

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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GREG ABBOTT, GOVERNOR OF TEXAS,)
ET AL.,)
) Appellants,)
) v.) No. 17-586
SHANNON PEREZ, ET AL.,)
) Appellees,)

GREG ABBOTT, GOVERNOR OF TEXAS,)
ET AL.,)
) v.) No. 17-626
SHANNON PEREZ, ET AL.,)
) Appellees.)

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12 v.) No. 17-626

13 SHANNON PEREZ, ET AL.,)

14 Appellees.)

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16 Washington, D.C.

17 Tuesday, April 24, 2018

18 The above-entitled matter came on for oral
19 argument before the Supreme Court of the United
20 States at 10:20 a.m.

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1 APPEARANCES:
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9 of the Appellees in No. 17-586.
10 ALLISON J. RIGGS, ESQ., Durham, North Carolina;
11 on behalf of the Appellees in No. 17-626.

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1 PROCEEDINGS

2 (10:20 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 17-586,
5 Abbott versus Perez, and the consolidated case.
6 General Keller.

7 ORAL ARGUMENT OF SCOTT A. KELLER

8 ON BEHALF OF THE APPELLANTS

9 MR. KELLER: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 The Texas legislature did not have a
12 racially discriminatory purpose when it adopted
13 the entire court-ordered congressional remedial
14 plan and virtually all of the remedial state
15 house plan.

16 This Court told the district court to
17 order districts that do not violate the
18 Constitution or the VRA, and on remand in 2012,
19 the district court itself said it obeyed this
20 Court's remand and fixed all plausible legal
21 defects under even the low Section 5 standard.
22 And, indeed, today, with nine groups of
23 plaintiffs here, we cannot draw a single
24 additional performing majority/minority
25 district, even though plaintiffs have tried for

1 years under those plans.

2 JUSTICE SOTOMAYOR: General Keller, I
3 know you want to get to the merits, but I don't
4 want to leave the jurisdiction question. And
5 this last point raises it for me in stark
6 relief, which is your -- you just said you
7 can't draw this map. The court below said you
8 can.

9 By not waiting for the remedy in this
10 case, we are not in a position to be fully
11 informed on that question. And so I still
12 don't understand how you distinguish Gunn, that
13 said that in these cases, unless a district
14 court has made clear that it is issuing an
15 injunction or prohibiting you from using your
16 map or some portion of your map, that you can't
17 appeal.

18 So could you address the -- our
19 jurisdiction first?

20 MR. KELLER: Sure. As an initial
21 matter, the district court did not say that we
22 could, in fact, draw additional performing
23 majority/minority districts. But I'll take
24 Gunn on jurisdiction first.

25 JUSTICE SOTOMAYOR: Well, it did at

1 least in one of the challenges, when there were
2 --

3 MR. KELLER: Not -- not a performing
4 district. This would be the Nueces County
5 state house district. In fact, there, the
6 plaintiff MALC's own expert testified if we had
7 drawn that additional performing -- if we had
8 drawn that additional majority/minority
9 district, then neither of the districts in
10 Nueces County would have performed. We would
11 have faced vote dilution cracking claims there.

12 JUSTICE SOTOMAYOR: I think that's
13 subject to dispute by your adversary, so let --
14 let's -- but the point still remains, which is
15 every time you're ordered to change one
16 district, it affects other districts.

17 And in the end, the court, in drawing
18 maps, may find that something it concluded
19 initially is proven wrong by the map drawing.
20 So that goes to why finality requires us to
21 often wait for a remedy --

22 MR. KELLER: Well --

23 JUSTICE SOTOMAYOR: -- before we
24 permit appeal. So tell me why that's not true
25 -- why that's not the case under Gunn.

1 MR. KELLER: Well, first of all, in
2 Gunn, what the district court did is it
3 expressly stayed its own ruling, and then,
4 months later, it issued no further order.

5 Here, in quite stark contrast, a mere
6 21 and 13 days after the district court entered
7 its order, it was ordering the state to appear
8 for expedited court-drawn redistricting.

9 JUSTICE SOTOMAYOR: No. It asked the
10 legislator to tell it whether it intended to do
11 redrawing. It didn't order it to do it. It
12 just said, do you intend to? And it hadn't
13 even started the process. But that goes only
14 to one prong of effectively final.

15 The other prong is, could you have
16 gotten relief at the end of this process? You
17 were granted a stay within less than two weeks
18 of your filing -- filing a motion. So even if
19 you had gone through the remedial stage, you
20 still would have had time to use your maps for
21 the next election.

22 MR. KELLER: Well, not in orderly
23 appellate review. And, here, we're in the same
24 practical position as Cooper and as in Gill,
25 where what happened was district courts

1 invalidated districts and then told the states
2 you had to redistrict, but those courts did not
3 impose remedial maps. And yet, there was
4 appellate jurisdiction. Here --

5 JUSTICE BREYER: Yeah. Go ahead. I
6 mean, that's --

7 MR. KELLER: And, moreover, here --

8 JUSTICE BREYER: Yeah.

9 MR. KELLER: -- what distinguishes
10 this case from virtually all other cases that
11 the Court has had is we were ordered to do
12 expedited redistricting on the eve of election
13 deadlines. We had told --

14 JUSTICE BREYER: You weren't ordered.
15 I mean, that's the problem. When I became a
16 judge in 1981, one of the first things that I
17 was told by the preexisting -- Lee Kemp, he
18 said when you get an appeal, they are appealing
19 from a piece of paper called a judgment, or
20 they are appealing from a piece of paper that
21 says injunction motion denied or possibly
22 granted.

23 What does the piece of paper say here?
24 It seems to me the piece of paper says come to
25 court. Now, if we're going to call that a

1 grant of an injunction, we're going to hear
2 50,000 appeals from the 93 -- however many
3 three-judge courts there are. And it also
4 says, when you come to court, have a plan.

5 Now I grant you there won't be 90,000
6 appeals; there will only be 40,000. But --
7 but, still, you see the point. What is the
8 order, the sentence, the piece of paper that
9 says injunction denied or says injunction
10 granted from which there is an appeal?

11 MR. KELLER: Well, there is no magic
12 word "injunction" used in these orders, but
13 under Carson --

14 JUSTICE BREYER: I didn't say magic
15 word. I said, what is the piece of paper, the
16 order? Read it to me. It probably only has
17 four words, and it is in effect saying -- is it
18 the one that says stay denied? Stay granted?
19 Produce some papers? You see what I'm driving
20 at?

21 MR. KELLER: Sure. For instance, CJS
22 Appendix 118a, the court said the violations
23 "now require remedy" and "must be remedied
24 either by the Texas legislature or this court."
25 The court ordered us -- if the governor was not

1 going to call a special session, the
2 legislature was not in session within 72 hours,
3 then we were ordered to take immediate steps to
4 consult with experts and mapdrawers, prepare
5 statewide congressional plans, we were meeting
6 --

7 JUSTICE BREYER: That's it. It is the
8 order. You are ordered to consult with
9 mapdrawers. All right? That is an injunction.

10 Now, if that's an injunction, that's
11 my concern. If you're going to call that an
12 injunction, you are ordered to consult with
13 mapdrawers, unless some other thing happens.
14 All right?

15 Now why won't that open the door to
16 you are ordered to be in court tomorrow
17 morning? You are ordered to produce a witness?
18 Okay? That's what I'm worried about.

19 MR. KELLER: Well, because the
20 practical effect of that order here was
21 blocking us from using the maps in the 2018
22 elections. And plaintiffs do not seriously say
23 that we could somehow have used the maps in the
24 2018 elections.

25 JUSTICE KAGAN: Well, General, I think

1 that might well be true, but I think it's --
2 it's also true in pretty much all of these
3 districting cases. In other words, in all of
4 these districting cases, once there's a
5 liability finding, there's a finding that a
6 particular district is -- is drawn or more than
7 one district is drawn in a way that violates
8 the Constitution. The upshot of that is that
9 you're not going to be allowed to use those
10 district lines.

11 But still there's a remedial process
12 that takes place, where people argue about what
13 the proper remedy is, and only at the end of
14 that process, customarily, or at least it
15 happened this way here, is there an injunction
16 put in place saying don't use this map, instead
17 use that map.

18 And what I'm concerned about is that
19 if you're right, we're going to be hearing all
20 of these districting cases not after the
21 remedial stage but, instead, straight away
22 after the liability stage.

23 MR. KELLER: Well, first of all, as an
24 initial matter, many of these cases would come
25 to the court in a preliminary injunction

1 posture. Here, of course, we're seven years
2 into the case after three trials and two
3 appeals to this Court.

4 But, more importantly, we would have
5 faced contempt if we would have told the
6 district court, no, we are not going to engage
7 in the redistricting that you have ordered on
8 an expedited basis. And what distinguishes
9 this case from virtually any --

10 JUSTICE SOTOMAYOR: Well, that's quite
11 -- that's quite odd. You always had the choice
12 of not participating and simply letting the
13 court draw the map.

14 MR. KELLER: No. We -- we did not.
15 Here, we were ordered to not only appear but to
16 bring our own Texas Legislative Council
17 employees with us for the court to do expedited
18 map drawing.

19 JUSTICE SOTOMAYOR: You still -- well,
20 it hasn't happened, but you could have had a --
21 an appeal from that. My point --

22 MR. KELLER: That's what --

23 JUSTICE SOTOMAYOR: My point goes back
24 to --

25 MR. KELLER: We are taking an appeal

1 from that today.

2 JUSTICE SOTOMAYOR: What you're now
3 saying to us is we have an appeal after the
4 preliminary injunction. Every time a law is
5 declared unconstitutional -- a map is declared
6 unconstitutional, we have an appeal.

7 And then we have a third appeal at the
8 end of a remedy. So automatically, because I
9 don't see how to distinguish this from Gunn
10 still, and I still don't know how to
11 distinguish it from the millions of others --
12 not millions, I'm exaggerating greatly -- from
13 the hundreds of these that we have received
14 where a court has said something's
15 unconstitutional and we have said that doesn't
16 end the case.

17 What ends the case is the final
18 injunction that imposed -- that stops you from
19 doing something and requires you to do
20 something else.

21 MR. KELLER: Well, but we were in the
22 same posture as Cooper and Gill and there were
23 not remedial maps there. And here, unlike in
24 Gunn --

25 JUSTICE SOTOMAYOR: That's in 1291.

1 I'm talking about 1253. What you're saying is
2 automatically -- you're not giving me any way
3 to distinguish any three-court decision on my
4 ability that doesn't result in an immediate
5 appeal.

6 You're basically saying every single
7 one of them, where a court says even one
8 district was drawn wrong, that that's
9 immediately appealable.

10 MR. KELLER: Well, but that would have
11 been Cooper and Gill. And I think this
12 highlights that redistricting itself is
13 different. When a court is not only declaring
14 certain districts invalid but then telling the
15 state you must redistrict, that itself,
16 particularly in this case when we were ordered
17 21 and 13 days later to come with Texas
18 Legislative Council employees to engage in
19 expedited redistricting --

20 JUSTICE SOTOMAYOR: But that goes back
21 to Justice Breyer's question. I don't think
22 that ever ordering someone to come to court and
23 give an explanation has been considered a final
24 order.

25 What is considered a final order is a

1 contempt finding, something else that happens
2 as a result of your failure to act, not the
3 request for you to come to court.

4 MR. KELLER: Well, but unlike in Gunn,
5 for instance, here -- in Gunn, the district
6 court stayed its own order and took no
7 additional action for months. If the district
8 court here, when we moved for a stay in the
9 district court, clarified, state, you can use
10 your maps for the 2018 elections, that would be
11 a very different case. But instead it did the
12 exact opposite.

13 JUSTICE SOTOMAYOR: But we don't know
14 that, right?

15 JUSTICE KAGAN: General, if -- if I
16 could --

17 JUSTICE ALITO: What would have
18 happened if you had told the district court,
19 well, fine, you've issued an opinion, but we're
20 going ahead and we're going to conduct
21 elections under the map that was adopted by the
22 state legislature?

23 MR. KELLER: We --

24 JUSTICE ALITO: What would have
25 happened?

1 MR. KELLER: We would have been held
2 in contempt for not obeying this order. And we
3 didn't have to suffer the threat of contempt to
4 be able to appeal.

5 And when we moved for a stay in this
6 Court, we informed the Court that we needed to
7 know by October 1, 2017 what the status of our
8 districts were.

9 And we told the Court, grant us a stay
10 by then, grant us a stay earlier, treat our
11 stay motion as a petition for a writ of
12 mandamus. We were very clear about the status
13 of this case, and the Court granted a stay.

14 And even then, when the circuit
15 justice issued a temporary stay in this case,
16 the district court issued an advisory informing
17 the parties they could voluntarily comply so
18 that redistricting could resume expeditiously,
19 to use the district court's words.

20 If I can turn from the jurisdictional
21 issue now to the merits.

22 JUSTICE KAGAN: General, if I could --
23 I'm sorry. But I guess I -- you -- you were
24 saying before you were interrupted, you said
25 what distinguishes this case, and I guess I do

1 want to know what does distinguish this case,
2 or if -- if in finding that there's
3 jurisdiction here, are we going to be finding
4 that there is jurisdiction after the liability
5 stage at all redistricting cases?

6 MR. KELLER: Not -- no, Justice Kagan.
7 If a court simply says -- declares districts
8 invalid and then issues no other injunction and
9 says the state doesn't have to redistrict, that
10 is a different case. But when the court goes
11 ahead and says the state must redistrict, and
12 here on an expedited basis on the eve of
13 election deadlines that all the parties
14 conceded existed, that's the practical effect
15 of an injunction.

16 CHIEF JUSTICE ROBERTS: Counsel --

17 JUSTICE KENNEDY: One more question
18 and then you have to get to the merits.
19 Suppose there had been a 45-day window. Would
20 that have been a practical effect of an
21 injunction? We can play the game between 3 and
22 45.

23 MR. KELLER: Sure. Justice Kennedy, I
24 think so, because this Court's precedent, *Wise*
25 versus *Lipscomb*, says that there must be a

1 reasonable opportunity for the legislature to
2 have to correct any deficiencies in the map,
3 when a part-time legislature is out of session
4 and a court is putting the state's -- the
5 sovereign authority of use it or lose it only
6 within 45 days, I -- I think that would still
7 be practically an injunction, but, again, here,
8 it was nothing close to 45 days.

9 It was within three days the governor
10 had to call a special session. That's
11 certainly not a reasonable opportunity.

12 CHIEF JUSTICE ROBERTS: I have a
13 question on the merits.

14 You put a lot of weight on the
15 adoption in 2013 of the court-drawn 20 -- what,
16 2012, 2011?

17 MR. KELLER: 2012.

18 CHIEF JUSTICE ROBERTS: 2012 plan.
19 And I -- I think a concern, though, is that the
20 district court plan was not comprehensive. It
21 -- it was put in quickly based -- it was
22 preliminary, as opposed to permanent.

23 And I wonder if that undermines the
24 weight you can place on it?

25 MR. KELLER: Well, I don't think so,

1 Mr. Chief Justice, for three reasons: First of
2 all, there was plenty of process in the court
3 in 2011 and 2012. This was not actually a
4 preliminary injunction posture. Preliminary
5 injunctions had been granted in 2011.

6 The only reason that a lower standard
7 was being used here is because there were
8 collateral Section 5 proceedings because this
9 was the unique posture where Section 5
10 preclearance proceedings were ongoing. And,
11 here, the procedure in the district court, we
12 had discovery. There were dispositive motions.

13 We had two weeks of trial. There was
14 an appeal to this Court with its Perry
15 decision. There was extensive briefing both
16 before and after this Court's decision in
17 Perry. There was the Section 5 briefing before
18 the district of D.C. There were two more days
19 of argument on remand.

20 And then, at that point, the district
21 court in 2012 issued tens of pages of written
22 findings and conclusions imposing those maps
23 that actually change nine congressional
24 districts and 28 state house districts.

25 In that context, particularly after

1 this Court said six different times to the
2 district court it was under a mandate to draw
3 lawful districts, and then, when the district
4 court expressly said it obeyed that mandate,
5 and in its own words, it fixed all plausible
6 legal defects, even -- even if there was an
7 issue where a claim was not insubstantial under
8 Section 5, the district court fixed those
9 districts. It said it was fixing those
10 districts. And it even said that its map "does
11 not incorporate any portion of the state map
12 that is allegedly tainted" --

13 JUSTICE SOTOMAYOR: Mr. General --

14 MR. KELLER: -- "by discriminatory
15 purpose."

16 JUSTICE SOTOMAYOR: General, one of
17 the things in this recitation that you forget
18 is that it wasn't just that court opining on
19 these maps. It was also in August of 2012 the
20 D.C. district court who -- who found these maps
21 and the districts that were left untouched
22 suspicious and who found intentional
23 discrimination with respect to some, that found
24 questionable some of the claims and reasons
25 that were given by the legislature for these

1 districts.

2 There were serious questions raised by
3 the D.C. circuit court. So the -- this Court
4 basically said when it ruled: This is
5 tentative. It's been done hurriedly. You
6 can't rely on these findings until we have a --
7 a full hearing.

8 But the D.C. district court made
9 findings contrary to your position. So should
10 -- wouldn't -- aren't we obligated to look at
11 the full picture, not just the picture you want
12 us -- the piece of the picture you want us to
13 look at?

14 MR. KELLER: The D.C. court, though,
15 did not find issues with the districts that had
16 been validated. Indeed, in 2011, plaintiff's
17 counsel MALDEF told the legislature that the
18 court-ordered maps, the 2012 court-ordered maps
19 from the district court in San Antonio fixed
20 every district where even Section 5
21 preclearance was denied. This is at CJS
22 Appendix 436-8 to 439-8. Plaintiffs do not
23 dispute that.

24 So what the evidence that the
25 legislature heard in 2013 was that the maps had

1 been fixed even beyond the analysis that the
2 court performed, also, to address plaintiff's
3 argument that somehow the process was rushed in
4 2013. That is clearly erroneous.

5 Here, in 2013, the House and Senate
6 committees heard nearly 33 hours of debate over
7 11 public hearings. That produced 1,355
8 transcript pages. That was just the committee
9 process. Then there were the floor debates.
10 That resulted in over 1,000 pages of transcript
11 in the House and Senate journals.

12 In that context, the legislature in
13 2013 engaged in a deliberative process. It
14 adopted wholesale the entire congressional map.
15 It didn't even tinker around with the districts
16 that had, in fact, been changed. And there
17 were nine districts that had been changed.

18 There were a couple congressional
19 districts that were left in place that
20 plaintiffs were challenging, but the district
21 court in 2012 issued seven pages and six pages,
22 respectively, of analysis that CD 35 and CD 27
23 were valid.

24 If that is not a basis on which a
25 legislature can rely on a federal court's

1 opinion, I'm not sure there's any breathing
2 space left --

3 JUSTICE KAGAN: Well --

4 MR. KELLER: -- for legislatures
5 engaging in redistricting --

6 JUSTICE KAGAN: -- but it --

7 MR. KELLER: -- to honor both their
8 constitutional and VRA obligations.

9 JUSTICE KAGAN: It seems as though
10 that that's a -- you're essentially saying that
11 this PI opinion was a safe harbor for the
12 state. And that seems an odd thing to say.

13 I mean, a PI opinion is just a PI
14 opinion. It's preliminary. And this Court
15 said multiple times that they're -- that it had
16 not got -- gone through all the evidence, that
17 it had not gone through all the facts, that
18 this was just the best it could do at the stage
19 it was at now.

20 And so, to turn that around and to say
21 this is a safe harbor for the state, isn't it
22 essentially to stop every case at the
23 preliminary injunction stage?

24 MR. KELLER: Justice Kagan, our
25 position is not that somehow this was a

1 categorical safe harbor, that the 2011
2 legislature's actions could not be examined.
3 But what can't happen is that only 2011 is
4 examined in isolation. This case did not end
5 in 2011.

6 Indeed, what happened in 2012 with all
7 that court process, and in 2013 with the
8 legislative process adopting a court-ordered
9 remedial district, is very good evidence that
10 the legislature was acting in good faith. And
11 you would need very persuasive evidence to
12 overcome the strong presumption of good faith,
13 the extraordinary caution that would apply when
14 charging a legislature with an illicit purpose.

15 And, here, essentially nothing changed
16 between 2012 and 2014. Plaintiffs point to
17 almost no new evidence that came in even on
18 retrial compared to what the district court was
19 aware of in 2012 when it had the entire 2011
20 legislative record before it.

21 In that context, with or without a
22 presumption of good faith, there is no basis to
23 find that the Texas legislature was somehow
24 invidiously racially discriminatory when what
25 it did is it adopted the entire congressional

1 map and virtually all the state house map that
2 it had been ordered to use.

3 JUSTICE KAGAN: General, what would
4 you think -- let's put aside the court order
5 for a second. Just pretend it doesn't exist,
6 which I realize is -- you know, that's an
7 important feature of the case for you, but
8 let's just pretend.

9 MR. KELLER: It is.

10 (Laughter.)

11 JUSTICE KAGAN: Suppose there's one
12 map and -- and -- and then there's a second
13 map, and the one map is later found to have all
14 kinds of evidence of discriminatory intent
15 surrounding it. There are e-mails. There's
16 everything.

17 The second map, nothing. But the
18 second map is exactly the same. What should a
19 court do with respect to the second map?

20 MR. KELLER: Justice Kagan --

21 JUSTICE KAGAN: Should it just say
22 there's no e-mails?

23 MR. KELLER: No, I -- I believe that's
24 a very different case --

25 JUSTICE KAGAN: I know it is.

1 MR. KELLER: -- precisely because --
2 and -- and under Arlington Heights, the court
3 could consider all of that evidence, and in
4 doing that analysis of the sequence of events,
5 the court could take cognizance of the fact
6 that the 2013 legislature there may not have
7 been doing anything at all, and that could
8 possibly go to the purpose.

9 But here, when we have a court-ordered
10 remedial plan and we have wholesale acceptance
11 on the congressional side and virtually
12 wholesale acceptance on the state house side,
13 this was not the legislature trying to pull a
14 fast one on anyone. And there is absolutely no
15 evidence in plaintiffs' briefs that somehow the
16 legislature was trying to lock in
17 discriminatory districts.

18 Mr. Chief Justice, if I may reserve
19 the remainder of my time.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Kneedler.

23

24

25

1 ORAL ARGUMENT OF EDWIN S. KNEEDLER
2 ON BEHALF OF APPELLEE UNITED STATES
3 IN SUPPORT OF THE APPELLANTS

4 MR. KNEEDLER: Mr. Chief Justice, and
5 may it please the Court:

6 I do want to address the merits, but
7 if I could make a -- a few points about
8 jurisdiction at the outset to show why this
9 case is different from other cases that may
10 arise. And there are a number of
11 distinguishing factors.

12 In this case, what the district court
13 did was say that the current plans, which had
14 been in place since 2012, three elections had
15 been held under those plans, may not be -- may
16 not be used. They -- there must be a remedy.

17 Then the court gave only three days to
18 the state legislature, which is not -- which is
19 far from sufficient time to allow a sovereign
20 state to engage in the critical act of deciding
21 whether to reapportion the legislature.

22 JUSTICE KAGAN: Mr. -- Mr. Kneedler,
23 that might be true. It might have been a
24 terrible decision to give only three days, but
25 suppose that the court had given three weeks.

1 Why would that have made a difference for this
2 question of whether something is an injunction
3 or has the practical effect of an injunction?

4 MR. KNEEDLER: I -- I think the
5 urgency or time limit is -- is a very important
6 consideration and, in fact, a very important
7 limitation on what we are proposing here.

8 October 1 was a -- a deadline that the
9 parties and the court in this case accepted,
10 when -- when preliminary measures had to be
11 taken to institute the election. This was only
12 45 -- about 45 days away from the district
13 court's opinion.

14 JUSTICE SOTOMAYOR: Mr. Kneedler, what
15 do -- what rule do we set to know how much time
16 is enough time? Meaning, in all of these
17 election cases, it seems to me that every
18 single one of them, even if it's decided today,
19 I'm going to hear that in eight months they
20 have to do something. In three months after
21 that, they have to do something else. In this
22 amount of time after that, they have to do
23 something else. Until it's clear that a
24 district court tells a state you can't use your
25 map at all, even within 24 hours, this Court

1 could intervene if need be.

2 So I'm not sure in what other setting
3 time constraints are a reason for immediate
4 appeal --

5 MR. KNEEDLER: Again --

6 JUSTICE SOTOMAYOR: -- if -- if it's
7 not permitted generally under the law.

8 MR. KNEEDLER: But -- but I think
9 under the practical effect test, one of the
10 practical effects is if the state is facing a
11 deadline in only three days -- if I could use
12 an example which I think this -- brings --
13 brings this home and would express a federal
14 interest in this. 2284 was enacted to accord
15 special deference to redistricting by
16 three-judge courts. That includes the
17 apportionment of Congress.

18 If a district court held that a
19 federal apportionment statute or something in
20 the census was defective and the district court
21 said perhaps two weeks before the President was
22 to report the apportionment to the House of
23 Representatives, you may not -- this is
24 defective, you will not be able to use this,
25 and the states will not be able to rely upon it

1 in an upcoming election, I think it would be
2 very important for the federal government, for
3 the nation as a whole --

4 JUSTICE BREYER: Yes, but there's a
5 way. What's bothering me here, as I said, is
6 not this case, but there are appeals and
7 injunctions in millions of cases.

8 So the judge says: I've written an
9 opinion which says just what you say. The
10 lawyer for the state says: Your Honor, we
11 respectfully disagree with that opinion. We
12 are going to go ahead and have the election,
13 unless you enter an order, an injunction, which
14 I think you shouldn't do, but you enter an
15 order, an injunction forbidding us from doing
16 so.

17 Now, when that piece of paper is
18 entered, at that point, of course, there is an
19 appeal. Now, once you say the practical
20 effects test, I haven't found a case with that.
21 Not even Carson. There was an injunction in
22 Carson in the settlement plan.

23 I found no case. Now maybe you'll
24 tell us some. People have used the word
25 "practical effects," but suddenly, when we stop

1 that without an injunction and adopt that, what
2 happens to the 4 million cases in the U.S.
3 courts?

4 MR. KNEEDLER: Well, let me make one
5 final important point, and then I do want to
6 move on to -- on to the merits. I -- there is
7 a -- there is a big difference between
8 redistricting, particularly, again, here, this
9 is -- the court was saying the state could not
10 use a plan that it had used for three
11 elections, that -- that the representatives and
12 the electorate had come to rely upon.

13 But another important distinction
14 between this and other cases and particularly
15 Gunn is, in -- in Gunn, the state could go
16 without the statute that was enjoined in that
17 case. In a redistricting case, there has to be
18 a districting of the legislature. The case
19 just can't go on with nothing further being
20 done.

21 And so, in a redistricting case, when
22 a court says you may not use this -- this plan
23 and gives the state foreign --

24 JUSTICE SOTOMAYOR: Mr. Kneedler --

25 CHIEF JUSTICE ROBERTS: Mr. Kneedler,

1 you have about five minutes left. Could you
2 move to the merits?

3 MR. KNEEDLER: Yes. I -- I'd like to.
4 And -- and the -- for us, the critical point to
5 be made here is that the question of whether
6 the 2013 plan enacted by the state legislature
7 was impermissibly discriminatory turns on the
8 intent of the legislature in 2013.

9 And this Court has said repeatedly
10 that there is a presumption of good faith with
11 respect to a legislative enactment, and that is
12 true even if a prior legislative enactment had
13 been found to be impermissibly discriminatory.

14 Here, the presumption of good faith is
15 particularly strong because, as has been
16 discussed, the district court in this case,
17 following this Court's careful instructions,
18 examined the 2011 plan and determined which
19 ones did not pass the not insubstantial test
20 that this Court articulated or there was not a
21 likelihood of success. And this Court said to
22 leave the other ones in place.

23 The court had extensive proceedings at
24 -- at that stage. And that in our view gave --
25 would have reinforced the proposition that the

1 state legislature could rely upon that, and it
2 -- it -- it certainly doesn't suggest any --
3 any impermissible intent on the part of the
4 state legislature.

5 JUSTICE SOTOMAYOR: So how --

6 JUSTICE KAGAN: But, Mr. Kneedler, in
7 -- in your briefs, you acknowledge two things.
8 You acknowledge, first, that when there are two
9 maps and they're exactly the same, that
10 evidence of intent as to the first map is
11 probative of -- of -- of intent as to the
12 second map. The question is always intent as
13 to the second map, but if two maps are exactly
14 the same, there's all kinds of evidence of bad
15 intent as to the first map, surely that's
16 probative.

17 And I think you acknowledge that.
18 Don't you think?

19 MR. KNEEDLER: Again, depending on --
20 depending on the circumstances, but --

21 JUSTICE KAGAN: Of course. Everything
22 depends on the circumstances. The -- the --
23 the facts, which, you know, this Court is the
24 -- has principal authority over.

25 The second thing that you acknowledge

1 in your brief is that these court orders,
2 especially at this preliminary stage, are not
3 safe harbors. Don't you think?

4 MR. KNEEDLER: We absolutely agree
5 they are not safe harbors. They could try to
6 prove a -- a intentional discrimination claim.
7 The results test under the Voting Rights Act
8 remains available as well, and that, in fact,
9 is the principal vehicle for challenging
10 redistricting.

11 JUSTICE KAGAN: So, given that the
12 district court has so much better understanding
13 of the facts than we do, what do you think went
14 wrong here? I'm trying to find the legal
15 principle that went wrong.

16 MR. KNEEDLER: The -- the legal
17 principle that went wrong is the court
18 basically said that the taint that it found in
19 -- with respect to certain districts in 2011
20 carried forward to 2013. And it was the
21 state's obligation, A, in the state legislature
22 to engage in a deliberative process to make
23 sure that that taint, which had not yet been
24 found by the district court, was eliminated.

25 JUSTICE KAGAN: But I don't think that

1 it did that. And I -- I recognize that there
2 are some sentences which can be read either
3 way. But if I understand you correctly, you're
4 suggesting that there was a shift in the burden
5 of proof. And that would be a legal error.

6 MR. KNEEDLER: That's -- that's the
7 way we do -- we do read the opinion. And this
8 Court has --

9 JUSTICE KAGAN: But -- but -- but here
10 is what they said, the district court said:
11 "The plaintiffs can establish their claim by
12 showing that the legislature adopted the 2013
13 plans with a discriminatory purpose, maintained
14 the district lines with a discriminatory
15 purpose, or intentionally furthered preexisting
16 intentional discrimination."

17 So it's talking about here is the way
18 the plaintiffs can establish their claim. What
19 happened in 2013?

20 MR. KNEEDLER: Yes, but -- but if --
21 if you read that whole section of the district
22 court's opinion, it puts great weight on -- on
23 its perception that the -- the state
24 legislature was required to engage in a -- a
25 deliberative process to make sure it was

1 undoing prior taint.

2 And as we have said, there is no
3 presumption of taint just because a legislature
4 was previously found -- and, by the way, those
5 findings come in --

6 JUSTICE KAGAN: Well, that might be
7 right, Mr. Kneedler, that there's no
8 presumption that comes from, but -- but it's --
9 it's surely evidence that one can take into
10 account that the legislature didn't engage in
11 any kind of deliberative process --

12 MR. KNEEDLER: But --

13 JUSTICE KAGAN: -- after having done a
14 map that's tainted with all kinds of
15 discriminatory intent.

16 MR. KNEEDLER: Right. But this Court
17 -- this Court has said that there is a -- a
18 presumption of good faith that is a demanding
19 test, whether to establish racial
20 discrimination, and there is no taint. That --
21 that requires the plaintiffs to come forward
22 with significant evidence bearing directly on
23 2013.

24 And, here, we think that the district
25 courts -- that's basically a record. The

1 district court's opinion, even though
2 preliminary, was -- was a record --

3 JUSTICE SOTOMAYOR: I'm sorry, I
4 thought the --

5 MR. KNEEDLER: -- before the -- before
6 the legislature.

7 JUSTICE SOTOMAYOR: -- I thought the
8 legislature had its own attorney tell it that
9 the findings of the district court were
10 tentative, preliminary only, and that what --
11 and went through what the plaintiffs claim and
12 told them that what they were doing would not
13 address the constitutional issues that were
14 raised by plaintiffs. So --

15 CHIEF JUSTICE ROBERTS: Why don't you
16 take an extra couple of minutes.

17 MR. KNEEDLER: Okay. Well, yes, the
18 -- the legislative counsel said this will not
19 resolve -- this will not end the litigation,
20 and, obviously, it hasn't.

21 JUSTICE SOTOMAYOR: No, I think he
22 said more. This won't resolve the taint that
23 -- I believe he said it won't resolve the --

24 MR. KNEEDLER: No, I don't -- I don't
25 -- I don't believe that's what he said. I

1 think he was just giving them advice that the
2 district court's decision was preliminary and
3 there -- and there could be -- there could be
4 further litigation.

5 But one of the primary motivations
6 here was to end the litigation. And the -- and
7 the plaintiffs suggest that there's something
8 pernicious about ending litigation, but, to the
9 contrary, the state legislature's acknowledging
10 that there was prior discrimination, accepting
11 what the district court did as a remedy, even
12 though preliminary for that -- for that and
13 enacting a -- a new law, that's something to be
14 commended when a state legislature proceeds in
15 that manner --

16 JUSTICE SOTOMAYOR: I -- I -- I --

17 MR. KNEEDLER: -- on the basis of an
18 independent review that was conducted by an
19 Article III court.

20 JUSTICE SOTOMAYOR: But may I ask
21 something? There's end of litigation. Are you
22 ending a litigation, or are you ending the
23 possibility of a court stopping you from
24 discriminating?

25 Meaning, if there is a basis, and --

1 and you're aware that there are claims that you
2 intentionally discriminated, there are findings
3 not just by the 2012 court but by the D.C.
4 circuit court -- district court, that you have
5 intentionally discriminated in drawing a number
6 of lines, intentionally or in results, and
7 you're now saying I don't really care, I want
8 to get the court outside of messing even with
9 my discriminatory lines.

10 MR. KNEEDLER: I --

11 JUSTICE SOTOMAYOR: It --

12 CHIEF JUSTICE ROBERTS: Why don't you
13 answer, Mr. Kneedler. Then we'll let you sit
14 down.

15 MR. KNEEDLER: Okay.

16 (Laughter.)

17 MR. KNEEDLER: I -- I -- I don't think
18 that's a fair account of what the -- of what
19 the record shows. And -- and if there are --
20 first of all, if there are -- if there are --
21 if there's indications going both ways, the
22 presumption of good faith, and the -- and
23 there's no continuing taint, should cut in the
24 -- should cut in the state's favor.

25 But the important point is that the --

1 the -- it's the intent in 2013 and the desire
2 to -- to accept what the district court did so
3 that the state could move on.

4 It didn't end the litigation, but so
5 that the state could move on is, again,
6 something that is to be encouraged when a
7 district court has found this, and to adopt
8 that rather than to continue to resist it.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Mr. Hicks.

12 ORAL ARGUMENT OF MAX RENEA HICKS ON
13 BEHALF OF THE APPELLEES IN NO. 17-586

14 MR. HICKS: Mr. Chief Justice, and may
15 it please the Court:

16 I hadn't anticipated doing this, but
17 I'm going to start with the jurisdictional
18 question, which, of course, is what you all
19 start with.

20 Justice Breyer asked a key question, I
21 think, of -- of -- of the other side in this.
22 He said, show me the language. Show me where
23 they entered an injunction.

24 The closest they can come, there --
25 and everybody agrees there was no remedy

1 ordered, so the only question becomes was there
2 an injunction against the 2018 elections for
3 Congress -- I'm speaking of Congress -- going
4 forward under the existing plan.

5 The closest they can come to an --
6 language that says there is an injunction, is
7 the language that says these violations that
8 we've just found and declared must be remedied.
9 But that's not an injunction.

10 It doesn't say when, how. It gives no
11 details. If you want language that addresses
12 the injunction question, the language is in the
13 court's order and in its response to --

14 JUSTICE KENNEDY: Could -- could Texas
15 have -- have used the current maps for the 2018
16 elections?

17 MR. HICKS: Yes, in the absence --
18 unfortunately, as far as we're concerned, but
19 yes, in the absence of --

20 JUSTICE KENNEDY: I mean insofar as
21 the court's order was concerned.

22 MR. HICKS: Yes. I don't think
23 there's any question about it. If -- if they
24 say we would have been held in contempt if we
25 had gone forward, it would have been impossible

1 to hold them in contempt because the court
2 itself said: We have not enjoined use of the
3 plan for any -- for the upcoming elections. So
4 --

5 CHIEF JUSTICE ROBERTS: Well, but the
6 judge -- the court gave the -- the governor
7 three days --

8 JUSTICE BREYER: Three days.

9 CHIEF JUSTICE ROBERTS: -- to call the
10 election. And, I mean, if you were the
11 governor, would you think, well, maybe we're
12 not going to be able to use the 2018 plans?

13 MR. HICKS: No, I would not at all.
14 First of all, that three-day window was a -- a
15 chance for the -- the legislature -- the
16 governor to come back and say, I will call the
17 legislature in special session. It wasn't
18 about when he would call them into session.

19 We had asked -- the court had, rather,
20 had said two different times in the spring of
21 2017 to the Texas Attorney General's Office,
22 you should consider having the legislature --
23 the first time it was in special -- in regular
24 session -- you should consider having them
25 address the -- the problems that have cropped

1 up so far in the districts that didn't change
2 between 2011 and 2013.

3 No response. Silence from the state.
4 Then, about two or three weeks later, after
5 this Court's decision in Cooper came down, the
6 court again said: Hey, kind of the
7 handwriting's on the wall here for problems
8 with your districts that didn't change. You
9 should consider calling a special session.
10 Will you?

11 This was in the spring. And they
12 didn't do it. In fact, at that time, they got
13 a definite answer: No, we won't do it.

14 So, when the time came in the August
15 order that said we find violations, we've
16 gotten to the point now after all these years
17 and we find violations in these two districts,
18 the court did not say you can't conduct the
19 elections. The court did not say that you only
20 have three days to call a special session.

21 It said you have three days to let us
22 know. And the pump had been primed.

23 JUSTICE GINSBURG: If you're -- if
24 you're -- if you're right about the
25 jurisdiction, that there is no injunction, what

1 happens next?

2 MR. HICKS: Well, I can tell you what
3 we hope happens next. If -- if the Court
4 dismisses this case for lack of jurisdiction,
5 and I have not consulted with every one of the
6 nine groups, but if -- if for our group, if the
7 Court says no jurisdiction and sends it back,
8 we're going to ask the court to set up a remedy
9 hearing and see if we might be able to get
10 relief in time for the 2018 elections.

11 There is a very good chance, I think a
12 pretty strong chance, the court, the district
13 court is not going to let us do that. We went
14 to the district court three different times,
15 Your Honor, asking for an injunction after the
16 trials. In 2015, we asked for an injunction
17 before the 2016 elections while the case was
18 pending, got a no.

19 In the -- in the -- in -- after the
20 March order on the old plan came down in -- in
21 2017, we went to the court and said: Will you
22 give us an injunction as to the districts that
23 are the same between the old plan and the new
24 plan? The court said no.

25 So we have tried. And we also went at

1 the end of 2016 and said: Please give us an
2 injunction to stop the 2018 elections from
3 going forward. The court said: No.

4 So we have knocked on the door three
5 times and the court had said no.

6 Then it came to the final -- it
7 finally got to the -- to the nub of the
8 liability issue and the declaratory relief
9 issue and we -- we didn't even get a chance to
10 say please enter an injunction. They said
11 schedule a --

12 JUSTICE GORSUCH: Counsel, are you
13 suggesting you're not going to seek an
14 injunction?

15 MR. HICKS: No. I -- as I said, I
16 can't speak for every one of the plaintiff
17 groups because we didn't consult with them as
18 -- before we walked in here today.

19 JUSTICE GORSUCH: But -- but it's your
20 intention to seek an injunction on the basis of
21 your --

22 MR. HICKS: For the Rodriguez
23 plaintiffs, I believe we will ask --

24 JUSTICE GORSUCH: Counsel -- counsel,
25 the question is --

1 MR. HICKS: Yes. We do.

2 JUSTICE GORSUCH: -- if I might. If I
3 might.

4 MR. HICK: We -- yes.

5 JUSTICE GORSUCH: You intend to seek
6 an injunction on the basis of the order
7 presently before us?

8 MR. HICKS: Yes.

9 JUSTICE GORSUCH: Okay.

10 MR. HICKS: But -- but I emphasize
11 there is -- there was pretty strong indication
12 that we aren't going to be successful in
13 getting it for the 2018 elections. I don't
14 know if it's just from this Court and what it
15 might say from the district court because it
16 has been very reluctant to interfere with the
17 election process. It's been very slow to do
18 that.

19 I want to churn -- turn if I may --
20 let me just mention one other thing about
21 jurisdiction. The kinds of orders they say
22 constitute an injunction -- injunctive relief,
23 they're case processing orders. They're
24 schedule -- case scheduling orders. You know,
25 show -- please show up on June 3 or whatever

1 day for a hearing. Or send the Legislative
2 Council people in to help us draw maps -- to
3 help us draw the maps that day.

4 If those things are injunctions, the
5 issue is very different. Was it a -- an abuse
6 of discretion for the court to order
7 Legislative Council to show up? It's not the
8 merits of the case here.

9 JUSTICE ALITO: Do you think we lack
10 jurisdiction if the order doesn't contain the
11 word "injunction" or "order" but has the
12 practical effect of doing that?

13 MR. HICKS: I -- I'll do a two-level
14 answer. The first answer is yes, I believe you
15 do not have jurisdiction unless it has an
16 injunction in it in so many words. I believe
17 that's true.

18 If the practical effects test that the
19 Court has applied in Carson Brands, which I
20 emphasize is only as to the denial of an
21 injunction, not to the grant, which has to be
22 much more specific, but if that practical
23 effects test is applied, there has to be
24 something that indicates there is injunctive
25 relief forthcoming. That is -- not

1 forthcoming; rather, there is injunctive relief
2 embedded in this. This Court knows to how to
3 look at something and tell if it's an
4 injunction or not.

5 JUSTICE GINSBURG: Has -- has the
6 practical effects been applied in the 1253
7 context as distinguished from 1292?

8 MR. HICKS: It never has. And I think
9 the Gunn case suggests if -- if that principle
10 is followed, it wouldn't be applied. We have
11 to remember in the -- in the Carson Brands
12 test, calling it the -- the practical effects
13 test, is really ultimately a misnomer because,
14 if you look at it, in Carson Brands, what had
15 happened was the district court had refused to
16 enter a consent decree. One piece of the
17 consent decree was specific -- would have
18 specifically been an injunction. That would
19 have been the consent decree. And the court
20 denied the entry of the consent decree, and
21 this Court said that has the practical effect
22 of denying that particular injunction that
23 would have been entered --

24 CHIEF JUSTICE ROBERTS: Counsel --

25 MR. HICKS: -- under Appendix B or

1 whatever.

2 CHIEF JUSTICE ROBERTS: Counsel, you
3 were the one who said you wanted to have one
4 more word on the jurisdictional issue. But on
5 the --

6 (Laughter.)

7 MR. HICKS: Sorry.

8 CHIEF JUSTICE ROBERTS: On the -- on
9 the merits, it seems a strong argument, which
10 you dismiss as just sort of wanting to end the
11 litigation, which is usually a good thing, for
12 the legislature to say: Okay, this is the
13 plan -- I understand it's preliminary and all
14 that -- but to move things along, this is the
15 plan the district court drew. That's what
16 we're going to go with.

17 It does seem to me that at the very
18 least -- and I understand this to be the point
19 on the other side -- that ought to give them
20 some presumption of good faith moving forward,
21 which is significant on the determination of
22 their intent to discriminate.

23 MR. HICKS: Right. That isn't what
24 gave them the presumption of good faith. They
25 always have a presumption of good faith when

1 the legislature acts. That's the first step,
2 is presume good faith. And the district court
3 proceeded from that. But in this particular
4 instance, the district court did not in 2012
5 draw a map. It did not draw a map.

6 For the two districts that are before
7 you now, Districts 25 and -- I mean 35 and 27,
8 it didn't touch them.

9 CHIEF JUSTICE ROBERTS: Well, they
10 were not changed, but that -- surely, the
11 district court could draw a map; you don't have
12 to change every single district when you're --
13 you're looking at what you think is an
14 appropriate map for two -- two elections to go
15 forward under.

16 MR. HICKS: I understand that, but in
17 this one, there were -- half of the Texas
18 congressional districts were not touched in the
19 interim map, not touched at all, including
20 the --

21 CHIEF JUSTICE ROBERTS: Is your answer
22 different if they did alter every single
23 district in Texas?

24 MR. HICKS: Well, my answer is it
25 would then be a court-drawn map in the

1 districts, and it would be court-drawn. But
2 these two districts were not court-drawn, as
3 well as 16 other districts there were not
4 court-drawn.

5 CHIEF JUSTICE ROBERTS: How -- how --
6 how many of the Texas districts were redrawn,
7 were altered?

8 MR. HICKS: There were -- there are 36
9 districts; 18 of them were altered in some way
10 and 18 of them were untouched. So it's half
11 and half. And I -- and though the 18 that were
12 untouched, you go look at the 2011 legislation
13 that drew them, and you find the block
14 descriptions of what they look like, the
15 geographic description. It's the statute is
16 there in 2011. And so --

17 JUSTICE ALITO: Well, as to the
18 district -- as to the congressional districts
19 that are at issue here to start, did the
20 district court simply rubber-stamp what had
21 been presented to it, or did it engage in a
22 pretty thorough, thoughtful analysis of the
23 legality of those districts?

24 MR. HICKS: It did as thorough an
25 analysis, I believe, as it could under the

1 constraints. And that is not a thorough
2 analysis.

3 The court itself said it's not
4 thorough. If Your Honors recall, this case
5 returned to them, and it isn't as though the
6 court on remand had a choice. There was a gap.
7 At that time, preclearance -- the preclearance
8 regime was in place and operative, and there
9 had to be a map in place.

10 There could not be one. This Court
11 had already postponed -- the district court had
12 already postponed elections two or three --
13 scheduled two or three times. And the district
14 court in D.C. had not yet acted on the state's
15 preclearance request. So there was a gap.

16 And it had to go forward. And the --
17 and to talk about the analysis, the district
18 court -- and the Texas Legislative Council's
19 lawyer did tell the legislature this -- the
20 district court, it's hard to find a more hedged
21 opinion about the outcome of a case.

22 They said it's a close question. I
23 don't know how many times they said it's a
24 close question. It's for this time only. And
25 the state, when it came up here before you on a

1 state request by LULAC in -- in 2016, I think
2 it was, the state told you: Hey, it's just a
3 one-time deal, that map. It's just a one-time
4 deal. We quote that in our brief.

5 And so it is -- it is not what I would
6 call a thorough analysis. There were things
7 that changed, substantial things that changed
8 between the 2012 map and the 2013 legislative
9 action, which they used the term "ratify" the
10 map. They didn't even say they have considered
11 and drawn the map. They say they ratified the
12 map.

13 But there were several things that
14 changed. One, as Justice Sotomayor said, there
15 was the district court in D.C. decision which
16 said there is, essentially, more intentional
17 discrimination in this congressional map than
18 you can shake a stick at. We -- we have had
19 evidence on that. They said there is a
20 preexisting crossover district in the Travis
21 County area that the district court in San
22 Antonio had not found existed yet. They said
23 there is a crossover district where people --
24 minority voters' rights are being exercised.

25 Also, in between, the -- the United

1 States had intervened in a different posture
2 back then. The United States had intervened
3 and opposed the map in D.C., and that evidence
4 had been introduced. That was all new evidence
5 that didn't exist in 2012.

6 JUSTICE ALITO: Why don't you talk
7 about one of the districts. Why don't we talk
8 about Congressional District 35 and some of the
9 points that the district court made when it
10 initially analyzed this.

11 Is it not true that this -- the
12 concept of this district was recommended by the
13 Mexican-American Legal Defense and Education
14 Fund and supported by the Latino Redistricting
15 Task Force?

16 MR. HICKS: The concept was one of two
17 alternatives. It was April 11 testimony, April
18 11, 2011, transcript -- Exhibit 591, if I
19 recall correctly. MALDEF goes in early in the
20 session and says: We have two maps. One is a
21 concept similar to this, and the other one is
22 an alternative map that does what we think
23 should happen. And they say we don't have a
24 choice between them. And they offered no --

25 JUSTICE ALITO: But they recommended

1 this as one of the alternatives, right?

2 MR. HICKS: It is, but there was --

3 JUSTICE ALITO: They're linking --
4 linking San Antonio and -- and Austin, and they
5 said there was a community of interest. And
6 the district court said that in its initial
7 opinion, did it not?

8 MR. HICKS: It said it didn't know for
9 sure whether there was a community of interest.
10 But the important thing about this is there was
11 no evidence -- under a racial gerrymandering
12 test, they have to survive strict scrutiny.
13 And so, on the strict scrutiny side, the Texas
14 legislature had nothing -- nothing in front of
15 it that suggested that there was problem with
16 racially polarized voting that would require
17 the creation of this district. They didn't
18 have -- it isn't that they didn't have --
19 whether they had strong evidence or not; they
20 had no evidence.

21 JUSTICE ALITO: I thought there was
22 evidence that there was racially polarized
23 voting in the district as a whole.

24 MR. HICKS: There is -- the state
25 offered no evidence at all on that. The state

1 offered no evidence. We offered evidence.

2 JUSTICE ALITO: You offered evidence
3 about Travis County.

4 MR. HICKS: Yes. We offered evidence
5 about Travis County. They offered no evidence
6 about racially polarized voting. And the more
7 important thing because Bethune-Hill, if Your
8 Honor recalls, says -- I think Justice Kennedy
9 wrote that opinion, who said you don't get to
10 do post-hoc investigation of whether there's a
11 problem; you look at it at the time the
12 legislature acted.

13 At the time the legislature acted, it
14 had nothing in front of it about this. It had
15 alternative maps that show you didn't have to
16 come into Travis County. And this is crucial.

17 JUSTICE ALITO: At the time it acted,
18 it had the district court's opinion, did it
19 not?

20 MR. HICKS: At the time in 2013?

21 JUSTICE ALITO: Isn't what we're
22 looking at?

23 MR. HICKS: At the time it acted in 20
24 -- yes, it did, and the district court said we
25 need more facts. That's specifically what it

1 said. And in the meantime, facts had come in
2 that showed that race, better than party,
3 explained the divisions in Travis County. But
4 the most important fact, Your Honor, the most
5 important fact the legislature had in front of
6 it in 2013 that it didn't have in 2011 was that
7 the elections had occurred under that map, and
8 what did the legislature know in 2013 that it
9 didn't know in 2011, that what it had intended
10 to do -- what it had intended to do had, in
11 fact, happened.

12 They had achieved everything they
13 wanted with this map with respect to these
14 districts, with regard to the racial -- the --
15 the tamping down of racial voting rights and so
16 on. That's the most important factor that they
17 had.

18 And the effects part of this under
19 Arlington Heights is the most important thing
20 to note. In 2013, they knew they had
21 succeeded. They had succeeded. Just briefly,
22 Your Honor.

23 CHIEF JUSTICE ROBERTS: You've got a
24 couple more minutes too.

25 MR. HICKS: Okay. Just briefly on

1 this point I would like to wrap up with this in
2 -- in -- in -- on this very point. In -- about
3 a week ago, in the Dimaya case, this Court
4 repeated a quip -- I guess you can call it a
5 quip -- from Justice Scalia, and it said
6 insanity is doing the same thing over and over
7 again and expecting a different result.

8 Well, the Texas legislature is not
9 insane. It knows -- it -- it knows how to do
10 redistricting maps and we believe it knows how
11 to do them, too, fairly well with respect to
12 diminishing minority voting rights.

13 So I would ask the Court to look at it
14 this way: If you've done it in 2011 and you
15 know the outcome of it, discrimination is doing
16 the same thing over and over again and
17 expecting and achieving exactly the same
18 results.

19 And that's what happened here, Your
20 Honor. Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Ms. Riggs.

24

25

1 ORAL ARGUMENT OF ALLISON J. RIGGS
2 ON BEHALF OF THE APPELLEES IN NO. 17-626

3 MS. RIGGS: Mr. Chief Justice, and may
4 it please the Court:

5 This Court does not have jurisdiction
6 to hear this appeal, but if it proceeds to the
7 merits, the district court properly applied the
8 Arlington Heights framework to analyze the
9 intent of the 2013 legislature in reenacting
10 some of the same state house districts it had
11 deliberately designed in 2011 to cancel out or
12 minimize the voting strength of black and
13 Latino voters in Texas.

14 And using that correct legal standard,
15 the district court concluded that the intent of
16 the legislature in 2013 was, in fact, to
17 maintain and perpetuate its ill-gotten and
18 racially discriminatory 2011 gains. Those
19 findings cannot be deemed clearly erroneous on
20 the grounds of this entire record, which is
21 quite voluminous.

22 The jurisdictional question has been
23 discussed quite a bit. There's one gloss I'd
24 like to add to what's already been mentioned.

25 First is that the rule in *Gunn*, which

1 is -- is restrictive and doesn't create any
2 exceptions, has been applied in a redistricting
3 case in Whitcomb. So there's precedent for --
4 for Gunn being read as we urge it to be read.

5 And then there's the practical
6 consequence of not affording a restrictive
7 reading to 1253. All redistricting cases
8 involve timing and all election deadlines start
9 at different times.

10 This invites manipulation to create
11 exceptions in -- under 1253 and in
12 redistricting cases, and the exception would
13 eat the rule.

14 Then turning to the merits. I think
15 it's helpful to look at the district court's
16 analysis of what the evidence in 2013 and all
17 of the evidence in front of it as falling into
18 buckets that match up with the Arlington
19 Heights framework. And I submit to you that if
20 you look at the district court's opinion,
21 there's three obvious buckets of evidence that
22 it identifies.

23 One relates to the 2011 redistricting
24 plans for state house. Another is the -- an
25 analysis of the actual motivation of the

1 legislature compared to its proffered --
2 offered justification. And third is process
3 problems with respect to 2013 that could give
4 rise to an inference of discriminatory intent.

5 I want to start with that 2011 bucket
6 because it provides several pieces of relevant
7 information under the Arlington Heights
8 framework. First, the effect of a
9 redistricting plan is, under Arlington Heights,
10 an important place to start. And the district
11 court made extensive findings about the
12 discriminatory effect that the 2011 House plan
13 would have.

14 And, as Mr. Hicks mentioned, the
15 legislature knew in 2013 that the intended
16 effect had, in fact, manifested. The -- the
17 2011 process and facts also provide historical
18 evidence of discrimination, not historical
19 evidence 10 years ago, 15 years ago.

20 JUSTICE ALITO: Well, has there -- has
21 there ever been appellate review of the
22 district court's determination -- findings as
23 to the 2011 plan? Do you -- do you think that
24 we should just accept those findings as givens?
25 If you're going to place a lot of weight on

1 them, would we not have to review those?

2 MS. RIGGS: They would be subject to a
3 clearly erroneous standard. As I understand
4 it, Texas challenges that the review of the
5 2011 plans was moot. It should have never
6 happened. But doesn't seriously contest the
7 actual factual findings made by the district
8 court, which were quite extensive.

9 And on the basis of --

10 JUSTICE ALITO: Well, we can ask
11 General Keller that on rebuttal, but I didn't
12 understand them to say that we agree that all
13 of the findings that were made as to the 2011
14 plan were correct, and we don't wish to -- we
15 -- we -- we accept them all.

16 MS. RIGGS: I'm certain they don't
17 accept them. But based on 300 pages of factual
18 findings with respect to the intent and effect
19 of the challenged 2011 House districts, it
20 would be very hard to challenge those findings
21 as clearly erroneous.

22 I also think the 2011 evidence is
23 properly conceived of as part of the -- the
24 sequence of events that led up to the 2013
25 challenged legislation; that is, the same

1 people doing the same thing in 2011 as they did
2 in 2013 can be viewed as part of the same
3 process.

4 The -- the district court didn't have
5 to issue a separate opinion with respect to the
6 2011 plan. They could have combined that all
7 together as one process, and the 2011 findings
8 -- so the 2011 findings fall under numerous
9 Arlington Heights frameworks.

10 I want to spend a few minutes talking
11 about specific districts, though, because what
12 the district court sussed out was a troubling
13 pattern that repeats what this Court saw last
14 redistricting cycle from Texas. It's LULAC v.
15 Perry all over again.

16 In House District 105 in Dallas
17 County, Latino voters were 19 votes shy from
18 electing their candidate of choice in the
19 district. And the legislature in 2011 went to
20 extreme lengths to protect that Anglo incumbent
21 from being held accountable to the growing
22 Latino population in that district. The -- the
23 legislature carved up precincts, pulled every
24 Anglo voter in western Dallas that it could
25 find to pack into 105 and protect the Anglo

1 incumbent, and carving those same precincts
2 pulled out every Latino and black voter from
3 House District 105.

4 JUSTICE SOTOMAYOR: I'm sorry, there's
5 -- there's a difference between pulling out
6 Republicans and pulling out Democrats. What
7 shows -- in protecting an incumbent, because,
8 presumably, our law would say you can protect
9 and incumbent if it's race -- if it's based on
10 party lines, but if you're using just race,
11 what findings are there to show that this was
12 race-based as opposed to incumbency-based?

13 MS. RIGGS: The district court's
14 findings were based on the fact that precincts
15 were split. You don't have political data at
16 the sub-precinct level, so when the legislature
17 -- when the legislature was drawing those
18 lines, it was only grabbing Anglo voters. It
19 was not grabbing what it knew to be Republican
20 voters. It was using -- it may have been using
21 race as a proxy for partisanship, but that's
22 certainly not acceptable either.

23 Likewise --

24 CHIEF JUSTICE ROBERTS: I'm sorry,
25 I've lost track of the -- which districting are

1 you talking about with respect to 105? Was it
2 20 -- the 2011 or 20 --

3 MS. RIGGS: 2011.

4 CHIEF JUSTICE ROBERTS: Okay. Sorry.

5 MS. RIGGS: And -- and, likewise, in
6 Nueces County, importantly, the district court
7 didn't have all of the -- I'm sorry, I meant to
8 say Bell County, House District 54 in Bell
9 County. Likewise, the district court when it
10 was making its interim ruling in 2012 didn't
11 have all of the relevant evidence in front of
12 it.

13 It had yet to hear the live testimony
14 of Representative Jimmie Don Aycock, who drew
15 the district in House District -- who drew
16 House District 54 and who stated that if he had
17 kept Killeen whole, as it had been kept whole
18 in numerous versions of the districts before,
19 because the population growth in Killeen had
20 been so explosive amongst minority voters, if
21 he left that district whole, it would be a
22 naturally occurring minority coalition district
23 and it would have got him unelected.

24 JUSTICE GORSUCH: Well --

25 CHIEF JUSTICE ROBERTS: Are these --

1 JUSTICE GORSUCH: -- what -- what are
2 we -- sorry, go ahead.

3 CHIEF JUSTICE ROBERTS: Are -- are
4 these districts that the district court in
5 entering its preliminary map looked at? Is
6 that your -- is that where I am on this, is
7 that these are things that the district court
8 changed but didn't have this additional
9 information before it?

10 MS. RIGGS: The district court didn't
11 change these districts in the 2012 interim
12 plan, but the house interim order was only 12
13 pages long. It didn't get into any detail.

14 And, importantly, these are hard
15 questions. It requires a delicate sussing out
16 of the evidence to determine whether race or
17 party predominated. And the district court
18 didn't have all of the evidence, and that's a
19 -- I agree with General -- it was either
20 General Keller or Mr. Kneedler, that it is a
21 serious thing to find that a legislature acted
22 with invidious discrimination.

23 This district court was acting very
24 carefully to make sure that it had done that
25 proper sussing out. And, in fact, in many

1 places, it found that district lines were drawn
2 for political reasons, not racial reasons. So
3 it -- this district court knows how to do that
4 very delicate analysis. It did it. But it
5 followed the evidence where the evidence led
6 it.

7 CHIEF JUSTICE ROBERTS: It did it --
8 it did it when? In the 2012 order?

9 MS. RIGGS: It -- it did it when it
10 issued the 2011 opinion.

11 CHIEF JUSTICE ROBERTS: Okay.

12 MS. RIGGS: It -- between the remand
13 to this Court on January 20th, 2012, and when
14 the plan needed to be -- was constructed,
15 February 28th, I don't think the court had the
16 time or all of the evidence to do this very
17 delicate balancing.

18 CHIEF JUSTICE ROBERTS: But if you're
19 the Attorney General or -- or the -- the
20 legislature in Texas and you want to take your
21 best shot at a plan that will be accepted by
22 the district court, wouldn't you take the plan
23 that the district court drafted?

24 MS. RIGGS: You might take that as a
25 starting point. And that was the advice the

1 Texas legislature's counsel gave it during
2 committee meeting.

3 But the district court really had --
4 had the question before it, that, did
5 legislature adopt the interim plan for
6 race-neutral reasons or did it use the adoption
7 of that interim plan as a mask for the
8 discriminatory intent that had manifested
9 itself just two years ago?

10 CHIEF JUSTICE ROBERTS: Well, who was
11 doing the masking? The district court when it
12 drew up the preliminary plan?

13 MS. RIGGS: No, the legislature in --
14 in invoking the adoption of the 2012 interim
15 plan as having been a safe harbor, essentially,
16 is the one masking. And this -- the district
17 court is the -- is the body that is well poised
18 to sniff out pretext and to sniff out real
19 justification.

20 And a unanimous three-judge panel
21 concluded that, in fact, the -- you know,
22 wanting to end the litigation and adopting the
23 interim plan was, indeed, a mask for
24 discrimination.

25 CHIEF JUSTICE ROBERTS: But that's --

1 JUSTICE GORSUCH: Counsel, what do we
2 do -- I'm sorry.

3 CHIEF JUSTICE ROBERTS: Go ahead. No,
4 I'm done. Okay.

5 JUSTICE GORSUCH: All right. You -- a
6 lot of complaints have to do with vote
7 dilution, and that's what you've been focused
8 on in a number of districts. But what do we do
9 about House District 90, for example, where
10 when the legislature sought to take into
11 consideration some concerns along those lines,
12 it -- it then gets attacked from the other
13 direction as -- as discriminating on the basis
14 of race in violation of the Fourteenth
15 Amendment.

16 How is it -- how is a state supposed
17 to balance its Section 2 obligations against
18 the Fourteenth Amendment obligations? It seems
19 like you're -- you're catching them on a bit of
20 a horns of a dilemma. Is there the way through
21 the thicket?

22 MS. RIGGS: There is and I think this
23 Court's provided that guidance in recent cases
24 as well, but -- consistent with instruction
25 dating as far back as the '90s. To answer your

1 question, though, the district court found as a
2 matter of fact that the legislature did not
3 create House District 90 with VRA compliance in
4 mind. They found as a matter of fact that
5 House District 90 employed a mechanical racial
6 target. Those are findings that are not
7 clearly erroneous and do -- and -- and then
8 must be affirmed.

9 The state -- the state can protect
10 itself by doing the types of Voting Rights Act
11 inquiries that this Court has seen in previous
12 cases and in making sure that when it does use
13 race in a predominant fashion, it does it in a
14 narrowly tailored sense.

15 JUSTICE ALITO: But what is your
16 evidence that the state adopted the plan
17 previously approved by the court for an
18 invidious reason?

19 MS. RIGGS: The evidence that the
20 district court looked at in -- in arriving at
21 that conclusion and -- and drawing the
22 inference from the evidence in front of it was
23 multi- -- multifaceted.

24 One was that the -- the district court
25 -- the legislature ignored the explicit

1 warnings of the district court that its ruling
2 was preliminary; it wasn't done looking. The
3 next was that the -- it -- it had in front of
4 it the ruling from the D.C. district court.

5 Now, the D.C. district court ruling
6 didn't reach discriminatory purpose with
7 respect to the state house case, but it noted
8 that the -- this -- it listed a bunch of record
9 evidence that it said would support a finding
10 of discriminatory purpose.

11 It also noted that the legislature had
12 had the advice of counsel during the
13 legislative committee meetings and floor
14 meetings. And -- and there I would point --

15 JUSTICE ALITO: The advice -- the
16 advice of what, that it was preliminary? The
17 original opinion was preliminary?

18 MS. RIGGS: So that's the particular
19 piece of advice from that exhibit that the
20 district court cited, but that exhibit, Joint
21 Exhibit 15.3, contains other advice from
22 legislative counsel, Mr. Archer, in which he
23 explains to members of the committee that House
24 District 54, where minority voters had been
25 fractured, cut in half, and stranded in two

1 Anglo districts, might have a target on its
2 back, and that the legislature, if it wanted to
3 avoid being found guilty of intentional
4 discrimination, ought to consider reuniting
5 that -- that district.

6 So this is the evidence that they had
7 in front of them. As late as May of 2013, we
8 had a status conference in the San Antonio
9 court, where we discussed the need for further
10 evidence. That status conference was discussed
11 in -- during the legislative proceedings. This
12 is the -- the evidence before the district
13 court in concluding that the actual motivation
14 was, in fact, an intent to discriminate.

15 JUSTICE BREYER: What is the law on
16 the -- what is the law, in your opinion, not
17 the facts, if you assume the following: One,
18 there is an old plan and a state legislature
19 thinks, you know, this old plan might really
20 have been discriminatory; I wasn't here then, I
21 didn't do it, but I see the point.

22 Two, there is a judge who says this is
23 okay, but, remember, I haven't seen all the
24 evidence, I might change my mind, please a
25 thousand cautions. And then we have bishops

1 who look into the heart of the new legislature
2 and they discover that the reason they passed
3 it really was because it's our best shot. You
4 see?

5 Now, imagine those three facts.
6 What's the law?

7 MS. RIGGS: The law is still Arlington
8 Heights and that even though the bishops
9 determined that there may be a motivating -- a
10 factor that --

11 JUSTICE BREYER: No, they determined
12 that's the real reason. They all voted because
13 it's our best shot. It's our best shot to get
14 the old plan through. See? Or some version
15 thereof. That's it. Just thought it's the
16 best shot. Got the fact? That's the
17 assumption.

18 Now what's the law?

19 MS. RIGGS: So the law that I would
20 point Your Honors to is the Guinn and Lane line
21 of cases where when a statute is enacted and --
22 and struck down for being unconstitutional and
23 then reenacted the next year, if it partakes
24 too much of the initial constitutional
25 infirmity, it cannot stand under the

1 Constitution.

2 I would also add, though, that wanting
3 to end the litigation even if it's coming from
4 a --- a good place doesn't end the
5 constitutional scrutiny. Racial discrimination
6 needs to be only one of the factors, not the
7 only or sole or dominant motivating factor.

8 And -- and litigation strategy,
9 wanting to win, doesn't end the constitutional
10 inquiry. If we -- if it did, we wouldn't need
11 Batson challenges. But more importantly, it's
12 not that they wanted to -- it doesn't matter
13 whether they wanted to end the litigation or
14 not; it matters how they wanted to end the
15 litigation. And they wanted to end the
16 litigation by maintaining the discrimination
17 against black and Latino voters, muffling their
18 growing political voice in a state where black
19 and Latino voters' population is exploding.
20 They're poised to take over in all of these
21 districts.

22 It was that intent that they wanted to
23 muffle.

24 CHIEF JUSTICE ROBERTS: And that --
25 and that -- don't you have to suggest that that

1 was the intent that the district court had when
2 it imposed the interim plan? Because keep in
3 mind, this -- this evil intent that you're
4 attributing comes from adopting the plan that
5 the district court adopted and let the
6 elections go forward under for two cycles.

7 MS. RIGGS: Well, the intent doesn't
8 have to encompass any racial animus. I think
9 the district court did the best it could with
10 the time it had and the evidence it had.

11 CHIEF JUSTICE ROBERTS: Yeah, but the
12 intent doesn't have to encompass any racial
13 animus?

14 MS. RIGGS: No. Discrimination --
15 just -- the discrimination that would fall
16 under the prohibitions of the Fourteenth
17 Amendment doesn't have to come from a deep
18 hateful place. It has --

19 CHIEF JUSTICE ROBERTS: Not a deep
20 hateful place. It has to be -- doesn't it have
21 to be racial -- intentional racial
22 discrimination? Which sounds pretty deep and
23 hateful.

24 MS. RIGGS: I -- I -- intentional
25 racial discrimination certainly attaches where

1 there's a purposeful intent to keep a cohesive
2 minority group from exercising the opportunity
3 to elect their candidate of choice where they
4 might otherwise have it, absent that
5 intervention, but I don't think that's the same
6 thing as racial animus.

7 Very briefly, I would like to note
8 that regardless of what this Court does on the
9 questions of intent, in the House case we have
10 two districts, two claims that are independent
11 of any intent. And one is House District 90,
12 which I already spoke with -- about with
13 Justice Gorsuch.

14 The other is the Section 2 effects
15 claim in a Nueces County. And there the
16 dispute boils down to a very narrow question.
17 There's no dispute that there is
18 racially-polarized voting and that under a
19 totality of the circumstances Latino voters in
20 Nueces County have been less likely -- less
21 able to elect their candidate of choice.

22 The dispute comes down to under the
23 first prong of Gingles, which just requires
24 plaintiffs show that you can draw an additional
25 majority Latino district, the state wants to

1 import an additional requirement into the first
2 prong of Gingles that requires plaintiffs to
3 also prove that the district is performing.

4 And I -- that is not consistent with
5 this Court's recent ruling in Bartlett v.
6 Strickland. This Court set a bright line
7 because a bright line is helpful to the states
8 and helpful to plaintiffs. And the plaintiffs
9 presented a demonstrative map that had one
10 district at 55.2 percent Hispanic
11 citizen voting age population, and one at
12 59.9 percent.

13 JUSTICE ALITO: Well, this would be
14 very important going forward. You want us to
15 hold that a -- A state can satisfy its Voting
16 Rights Act obligations by creating a district
17 where there is a mathematical majority but that
18 district would not perform for the election of
19 the minority preferred candidate? Do you want
20 us to hold that?

21 MS. RIGGS: No. I think what the --

22 JUSTICE ALITO: I thought that's what
23 you were just saying.

24 MS. RIGGS: No. I think liability
25 under Section 2, the effects test has been

1 proven when it has been shown that it is
2 possible to draw two majority Latino districts.

3 JUSTICE ALITO: Yeah, and did the
4 district court find that? I thought the
5 district court did not find that you can create
6 two performing districts in Nueces County.

7 MS. RIGGS: It said there was some
8 question about whether they were actually going
9 to be performing. It was using exogenous
10 elections that didn't have Latino candidates in
11 it. But this goes to the jurisdictional
12 question, in fact.

13 That's an issue that still needed --
14 needs to be determined, and this Court can't
15 resolve that at this stage in the case. Thank
16 you.

17 CHIEF JUSTICE ROBERTS: You can have
18 another minute if you'd like.

19 MS. RIGGS: The -- the only thing I
20 would add to that, Justice Alito, is that the
21 court said that the -- this was just the
22 liability stage. So proving a majority
23 Hispanic citizen voting age population at the
24 liability stage is what gets you to the next
25 stage.

1 JUSTICE ALITO: Yeah and to --

2 MS. RIGGS: And if you --

3 JUSTICE ALITO: -- and to establish
4 liability is it not necessary to show that you
5 could create another performing district?

6 MS. RIGGS: Yes. And --

7 JUSTICE ALITO: And did the district
8 court find that you could do that, and is it
9 not true that one of the plaintiff's experts
10 found that one of these districts, if you split
11 Nueces County in half, would not perform one
12 time in 35 elections and the other one -- in
13 the other, it would perform seven times in 35
14 elections?

15 MS. RIGGS: I misspoke earlier. The
16 -- the -- proving liability is just the
17 additional majority district. It's not
18 performing.

19 Plaintiffs do believe they can draw up
20 performing districts. They just haven't had
21 the opportunity to present those maps yet.
22 They -- the liability maps are something
23 different. And a state can -- can understand
24 that there's Section 2 liability and then
25 engage in a meaningful debate about drawing

1 performing districts.

2 JUSTICE SOTOMAYOR: I'm sorry.

3 CHIEF JUSTICE ROBERTS: Thank --
4 please.

5 JUSTICE SOTOMAYOR: Was 90 a Gingles
6 test or was it an intentional discrimination
7 finding?

8 MS. RIGGS: Neither, Your Honor. It
9 was a racial gerrymandering, a Shaw finding.

10 JUSTICE SOTOMAYOR: And I don't think
11 we need to prove that fact of -- of whether you
12 create a -- a majority or minority; is that
13 correct?

14 MS. RIGGS: Right, Your Honor, just
15 that race predominated without a compelling
16 interest and race was not used in a narrowly
17 tailored fashion.

18 JUSTICE SOTOMAYOR: So, I guess --

19 CHIEF JUSTICE ROBERTS: Thank -- I'm
20 sorry. Thank you, counsel.

21 General, you have four minutes
22 remaining.

23 REBUTTAL ARGUMENT OF SCOTT A. KELLER

24 ON BEHALF OF THE APPELLANTS

25 MR. KELLER: I'll start very briefly

1 with jurisdiction. You have heard plaintiffs
2 say that they want to now modify the districts
3 for 2018. We have already had our primary
4 elections. And that is precisely why this
5 Court should note jurisdiction now and resolve
6 these issues.

7 I want to start and back up a bit to
8 higher level points. There were three
9 significant major legal errors here made by the
10 district court. First, there was no
11 presumption of good faith applied. You heard
12 plaintiffs said that there was. There is no
13 mention of a presumption of good faith. There
14 is not even a mention of presumption of good
15 faith in their congressional red brief.

16 The second major legal error was the
17 Feeney well-accepted standard that to show
18 intentional discrimination you must show that a
19 legislature acted because of race with an
20 intent to harm minorities and minority voting
21 power.

22 That was not the standard applied, and
23 this brings me to my third major legal error,
24 which was the test applied was the wrong
25 question. It was, was taint removed even

1 though there had been no finding of taint by
2 the district court at that time.

3 JUSTICE SOTOMAYOR: So, why don't we
4 remand --

5 MR. KELLER: And also that reversed
6 the burden --

7 JUSTICE SOTOMAYOR: -- then all of
8 this just proves to me that at best all you get
9 is a vacate this order and send it back under
10 the right legal test.

11 MR. KELLER: Well, in addition to
12 those three major legal errors, there is also
13 the fact that these findings were clearly
14 erroneous.

15 First of all, there is no evidence,
16 and you heard no evidence whatsoever today,
17 that somehow the 2013 legislature was trying to
18 mask an invidious intent that it had either
19 carried over or not.

20 JUSTICE SOTOMAYOR: It's a very simple
21 argument. You know that what you wanted to do,
22 which was to block Hispanic voters or other
23 voters, and -- and get certain candidates
24 elected, that your own counsel is telling you
25 that in those -- in certain of those districts

1 that's exactly what you got, and you say we
2 want to get the district court not to change
3 these maps, that that's enough for the
4 three-judge panel to conclude that you wanted
5 to put in place the discriminatory intent and
6 effect.

7 That's the simple argument.

8 MR. KELLER: But that -- that -- that
9 hinges completely on one Texas legislative
10 council member, Jeff Archer. And Jeff Archer
11 simply testified that there were preliminary
12 findings. He said, and this is JX 15.3 at 42:
13 "I don't think that you can say that Section 2
14 requires that district." That was referring to
15 the quote my friend gave.

16 Jeff Archer was simply saying this
17 case, yes, litigation will not end. And even
18 here this is a -- it would be passing strange
19 to find intentional discrimination in this case
20 where there is no discriminatory effect. The
21 only place that we could draw an additional
22 majority/minority district is that Nueces
23 County state house map. And you heard counsel
24 say that they don't know if it can perform.

25 The maps that they presented to the

1 Court, their own expert, plaintiff's expert,
2 MALC, testified and conceded that they --

3 JUSTICE SOTOMAYOR: Well, I have --

4 MR. KELLER: -- offered a map --

5 JUSTICE SOTOMAYOR: I have two
6 questions. On racial gerrymandering, I don't
7 think we've ever required a proof of effect.
8 We have only required that you've intentionally
9 gerrymandered --

10 MR. KELLER: But --

11 JUSTICE SOTOMAYOR: -- on the basis of
12 race, is that correct?

13 MR. KELLER: And I'm referring to
14 Nueces County. And that was a vote dilution
15 effect claim. I'll turn to H -- I will turn to
16 HD90 --

17 JUSTICE SOTOMAYOR: All right, but
18 then -- but then just answer my question. On
19 racial gerrymandering you don't have to prove
20 it?

21 MR. KELLER: That's right, and I'll
22 turn to racial gerrymandering in HD90, that
23 would be the one district we did change. And,
24 by the way, if we had changed other districts,
25 then we would have been subjected to all sorts

1 of additional legal challenges which is exactly
2 why the legislature acted in good faith in
3 adopting the Congressional map wholesale and
4 virtually all the State House map.

5 In HD90 we had the best of reasons to
6 believe that we had a valid VRA compliance
7 defense. In 2011 MALDEF told the legislature
8 the district had to be drawn as majority
9 Hispanic. In 2012 the district court adopted
10 the previous version as majority Hispanic.

11 In 2013 MALC's counsel told the
12 legislature it had to be adopted as majority
13 Hispanic. That's JA 403 to 404a. There were
14 title actions after that where the Hispanic
15 candidate narrowly lost and narrowly won.

16 JUSTICE GORSUCH: So what room --

17 MR. KELLER: And in this case --

18 JUSTICE GORSUCH: What room is left
19 between our VRA jurisprudence under Section 2
20 and the Fourteenth Amendment? What space is
21 there?

22 MR. KELLER: Well, and -- and the
23 breathing space that must be accorded is we --
24 we only need good reasons. And, Mr. Chief
25 Justice, if I may answer?

1 CHIEF JUSTICE ROBERTS: Sure.

2 MR. KELLER: We do not have to have a
3 perfect analysis ahead of time. We just need
4 good reasons that we were trying to comply with
5 the VRA. And take Congressional District 35,
6 for instance.

7 There we had the best of reasons
8 possible to believe that that had to be a
9 majority/minority district because that's
10 precisely what the district court imposed in
11 2012, saying that that was a valid Section 2
12 district. And here we are now seven years
13 later, three trials, and two appeals to this
14 Court.

15 We would ask this Court to find that
16 the challenged districts are valid and reverse.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel. The case is submitted.

19 (Whereupon, at 11:38 a.m., the case
20 was submitted.)

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