No. 22-136

In the Supreme Court of the United States

ROY CHARLES BROOKS *et al.*, APPELLANTS

v.

GREG ABBOTT, GOVERNOR OF TEXAS, *et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

MOTION TO DISMISS OR AFFIRM

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Lanora.Pettit@oag.texas.gov
(512) 936-1700

JUDD E. STONE II
Solicitor General

LANORA C. PETTIT
Principal Deputy Solicitor General
Counsel of Record

WILLIAM F. COLE
Assistant Solicitor General

SARA BAUMGARDNER
Assistant Attorney General

QUESTIONS PRESENTED

Appellants filed the underlying motion to preliminarily enjoin Texas's redistricting maps nearly a year ago. The district court denied that motion in February with an opinion explaining that denial in May. Appellants waited so long to file this appeal from the denial of their motion for a preliminary injunction that they asked this Court to delay even jurisdictional briefing until *after trial*, *see* Jurisdictional Statement 3, and only months before Texas's Constitution demands the maps in question be revisited, Tex. Const. art. III, § 28. Nevertheless, rather than wait for that trial to occur or for the Legislature to do its work, appellants demand that this Court reweigh the evidence presented over the course of a four-day evidentiary hearing that occurred nine months ago. The questions presented are:

1. Whether this appeal is untimely because it was filed 121 days after the district court's order denying appellants' motion for a preliminary injunction—four times the 30 days allotted under 28 U.S.C. § 2101(b).

2. Whether appellants fail to raise a substantial question requiring this Court's review by arguing that the district court: (a) clearly erred in its assessment that appellants have not shown they are likely to prove the Texas Legislature intentionally discriminated against minorities when it reapportioned Texas State Senate District 10; or (b) abused its discretion in holding the balance of equities and public interest disfavored issuing injunctive relief one month before a primary election (which has now long-since occurred).

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INTRODUCTION

This Court lacks jurisdiction over this untimely appeal. To validly invoke this Court's appellate jurisdiction, a party aggrieved by a three-judge district court's interlocutory judgment, order, or decree must appeal "within thirty days from th[at] judgment, order or decree." 28 U.S.C. § 2101(b). Here, the district court issued its order denying appellants' motion for a preliminary injunction on February 1, 2022. App.86-89. But appellants filed their notice of appeal on June 2, 2022, App.91-93—well after their thirty-day deadline, 28 U.S.C. § 2101(b).

Even if this Court had jurisdiction, the Court should summarily affirm because appellants fail to raise a substantial question regarding the three-judge district court's order denying appellants' motion for a preliminary injunction. The district court carefully weighed the evidence that appellants marshalled over the course of a four-day evidentiary hearing regarding the reapportionment of Texas Senate District 10 ("S.D. 10") against the factors this Court articulated in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267-68 (1977). The court did not clearly err by holding that the evidence did "not suggest that the legislature acted with discriminatory intent." App.58. And appellants do not show why this assessment by the district court was not "plausible" or "permissible." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349 (2021). To be sure, appellants quibble with the weight the district court gave certain pieces of evidence, but those factual conclusions are entitled to "significant deference on appeal to this Court." *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017). Appellants offer nothing that would come close to overcoming that deference.

Nor do appellants show that the district court abused its discretion in concluding that the balance of equities and the public interest disfavored issuing the requested preliminary injunction just one month before the March 2022 primary election under the principles announced in *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), and its progeny. Indeed, appellants do not even try. Instead, they argue that the district court's ruling regarding the equities as applied to the 2022 primary should be reversed because otherwise the *Purcell* principle might also prevent them from obtaining relief before the 2024 primary. That question, however, was not presented to—let alone decided by—the district court. Even on direct appeal, this Court is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Because the district court correctly decided the preliminary-injunction motion before it, this appeal does not provide a vehicle to issue an advisory opinion about how *Purcell* might operate in the context of future orders whose content and timing are necessarily unknown and indeterminate.

STATEMENT[1]

I. Texas's 2021 Redistricting Process

A. Under federal law, the U.S. Census Bureau is obligated to release a "decennial census of [the] population," on the first day of April "every 10 years." 13 U.S.C.

[1] This Statement is taken from matters subject to judicial notice and the limited record available at the preliminary-injunction hearing. During the lengthy delay since the preliminary-injunction hearing, the parties have engaged in significant discovery. Because of the unique procedural posture of this case, that evidence is not before the Court. It is appellees' position, however, that discovery only reinforced that S.D. 10 was redrawn for non-racial, partisan reasons.

§ 141(a); *see also* U.S. Const. art. I, § 2, cl. 3 (empowering Congress to carry out the census "in such Manner as they shall by Law direct"). Like other States, Texas uses this data to reapportion seats for its legislature, thereby ensuring its election districts reflect changes in population as required both by state law, Tex. Const. art. III, § 28, and the one-person, one-vote principle announced by this Court in *Reynolds v. Sims*, 377 U.S. 533 (1964). This is a complicated process because in addition to numerous other traditional redistricting considerations, "jurisdictions must design both congressional and state-legislative districts with equal populations, and must regularly reapportion districts to prevent malapportionment." *Evenwel v. Abbott*, 578 U.S. 54, 59 (2016). In Texas, the reapportionment process "ordinarily can take about two months." App.52.

Under Texas law, the Texas Legislature must conduct its redistricting process during the first regular legislative session immediately following the release of data from the decennial U.S. Census. App. 11; Tex. Const. art. III, § 28. This provision was added in the mid-20th Century to ensure that the State is reapportioned in a timely fashion as required by both state and federal law. *Abbott v. Mex. Am. Legislative Caucus, Tex. House of Representatives*, 647 S.W.3d 681, 701 (Tex. 2022) ("*MALC*") (describing the history of section 28).

But in 2021, due to COVID-19-related delays, the U.S. Census Bureau missed its April 1 statutory deadline for releasing the census data. App.11.[2] The agency first "provide[d] … redistricting data" as "legacy format

[2] *See also* Press Release, U.S. Census Bureau, Census Bureau Statement on Redistricting Data Timeline (Feb. 12, 2021), https://www.census.gov/newsroom/press-releases/2021/statement-redistricting-data-timeline.html.

redistricting data summary files to all states by . . . August 12" but could only commit "to provid[ing] the full redistricting data toolkit by Sept. 30, 2021, with delivery on Sept. 16, 2021." U.S. Census Bureau, Decennial Census P.L. 94-171 Redistricting Data (Sept. 16, 2021), https://www.census.gov/programs-surveys/decennial-census/about/rdo/summary-files.html.

The delayed release of the census data created a risk that Texas would not be able to reapportion in time for the 2022 primary. The Texas Legislature could not begin the redistricting process during its 87th Regular Session, which is constitutionally limited to 140 days and ran from January 12, 2021, to May 31, 2021. App.11; *see also* Tex. Const. art. III, §§ 5(a), 24(b); Tex. Legis. Council, Dates of Interest: 87th Legislature, https://tinyurl.com/4ec7awdt.

To avoid running the 2022 elections based on maps from the last decade, on September 7, 2021, "promptly after the census data was made public," Texas Governor Greg Abbott called a special session of the Legislature, to begin on September 20, that would tackle redistricting. App.11; *see* Tex. Const. art. III, § 5(a); Tex. Gov. Proclamation No. 41-3858, 46 Tex. Reg. 5989, 5989 (2021). This effort helped avoid a federal-law claim for redistricting too late, but it subjected Texas officials to a state-law claim for allegedly redistricting too early. *MALC*, 647 S.W.3d at 688. The Texas Supreme Court ultimately declined to hold that the Texas Legislature redistricted too early. *Id.* at 704. But it did so only after state officials represented that the Legislature would have to revisit the present maps during the 2023 Regular Session, which is now scheduled to begin in less than three months. *E.g.*, *id.* at 690.

B. This appeal concerns only one of Texas's thirty-one state senate districts that were redrawn during that 2021 redistricting process for the 2022 election: S.D. 10. In its "benchmark" iteration drawn from 2010-census data, S.D. 10 was located "entirely within" Tarrant County. App.3-4. As redrawn during Texas's 2021 redistricting process, S.D. 10 now "includes all or part of seven less-populous counties" to the south and west of Tarrant County, as well as a "reduced portion" of Tarrant County itself. App.5.

S.D. 10 has been politically competitive "for at least two decades." App.6. For some time, it elected primarily Republicans, but since 2008 it has flipped three times: in 2008, it elected a Democratic candidate, App.6, in 2014, a Republican, and in 2018, a Democrat again. App.6. The incumbent is Democratic Senator Beverly Powell. App.6.

The relevant region of Texas has also been ethnically diverse, with no single racial group constituting a majority of the population. Specifically, the voting-age population ("VAP") of benchmark S.D. 10 is 43.9% Anglo, 28.8% Hispanic, 20.3% Black, and 5.5% Asian, and the citizen voting-age population ("CVAP") is 53.9% Anglo, 20.4% Hispanic, 20.9% Black, and 3.6% Asian. App.7. Per the preliminary-injunction order, the redrawn district is "significantly more Republican and significantly more Anglo" than the benchmark district, as the additional counties are "populated mostly by rural Anglos who tend by a large margin to vote Republican." App.8.

C. The record reflects that the topic of S.D. 10's district lines was broached over the course of several private meetings between Senator Joan Huffman, the chairperson of the Texas Senate's redistricting committee, and Senator Beverly Powell, the incumbent senator for

S.D. 10, as well as on the floor of the Texas Senate. App.11-14.

The first private meeting took place on February 12, 2020—more than a year-and-a-half before the release of the census data—between staffers for both senators. App.11. According to notes from one of Senator Powell's staffers, Senator Huffman's chief of staff told his counterparts in Senator Powell's office to "expect 'very little change' because SD 10 was already close to ideal size." App.11.

But in the coming months, partisan rancor in Texas became famously heated. To avoid voting on legislation unrelated to redistricting, numerous Democratic legislators fled the jurisdiction.[3] During this time, those legislators who had stayed in Texas were required to remain in Austin for sequential special sessions, which ultimately led to litigation about whether truant Democrats could be arrested and compelled to attend to the business of the people of Texas. *See generally In re Abbott*, 628 S.W.3d 288 (Tex. 2021).

Following this episode and the belated release of census data—and during the Legislature's third consecutive special session—another meeting was held on September 14 between Senators Huffman (R) and Powell (D). During that meeting, Senator Huffman and her staff "revealed their plans to redraw SD 10 by adding several rural counties" to Senator Powell and her staff. App.12. Senator Powell objected and gave "the [meeting] participants copies of the maps of [S.D. 10] shaded to indicate

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[3] Farah Eltohamy, *What it means to break quorum and what you need to know about the Texas House Democrats' dramatic departure*, TEXAS TRIBUNE (July 14, 2021), https://www.texastribune.org/2021/07/14/texas-democrats-walkout-quorum/.

the distribution of racial groups," reading aloud the headers of each map as she did so. App.12.

Those present dispute what happened next. Appellants aver that "Senator Huffman looked at each map and asked that all present initial and date the maps, which they did." App.12 But Senator Huffman says that she looked at the maps for "less than a second" and, upon realizing they contained racial data, turned them over "flat" and refused to look at them. App.12-13. Indeed, Senator Huffman "insist[s] [that] she 'blinded [her]self'" to racial data in the process of drawing these maps. App.13 (third alteration in original). And after she drew them, "she ensured that they underwent a legal compliance check" to avoid violations of the Voting Rights Act. App.13.

Following that meeting, Senator Powell and her staff "sent various letters and emails to Senator Huffman and her staff, and to the Senate more generally," describing what Senator Powell believed to be the "racial implications of the proposed changes to SD 10." App.12. Senator Huffman's chief of staff responded to one such email by saying "he had closed the attachments immediately after realizing they contained racial data." App.13.

On September 18, 2021, Senator Huffman's office filed the new electoral map for the Texas Senate, which was numbered as Senate Bill 4 ("S.B. 4"). App.13. Two days later, the bill was referred to committee. S.J. of Tex., 87th Leg., 3rd C.S. 3-4 (2021). Public hearings were held on September 24 and 25, 2021, and again on September 28, 2021, when the proposed map was reported favorably out of committee. App.54-55; S.J. of Tex., 87th Leg., 3rd C.S. 46 (2021).

At the September 24 hearing, Senator Huffman listed her "goals and priorities" in developing the redistricting plans, which included:

> first and foremost abiding by all applicable law, equalizing population across districts, preserving political subdivisions and communities of interest when possible, preserving the cores of previous districts to the extent possible, avoiding pairing incumbent members, achieving geographic compactness when possible, and accommodating incumbent priorities also when possible.

App.13, 54. At the September 28 redistricting-committee hearing, Senator Huffman explained that "addressing partisan considerations" was also one of her redistricting aims. App.14.

On October 4, in a floor debate before the full Senate, Senator Powell interrogated Senator Huffman about why she had redrawn S.D. 10. App.55. Senator Huffman "repeatedly stated that 'all'" the redistricting criteria she had previously mentioned "had informed various decisions."App.55. Senator Powell insisted that she believed racial considerations drove the reapportionment of S.D. 10. App.55-56. But Senator Huffman reiterated that though she has "an awareness that there are minorities that live all over this [S]tate," she had "blinded [her]self to that as [she] drew these maps." App.55-56. And at that floor debate even Senator Powell acknowledged, in response to a question from one of her Democratic colleagues, that her "district [was] being intentionally targeted for elimination as . . . a Democratic trending district." App.14

On October 4, the Senate passed S.B. 4 with bipartisan support (20 Yeas to 11 Nays). App.14; *see* S.J. of Tex., 87th Leg., 3rd C.S. 61-62 (2021). The bill then proceeded to the Texas House of Representatives, which held a hearing on S.B. 4 on October 10. App.56. The House passed the bill the same day it was introduced, and Governor Abbott later signed it into law. App.15, 56; S.J. of Tex., 87th Leg., 3rd C.S. 285 (2021).

II. Procedural Background

The lawsuit underlying this appeal is one of several federal-law actions challenging the Texas Legislature's 2021 reapportionment of its election maps for the State House, the State Senate, the U.S. House, and the State Board of Education. App. 15-16. Each of these actions has been consolidated before a three-judge district court. App.15; *see* 28 U.S.C. § 2284.[4]

Appellants' operative complaint asserts claims under Section 2 of the Voting Rights Act ("VRA"), 52 U.S.C. § 10301, *et seq.*, as well as under the Fourteenth and Fifteenth Amendments to the U.S. Constitution. *See* Second Amended Complaint at 57-62, *Brooks v. Abbott*, No. 3:21-cv-00259 (W.D. Tex. June 12, 2022), ECF No. 357. Although their complaint asserts legal challenges to several state and congressional districts, on November 24, 2021, appellants moved for a preliminary injunction only as to S.D. 10. App.16. Moreover, appellants did *not* seek a preliminary injunction on the theory that the Texas Legislature's apportionment of S.D. 10 violated the VRA.

[4] Some of the same plaintiffs also filed parallel state-law actions, which were consolidated in Travis County. *MALC*, 647 S.W.3d at 686. Those cases have, however, been dismissed for lack of standing or a relevant exception to sovereign immunity. *Id.* at 702-03. Although one plaintiff was given leave to replead, he has yet to do so.

Instead, appellants' motion was limited to their constitutional theories—namely, that the Texas Legislature engaged in intentional vote dilution and racial gerrymandering when it reapportioned S.D. 10. App.20.[5]

The district court held a four-day evidentiary hearing on appellants' preliminary-injunction motion from January 25 to January 28, 2022. App.18.

On February 1, 2022, the district court issued an order denying appellants' motion for a preliminary injunction. App.86-89. The court recited both parties' arguments, articulated the elements appellants were required to establish to obtain such relief, and concluded that, "[a]fter careful consideration of the parties' arguments and four days of testimony and evidentiary submissions," appellants had "not satisfied the requirements necessary to obtain a preliminary injunction." App.87–89. The Court briefly noted that the "reasons" for the denial of the motion would "be stated in a forthcoming opinion." App. 89. As the Court would later explain, it issued the February 1 "order promptly to permit the March 1, 2022 primary to be conducted on schedule as designated by statute." App.19.

On May 4, the three-judge district court issued a memorandum opinion explaining the reasons supporting its earlier order denying appellants' preliminary-injunction motion. App.1-84. The court observed that it had previously denied appellants' motion for a preliminary injunction, App.18, 84, and it explained that appellants

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[5] For this reason, any statements by appellants regarding the VRA—including, for example, appellants' aspersions (at 34 n.3) regarding Texas's supposedly "unearned freedom from Section 5's substantive retrogression prohibition"—are as irrelevant as they are incorrect. Appellees will not address them here but reserve the right to do so at an appropriate time.

had not shown a likelihood of success on the merits of their claims, App.31-71, 84. It noted that appellants advanced their intentional-discrimination theory via two types of claims—an intentional-vote-dilution claim and a racial-gerrymandering claim. App.20. The district court carefully traced the origin of these two claims and concluded that appellants had not established a likelihood of success regarding vote dilution—let alone racial gerrymandering, which "requires a stronger showing" of discriminatory intent. App.26-27. The court also held that the balance of equities and the public interest did not favor a preliminary injunction. App.74-82, 84.

Appellants filed a notice of appeal from the district court's memorandum opinion on June 2, 2022. App.91-93. In so doing, appellants waited until their appeal was almost mooted by the trial in this matter, *compare* Jurisdictional Statement at 3, *with Smith v. Ill. Bell Tel. Co.*, 270 U.S. 587, 588-89 (1926), and it may yet be mooted by the Texas Legislature's state-law obligation to reapportion in 2023, *see* Tex. Const. art. III, § 28; *MALC*, 647 S.W.3d at 707 (Hecht, C.J., dissenting).

ARGUMENT

I. The Court Lacks Jurisdiction Because This Appeal Is Untimely.

This Court lacks jurisdiction because appellants failed to notice their direct appeal to this Court "within thirty days from the judgment, order or decree, appealed from, if interlocutory." 28 U.S.C. § 2101(b). In this case, the district court entered its order denying appellants' motion for a preliminary injunction on February 1, 2022. App.87-89. But appellants did not notice this appeal until June 2, 2022, App.92-93—121 days later and well beyond their 30-day statutory deadline. Appellants are likely to argue that their deadline to file a notice of appeal did not

begin running under section 2101 until the district court issued its memorandum opinion explaining that order on May 4, 2022. App.84-85. Appellants would be wrong.

A. This Court's precedent confirms that the time to appeal began to run from the February order, not the May opinion: it has stated in a variety of contexts that "this Court reviews judgments, not opinions." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 & n.8 (1984) (collecting cases). And, consistent with this rule, section 2101(b) keys the deadline for the notice of appeal to the issuance of the "judgment, order or decree," 28 U.S.C. § 2101(b)—not from any later-in-time memorandum opinion explaining the earlier order. This Court has previously dismissed appeals for lack of jurisdiction under virtually identical circumstances. *See Dean v. Leake*, 555 U.S. 801 (2008).

Put another way, "[w]here, as here, a formal judgment is signed by the judge," that judgment—or in this case, that order—"is prima facie the decision or judgment rather than a[ny] statement in an opinion or a docket entry." *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 235 (1958) (quoting *United States v. Hark*, 320 U.S. 531, 534-35 (1944)). Indeed, when the Court "enter[s] a formal order of record," this Court is "unwilling to assume that" the district court "deemed this an empty form or that [it] acted from a purpose indirectly to extend the appeal time, which [it] could not do overtly." *Id.*

The February 1 order was such a "formal order." *Id.* After reciting the relevant legal standard and reciting the parties' arguments, the district court's three-page order unequivocally concluded that, "after careful consideration of the parties' arguments and four days of testimony and evidentiary submissions," appellants had

"not satisfied the requirements necessary to obtain a preliminary injunction." App.87-89. It therefore held that appellants' preliminary injunction motion "is DENIED." App.89. That order could not have been merely tentative and precatory: as the district court explained, the purpose of issuing that order on February 1 was to resolve appellants' motion and "permit the March 1, 2022 primary to be conducted on schedule as designated by statute." App.19.

B. Appellants' notice of appeal suggests that they believe their appeal is timely because the May 4 opinion "modified" the February 1 order. App.92. It did no such thing. The opinion certainly *expounded upon* the rationale for the earlier order, but "'[m]odify' . . . connotes . . . change." *MCI Telecom. Corp. v. Am. Tel & Tel. Co.*, 512 U.S. 218, 228 (1994). Indeed, "[v]irtually every dictionary . . . says that 'to modify' means to change moderately or in minor fashion." *Id.* at 225. Yet the district court's May 4 opinion does not "change" its February 1 denial of appellants' preliminary-injunction motion. *Compare* App.84 (disposition of May 4 order) *with* App.89 (disposition of February 1 order).

Ultimately, because appellants filed their notice of appeal more than thirty days after the February 1 order, their appeal is untimely, and this Court lacks jurisdiction to hear it.[6]

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[6] By the time the Court reaches the merits, it is also likely to lose jurisdiction for another reason: the case will likely be moot either because the trial will have occurred or because the Texas Legislature will have redrawn the Senate map as required by state law. *Supra* pp. 3-4.

II. The Questions Presented Are Not Substantial.

Even if the Court had jurisdiction to consider this appeal, it should summarily affirm. Though packaged as five separate points of error, appellants' arguments can be distilled to two overarching issues. The first (at 20-38) is a four-part challenge to how the district court weighed evidence relevant to three of the *Arlington Heights* factors. The second (at 38-40) is a request for this Court to issue an advisory opinion on the scope of the *Purcell* doctrine.

Neither presents a substantial question meriting this Court's review. The district court did not clearly err in its fact findings, which underly its holding that appellants failed to meet their burden of showing a substantial likelihood of success on the merits. To the contrary, it properly weighed the evidence bearing on the three *Arlington Heights* factors appellants challenge: sequence of events, procedural departures, and legislative history.[7] Nor did it abuse its discretion in applying *Purcell*, within the context of balancing the equities and public interest, to refuse to enjoin the use of the maps for the 2022 primary. As appellants' arguments regarding 2024 were never raised in the district court and are inherently speculative, this appeal does not provide a vehicle for exploring *Purcell*'s future application.

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[7] For the avoidance of doubt, appellees do not concede that appellants have carried or will carry their burden on *any* of the *Arlington Heights* factors. Nor do they concede that appellants have met their burden to establish irreparable injury. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

A. The district court did not clearly err in weighing the evidence bearing on appellants' likelihood of success on the merits.

Appellants sought preliminary injunctive relief based on the theory that the Texas Legislature intentionally discriminated against minorities when it drew the boundaries of Texas Senate District 10 in S.B. 4.[8] To obtain a preliminary injunction, appellants were required to establish, among other elements, that they are "likely to succeed on the merits" of their claims. *Winter*, 555 U.S. at 20. In the context of appellants' intentional-discrimination claim, this required appellants to show that the Texas Legislature "acted with a discriminatory purpose" in drawing S.D. 10. *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 481 (1997). Discriminatory purpose "implies more than intent as volition or intent as awareness of consequences;" instead it implies that "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." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

This Court has articulated five nonexclusive factors to guide a court's inquiry into whether a state legislature acted with a discriminatory purpose: (1) the discriminatory effect of the official action, (2) the decision's historical background, (3) "[t]he specific sequence of events leading up to the challenged decision," (4) procedural and substantive departures, and (5) legislative or administrative history. *Arlington Heights*, 429 U.S. at 267–68.

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[8] Because appellants do not appear to dispute the district court's conclusion that a failure of proof on an intentional-vote-dilution claim would necessarily doom their racial-gerrymandering claim, App.26-27, this motion focuses on appellants' intentional-vote-dilution claim.

After a four-day evidentiary hearing, the district court applied that standard to hold that, while appellants had adequately demonstrated that the first two factors favored appellants under the prevailing preliminary-injunction test, *see* App.32, 43-45, they had not carried that burden with respect to the last three factors, *see* App.49-53, 57. On balance, then, the district court found that appellants were "unlikely to succeed on the merits of their intentional-discrimination claim" because appellants had not demonstrated that the Texas Legislature acted with discriminatory purpose. App.59.

None of appellants' arguments for why the district court erred in that assessment has merit—let alone raises a substantial question meriting this Court's review. As appellants appear to acknowledge (at 26, 28-29), rather than legal arguments, they contest the district court's weighing of the evidence relevant to the *Arlington Heights* inquiry. But "appellate review of that conclusion is for clear error." *Brnovich*, 141 S. Ct. at 2348 (citing *Pullman-Standard v. Swint*, 456 U.S. 273, 287-88 (1982)). Indeed, "[a] district court's assessment of a districting plan . . . warrants significant deference on appeal to this Court." *Cooper*, 137 S. Ct. at 1464. As a result, "[i]f the district court's view of the evidence is plausible in light of the entire record, an appellate court may not reverse even if it is convinced that it would have weighed the evidence differently in the first instance." *Brnovich*, 141 S. Ct. at 2349 (citing *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985)). And "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.*; *see also Cooper*, 137 S. Ct. at 1465. Under these standards, appellants' request for this Court to second-guess the district court's unanimous assessment of the evidence with

regard to its analysis of three of the *Arlington Heights* factors lacks merit.

1. Sequence of events

Appellants first assert (at 26-29) that the district court erred by refusing to infer an intent to discriminate against minorities from the sequence of events leading up to the passage of S.B. 4. In particular, appellants' evidence—and thus, the district court's analysis—focused on a series of private meetings and communications between Senator Joan Huffman, the chair of the Texas Senate's Redistricting Committee, and Senator Beverly Powell, the incumbent Senator for S.D. 10. Jurisdictional Statement at 22-24; App.47-49.

a. The evidence certainly shows that Senator Powell tried to insert race into the conversation with Senator Huffman in at least one of three meetings regarding her seat. At the first of those meetings—which was conducted entirely between staffers more than a year before the census data was released—one of Senator Huffman's staffers allegedly told Senator Powell's staff that S.D. 10 was not likely to undergo major changes. App.47. At a second meeting—also between staffers and still months before the release of the 2020 census data—maps of S.D. 10 containing boxes with basic racial data were allegedly present, though "the maps did not illustrate how racial minorities were distributed throughout the district." App. 48. At a third meeting—apparently the first after the release of the 2020 census data and Senator Huffman's proposed maps—*Senator Powell* and her staff handed out maps of benchmark S.D. 10 that highlighted that district's racial data. App. 48.

Similarly, email communications suggest that Senator Powell's staff had raised the racial impact of redrawn S.D. 10. App. 49. Moreover, emails confirmed that

Senator Huffman's staff had access to a folder containing, among other files, the maps with racial data of S.D. 10 that Senator Powell's staff previously provided. App.48.

b. But, assessing the evidence as a whole, the district court held that it did "not find or infer discriminatory intent" on behalf of the Texas Legislature "from those events." App.49. Indeed, the district court held that none of the alleged "expos[ures] to racial data on S.D. 10" was even "suspicious" as to Senator Huffman because none "contradict[ed] Senator Huffman's assertion that she willfully 'blinded [her]self' to race in drawing the maps." App.49. Further, the court observed that mere "aware[ness]" of race in the redistricting process—which is the most that appellants' evidence suggested—"in itself does not merit any nefarious inference" under this Court's precedent. App.49-50. That is entirely consistent with this Court's observation that "[r]edistricting legislatures will . . . almost always be *aware* of racial demographics; but it does not follow that race predominates in the redistricting process." *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

Contrary to appellants' repeated suggestion (*e.g.*, at i, 20-21), this analysis did not improperly import a predominance inquiry into the relevant test. Instead, it rejected appellants' assertions—repeated here (*e.g.*, at 22-24, 32-33, 35-36)—that a racial intent of the legislature can be imputed because a legislator (*i.e.*, Senator Huffman) was aware of the racial composition of a single district. Far from importing improper considerations, the district court's analysis is driven by this Court's observations across a variety of contexts that demonstrating the Legislature's "mere awareness of race," *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities*

Project, Inc., 576 U.S. 519, 545 (2015),[9] does not equate to the "[p]roof of racially discriminatory intent or purpose" that "is required to show a violation of the Equal Protection Clause," *Arlington Heights*, 429 U.S. at 265. And it is entirely consistent with this Court's statement just last year that a federal court may not presume "the legislators who vote to adopt a bill" act as "the agents of the bill's sponsor or proponents." *Brnovich*, 141 S. Ct. at 2350.

c. Appellants supply no legal or factual basis that would permit this Court to disturb the district court's decision to credit Senator Huffman's testimony that she "willfully 'blinded [her]self' to race in drawing the maps." App.49. Nor could they: this Court's precedent requires respect for the district court's assessment of this evidence so long as it is "plausible." *Brnovich*, 141 S. Ct. at 2348-49. And it "give[s] singular deference to a trial court's judgments about the credibility of witnesses." *Cooper*, 137 S. Ct. at 1474; *see also id.* at 1478 ("We cannot disrespect such credibility judgments."). Appellants instead make two responses. Neither has merit.

First, appellants try to frame (at 24-25) their disagreement with the district court's weighing of the evidence as a dispute over whether the Court's comment in *Miller* should be limited to the context of a racial-gerrymandering claim or applied to an intentional-vote-

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[9] *See also, e.g.*, *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (citing *Shaw v. Reno*, 509 U.S. 630 (1993)); *Bush v. Vera*, 517 U.S. 952, 968 (1996) (plurality op.); *cf. City of Memphis v. Greene*, 451 U.S. 100, 143 (1981) (Marshall, J., dissenting) (criticizing the majority for rejecting an equal-protection claim based on the closure of a street where it "cannot be disputed that all parties were aware of the disparate racial impact of the erection of the barrier").

dilution claim under *Arlington Heights*. But *Miller* was merely a specific application of *Feeney*'s holding—decided in the context of an intentional-discrimination claim—that discriminatory purpose "implies more than intent as volition or intent as *awareness* of consequences." 442 U.S. at 279 (emphasis added); *see also Miller*, 515 U.S. at 916. Appellants' effort to cabin *Miller* to the racial-gerrymandering context is therefore without merit.

Second, Appellants ask (at 25) this Court to give greater weight to the first *Arlington Heights* factor—an alleged discriminatory effect—than afforded by the district court. In support of that conclusion, they point (at 25) to a footnote in *Feeney*, which provides that "when the adverse consequences of a law upon an identifiable group are . . . inevitable . . . a strong inference that the adverse effects were desired can reasonably be drawn." 442 U.S. at 279 n.25. From that principle, they ask (at 25) this Court to hold that the alleged "adverse consequences" of S.B. 4 on voters in S.D. 10 should raise a "strong inference" that the Texas Legislature acted with a discriminatory purpose.

But nothing in *Feeney*'s footnote *requires* a district court to balance the *Arlington Heights* factors that way—let alone does it demonstrate that it was clear error for the district court to weigh them "holistically," App.59. To the contrary, *Feeney* recognized that "[p]roof of discriminatory intent must necessarily usually rely on objective factors, *several* of which were outlined in *Arlington Heights.*" *Feeney*, 442 U.S. at 279 n.24 (emphasis added). And the subsequent sentences of footnote 25 caution that "an inference is a working tool, not a synonym for proof," and recognize that the "statutory history" and other "available evidence" may "demonstrate the

opposite." *Id.* at 279 n.25. That is exactly what the district court found here, App.58-59, and appellants have done nothing to show that conclusion was clearly erroneous.

2. Alleged procedural irregularities

Appellants next argue (at 26) that "[t]he district court clearly erred in attributing the legislature's procedural departures solely to COVID-caused Census data delays." This Court has held that "[d]epartures from the normal procedural sequence . . . might afford evidence that improper purposes are playing a role." *Arlington Heights*, 429 U.S. at 267. It is unclear how that factor *could* ever apply in this circumstance: never before has the Texas "Legislature been faced with such a lengthy delay in the release of the decennial census," particularly when "it [wa]s undisputed that the 2020 census data rendered the then-existing district maps unconstitutional." *MALC*, 647 S.W.3d at 703. Past procedural precedent is of little—if any—probative value when a legislature is faced with unprecedented circumstances.

a. The district court nevertheless carefully considered appellants' argument that "the more limited timeframe of a special session" in which S.B. 4 was passed is a procedural irregularity that warrants an inference of discriminatory purpose. App.50. Specifically, it considered the argument that "the Texas Senate conducted only limited public hearings about the redrawing" of S.D. 10, App.52, along with appellants' "observ[ation] that the Texas House spent just one day considering the senate plan, providing significantly less opportunity for public discussion and amendments than would usually be the case." App.52-53.

After carefully reviewing the evidence, the district court found appellants' "claim of discriminatory intent

stemming from the delay [to be] extraordinarily weak" and observed that appellants had not pointed to any "indication of nefarious purpose." App.52. Instead, the district court held "that the pandemic more than adequately explain[ed]" the comparatively rushed redistricting process. App.53. The court credited testimony that the 2020 census was released after the constitutionally designated time for the Texas Legislature's regular session had elapsed. App.51-52 (citing Tex. Const. art. III §§ 5, 24). That delay forced the Legislature "to redistrict during a special session," which is constitutionally limited to 30 days, Tex. Const. art. III, § 40, and "which did not provide the ordinary amount of time" required to redistrict—namely, about two months. App.52. As a result, the district court found that "[i]t was thus unavoidable that the legislature would depart from its ordinary procedures during the 2021 redistricting, for reasons that had nothing to do with discriminatory intent." App.52. Thus, although the Legislature's actions "may have been atypical," the district court found, "all of them suggest a legislature pressed for time"—not a legislature motivated by discriminatory purpose. App.53.

b. Appellants do not argue that the district court's analysis regarding the passage of S.B. 4 represents an "[im]plausible" or "[im]permissible" view of the evidence. *Brnovich*, 141 S. Ct. at 2348-49. Instead, they contend (at 28) that two other pieces of evidence undermine the district court's conclusion that "COVID fully explained the procedural irregularities."

As an initial matter, this thinly veiled request for this Court to reweigh the evidence is improper: under a clear-error standard of review, "an appellate court may not reverse even if it is convinced that it would have weighed the evidence differently in the first instance." *Brnovich*,

141 S. Ct. at 2349. Appellants' arguments are also without merit.

First, they claim (at 28) that, through Texas Election Code § 41.0075, which set three alternative schedules for the 2022 primary election depending on when the census data came out, "the legislature itself already ensured it would not be 'pressed for time' and required to resort to procedural shortcuts because of COVID-delayed census data." But appellants do not explain how the existence of this statute demonstrates that the Legislature's compressed timelines were racially motivated. Indeed, they cannot make that connection because it is a non sequitur: regardless of when the primary was scheduled, the late release of census data meant the Legislature would have had to redistrict during a special session, which is constitutionally limited to thirty days. Tex. Const. art. III, § 40.

Moreover, as the district court found, "the point of the statute was to *accommodate* legislative delays in enacting a redistricting plan." App.80-81 (emphasis altered). Nothing about that statute *required* the Legislature to take multiple special sessions to pass redistricting legislation or even guaranteed the Legislature would have the opportunity to do so. After all, Texas law gives the prerogative to call a special session solely to the Governor. Tex. Const. art. III, § 40; *Walker v. Baker*, 196 S.W.2d 324, 330 (Tex. 1946). And, due to the intransigence of Senator Powell's minority party, *supra* p. 6, the Governor had already been forced to called three special sessions in 2021. The Legislature could hardly assume he would be willing to call a fourth because of legislative deadlock. Instead, the Legislature had to presume that failure to act would effectively cede control of redistricting to the Legislative Redistricting Board, Tex. Const. art. III § 28, or to a court. Trying to retain control over

what Texas law recognizes as a "uniquely political" task that "for sound practical as well as theoretical reasons is constitutionally committed to the legislative branch" hardly evidences racial bias. *Terrazas v. Ramirez*, 829 S.W.2d 712, 720 (Tex. 1991).

Second, appellants briefly argue (at 28) that "there is no record evidence that the COVID-related Census delay actually explained the procedural departures." Not so: the district court cited record evidence that "challenges caused by the pandemic[] delayed publication of the [census] results until after the regular session [of the Texas Legislature] had already ended." App.52. The court specifically pointed to testimony from appellants' own witness "that the redistricting process ordinarily can take about two months." App.52. But as the court noted, this was "twice as long" as the thirty days that the Texas Constitution provides for special sessions of the Legislature. App.51-52 (citing Tex. Const. art. III, § 40). In the light of these temporal facts, the district court concluded that "[i]t was thus unavoidable that the legislature would depart from its ordinary procedures." App.52. Appellants' disagreement with these "plausible" and "permissible," *Brnovich*, 141 S. Ct. at 2349, inferences that the district court drew from the factual record hardly supplies a basis to establish clear error.

3. Legislative history

Finally, appellants argue (at 29-38) that the district court clearly erred by rejecting the relevance of the alternative maps they offered and by refusing to dispense with the presumption of good faith that is afforded to the Texas Legislature based on alleged inconsistencies in the statements of a single legislator. Both arguments are aimed at undermining the district court's finding regarding the fifth *Arlington Heights* factor, 429 U.S. at 268:

namely, that the legislative history of S.B. 4 supports a conclusion that the Texas Legislature was motivated by partisan considerations—not racial ones. App.53-57. Neither of appellants' arguments has merit.

Alternative maps. Appellants argue (at 29) that "[t]he district court erred in assessing the evidentiary value of the alternative maps plaintiffs proffered." This Court has observed that "[o]ne ... way to disprove a State's contention that politics drove a district's lines is to show that the legislature had the capacity to accomplish all its partisan goals without moving so many members of a minority group into the district." *Cooper*, 137 S. Ct. at 1479. Heeding this observation, appellants tried to establish that the Texas Legislature could have drawn the state senate map in a manner that would have achieved the Legislature's partisan goals without breaking apart S.D. 10 by offering four alternative maps. App.59-60.

a. But the district court spotted a common flaw in each of these alternative maps: each "crack[s] SD 14, a Democratic bastion located mostly in Travis County, instead of SD 10," in Tarrant County. App.62. Yet "Travis County is about as diverse as Tarrant County," so "cracking th[at] district" (S.D. 14), "would produce about as clear a discriminatory effect" as cracking S.D. 10. App.62. As a result, the court concluded: "[t]hat the legislature decided to crack one and not the other thus seems to yield no particular inference about the role of race in redistricting or about partisanship's role." App.62. Indeed, as the Court noted, a truly "racially motivated legislature might also have cracked both SD 14 and SD 10." App.63. By contrast, there are many "legally innocuous reasons why the Texas Legislature may have preserved SD 14" and opted to alter S.D. 10, including

S.D. 10's status as a swing district (unlike S.D. 14); a desire for S.D. 14 to "function as a vote sink;" political fallout from breaking up "a longstanding Democratic bastion" (again, unlike S.D. 14); and "respect[ing] traditional redistricting criteria," since appellants' proposed S.D. 14 is "as unnaturally shaped as is the current SD 10." App.63.

b. Appellants make three attempts to show that these conclusions were implausible or impermissible, *Brnovich*, 141 S. Ct. at 2348-49, but none has merit. *First*, appellants point (at 30, 32) to orders from three-judge district courts in past redistricting cycles that have blessed the notion of cracking Austin area districts to accomplish a partisan gerrymander, *Perez v. Abbott*, 253 F. Supp. 3d 864, 897 (W.D. Tex. 2017), and disapproved of previous efforts to redraw S.D. 10, *Texas v. United States*, 887 F. Supp. 2d 133, 166 (D.D.C. 2012), *vacated on other grounds*, 570 U.S. 928 (2013). By appellants' logic, the Legislature's decision to redraw S.D. 10 instead of cracking S.D. 14 supports an inference of discriminatory purpose given these previous judicial decisions. Jurisdictional Statement at 32-33.

But as the district court explained, "neither decision was controlling." App.64. *Perez*'s comment about cracking S.D. 14 was "dictum" concerning congressional, not state senate, districts. App.63-64. And *Texas v. United States* was decided under the erstwhile preclearance regime of Section 5 of the Voting Rights Act. App.46. For this reason, the district court rejected as "implausible" appellants' argument, repeated here (at 34 n.3), that the Legislature "thumb[ed] its nose at the federal judiciary" by redrawing S.D. 10 even though a three-judge district court refused to "preclear" maps redrawing that district in an earlier redistricting cycle. *See Texas*, 887

F. Supp. 2d at 138. As the district court rightly observed, that decision was issued under a vastly different legal standard "that required Texas to prove a negative." App.46.

In the light of these differences, the district court held that neither case bound the Legislature here, and that the Legislature's purported failure to follow them does not support any inference of racially discriminatory purpose. *See* App.63-64. Appellants do not explain why this conclusion was clearly erroneous.

Second, appellants take issue (at 32-33) with the district court's observation that a Legislature motivated by racial, rather than partisan, concerns may have attempted to crack *both* S.D. 10 and S.D. 14. Appellants say (at 33) that no record evidence demonstrates "that it is *possible* to crack both SD 10 and SD 14 while retaining Republican performance in the surrounding districts, complying with the VRA in neighboring districts, and satisfying the legislature's other redistricting objectives."

But this argument elides the district court's principal finding: because appellants' alternative maps would require cracking S.D. 14 and therefore "produce about as clear a discriminatory effect" as is alleged regarding S.D. 10 in the current maps, the Legislature's decision "to crack one and not the other thus seems to yield no particular inference about the role of race in redistricting or about partisanship's role." App.62. Shifting the alleged discriminatory effect from one district to another might have helped Senator Powell keep her seat.[10] But

[10] Senator Powell has publicly blamed the newly drawn S.D. 10 for her failed reelection campaign. Ashley Valenzuela, *Citing 'unwinnable race' due to redrawn political map, state Sen. Beverly*

failure to do so does nothing to show "that the legislature had the capacity to accomplish all its partisan goals without moving so many members of a minority group into the district." *Cooper*, 137 S. Ct. at 1479. Appellants fail to show why that factual finding is implausible or impermissible. *Brnovich*, 141 S. Ct. at 2348-49.

Third, appellants complain (at 33) that the district court cited no "record evidence" for the various non-racial reasons that it offered for why the Texas Legislature might have chosen to leave S.D. 14 intact while redrawing S.D. 10. But the entire enterprise of looking at alternative maps to discern a legislature's intent is necessarily hypothetical, as it depends upon consideration of "would-have, could-have, . . . should-have arguments." *Cooper*, 137 S. Ct. at 1479. Appellants' insistence upon "record evidence" of legislative purpose concerning alternative maps that were never considered, much less enacted, by the Texas Legislature is at war with the nature of the inquiry they insist the district court should have undertaken.

In any event, the district court's conclusion that the Legislature may have had non-racial reasons for preserving S.D. 14, App.63, *was* based on record evidence. This included evidence concerning the demographic and politically competitive nature of S.D. 10, *see* App.6-8 (citing, *e.g.*, Defendants' Exhibits 11, 17 and Plaintiffs' Exhibit 44), the shape of S.D. 10, App.4-5, and testimony concerning the Legislature's "redistricting criteria," App.13-14 (citing Defendants' Exhibits 58, 62 and Plaintiffs' Exhibit 41). Appellants may disagree with the "inferences" that the district court drew from those facts,

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Powell drops re-election bid, SPECTRUM NEWS 1 (Apr. 6, 2022), https://tinyurl.com/3bmpjuz8.

but those "inferences" are entitled to deference under clear-error review. *Anderson*, 470 U.S. at 574.

Presumption of legislative good faith. Appellants also argue (at 35-38) that the district court clearly erred by refusing to discard the presumption of legislative good faith when it concluded that the legislative history of S.B. 4 indicated partisan, not racial, motivation. This fails to establish clear error for three reasons.

First, it is a red herring. The district court stated at least three times that appellants "would fail to show a likelihood of success on the merits even if there were no presumption working against them." App.69; *see also* App.68 ("Even without applying any presumptions, this Court does not find that any of the Plaintiffs' evidence is *more* consistent with racial motives than it is with exclusively partisan motives."); App.70 ("Plaintiffs['] [claims] fail regardless of whether the presumption applies"). Appellants cannot show the district court clearly erred by refusing to expressly put aside a presumption the district court thrice said was irrelevant to its ultimate conclusion.

Second, appellants are factually wrong (at 36) that the district court held that "'direct' evidence of racially discriminatory intent" is required "to rebut the presumption of [legislative] good faith." In exploring the scope of the presumption of legislative good faith, the district court did suggest that "there are strong reasons to conclude that the presumption of good faith is overcome only when there is a showing that the legislature acted with an ulterior *racial* motive." App.69. But ultimately, the court concluded that it did not need "to choose among the different possible understandings of 'good faith' in the context of redistricting" because appellants had not shown a likelihood of success on the merits even without applying the presumption. App.69.

Third, appellants' arguments (at 36-37) are without legal merit. Indeed, they amount to little more than a broadside against the supposedly deleterious "incentive structure created by this Court's decisions" in *Shelby County v. Holder*, 570 U.S. 529 (2013), and *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), coupled with a policy proposal for the circumstances under which they think the presumption of legislative good faith should be overcome. But none of appellants' musings satisfies this Court's test for reversing the district court's well-supported conclusion that appellants failed to demonstrate a likelihood of success on the merits of their intentional-discrimination claim. Thus, taken alone or together with appellants' other contentions, this argument does not raise a substantial question requiring this Court's review—even if it had jurisdiction to do so.

B. The district court did not address—and could not have abused its discretion regarding—application of *Purcell* to the 2024 primary.

Appellants also fail to raise a substantial question by challenging (at 38-40) the district court's discretionary assessment of the balance of equities and public interest. The district court decided one thing: whether the proximity of the 2022 primary militated against enjoining use of the 2021 maps. App.75-79. The 2024 election was not at issue in its weighing of the equities.

Applying the principles derived from this Court's decision in *Purcell*, 549 U.S. at 1, and crediting unrebutted testimony from local election administrators, App.77-79, the district court found that both the balance of the equities and the public interest favored appellees. App.74-82. The court held that issuing a preliminary injunction one month before the March 2022 primary—and after some voters had already cast their ballots—"would

confuse and disenfranchise voters, leave candidates in the lurch, stress already overburdened election administrators, and inflict significant costs that would fall most heavily on the state's smallest counties." App.82.

Appellants do not point to any legal error in the district court's application of *Purcell* as to the now long-concluded 2022 primary. Nor could they: the district court's order faithfully applies this Court's instruction that "lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam); *see also Merrill v. Milligan*, 142 S. Ct. 879 (2022). Indeed, because the 2022 primary elections were scheduled to begin just one month after the district court's order denying appellants' preliminary-injunction motion, App.19, this case represents the archetypical case for application of *Purcell*. *Cf. Purcell*, 549 U.S. at 4; *Milligan*, 142 S. Ct. at 888 (Kagan, J., dissenting) (noting that this Court granted a stay of a district-court order enjoining use of congressional maps "about four months" before primaries).

Instead of asking this Court to review the district court's order, appellants ask this court to engage in a free-floating exploration of the outer boundaries of the *Purcell* doctrine as applied to the 2024 primary. Appellants say (at 40) that they need clarity about *Purcell*'s contours now because the district court may use the "*Purcell* principle . . . to outright *deny* relief" in 2024. Jurisdictional Statement at 40. But any equities regarding 2024 were not placed before the district court and cannot be the basis to impeach its discretionary decision not to award an injunction. *See Youngberg v. Romeo*, 457 U.S. 307, 316 n.19 (1982).

Moreover, it is inappropriate to ask this Court to address a hypothetical, future district-court order whose contents and timing are unknown, simply because appellants would like advice regarding "how near" to an election *Purcell* would prohibit judicial intervention. Jurisdictional Statement at 38-39. "Plaintiffs agreed" that one month is too close, so "that by the time the district court held its hearing in late January 2022 . . . it was too late to change district lines for the March 2022 primary elections." *Id.* at 39. And appellees have never maintained that two years is close enough. As a result, there is no "dispute which calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts." *Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977) (per curiam) (quotation marks omitted) (reiterating that federal courts may not be "asked to answer [a] hypothetical question" where there is "[n]o present right at stake") (cleaned up).

If anything, this is a particularly poor vehicle to address the outer bounds of *Purcell* because, under Texas law, the senate map is not likely to be used in any future elections. *Supra* p. 6; *cf. MALC*, 647 S.W.3d at 690; *id.* at 706-07 (Hecht, J., dissenting). And application of *Purcell* turns on fact-based "considerations specific to election cases," such as the effect on voters and election administration, *Purcell*, 549 U.S. at 4-5, which cannot be addressed in a vacuum. This appeal thus supplies no vehicle for exploring the boundaries of the *Purcell* doctrine in balancing the equities of allowing maps that have not yet been drawn to be used in a future election that has not yet been examined by the district court. To hold otherwise would necessarily require this Court to issue an impermissible advisory opinion. *Cf. Flast v. Cohen*, 392 U.S. 83, 96 (1968).

CONCLUSION

This Court should dismiss this appeal for lack of jurisdiction or, alternatively, summarily affirm the judgment below.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Lanora.Pettit@oag.texas.gov
(512) 936-1700

JUDD E. STONE II
Solicitor General

LANORA C. PETTIT
Principal Deputy Solicitor General
Counsel of Record

WILLIAM F. COLE
Assistant Solicitor General

SARA BAUMGARDNER
Assistant Attorney General

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