No. 17A225 and No. 17A245

In the Supreme Court of the United States

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

v.

SHANNON PEREZ, et al.,
Respondents.

ON EMERGENCY APPLICATION FOR STAY OF ORDER INVALIDATING CONGRESSIONAL DISTRICTS PENDING APPEAL TO THE SUPREME COURT OF THE UNITED STATES

MOTION FOR LEAVE TO FILE AMICUS BRIEF, MOTION FOR LEAVE TO FILE BRIEF ON 8 1/2 BY 11 INCH PAPER, AMICUS BRIEF FOR THE STATES OF LOUISIANA, ALABAMA, GEORGIA, MICHIGAN, MISSOURI, OHIO, SOUTH CAROLINA, UTAH AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF APPLICANTS

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MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR STAY FOR THE STATES OF LOUISIANA, ALABAMA, GEORGIA, MICHIGAN, MISSOURI, OHIO, SOUTH CAROLINA, UTAH AND WISCONSIN

The States of Louisiana, Alabama, Georgia, Michigan, Missouri, Ohio, South Carolina, Utah and Wisconsin move the Court for leave to file an amicus brief in support of Texas' Emergency Application for Stay.

In support of their motion, *Amici* States assert that the district court ruling at issue has the potential to affect prior redistricting decisions as well as future redistricting efforts in the states. The ruling raises grave concerns among the *Amici* States about disruption of 2018 elections.

Amici States assert the ruling creates exceptional circumstances that warrant being permitted to be heard on the issue of Texas' emergency application for stay and request their motion to file the attached amicus brief be granted.

Respectfully submitted.

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The States of Louisiana, Alabama, Georgia, Michigan, Missouri, Ohio, South Carolina, Utah and Wisconsin, move the Court for leave to file their *amicus* brief in support of Texas' Emergency Application for Stay on 8 ½ by 11 inch paper rather than in booklet form.

In support of their motion, *Amici* States assert that Texas filed its Emergency Application for Stay in this matter on the afternoon of Friday, August 25, 2017. A temporary stay was granted and response deadline of September 5, 2017, was ordered on Monday, August 28, 2017. The expedited filing of Texas' application and the resulting compressed deadline for any response (including a federal holiday in the interim) impaired *Amici's* ability to get their brief prepared for printing and filing in booklet form. *Amici* desire to be heard on the application and request the

Court grant this motion and accept the paper filing.

Respectfully submitted.

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Louisiana, Alabama, Georgia, Michigan, Missouri, Ohio, South Carolina, Utah and Wisconsin. The States have a vital interest in the law regarding redistricting, since redistricting is inherently a State function. The district court's ruling has widespread implications for States entering the 2018 election cycle, destabilizing the democratic system in all States. Additionally, the district court's ruling undermines the ability of States to rely in good faith on the plain language of a district court opinion as to the lawfulness of conduct ordered by that court.

ARGUMENT

Texas has moved for a stay of a three-judge district court's order declaring unconstitutional two voting districts that the same court five years earlier had included as part of its own remedial electoral map drawn in response to this Court's 2012 order vacating the district court's first attempt at redistricting.[1] In that 2012 order, this Court found that in crafting its first plan, the district court had impermissibly usurped the role of the Texas Legislature in determining the best interests of its citizens. *Id.*, at 396. This Court remanded the matter back to the district court with express instructions to implement a plan that was lawful under the Constitution and the VRA "without displacing legitimate state policy judgments with the court's own preferences." *Id.*, at 394.[2] Notwithstanding this clear directive to the district court, it has done it again – displaced legitimate state policy judgment's with the court's own preferences. And to complicate matters further, the district court's order comes less than two months before the October 1 deadline for the state to have a map in place for the 2018 primary elections, yet it comes *five years* after the district court ordered Texas to adopt and implement the court's plan,

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[1] *Perry v. Perez*, 565 U.S. 388 (2012) (*per curiam*).

[2] In fact, there are *six times* in this Court's order where the district court is expressly instructed to draw a plan that is compliant with the Constitution and the VRA. *Id.*, at 393, 394, 395 and 396. This Court also emphasized that the district court should "take care not to incorporate into the interim plan any legal defects in the state plan." *Id.*, at 394.

Plan C235. The district court's ruling is legally flawed and should be reviewed. In addition, however, the undersigned states urge this Court to grant the stay Texas seeks. The order prevents Texas from seeking meaningful appellate relief because it set a September 5 hearing at which the district court intends to make a third attempt at drawing a valid map. Not only is the substance of the order an egregious attack on state sovereignty, but its timing amplifies those harms and is a harm of its own. For these same reasons, this Court should also stay the district court's ruling of August 24, 2017, regarding the Texas state house map.

I. A Legislature Cannot Have an Unlawful Purpose When It Adopts Districts Contained in a Court-Drawn Remedial Map

No doubt Texas could be forgiven for feeling it has become the victim of a decidedly unfunny practical joke. After this Court ruled the district court's first plan invalid and remanded the matter back to the district court for creation of a remedial plan that passed Constitutional and VRA muster without displacing legitimate state policy determinations, the district court developed Plan C235. Plan C235 modified some districts but made no changes to CD 27 or CD 35. In a lengthy opinion, the district court affirmed it met its obligation to ensure all of the districts in Plan C235 were lawful under the Constitution and the VRA. Its opinion also included several pages of analysis specific to why districts CD 27 and CD 35 were lawful. Although Texas could have continued its defense of its 2011 plan, ultimately

it decided to forgo further litigation and acquiesce in the district court's plan.[3] Accordingly, the Texas Legislature went into special session to consider adopting Plan C235 as ordered by the district court[4] and subsequently enacted it into law in June of 2013.[5] And, as any State in Texas' position would have reasonably assumed, Texas believed its acquiescence in the district court's plan would conclude the litigation.

A. The district court improperly "locked in" a finding of unlawful intent from a 2011 Legislative Act to secure continuing jurisdiction.

Any reasonable litigant would be entitled to believe further inquiry into its alleged intent concerning a *never-implemented* redistricting plan would be irrelevant and moot after a *new* plan -- independently drawn *by the district court* and *ordered* by the district court -- had been enacted into law. This would be true even if the district court had not been so careful to show it fully met its obligations on remand from this Court to draw a legally valid plan, *free* from legal defects identified in the state plan. And it would be true even if the district court had not *meticulously* detailed why districts CD 27 and CD 35 as originally proposed by the State were lawful and even if the district court had not presented Plan C235 as compliant with the Constitution and the VRA. These additional circumstances,

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[3] Texas implemented Plan C235 for the 2012 congressional elections per the district court's order and Plan C235 has been used in each election cycle since that time.

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

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

however, demonstrate the district court's complete disregard of its obligations to defer to Texas on policy choices and to employ a presumption of constitutionality to its legislative action. Irrespective of any question about those districts prior to Plan C235, the district court's specific findings of validity and inclusion of those districts without change necessarily removes any "taint" allegedly associated with the original maps.

The 2013 Legislature was clearly taking a different action than the 2011 Legislature, but the district court treated its actions as if the 2011 Legislature's intent was essentially locked in for all time and could never be cured. It simply cannot be legally correct that a state can never cure prior alleged unlawful intent. The district court's order, however, blurs the line between *intent* and *effect* of a previous decision maker versus the mere effect of what is passed by the subsequent one.

B. Finding the Legislature's process was not sufficiently "deliberative" is nonsensical.

The fact that the Legislature was complying with the district court's *own order* in enacting Plan C235 makes the district court's criticism of the Legislature's deliberative process entirely nonsensical. The legislative process of passing a law is inherently deliberative, generally beginning with the filing of a bill, proceeding to hearings and testimony, continuing with debate and a vote by members of both houses of the legislature, and concluding with gubernatorial action or inaction as set forth in each State's constitution, laws and legislative rules. The 2013 Texas Legislature undertook exactly such a deliberate process when it repealed the never-

implemented 2011 maps and enacted the court-ordered plan in accordance with its legislative rules. The Texas Legislature's "deliberative process" is not an issue in this case and it is not within the federal judicial power in any case to dictate the robustness by which a legislative body passes a law. Moreover, this Court has held that the Constitution does not "require States engaged in redistricting to compile a comprehensive administrative record." *Bush v. Vera*, 517 U.S. 952, 966 (1996). This legally suspect conclusion, in particular, raises the question whether the district court's true motive is to find a way – any way – to ensure Texas remains subject to federal oversight, notwithstanding this Court's decision in *Shelby County v. Holder*, 133 S.Ct. 2612 (2013), which was released while Texas's appeal of the D.C. Court's decision was pending.[6]

C. The district court ruling eviscerates the presumptions of constitutionality and good faith.

Further compounding the folly in the district court's ruling, the court conflates an alleged intent of the 2011 Legislature in drafting the 2011 plan with the purpose of the 2013 Legislature in adopting the court's plan. In so doing, the district court failed to apply a presumption of constitutionality and good faith to Texas's enactment of Plan C235. This Court has recognized that federal judicial scrutiny of state redistricting is a "serious intrusion on the most vital of local

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[6] The District Court observed that although this Court did not rule on § 5 itself, the effect of its ruling was to release Texas from the preclearance requirement and render D.C. preclearance proceedings moot. *See* at Order on Plan C235 (Doc. 1535) p. 7, n.11. Indeed, it was not until after this Court's decision in *Shelby County* that the plaintiffs amended their pleadings to challenge the 2013 plans.

functions." *Miller v. Johnson*, 515 U.S. 900, 915 (1995). Accordingly, federal courts must "exercise extraordinary caution" in redistricting cases and afford states a presumption of constitutionally and good faith. *Miller*, 515 U.S. at 916. *Miller* is just one of a long line of cases to hold that government action is presumed valid[7] and a court may not infer an unlawful purpose where legitimate motives exist.[8] Here, the district court utterly failed to acknowledge its own reasoning and analysis in support of the validity of Plan C235 as a good faith basis for Texas' 2013 enactment and implementation of the Plan. In so doing, it now repudiates its own findings and the lawfulness of its own order. The mere fact that the court entered an order directing Texas to adopt Plan C235 is enough, without more, to constitute a legitimate, good faith basis for the legislation's passage. The record does not contain any basis on which to infer that the 2013 Legislature had any improper purpose in adopting Plan C235. Under a proper application of the presumption of good faith and constitutionality, the court's ruling cannot stand. Finally, the district court legally erred in applying the *Arlington Heights* factors to this case, where the foundation for the "official action" is the official action *of the district court*. *Arlington Heights v. Metropolitan Housing Corp*, 429 U.S. 252 (1977).[9] This factual

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[7] *See, e.g., Sunday Lake Iron Co. v. Wakefield Twp.*, 247 US 350, 353 (1918); *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926); *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990).

[8] *See, e.g., McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979).

[9] In *Cooper v. Harris*, 137 S.Ct. 1455, 1479-80 (2017), this Court cited *Arlington Heights* for the proposition that it offered "a varied and non-exhaustive list of

and legal background should foreclose any further exposure to a finding of discriminatory intent based on the history of official action pursuant the *Arlington Heights* factors.

In *Arlington Heights*, this Court established an analytical framework for federal courts to use in making a finding of discriminatory purpose by a governmental entity. It does not, however, establish authority for courts to exercise unfettered discretion to find constitutional violations based solely on their disagreements with States' chosen policies and internal democratic processes. *Arlington Heights*, to the contrary, states while impact of the official action may provide "an important starting point," impact alone "is not determinative and the court must look to other evidence." *Id.* at 266. In particular, this Court in *Arlington Heights* observed "the specific sequence of events leading up to the challenged decision also may shed light on the decisionmaker's purposes." *Id.* at 267 (citations omitted). This district court has struck down *four* different legislative actions. The House plan enacted in the regular session in 2011; the congressional plan enacted in the special session in 2011; the adoption in the 2013 special session of Plan C235 *as drawn by the district court*; and, most recently, the adoption in 2013 of virtually all of the 2012 district-court-imposed map for the Texas State House of Representatives. Even Texas' passage of two of district court's own plans was not

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'subjects' of proper inquiry in determining whether racially discriminatory intent existed'." The Court, however, also reaffirmed the burden of proof on the plaintiff to prove race, not politics, was the predominant consideration is demanding. *Id.* (citations omitted.)

sufficient for the court to find that Texas has remediated any alleged violations. The court has plainly put Texas in a *no-win* situation by providing a goal line, then moving the line. This is not the role of federal courts, particular in the area of redistricting which deeply implicates state sovereign interests and individual citizens' interests in representative democracy.

II. THE DISTRICT COURT'S PUNITIVE TIME FRAME JUSTIFIES A STAY FROM THIS COURT

The district court's order required Texas to immediately (within *72 hours*) advise the Court whether the Legislature will convene a special legislative session to draft a new Plan or to appear in court on September 5, 2017, when the court intends to draw a new map. The substantive errors in the district court's judgment are one thing—in the ordinary course Texas could appeal the judgment and obtain relief. But in this case, the district court's accelerated timing works an unconscionable hardship and prejudice on the State. In order for the 2018 elections to proceed, a new plan must be set by October 1. The district court's timing has thus deprived Texas of the opportunity to appeal the order to this Court and obtain relief before the deadline. Furthermore, Texas would have to expend vast state resources in connection with the September 5 court conference and any resulting redrawn Plan, with the real probability that all of those resources will be spent in vain. Thus, although a temporary stay has been ordered by this Court, *Amici* assert that a longer stay is warranted. This Court should maintain the *status quo*, allow the existing plan to govern the 2018 elections, and allow Texas the opportunity to appeal both the August 15, 2017, order. For these same reasons, this Court should

also stay the district court's order of August 24, 2017, regarding the Texas state house map.

CONCLUSION

It was manifestly erroneous for the district court to attempt to reach back and invalidate two districts it previously endorsed and to attribute an alleged improper purpose to the Legislature for following the court's order to adopt and implement Plan C235. These errors were compounded by the enormous prejudice to Texas in the timing of the order and the setting of a September 5, 2017, court conference to redraw the maps ahead of the 2018 elections. The stay of the district court's August 15, 2017, and August 24, 2017, order should be extended.

Date: September 1, 2017

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