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

BRIEF FOR APPELLANTS

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QUESTIONS PRESENTED

1. Whether the Equal Protection Clause and the First Amendment prohibit States from redrawing lawful districting plans in the middle of the decade, for the sole purpose of maximizing partisan advantage.

2. Whether Section 2 of the Voting Rights Act permits a State to destroy a district effectively controlled by African-American voters, merely because it is impossible to draw a district in which African-Americans constitute an absolute mathematical majority of the population.

3. Whether, under *Bush v. Vera*, 517 U.S. 952 (1996), a bizarre-looking congressional district, which was intentionally drawn as a majority-Latino district by connecting two far-flung pockets of dense urban population with a 300-mile-long rural "land bridge," may escape invalidation as a *racial* gerrymander because drawing a compact majority-Latino district would have required the mapmakers to compromise their *political* goal of maximizing Republican seats elsewhere in the State.

PARTIES TO THE PROCEEDING

Plaintiff-appellants in No. 05-276 are the "Jackson Plaintiffs" (Eddie Jackson, Barbara Marshall, Gertrude "Traci" Fisher, Hargie Faye Jacob-Savoy, Ealy Boyd, J.B. Mayfield, Roy Stanley, Phyllis Cottle, Molly Woods, Brian Manley, Tommy Adkisson, Samuel T. Biscoe, David James Butts, Ronald Knowlton Davis, Dorothy Dean, Wilhelmina R. Delco, Samuel Garcia, Lester Gibson, Eunice June Mitchell Givens, Margaret J. Gomez, Mack Ray Hernandez, Art Murillo, Richard Raymond, Ernesto Silva, Louis Simms, Clint Smith, Connie Sonnen, Alfred Thomas Stanley, Maria Lucina Ramirez Torres, Elisa Vasquez, Fernando Villareal, Willia Wooten, Ana Yañez-Correa, and Mike Zuniga, Jr.); and the "Democratic Congressional Intervenors" (Chris Bell, Gene Green, Nick Lampson, Lester Bellow, Homer Guillory, John Bland, and Reverend Willie Davis).

Other plaintiffs in the court below are the League of United Latin American Citizens (LULAC); the "Valdez-Cox Plaintiff-Intervenors" (Juanita Valdez-Cox, Leo Montalvo, and William R. Leo); the Texas Coalition of Black Democrats; the Texas Conference of National Association for the Advancement of Colored People Branches (Texas-NAACP); Gustavo Luis "Gus" Garcia; the "Cherokee County Plaintiff" (Frenchie Henderson); the "GI Forum Plaintiffs" (the American GI Forum of Texas, LULAC District 7, Simon Balderas, Gilberto Torres, and Eli Romero); Webb County and Cameron County; Congresswoman Sheila Jackson Lee and Congresswoman Eddie Bernice Johnson; and Travis County and the City of Austin.

Defendant-appellees are Rick Perry, Governor of Texas; David Dewhurst, Lieutenant Governor of Texas; Tom Craddick, Speaker of the Texas House of Representatives; Roger Williams, Secretary of State of Texas; Tina Benkiser,

Chairman of the Republican Party of Texas; Charles Soechting, Chairman of the Texas Democratic Party; and the State of Texas. All individual defendants were sued in their official capacities.

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The three-judge District Court's majority and concurring opinions are reported at 399 F. Supp. 2d 756 and reprinted at pages 1a to 55a of the Appendix to the Jackson appellants' Jurisdictional Statement ("J.S. App."). The District Court's final judgment is reprinted at J.S. App. 56a. The District Court's earlier majority and dissenting opinions addressing appellants' Voting Rights Act and racial-gerrymandering claims are reported at 298 F. Supp. 2d 451 and reprinted at J.S. App. 57a-200a.

JURISDICTION

The District Court denied appellants' claims for injunctive relief on June 9, 2005. J.S. App. 40a. Pursuant to 28 U.S.C. § 2101(b), appellants timely filed a notice of appeal on July 5, 2005. *Id.* at 227a-230a. This Court's jurisdiction is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The First Amendment to the Constitution in part prohibits laws "abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 2 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U.S.C. § 1973, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of

> any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT OF THE CASE

The State of Texas enacted a new congressional districting plan in 2003 for one and only one reason: to engineer the replacement of Democratic Members of Congress with Republicans. At the time, there was no legal necessity to change the district lines, because the State had a redistricting plan in place that had been drawn in 2001 by a unanimous three-judge District Court and upheld in an appeal to this Court. In that appeal, the State itself had argued that the court-drawn plan was lawful. *See Balderas v. Texas*, 536 U.S. 919 (2002). Under that 2001 plan, which was court-drawn because Texas had defaulted on its constitutional duty to enact a plan in 2001, the Republicans gained two additional congressional seats in the 2002 election. The 2001 map had been found to be politically fair by the District

Court that drew it and later was labeled by the State's own expert witness as somewhat biased in favor of the Republicans. The only reason for its replacement in 2003 was a desire to defeat at least seven targeted Democratic incumbents, while protecting all Republican incumbents from any chance of defeat.

The redrawing was accomplished in four steps. *First*, the Legislature carved up the districts of the six Democratic incumbents who had been reelected in 2002 in generally Republican-leaning districts, in order to avoid having to beat those incumbents on their "home turf." *Second*, targeting a seventh Democratic incumbent, the Legislature obliterated District 24, a district effectively controlled by African-Americans, by fracturing minority voters among five new districts. *Third*, the mapmakers redrew District 23, a majority-Latino district previously won narrowly by a Republican, to assure its future control by Anglo (*i.e.*, non-Latino white) voters. *Fourth*, seeking to avoid Voting Rights Act liability for the new version of District 23, the Legislature inserted an absurdly misshaped new majority-Latino District 25 connecting the Latino portions of Austin with a chunk of the city of McAllen, 300 miles away on the Mexican border.

I. The Process Leading to the 2003 Plan

After the 2000 federal decennial census, Texas became entitled to 32 seats in Congress. The task of replacing the 30 old malapportioned districts from the 1990s with 32 new equipopulous ones fell initially to the Texas Legislature. But in Texas in 2001, political power was split, with Republicans controlling the State Senate and the Governor's mansion and Democrats controlling the State House. The Legislature made no serious effort to reach agreement on a new congressional map in its 2001 regular session, and Texas Governor Rick Perry declined to call a special session. As a

result, the State of Texas defaulted on its constitutional obligation to create appropriate congressional districts for the 2002 election.

That default left the three-judge District Court in *Balderas v. Texas* "with the 'unwelcome obligation of performing in [the Legislature's] stead.'" J.S. App. 202a (citation omitted). On November 14, 2001, the *Balderas* court, after finding that the 30 existing congressional districts in Texas were unconstitutional and noting the continuing "failure of the State to produce a congressional redistricting plan," unanimously imposed on the State of Texas a new 32-district congressional map known as "Plan 1151C." *Id.*; *see also* Joint Appendix ("JA") 295 (color map of 2001 plan).

In drawing that map, the *Balderas* court expressly rejected the idea that it should defer to the "traces of the unconstitutional plan being replaced." J.S. App. at 205a. Instead, the court said it was duty-bound to draw an entirely new map based on "neutral redistricting factors" like "compactness, contiguity, and respecting county and municipal boundaries." *Id.* In doing so, the court followed the process proposed by Rice University political-science professor John R. Alford, who was the State's expert witness in the 2001 *Balderas* litigation. *Id.* at 205a-206a. That process began with a "blank map of Texas," on which the court proceeded to draw minority districts required by the Voting Rights Act, as well as the two new districts allocated to Texas, which it located in areas of high population growth. *Id.* at 206a. The court then drew in the remaining districts using neutral and traditional criteria while continuing to "eschew[] an effort to treat old lines as an independent locator." *Id.* at 207a. By following neutral and traditional criteria, the *Balderas* court "did much to end most of the below-the-surface 'ripples' of the 1991 plan," *id.* at 208a, a plan that had been drawn by Democratic legislators at a time

when the State of Texas still leaned Democratic in most races.[1]

Having drawn this new map from scratch, the court "checked [its] plan against the test of general partisan outcome, comparing the number of districts leaning in favor of each party based on prior election results against the percentage breakdown statewide of votes cast for each party in congressional races." *Id.* at 208a. The court found that its plan was likely to reflect "the party voting breakdown across the state," *id*. at 209a, with "20 of the 32 seats offering a Republican advantage," *id.* at 85a. Indeed, the State's own expert later testified that the 2001 plan was somewhat biased to favor the *Republicans*. *See* Jackson Pls. Ex. 141 (report of Prof. Ronald Keith Gaddie), JA 189-93, 216; Jackson Pls. Ex. 140 (Gaddie expert deposition), JA 224-25.

Neither the State of Texas nor any other defendant appealed the District Court's decision. The only appeal was taken by a group of Latino voters known as the "Balderas Plaintiffs." The State of Texas filed a motion asking this Court to affirm the District Court's judgment. This Court summarily affirmed on June 17, 2002. *Balderas v. Texas*, 536 U.S. 919 (2002). The court-drawn Plan 1151C therefore governed the 2002 congressional election in Texas.

That election generated a congressional delegation with 15 Republicans and 17 Democrats. The two new congressional districts that Texas gained from reapportionment elected Republicans, while the other 30 districts reelected 28 incumbents and elected one freshman from each party (each of whom replaced a retiring member of the same party).

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[1] By 2001, that 1991 plan had already been revised substantially by a court-drawn plan imposed in the *Vera* litigation. *See infra* note 23.

Seven of the incumbents — six Democrats and one Republican — prevailed even as their districts were voting for senatorial, gubernatorial, and other statewide candidates of the *opposite* party. In other words, seven Members of Congress won because they attracted split-ticket voters in relatively competitive races. Without that support, each would have lost to a challenger from the district's dominant political party. Otherwise, 14 of the districts voted consistently Republican and 11 voted consistently Democratic.

At the same time that Republicans were picking up two new congressional seats, they also made gains in Texas House races, winning unified control of the state government for the first time since Reconstruction. In 2003, the newly elected 78th Legislature convened and took the unprecedented step of voluntarily considering congressional redistricting in the middle of a decade.

The process for redrawing the congressional map was extraordinary. As a critical deadline approached for passing legislation in the regular session, a group of Democratic state representatives left the State and broke quorum for a week, effectively killing redistricting for that session.[2] Governor Perry then called the Texas Legislature into special session to take up congressional redistricting — an action he had refused to take two years earlier when the State had a constitutional duty to redistrict but the Legislature had been split along partisan lines.

In the first special session, the Senate failed to pass a map when 11 senators (more than a third of the 31-member chamber) stated that they were opposed to taking up congressional-redistricting legislation. It has been a long-

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[2] Tr., Dec. 15, 2003, 1:00 p.m., at 76-77 (Rep. Richard Raymond).

standing tradition in the Texas Senate to require that a two-thirds supermajority support a measure before the full Senate will consider it.[3] *See* Jurisdictional Statement at 3-9, *Barrientos v. Texas*, 541 U.S. 984 (2003) (No. 03-756).

When Lieutenant Governor David Dewhurst then announced that he would abandon the two-thirds rule in any future special session on congressional redistricting, 11 Texas senators left the State to deprive the Senate of a quorum.[4] But when one of them returned to the State a month later, Governor Perry called a third special session.

A key issue at the time was how aggressive to be in undermining minority districts to maximize Republican electoral opportunities. In the third special session, each house *initially* passed a map that preserved all 11 minority districts.[5] But the conferees — after extensive meetings in Austin with Congressman (and House Majority Leader) Tom DeLay — instead produced a map that dismantled as minority districts both District 24 in the Dallas/Fort Worth area and District 23 in South and West Texas, while adding a new majority-Latino district running from McAllen (on the Mexican border) 300 miles north to Austin.[6] The House and Senate passed this new map, known as "Plan 1374C," in October 2003. *See* JA 296 (map of 2003 plan).

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[3] Tr., Dec. 15, 2003, 8:30 a.m., at 7-8 (Sen. Bill Ratliff).

[4] Tr., Dec. 17, 2003, 1:00 p.m., at 119 (Sen. Royce West).

[5] Tr., Dec. 15, 2003, 1:00 p.m., at 83 (Rep. Richard Raymond). Representative Phil King, the legislation's chief sponsor in the Texas House, initially asked the Redistricting Committee to pass a map dismantling District 24 (in the Dallas/Fort Worth area) as a minority district. The next day, he reversed course and supported a plan that left intact all 11 majority-minority districts. He said he did so to improve the chances of winning preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. *See* Tr., Dec. 18, 2003, 1:00 p.m., at 148-51 (Rep. Phil King).

[6] Tr., Dec. 18, 2003, 1:00 p.m., at 148-49, 157 (Rep. Phil King).

The new map shifted more than eight million Texans into new districts and split more counties into more pieces than did the court-drawn 2001 plan.[7] And the 32 districts in the new map were, on average, much less compact, under either of the Legislature's two standard measures.[8]

The 2003 plan was designed to protect all 15 Republican Members of Congress and to defeat at least 7 of the 17 Democratic Members.[9] But it could not do so without undercutting the political power of minority voters. Thus, in a State where minorities constitute roughly 40% of the adult citizen population and vote overwhelmingly for Democratic candidates, the Texas Legislature sought to draw barely 30% of the districts (10 out of 32) as ones where minority voters would have a chance to elect their preferred candidates.

Among those targeted for defeat were the six Democrats in competitive or Republican-leaning districts, who had won in November 2002 on the strength of ticket-splitting voters. Each of them was "paired" with another incumbent, placed in a substantially more Republican district, or given hundreds of thousands of new, unfamiliar (and heavily Republican) constituents who would be less likely to split their tickets based on personal allegiance.

The seventh Democrat targeted for defeat was Congressman Martin Frost, an Anglo Democrat who represented District 24 in the Dallas/Fort Worth area. Under the 2001 plan, District 24 was a majority-minority district with a total population roughly 23% black, 38% Latino, 35% Anglo (*i.e.*, non-Latino white), and 4% Asian or "Other." In general elections, the district was reliably Democratic, and in

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[7] Jackson Pls. Ex. 141 (Gaddie expert report), JA 177; Jackson Pls. Ex. 89.

[8] Jackson Pls. Ex. 141 (Gaddie expert report), JA 178.

[9] Jackson Pls. Ex. 44 (Alford expert report), JA 42-45.

Democratic primary elections, where the ultimate winners were nominated, blacks routinely constituted about 64% of the voters. J.S. App. 197a.[10] Thus, African-Americans consistently could nominate and elect their preferred candidates within the 2001 plan's District 24.[11] The State's own expert testified that District 24 "perform[s] for African-Americans."[12]

But the new 2003 plan dismantled District 24 and splintered its minority population (more than 400,000 persons) into five pieces, each of which was then submerged in an overwhelmingly Anglo Republican district. The largest African-American concentration, located in urban southeast Fort Worth, was encircled and linked to a suburban and exurban district that runs north to the Oklahoma border.

The single Republican incumbent in a competitive district, who had won narrowly in November 2002 by attracting ticket splitters — District 23's Congressman Henry Bonilla — was made substantially safer, as nearly 100,000 Latinos from the Laredo area were removed and replaced with heavily Anglo and Republican voters from the area west of San Antonio.[13] As a result, District 23 is now concededly controlled by Anglo voters, but 359,000 Latinos remain stranded there, with little hope of electing their preferred candidate.[14]

In an attempt to "offset" that loss of electoral opportunity for Latinos, the Legislature drew a new, bizarrely shaped

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[10] Tr., Dec. 11, 2003, 1:00 p.m., at 73-75 (Prof. Allan J. Lichtman); Jackson Pls. Ex. 140 (Gaddie expert deposition), JA 218-19.

[11] Jackson Pls. Ex. 1 (Lichtman expert report), JA 98-102.

[12] Jackson Pls. Ex. 140 (Gaddie expert deposition), JA 219.

[13] Jackson Pls. Ex. 44 (Alford expert report), JA 29-30.

[14] Jackson Pls. Ex. 1 (Lichtman expert report), JA 135-41; *see also infra* note 36.

majority-Latino district stretching from McAllen on the Rio Grande all the way to the Latino neighborhoods of Austin in Central Texas. This new District 25 is more than 300 miles long and in places less than 10 miles wide. *See* JA 297 (District 25 silhouette). The two ends of the district are densely populated and contain more than 89% of its Latino population, as the six intervening rural counties serve primarily to "bridge" the two population centers. *See* JA 298 (map showing population densities).

At trial in 2003, experts on both sides predicted that the new map would produce at least 21 solidly Republican districts (out of 32 total districts). That prediction was realized when the map was implemented in 2004. As Professor Alford declared:

> [T]he consensus expectation for the new district map for Texas was that it would shift the state rapidly to a 22R-10D party split composed of noncompetitive district strongholds for each party. The only surprise in the actual 2004 election results is how far things moved in that direction in a single election year. Already the split is 21R-11D, and the party vote shares, even in open seats, are strikingly noncompetitive. The trend could easily complete itself in 2006, with a 22R-10D result, and extend throughout the rest of the decade with even less competition than what was evident in 2004.

J.S. App. 226a (expert declaration of Prof. Alford).

II. The Procedural History of the Case

Appellants — Texas voters of various races and ethnicities who reside in 17 congressional districts — challenged the 2003 plan as an unconstitutional partisan gerrymander (under the Equal Protection Clause, the First Amendment, and Article I of the Federal Constitution) and as a violation of both Section 2 of the Voting Rights Act and the

racial-gerrymandering doctrine of *Shaw v. Reno*, 509 U.S. 630 (1993). Challenges to the new map were consolidated with the *Balderas* case and assigned to the same three-judge panel (but with Judge Rosenthal replacing the late Judge Hannah). After expedited discovery, the District Court held a full trial on the merits in mid-December 2003. In late December, after the parties had rested, but before the District Court heard closing arguments and decided the case, the Department of Justice precleared the 2003 plan under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.[15]

In January 2004, the District Court issued a divided opinion upholding the 2003 plan and effectively dissolving the 2001 *Balderas* injunction. The majority held that the 2003 plan satisfies the partisan-gerrymandering standard set forth in *Davis v. Bandemer*, 478 U.S. 109 (1986); the racial-gerrymandering standard set forth in *Shaw v. Reno*; and the minority vote-dilution standard set forth in two Voting Rights Act cases from the Fifth Circuit. J.S. App. 91a-93a, 106a-113a, 150a-165a. In dissent, Judge Ward stated that the 2003 plan violates Section 2 of the Voting Rights Act and thus should not replace the 2001 plan — "a plan that is beyond dispute a legal one." *Id.* 195a.

This Court denied a stay, *Jackson v. Perry*, 540 U.S. 1147 (2004), but later vacated the ruling below and remanded the case for reconsideration in light of *Vieth v. Jubelirer*, 541 U.S. 267 (2004). *See Jackson v. Perry*, 125 S. Ct. 351 (2004). After further briefing and argument, the three-judge District Court again upheld the 2003 plan.

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[15] The Justice Department has now acknowledged that it made this preclearance decision over the contrary unanimous recommendation of career staff in the Civil Rights Division. Dan Eggen, *Justice Staff Saw Texas Districting as Illegal*, WASH. POST, Dec. 2, 2005, at A1.

Prior to the remand, the State of Texas had admitted, and the three-judge court below had found as fact, that the *sole* motivation for changing the court-drawn map mid-decade was partisan gain. *See, e.g.*, J.S. App. 85a ("There is little question but that the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage."); *id.* at 88a ("Plaintiffs' expert testimony supports our conclusion that politics, not race, drove Plan 1374C."); *id.* at 88a-89a ("'[T]he newly dominant Republicans . . . decided to redraw the state's congressional districts solely for the purpose of seizing between five and seven seats from Democratic incumbents.'") (citation omitted; alterations in the original); *id.* at 85a ("With Republicans in control of the State Legislature, they set out to increase their representation in the congressional delegation to 22."); *id.* at 89a (concluding "that this plan was a political product from start to finish").

Indeed, Representative Phil King, one of the 2003 plan's architects, openly boasted at trial that Congressman DeLay and the Republicans had set out to "get as many seats as we could."[16] And the State of Texas conceded in its post-trial brief that

> [t]he overwhelming evidence demonstrated that *partisan gain was the motivating force behind the decision to redistrict in 2003*. As now-retired Senator Bill Ratliff colorfully put it, political gain for the Republicans was "110 percent" of the motivation for Plan 1374C.

State Defs.' Post-Trial Br. at 51 (filed Dec. 22, 2003) (citation omitted; emphasis added).

In its most recent decision reexamining the partisan-gerrymandering issues on remand from this Court, the three-

[16] Tr., Dec. 18, 2003, 1:00 p.m., at 142 (Rep. Phil King).

judge court below did not rescind its earlier findings that partisan maximization was the sole motive behind the 2003 redistricting. Instead, the District Court concluded that a redistricting map serving purely partisan ends is constitutionally permissible. *See* J.S. App. at 15a-17a. It reasoned that this Court so held in *Vieth*, pointing out that the plaintiffs' complaint there had alleged that the redistricting map was driven solely by partisan motives. *See id.* at 15a-16a. The District Court also reasoned that a purely partisan map may be permitted if its purpose is to redress a perceived partisan imbalance in the existing map. *See id.* at 18a-20a. Then, contradicting the court's own prior description of the 2001 court-drawn plan, *id.* at 205a-209a, the court suddenly asserted that it contained vestiges of the 1991 map drawn by Democrats to favor their interests. *See id.* at 20a-22a.

The court also rejected the argument that a legislature voluntarily revising a lawful map in mid-decade should not be allowed to rely on outdated census data. While recognizing the attractiveness of that rule as a matter of policy, the court concluded that it lacked a valid constitutional basis. *Id.* at 31a-39a. *But see id.* at 45a-55a (Ward, J., concurring in the judgment).

This appeal followed. On December 12, 2005, the Court noted probable jurisdiction and set an expedited schedule for briefing and oral argument on the merits.

SUMMARY OF ARGUMENT

The District Court's judgment upholding Texas's 2003 congressional redistricting plan should be reversed because (1) the Constitution prohibits legislators from redrawing election districts in the middle of a decade *solely* to achieve partisan advantage; (2) under the Voting Rights Act, a State may not destroy a district in which African-Americans, though lacking a majority of the population, can nominate and elect candidates of their choice; and (3) pursuit of

partisan advantage is no defense to a racial-gerrymandering claim under the Equal Protection Clause.

1. The District Court erroneously upheld the constitutionality of the State's decision to redraw a perfectly lawful congressional districting plan in the middle of the decade. Prior to 2003, mid-decade congressional "re-redistricting" — replacing a lawful plan after it has been used in at least one election — was unprecedented in the modern era. The State of Texas has conceded that partisanship was the sole motivation behind this extraordinary change. It follows, under the Court's precedents, that the 2003 redistricting law was not a constitutionally valid exercise of governmental power.

This Court has recognized that government generally may not make even very discretionary decisions based on a desire to promote one political party or viewpoint at the expense of another. *E.g.*, *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996); *Mt. Healthy City Sch. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Elrod v. Burns*, 427 U.S. 347 (1976). Indeed, even outside the context of partisan favoritism, the Court repeatedly has held that a law motivated solely by a desire to harm an unpopular group of citizens is not a legitimate exercise of power under our Constitution. *E.g.*, *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

The various opinions in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), in turn, support application of these bedrock principles to an unnecessary redrawing of district lines designed solely to replace representatives from one party with representatives from another. The justiciability concerns expressed there do not apply where, as here, the claim turns on proof that the redistricting law serves no legitimate governmental purpose. Moreover, several of the opinions in *Vieth* emphasized that redistricting motivated

solely by partisanship would go too far. *See* 541 U.S. at 307 (Kennedy, J., concurring in the judgment) (goal is a rule excluding redistricting "unrelated to any legitimate legislative objective"); *id.* at 318 (Stevens, J., dissenting) (Constitution is violated when "partisanship is the legislature's sole motivation"); *id.* at 351 (Souter, J., dissenting) (constitutionally suspect districts must be justified by "objectives other than naked partisan advantage"). The District Court thus erred in saying that *Vieth* forecloses the distinct type of claim appellants have pursued in this case.

Nor can the State's use of the machinery of government to achieve purely political ends be upheld on the theory that "two wrongs make a right." The District Court's assertion that the 2003 changes were merely compensatory because the 2001 court-drawn map retained vestiges of a prior Democratic gerrymander is insupportable. A desire to dictate partisan outcomes does not become a legitimate public purpose for redistricting legislation just because legislators do not like the composition of the State's current congressional delegation. That is particularly true where, as here, the supposed "vestiges" of prior gerrymanders amounted to a continued ability of Democratic incumbents to win narrowly in Republican-leaning districts. It is not a valid defense of purely partisan mid-decade redistricting that it was intended to prevent voters from continuing to reelect the incumbents they prefer, by separating those incumbents from the constituents who know them best.

Unnecessary mid-decade redistricting also violates the one-person, one-vote doctrine. The legal fiction that census results are valid for 10 years exists to promote district stability and democratic accountability. That same fiction should not be available when legislators needlessly redraw lines to serve partisan purposes, thus undermining stability and accountability.

2. In its prior ruling, the majority below misread this Court's treatment of the Voting Rights Act in such cases as *Georgia v. Ashcroft*, 539 U.S. 461 (2003), *Johnson v. De Grandy*, 512 U.S. 997 (1994), and *Thornburg v. Gingles*, 478 U.S. 30 (1986), in ruling that the only districts that "count" under Section 2 of the Act are those in which one minority group constitutes a mathematical majority of the population. On the basis of that flat, mechanical rule, the court blessed the deliberate destruction of District 24. That district, although not majority-black, was a majority-minority district where African-Americans had been able to nominate and elect their preferred candidate by controlling the Democratic primary and forming effective coalitions in the general election. As numerous courts have recognized, Section 2 need not and should not be read to exclude from statutory protection districts that operate as minority opportunity districts even though the relevant group lacks an absolute majority of the population.

3. The court below upheld as constitutional under *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny, an absurdly noncompact district that uses a long, thin corridor of largely empty counties to connect two far-flung urban pockets of dense Latino population that are 300 miles apart. *See* JA 297, 298 (maps). The court did so in large part because the Legislature created that new district to facilitate efforts to protect a nearby Republican incumbent. That is the precise kind of justification for racial gerrymandering that this Court rejected in *Bush v. Vera*, 517 U.S. 952 (1996).

4. If the Court invalidates the 2003 plan as a partisan gerrymander, it should direct that the 2001 plan immediately be reinstated for Texas's 2006 election.

ARGUMENT

I. THE CONSTITUTION PROHIBITS STATES FROM REDRAWING LAWFUL DISTRICTING PLANS IN THE MIDDLE OF THE DECADE FOR THE SOLE PURPOSE OF MAXIMIZING PARTISAN ADVANTAGE.

The challenge to the Texas map on grounds of partisanship presented here differs fundamentally from the partisan-gerrymandering claim this Court rejected in *Vieth v. Jubelirer*. That claim focused not just on the predominant purpose but also on the *effects* of the district lines, claiming that they were too biased to be constitutionally permissible. Appellants' current claim alleviates the justiciability concerns expressed in *Vieth*, because it does not ask a court to determine how much bias is too much.

Indeed, the opinions in *Vieth* strongly support the conclusion that a redistricting plan undertaken solely to achieve partisan advantage, and serving no other purpose, necessarily violates the Constitution. That rule is well grounded in this Court's constitutional jurisprudence. Under the governing caselaw, there should be no doubt that a redistricting law violates the Equal Protection Clause and the First Amendment when it is enacted solely to skew future election results in favor of one political party and against another, at a time when a lawful map is already in place and there is no other legitimate justification for changing the district lines. A mere desire to lessen the power of one group of citizens because of their disfavored political beliefs is not a legitimate basis for exercising governmental power. While political motives will always play a role in redistricting, that reality is tolerated if other, legitimate governmental interests are being served. But if a redistricting law is enacted in mid-decade, the goals served can be, as in this case, purely

partisan. Such a law is not a legitimate exercise of governmental power.

A. Partisan Advantage Can Never Be the Sole Interest Served by a Governmental Action.

"The concept of equal justice under law requires the State to govern impartially. . . . The sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective." *Lehr v. Robertson*, 463 U.S. 248, 265 (1983) (citing *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979); *Reed v. Reed*, 404 U.S. 71, 76 (1971)). That principle, as applied here, means that a redistricting plan passed solely for the purpose of changing the political balance of power is constitutionally invalid because the First and Fourteenth Amendments render such a goal an illegitimate basis for governmental action.[17]

One application of these principles is the political-patronage line of cases beginning with *Elrod v. Burns*, 427 U.S. 347 (1976), and continuing through *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996). Those cases hold that the First Amendment and the Equal Protection Clause do not allow the government to make hiring decisions (other than appointing high high-level

[17] Appellants do not ask the Court to apply intermediate or strict scrutiny under the Fourteenth Amendment — although there certainly are strong arguments for applying such heightened scrutiny to a law designed solely to favor some private interests and disfavor others, in the exercise of the fundamental right to vote, based on whether their political views align with those of the majority of legislators. The Court's cases establish that even under the more lenient rational-basis standard of review, governmental power may not be exercised solely to augment the influence of those with a favored political agenda at the expense of those who disagree with them, because that goal is not itself a legitimate public purpose.

policymakers) or select contractors based on the applicants' political affiliation or beliefs. In *O'Hare*, for example, the Court recognized that the City could terminate its relationship with a contractor at will, but held that it could *not* do so to punish a contractor's political affiliation:

> Respondents' theory, in essence, is that no justification is needed for their actions, since government officials are entitled, in the exercise of their political authority, to sever relations with an outside contractor for any reason including punishment for political opposition. Government officials may indeed terminate at-will relationships, unmodified by any legal constraints, without cause; but it does not follow that this discretion can be exercised to impose conditions on expressing, or not expressing, specific political views . . . .

Id. at 725-26.

The *O'Hare* Court then invoked the familiar *Mt. Healthy* test for assessing government employees' claims that they were dismissed in retaliation for exercising their First Amendment rights. *See id.* at 725 (citing *Mt. Healthy City Sch. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). Under that test, if the employee shows that impermissible retaliatory motives were a motivating factor, the burden shifts to the government to show that it would have taken the same action "even in the absence of the protected conduct." *Mt. Healthy*, 429 U.S. at 287. Such a test allows hostility to an employee's political speech to be *a* motivating factor — just as politics can be considered by legislators in redistricting. But the test bars governmental actions that would not have occurred absent the desire to punish unpopular speech. *Mt. Healthy* thus constitutes another example of this Court's recognition that governmental action

aimed at promoting or punishing a given political perspective is not constitutionally legitimate.[18] *See also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 572 n.2 (1975) (Rehnquist, J., dissenting) ("A municipal auditorium which opened itself to Republicans while closing itself to Democrats would run afoul of the Fourteenth Amendment.").

The redistricting law at issue here violates these principles. The use of governmental power solely to help or hurt a particular political party's or group's voters, based on the content of their speech or beliefs, cannot be squared with the First Amendment and the guarantee of equal protection. That is precisely what occurred here.

Even outside the context of illegitimate *political* favoritism or punishment, the Court has several times struck down laws designed to harm particular groups of people simply because they are unpopular. As the Court held in *Romer v. Evans*, 517 U.S. 620 (1996), a law "inexplicable by anything but animus toward the class it affects . . . lacks a rational relationship to legitimate state interests." *Id.* at 632. That is because a "'bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'" *Id.* at 634 (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)) (emphasis in the original); *see also City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446-50 (1985) (law motivated by animus toward mentally disabled); *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment) ("When a law exhibits such a desire to harm a politically

[18] The District Court's findings of purely partisan motivation render it unnecessary for this Court to address the proper treatment of redistricting when partisanship is one of several motives. The *Mt. Healthy* standard suggests, however, that such a redistricting law would be invalid if partisanship were the "but for" cause of the State's decision to make changes in the district lines.

unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.").

Justice Kennedy summarized this constitutional principle in his concurrence in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), discussing rational-basis review under the Fifth Amendment's Public Use Clause, which he analogized to rational-basis review under the Equal Protection Clause:

> The determination that a rational-basis standard of review is appropriate does not . . . alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden . . . .
>
> A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as *a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications*.

Id. at 2669 (citing *City of Cleburne*, 473 U.S. at 446-47, 450; *Moreno*, 413 U.S. at 533-36) (emphasis added).

It is hard to imagine a clearer example of such a constitutional problem than this case, where the State conceded, and the District Court found, that a thoroughgoing revision of congressional districts was passed in mid-decade not for any good and legitimate *public* purpose, but *solely* to give one group of citizens greater political power at the expense of another.

B. A Majority of the Justices in *Vieth* Supported the Proposition that a Redistricting Plan Is Unconstitutional If Its Sole Motivation Was To Grant One Political Party's Voters an Advantage over the Other's.

The various opinions of the Justices in *Vieth*, taken together, support the application to redistricting of the bedrock principle that the government has to have some *legitimate* basis for acting — not merely a desire to help one political party. Indeed, all nine Justices in *Vieth* recognized that excessive partisanship in redistricting is constitutionally illegitimate (even if, as some Justices thought, that constitutional violation is nonjusticiable). *See Vieth*, 541 U.S. at 292 (plurality opinion) ("severe partisan gerrymanders violate the Constitution"); *id*. at 293 ("[A]n *excessive* injection of politics [in redistricting] is *un*lawful." (emphasis in the original)); *id*. at 316 (Kennedy, J., concurring in the judgment) (agreeing with the plurality that partisan gerrymandering is incompatible with "'democratic principles'" and thus constitutionally impermissible) (quoting the plurality, *id.* at 292); *id*. at 323-25 (Stevens, J., dissenting); *id*. at 343-44 (Souter, J., joined by Ginsburg, J., dissenting); *id.* at 355 (Breyer, J., dissenting).

To be sure, the plurality in *Vieth* and Justice Kennedy did express the view that partisan gerrymandering is or may be nonjusticiable — even though unconstitutional — because of the difficulty of identifying maps that "go too far." But that problem does not arise with a challenge to a mid-decade remap needlessly undertaken for solely partisan reasons. Such a challenge does not turn on analysis of the exact effects of the map. Nor does it turn on analysis of the reasons or purposes behind the drawing of any particular lines. Instead, it turns on whether the State had a constitutionally legitimate reason for taking any action at all

— the kind of analysis that courts routinely undertake under the Equal Protection Clause.

Indeed, in his *Vieth* concurrence, Justice Kennedy recognized this distinction by indicating that a justiciable test would be one targeting maps driven *solely* by a partisan agenda unrelated to the legitimate and traditional goals of redistricting. He stated that a "determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner *or in a way unrelated to any legitimate legislative objective*." 541 U.S. at 307 (emphasis added).

Justice Kennedy went on to say that the goal was to enunciate a "subsidiary standard" that would identify those redistricting maps that went so far in the single-minded pursuit of partisan advantage that they established political classifications "unrelated to the aims of apportionment." *Id.* at 312-14. As he put it, "[i]f a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles,' we would surely conclude the Constitution had been violated." *Id.* at 312 (citation omitted). It follows, he said, that the Court should seek a standard that determines when, in parallel fashion, "an apportionment's *de facto* incorporation of partisan classifications burdens rights of fair and effective representation (and so establishes the classification is *unrelated to the aims of apportionment* and

thus is used in an impermissible fashion)." *Id.* (emphasis added).[19]

Justice Stevens agreed that a redistricting law is unconstitutional if it was enacted for solely partisan reasons and therefore serves no legitimate governmental policy. *See* 541 U.S. at 317-42 (dissenting opinion). In his view, partisan gerrymandering lacks "any rational justification" if partisanship is the legislature's "*sole* motivation — when any pretense of neutrality is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage." *Id.* at 318 (emphasis added). In that event, "the governing body cannot be said to have acted impartially."[20]

Justice Souter, joined by Justice Ginsburg, took a similar approach. He would have required a State to justify districts that (1) disregard traditional districting criteria like contiguity, compactness, and respect for political subdivisions, and (2) do so in a manner that correlates with achieving the "packing" and "cracking" goals of a gerrymander. *Id.* at 347-49 (dissenting opinion). The justification would have to invoke "objectives *other than naked partisan advantage*." *Id.* at 351 (emphasis added).

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[19] In light of the principles he enunciated, it is not surprising that Justice Kennedy did not find a constitutional violation in *Vieth*, as the map at issue there was passed at the beginning of the decade to cure population disparities evidenced by the latest census and thus could not be said to serve *purely* partisan purposes. For a scholarly approach that builds on Justice Kennedy's opinion, *see* Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 807-54 (2005).

[20] In Justice Stevens's view, the appropriate way to assess these issues is generally on a district-specific basis — at least where, as in *Vieth*, some new map was needed at the beginning of the decade to satisfy other legal constraints. *See id.* at 327-29. But his approach would not preclude a "statewide" challenge to a mid-decade redistricting that would not have occurred at all absent the pursuit of partisan goals.

Finally, Justice Breyer evinced similar concerns about "purely political 'gerrymandering' [that fails] to advance any plausible democratic objective while simultaneously threatening serious democratic harm." *Id.* at 355 (dissenting opinion). He included here maps that have been redrawn in mid-decade and "cannot be justified or explained other than by reference to an effort to obtain partisan political advantage." *Id.* at 366-67. In sum, the opinions in *Vieth* strongly support the type of claim at issue here.

The District Court held otherwise, reasoning that this Court in *Vieth* had actually addressed and rejected the argument that proof of a purely partisan motivation would suffice to invalidate a given districting plan. Relying on the fact that the complaint filed in *Vieth* alleged that some of the district lines in Pennsylvania were the product of pure partisanship, the District Court reasoned that the plurality and Justice Kennedy implicitly held that such allegations, even if proved, would not be enough. J.S. App. 16a. But that is not what occurred in *Vieth*.

By the time the case reached this Court, the *Vieth* plaintiffs' argument was that maps drawn with a "predominantly" partisan intent and substantial statewide biasing effects should be invalidated. *See* 541 U.S. at 284-90 (plurality opinion). That was the argument addressed by the plurality and Justice Kennedy. There is not a word in either opinion suggesting that it would be lawful for a State to decide to redraw a districting plan for purely partisan reasons without articulating any other state interest being served.[21]

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[21] To be sure, as the District Court noted, J.S. App. 16a, Justice Stevens's dissent did emphasize allegations in the *Vieth* complaint that the challenged plan was motivated solely by partisan goals. 541 U.S. at 318-19 (Stevens, J., dissenting). But what matters here is the argument

The reason why the *Vieth* appellants did not make a "sole purpose" argument in this Court was that they were challenging a map that was drawn right after the census and that made changes in the number and size of districts in response to the new census data. Such a map cannot serve *solely* partisan purposes. But that is where *Vieth* differs so dramatically from this case. Here, the 2003 plan replaced a 2001 plan that *already* had the right number of districts of the right size. There was no constitutional obligation to act at all. So it is not surprising that in this situation the District Court found as fact that the 2003 plan's very existence arose *solely* because the majority in the Legislature wanted to maximize the number of Republican Representatives in Congress.

Barring redistricting undertaken solely to pursue partisan advantage would thus impose a potentially meaningful check on decisions to replace existing lawful maps in mid-decade. Indeed, when legislators redraw lawful districts in mid-decade, courts should presume that action to be purely partisan. By contrast, a ruling for appellants would call into question few, if any, maps drawn right after a new decennial census.[22]

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actually considered by the five Justices who voted against the plaintiffs in *Vieth*.

[22] Redistricting only at the beginning of each decade "tak[es] agenda-setting power away from state political actors[,] . . . partially randomiz[es] control over the redistricting process, [and lessens] the likelihood that redistricting will occur under conditions favoring partisan gerrymandering." Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 776 (2004); *see also* Berman, 83 TEX. L. REV. at 845-52 (analyzing mid-decade redistricting).

C. The 2003 Plan Cannot Withstand Scrutiny on the Theory that It Promoted Partisan Fairness.

As noted above, the three-judge District Court did not back away from its prior finding that Texas's 2003 redistricting plan was the product of purely partisan intent. Rather, the court sought to justify that partisan effort on the theory that the new map served to undo the residual effects of Democratic gerrymandering in 1991 — effects that the court said had found their way into the map the court itself drew in 2001. This justification fails as a matter of law as well as fact.

Legally, a desire to eliminate a supposed "vestige" of a prior gerrymander may not be the sole reason for a law redrawing election districts. Allowing a State to defend a needless mid-decade redistricting on that basis would amount to endorsing state action aimed solely at altering the future partisan outcome of elections. A State may be free to give some weight to concerns about electoral outcomes when complying with a legal obligation to redraw the lines. But having wholly failed to act when it had such an obligation in 2001, the State should not be allowed to redraw the map later in the decade solely to engineer what it views as a better partisan outcome. *Cf. Cook v. Gralike*, 531 U.S. 510, 523 (2001) (invalidating a state law intended to "dictate electoral outcomes"); *id.* at 528 (Kennedy, J., concurring) ("Neither the design of the Constitution nor sound principles of representative government are consistent with the right or power of a State to interfere with the direct line of accountability between the National Legislature and the people who elect it."). Manipulating electoral outcomes cannot be transformed from an illegitimate to a legitimate public purpose for passing an otherwise unnecessary redistricting bill just because the legislative majority articulates a view that the current map is "unfair" or

"skewed." Allowing that exception would eviscerate constitutional limits altogether.

In any event, factually, the partisan-balance justification is insupportable here. It rests on the notion that the 2001 plan made only modest changes to the 1991 plan that the court saw as favoring the Democrats. But in reality, as the *Balderas* three-judge court explained in 2001, its map-drawing methodology was not based on the existing districts from the 1990s but instead started with "a blank map of Texas" and applied neutral factors such as compactness, contiguity, and respect for political subdivisions like cities and counties. J.S. App. 206a; *see id.* at 207a ("We eschewed an effort to treat old lines as an independent locator, an effort that, in any event, would be frustrated by the population changes in the last decade."). In so doing, the court followed the "neutral approach" urged by the *State's* expert, who obviously was not seeking to preserve any preexisting pro-Democratic bias that may have existed in the earlier map. *Id.* at 206a. The 2001 court then verified the partisan fairness of its neutrally drawn map by (1) checking whether three senior Members of Congress from each party were threatened, and (2) checking the "plan against the test of general partisan outcome, comparing the number of districts leaning in favor of each party based on prior election results against the percentage breakdown statewide of votes cast for each party in congressional races." *Id.* at 208a.

Two years later, a modified three-judge panel (which included two of the three original judges) confirmed after a full trial that 20 of 32 districts in the 2001 plan "offer[ed] a Republican advantage." *Id.* at 85a. In so concluding, the court had the benefit of another expert for the State, who testified that the 2001 plan had a small *pro-Republican* bias. *See* Jackson Pls. Ex. 141, JA 189-93, 216; Jackson Pls. Ex. 140, JA 224-25. The court was not dissuaded of the fairness of its map by the fact that "the voters in 2002 split their

tickets" to narrowly reelect "[s]ix incumbent Anglo Democrats . . . in Republican-leaning districts." J.S. App. 85a. The court implicitly recognized that incumbency can affect the results produced by a given map in the short term, but cannot alter the underlying fairness or unfairness of the districts as drawn.

But in 2005, the 2002 election results and incumbency effects that allowed some Democrats narrowly to win in Republican-leaning districts became "evidence" of a supposed residual pro-Democratic bias in the court-drawn 2001 map. In so stating, the court below took no account of the actual process used to draw the map in 2001 — a process *not* based on the prior map. Nor did it evince any awareness of the distinction between residual *bias* — which the record makes clear was *not* present in the 2001 map — and the advantages of *incumbency*, which can affect outcomes in the short term.[23]

The 2001 districts, by every indication, gave the Republicans at least a fair share of electoral opportunities. The fact that the Republicans in 2002 did not immediately defeat the Democratic incumbents left vulnerable by the 2001 map, and the Texas delegation therefore remained about evenly divided politically, does not amount to a "nonpartisan" reason to redraw the lines. It amounts to an effort to use the reins of government to avoid having do any "heavy lifting" to attain a desired partisan outcome.

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[23] The court below also ignored the fact that a three-judge district court in 1996 redrew 13 of the 30 districts in the 1991 map, over vigorous objections from Democratic voters and officeholders. *See Vera v. Bush*, 933 F. Supp. 1341, 1342 (S.D. Tex.) (three-judge court), *stay denied sub nom. Bentsen v. Vera*, 518 U.S. 1048 (1996).

D. Mid-Decade Partisan Gerrymandering Violates the One-Person, One-Vote Doctrine.

There is an additional basis for recognizing a presumption against the validity of mid-decade remaps: the one-person, one-vote doctrine grounded in the Equal Protection Clause and Article I of the Constitution. This Court has recognized a legal fiction that population figures produced by the Census Bureau remain valid for ten years, thus precluding mid-decade one-person, one-vote challenges to districts that were equipopulous at the start of the decade. *See Georgia v. Ashcroft*, 539 U.S. at 488 n.2. This fiction fosters stability, which in turn strengthens democratic accountability, as constituents can vote for representatives who have served them well and can vote against those who have served them poorly. *See Cook v. Gralike*, 531 U.S. at 528 (Kennedy, J., concurring) ("[F]reedom is most secure if the people . . . hold their federal legislators to account for the conduct of their office."); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 844 (1995) (Kennedy, J., concurring) (explaining that "resident voters in federal elections" have a constitutional right to elect their preferred candidates to Congress, and that a State cannot burden that right "by reason of the manner in which [the voters] earlier had exercised it").[24] When a State gratuitously undermines stability and accountability by changing districts for purely partisan reasons in mid-decade, the justification for the legal fiction does not apply.

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[24] *See also* J.S. App. 171a-172a (citing *Cook v. Gralike*, 531 U.S. at 523; *Term Limits*, 514 U.S. at 833-34); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 586 (1833) ("[A] fundamental axiom of republican governments [provides] that there must be a dependence on, and responsibility to, the people, on the part of the representative, which shall constantly exert an influence upon his acts and opinions, and produce a sympathy between him and his constituents.").

Moreover, mapmakers pursuing a partisan agenda years after the census can use their knowledge of post-census population shifts to produce districts that appear to be equipopulous (using the old census data) but in fact pack voters from the disfavored party into larger-than-average districts, further diluting their votes. This could occur, for example, if the line-drawers know that particular areas are experiencing unusually rapid Latino growth that, over a ten-year period, could transform a Republican-leaning district into a competitive one. If allowed to redraw lines mid-decade based on the old census data, the mapmakers can "fix the problem" by swapping territory between adjoining districts to ensure that these high-growth areas are removed from the Republican-held district and placed in a packed Democratic district. When that occurs, the Democratic districts will have more residents than other districts, but using old census data will disguise the deviations and make the districts appear equipopulous.

The danger of this type of partisan manipulation reinforces the arguments for recognizing a strong presumption against the constitutionality of unnecessary mid-decade redistricting. Not only are such destabilizing changes almost certain to be undertaken solely for partisan reasons, but they allow manipulation of population differentials that are obscured through the pretense that the old census data remain accurate.

II. TO MAXIMIZE PARTISAN GAINS, THE TEXAS LEGISLATURE VIOLATED THE VOTING RIGHTS ACT AND DELIBERATELY DESTROYED A COALITIONAL DISTRICT WHERE AFRICAN-AMERICANS COULD CONSISTENTLY NOMINATE AND ELECT THEIR PREFERRED CANDIDATE.

The lengths to which the Texas Legislature was willing to go to maximize Republican control of congressional districts are further illustrated by the fact that the 2003 plan carved up former District 24 in the Dallas/Fort Worth area and thereby denied African-American citizens an equal "opportunity . . . to participate in the political process and to elect representatives of their choice" — in violation of Section 2 of the Voting Rights Act. 42 U.S.C. § 1973(b).

The court below erred in holding that the deliberate dismantling of a "coalitional" district where African-American voters consistently nominated and elected their preferred candidate was immunized from scrutiny under Section 2 because African-Americans do not constitute a majority of the district's adult citizen population. J.A. App. 107a-110a. It was undisputed below that the number of districts where African-American voters exercise effective control in the 2003 plan (3 out of 32) falls short of a proportional share (slightly more than 4 out of 32).[25] It was also undisputed that it is impossible to draw a new district in which African-Americans will be a majority of the population. The question is whether, under those circumstances, the Voting Rights Act permitted the State to eliminate existing District 24, in which African-Americans were able to exercise electoral power in coalition with others.

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[25] *See* Jackson Pls. Ex. 1 (Lichtman expert report), JA 89-91.

As this Court recently explained when interpreting Section 5 of the Act, 42 U.S.C. § 1973c, a State marked by long-standing minority underrepresentation may choose whether to create "safe" majority-black districts or a larger number of "coalitional" districts. *Georgia v. Ashcroft*, 539 U.S. at 479-83. But where, as here, it is not possible to create another majority-black district and African-Americans are underrepresented statewide, a State should not be free to choose "neither route," by destroying a functioning coalitional district. J.S. App. 198a. The Fifth Circuit rule used to justify that action here — which denies statutory protection to any district lacking an absolute majority of citizen adults from a single minority group — has been rightly rejected by many courts as contrary to Congress' purposes in enacting the Voting Rights Act.[26]

A. Section 2 of the Voting Rights Act Protects Coalitional Districts.

In rejecting appellants' Section 2 challenge to the dismantling of former District 24, the District Court relied primarily on the Fifth Circuit's "50% Rule," which holds that the Voting Rights Act applies only where it is possible to draw an additional district in which the relevant protected group has an absolute mathematical majority of the citizen voting-age population. J.S. App. 96a & n.76, 107a-108a & nn.111-12 (citing *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 852-53 (5th Cir. 1999), and *Perez v.*

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[26] In addition to destroying an African-American coalitional district in the Dallas/Fort Worth area, *see infra* pages 39-43, and a majority-Latino district in South and West Texas, *see infra* note 36, the 2003 plan eliminated half a dozen other districts where African-Americans and Latinos had exerted significant electoral influence by providing successful candidates their margins of victory. *See* Jackson Pls. Ex. 1 (Lichtman expert report), JA 158-64; *Georgia v. Ashcroft*, 539 U.S. at 482-85 (discussing influence districts).

Pasadena Ind. Sch. Dist., 165 F.3d 368, 372-73 (5th Cir. 1999)).[27] But that rule has no basis in the text of the Act, creates tension with this Court's precedents, repeatedly has been rejected by the Justice Department, has not been followed in some other circuits, and makes little sense.

Indeed, the rule can have the perverse effect of preventing minorities from achieving the statutory goal of an equal opportunity "to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). It does so by demanding the unnecessary packing of minority voters into majority-black or majority-Latino districts wherever that is possible, and by withdrawing all protection from minority voters living outside those districts. The plain text of the Act, however, focuses not on whether a district is "majority-black" or "majority-Latino" — words that appear nowhere in Congress' enactment — but rather on whether a district offers minority voters an "opportunity . . . to elect representatives of their choice." *Id.*

Lacking support in the statutory text, the 50% Rule purports instead to flow from the first of the three "preconditions" established in *Thornburg v. Gingles*, 478 U.S. 30 (1986). But rather than focusing myopically on minority population percentages and arbitrary mathematical quotas, the *Gingles* Court drew a pragmatic distinction between minority voters' ability to elect their preferred candidates under some plan proposed by a plaintiff and their inability to do so under the plan challenged by that plaintiff. Thus, the *Gingles* Court found Section 2 liability where the Anglo bloc "normally will defeat the *combined* strength of

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[27] *See also, e.g.*, *Hall v. Virginia*, 385 F.3d 421, 427-32 (4th Cir. 2004), *cert. denied*, 125 S. Ct. 1725 (2005); *Parker v. Ohio*, 263 F. Supp. 2d 1100, 1104-05 (S.D. Ohio) (three-judge court), *summarily aff'd*, 540 U.S. 1013 (2003).

minority support *plus white 'crossover' votes*." *Id.* at 56 (emphasis added); *see also id.* at 46 n.11 ("Dilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an *ineffective* minority of voters . . . " (emphasis added)). In her concurrence for four Members of this Court, Justice O'Connor rejected a 50% quota and noted the "artificiality" of distinguishing a majority-black district from an effective coalitional district that could elect the very same candidates. *Id.* at 89-90 n.1.

In *Growe v. Emison*, 507 U.S. 25 (1993), the Court again focused on actual electoral opportunities, not arbitrary mathematical cut points, when it explained that proof of *Gingles*'s first prong was needed to "establish that the minority has the *potential to elect* a representative of its own choice in some single-member district." *Id.* at 40 (emphasis added). And in *Voinovich v. Quilter*, 507 U.S. 146 (1993), the Court assumed, without deciding, that less than a majority sufficed to prove vote dilution under Section 2. *See id.* at 154, 158.

The following Term, in *Johnson v. De Grandy*, 512 U.S. 997 (1994), the Court explained that *Gingles*'s first prong required an "effective" majority of minority voters in the proposed district. It said that the "first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts *with a sufficiently large minority population to elect candidates of its choice*." *Id*. at 1008 (emphasis added). It then assumed, without deciding, that the first *Gingles* condition could be satisfied "even if Hispanics are not an absolute majority of the relevant population in the additional [proposed] districts." *Id*. at 1009. The Court added that, while "society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity, that should not obscure the fact that there are communities in

which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice." *Id*. at 1020.[28] In interpreting the Voting Rights Act, the *De Grandy* Court thus disavowed attempts to "promote and perpetuate . . . majority-minority districts . . . where they may not be necessary to achieve equal political and electoral opportunity." *Id.* at 1019-20.

Most recently, in *Georgia v. Ashcroft*, the Court returned to the theme of "coalitional" districts in a case interpreting Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Citing *De Grandy* and Justice O'Connor's *Gingles* concurrence, the Court again recognized that protected groups can and do elect their preferred representatives and exercise meaningful electoral power in districts where they lack an absolute mathematical majority. *See* 539 U.S. at 479-91. Rather than focusing solely on majority-black and majority-Latino districts, all nine Justices called for a more nuanced assessment of districting plans — including recognition of "coalitional" districts where minority voters can elect their preferred candidates by forming coalitions with predictably supportive nonminority voters. *See id*.; *see also id.* at 492 (Souter, J., dissenting) (agreeing with the majority's treatment of "coalitional districts," where minorities have an opportunity to "elect their candidates of choice . . . when joined by predictably supportive nonminority voters"); *cf. id.* at 491 (Kennedy, J., concurring) ("The discord and inconsistency between §§ 2 and 5 [of the Act] . . . should be confronted.").

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[28] *See also id*. at 1000 (discussing "effective voting majorities"); *id*. at 1004 ("a functional majority of Hispanic voters"); *id.* at 1014, 1021, 1023 n.19 ("an effective voting majority"); *id.* at 1017 ("districts in which minority voters form an effective majority"); *id.* at 1024 ("an effective majority").

Taking these cues, the Justice Department and many lower courts have rejected the rigid 50% Rule. For example, in 1999, the United States filed briefs in this Court strongly disagreeing with the Fifth Circuit's "flat 50%," or "absolute numerical majority," rule and arguing instead that Voting Rights Act plaintiffs can make out a claim of vote dilution by showing that the minority voters in the plaintiffs' proposed district have the potential to elect a representative of their choice with the assistance of limited but predictable crossover voting from the white majority (or from other racial or language minorities) — regardless of whether members of the plaintiffs' minority group constitute an arithmetic majority in the district. *See, e.g.*, Br. for the United States as Amicus Curiae at 6-14, *Valdespino v. Alamo Heights Ind. Sch. Dist.*, 528 U.S. 1114 (2000) (No. 98-1987). The Justice Department has taken this same position for at least a decade and a half, spanning at least three administrations. *See, e.g.*, Br. for the United States at 52-56, *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990) (No. 90-55944).

Likewise, in *Martinez v. Bush*, 234 F. Supp. 2d 1275 (S.D. Fla. 2002), the three-judge court expressed doubt that the first *Gingles* factor "was intended as a literal, mathematical requirement" and instead focused on what it called "performing minority districts," which "may or may not have an actual majority . . . of minority population, voting age population, or registered voters." *Id.* at 1320 n.56, 1322. And the *Martinez* court criticized "the approach of focusing mechanically on the percentage of minority population (or voting age population or registered voters) in a particular district, without assessing the actual voting strength of the minority in combination with other voters." *Id.* at 1322. Similarly, in *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991), the three-judge court first noted that the pertinent issue under Section 2 is "not whether [black voters]

can elect a black candidate, but rather whether they can elect a *candidate of their choice*," and went on to decide that, with slightly less than one third of the voting-age population in a particular district, this requirement was satisfied. *Id*. at 1059-60.[29]

More recently, in *Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004) (en banc) *(per curiam)*, the First Circuit rejected the 50% Rule and held that a successful Section 2 claim could be brought where the plaintiff group "was a numerical minority but had predictable cross-over support from other groups." *Id.* at 11; *see id.* at 9-12. Even the dissent in *Metts* recognized the potential legal significance of limited crossover voting and thus refused to endorse the flat 50% Rule. *Id*. at 13-14 (Selya, J., dissenting).

The absence of a mathematical majority in a given area should not negate all rights under Section 2 to create an effective coalitional district. And as the First Circuit suggested in *Metts*, *see* 363 F.3d at 9-12, the 50% Rule is particularly inapt where, as here, plaintiffs seek not to create a new coalitional district but rather to *reinstate* a preexisting, functioning coalitional district. Even if the Court were inclined to require that a Section 2 plaintiff challenging an at-large electoral system draw a *hypothetical* district with a

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[29] *See also Puerto Rican Legal Defense & Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 681, 694 (E.D.N.Y. 1992) (three-judge court) (rejecting any bright-line rule for minority percentages under Section 2 of the Act); *West v. Clinton*, 786 F. Supp. 803, 807 (W.D. Ark. 1992) (three-judge court) (same); *Jordan v. Winter*, 604 F. Supp. 807, 814-15 (N.D. Miss.) (three-judge court) (recognizing that Section 2 protects a 41.99% black district), *summarily aff'd sub nom. Mississippi Republican Exec. Comm. v. Brooks*, 469 U.S. 1002 (1984); *cf. Page v. Bartels*, 144 F. Supp. 2d 346, 355-66 (D.N.J. 2001) (three-judge court) (finding no Section 2 violation where minority voters comprising less than half the district population, with the support of limited but predictable crossover voting, could usually elect minority candidates of choice).

majority of blacks or Latinos, it makes no sense to deny protection to an *existing* coalitional district effectively controlled by one minority group. *Cf.* 42 U.S.C. § 1973(b) (ensuring minority citizens an equal "opportunity . . . to participate in the political process and to elect representatives of their choice").

Moreover, the District Court's reading of the Voting Rights Act unwisely elevates race to an "all or nothing" proposition in redistricting: African-Americans and Latinos who cannot be combined into majority-black or majority-Latino districts become legally irrelevant, and the State is then free to take any and all steps to render them *politically* irrelevant as well. By contrast, appellants' reading of the law allows the strictures of the Voting Rights Act to ratchet down as politics and housing patterns become increasingly integrated and as minority leaders build their capacity to "pull, haul, and trade" with their Anglo counterparts. *De Grandy*, 512 U.S. at 1020. A proper interpretation of the Voting Rights Act thus encourages "the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life." *Georgia v. Ashcroft*, 539 U.S. at 490-91 (citing *Shaw v. Reno*, 509 U.S. at 657).

B. This Case Shows How the Fifth Circuit's Talismanic "50% Rule" Heightens Race-Consciousness in Districting and Undermines the Goals of the Voting Rights Act.

This case demonstrates the hazards of mechanically applying the rigid 50% Rule. More than one out of every eight Texas citizens is African-American. Texas's three largest African-American communities are located in Houston, Dallas, and Fort Worth. The 2001 plan contained four districts (two based in Houston, one in Dallas, and one in Fort Worth) where African-American citizens could

nominate and elect their preferred candidates. Although all four districts were majority-minority (with non-Anglos outnumbering Anglos), none was literally majority-black. Inexplicably, while acknowledging that none of these four districts was majority-black, the court below nonetheless treated two of them as "Voting-Rights-Act-protected" districts that "could not be disrupted" without violating Section 2. J.S. App. 109a, 111a, 167a-168a, 206a.[30] In the 2003 plan, each of the three remaining black-controlled districts also is majority-minority, but not majority-black in total population. *Id.* at 166a-168a.[31]

District 24 as drawn in 2001 was a majority-minority district in which African-Americans, although less than one fourth of the population, regularly constituted an overwhelming majority (approximately 64%) of voters in the Democratic primary. J.S. App. 197a.[32] African-Americans

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[30] *See generally* Bernard Grofman, Lisa Handley & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383 (2001) (explaining how African-Americans can control a district politically without dominating numerically), *cited in Georgia v. Ashcroft*, 539 U.S. at 483, *and in* J.S. App. 198a.

[31] At trial, the State emphasized that the new map created a modified version of existing District 25 in the Houston area (renumbered as District 9 in the 2003 plan) in which the African-American population (although not a majority) would have enhanced control of electoral outcomes. But that Houston district has no relevance to a Section 2 challenge to the elimination of a district hundreds of miles away, in the Fort Worth area, especially given the statewide underrepresentation of African-Americans in the 2003 plan. *See Johnson v. De Grandy*, 512 U.S. at 1014-21; J.S. App. 200a; Jackson Pls. Ex. 1 (Lichtman expert report), JA 90-91, 119-30.

[32] This 64% figure applied to *all* Democratic primaries held in the precincts constituting District 24 (for all offices); some of those primaries involved biracial contests, others did not. The District Court therefore clearly erred in suggesting that African-Americans' controlling share of

dominated the primary because the district's Anglo and Latino voters were much more likely to participate in the Republican primary, to be noncitizens (and therefore nonvoters), or simply to stay home. And in the general election, the district consistently supported Democrats of all races, making the ability to nominate in District 24 "tantamount to the ability to elect." *Id.* Based on these facts, experts for both the appellants and the State testified that the district functioned as an *effective* African-American-controlled district.[33]

To see how this worked in practice, one need only look at the composition of the district's general electorate. African-Americans in District 24 constituted about 33% of the voters in general elections. J.S. App. 111a. An additional 6% were Latinos who, like the African-Americans, voted almost unanimously for the Democratic nominee in this district, according to the State's own expert analyses. Jackson Pls.

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the Democratic primary electorate might evaporate if an African-American were to challenge Anglo Congressman Martin Frost because Anglo voters supposedly would then flock to the Democratic primary. J.S. App. 111a-112a; *see also id.* at 199a-200a.

The court below also clearly erred in suggesting — based on one primary in which African-Americans split 72% to 28% and another in which they split 60% to 40% — that District 24's African-American voters were not cohesive in Democratic primaries. *Id.* at 112a. Voting Rights Act liability turns not on perfect unanimity within the minority community (which would render the Act worthless), but rather on opportunities to nominate and elect candidates of choice. Here, the record contains only one example of an election (the 1998 Attorney General's race) in which the African-Americans' candidate of choice in the Democratic primary did not carry the district. *See id.*

[33] The majority below disagreed with this conclusion, based on its curious assertion that the district was controlled by "Anglo Democrats." *Id.* at 111a-112a. In fact, Anglo Democrats constituted only about 18% of the district's general electorate. Far outnumbered by African-American voters, they had no ability to control who the party nominated.

Ex. 140 (Gaddie expert deposition), JA 220. Thus, for the African-American candidate of choice to be elected, "crossover" support from only about a fifth of the Anglo voters was needed. In practice, although a large majority of Anglos in the general elections voted against the candidates nominated and preferred by black voters, the Anglo crossover rate was high enough that those candidates consistently won.[34] Indeed, in 19 of 20 recent general elections for statewide office, the candidate preferred by black and Latino voters carried this district.

The dissenting judge below recognized former District 24 as "a district that fostered our progression to a society that is no longer fixated on race. . . . [T]he black voters in old District 24 repeatedly nominated and helped to elect an Anglo congressman [Martin Frost] with an impeccable record of responsiveness to the minority community." J.S. App. 199a.[35]

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[34] The fact that roughly 30% of Anglo voters in District 24 regularly supported black-preferred candidates in the general elections does not undermine a finding of racially polarized voting. *See Thornburg v. Gingles*, 478 U.S. at 80-82 (finding legally significant white bloc voting even where the fraction of white voters who "crossed over" and supported minority candidates in general elections was as high as 42%).

[35] The majority below suggested that there was some doubt about whether District 24 actually could elect a candidate preferred by black voters, given that incumbent Congressman Frost, an Anglo, had not been challenged in a primary. J.S. App. 111a. But Congressman Frost went unchallenged in the African-American-dominated primaries precisely because he was the black voters' candidate of choice, as explained in undisputed testimony from local African-American leaders. *See id*. at 199a-200a; Tr., Dec. 12, 2003, 3:00 p.m. (Mayor Ron Kirk), JA 238-41; *id.* (Comm'r Roy Brooks), JA 241-43; *see also id.* (Cong. Martin Frost), JA 244-47. There also was testimony that, upon Congressman Frost's retirement, his replacement would likely be African-American. *See id*. at 246-47; *id.* (Comm'r Roy Brooks), JA 243.

The 2003 plan eliminated this district, which was one of only two districts in the entire Dallas/Fort Worth Metroplex where minority voters played a significant role. District 24's population was scattered among five districts, each of which is dominated by Anglo Republican voters. A particularly egregious feature of the plan is District 26, which is based in suburban (and heavily Anglo) Denton County but shoots a long finger down into Tarrant County to scoop up the politically active African-American community in urban southeast Fort Worth. *See* JA 296 (map). One could hardly imagine a clearer example of deliberately fracturing and submerging a minority community.

Yet the majority below stuck with a wooden rule that States' obligations under Section 2 extend only to majority-black and majority-Latino districts. By imposing a formalistic barrier to minority voters seeking to build cross-racial coalitions, the District Court's "50% Rule" can only serve to entrench racial stereotypes, to thwart the Voting Rights Act's goals, and to retard the integration of American politics.

III. TO MAXIMIZE PARTISAN GAINS, THE TEXAS LEGISLATURE DREW AN UNCONSTITUTIONAL RACIAL GERRYMANDER.

The Texas Legislature's drive for partisan maximization also led it to draw new District 25, a textbook example of a racial gerrymander violating the Equal Protection Clause under *Shaw v. Reno*, 509 U.S. 630 (1993), *Miller v. Johnson*, 515 U.S. 900 (1995), and *Bush v. Vera*, 517 U.S. 952 (1996). In upholding that district, the court below relied on precisely the same argument that this Court *rejected* in *Bush v. Vera* — that it is permissible to give a majority-minority district a bizarre shape to maintain partisan control over nearby districts.

As the District Court correctly recognized, the creation of District 25 was indeed a direct result of changes being made for political reasons in nearby District 23. District 23 was redrawn to eliminate any chance of Latino control and thus ensure the reelection of an endangered Republican incumbent, Congressman Bonilla. J.S. App. 156a. But that necessitated creating an additional effective Latino district elsewhere, in an attempt to avoid Voting Rights Act liability. The Legislature chose to combine two densely populated pockets of Latino population separated by 300 miles of largely empty territory. *Id.* at 161a-165a. So, having transformed District 23 from one potentially controlled by Latino voters to one indisputably controlled by Anglos,[36] the designers of the 2003 plan created a new Latino District 25 running from McAllen on the Mexican border to the heavily Latino neighborhoods of Austin, in Central Texas, 300 miles away.

In the new District 25, ethnicity is the only common thread. The district grabs two dense pockets of Latino population 300 miles apart — in the northern part of the district (in the city of Austin) and along the Mexican border (in and around the city of McAllen). *See* JA 298. More than 89% of the district's Latinos reside at either end of the district (in Travis County at the northern tip and in Hidalgo and Starr Counties at the southern tip), with sparsely populated counties in between serving as little more than a rural "land bridge." J.S. App. 145a, 154a-155a; *see also* JA 298 (map showing population densities in and around new

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[36] Appellees also violated the Voting Rights Act by intentionally stranding 359,000 Latinos in District 23, where they have virtually no hope of influencing, much less controlling, electoral outcomes. That violation is thoroughly addressed in the dissent below, *see* J.S. App. 173a-194a, and by appellants in *GI Forum of Texas v. Perry*, No. 05-439, and in *LULAC v. Perry*, No. 05-204.

District 25); JA 297 (district silhouette, showing that this 300-mile-long "bacon strip" district is less than 10 miles wide in some places). The court below found that these two far-flung population centers, although both heavily Latino, lack common needs and interests, given the glaring "differences in socio-economic status, education, employment, health, and other characteristics between Hispanics who live near Texas's southern border and those who reside in Central Texas." J.S. App. 163a-164a.[37]

That finding was reminiscent of *Miller v. Johnson*, in which this Court found Georgia's Eleventh Congressional District to be an unconstitutional racial gerrymander because it connected via a narrow passageway "the black neighborhoods of metropolitan Atlanta and the poor black populace of coastal Chatham County," even though they were "260 miles apart in distance and worlds apart in culture." 515 U.S. at 908; *see id.* at 941-42 (Ginsburg, J., dissenting) (noting that in Georgia's District 11, as here, the connecting links consisted of whole rural counties). The "social, political, and economic makeup of [Georgia's] Eleventh District," like that of Texas's new District 25, told "a tale of disparity, not community." *Id.* at 908. *Compare id.* at 928 Appendix B (color map showing population densities within Georgia's District 11) *with* JA 298 (identically formatted map for Texas's District 25). Furthermore, Texas's District 25 is not functionally compact, as it covers parts of four media markets and demands what is

[37] The evidence showed that Latinos in Austin had formed effective coalitions with African-American and Anglo voters in Austin, jointly supporting candidates from all three groups in an example of the kind of cross-racial coalition building the Voting Rights Act is supposed to encourage. But the 2003 plan trisects Austin, extracting the city's predominantly Latino neighborhoods and tying them to the border region 300 miles away.

(for a district whose constituents are mostly urban) a large amount of long-distance travel for any Representative or candidate.

The trial court, based in part on its analysis of compactness scores computed by the nonpartisan, bicameral Texas Legislative Council (TLC), concluded that District 25 was not a racial gerrymander. J.S. App. 152a-155a. In doing so, the majority found that the scores did not "approach those of [the] districts [that were] so bizarrely and irregularly drawn" in the 1990s that they triggered strict scrutiny as presumptively unconstitutional racial gerrymanders. *Id.* at 153a.

But the testimony of the State's own expert, Todd Giberson, contradicted that conclusion. He testified that the TLC routinely calculated, for every district, a "Smallest Circle" score, which is the ratio of the area of the smallest circle that could circumscribe the district to the area of the district itself. This score measures how elongated, or stretched out, a district is. When a mapmaker drawing a minority district reaches out a long distance to grab a distant pocket of ethnic population, without picking up substantial intervening Anglo population, the district's "Smallest Circle" score suffers. *See, e.g.*, JA 297 (silhouette of District 25).[38] Using this Smallest Circle measure, District 25 scored worse than half a dozen congressional districts that were determined

[38] The TLC also calculated for each district a "Perimeter to Area" score, which is the ratio of the area of a circle whose perimeter is the same length as the district's perimeter to the area of the district itself. This score measures the irregularity or jaggedness of the district's border. Extremely high scores on *either* measure, combined with clear evidence that this noncompactness was "predominantly due to the misuse of race," triggers strict scrutiny under the *Shaw* doctrine. *Bush v. Vera*, 517 U.S. at 993 (O'Connor, J., concurring).

to be racial gerrymanders subject to strict scrutiny in the 1990s.[39]

Furthermore, District 25's low score cannot be attributed to the peculiar geography and population distribution of South and Central Texas: As Mr. Giberson conceded, other districting plans covering precisely the same territory are not afflicted by similar levels of noncompactness.[40] Thus, the

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[39] Among the 1990s racial gerrymanders whose scores were not as bad as Texas's District 25 were: Georgia's District 11, struck down in *Miller v. Johnson*, 515 U.S. at 928; Georgia's District 2, struck down in *Johnson v. Miller*, 922 F. Supp. 1556 (S.D. Ga. 1995) (three-judge court), *aff'd sub nom. Abrams v. Johnson*, 521 U.S. 74 (1997); New York's District 12, struck down in *Diaz v. Silver*, 978 F. Supp. 96 (E.D.N.Y.) (three-judge court), *summarily aff'd*, 522 U.S. 801 (1997); Virginia's District 3, struck down in *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va.) (three-judge court), *summarily aff'd*, 521 U.S. 1113 (1997); Illinois's District 4, which was held to be a presumptively unconstitutional racial gerrymander, but was ultimately upheld as narrowly tailored to serve a compelling state interest, in *King v. Illinois Board of Elections*, 979 F. Supp. 619 (N.D. Ill. 1997) (three-judge court), *summarily aff'd*, 522 U.S. 1087 (1998); and South Carolina's District 6, which the parties stipulated was a racial gerrymander in *Leonard v. Beasley*, Civil No. 3:96-CV-3640 (D.S.C. 1997) (three-judge court) (stipulating that the mapmakers had subordinated traditional redistricting principles to racial considerations, but agreeing to dismiss plaintiffs' claim in anticipation of the 2000 census).

[40] District 25's Smallest Circle compactness score is worse than that of: any of the 32 Texas congressional districts in the 2001 plan; any of the 30 Texas congressional districts in the plan used in the 1996, 1998, and 2000 elections; any of the 30 Texas congressional districts in the plan used in the 1992 and 1994 elections, including the three districts that this Court struck down as racial gerrymanders in *Bush v. Vera*, 517 U.S. at 957; any of the 31 Texas State Senate districts currently in effect; any of the 150 Texas House districts currently in effect; and any of the 15 Texas State Board of Education districts currently in effect. *See* Tr., Dec. 19, 2003, 8:30 a.m., at 39-40, 44-45 (Todd Giberson). In total, 288 districts in six different plans — all including the same South and Central Texas geography and population distribution that the 2003 plan covers —

court below clearly erred when it relied on compactness scores to rebut appellants' claim of racial gerrymandering.

Moreover, the trial court ignored direct testimony from the State's own witnesses admitting that the intent in creating new District 25 was racial, not political. *See*, *e.g.*, Tr., Dec. 18, 2003, 1:00 p.m., at 152-54 (testimony of Rep. Phil King, the plan's House sponsor); Tr., Dec. 19, 2003, 8:30 a.m., at 47 (testimony of Mr. Giberson) (conceding that, in constructing District 25, "[i]t was more important to create a Hispanic district than a Democratic district"). Thus, while partisan maximization was the driving motivation behind the plan as a whole, race was the key to District 25's bizarre configuration. And racial-gerrymandering claims under the *Shaw* doctrine are always district-specific. *See*, *e.g.*, *Bush v. Vera*, 517 U.S. at 957-58; *Shaw v. Hunt*, 517 U.S. 899, 902-04 (1996); *Miller v. Johnson*, 515 U.S. at 917-20.

The District Court's primary error was its attempt to justify this racial gerrymander as the by-product of political decisions to protect nearby incumbents. The court concluded that the claim of excessive race-consciousness was negated by the fact that District 25's elongated shape flowed from the "political goal[s] of increasing Republican strength in congressional District 23" — to bolster Congressman Bonilla's reelection chances — and maintaining Republican strength in nearby District 21. J.S. App. 161a. The problem with this defense is that it is precisely the one this Court rejected in *Bush v. Vera*. That case held that race-based line-drawing cannot be justified by a desire to protect nearby incumbents. *See* 517 U.S. at 967-73 (plurality opinion). There, the irregular shape of a challenged African-American district in North Texas had been defended as necessary not to

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managed to avoid the kind of bizarrely elongated shape that marks District 25.

capture African-American voters *per se*, but to do so consistent with the interests of adjacent Anglo Democratic incumbents. *See id.* This Court flatly rejected that justification as inconsistent with fundamental Fourteenth Amendment principles. *See id.* It should do so here, for precisely the same reasons.

IV. IF THIS COURT INVALIDATES THE 2003 PLAN AS AN ILLEGAL PARTISAN GERRYMANDER, IT SHOULD ORDER THE DISTRICT COURT TO REINSTATE THE 2001 PLAN FOR THE 2006 ELECTION.

If this Court concludes that the 2003 plan is an unconstitutional mid-decade partisan gerrymander, it should reverse the judgment below and remand the case with instructions to invalidate the 2003 plan, which would immediately and automatically reinstate the 2001 *Balderas* injunction and the court-ordered 2001 plan. That plan was adopted by a unanimous three-judge District Court, supported by the State, upheld by this Court, and used in the 2002 primary and general elections. There is no legitimate reason to alter that map.

Moreover, there is no reason to allow another election cycle to pass under an unconstitutional plan, as the 2001 plan can be implemented immediately. As this Court observed in *Reynolds v. Sims*, 377 U.S. 533 (1964), "once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." *Id.* at 585. Promptly putting the 2001 plan back into effect would likely require nullifying the results of the March 7, 2006 congressional primary elections (in the 31 districts altered by the 2003 plan) and either holding new congressional primaries at a later date or following the

precedent set by the three-judge court on remand from this Court's June 13, 1996 decision in *Bush v. Vera*. *See Vera v. Bush*, 933 F. Supp. 1341, 1342, 1347-49, 1352-53 (S.D. Tex.) (three-judge court), *stay denied sub nom. Bentsen v. Vera*, 518 U.S. 1048 (1996). There, the court ordered special congressional elections to be held in all the changed districts in November 1996 (in conjunction with the regularly scheduled general election for other offices), with congressional runoffs in any district where no candidate initially won an outright majority of the vote. *See id.*; *see also Love v. Foster*, 147 F.3d 383, 384-85 (5th Cir. 1998) (approving order calling for November congressional elections followed by December runoffs where needed).[41]

CONCLUSION

The Court should reverse the judgment below and remand the case to the three-judge District Court with instructions to invalidate the 2003 plan and immediately reinstate congressional redistricting Plan 1151C.

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[41] *See* Kenneth W. Starr, *Federal Judicial Invalidation as a Remedy for Irregularities in State Elections*, 49 N.Y.U. L. REV. 1092, 1124 (1974) (concluding that federal courts should invalidate elections when a constitutional violation "may have affected the [election's] outcome").

Respectfully submitted,

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