Nos. 17-586 and 17-626

IN THE

Supreme Court of the United States

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

v.

SHANNON PEREZ, ET AL.,
Appellees.

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

BRIEF OF CAMPAIGN LEGAL CENTER, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AND NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") was formed in 1963 at the request of President John F. Kennedy to involve private attorneys throughout the country in the effort to ensure civil rights to all Americans. Protection of the voting rights of racial and language minorities is an important part of the Lawyers' Committee's work. The Lawyers' Committee has represented litigants in numerous voting rights cases throughout the nation over the past 50 years, including cases before this Court. *See, e.g.*, *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013); *Shelby County v. Holder*, 570 U.S. 529 (2013); *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *Young v. Fordice*, 520 U.S. 273 (1997); *Clark v. Roemer*, 500 U.S. 646 (1991); *Clinton v. Smith*, 488 U.S. 988 (1988); and *Connor v. Finch*, 431 U.S. 407 (1977). The Lawyers' Committee has also participated as *amicus curiae* in other significant voting rights cases in this Court, including *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016); *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Shaw v. Reno*, 509 U.S. 630 (1993); *Thornburg v. Gingles,* 478 U.S. 30 (1986)*;* and *City of Mo-*

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[1] No counsel for any party has authored this brief in whole or in part, and no one other than *amici curiae*, their members, or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

bile v. Bolden, 446 U.S. 55 (1980*)*. The Committee has an interest in the instant appeal because it raises important voting rights issues that are central to its mission.

Amicus curiae Campaign Legal Center (CLC) is a non-partisan, non-profit organization that works in the area of election law, generally, and voting rights law, specifically, generating public policy proposals and participating in state and federal court litigation throughout the nation regarding voting rights. CLC has served as *amicus curiae* or counsel in voting rights and redistricting cases before this Court, including, *inter alia*, *Cooper v. Harris,* 137 S. Ct. 1455 (2017); *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788 (2017); *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016); *Shelby County*, 570 U.S. 529; and *Bartlett*, 556 U.S. 1. CLC currently represents minority voters in several actions under the Voting Rights Act and the U.S. Constitution, including *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc), and *Thompson v. Alabama*, No. 2:16-cv-783 (M.D. Ala.). CLC is deeply committed to preserving the rights of minority voters to access the ballot box free from discrimination.

Amicus curiae the NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit, non-partisan law organization established under the laws of New York in 1940 under the leadership of Thurgood Marshall to assist Black people in the full, fair, and free exercise of their constitutional rights. LDF has been involved as counsel or *amicus curiae* in numerous precedent-setting litigation relating to minority political representation and voting rights

before federal courts, including lawsuits involving constitutional and statutory challenges to discriminatory redistricting plans or those otherwise implicating minority voting rights. *See, e.g.*, *Gill v. Whitford*, 16-1161; *Husted v. APRI*, No. 16-980; *Evenwel*, 136 S. Ct. at 1120; *ALBC*, 135 S. Ct. at 1257; *Shelby County*, 570 U.S. 529; *Nw. Austin Mun. Dist. No. 1*, 557 U.S. 193; *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *United States v. Hays*, 515 U.S. 737 (1995); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney Gen. of Texas*, 501 U.S. 419 (1991); *Gingles*, 478 U.S. 30; *Beer v. United States*, 425 U.S. 130 (1976); *White v. Regester*, 422 U.S. 935 (1975) (per curiam); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953); *Schnell v. Davis*, 336 U.S. 933 (1949) (per curiam); *Smith v. Allwright*, 321 U.S. 649 (1944); *Kirksey v. Bd. of Supervisors*, 554 F.2d 139 (5th Cir. 1977); and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973).

SUMMARY OF ARGUMENT

This Court should affirm the three-judge court's holding that Texas's 2013 maps unlawfully furthered and maintained the purposeful dilution of minority voting strength in the 2011 maps and that the districts impacted by that purposeful discrimination must be remedied. *Perez v. Abbott*, 274 F. Supp. 3d 624, 649-50, 652 (W.D. Tex. 2017) (*"Perez I"*) ("The

Legislature in 2013 intentionally furthered and continued the existing discrimination in the plans.").

The three-judge court's factual findings that the 2013 maps carried over the discriminatory intent of their predecessor maps are not clearly erroneous. The record demonstrates that the Texas Legislature adopted the 2013 maps in a strategic attempt by the Legislature to maintain as many of its discriminatory 2011 choices as possible while insulating itself from further constitutional challenge. This Court's discriminatory intent cases make clear that those discriminatory 2011 choices are unlawful in the 2013 maps as well. The three-judge court was not required, as Appellants argue, to turn a blind eye to the context of the 2013 maps. To the contrary, it was required to engage in the close examination it did of the 2013 maps in light of their inextricable relationship to the 2011 maps. *See Lane v. Wilson*, 307 U.S. 268, 275 (1939) ("The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination.").

Because it had been determined that the 2011 maps contained districts drawn with discriminatory intent, it was Texas's burden to show that the 2013 maps, which left unchanged districts that the District Court held had been drawn with discriminatory intent in 2011, did not maintain or further that intent. But regardless of who bore the burden of proof at that stage of litigation, the three-judge court had ample evidence before it to come to its conclusions that the 2013 maps were intentionally discriminatory. Moreover, any holding that failed to eliminate the discriminatory choices of the 2011 maps "root

and branch" would have deprived the Plaintiffs of a complete remedy for Texas's purposeful discrimination. *See Green v. County Sch. Bd.*, 391 U.S. 430, 437–38 (1968).

Finally, Texas's attempt to use the three-judge court's interim maps as a shield against any further remedies is at odds with the purpose of interim relief in redistricting and other time-sensitive election-law disputes. It is well established that such preliminary relief does not, and could not, settle the final rights of the parties. Indeed here, at the time of the interim map, the three-judge court warned that it had not fully adjudicated the question of which lines were infected with the Texas Legislature's discriminatory purpose. When the court did so in its 2017 ruling, it found that the intentional discrimination in the 2011 maps impacted more districts than the three-judge court initially identified in its preliminary review of the proposed interim map. Thus, Texas's argument, if it prevailed, would profoundly disrupt the incentives for both courts and parties at the interim stages of litigation by establishing interim relief as the potential outer limit of potential final relief even before full adjudication of the merits of a case. Texas's legal theory of the case—which seeks to transform an interim remedy into a constitutional shield—cannot stand.

ARGUMENT

I. THE 2013 MAPS ARE INEXTRICABLY LINKED TO THE DISCRIMINATORY 2011 MAPS.

Despite Texas's contrary representations, the 2013 maps were not new redistricting maps born of the three-judge court's imagination or a new legislative process. Rather, the 2013 maps are nothing more than the 2011 legislatively enacted maps as partially altered by the three-judge court based on its *preliminary* findings of constitutional and statutory defects. Jurisdictional App. 314a[2] ("We emphasize the preliminary and temporary nature of the interim plan[.]").

In 2011, the Texas Legislature passed redistricting maps for the congressional and state legislative districts. These maps were subject to pre-clearance under the then-applicable provisions of Section 5 of the Voting Rights Act, and pre-clearance litigation was instituted by Texas. Simultaneously, Plaintiffs challenged the 2011 maps as racially discriminatory under the Constitution and Section 2 of the Voting Rights Act.

After Texas failed to obtain a timely pre-clearance decision from the District Court for the District of Columbia, the three-judge panel in this case drew a set of interim maps to allow the 2012 Texas primary and general elections to proceed on

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[2] Jurisdictional App. refers to the Jurisdictional Appendix of Greg Abbott et al. (No. 17-626) (filed Oct. 27, 2017).

schedule. Texas objected to this first set of interim maps and appealed to this Court to ensure that the three-judge court's interim remedy maps would make as few changes as possible based on the court's preliminary review of Plaintiffs' likely success on the merits. *Perry v. Perez*, 565 U.S. 388, 392 (2012). This Court substantiated Texas's objection. *Id.* at 394 ("[T]he state plan serves as a starting point for the district court. . . . [A] district court should still be guided by that plan, except to the extent those legal challenges are shown to have a likelihood of success on the merits.").[3] On remand, the three-judge panel then produced the second set of interim maps that are at issue in this case. Per this Court's orders, the second set of interim maps "maintained the status quo" except where the three-judge court found that the Plaintiffs, based on preliminary evidence, proved a likelihood of success on the merits of their chal-

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[3] Indeed, at that point in the litigation, Texas repeatedly argued to this Court that the three-judge court's preliminary findings and use of an interim map that largely followed the 2011 map would not be dispositive of the ultimate legality of the 2011 lines. *See, e.g.*, Reply Brief for Appellants at 27-28, *Perry v. Perez*, 565 U.S. 388 (2012) (No. 11-713), 2012 WL 10392, at *27-28 ("Requiring the district court to make a preliminary finding of a likelihood of success on the merits prior to ordering the alteration of the State's maps is thus consistent with this Court's precedent, and does not intrude upon the D.C. court's exclusive jurisdiction to enter final rulings on preclearance claims. In assessing whether to enter preliminary equitable relief, district courts routinely make preliminary findings before engaging in a full assessment of the merits . . . There is no reason why interim redistricting plans - which are temporary equitable remedies that apply only for a single election cycle - should be treated any differently.").

lenges. *Perez v. Texas*, 891 F. Supp. 2d 808, 816 (W.D. Tex. 2012). However, the three-judge court expressly stated that the interim maps were not intended to address or provide relief for all of the Section 2 or constitutional claims before it. *Id.* at 812. After a full trial on the merits, the three-judge court found that the evidence proved additional discriminatory defects requiring a broader remedy. *See Perez I*, 274 F. Supp. 3d at 686.

While the case before the three-judge court was proceeding, the Texas Legislature took those interim maps—which the three-judge court warned did not necessarily remedy all the defects in the enacted maps—and adopted them with no or minimal changes. Appellants' Brief at 10. The Texas Legislature chose this route as a deliberate attempt to insulate as many of its initial 2011 line-drawing choices as possible from further constitutional review. Jurisdictional App. 359a. Such gamesmanship cannot be allowed to circumvent proper and complete review of the redistricting plans based on a full trial record.

After reviewing all of the evidence, the three-judge court found that the intentional discrimination in the 2011 House and congressional maps impacted more districts than the court initially identified in its preliminary review of the proposed interim map. *See Perez v. Abbott,* 253 F. Supp. 3d 864 (W.D. Tex. 2017) (*"Perez II"*) (ruling on the 2011 congressional map); Jurisdictional App. 88a (ruling on House map). Because the 2013 maps retained the lines of the districts drawn in 2011 with discriminatory intent, and Texas offered no additional rationale for retaining those districts, the three-judge court was

entirely correct in weighing the original 2011 intent in its evaluation of the 2013 plans. Texas's arguments to the contrary contravene basic Fourteenth Amendment principles on adjudicating and remedying intentional discrimination and would lead to perverse incentives with respect to preliminary orders.[4] Texas cannot treat the Legislature's adoption of interim maps—maps in which Defendants sought to retain as many features of the 2011 plans as possible—as a complete break from the 2011 plans requiring the three-judge court to turn a blind eye to the initial reasons that the lines were drawn.

II. MAINTENANCE AND FURTHERANCE OF INTENTIONALLY DISCRIMINATORY ACTIONS VIOLATE THE FOURTEENTH AMENDMENT

The three-judge court's finding that "the adoption of the interim plans intentionally furthered and continued any discrimination that might be found in the 2011 plans and incorporated into the 2013 plans" is

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[4] This brief focuses solely on the issues that Texas has raised based on the claims of intentional vote dilution. It does not address the separate Section 2 of the Voting Rights Act results claims or the related, but distinct, *Shaw v. Reno*, 509 U.S. 630 (1993) type racial gerrymandering claims, which the three-judge court distinguished in footnote 36 of its opinion on the 2013 congressional map. *See Perez I*, 274 F. Supp. 3d at 647 n.36. Because these claims are legally and analytically distinct, it is possible to affirm the district court's ruling on the Appellees' *Shaw* and Section 2 results claims without necessarily affirming the court's rulings on intentional vote dilution, Texas's assertions to the contrary notwithstanding.

not clearly erroneous. *Perez I*, 274 F. Supp. 3d at 652 ("The Legislature in 2013 intentionally furthered and continued the existing discrimination in the plans."). Nor, as Texas suggests, was the three-judge court's consideration of the 2011 intent in evaluating the 2013 plans legally improper in any way. Intentional maintenance or furtherance of discrimination is as offensive to Fourteenth Amendment principles as an initial discriminatory act. The 2013 maps undoubtedly maintain and further features in the 2011 maps that the District Court determined were intentionally discriminatory. Under similar circumstances, this Court has found that subsequent iterations of discriminatory laws continue to carry improper intent and, therefore, must be voided. Texas bears the burden of proving that the 2013 maps are not tainted with the discriminatory intent behind the 2011 maps and it has failed to carry that burden. But, as discussed below, regardless of which party bears the burden, the District Court's factual findings were not clearly erroneous and were based on ample evidence of continuing discriminatory intent.

A. Purposeful Maintenance and Furthering of Discriminatory Intent Compel a Finding of Discriminatory Intent.

Where a subsequent act retains discriminatory features of a prior act—and particularly does so without further debate and without offering new rationales for those features—the evidence weighs heavily in favor of finding that the prior discriminatory intent infects the current act. This follows from this Court's admonition that a governmental action violates the Fourteenth Amendment when "the deci-

sionmaker, in this case a state legislature, selected *or reaffirmed* a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (emphasis added).

Having found, in accordance with the factors set forth in *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), that the 2011 maps were drawn with discriminatory intent, the three-judge court appropriately viewed the 2013 maps in the context of its full legislative history. This Court has instructed lower courts to rely on the intent of predecessor discriminatory laws if subsequent acts maintain those same provisions. *See Arlington Heights,* 429 U.S. at 267-68 (instructing trial courts to consider "[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes" as well as "the specific sequence of events leading up to the challenged decision" and "the legislative or administrative history").

Importantly, in noting the relevance of the historical background to the intent inquiry, the Court in *Arlington Heights* cited to *Lane*. *Id*. In *Lane,* this Court determined that Oklahoma's new registration scheme largely incorporated the discrimination of a prior intentionally discriminatory grandfather clause. 307 U.S. at 275-77. The Court stated that federal courts must ensure that the Fifteenth Amendment is enforced to "nullif[y] sophisticated as well as simple-minded modes of discrimination." *Id.* at 275. As with the scheme in *Lane*, the 2013 maps

"partake too much of the infirmity of the [2011 maps] to be able to survive." *Id.*

Similarly, in *Hunter v. Underwood*, this Court considered the issue of whether the passage of time and subsequent events had eliminated the original discriminatory intent behind a provision in Alabama's constitution that had disenfranchised persons convicted of crimes of "moral turpitude." 471 U.S. 222, 223-24 (1985). Because the core provisions of the law stood unchanged, this Court ruled that the provision retained its original discriminatory intent despite the substantial passage of time. *Id.* at 233. While Texas argues that *Hunter* is inapplicable because there was a new enactment here, unlike in *Hunter*, such facile analysis is insufficient. *Hunter* was concerned with whether a provision originally enacted with discriminatory intent remained in the law and continued to have a harmful impact. *Id.* That is the case here. While *Hunter* reserved the question of whether a distinct passage of the same law "without any impermissible motivation" would pass muster, *id.*, there is no evidence here that the 2013 maps are independent from the 2011 maps passed with impermissible motivation.

In the education context, this Court has also stressed that purposeful maintenance of discriminatory features of a law can equally offend the Fourteenth Amendment. This is particularly the case if those discriminatory features cannot be otherwise justified. In *United States v. Fordice*, this Court explained that:

> If the State perpetuates policies and practices traceable to its prior system

> that continue to have segregative effects-whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system-and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system.

505 U.S. 717, 731 (1992).

Applying these factors to Texas's 2013 maps, it is clear that they still carry the prior unlawful discriminatory intent. Indeed, the exact district lines that the three-judge court found were drawn with discriminatory intent are unmodified in the 2013 maps. Nor does the record evidence provide a *sound* justification for the maintenance of those lines. Nowhere in the legislative record is there any rationale for the 2013 maps independent of a desire to maintain as much of the 2011 maps, including the discriminatory choices that escaped the three-judge court's preliminary analysis, as possible. The Legislature undertook no new analysis of the potential discriminatory impact of the maps. Indeed, every single amendment offered to address lingering constitutionality concerns was summarily rejected. *See* Jurisdictional App. 247a.

Thus no new intent or purpose can be attributed to the lines in question. The three-judge court correctly found that the Legislature rubberstamped the interim maps as part of a litigation strategy to de-

prive Plaintiffs of a complete remedy for discrimination. *Perez I*, 274 F. Supp. 3d at 649.

It is undeniably within the Legislature's prerogative to try to remedy unlawful maps to end protracted litigation. But that is not what the three-judge court found occurred. Instead, it found that the Legislature's litigation strategy was "discriminatory at its heart" and sought to insulate harmful and discriminatory choices from lawful remedies. *Id.* at 651. Under these circumstances, the three-judge court was correct in finding that the taint of the original discriminatory intent was not removed but instead "intentionally furthered."[5] *Id.* at 652.

Given these facts, Texas's reliance on *Palmer v. Thompson* is telling. Appellants' Brief at 32. Texas relies on the following statement from *Palmer*:

> Furthermore, there is an element of futility in a judicial attempt to invalidate

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[5] *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998), which Texas cites, does not help Texas. In *Cotton,* the Fifth Circuit found that a criminal disenfranchisement law was sufficiently removed from the taint of its predecessor law. 157 F.3d at 391. However, in that case, the legislature made meaningful changes to the law through a deliberative process and those changes demonstrated lack of discriminatory intent. *Id.* The Fifth Circuit also relied on the significant passage of time between the original and new law. *Id.* Here, the 2013 maps were passed quickly, without deliberation, and only two years after the original discriminatory maps were adopted. No changes were made that showed any intent other than to keep as many of the lines of the 2011 plans as possible.

> a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.

403 U.S. 217, 225 (1971). Apparently, Texas believes that this Court's jurisprudence allows a legislative body to re-pass a discriminatory law so long as it introduces some non-discriminatory pretext for the repassage.

Palmer also pre-dates this Court's modern Equal Protection jurisprudence. The Court in *Palmer* noted that "no case in this Court has held that a legislative action may violate equal protection solely because of the motivations of the men who voted for it." *Id.* at 224. In *Washington v. Davis*, this Court limited *Palmer*'s holding and disavowed any suggestion that a "close inquiry into the purpose of a challenged statute" is not necessary to constitutional adjudication. 426 U.S. 229, 244 n.11 (1976). The Court has made clear that a decision motivated at least in part by discriminatory intent can violate the Equal Protection Clause. *Arlington Heights*, 429 U.S. at 265-66. This Court has rejected such litigation strategies to launder discriminatory intent before and it should do so here.

In *McCreary County v. Am. Civil Liberties Union of Kentucky,* the Court "dispatched quickly" the defendants' argument that the purpose inquiry should be limited to the "latest news about the last in a series of governmental actions": "[T]he world is not

made brand new every morning, and the Counties are simply asking us to ignore perfectly probative evidence; they want an absentminded objective observer, not one presumed to be familiar with the history of the government's actions and competent to learn what history has to show." 545 U.S. 844, 866 (2005) (*citing Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)). Moreover, the Court was able to smoke out easily statements that "were presented only as a litigation position" and that therefore had little relevance to the question of intent. *Id.* at 871. Here, the three-judge court engaged in the same close inquiry of intent: based on its familiarity with the history of the 2013 maps, it determined that any new statements of purpose were mere litigation positions and that the district lines drawn in 2011 to harm minority voters were maintained for that same reason. Those findings are not clearly erroneous.

Amici are not suggesting that the taint of prior discriminatory intent forever handcuffs a Legislature; however, the evidence presented here suggested intent to maintain discrimination rather than eliminate it. If the Texas Legislature drew maps anew, deliberated over them, and engaged in an open and democratic process, and ultimately maintained some 2011 lines while changing others, the story might be different. That is not the record before this Court.

B. Texas Has the Burden of Proving That the 2013 Maps Did Not Maintain or Further the Discriminatory Intent Behind the 2011 Maps.

For all the reasons described above, the three-judge court had sufficient evidence before it to find that the 2013 maps were infected by discriminatory purpose regardless of who bore the burden in this stage of the litigation. However, this Court's jurisprudence suggests that Texas bore the burden of proving that the 2013 maps—which maintained as many of the 2011 lines as possible at the time—did not carry the taint of the 2011 Legislature's intentional discrimination. This issue has come before this Court most often in the context of desegregation. In that context, this Court has held that "given an initially tainted policy, it is eminently reasonable to make the State bear the risk of nonpersuasion with respect to intent at some future time . . . because . . . the State has created the dispute through its own prior unlawful conduct." *Fordice*, 505 U.S. at 746–47; *see also Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 209 (1973) ("In the context of racial segregation in public education, the courts…have recognized a variety of situations in which 'fairness" and 'policy' require state authorities to bear the burden of explaining actions or conditions which appear to be racially motivated.").

Analogously, once state-sponsored discrimination is found, this Court has routinely sanctioned a burden-shifting framework that requires a State actor to prove that an act would have been taken absent that discrimination: "Once racial discrimination is shown

to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter*, 471 U.S. at 228 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)); *see also N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 221 (4th Cir. 2016), *cert. denied sub nom. North Carolina v. N. Carolina State Conference of NAACP*, 137 S. Ct. 1399 (2017). That burden-shifting framework should not be changed where a legislature does nothing but rubberstamp prior discriminatory provisions in a new package.

III. INTENTIONAL DISCRIMINATION REQUIRES A COMPLETE REMEDY

The three-judge court's holding is correct for another related reason: anything less than the three-judge court's finding that the discriminatory lines maintained without change in the 2013 maps must be remediated would deprive the Plaintiffs who challenged the initial 2011 maps of the full remedy to which they are entitled.

A law passed with discriminatory intent has "no legitimacy at all under our Constitution." *City of Richmond v. United States*, 422 U.S. 358, 378 (1975). And the racial discrimination of that law must "be eliminated root and branch." *Green*, 391 U.S. at 437–38. The benchmark for any remedy for unconstitutional discrimination is whether it "place[s] the victims of discrimination in 'the position they would have occupied in the absence of discrimination.'" *United States v. Virginia*, 518 U.S. 515, 547 (1996)

(quoting *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)).

The legislative choices underlying an intentionally discriminatory law are owed no deference whatsoever. *See Arlington Heights*, 429 U.S. at 265-66. At the time of the interim maps, the three-judge court had not fully adjudicated the question of which lines were infected with the Legislature's discriminatory purpose. When it completed its analysis based on the fuller record presented at trial, it determined more districts were impacted by that purpose than it originally identified at the time that it drew the interim maps under the pressure of impending election deadlines. Therefore, the legislative choices that the three-judge court left in place in the interim maps out of deference were not entitled to any such deference in designing a permanent remedy.

Where a court finds that the state has acted with unconstitutional discriminatory intent, "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965). Under the 2013 plans, the three-judge court determined that many purposeful discriminatory choices from the 2011 plans continued to injure Plaintiffs and dilute their voting strength. *See Perez II*, 253 F. Supp. 3d at 875; *Perez I*, 274 F. Supp. 3d at 652.

That *some* of the discriminatory choices were identified and eliminated in the interim maps is not sufficient to right these wrongs. *See Dillard v. Baldwin County Comm'n*, 694 F. Supp. 836, 843 (M.D.

Ala. 1988), *aff'd* 862 F.2d 878 (11th Cir. 1988) (rejecting a state-proposed remedy that was "still a product of the legislature's intentional racial discrimination" and holding that "deleting just one feature of [a discriminatory] at-large system would [not] delete the invidious taint of this broad legislative scheme"); *N. Carolina State Conference of NAACP*, 831 F.3d at 240 ("But, even if the State were able to demonstrate that the amendment lessens the discriminatory effect of the photo ID requirement, it would not relieve us of our obligation to grant a complete remedy in this case. That remedy must reflect our finding that the challenged provisions were motivated by an impermissible discriminatory intent and must ensure that those provisions do not impose any lingering burden on African American voters.").

The three-judge court was correct to order a complete remedy for the intentional harms to minorities perpetuated by the 2013 plans. Anything less would not "place the victims of [Texas's] discrimination in the position they would have occupied in the absence of discrimination." *See Virginia*, 518 U.S. at 565; *see also City of Port Arthur v. United States*, 459 U.S. 159, 168 (1982) (holding that "in light of the prior findings of discriminatory purpose," the district court's elimination of the majority vote requirement in the proposed remedial plan "was a reasonable hedge against the possibility that the [remedial] scheme contained a purposefully discriminatory element"); *Louisiana*, 380 U.S. at 154-155 (enjoining an unconstitutional literacy test and a new subsequently enacted test because, even if the new test was nondiscriminatory, it perpetuated the discrimi-

natory burdens placed on Black voters by the prior test).

IV. AN INTERIM REMEDIAL ORDER DOES NOT SET THE FINAL CONTOURS OF RELIEF

Texas's argument regarding the legal significance of its legislature adopting the three-judge court's interim plans as its enacted plans misconstrues the nature of preliminary relief. Texas argues: "[O]ne would have thought there was one reasonably safe course available to bring [redistricting litigation] to an end—namely, enacting the three-judge court's remedial redistricting plan as the legislature's own." Appellants' Brief at 1. That might be true of a *final* remedial plan but it is certainly not true of a preliminary remedy at an early stage in the case.

It is well established that such preliminary relief does not and could not settle the final rights of the parties. "The purpose of such interim equitable relief is not to conclusively determine the rights of the parties but to balance the equities as the litigation moves forward." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (per curiam) (internal citations removed); *see also Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 317 (1985) ("[A]ny conclusions reached at the preliminary injunction stage are subject to revision[.]"); *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Although Texas argues that it "took the court at its word that those maps complied with the Constitution and the VRA," Appellants' Brief at 1, the court did not make that assertion. To the contrary, the order warned both parties that the map did not

represent "a final judgment on the merits as to any claim or defense in this case." Jurisdictional App. 315a.

Thus, Texas's description of the three-judge court's ruling, which drives many of its legal arguments, is fatally flawed:

> According to the district court, its own maps were infected with the "taint of discriminatory intent"—a taint that the Legislature (but apparently not the court) was obligated to "remove" if it wanted to adopt those maps as state law rather than just abide by them as a judicial decree.

Appellants' Brief at 1. The three-judge court eventually concluded that its interim and preliminary order did not identify all of the discriminatory choices that the Texas Legislature engaged in. If the Texas Legislature had not enacted the 2013 plan into law, the three-judge court would assuredly have altered its own remedial map to remove those discriminatory choices in its final remedial order. Thus, the three-judge court is not imposing any double standard on Texas but merely recognizing its duty to alter interim relief based on final merits findings. That is how interim and final relief work.

Texas's argument, if it prevailed, would profoundly disrupt the incentives for both courts and parties at the interim stages of litigation. This Court has urged district courts, in fashioning interim remedial relief in redistricting matters, to defer as much as possible to state legislative policy choices and re-

quire plaintiffs to meet their burden of proving likelihood of success on the merits of a challenge to alter those choices. *See Perry*, 565 U.S. at 393-94. Yet, ironically, if Texas's position prevails, three-judge courts may often skew their results to provide broader relief at the preliminary stage in order to maintain their discretion to fashion appropriate final relief. That is because Texas's argument creates a one-way ratchet where awarding additional relief at the final stage may be exceedingly difficult. So long as the state accepts the interim relief as its own, the court will lose its authority to determine that more relief is necessary after review of a full record. This approach, while attractive to Texas at this moment to protect this map, is harmful to the process overall. It creates incentives for district courts to provide greater preliminary relief with the knowledge that such relief can be scaled back but may impose a ceiling. Such incentives run directly counter to this Court's admonition that "[r]edistricting is 'primarily the duty and responsibility of the State'" and courts should be reticent to disturb state choices. *Id.* at 392 (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)).

This strategy will also disrupt the incentives for negotiation at the interim stage. Interim relief in elections-related cases is often urgent, requiring quick and decisive action in time for relief to be put into place prior to an upcoming election. *See, e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1 (2006). These interim plans are often negotiated compromises among the parties. Indeed, this plan was not drawn by the three-judge court but by Defendants and some Plaintiff groups. *Perez v. Texas*, 891 F. Supp. 2d at 825. Negotiation and compromise among the parties at

the interim stage helps preserve judicial resources and ensure timely relief. It should be encouraged.

But Texas's strategy, if successful, will prevent plaintiffs from engaging in good-faith compromise in the interest of agreed upon interim relief if that means they are creating obstacles to complete relief at the final stage. Moreover, courts will be hesitant to accept a compromise plan if it may prevent them from awarding full relief in the future. This is particularly true if, as was the case here, only some plaintiffs agree to the compromise plan. If Texas succeeds, courts would be right to reject such compromise plans that may trade away the rights of other plaintiffs without full adjudication. The end result of Texas's legal theory is that parties will be seeking this Court's interference at the interim stage of many more redistricting matters.

Texas's legal theory of the case fundamentally misunderstands the role of interim relief in the judicial process. Moreover, the incentive structure it would create is unnecessary and harmful to the ability of courts and parties to fashion interim relief. It should be rejected.

CONCLUSION

For the foregoing reasons, the decision of the three-judge court should be affirmed.

Respectfully submitted,

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