



1           IN THE SUPREME COURT OF THE UNITED STATES

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3   GREG ABBOTT, GOVERNOR OF TEXAS,        )

4   ET AL.,                                        )

5                           Appellants,        )

6                           v.                        ) No. 17-586

7   SHANNON PEREZ, ET AL.,                    )

8                           Appellees,                                )

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10   GREG ABBOTT, GOVERNOR OF TEXAS,        )

11   ET AL.,                                        )

12                           v.                        ) No. 17-626

13   SHANNON PEREZ, ET AL.,                    )

14                           Appellees.                                )

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16    Washington, D.C.

17    Tuesday, April 24, 2018

18

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

22

23

24

25

1 APPEARANCES:  
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6 on behalf of Appellee United States, in  
7 support of the Appellants.  
8 MAX RENE HICKS, ESQ., Austin, Texas; on behalf  
9 of the Appellees in No. 17-586.  
10 ALLISON J. RIGGS, ESQ., Durham, North Carolina;  
11 on behalf of the Appellees in No. 17-626.  
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1 P R O C E E D I N G S

2 (10:20 a.m.)

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

7 ORAL ARGUMENT OF SCOTT A. KELLER  
8 ON BEHALF OF THE APPELLANTS

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

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

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

1 years under both plans.

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

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

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

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

25 JUSTICE SOTOMAYOR: Well, it did at

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

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

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

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

22 MR. KELLER: Well --

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

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

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

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

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

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



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

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

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

8                JUSTICE BREYER: Yeah.

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

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

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

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

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

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

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

21 MR. KELLER: Sure. For instance,  
22 C.J.S. Appendix 118a, the court said the  
23 violations "now require remedy" and "must be  
24 remedied either by the Texas legislature or  
25 this court." The court ordered us -- if the

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

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

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

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

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

25 JUSTICE KAGAN: Well, General, I think

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

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

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

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

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

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

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

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

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

22 MR. KELLER: That's what --

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

25 MR. KELLER: We are taking an appeal

1 from that today.

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

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

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

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

25 JUSTICE SOTOMAYOR: That's in 1291.

1 I'm talking about 1253. What you're saying is  
2 automatically --

3 MR. KELLER: But --

4 JUSTICE SOTOMAYOR: -- you're not  
5 giving me any way to distinguish any  
6 three-court decision on liability that doesn't  
7 result in an immediate appeal.

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

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

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

1 order.

2 MR. KELLER: Well, we --

3 JUSTICE SOTOMAYOR: What is considered  
4 a final order is a contempt finding, something  
5 else that happens as a result of your failure  
6 to act, not the request for you to come to  
7 court.

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

17 JUSTICE SOTOMAYOR: But we don't know  
18 that --

19 JUSTICE KAGAN: General, if -- if I  
20 could --

21 JUSTICE ALITO: What would have  
22 happened if you had told the district court,  
23 well, fine, you've issued an opinion, but we're  
24 going ahead and we're going to conduct  
25 elections under the map that was adopted by the



1 state legislature?

2 MR. KELLER: We --

3 JUSTICE ALITO: What would have  
4 happened?

5 MR. KELLER: We would have been held  
6 in contempt for not obeying this order. And we  
7 didn't have to suffer the threat of contempt to  
8 be able to appeal.

9 And when we moved for a stay in this  
10 Court, we informed the Court that we needed to  
11 know by October 1, 2017, what the status of our  
12 districts were.

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

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

24 If I can turn from the jurisdictional  
25 issue now to the merits.

1           JUSTICE KAGAN:  General, if I could --  
2    I'm sorry.  But I guess I -- you -- you were  
3    saying before you were interrupted, you said  
4    what distinguishes this case, and I guess I do  
5    want to know what does distinguish this case,  
6    or is -- if in finding that there's  
7    jurisdiction here, are we going to be finding  
8    that there's jurisdiction after the liability  
9    stage at all redistricting cases?

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

20           CHIEF JUSTICE ROBERTS:  Counsel --

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

1 between 3 and 45.

2 MR. KELLER: Sure. Justice Kennedy, I  
3 think so, because this Court's precedent, *Wise*  
4 versus *Lipscomb*, says that there must be a  
5 reasonable opportunity for the legislature to  
6 have to correct any deficiencies in the map,  
7 when a part-time legislature is out of session  
8 and a court is putting the state's -- the  
9 sovereign authority of use it or lose it only  
10 within 45 days, I -- I think that would still  
11 be practically an injunction, but, again, here,  
12 it was nothing close to 45 days.

13 It was within three days the governor  
14 had to call a special session. That's  
15 certainly not a reasonable opportunity.

16 CHIEF JUSTICE ROBERTS: I have a  
17 question on the merits.

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

21 MR. KELLER: 2012.

22 CHIEF JUSTICE ROBERTS: 2012 plan.  
23 And I -- I think a concern, though, is that the  
24 district court plan was not comprehensive. It  
25 -- it was put in quickly based -- it was

1 preliminary, as opposed to permanent.

2 And I wonder if that undermines the  
3 weight you can place on it?

4 MR. KELLER: Well, I don't think so,  
5 Mr. Chief Justice, for three reasons: First of  
6 all, there was plenty of process in the court  
7 in 2011 and 2012. This was not actually a  
8 preliminary injunction posture. Preliminary  
9 injunctions had been granted in 2011.

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

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

24 And then, at that point, the district  
25 court in 2012 issued tens of pages of written

1 findings and conclusions imposing those maps  
2 that actually change nine congressional  
3 districts and 28 state house districts.

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

17 JUSTICE SOTOMAYOR: Mr. General --

18 MR. KELLER: -- by discriminatory  
19 purpose."

20 JUSTICE SOTOMAYOR: General, one of  
21 the things in this recitation that you forget  
22 is that it wasn't just that court opining on  
23 these maps. It was also in August of 2012 the  
24 D.C. district court who -- who found these maps  
25 and the districts that were left untouched

1 suspicious and who found intentional  
2 discrimination with respect to some, that found  
3 questionable some of the claims and reasons  
4 that were given by the legislature for these  
5 districts.

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

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

18           MR. KELLER: The D.C. court, though,  
19 did not find issues with the districts that had  
20 been validated. Indeed, in 2011, plaintiff's  
21 counsel MALDEF told the legislature that the  
22 court-ordered maps, the 2012 court-ordered maps  
23 from the district court in San Antonio fixed  
24 every district where even Section 5  
25 preclearance was denied. This is at

1 C.J.S. Appendix 436(a) to 439(a). Plaintiffs  
2 do not dispute that.

3 So what the evidence that the  
4 legislature heard in 2013 was that the maps had  
5 been fixed even beyond the analysis that the  
6 court performed, also, to address plaintiff's  
7 argument that somehow the process was rushed in  
8 2013. That is clearly erroneous.

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

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

22 There were a couple congressional  
23 districts that were left in place that  
24 plaintiffs were challenging, but the district  
25 court in 2012 issued seven pages and six pages,

1       respectively, of analysis that CD35 and CD27  
2       were valid.

3                If that is not a basis on which a  
4       legislature can rely on a federal court's  
5       opinion, I'm not sure there's any breathing  
6       space left --

7                JUSTICE KAGAN:   Well --

8                MR. KELLER:   -- for legislatures  
9       engaging in redistricting --

10               JUSTICE KAGAN:   -- but it --

11               MR. KELLER:   -- to honor both their  
12       constitutional and VRA obligations.

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

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

24               And so, to turn that around and to say  
25       this is a safe harbor for the state, isn't it



1 essentially to stop every case at the  
2 preliminary injunction stage?

3 MR. KELLER: Justice Kagan, our  
4 position is not that somehow this was a  
5 categorical safe harbor, that the 2011  
6 legislature's actions could not be examined.  
7 But what can't happen is that only 2011 is  
8 examined in isolation. This case did not end  
9 in 2011.

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

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

25 In that context, with or without a

1 presumption of good faith, there is no basis to  
2 find that the Texas legislature was somehow  
3 invidiously racially discriminatory when what  
4 it did is it adopted the entire congressional  
5 map and virtually all the state house map that  
6 it had been ordered to use.

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

13 MR. KELLER: It is.

14 (Laughter.)

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

21 The second map, nothing. But the  
22 second map is exactly the same. What should a  
23 court do with respect to the second map?

24 MR. KELLER: Justice Kagan --

25 JUSTICE KAGAN: Should it just say

1       there's no e-mails?

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

4                   JUSTICE KAGAN:  I know it is.

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

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

22                   Mr. Chief Justice, if I may reserve  
23      the remainder of my time.

24                   CHIEF JUSTICE ROBERTS:  Thank you,  
25      counsel.

1 Mr. Kneedler.

2 ORAL ARGUMENT OF EDWIN S. KNEEDLER

3 ON BEHALF OF APPELLEE UNITED STATES

4 IN SUPPORT OF THE APPELLANTS

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

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

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

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

23 JUSTICE KAGAN: Mr. -- Mr. Kneedler,  
24 that might be true. It might have been a  
25 terrible decision to give only three days, but

1     suppose that the court had given three weeks.  
2     Why would that have made a difference for this  
3     question of whether something is an injunction  
4     or has the practical effect of an injunction?

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

10            October 1 was a -- a deadline that the  
11     parties and the court in this case accepted,  
12     when -- when preliminary measures had to be  
13     taken to institute the election.  This was only  
14     45 -- about 45 days away from the district  
15     court's opinion.

16            JUSTICE SOTOMAYOR:  Mr. Kneedler, what  
17     do -- what rule do we set to know how much time  
18     is enough time?  Meaning, in all of these  
19     election cases, it seems to me that every  
20     single one of them, even if it's decided today,  
21     I'm going to hear that in eight months they  
22     have to do something.  In three months after  
23     that, they have to do something else.  In this  
24     amount of time after that, they have to do  
25     something else.  Until it's clear that a

1 district court tells a state: You can't use  
2 your map at all, even within 24 hours, this  
3 Court could intervene if need be.

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

7 MR. KNEEDLER: Again --

8 JUSTICE SOTOMAYOR: -- if -- if it's  
9 not permitted generally under the law.

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

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

1 defective, you will not be able to use this,  
2 and the states will not be able to rely upon it  
3 in an upcoming election, I think it would be  
4 very important for the federal government, for  
5 the nation as a whole --

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

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

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

25 I found no case. Now maybe you'll

1 tell us some. People have used the word  
2 "practical effects," but suddenly, when we stop  
3 that without an injunction and adopt that, what  
4 happens to the 4 million cases in the U.S.  
5 courts?

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

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

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



1 JUSTICE SOTOMAYOR: Mr. Kneedler --

2 CHIEF JUSTICE ROBERTS: Mr. Kneedler,  
3 you have about five minutes left. Could you  
4 move to the merits?

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

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

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

25 The court had extensive proceedings at

1 -- at that stage. And that in our view gave --  
2 would have reinforced the proposition that the  
3 state legislature could rely upon that, and it  
4 -- it -- it certainly doesn't suggest any --  
5 any impermissible intent on the part of the  
6 state legislature.

7 JUSTICE SOTOMAYOR: So how --

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

19 And I think you acknowledge that.  
20 Don't you think?

21 MR. KNEEDLER: Again, depending on --  
22 depending on the circumstances, but --

23 JUSTICE KAGAN: Of course. Everything  
24 depends on the circumstances. The -- the --  
25 the facts, which, you know, this Court is the

1 -- has principal authority over.

2           The second thing that you acknowledge  
3 in your brief is that these court orders,  
4 especially at this preliminary stage, are not  
5 safe harbors. Don't you think?

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

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

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

1 found by the district court, was eliminated.

2 JUSTICE KAGAN: But I don't think that  
3 it did that. And I -- I recognize that there  
4 are some sentences which can be read either  
5 way. But if I understand you correctly, you're  
6 suggesting that there was a shift in the burden  
7 of proof. And that would be a legal error.

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

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

20 So it's talking about here is the way  
21 the plaintiffs can establish their claim. What  
22 happened in 2013?

23 MR. KNEEDLER: Yes, but -- but if --  
24 if you read that whole section of the district  
25 court's opinion, it puts great weight on -- on

1 its perception that the -- the state  
2 legislature was required to engage in a -- a  
3 deliberative process to make sure it was  
4 undoing prior taint.

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

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

15 MR. KNEEDLER: But --

16 JUSTICE KAGAN: -- after having done a  
17 map that's tainted with all kinds of  
18 discriminatory intent.

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

1 2013.

2 And, here, we think that the district  
3 courts -- that's basically a record. The  
4 district court's opinion, even though  
5 preliminary, was -- was a record --

6 JUSTICE SOTOMAYOR: I'm sorry, I  
7 thought the --

8 MR. KNEEDLER: -- before the -- before  
9 the legislature.

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

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

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

24 JUSTICE SOTOMAYOR: No, I think he  
25 said more. This won't resolve the taint that

1 -- I believe he said it won't resolve the --

2 MR. KNEEDLER: No, I don't -- I don't  
3 -- I don't believe that's what he said. I  
4 think he was just giving them advice that the  
5 district court's decision was preliminary and  
6 there -- and there could be -- there could be  
7 further litigation.

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

19 JUSTICE SOTOMAYOR: I -- I -- I --

20 MR. KNEEDLER: -- on the basis of an  
21 independent review that was conducted by an  
22 Article III court.

23 JUSTICE SOTOMAYOR: But may I ask  
24 something? There's end of litigation. Are you  
25 ending a litigation, or are you ending the

1 possibility of a court stopping you from  
2 discriminating?

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

13           MR. KNEEDLER: I --

14           JUSTICE SOTOMAYOR: It --

15           CHIEF JUSTICE ROBERTS: Why don't you  
16 answer, Mr. Kneedler. Then we'll let you sit  
17 down.

18           MR. KNEEDLER: Okay.

19           (Laughter.)

20           MR. KNEEDLER: I -- I -- I don't think  
21 that's a fair account of what the -- of what  
22 the record shows. And -- and if there are --  
23 first of all, if there are -- if there are --  
24 if there's indications going both ways, the  
25 presumption of good faith, and the -- and



1 there's no continuing taint, should cut in the  
2 -- should cut in the state's favor.

3 But the important point is that the --  
4 the -- it's the intent in 2013 and the desire  
5 to -- to accept what the district court did so  
6 that the state could move on.

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

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14 Mr. Hicks.

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

17 MR. HICKS: Mr. Chief Justice, and may  
18 it please the Court:

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

23 Justice Breyer asked a key question, I  
24 think, of -- of -- of the other side in this.  
25 He said, show me the language. Show me where

1 they entered an injunction.

2 The closest they can come, there --  
3 everybody agrees there was no remedy ordered,  
4 so the only question becomes was there an  
5 injunction against the 2018 elections for  
6 Congress -- I'm speaking of Congress -- going  
7 forward under the existing plan.

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

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

17 JUSTICE KENNEDY: Could -- could Texas  
18 have -- have used the current maps for the 2018  
19 elections?

20 MR. HICKS: Yes, in the absence --  
21 unfortunately, as far as we're concerned, but  
22 yes, in the absence of --

23 JUSTICE KENNEDY: I mean insofar as  
24 the court's order was concerned.

25 MR. HICKS: Yes. I don't think

1     there's any question about it.  If -- if they  
2     say we would have been held in contempt if we  
3     had gone forward, it would have been impossible  
4     to hold them in contempt because the court  
5     itself said:  We have not enjoined use of the  
6     plan for any -- for the upcoming elections.  So  
7     --

8                 CHIEF JUSTICE ROBERTS:  Well, but the  
9     judge -- the court gave the -- the governor  
10    three days --

11                JUSTICE BREYER:  Three days.

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

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

22                We had asked -- the court had, rather,  
23    had said two different times in the spring of  
24    2017 to the Texas Attorney General's Office,  
25    you should consider having the legislature --

1 the first time it was in special -- in regular  
2 session -- you should consider having them  
3 address the -- the problems that have cropped  
4 up so far in the districts that didn't change  
5 between 2011 and 2013.

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

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

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

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

1                   JUSTICE GINSBURG:  If you're -- if  
2  you're -- if you're right about the  
3  jurisdiction, that there is no injunction, what  
4  happens next?

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

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

22                   In the -- in the -- in -- after the  
23 March order on the old plan came down in -- in  
24 2017, we went to the court and said:  Will you  
25 give us an injunction as to the districts that

1 are the same between the old plan and the new  
2 plan? The court said no.

3 So we have tried. And -- and we also  
4 went at the end of 2016 and said: Please give  
5 us an injunction to stop the 2018 elections  
6 from going forward. The court said: No.

7 So we have knocked on the door three  
8 times and the court had said no.

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

15 JUSTICE GORSUCH: Counsel, are you  
16 suggesting you're not going to seek an  
17 injunction?

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

22 JUSTICE GORSUCH: But -- but it's your  
23 intention to seek an injunction on the basis of  
24 your --

25 MR. HICKS: For the Rodriguez

1 plaintiffs, I believe we will ask --

2 JUSTICE GORSUCH: Counsel -- counsel,  
3 the question is --

4 MR. HICKS: Yes. We do.

5 JUSTICE GORSUCH: -- if I might. If I  
6 might.

7 MR. HICK: We -- yes.

8 JUSTICE GORSUCH: You intend to seek  
9 an injunction on the basis of the order  
10 presently before us?

11 MR. HICKS: Yes.

12 JUSTICE GORSUCH: Okay.

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

22 I want to churn -- turn if I may --  
23 let me just mention one other thing about  
24 jurisdiction. The kinds of orders they say  
25 constitute an injunction -- injunctive relief,

1 they're case processing orders. They're  
2 schedule -- case scheduling orders. You know,  
3 show -- please show up on June 3 or whatever  
4 day for a hearing. Or send the Legislative  
5 Council people in that help us draw maps to  
6 help us draw the maps that day.

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

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

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

21           If the practical effects test that the  
22 Court has applied in Carson Brands, which I  
23 emphasize is only as to the denial of an  
24 injunction, not to the grant, which has to be  
25 much more specific, but if that practical



1 effects test is applied, there has to be  
2 something that indicates there is injunctive  
3 relief forthcoming. That is -- not  
4 forthcoming; rather, there is injunctive relief  
5 embedded in this. This Court knows to how to  
6 look at something and tell if it's an  
7 injunction or not.

8 JUSTICE GINSBURG: Has -- has the  
9 practical effects been applied in the 1253  
10 context as distinguished from 1292?

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

1 entered --

2 CHIEF JUSTICE ROBERTS: Counsel --

3 MR. HICKS: -- under Appendix B or  
4 whatever.

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

9 (Laughter.)

10 MR. HICKS: Sorry.

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

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

1           MR. HICKS: Right. That isn't what  
2 gave them the presumption of good faith. They  
3 always have a presumption of good faith when  
4 the legislature acts. That's the first step,  
5 is presume good faith. And the district court  
6 proceeded from that. But, in this particular  
7 instance, the district court did not in 2012  
8 draw a map. It did not draw a map.

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

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

19           MR. HICKS: I understand that, but in  
20 this one, there were -- half of the Texas  
21 congressional districts were not touched in the  
22 interim map, not touched at all, including  
23 these two --

24           CHIEF JUSTICE ROBERTS: Does -- is  
25 your answer different if they did alter every

1 single district in Texas?

2 MR. HICKS: Well, my answer is it  
3 would then be a court-drawn map in the  
4 districts, and it would be court-drawn. But  
5 these two districts were not court-drawn, as  
6 well as 16 other districts there were not  
7 court-drawn.

8 CHIEF JUSTICE ROBERTS: How -- how --  
9 how many of the Texas districts were redrawn or  
10 altered?

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

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

1       legality of those districts?

2               MR. HICKS:  It did as thorough an  
3       analysis, I believe, as it could under the  
4       constraints.  And that is not a thorough  
5       analysis.

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

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

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

25              They said it's a close question.  I

1 don't know how many times they said it's a  
2 close question. It's for this time only. And  
3 the state, when it came up here to -- before  
4 you on a stay request by LULAC in -- in 2016, I  
5 think it was, the -- the state told you: Hey,  
6 it's just a one-time deal, that map. It's just  
7 a one-time deal. We quote that in our brief.

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

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

1 They said there is a crossover district where  
2 people -- minority voters' rights are being  
3 exercised.

4 Also, in between, the United States  
5 had intervened in a different posture back  
6 then. The United States had intervened and  
7 opposed the map in D.C., and that evidence had  
8 been introduced. That was all new evidence  
9 that didn't exist in 2012.

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

15 Is it not true that this -- this --  
16 the concept of this district was recommended by  
17 the Mexican-American Legal Defense and  
18 Education Fund and supported by the Latino  
19 Redistricting Task Force?

20 MR. HICKS: The concept was one of two  
21 alternatives. It was April 11th testimony,  
22 April 11, 2011, if you -- transcript --  
23 Exhibit 591, if I recall correctly. MALDEF  
24 goes in early in the session and says: We have  
25 two maps. One is a concept similar to this,

1 and the other one is an alternative map that  
2 does what we think should have happened. And  
3 they say we don't have a choice between them.  
4 And they offered no --

5 JUSTICE ALITO: But they recommended  
6 this as one of the alternatives, right?

7 MR. HICKS: Right. It is, but there  
8 was --

9 JUSTICE ALITO: Linking -- linking San  
10 Antonio and -- and Austin, and they said there  
11 was a community of interest. And the district  
12 court said that in its initial opinion, did it  
13 not?

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



1 had no evidence.

2 JUSTICE ALITO: I thought there was  
3 evidence that there was racially polarized  
4 voting in the district as a whole.

5 MR. HICKS: There is -- the state  
6 offered no evidence at all on that. The state  
7 offered no evidence. We offered evidence.

8 JUSTICE ALITO: You offered evidence  
9 about Travis County.

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

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

23 JUSTICE ALITO: At the time it acted,  
24 it had the district court's opinion, did it  
25 not?

1 MR. HICKS: At the time in 2013?

2 JUSTICE ALITO: Yeah. Isn't what  
3 we're looking at?

4 MR. HICKS: At the time it acted in  
5 2013 -- yes, it did, and the district court  
6 said we need more facts. That's specifically  
7 what it said. And in the meantime, facts had  
8 come in that showed that race, better than  
9 party, explained the divisions in Travis  
10 County.

11 But the most important fact, Your  
12 Honors, the most important fact the legislature  
13 had in front of it in 2013 that it didn't have  
14 in 2011 was that the elections had occurred  
15 under that map, and what did the legislature  
16 know in 2013 that it didn't know in 2011, that  
17 what it had intended to do -- what it had  
18 intended to do had, in fact, happened.

19 They had achieved everything they  
20 wanted with this map with respect to these  
21 districts, with regard to the racial -- the --  
22 the tamping down of racial voting rights and so  
23 on. That's the most important factor that they  
24 had.

25 And the effects part of this under

1 Arlington Heights is the most important thing  
2 to note. In 2013, they knew they had  
3 succeeded. They had succeeded.

4 Just briefly, Your Honor.

5 CHIEF JUSTICE ROBERTS: You've got a  
6 couple more minutes too.

7 MR. HICKS: Okay. Just briefly on  
8 this point, I would like to wrap up with this  
9 in -- in -- in -- on this very point. In --  
10 about a week ago, in the Dimaya case, this  
11 Court repeated a quip -- I guess you can call  
12 it a quip -- from Justice Scalia, and it said  
13 insanity is doing the same thing over and over  
14 again and expecting a different result.

15 Well, the Texas legislature is not  
16 insane. It knows -- it -- it knows how to do  
17 redistricting maps and we believe it knows how  
18 to do them, too, fairly well with respect to  
19 diminishing minority voting rights.

20 So I would ask the Court to look at it  
21 this way: If you've done it in 2011 and you  
22 know the outcome of it, discrimination is doing  
23 the same thing over and over again and  
24 expecting and achieving exactly the same  
25 results.

1                   And that's what happened here, Your  
2 Honor. Thank you.

3                   CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5                   Ms. Riggs.

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

8                   MS. RIGGS: Mr. Chief Justice, and may  
9 it please the Court:

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

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

1 quite voluminous.

2           The jurisdictional question has been  
3 discussed quite a bit. There's one gloss I'd  
4 like to add to what's already been mentioned.

5           First is that the rule in Gunn, which  
6 is -- is restrictive and doesn't create any  
7 exceptions, has been applied in a redistricting  
8 case in Whitcomb. So there's precedent for --  
9 for Gunn being read as we urge it to be read.

10           And then there's the practical  
11 consequence of not affording a restrictive  
12 reading to 1253. All redistricting cases  
13 involve timing and all election deadlines start  
14 at different times.

15           This invites manipulation to create  
16 exceptions in -- under 1253 and in  
17 redistricting cases, and the exception would  
18 eat the rule.

19           Then turning to the merits. I think  
20 it's helpful to look at the district court's  
21 analysis of what the evidence in 2013 and all  
22 of the evidence in front of it as falling into  
23 buckets that match up with the Arlington  
24 Heights framework. And I submit to you that if  
25 you look at the district court's opinion,

1     there's three obvious buckets of evidence that  
2     it identifies.

3             One relates to the 2011 redistricting  
4     plans for state house. Another is the -- an  
5     analysis of the actual motivation of the  
6     legislature compared to its proffered motive --  
7     motive -- offered justification. And third is  
8     process problems with respect to 2013 that  
9     could give rise to an inference of  
10    discriminatory intent.

11            I want to start with that 2011 bucket  
12    because it provides several pieces of relevant  
13    information under the Arlington Heights  
14    framework.

15            First, the effect of a redistricting  
16    plan is, under Arlington Heights, an important  
17    place to start, and the district court made  
18    extensive findings about the discriminatory  
19    effect that the 2011 House plan would have.

20            And, as Mr. Hicks mentioned, the  
21    legislature knew in 2013 that the intended  
22    effect had, in fact, manifested. The -- the  
23    2011 process and facts also provide historical  
24    evidence of discrimination, not historical  
25    evidence 10 years ago, 15 years ago.

1 JUSTICE ALITO: Well, has there -- has  
2 there ever been appellate review of the  
3 district court's determination -- findings as  
4 to the 2011 plan? Do you -- do you think that  
5 we should just accept those findings as givens?  
6 If you're going to place a lot of weight on  
7 them, would we not have to review those?

8 MS. RIGGS: They would be subject to a  
9 clearly erroneous standard. As I understand  
10 it, Texas challenges that the review of the  
11 2011 plans was moot. It should have never  
12 happened. But doesn't seriously contest the  
13 actual factual findings made by the district  
14 court, which were quite extensive.

15 And on the basis of --

16 JUSTICE ALITO: Well, we can ask  
17 General Keller that on rebuttal, but I didn't  
18 understand them to say that we agree that all  
19 of the findings that were made as to the 2011  
20 plan were correct, and we don't wish to -- we  
21 -- we -- we accept them all.

22 MS. RIGGS: I'm certain they don't  
23 accept them. But based on 300 pages of factual  
24 findings with respect to the intent and effect  
25 of the challenged 2011 House districts, it

1 would be very hard to challenge those findings  
2 as clearly erroneous.

3 I also think the 2011 evidence is  
4 properly conceived of as part of the -- the  
5 sequence of events that led up to the 2013  
6 challenged legislation; that is, the same  
7 people doing the same thing in 2011 as they did  
8 in 2013 can be viewed as part of the same  
9 process.

10 The -- the district court didn't have  
11 to issue a separate opinion with respect to the  
12 2011 plan. They could have combined that all  
13 together as one process, and the 2011 findings  
14 -- so the 2011 findings fall under numerous  
15 Arlington Heights frameworks.

16 I want to spend a few minutes talking  
17 about specific districts, though, because what  
18 the district court sussed out was a troubling  
19 pattern that repeats what this Court saw last  
20 redistricting cycle from Texas. It's LULAC v.  
21 Perry all over again.

22 In House District 105 in Dallas  
23 County, Latino voters were 19 votes shy from  
24 electing their candidate of choice in the  
25 district. And the legislature in 2011 went to



1 extreme lengths to protect that Anglo incumbent  
2 -- incumbent from being held accountable to the  
3 growing Latino population in that district.  
4 The -- the legislature carved up precincts,  
5 pulled every Anglo voter in western Dallas that  
6 it could find to pack into 105 and protect the  
7 Anglo incumbent, and carving those same  
8 precincts pulled out every Latino and black  
9 voter from House District 105.

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

19 MS. RIGGS: The district court's  
20 findings were based on the fact that precincts  
21 were split. You don't have political data at  
22 the sub-precinct level, so when the legislature  
23 -- when the legislature was drawing those  
24 lines, it was only grabbing Anglo voters. It  
25 was not grabbing what it knew to be Republican

1 voters. It was using -- it may have been using  
2 race as a proxy for partisanship, but that's  
3 certainly not acceptable either.

4 Likewise --

5 CHIEF JUSTICE ROBERTS: I'm sorry,  
6 I've lost track of the -- which districting are  
7 you talking about with respect to 105? Was it  
8 20 -- the 2011 or 20 --

9 MS. RIGGS: 2011.

10 CHIEF JUSTICE ROBERTS: Okay. Sorry.

11 MS. RIGGS: And -- and, likewise, in  
12 Nueces County, importantly, the district court  
13 didn't have all of the -- I'm sorry, I meant to  
14 say Bell County, House District 54 in Bell  
15 County. Likewise, the district court when it  
16 was making its interim ruling in 2012 didn't  
17 have all of the relevant evidence in front of  
18 it.

19 It had yet to hear the live testimony  
20 of Representative Jimmie Don Aycock, who drew  
21 the district in House District -- who drew  
22 House District 54 and who stated that if he had  
23 kept Killeen whole, as it had been kept whole  
24 in numerous versions of the districts before,  
25 because the population growth in Killeen had

1     been so explosive amongst minority voters, if  
2     he left that district whole, it would be a  
3     naturally occurring minority coalition district  
4     and it would have got him unelected.

5             JUSTICE GORSUCH:   Well --

6             CHIEF JUSTICE ROBERTS:   Are these --

7             JUSTICE GORSUCH:   -- what -- what are  
8     we -- sorry.

9             CHIEF JUSTICE ROBERTS:   Go ahead.   Are  
10    -- are these districts that the district court  
11    in entering its preliminary map looked at?   Is  
12    that your -- is that where I am on this, is  
13    that these are things that the district court  
14    changed but didn't have this additional  
15    information before it?

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

20            And, importantly, these are hard  
21    questions.   It requires a delicate sussing out  
22    of the evidence to determine whether race or  
23    party predominated.   And the district court  
24    didn't have all of the evidence, and that's a  
25    -- I agree with General -- it was either

1 General Keller or Mr. Kneedler, that it is a  
2 serious thing to find that a legislature acted  
3 with invidious discrimination.

4 This district court was acting very  
5 carefully to make sure that it had done that  
6 proper sussing out. And, in fact, in many  
7 places, it found that district lines were drawn  
8 for political reasons, not racial reasons. So  
9 it -- this district court knows how to do that  
10 very delicate analysis. It did it. But it  
11 followed the evidence where the evidence led  
12 it.

13 CHIEF JUSTICE ROBERTS: It did it --  
14 it did it when? In the 2012 order?

15 MS. RIGGS: It -- it did it when it  
16 issued the 2011 opinion.

17 CHIEF JUSTICE ROBERTS: Okay.

18 MS. RIGGS: It -- between the remand  
19 to this Court on January 20, 2012, and when the  
20 plan needed to be -- was constructed, February  
21 28, I don't think the court had the time or all  
22 of the evidence to do this very delicate  
23 balancing.

24 CHIEF JUSTICE ROBERTS: But if you're  
25 the Attorney General or -- or the -- the

1 legislature in Texas and you want to take your  
2 best shot at a plan that will be accepted by  
3 the district court, wouldn't you take the plan  
4 that the district court drafted?

5 MS. RIGGS: You might take that as a  
6 starting point. And that was the advice the  
7 Texas legislature's counsel gave it during  
8 committee meeting.

9 But the district court really had --  
10 had the question before it, that, did the  
11 legislature adopt the interim plan for  
12 race-neutral reasons, or did it use the  
13 adoption of that interim plan as a mask for the  
14 discriminatory intent that had manifested  
15 itself just two years ago?

16 CHIEF JUSTICE ROBERTS: Well, who was  
17 doing the masking? The district court when it  
18 drew up the preliminary plan?

19 MS. RIGGS: No, the legislature in --  
20 in invoking the adoption of the 2012 interim  
21 plan as having been a safe harbor, essentially,  
22 is the one masking. And this -- the district  
23 court is the -- is the body that is well poised  
24 to sniff out pretext and to sniff out real  
25 justification.

1           And a unanimous three-judge panel  
2           concluded that, in fact, the -- you know,  
3           wanting to end the litigation and adopting the  
4           interim plan was, indeed, a mask for  
5           discrimination.

6           CHIEF JUSTICE ROBERTS: That's --

7           JUSTICE GORSUCH: Counsel, what do we  
8           do -- I'm sorry.

9           CHIEF JUSTICE ROBERTS: Go ahead. No,  
10          I'm done. Okay.

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

22          How is it -- how is a state supposed  
23          to balance its Section 2 obligations against  
24          the Fourteenth Amendment obligations? It seems  
25          like you're -- you're catching them on a bit of

1 a horns of a dilemma.

2 MS. RIGGS: Well --

3 JUSTICE GORSUCH: Is there a way  
4 through the thicket?

5 MS. RIGGS: There is and I think this  
6 Court's provided that guidance in recent cases  
7 as well, but -- consistent with instruction  
8 dating as far back as the '90s. To answer your  
9 question, though, the district court found as a  
10 matter of fact that the legislature did not  
11 create House District 90 with VRA compliance in  
12 mind. They found as a matter of fact that  
13 House District 90 employed a mechanical racial  
14 target. Those are findings that are not  
15 clearly erroneous and do -- and -- and then  
16 must be affirmed.

17 The state -- the state can protect  
18 itself by doing the types of Voting Rights Act  
19 inquiries that this Court has seen in previous  
20 cases and making sure that when it does use  
21 race in a predominant fashion, it does it in a  
22 narrowly tailored sense.

23 JUSTICE ALITO: But what is your  
24 evidence that the state adopted the plan  
25 previously approved by the court for an

1 invidious reason?

2 MS. RIGGS: The evidence that the  
3 district court looked at in -- in arriving at  
4 that conclusion and -- and drawing the  
5 inference from the evidence in front of it was  
6 multiple -- multifaceted.

7 One was that the -- the district court  
8 -- the legislature ignored the explicit  
9 warnings of the district court that its ruling  
10 was preliminary; it wasn't done looking. The  
11 next was that the -- it -- it had in front of  
12 it the ruling from the D.C. district court.

13 Now the D.C. district court ruling  
14 didn't reach discriminatory purpose with  
15 respect to the state house case, but it noted  
16 that the -- this -- it listed a bunch of record  
17 evidence that it said would support a finding  
18 of discriminatory purpose.

19 It also noted that the legislature had  
20 -- had the advice of counsel during the  
21 legislative committee meetings and floor  
22 meetings. And -- and there I would point --

23 JUSTICE ALITO: The advice -- the  
24 advice of what? That it was preliminary? The  
25 original opinion was preliminary?



1           MS. RIGGS: So that's the particular  
2 piece of advice from that exhibit that the  
3 district court cited, but that exhibit, Joint  
4 Exhibit 15.3, contains other advice from  
5 legislative counsel, Mr. Archer, in which he  
6 explains to members of the committee that House  
7 District 54, where minority voters had been  
8 fractured, cut in half, and stranded in two  
9 Anglo districts, might have a target on its  
10 back, and that the legislature, if it wanted to  
11 avoid being found guilty of intentional  
12 discrimination, ought to consider reuniting  
13 that -- that district.

14           So this is the evidence that they had  
15 in front of them. As late as May of 2013, we  
16 had a status conference in the San Antonio  
17 court, where we discussed the need for further  
18 evidence. That status conference was discussed  
19 in -- during the legislative proceedings. This  
20 is the -- the evidence before the district  
21 court in concluding that the actual motivation  
22 was, in fact, an intent to discriminate.

23           JUSTICE BREYER: What -- what is the  
24 law on the -- what is the law, in your opinion,  
25 not the facts, if you assume the following:

1 One, there is an old plan and a state  
2 legislature thinks, you know, this old plan  
3 might really have been discriminatory; I wasn't  
4 here then, I didn't do it, but I see the point.

5 Two, there is a judge who says this is  
6 okay, but, remember, I haven't seen all the  
7 evidence, I might change my mind, please 1,000  
8 cautions. And then we have bishops who look  
9 into the heart of the new legislature and they  
10 discover that the reason they passed it really  
11 was because it's our best shot. You see?

12 Now imagine those three facts. What's  
13 the law?

14 MS. RIGGS: The law is still Arlington  
15 Heights and that even though the bishops  
16 determined that there may be a motivating -- a  
17 factor that --

18 JUSTICE BREYER: No, they determined  
19 that's the real reason. They all voted because  
20 it's our best shot. It's our best shot to get  
21 the old plan through. See? Or some version  
22 thereof. That's it. Just thought it's the  
23 best shot. Got the fact? That's the  
24 assumption.

25 Now what's the law?

1 MS. RIGGS: So the law I think -- that  
2 I would point Your Honors to is the Guinn and  
3 Lane line of cases where, when a statute is  
4 enacted and -- and struck down for being  
5 unconstitutional and then reenacted the next  
6 year, if it partakes too much of the initial  
7 constitutional infirmity, it cannot stand under  
8 the Constitution.

9 I would also add, though, that wanting  
10 to end the litigation, even if it's coming from  
11 a -- a good place, doesn't end the  
12 constitutional scrutiny. Racial discrimination  
13 needs to be only one of the factors, not the  
14 only or sole or dominant motivating factor.

15 And -- and litigation strategy,  
16 wanting to win, doesn't end the constitutional  
17 inquiry. If we -- if it did, we wouldn't need  
18 Batson challenges.

19 But more importantly, it's not that  
20 they wanted to -- it doesn't matter whether  
21 they wanted to end the litigation or not; it  
22 matters how they wanted to end the litigation.  
23 And they wanted to end the litigation by  
24 maintaining the discrimination against black  
25 and Latino voters, muffling their growing

1 political voice in a state where black and  
2 Latino voters' population is exploding.  
3 They're poised to take over in all of these  
4 districts. It was that intent that they wanted  
5 to muffle.

6 CHIEF JUSTICE ROBERTS: And that --  
7 and that -- don't you have to suggest that that  
8 was the intent that the district court had when  
9 it imposed the interim plan? Because keep in  
10 mind, this -- this evil intent that you're  
11 attributing comes from adopting the plan that  
12 the district court adopted and let the  
13 elections go forward under for two cycles.

14 MS. RIGGS: Well, the intent doesn't  
15 have to encompass any racial animus. I think  
16 the district court did the best it could with  
17 the time it had and the evidence it had.

18 CHIEF JUSTICE ROBERTS: But the intent  
19 doesn't have to encompass any racial animus?

20 MS. RIGGS: No. Discrimination --  
21 just -- the discrimination that would fall  
22 under the prohibitions of the Fourteenth  
23 Amendment doesn't have to come from a deep,  
24 hateful place. It has --

25 CHIEF JUSTICE ROBERTS: Not a deep,

1 hateful place. It has to be -- doesn't it have  
2 to be racial -- intentional racial  
3 discrimination? Which sounds pretty deep and  
4 hateful.

5 MS. RIGGS: I -- I -- intentional  
6 racial discrimination certainly attaches where  
7 there's a purposeful intent to keep a cohesive  
8 minority group from exercising the opportunity  
9 to elect their candidate of choice where they  
10 might otherwise have it, absent that  
11 intervention, but I don't think that's the same  
12 thing as racial animus.

13 Very briefly, I would like to note  
14 that regardless of what this Court does on the  
15 questions of intent, in the House case, we have  
16 two districts, two claims that are independent  
17 of any intent, and one is House District 90,  
18 which I already spoke with -- about with  
19 Justice Gorsuch.

20 The other is the Section 2 effects  
21 claim in Nueces County, and there the dispute  
22 boils down to a very narrow question. There's  
23 no dispute that there's racially-polarized  
24 voting and that under a totality of the  
25 circumstances, Latino voters in Nueces County

1 have been less likely -- less able to elect  
2 their candidate of choice.

3           The dispute comes down to, under the  
4 first prong of Gingles, which just requires  
5 plaintiffs show that you can draw an additional  
6 majority Latino district, the state wants to  
7 import an additional requirement into the first  
8 prong of Gingles that requires plaintiffs to  
9 also prove that the district is performing.

10           And I -- that is not consistent with  
11 this Court's recent ruling in Bartlett v.  
12 Strickland. This Court set a bright line  
13 because a bright line is helpful to the states  
14 and helpful to plaintiffs. And the plaintiffs  
15 presented a demonstrative map that had one  
16 district at 55.2 percent Hispanic  
17 citizen voting age population and one at  
18 59.9 percent.

19           JUSTICE ALITO: Well, this would be  
20 very important going forward. You want us to  
21 hold that a -- a state can satisfy its Voting  
22 Rights Act obligations by creating a district  
23 where there is a mathematical majority, but  
24 that district would not perform for the  
25 election of the minority preferred candidate?

1 Do you want us to hold that?

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

3 JUSTICE ALITO: I thought that's what  
4 you were just saying.

5 MS. RIGGS: No. I think liability  
6 under Section 2, the effects test, has been  
7 proven when it's been shown that it's possible  
8 to draw two majority Latino districts.

9 JUSTICE ALITO: Yeah, and did the  
10 district court find that? I thought the  
11 district court did not find that you can create  
12 two performing districts in Nueces County.

13 MS. RIGGS: It said there was some  
14 question about whether they were actually going  
15 to be performing. It was using exogenous  
16 elections that didn't have Latino candidates in  
17 it. But this goes to the jurisdictional  
18 question, in fact.

19 That's an issue that still needed --  
20 needs to be determined, and this Court can't  
21 resolve that at this stage in the case. Thank  
22 you.

23 CHIEF JUSTICE ROBERTS: You can have  
24 another minute if you'd like.

25 MS. RIGGS: The -- the -- the only

1 thing I would add to that, Justice Alito, is  
2 that the court said that the -- this was just  
3 the liability stage. So proving a majority  
4 Hispanic citizen voting age population at the  
5 liability stage is what gets you to the next  
6 stage.

7 JUSTICE ALITO: Yeah, and to --

8 MS. RIGGS: And if you --

9 JUSTICE ALITO: -- and to establish  
10 liability, is it not necessary to show that you  
11 could create another performing district?

12 MS. RIGGS: Yes. And --

13 JUSTICE ALITO: And did the district  
14 court find that you could do that, and is it  
15 not true that one of the plaintiffs' experts  
16 found that one of these districts, if you split  
17 Nueces County in half, would not perform one  
18 time in 35 elections and the other one -- in  
19 the other, it would perform seven times in 35  
20 elections?

21 MS. RIGGS: I misspoke earlier. The  
22 -- the -- proving liability is just the  
23 additional majority district. It's not  
24 performing.

25 Plaintiffs do believe they can draw up



1 performing districts. They just haven't had  
2 the opportunity to present those maps yet.  
3 They -- the liability maps are something  
4 different. And a state can -- can understand  
5 that there's Section 2 liability and then  
6 engage in a meaningful debate about drawing  
7 performing districts.

8 JUSTICE SOTOMAYOR: I'm sorry.

9 CHIEF JUSTICE ROBERTS: Thank --  
10 please.

11 JUSTICE SOTOMAYOR: Was 90 a Gingles  
12 test, or was it an intentional discrimination  
13 finding?

14 MS. RIGGS: Neither, Your Honor. It  
15 was a racial gerrymandering, a Shaw finding.

16 JUSTICE SOTOMAYOR: And I don't think  
17 we need to prove that fact of -- of whether you  
18 create a -- a majority or minority; is that  
19 correct?

20 MS. RIGGS: Right, Your Honor, just  
21 that race predominated without a compelling  
22 interest and race was not used in a narrowly  
23 tailored fashion.

24 JUSTICE SOTOMAYOR: So, I guess --

25 CHIEF JUSTICE ROBERTS: Thank -- I'm

1       sorry. Thank you, counsel.

2                   General, you have four minutes  
3 remaining.

4                   REBUTTAL ARGUMENT OF SCOTT A. KELLER

5                   ON BEHALF OF THE APPELLANTS

6                   MR. KELLER: I'll start very briefly  
7 with jurisdiction. You've heard plaintiffs say  
8 that they want to now modify the districts for  
9 2018. We've already had our primary elections.  
10 And that is precisely why this Court should  
11 note jurisdiction now and resolve these issues.

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

21                   The second major legal error was the  
22 Feeney well-accepted standard that to show  
23 intentional discrimination you must show that a  
24 legislature acted because of race with an  
25 intent to harm minorities and minority voting

1 power.

2 That was not the standard applied, and  
3 this brings me to my third major legal error,  
4 which was the test applied was the wrong  
5 question. It was, was taint removed even  
6 though there had been no finding of taint by  
7 the district court at that time.

8 JUSTICE SOTOMAYOR: So why don't we  
9 remand --

10 MR. KELLER: And also that reversed  
11 the burden --

12 JUSTICE SOTOMAYOR: -- then all of  
13 this just proves to me that, at best, all you  
14 get is a vacate this order and send it back  
15 under the right legal test.

16 MR. KELLER: Well, but in addition to  
17 those three major legal errors, there's also  
18 the fact that these findings were clearly  
19 erroneous.

20 First of all, there is no evidence,  
21 and you heard no evidence whatsoever today,  
22 that somehow the 2013 legislature was trying to  
23 mask an invidious intent that it had either  
24 carried over or not.

25 JUSTICE SOTOMAYOR: It's a very simple

1 argument. You know that what you wanted to do,  
2 which was to block Hispanic voters or other  
3 voters, and -- and get certain candidates  
4 elected, that your own counsel is telling you  
5 that in those -- in certain of those districts,  
6 that's exactly what you got, and you say we  
7 want to get the district court not to change  
8 these maps, that that's enough for the  
9 three-judge panel to conclude that you wanted  
10 to put in place the discriminatory intent and  
11 effect.

12 That's the simple argument.

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

21 Jeff Archer was simply saying this  
22 case, yes, litigation will not end. And even  
23 here, this is a -- it would be passing strange  
24 to find intentional discrimination in this case  
25 where there is no discriminatory effect. The

1     only place that we could draw an additional  
2     majority/minority district is that Nueces  
3     County state house map. And you heard counsel  
4     say that they don't know if it can perform.

5             The maps that they presented to the  
6     Court, their own expert, plaintiff's expert,  
7     MALC, testified and conceded that they --

8             JUSTICE SOTOMAYOR: Well, I have --

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

10            JUSTICE SOTOMAYOR: -- I have two  
11     questions. On racial gerrymandering, I don't  
12     think we've ever required a proof of effect.  
13     We've only required that you've intentionally  
14     gerrymandered --

15            MR. KELLER: But --

16            JUSTICE SOTOMAYOR: -- on the basis of  
17     race, is that correct?

18            MR. KELLER: And I'm referring to  
19     Nueces County, and that was a vote dilution  
20     effect claim. I'll turn to H -- I'll turn to  
21     HD90 --

22            JUSTICE SOTOMAYOR: All right, but  
23     then -- but that just answered my question. On  
24     racial gerrymandering, you don't have to prove  
25     it?

1           MR. KELLER: That's right, and I'll  
2           turn to racial gerrymandering in HD90, that  
3           would be the one district we did change. And,  
4           by the way, if we had changed other districts,  
5           then we would have been subjected to all sorts  
6           of additional legal challenges, which is  
7           exactly why the legislature acted in good faith  
8           in adopting the congressional map wholesale and  
9           virtually all the State House map.

10           In HD90, we had the best of reasons to  
11           believe that we had a valid VRA compliance  
12           defense. In 2011, MALDEF told the legislature  
13           the district had to be drawn as majority  
14           Hispanic. In 2012, the district court adopted  
15           the previous version as majority Hispanic.

16           In 2013, MALC's counsel told the  
17           legislature it had to be adopted as majority  
18           Hispanic. That's JA 403 to 404a. There were  
19           title actions after that where the Hispanic  
20           candidate narrowly lost and narrowly won.

21           JUSTICE GORSUCH: So what room --

22           MR. KELLER: And in this case --

23           JUSTICE GORSUCH: -- what room is left  
24           between our VRA jurisprudence under Section 2  
25           and the Fourteenth Amendment? What space is

1       there?

2                   MR. KELLER:   Well, and -- and -- and  
3       the breathing space that must be accorded is we  
4       -- we only need good reasons.

5                   And, Mr. Chief Justice, if I may  
6       answer.

7                   CHIEF JUSTICE ROBERTS:   Sure.

8                   MR. KELLER:   We do not have to have a  
9       perfect analysis ahead of time.   We just need  
10      good reasons that we were trying to comply with  
11      the VRA.   And take Congressional District 35,  
12      for instance.

13                   There, we had the best of reasons  
14      possible to believe that that had to be a  
15      majority/minority district because that's  
16      precisely what the district court imposed in  
17      2012, saying that that was a valid Section 2  
18      district.   And here we are now seven years  
19      later, three trials, and two appeals to this  
20      Court.

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

23                   CHIEF JUSTICE ROBERTS:   Thank you,  
24      counsel.   The case is submitted.

25

1                   (Whereupon, at 11:38 a.m., the case  
2 was submitted.)  
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