No. 05-276

IN THE

Supreme Court of the United States

EDDIE JACKSON, *et al.*,
Appellants,
v.
RICK PERRY, *et al.*,
Appellees

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

REPLY BRIEF OF THE TEXAS STATE-AREA CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

REPLY BRIEF OF THE TEXAS STATE-AREA CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Our opening brief showed the district court erred (1) by viewing Plaintiffs' Section 2 grievance, seeking a remedy from the deliberate dispersal of Tarrant County's black community "into districts in which they constitute an ineffective minority," *Thornburgh v. Gingles*, 478 U.S. 30, 46 n.11 (1986), through the distorted lens of the "50% rule" and (2) by ignoring the context in which this occurred, *i.e.*, as part of a measure that drastically reduced minority voting strength statewide and reversed progress toward the "'interracial democracy,'" see *Georgia v. Ashcroft*, 539 U.S. 461 (2003), that the Texas NAACP and others – of all races and political affiliations – have labored to achieve.

The various Appellees assert that the Court may uphold that ruling, sometimes trying to show that the "50% rule" is correct and elsewhere claiming that the court made other "factual findings" that, if reviewed deferentially, could support affirmance. Both assertions are wrong: the 50% rule is indefensible as a matter of principle and precedent, and because the "clearly erroneous" standard does not insulate findings predicated on *legal* errors, the statements to which Appellees point would not, if they *were* findings, allow affirmance.

Rather than confine themselves to the conventional (albeit untenable) argument that the decision was not clearly erroneous, Appellees also ask the Court to accept that the plan "*expanded* minority opportunity" under the Voting Rights Act, State Br. 18 (emphasis added), and to drape what a *sympathetic* observer would describe as an act of raw partisan aggrandizement in the mantle of *Georgia v. Ashcroft* and the Civil Rights Movement. But no one who participated in these still-recent events (defendants least of all) could take such claims seriously – and Appellees' misguided and fundamentally counterfactual efforts do not make for easy reading.

I. The 2003 Plan Did Not "Expand Minority Opportunity" and It Is Nothing Like The One Considered in *Georgia v. Ashcroft*

Appellees do not attempt to back their claim of "expanded opportunity" with an explanation why every African-American legislator except one – who was voted out of office in the next election – voted against the plan;[1] why 89% of the 2,620 individuals attending public hearings spoke against it, see Ft. Worth NAACP *Amicus* Br. 3; why it met unanimous opposition from the State's minority civil rights groups, who urged the Justice Department to interpose an objection – or why civil servants in the Justice Department were equally unable to perceive its supposedly salutary effect.

The reasons for this reaction, set out in our opening brief, are hard to obscure. By every objective measure, the plan drastically reduced electoral opportunity for African-American and Latino voters, replacing an arrangement where minority voters elected or substantially influenced the election of 17 of 32 members of Texas's congressional delegation with one that divides the State into 10 "minority" districts and 22 Anglo districts; where African-American votes will be effectively irrelevant in almost all congressional elections and residents of the State's third-largest black community, previously able to elect their representative, were splintered into five districts, where they have no electoral influence at all.[2]

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[1]That legislator, as an *amicus*, asserts that "[t]he Texas Democratic Party, angered by his support for the Republican-backed congressional map, successfully worked to remove [him]," Ron Wilson *Amicus* Br.5 n.4. But it was the legislator's *constituents* who turned him out of office, in a primary contest where his support for the plan was the central issue, notwithstanding his otherwise strong legislative record on issues of concern to the African-American community.

[2]The Benkiser Appellees startlingly assert, Br. 29 n.24, that "there is no suggestion here * * * 'that candidates elected without decisive minority support would be willing to take the minority's interest into account.'" (quoting *Ashcroft*, 539 U.S. at 482). But as we showed, the Representatives of the districts to which these black voters were reassigned consistently

Moreover, direct evidence showed that, to the extent they considered "minority opportunity under the Voting Rights Act," defendants treated the law as an obstacle to be circumvented – and that they opted for an alternative they themselves ranked as offering minority voters the least. It further showed, that the "plans" presented to the public with great solemnity were a diversion – with the real plan, drawn and vetted in Washington, kept from Texas's citizenry until the last possible moment.

The substantiation Appellees do muster for their claim – a statement that "[s]ome legislators referred to the new map as an '8-3' map, replacing the prior '7-2' map," (supposedly) because "it went from seven majority-Hispanic voting-age population (VAP) districts to eight" and "from two African-American opportunity districts * * * to three," State Br. 12 – only attests to the difficulty of obscuring the plan's true character.

A "legislator" who thus described the plan would be straining the outer limits of statistical ingenuity. Not only does the "8" rely on a population measure, VAP, that the *State* (citing Fifth Circuit precedent) has consistently claimed has no place in Voting Rights Act analysis, but it counts a district that the decision below, *in a finding the State expressly endorses*, said "is not an Hispanic-opportunity district." See Br. 15 (citing J.S.App. 134a).

Nor does the State endeavor to explain why these "legislators" would resort to an entirely *different* metric – "opportunity districts" – to describe *African-American* electoral strength. While this shift in focus enables the State to avoid the "inexorable zero," *Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977) – *the plan has no district with a "majority-[black] voting-age population*"– doing so carries a heavy price in a brief that elsewhere tries to persuade the Court that, as a matter of plain statutory meaning, African-American voters do not, and cannot, elect candidates of choice unless they

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received scores of "F" on the NAACP's Legislative Scorecard.

constitute 50% or more of district population. See *infra*.[3]

Appellees' assertions that the 2003 Texas plan is just "like the [one enacted by the] Georgia Legislature in *Ashcroft*," Benkiser Br. 47; see State Br. 92, entail a bold misreading of precedent and a seemingly determined effort to foster misunderstanding of what the Texas plan actually involved.

From a minority voting rights perspective, the Texas and Georgia plans are no more alike than the two prominent public officials with whom they are associated – U.S. Representatives John Lewis and Tom DeLay. The Georgia plan was intended to, and did, expand the number of districts in which African American voters could wield power, "increas[ing] the number of [state senate] districts with a majority black voting age population by three, and * * * the number of districts with a black voting age population of between 30% and 50% by another five." 539 U.S. at 471. Representative Lewis and other African-American leaders testified that Georgia's plan would "give real meaning to voting for African Americans' [by giving them] 'a greater chance of putting in office people [who would be] responsive.'" *Id.* at 489; 195 F. Supp. 2d at 106 (Oberdorfer, J., dissenting).

The processes by which the Georgia and Texas plans were created could not have been more different either. The Georgia redistricting was conducted under ordinary legislative rules, and the State's "African-American legislators were key figures in crafting [it]," 195 F. Supp. 2d at 104 (Oberdorfer, J.). An African-American state senator had chaired the subcommittee responsible for drafting the plan, *id.*, and 43 of the 45 black members of the legislature voted in favor. 539 U.S. at 471. Compare Ft. Worth NAACP Br. 3-4 (describing intensity of opposition to Texas plan within the African-American

[3]The State's claim is in fact contradicted by the Benkiser Appellees' recognition (albeit as part of a spurious "proportionality" demonstration) that the plan dramatically *reduces* minority voting strength. See Br. 43.

community).[4]

The lone basis Appellees cite for their claim to have embraced a model of "effective minority representation" is the (post-trial) evidence of success of an African-American congressional candidate in District 9. See State Br. 82 (noting 2004 election results in "new District 9, which had a markedly greater African-American voting-age population (36.5%)" in which "incumbent Anglo Democrat Chris Bell * * * was roundly defeated by an African-American Democrat, now-Congressman Al Green, 66.5% to 31.3%"). From this fact, Appellees spin out an argument that, as in Georgia, changing *District 24* was part of an effort to enhance black electoral strength and accuse Plaintiffs of seeking to "repack" District 24 – and thereby prevent the State from augmenting black voting strength. See State Br. 93 (accusing Plaintiffs of opposing the "dismantling [District 24] * * * to expand minority opportunity in majority-minority districts").

First, whatever other relevance it might have to this case, see *infra*, the inescapable import of this (non-record) evidence is this: if a district that has an African-American VAP of 36.5% can be described as a "safe" seat, Wilson Br. 6 – or one in which African-American voters can "predictably" elect a "*black*-supported black candidate," Benkiser Br. 47, and defeat an incumbent Anglo Democrat by a *35% margin* in the party primary, then the supposed "50% rule" has been refuted.[5]

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[4] The State's boast (Br. 11) that the plan honored "*a number* of [minority legislators'] requests," must be placed in perspective. The State points to the fact that, at his request, Representative Lewis's district was kept whole – "in CD26." But Rep. Lewis voted *against* the plan – and he had asked that his district be put whole in Martin Frost's district. J.S.App. 87a n.62. That his constituents are now together in a district carefully chosen to minimize their chance of affecting the vote – is hardly overpowering evidence of solicitude for minority voters or their representatives.

[5] As we explain below, these were no slips of the pen. Appellees' legal position *requires them* to have things both ways. Like the district court, Appellees simultaneously insist that there is some essential difference between districts where a minority group is a numerical "majority" and those

But the insinuation that voting strength in Fort Worth was diminished *in order to* "afford more electoral opportunity" in Houston, State Br. 92, assumes that the Court lacks access to a map of Texas. New District 9 is hundreds of miles away from District 24, and not a single Fort Worth voter is part of the new Houston-based district. Indeed, the NAACP placed before the district court a Plan, 1251C which both strengthened the Houston district and increased the percentage of minority voters in District 24.[6]

Plaintiffs obviously did not ask the court to "re-pack[] voters into old CD24" (State Br. 95). See *Johnson v. De Grandy*, 512 U.S. 997, 1007 (1994) (describing "packing" as concentrating voters in order to "minimize their influence in the districts next door"); *Gingles*, 478 U.S. at 46 n.11 ("the concentration of blacks into districts where they constitute an excessive majority"). Unlike in Georgia, where incumbent African-American legislators accepted less "safe" districts, so some of their minority constituents could cast votes in *adjoining districts*, where they would elect candidates responsive to minority interests, see 195 F. Supp. 2d at 92, the evidence is undeniable that black residents of Tarrant County were not dispersed *so they could have greater representation*. They were shunted to districts carefully chosen to assure that their votes would have *no* effect. District 24 has been "unpacked" only in the sense one could say that a child who takes a hammer to a ceramic piggy bank "unpacks" it.

Nor, of course, did the Texas NAACP ever argue that "old CD25 could not be altered because * * * it effectively

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where it accounts for less than 50% of CVAP, while relying on districts that fail that test to support their claims of racial fairness. See also State Br. 82 (quoting court's description of Congresswoman Johnson as "holding a seat in an adjacent *largely Black* district," J.S.App. 107a) (emphasis added); J.A. 184-86 (State's expert describing three districts with less than 50% black CVAP as "controlled" by African American voters).

[6]Indeed, *Amicus* Wilson voted in favor of this Plan when it was introduced in the Legislature.

functioned as an African-American opportunity district." State Br. 81. Far from questioning the power of the State to re-draw the district to give black voters *greater* power, we and other minority groups demonstrated that – whatever might be said about the electoral behavior of the district drawn by the court – strengthening the electoral power of Houston's black voters in no way depended on destroying District 24. See *Shaw v. Hunt*, 517 U.S. 899, 917 (1996).[7]

II. The District Court Clearly Erred in Denying The Voting Rights Act Claim

Appellees' primary defense of the Voting Rights Act decision is to highlight that there was a trial below and repeat that *Gingles*' held that the "clearly erroneous" standard governs review of the ultimate vote dilution finding, as well as subsidiary findings of fact. See State Br. 70-71, 80, 84, 86, 88, 90. But the district court's brusque handling of the Section 2 challenge to the dismantling of CD24 surely did not involve the kind of "searching * * * evaluation," 478 U.S. at 65, that *Gingles* contemplates – the list of considerations that the Court (and the 97th Congress) identified as central to the ultimate question of liability, *id.* at 44, are not even *mentioned* in the decision below – and the bulk of the judicial statements on which Appellees' deference arguments hinge are more fairly described as comments than "findings of fact." See *infra*, pp. 16-20; Fed. R. Civ. P. 52(a) ("the court shall find the facts specially and state separately its conclusions of law thereon").

But there is a bigger problem with Appellees' reliance on the standard of review. It is blackletter law that a factual

[7] The assertion that the new map "enhances" minority political influence would take the prize for implausibility were it not for the claim by the Chair of the Texas Republican Party that "Appellants' theory * * * produces results that may actually *harm minorities' quest for equal electoral opportunity*." Benkiser Br. 43 (emphasis added). But there is no need to refute this claim here – because that task is accomplished in the very *next sentence* of the same Brief, wherein Appellees purport to show that the former plan afforded minorities *too much* representation.

finding *is* clearly erroneous when it is "predicated on a misunderstanding of the governing rule of law.'" *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 501 (1984); see also *Koon v. United States*, 518 U.S. 81, 100 (1996) (a "court by definition abuses its discretion when it makes an error of law"). In fact, that principle was expressly invoked in *Gingles*, where the Court reversed certain of the district court's vote dilution findings. See 478 U.S. at 79 (emphasizing that the "clearly erroneous" standard "'does not inhibit an appellate court's power,'" to overturn factual findings infected by legal error) (quoting *Bose*, 466 U.S. at 501).[8] Both the ultimate finding and the "findings" to which Appellees direct the Court's attention are infected with legal error.

A. Appellees Fundamentally Misconceive The Relationship Between Sections 2 and 5

As our opening brief explained (Br. 48-50), the district court's whole consideration of Plaintiffs' challenge to the dismantling of District 24 was premised on a serious error: *i.e.*, "that alterations to [CD24] raised questions primarily of *§ 5*, which have been answered by the Department of Justice," J.S.App. 113a (emphasis added), when neither the availability of administrative review nor the "answer" it yields is supposed to have relevance in the Section 2 analysis.

Appellees likewise invoke Section 5, insisting that allowing plaintiffs to establish "potential to elect," see *Gingles*, 478 U.S. at 50, through evidence of actual behavior, rather than only by district demographics, would conflict with *Georgia v. Ashcroft*'s construction of that provision:

If Appellants' reading of §2 is to be believed, Georgia

[8] This Court's post-*Gingles* cases show no special reluctance to apply this principle in the voting rights context. See, *e.g.*, *De Grandy*, 512 U.S. at 1022; *Voinovich v. Quilter*, 507 U.S. 146, 154-58 (1993); cf. *Easley v. Cromartie* 532 U.S. 234, 242 (2001) (emphasizing that Court's ususal reluctance to overturn "the concurrent findings of * * * two lower courts" does not apply when "there is no intermediate court, and we are the only court of review") (citation omitted).

> would have surely violated §2 by doing precisely what the Court eventually blessed – reducing the concentration of a majority-African-American district in order to afford more electoral opportunity elsewhere in the map.

State Br. 92; see also Benkiser Br. 46 (suggesting that the fact a plan satisfies "the stringent requirements of Section 5" should dispose of Section 2 questions).

As just explained, the question whether a measure adopted to "afford *more electoral opportunity*" could violate Section 2 is not presented here – whereas Georgia's plan reflected a decision that "substantive * * * representation" was preferable to "descriptive," 539 U.S. at 483, the 2003 Texas plan "chose neither," J.S.App. 198a (Ward, J.). Indeed, the only § 2 challenge that *could have been raised* to the Georgia plan would have relied on arguments that *Appellees* here advance: that districts in which minority voters account for a nominal majority are different in kind for Voting Rights Act purposes from those where a smaller group can, in fact, elect candidates of their choice. And whether any particular plan "*violates* § 2" depends on a comprehensive appraisal of the circumstances; whatever "theory" a districting plan reflects, its validity depends on its *results*, *i.e.*, whether in fact, minority voters, have equal opportunity "to participate in the political process and to elect representatives of their choice,"42 U.S.C. 1973(b).

All of this aside, it is *Appellees*' reading of Section 2 – premised on the notion that it must be construed as permitting any plan that "complies with Section 5," Benkiser Br. 47 – that is breathtakingly "novel" and indeed contrary to precedent and plain statutory language. Consistent with the express terms of 42 U.S.C. 1973c and with the Department's recognition that preclearance does not mean that a practice "satisfies any other requirement of the law beyond that of section 5," 28 C.F.R. 51.49, this Court has held that a plan which "clearly violates" Section 2 may not be objected-to on that basis, *Reno v. Bossier Parish School Bd.*, 520 U.S. 471 (1997), and that even a

purposefully discriminatory plan can "compl[y] with Section 5," see *Bossier Parish II*, 528 U.S. 320 (2000).

Indeed, the construction of Section 2 that Appellees declare beyond "belief" was the one *adopted* in *Gingles*, see 478 U.S. at 34 (invalidating districts in a plan that had been precleared). Not only does the absence of a Section 5 objection say nothing about violations of Section 2, but decisions not to interpose an objection require no reasons, let alone any specific finding of fact, and indeed can mean nothing more than that the 60-day time period has lapsed, see *Morris v. Gressette*, 432 U.S. 491 (1977). "Unlike court proceedings, administrative review under § 5 – which is by statute limited to 60 days upon receipt of all necessary information – does not * * * provide for the full presentation of evidence and rebuttal evidence by contesting parties and others interested in the proceedings." *Revision of Procedure for the Administration of Section 5 of the Voting Rights Act of 1965*, 52 Fed. Reg. 486, 487 (Jan. 6, 1987).

A rule that subjected plans to deferential review because they have been precleared would distort the Voting Rights Act in another basic way. Section 5 does not *confer* latitude; it is a limitation imposed, *in addition to* those imposed nationwide under Section 2, on certain jurisdictions, based on their longstanding history of denying electoral opportunity. See *City of Rome v. United States*, 446 U.S. 156 (1980). Making administrative preclearance preclusive would defeat the Section 2 rights of voters in the very jurisdictions where the legacy of racial discrimination in voting is greatest.

Finally, while *Georgia v. Ashcroft* did not "flatly reject[]," State Br. 93, *any* construction of *Section 2* – a provision that was not before the Court – that decision does nothing but undermine the construction urged by Appellees and imposed by the court below. The Court in *Ashcroft* (1) affirmed what was implicit in *Gingles* (and is undeniable as a matter of political reality and political science) – that a minority group's ability to elect candidates of choice does not depend on its constituting

50% (or any other fixed share) of district population, see *infra*; it (2) foreclosed the notion (accepted by the district court) that a "totality of the circumstances" analysis could ignore evidence of political influence; and it (3) extolled the virtues of coalition districts, contrary to the lower court's view that such districts – but not ones that are safely "packed" – are *properly* the "bull's eye" (J.S.App. 105a) for destruction in redistricting. See Opening Br. 32.[9]

If any case is an especially *unlikely* one to give greater-than-usual effect to the Justice Department's failure to object, this one would be it. The Section 5 conclusion was reached, despite a series of determinations by career professionals whose detailed analysis of the electoral data conflicts with central "factual" assertions advanced by Appellees here. Although we do not question the legal authority of the Department's political appointees to overrule its neutral analysts' recommendation, this case surely presents no reason for departing from the long-settled understanding of what Department preclearance means.

B. Actions That Intentionally Dismantle Districts Merit Different, Closer Scrutiny

As a more modest alternative to its assertion that challenges to the dismantling of an existing district are within the primary or exclusive jurisdiction of the Justice Department, the district

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[9] The Benkiser Appellees attempt (Br. 43) to "expose" plaintiffs as partisan, asserting that we maintain that "'submergence' of minority voters into majority-*Democrat* districts * * * *fulfills* the mandate of the Voting Rights Act, but placing precisely the same minority voters into a majority-*Republican* district is, *ipso facto*, a violation." Even as rhetoric, this sound-bite misses the mark: plaintiffs do not seek "submergence," but instead seek *to avoid* submergence in districts in which representatives are not – and do not need to be – responsive to their interests. What *Georgia v. Ashcroft* makes clear is that courts need not – and should not – ignore party identification in analyzing such questions. See also *Easley*, 532 U.S. at 245. As decades of case law attest, it makes no sense to address questions of electoral equality *without* recognizing the reality that Americans participate in the political process and elect candidates *through* political parties. See *Smith v. Allwright*, 321 U.S. 649, 656-66 (1944).

court held that a State's purposeful destruction of a district in which minorities have a demonstrated ability to control or influence electoral outcomes is no different under Section 2 than a claim challenging the failure ever to have drawn a district. See J.S. App. 110a n.114 ("If there is no obligation to create a * * * district, there is no obligation to retain" it).

But this weaker version of the rule is also at odds with Section 2's emphasis on the practical realities of the political process. The same reasons why Congress recognized that political participation is more difficult for groups that have long been fenced out show why destroying a district with a proven history of minority political success is far more damaging than is not creating a district in the first place. When an empowered minority community is splintered, the squandering of the "hard work" that has been invested in organizing and building bridges to other communities, see J.S.App. 196a (Ward, J.) (discussing testimony of Deralyn Davis); Ft. Worth NAACP Br. 3, is a circumstance deserving substantial weight in the Section 2 analysis.[10]

C. Appellees Fail to Offer Any Coherent Defense of A "50% Rule"

The State makes only a desultory effort to defend the "50% rule," largely suggesting (Br. 71-72) that the district court did not rely on it or that its finding can be upheld on alternate grounds. This surely understates the importance of the rule to the district court's analysis; indeed, the court's assumption that Plaintiffs could not satisfy the first *Gingles* prong (combined with its erroneous view that the District 24 claim "really" sounded in Section 5) helps explain why the decision's

[10]Challenges like this one are generally more straightforward, as they do not invite disagreements over which hypothetical "benchmark" is appropriate, see *Holder v. Hall*, 512 U.S. 874 (1994), and when mapmakers act against the background of a district's actual political behavior, courts have a more concrete basis for evaluating both their purposes and the likely effects for minority voters. See *Metts v. Murphy*, 363 F.3d 8, 11 (1st Cir. 2004) (en banc) (per curiam).

treatment of the other Section 2 issues is so cursory. See *infra*.

To the extent Appellees do mount a defense of the district court's legal rule, it falls flat. First, they attempt to make the task easier by misrepresenting what is at stake, repeatedly insisting that Plaintiffs – by arguing that Section 2 does not *exempt* claims based on empirical, rather than demographic, evidence of potential to elect – are asking the Court to announce a rule of Section 2 *liability*. Thus, Appellees argue that confirming that there is no 50% rule would "*require* the creation of districts where * * * *simply because* the minority-preferred candidate will usually win in that district, but usually lose in the * * * district created by the legislature" (emphasis added); mandate a remedy "regardless of whether the challenged district better complies with neutral districting criteria"; and mean that assigning minority voters to a "majority-*Republican* district is, *ipso facto*, a violation of the Act," Benkiser Br. 28, 30, 43.[11]

These assertions depend on a basic misreading of the statute. Rejecting the supposed 50% limitation does not change the terms on which courts impose liability, but rather confirms that where (as here) plaintiffs can establish ability to elect by means other than district population statistics (*and* establish the other two *Gingles* preconditions) a court is not foreclosed from considering the "totality of the circumstances." See *De Grandy*, 512 U.S. at 1011.[12]

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[11]The legal significance of the fact that a challenged district "better complies with neutral districting criteria" is not presented here; the plan *sacrificed* geographic compactness, respect for communities of interest, and other traditional principles in its single-minded pursuit of partisan gain. See, *e.g.*, JA 110, 178.

[12]Appellees step back from the rhetorical brink, conceding in a footnote (Benkiser Br. 37 n.28) that "the *Gingles* preconditions do not technically establish a Section 2 violation." But this is no technicality. See *De Grandy*, 512 U.S. at 1011 (*Gingles* "clearly declined to hold * * * that a court's examination of relevant circumstances was complete once the three factors were found to exist * * * * because the ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments

On the merits, Appellees' brief for a 50% requirement fails first – and most conspicuously – for the reason noted above: because Appellees' *defense of the 2003 plan* depends critically on the proposition they purport to deny: that African-American voters *can* elect candidates of choice, when they do not account for 50% or more of district CVAP. The many instances when the district court, Appellees, their expert witnesses, and their *amici* refer to districts that fail their test as "safe" or "majority-minority," do not reflect semantic imprecision, but instead a contradiction at the core of their position.

Thus, while Appellees cite *De Grandy*'s observation that "'[p]roportionality' * * * links the number of *majority-minority* voting districts to minority members' share of the relevant population" as supporting a 50% rule, Benkiser Br. 49 (citing 512 U.S. at 1014 n.11) (emphasis added by Appellees), they ignore the implication of their position: the 2003 plan provides African Americans, who account for 12.6% of Texas's citizen voters, *one* district out of 32 (CD30) where they account for a CVAP majority (50.6%). And a brief that affirmatively insists that creating a district with a 36.5% black VAP provides "descriptive representation," *i.e.*, ensuring that African-American voters will elect a (black) candidate of choice, shows the pointlessness of labored textual arguments that voters in districts below the 50% line cannot "elect" their preferred candidates. See JA 184-86 (State's expert's report, describing Districts 9, 18, and 30 as "African American district[s]" that will be "controlled by African American voters").

Second, the notion that the plain text of the statute recognizes some essential difference between districts above and below the 50% line can no longer be squared with controlling law.[13] Far beyond "*seem[ing] to suggest*" Benkiser

resting on comprehensive, not limited, canvassing of relevant facts").

[13] Although Appellees are quite certain that the plain language of Section 2 supports their position, they are unable to settle precisely on *which* language makes that reading so plain. At various points, their brief italicizes "on account of *race*"; "*less* opportunity * * *"; "*to elect* representatives of

Br. n.25, that minority voters can "elect a candidate of their choice," in a district where they account for less than 50% of the population, *Georgia v. Ashcroft* unequivocally endorsed that proposition, see 539 U.S. at 481, and even the dissenting opinion, while arguing for a narrower interpretation of the right to "elect candidates of choice," rejected the notion that the 50% figure should be determinative, *id.* at 492, 498-99 (Souter, J., dissenting).

Indeed, as our opening brief explained (at 22-26), this recognition did not break new ground. Not only did Justice O'Connor make the point in so many words in her *Gingles* concurrence, 478 U.S. at 89 n.1, but *Justice Brennan's* opinion (478 U.S. at 59) contemplated that the "threshold" could be cleared in a case where minority voters' ability to elect was *dependent* upon "'Anglos who vote with them.'" State Br. 73 (quoting J.S.App. 111a). Because *Gingles* properly acknowledged that "cohesion" does not mean unanimity, cf. *Shaw v. Reno*, 509 U.S. 630, 647 (1993), black voters' ability to elect in a "50% district" would *necessarily* depend on a "coalition" of the "overwhelming majority" of minority voters and a reliable group of white voters. Thus, *Gingles* sanctioned claims by "persons joined, not by race, but by common view," J.S.App. 110a (describing statute as intended to exclude such claims) – and *Ashcroft* is even more explicit in doing so.

Efforts to extract a "policy" rationale for the "50% rule" cannot be squared with *Gingles* itself. If, the Court had viewed a 50% requirement as a "bulwark against an otherwise unbridled concept of minority voting rights," Benkiser Br. 38, it surely would not have expressly reserved the possibility of claims by *smaller* groups, 478 U.S. at 46 n.12 – a reservation reaffirmed repeatedly, see, *e.g.*, *Voinovich*, 502 U.S. at 154, including in circumstances where the "rule" could have been dispositive. See *De Grandy*, 512 U.S. at 1009. The "rule" is in fact inconsistent with the policy that *is* expressed in the

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their choice"; and "*den*[*ied*]." Benkiser Br. 32,33,33,33.

statutory text – that "judgments rest[] on comprehensive, not limited, canvassing of relevant facts," *id*. at 1011 – and it leads to results at odds with what this Court has identified as the Act's paramount object: "hasten[ing] the waning of racism in American politics," *id*. at 1020. See Opening Br. 30-36.

Finally, if there were any doubt as to the sense of Appellees' proffered construction, this surely would provide the acid test: on their "plain meaning" reading, black voters in Chicago did not "elect the candidate of their choice" in Harold Washington's watershed 1983 mayoral victory, because, despite intense racial polarization, he won with a tiny sliver of "crossover" support. See Opening Br. 30.

D. No District Court "Finding" Can Support the Judgment Below

1. "Anglo Democrat Control"

Appellees ask the Court to affirm the decision below based on the district court's "finding" that "Anglo Democrats control[led]" District 24. J.S. App. 111a-112a. If that offhand observation even counts as a "finding," it is clearly erroneous.

To begin with, because "Anglo Democrats" were, by all accounts, less numerous in the district than African-American Democrats, control, let alone "dominat[ion]," J.S.App. 111a, by that group would seem an especially unlikely conclusion. And the only evidence claimed to support the asserted "control" betrays a critical *legal* error: the assumption that a district "drawn by an Anglo Democrat, and for an Anglo Democrat," J.S.App. 111a, establishes control by Anglo Democratic *voters*.

Nor does the record support the assumption that the Anglo Democrat in question – Congressman Frost – was not the candidate of choice of the district's *African-American* voters. In the face of strong, consistent testimony that he *was*, see Opening Br. 37-39 – supported by objective evidence of a voting record that placed him literally at the top of the Texas delegation on issues of importance to the African-American community – the contrary argument boils down to one fact: that

he is an "Anglo." But "such an approach" is contrary to precedent, and "it would project a bleak, if not hopeless, view of our society – a view inconsistent with our people's aspirations for a multiracial and integrated constitutional democracy," *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1016 (2d Cir.1995).[14]

Indeed, the premise that Frost was the candidate of Anglo Democrats is belied by the very evidence that Appellees trumpet. Attempting to show that "potential" voting must trump actual electoral behavior, the State (Br. 77) highlights that "14.5% of African-American voters turned out," to cast their votes for Congressman Frost in a Democratic primary, "while only * * * a scant 1.3% of Anglo voters did so." But surely the fact that African Americans turned out at a rate ten times as high to cast votes for Frost *refutes* the premise that Anglo Democrats were his "true base," while black support was somehow grudging.[15]

Finally, Appellees seek to prop up the court's "finding" with an *analogy* to former CD25, where former Representative Bell defeated a black opponent in 2002 – but was then defeated in a 2004 Democratic primary in a redrawn (and renumbered) district with an African-American VAP of 36.5%. That analogy might at least have intuitive force if it were advanced on behalf of plan that gave African-American voters in Tarrant County a *larger* numerical share of their district, but it hardly resonates in defending an arrangement in which they have been splintered

[14]Even *Amicus* Wilson did not dispute that the votes that earned Frost exemplary marks from the NAACP involved issues of critical importance to African Americans.

[15] Nor does any *evidence* support speculation that this was a district where "'candidates favored by blacks can win, but only if the candidates are white.'" Benkiser Br. 27 (quoting *Jeffers v. Clinton*, 730 F. Supp. 196, 209 (E.D. Ark.1989)). On the contrary, although there was conflicting testimony as to whether an African-American challenger could unseat the popular Anglo *incumbent*, the testimony concerning what would happen if the seat were open was that African-American voters' preferred candidate – including a black candidate – would win. See JA 243.

to districts in which they are conceded to have no opportunity to elect or even influence election outcomes.

And neither Plaintiffs' case nor this Court's precedents permits the premise of this line of argument: that districts with similar demographic composition are interchangeable – *i.e.*, that Rep. Chris Bell can be treated as a proxy for Rep. Martin Frost (and Bell's defeated 2002 challenger, as a stand-in for the hypothetical African-American rival the court below believed Frost should have faced). See *Gingles*, 478 U.S. at 59 n.28 ("The inquiry into the existence of vote dilution * * * is district specific * * * * Courts must not rely on data" from other districts); cf. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989) (rejecting claim that court may "borrow" findings of discrimination from other jurisdictions).[16]

2. White Bloc Voting

Appellees also claim that the district court's judgment can be sustained based on its "conclu[sion]" that "the high crossover voting" failed to satisfy the third *Gingles* precondition. See State Br. 73. Whether the district court's observation is described as a "finding" or a "suggest[ion]," U.S. Br. 7, it, too, is factually and legally untenable.

As we explained (Opening Br.39 n.35), the district court's assertion rested on a plain legal error. Although the court described *Abrams v. Johnson*, 521 U.S. 74 (1997), as holding that a 30% "crossover rate * * * establish[es] the absence of Anglo bloc voting * * * as a matter of law," J.S. App. 111a & n.115, that decision announced no such rule of law. *De Grandy* (512 U.S. at 1011) described "bloc voting [as] a matter of degree, with a variable legal significance depending on other

[16] If numbers alone were critical, the 2004 result supports a very different inference from the one Appellees would impose: not only were voters accounting for "only" 36.5% of the district's VAP able to elect their preferred candidate, but the fact that their candidate won the primary by a *35% margin* only raises questions about the district court's (and Appellees') skepticism about CD24's African-American voters' ability to control the Democratic primary.

facts," and *Abrams* did not hold otherwise: it merely sustained a discrete district court finding. See 521 U.S. at 93; compare *Gingles*, 478 U.S. at 58, 81 (finding bloc voting, despite white crossover as high as 42%).[17]

But there are two further problems. First, the evidence here *did not establish* – as the State continues to argue – that the Anglo crossover rate in former District 24 averaged 30.75%. Rather, that figure ignores all general election contests and most primaries and it reflects the atypically high support that a single candidate, Dallas Mayor Ron Kirk, received from Anglo Democrats. *Appellees*' expert (State Ex. 1) found Anglo crossover in CD24 typically to be between 15% and 25%, exceeding 30% in only 2 of the 20 contests he examined.

Second, Appellees' arguments suffer from a fatal *legal* defect. Plaintiffs in this case do not contend that racially polarized voting denied them opportunity to elect candidates of choice in *former District 24*. The premise of the claim is that the districts to which they have been assigned under the 2003 plan afford no opportunity, *i.e.*, that their present inability to elect candidates was the result of the challenged practice. See *Voinovich*, 502 U.S. at 153 ("If the majority in each district votes as a bloc against the minority candidate, the fragmented minority group will be unable to muster sufficient votes in any district to carry its candidate to victory"). Whether whites would vote as a bloc in the district a Section 2 plaintiff proposes as a *remedy* has no place in the *Gingles* inquiry. In these five districts, Appellees' expert confirmed, candidates preferred by black voters lost every election analyzed by double-digit margins, and in new District 26, where many of Fort Worth's black voters were placed, an average of 18% of Anglo voters supported the black-preferred candidate in general elections.

[17] Although the State implicitly recognizes the district court's legal error, describing *Abrams* as "uph[olding] a district court's finding," State Br. 89, the Benkiser Appellees (Br. 44) make the surprising assertion that "the court below [was] correct[]" in recognizing that "this Court has held that crossover voting of between 22% and 38% is not racial bloc voting as a matter of law."

3. Political Cohesion

The district court "finding" (State Br. 73, 84) concerning black political cohesion makes the others just discussed appear to be models of judicial rigor. The only thing the decision below said about the second *Gingles* prong is this: "Nor is the cohesiveness of [District 24's] black voting age population clear." J.S. App. 112a. But once more, if it were a factual finding, this would be clearly erroneous.

Plaintiffs more than made the necessary showing, *i.e.*, that "a significant number of minority group members usually vote for the same candidates," *Gingles*, 478 U.S. at 56, in District 24. Indeed, the evidence here is indistinguishable from that in *Gingles*, where the fact that candidates enjoyed between 71% and 92% black support in 11 of 16 primaries and "between 87% and 96%" in general elections was held "clearly" to establish cohesion. 478 U.S. at 59. In CD24, African-American candidates in 2 of 3 primaries received 72% and 93% of the black vote, and in each of the 20 general elections analyzed by Appellees' expert, black voters cast well over 90% of their votes for the same candidate. State Ex. 1; see also JA 66, 72-77. Appellees' purported contrary demonstration requires not only disregarding the testimony of minority citizens and leaders who actually participate in the community's political life, but evaluating the statistics in ways *Gingles* expressly forbids: (1) ignoring general election results (compare 478 U.S. at 59); (2) treating 72% black support as only modest cohesion, compare State Br. 85 with 478 U.S. at 59 (describing 71% as "overwhelming"); and (3) treating a single, atypical election, in which the African-American vote divided, as fatal (compare *id.* at 59, discounting five such results).

CONCLUSION

The judgment of the district court should be reversed.

Respectfully Submitted,

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FEBRUARY 2006