No. 22-136

IN THE

Supreme Court of the United States

ROY CHARLES BROOKS, *et al.*,

Appellants,

v.

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

Appellees.

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

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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INTRODUCTION

The district court concluded that the Texas legislature acted with bad faith and gave false explanations for its motives in dismantling a state senate district in the same manner found intentionally discriminating with respect to the same district in the last redistricting cycle. Yet the district court applied a presumption of good faith and concluded that partisanship explained the legislature's actions.

In doing so, the district court applied the wrong legal standard—demanding direct evidence of racial predominance instead of circumstantial evidence that racial discrimination was *a* motivating factor. It likewise erred in assessing the evidentiary value of Plaintiffs' alternative maps—maps of the type this Court unanimously endorsed in *Cooper*, and further reached factual conclusions with no record evidence to support them. Finally, the court improperly employed the *Purcell* principle as a basis to deny relief, when that principle instead informs *when* relief should take effect, not *if* relief should take effect. Correcting this error is critical because in the time since Appellants' Jurisdictional Statement was filed, the district court continued the trial date (which had been set for September 2022) and no new date has been announced for trial. This appeal must be heard to ensure relief can be entered in time for the 2024 election.

ARGUMENT

I. The Court has jurisdiction because the notice of appeal was timely filed.

The Court has jurisdiction to hear this appeal because the notice of appeal was timely filed. A party before a three-judge district court proceeding "may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction." 28 U.S.C. § 1253. The notice of appeal from such an order must be filed in the district court within 30 days. 28 U.S.C. § 2101(b).

The district court issued two "order[s] . . . denying . . . an interlocutory . . . injunction" in this case. 28 U.S.C. § 1253. It issued a brief order on February 1, 2022 with one sentence addressing the court's ruling. App.-89. Then, on May 4, 2022, the district court issued a 63-page "Preliminary-Injunction Memorandum Opinion *and Order*" in which the Court twice ordered that it "DENIES a preliminary injunction." App.-2-3 (emphasis added); *see also* App.-84 ("Plaintiffs' motion for a preliminary injunction is DENIED . . . .").

The plain text of 28 U.S.C. § 1253 confirms that the May 4, 2022 decision was an "order . . . denying . . . an interlocutory . . . injunction," because that is precisely what that decision was *called*, and precisely what that decision *did*. This Court has held that even an order having merely the "practical effect" of granting or denying an injunction triggers this Court's § 1253 appellate jurisdiction. *See Abbott v. Perez*, 138 S. Ct. 2305, 2321 (2018). If that is so, then an order that on its face specifically denies an injunction must

also do so.

The State contends that only the district court's February 1 order was appealable. But nothing in the plain text of § 1253 compels that conclusion; indeed such a rule would judicially amend the statute to foreclose jurisdiction that the statute's plain text grants. The State cites this Court's one-sentence denial of jurisdiction in *Dean v. Leake*, 555 U.S. 801 (2008) as a "virtually identical circumstance" as this case. Mot. at 12. But in that case the subsequent decision from which an appeal was filed on its face was not an "order," but was rather merely a "Memorandum Opinion." *Dean v. Leake*, 550 F. Supp. 2d 594 (E.D.N.C. 2008). Here, the district court expressly identified its May 4 decision as an "Order" and expressly denied injunctive relief within the body of that Order—twice.

Circuit courts have rejected similar arguments seeking to deny appellate jurisdiction to orders that expressly fall within the plain statutory text. For example, the Ninth Circuit has held that a notice of appeal may be filed from either of two orders that expressly dispose of requested relief.

> When two dispositive orders are entered, one after the other, does one nullify the other for purposes of filing a timely notice of appeal? We hold that it does not. The validity of one does not establish the invalidity of the other. Moreover, if a district court enters two dispositive orders, each of which is sufficient to trigger the time to appeal under Fed.R.App.P. 4(a)(4), a party should not have

> to run the risk that the order he may choose to appeal from may not be the same order the court of appeals decides he should have chosen.

Ingram v. ACandS, Inc., 977 F.2d 1332, 1339 (9th Cir. 1992). The Tenth Circuit likewise has held that a second dispositive order is appealable even if the first also would have been. *Kline v. Dep't of Health & Human Servs.*, 927 F.2d 522, 524 (10th Cir. 1991) (explaining that initial order "would have been sufficient to provide jurisdiction had an appeal been taken" but that court was "reluctant to hold that because such an order was entered, the parties may not appeal from a *later* separate order which clearly meets the requirements of Rule 58" (emphasis in original)). Indeed, as this Court has explained, "there is no question that there can be more than one appeal in a case challenging a redistricting plan." *Perez*, 138 S. Ct. at 2323. Redistricting litigation is complex, and its path through three-judge district courts does not always follow a straight line. But when the court enters an "Order" that grants or denies injunctive relief—regardless of the order it previously entered—§ 1253's plain terms authorize an appeal.

Not only would the State's position impose an extra-textual limitation on jurisdiction, it also makes no practical sense. Appellants had no means to determine from the barebones February 1 order whether there were appealable flaws in the district court's analysis. Indeed, given that the May 4 Order did not issue until over 90 days later, under the State's proffered rule Appellants would have been required to

not only file a notice of appeal, but also file their Jurisdictional Statement explaining the basis of their appeal *before* the district court ever explained its reasoning for denying the injunction. *See* Sup. Ct. Rule 18(3) (Jurisdictional Statement due 60 days after filing of notice of appeal).

The Court should reject the State's invitation to rewrite the statute Congress enacted and thereby inject considerable confusion into a statute whose terms are plain and which controls a party's appellate rights.[1]

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

As Appellants explained in their Jurisdictional Statement (at 20-26), the district court committed legal error by applying the "racial predominance" standard to its consideration of plaintiffs' intentional discrimination claim.[2] The State's argument to the contrary is meritless.

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[1] The Court should likewise reject the State's speculation that this case may in the future become moot by the trial or by the legislature's adoption of a new redistricting plan. The trial date has been continued; a new date has not been set. ECF No. 569. And neither is it guaranteed that the next legislature will *succeed* in enacting new redistricting legislation nor that it will make any changes to SD10.

[2] The State contends this is a factual question subject to clear error review. Mot. at 16. That is wrong; whether the district court applied the wrong legal standard is quite obviously a legal question subject to de novo review.

The State contends that the "racial predominance" standard this Court set forth in the *Shaw* line of cases also governs courts' adjudication of intentional discrimination cases. *See* Mot. at 20 ("Appellants' effort to cabin *Miller* to the racial-gerrymandering context is . . . without merit."). But this Court expressly cabined *Miller* to racial gerrymandering claims in *Miller itself*: "*Shaw* recognized a claim 'analytically distinct' from a vote dilution claim." *Miller v. Johnson*, 515 U.S. 900, 911 (1995). The *Shaw*/racial gerrymandering "predominance" inquiry is wholly at odds with the standard this Court has announced for *intentional discrimination* claims, which aims to determine whether invidious discrimination was *a* motivation—even if not "the 'dominant' or 'primary'" purpose. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977). This distinction makes sense: invidious discrimination—even if one of many goals—is unconstitutional. But absent a discriminatory intent, this Court has held that racial considerations must rise to the level of predominance to trigger liability. The district court committed legal error by applying the wrong standard.

As Appellants explained in their Jurisdictional Statement (at 25), this error led the district court to improperly disregard this Court's statement in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 n.25 (1979), that where "the adverse consequences of a law upon an identifiable group" are clear, "a strong inference that the adverse effects were desired can reasonably be drawn." The State counters

that *Feeney* does not "*require*" that such an inference be drawn, Mot. at 20, but the district court did not even consider whether to draw such an inference at all because it mistakenly was searching for direct evidence of racial predominance. App.50. That was legal error.

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

The district court clearly erred in attributing the legislature's procedural departures to COVID. As Appellants explained in their Jurisdictional Statement (at 28), the district court clearly erred in concluding that COVID fully explained the legislature's procedural departures in its consideration of redistricting legislation because there is no record evidence to support that conclusion. In response, the State cites evidence that the pandemic delayed the release of Census data and caused redistricting to occur in a 30-day special session. Mot. at 24. But this misses the point—the special session was not the procedural departure, rather the rejection of resource witnesses and expert testimony, the unannounced deadline for committee amendments, and the single-day hearing and vote on maps were. *E.g.*, Jurisdictional Statement at 14-15, 26. And neither the State nor the district court cited any record evidence to support the conclusion that anything about COVID or the 30-day limit for special sessions explained these departures. To the contrary, the only record evidence on the topic is that there was time *within* the 30-day special session to avoid these

procedural irregularities. *Id.* at 28.

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

The district court erred in assessing the evidentiary value of plaintiffs' alternative maps. The State's effort to resuscitate the district court's reasoning is unpersuasive.

First, the State parrots the district court's flawed premise by contending that dismantling Austin-based SD14 rather than Tarrant County-based SD10 "would produce about as clear a discriminatory effect as cracking SD10." Mot. at 25, 27-28 (internal quotation marks omitted). But this misses the point of the exercise, which is to draw alternative maps that a legislature focused only on *partisanship* and not *race* would have drawn. In that world, the legislature would not have been *aware* of the increase in Austin's minority population in the past decade as it drew a partisan-motivated plan.

Second, the State dismisses as not "controlling" the judicial opinions from last decade's Texas redistricting in which the State was granted permission to engage in partisan gerrymandering in Austin but not racial discrimination in Tarrant County. Mot. at 26-27. But the point is not whether those judicial declarations were *controlling* or "bound the Legislature here," *id.* at 27, but rather their effect on the mapdrawers' *state of mind*. The primary mapdrawer, Ms. Mackin, was a lawyer in the case in which Texas was told it could permissively partisan gerrymander in Austin but could not crack apart

Tarrant County's minority population. Jurisdictional Statement at 30-31. The question is not whether the legislature had some legal *obligation* because of the prior judicial decision, but rather whether a partisan (rather than racially) motivated mapdrawer would have taken the action the federal court had just labeled permissive partisanship (crack SD14) or the action the federal court had just labeled unlawful racial discrimination (crack SD10). A mapdrawer—particularly one who is a lawyer—who is acting from solely partisan considerations would follow the course charted by federal courts for partisan gerrymandering, not the one labeled as racial discrimination.

Third, the State defends the district court's invention of hypothetical explanations for the legislature's decisionmaking, contending that record evidence need not support the district's factual conclusions. Mot. at 28. But it is clear error for the district court to find facts unsupported by the record. *See, e.g., Perez*, 138 S. Ct. at 2327 (finding clear error where "relevant evidence in the record" is "plainly insufficient" to support district court's factual finding). Moreover, the State ignores that the district court's hypothesized explanations are internally incoherent; the district court posited that the legislature was engaged in partisan gerrymandering while simultaneously hypothesizing that a partisan-motivated legislature would have cracked *both* SD10 and SD14 (something the legislature did not do). *See* Jurisdictional Statement at 33-34. The district court erred by dismissing the "highly persuasive," "key evidence" proffered by plaintiffs through their

alternative maps by hypothesizing inconsistent explanations with no support in the evidentiary record. *Cooper v. Harris*, 137 S. Ct. 1455, 1479 (2017).

V. The district court erred by concluding a legislature it found to be acting in bad faith was entitled to a presumption of good faith.

The district court erred by concluding that a presumption of good faith attached to a legislature it found to have acted in bad faith. The court correctly found that the legislative sponsor and mapdrawer was "disingenuous," provided "not true" answers with a "smirk," was "evasive[]" and "unconvincing," and engaged in "'bad faith' in the colloquial sense." App.-57, 66-69. But it still concluded a presumption of good faith may be warranted.

The State does not dispute the district court's factual findings of bad faith, but rather contends that the district court's good faith presumption analysis is irrelevant because the district court said it would reach the same ultimate merits conclusion regardless of the presumption. Mot. at 29. But, as explained above, the district court's merits analysis was likewise legally and factually erroneous, and so its misapplication of the good faith presumption is indeed relevant. Once the district court applies the correct legal test to plaintiffs' claim bounded by the factual record, the court must not presume the good faith of a legislature it believes acted in bad faith.

Moreover, the State dismisses as a "policy proposal" Appellants' view that the presumption of good faith cannot apply to a legislature that acted in bad faith and repeatedly refused to claim a partisan

purpose while the line drawing was ongoing. Mot. at 30. But the presumption of good faith *itself* is a judicial *policy*, so of course its contours must be informed by policy. And it cannot be the law that a legislature can shelter under a judicially-created presumption of good faith while asserting partisan motives it declined to put forth while drawing the lines as a sword, abandoning the pretextual justifications it asserted during the legislative process, and shielding any attempt to uncover its true motivations through its assertions of legislative privilege. That is especially so here, where the record shows that Senator Huffman could not remember how to answer the question of whether she engaged in partisan gerrymander between her deposition and her preliminary injunction hearing days later, because at the latter she lacked the benefit of her counsel signaling the appropriate response. *See* Jurisdictional Statement at 38 n.4. This case makes a mockery of the presumption of legislative good faith.

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

The *Purcell* principle needs to be defined in a merits decision. This case presents the opportunity to shape some of its contours, including whether the *Purcell* principle can justify *denying* rather than merely *delaying* preliminary injunctive relief. For example, the district court here justified its denial of preliminary relief in part based on the proximity of the March 2022 primary election. But this case no longer has a trial date, and it is not at all clear that relief prior to the November *2024* election is feasible

absent a preliminary injunction. *Purcell* may appropriately inform the *timing* of a preliminary injunction, but it has no place as a basis to outright to deny relief, as the district court employed it here.

The State contends that the issue of the 2024 election was not addressed below. Mot. at 31. But this is not accurate. For one, there was still time for relief for the 2022 general election, and Plaintiffs offered avenues for such relief that would not offend *Purcell*. ECF No. 159. Also, in that same filing, the Plaintiffs specifically raised the argument that a special election could be ordered and cited to other courts that had done the same. *Id.* at 4. Now time has overtaken options for the 2022 elections, leaving the possibility of a special election. With the trial date continued and no replacement date set, it is critical that this appeal be considered, at the very least in time to permit relief for 2024. In doing so, it would be inappropriate for this Court to affirm the district court simply because relief for the 2022 primary was no longer practical, particularly without any guidance to courts and parties about when injunctive relief for intentional discrimination is available. *See Shelby County v. Holder*, 570 U.S. 529, 537 (2013) (affirming that "injunctive relief is available in appropriate cases to block voting laws from going into effect"). If this Court's promise in *Shelby County* is to have any meaning, *Purcell* should function only to determine the *timing* of relief, not entitlement to relief.

CONCLUSION

For the foregoing reasons, the State's motion to dismiss or affirm should be denied and the Court

should note probable jurisdiction and vacate or reverse.

October 20, 2022

Respectfully submitted,

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