No. 05-254

In The
Supreme Court of the United States

TRAVIS COUNTY, TEXAS, *et al.*,

Appellants,

vs.

RICK PERRY, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Texas

REPLY BRIEF OF APPELLEE FRENCHIE HENDERSON IN SUPPORT OF APPELLANTS

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REPLY BRIEF OF APPELLEE FRENCHIE HENDERSON IN SUPPORT OF APPELLANTS

In the Present Case, No Constitutional Principle of Federalism Is Implicated by Permitting a Court to "Establish" Permanent Congressional Districts Until the Return of a Subsequent Federal Census.

In its Brief the State of Texas has essentially asserted an unfettered "constitutional right" to have its legislature supplant the valid congressional districting plan judicially established by the District Court in *Balderas v. Texas*, No. 6:01CV158 (E.D. Tex.) (unpublished), *aff'd memo.*, 536 U.S. 919 (2002). Contrary to the State's contention, this Court has never directly addressed whether Article I, Section 4 (hereinafter the "Elections Clause") delegates that superseding right to State legislatures; and, for the reasons stated below, the Court should reject the State Appellees's constitutional argument.[1]

[1] Of the seven Supreme Court decisions cited by the State of Texas and the District Court for the proposition that State legislatures constitutionally possess such a superseding power to alter valid congressional districts, see *State Appellees' Brief,* 52-53; *Session v. Perry*, 298 F.Supp.2d 451, 460 n. 14 (E.D. Tex. 2004); four did not involve congressional redistricting. See *Burns v. Richardson*, 384 U.S. 73 (1966) (State Senate districts); *Connor v. Finch*, 431 U.S. 407 (1977) (State House and Senate districts); *Wise v. Lipscomb*, 437 U.S. 535 (1978) (City Council districts); *White v. Regester*, 422 U.S. 935 (1975) (State House districts). In the remaining three decisions cited by the State on this point, in one a valid statewide congressional districting plan had not yet been established, judicially or otherwise, *Upham v. Seamon*, 456 U.S. 37 (1982); in another, no "final judgment" had been entered, *White v. Weiser*, 412 U.S. 783, 789 (1973); and in the third, *Branch v. Smith*, 538 U.S. 254 (2003) (involving yet another "interim" plan), the Court merely stated that "the District Court's alternative holding" (which was vacated by the Court) would not prevent Mississippi

(Continued on following page)

No constitutional principle of federalism is implicated by permitting Courts, at the direction of Congress, to "establish" permanent congressional districts until the return of a subsequent federal census, when, as here, a State legislature has wholly failed (deliberately) to timely enact new districts after a federal census and apportionment, and before the ensuing congressional election thereafter. As discussed in greater detail in Appellee Henderson's jurisdictional statement,[2] the First Congress of the United States considered and *rejected* a proposed constitutional amendment (adopted at the New York ratification convention) that would have "broadened" the power of State legislatures under the Elections Clause to include *precisely* the power to supersede federal regulations now claimed by the State of Texas. This rejected amendment was proposed by those who, like the State of Texas, "apprehend[ed] that the [Elections] clause might be so construed as to deprive the States of an essential right, which, in the true design of the constitution was to be reserved to them."[3] It's proponents sought, like the State of Texas seeks here, to ensure that federal election regulations implemented *via* the powers of Congress, and enacted as the result of a State legislature's default, would remain in effect "*only until the legislature of such state shall make provision in the premises*."[4] The fact that a Select Committee of the First Congress voted not to report

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from again "seeking to administer" a "redistricting plan adopted by the Chancery Court." *Id*., 538 U.S. at 265-266.

[2] *Henderson v. Perry*, No. 04-10649, pages 34-37.

[3] 2 *Elliot, The Debates of the Several State Conventions on the Adoption of the Federal Constitution*, 325-326 (hereinafter "*Elliot's Debates*").

[4] 1 *Elliot's Debates*, 329-330.

this amendment for further consideration[5] provides "inferentially meaningful" evidence of the Framers's intent;[6] and, being a "Decision of 1789," that decision constitutes "contemporaneous and weighty evidence of the Constitution's meaning."[7]

The Framers also understood the maxim *qui facit per alium facit per se*,[8] as did the 47th Congress when it was first to consider delegating its own Elections Clause power to other "constituted agencies" in order to compel dilatory or intransigent State legislatures to *timely* comply with a single member districting requirement.[9] The decision of the 90th Congress, embodied in present Title II U.S.C. Section 2c (hereinafter "Section 2c"), to delegate its own redistricting power under the Elections Clause to the courts – State and Federal, in order to compel dilatory or intransigent States to *timely* comply with the single member districting requirement (whether intended or not to foreclose "re-redistricting" by State legislatures before a subsequent federal census), simply does not, in any constitutional

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[5] 1 *Annals of Congress*, 786-788 (Aug. 18, 1789).

[6] *Cf*., *Mistretta v. United States*, 488 U.S. 361, 398 (1989) ("we find it at least inferentially meaningful that at the Constitutional Convention . . . [prohibitions] were proposed, but did not reach the floor of the Convention for a vote.").

[7] *Bowsher v. Synar*, 478 U.S. 714, 723 (1986). A similar but more limited amendment to the Elections Clause was debated and rejected three days later by the First Congress. 1 *Annals of Congress*, 797-802 (Aug. 21, 1789).

[8] 1 *The Records of the Federal Convention of 1787*, 234 (Farrand ed. 1911) ("What a man does by another, he does by himself.") (Statement of Delegate Roger Sherman, describing this "maxim") (June 13, 1787).

[9] 13 *Cong.Rec*., 1228 (1882) ("Whatever this Congress does by its constituted agent it does by itself.") (Statement of Rep. Thompson of Kentucky when proposing statutory predecessor to current Section 2c).

sense, infringe on any "States' rights." The District Court in *Balderas v. Texas*, when establishing congressional districts in 2001, was functioning as an agent of Congress pursuant to a *congressional delegation of authority* provided by federal statute and expressly permitted by the Elections Clause.[10]

In short, the State of Texas's claim to a "constitutional right" to pursue congressional redistricting at will *after* valid districts have been judicially "established" *via* Congressional authority pursuant to Section 2c, is not of constitutional dimension. It is instead either: 1) an argument that the State's newly enacted districts do not "conflict" (territorially) with those "established" by the *Balderas* court (which would "not depend on discerning the intent behind [Section 2c]");[11] or, 2) an argument that Congress, when enacting Section 2c, intended for State legislatures to retain such residual "re-redistricting"

[10] As noted by this Court in *Branch v. Smith*, prior to enactment of Section 2c, and in light of Title II, U.S.C. Section 2a (c), a plaintiff had no legal right to compel, and courts held no "equitable" power to decree, that a State be districted for congressional elections. *Id*., 538 U.S. at 269, citing *Park v. Faubus*, 238 F.Supp. 62, 66 (E.D. Ark. 1965). Because Section 2c involves *a congressional delegation of power* that conveys a "derivative right [to] the judiciary," 113 *Cong.Rec.* 31, 719 (Nov. 8, 1967) (statement of Sen. Baker on adoption of Section 2c), its authorization of congressional redistricting by courts, as opposed to State legislatures, is not "conspicuously" devoid of "participation in the process by a body representing the people." *Colorado General Assembly v. Salazar*, 541 U.S. 1093, 124 S.Ct. 2228, 2230 (2004) (Rehnquist, C.J., joined by Scalia and Thomas, J.J., dissenting from denial of certiorari).

[11] *Foster v. Love*, 522 U.S. 67, 73 (1997); and *id*., at 69 ("regulations made by Congress are paramount" when a "conflict" exists).

power wholly without regard for intervening population shifts or growth.[12]

Far from "preserv[ing] the relative roles of Congress and the states under the Elections Clause";[13] the District Court's explicit acceptance of the State of Texas's constitutional "States' rights" contention[14] unconstitutionally "broadens" the power delegated to State legislatures. Under the Elections Clause, valid federal election regulations do not yield, and cannot be made to simply evaporate, whenever a State legislature belatedly decides to enter an appearance.

Respectfully submitted,

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[12] The legislative history of Section 2c clearly demonstrates a contrary congressional intent. See *Henderson v. Perry*, No. 04-10649, *juris. stat*., at pages 27-30.

[13] *Session v. Perry*, 298 F.Supp.2d at 465.

[14] *Id.,* 298 F.Supp.2d at 464 n. 35 (requiring "clear" textual evidence of Framers's intent to "preempt" superseding power possessed by States *before* ratification).