2006 WL 247290 (U.S.) (Appellate Brief)
Supreme Court of the United States.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, et al., Appellants,
v.
Rick PERRY, Governor of Texas, et al., Appellees.
TRAVIS COUNTY, TEXAS, et al., Appellants,
v.
Rick PERRY, Governor of Texas, et al., Appellees.
Eddie JACKSON, et al., Appellants,
v.
Rick PERRY, Governor of Texas, et al., Appellees.
GI FORUM OF TEXAS, et al., Appellants,
v.
Rick PERRY, Governor of Texas, et al., Appellees.

Nos. 05-204, 05-254, 05-276, 05-439.
February 1, 2006.

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

Brief of the Republican National Committee as Amicus Curiae Supporting Appellees

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*1 INTEREST OF THE AMICUS CURIAE

Amicus Republican National Committee ("RNC") is an unincorporated association that represents the National Republican Party - including Republican congressmen and women, state legislators, and registered voters - and its interests are directly affected by the redistricting process in all fifty states, including Texas.[1] The RNC seeks fair redistricting procedures nationwide, such as those used by the Texas legislature in drawing the Texas 2003 legislatively enacted congressional map, Plan 1374C (the "Texas Map"), because such procedures protect against egregious partisan gerrymandering that dilutes opportunities for Republican congressional and state legislative candidates to win elections, and denies Republican voters their rights to full representation and to full participation in the political process.

SUMMARY OF ARGUMENT

1. If a political party has geographically identifiable and stable demographic voting segments, sophisticated technology makes it possible to draw a congressional map that locks that party into winning a majority of the delegation despite losing the popular vote. Such a partisan gerrymander violates the Fourteenth Amendment's equal protection clause. The Texas Map does not constitute such a political gerrymander, and it does not violate equal protection. This Court's political gerrymandering jurisprudence, beginning with *Davis v. Bandemer* and continuing through *Vieth v. Jubelirer,* makes clear that the Texas Map is not constitutionally deficient. The Texas Map survives scrutiny under the Court's plurality standard in *Bandemer*; indeed, the Texas Map survives scrutiny under any cognizable standard of vote dilution. On the contrary, ***2** the legislatively drawn Texas Map more accurately translates the Texas vote into Congressional representation.

2. Appellants' argument with respect to the Voting Rights Act amounts to interest group politics, which Justice White made clear in his *Thornburg v. Gingles* concurrence should play no part in the Act. The Voting Rights Act of 1965 was a legislative response to the violence that erupted in Selma, Alabama, when African-Americans simply tried to register to vote. The legislative record makes clear that legislators from *both* parties supported the Voting Rights Act's initial passage and each of its three following renewals as a means to tear down historical impediments to political participation that were (and are) targeted at or effecting minority populations - in particular, policies and programs designed to, or that did, stop African-Americans from voting. Based upon the Act's language, case law, the legislative record, and the historically clear and strong support of the Act by a majority of Republican congressmen and the Republican Party, it defies logic to argue that the Act was intended to favor one *political party* over another.

ARGUMENT

I. THE TEXAS 2003 LEGISLATIVELY ENACTED CONGRESSIONAL MAP DOES NOT VIOLATE THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE.

Partisan gerrymandering removes control of legislative bodies from the hands of the electorate. By definition, partisan gerrymandering accords different weight to different votes on the basis of political party. A party with geographically identifiable and stable demographic voting segments can combine with clever cartographers to create a map that institutionalizes single-party domination over a state's congressional delegation against popular will. Such partisan ***3** gerrymandering dilutes the votes of one (or more) party's voters in violation of the Equal Protection Clause of the Fourteenth Amendment. The RNC has consistently articulated this concern and a plurality of this Court has recognized the potential for such a violation since *Davis v. Bandemer.* [2] 478 U.S. 109 (1986); *Vieth v. Jubelirer,* 541 U.S. 267, 292 (2004) ("the issue we have discussed is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy"); *see also* Brief of Amicus Curiae Republican National Committee, *Bandemer*, 478 U.S. 109 (1986). The RNC's position on partisan gerrymandering remains unchanged. [3] While no single standard for determining an unconstitutional political gerrymander has emerged, it is clear that the Texas Map is not an unconstitutional political gerrymander under *any* standard.

A. The Texas Map Does Not Meet the Standard Set Forth By the *Bandemer* Plurality.

The Court first articulated a standard for establishing an unconstitutional partisan gerrymander in its plurality opinion in *Bandemer* - the only such standard that has ever been judicially ***4** endorsed. [4] The Court set this standard aside in *Vieth*; however, while *Bandemer's* test was never successful in identifying what does constitute an unconstitutional political gerrymander, it is instructive in this case insofar as it helped identify indicia of what does not.

Bandemer's standard was two-pronged: plaintiffs had to show intentional discrimination against, and actual discriminatory effects upon, an identifiable political group. *Bandemer*, 478 U.S. at 127. A threshold showing of discriminatory vote dilution was required to make out an initial equal protection case. Such vote dilution, in turn, triggered a violation only when the electoral system was arranged in a manner that "consistently degrades a voter's or a group of voters' influence on the process *as a whole.*" *Id.* at 132 (emphasis added). Simply because a particular redistricting map made it more difficult for a particular group, including a political party, in a particular district to elect their representatives was not enough to show a discriminatory effect - winning elections was not the sole determinant of political ***5** participation. [5] *Id.* at 131; *see also Badham v. Eu,* 694 F. Supp. 664, 669 (N.D. Cal. 1988) (effects test requires more than "present *or projected* election results under the challenged districts" (emphasis added)). Therefore, that fewer Democratic congressional candidates were elected in 2004 under the Texas Map would not be enough to invalidate the map.

The relevant discriminatory effects inquiry asked whether voters had been denied their ability to directly or indirectly influence the elections of a state legislature as a whole. *Bandemer*, 478 U.S. at 133. The Court set forth two broad categories in analyzing whether such a denial existed: (1) history of disproportionate election results visited on the plaintiffs; and (2) indicia of lack of political power or fair representation. *See id.* at 139; *Pope v. Blue,* 809 F. Supp. 392, 396 (W.D.N.C. 1992). Further, it is important to note that an equal protection claim based on partisan gerrymandering must ultimately be evaluated with respect to the makeup of the representative body that the map affects. [6] *See Bandemer*, 478 U.S. at 133. Since the Texas Map, however, is a *congressional* ***6** map, any accurate measure of "fairness" must view the Texas delegation in the context of the United States House of Representatives - and in 2004, Democrats won 46.6 percent of the national congressional vote and 46.4 percent of House seats. Clerk of the U.S. House, Report on Statistics of The Presidential and Congressional Election of November 2, 2004 (2005) *available at* http://clerk.house.gov/members/electionInfo/2004election.pdf (last visited Jan. 27, 2006). The Texas Map cannot be adjusted without altering this national balance. Appellants wholly fail to address this concern, or offer to any explanation as to why this demonstrates some "unfairness" on the part of the Texas Map.

Justice Powell, in his *Bandemer* concurrence, articulated an alternative standard for umconstitutionality that, although rejected by the Court in *Vieth*, the Texas Map also survives. Adhering to the intent and effect framework, Justice Powell wrote that the relevant inquiry's focus should be "whether district boundaries had been drawn solely for partisan ends to the exclusion of all other neutral factors relevant to the fairness of redistricting." *Bandemer*, 478 U.S. at 161 (Powell, J., concurring in part and dissenting in part). Justice Powell offered the following factors, among others, to consider: (1) the shapes of voting districts and adherence to established political subdivision boundaries; (2) the nature of the legislative procedures by which the apportionment law was adopted; (3) any legislative history reflecting contemporaneous legislative goals; and (4) evidence concerning population disparities and ***7** statistics tending to show vote dilution.[7] *Id.* at 161. Appellants fail to offer support evidencing discriminatory effect in *any* of Justice Powell's suggested categories; if anything, the evidence demonstrates that the Texas Map redresses such discriminatory effects that had been visited upon *Republicans. See Henderson v. Perry*, 399 F. Supp. 2d 756 (E.D. Tex. 2005).[8]

Over time, lower courts attempting to apply *Bandemer* in political gerrymandering cases unanimously failed to find a constitutional violation. *See Vieth*, 541 U.S. at 279-80. Undoubtedly, some of this record is due to the difficulties inherent in applying *Bandemer's* test and in attempting to discern a concept as slippery as "political fairness." It is also due, however, to the high threshold the *Bandemer* plurality set ***8** for finding a partisan gerrymander unconstitutional.[9] *See Bandemer*, 478 U.S. 109; *see also Pope*, 809 F. Supp. 392. This bar is high for good reason: too low a threshold would invite attacks on virtually every single legislatively drawn map, swamp the federal courts in litigation, and force the judiciary ever deeper into the "political thicket." *See Bandemer*, 478 U.S. at 143 (noting that the standard was "of necessity a difficult inquiry"); *see also Vieth*, 541 U.S. at 300-01 ("[t]he vaguer the test for availability, the more frequently interest rather than necessity will produce litigation"); *Colegrove v. Green,* 328 U.S. 549, 556 (1946). Appellants have offered no justification for lowering the bar in this case.

B. The Texas Map Survives Any Cognizable Standard of Vote Dilution.

More than satisfying *Bandemer's* constitutional standard, the Texas Map meets any "substantive notion of fairness" and survives scrutiny under *any* cognizable standard of vote dilution. *See Vieth*, 541 U.S. at 299, 344. This is underscored by Texas' s redistricting history - about which the District Court analyzing the Texas Map in *Henderson v. Perry,* 399 F. Supp. 2d 756 (E.D. Tex. 2005), stated:

> ***9** While the present plan, drawn by a Republican Party majority in 2003, has been decried as egregious, the story must begin with the earlier map drawn by a Democratic Party majority in 1991. That plan, put in place following the 1990 census, was cited in the political science literature as an extreme example of what one party can do in drawing a redistricting map to the detriment of the other. In 2000, the Democratic Party gerrymander was still in place and, although Republicans now enjoyed substantial statewide majority strength, the results of the congressional elections favored Democrats by a seventeen to thirteen margin, *ld.* at 767-68.

No one standard came out of *Vieth*, but four different potential standards were suggested - one by the plaintiffs, and one by each dissenting justice. The Texas Map does not meet any of these standards.

The Texas Map Yielded Election Results That Were Closer to Proportional Partisan Representation Than Those Under the 2001 Court Drawn Map.

While the Court has rejected proportionality as a requirement, it is relevant as a measure of "fairness" for purposes of surviving a vote dilution claim. [10] *See* ***10** *Johnson v. De Grandy*, 512 U.S. 997, 1023 (1994). Indeed, "disproportionate election results" has been the gravamen of virtually every political gerrymandering complaint, underlying most standards suggested to adjudicate political gerrymandering claims. The Texas Map resulted in party representation in the Texas congressional delegation that closely reflected the percentage of the congressional vote each party won in 2004. As a result, the 2004 delegation was undeniably closer to being proportional than the 2001 delegation elected under the interim court drawn map (or elected under any other Texas congressional map in decades). [11] Moreover, judging fairness in this regard, the Texas Map exceeds both maps that were challenged, and upheld by the Court, in *Bandemer* and *Vieth.* [12]

11** ***There Is No History of Disproportionate Election Results Visited Upon Appellants.

Texas electoral history displays no signs of disproportionate election results affecting the Democratic Party. Indeed, if this history demonstrates anything at all it is that Appellants *benefited* from disproportionate election results for decades and the Texas Map merely corrected the Democrats' disproportionate hold on the Texas congressional delegation. Or, in the words of the *Henderson* Court:

> The State's description of the 2003 Texas legislative plan as dismantling a prior partisan gerrymander that had entrenched a minority party [the Democrats], in order to allow a party with overwhelming statewide voting strength [the Republicans] to capture two-thirds of Texas's congressional delegation, *is a characterization that the record supports.* *Henderson*, 399 F. Supp. 2d at 770 (emphasis added).

Moreover, Appellants' complaint is based only upon the results of the 2004 election. Yet this Court has been clear that a partisan gerrymandering claim is particularly difficult to support when it comes after just a single election held under a newly redrawn map. *See* *Bandemer* 478 U.S. at 135 ("[r]elying on a single election to prove unconstitutional discrimination is unsatisfactory"). Indeed, without a finding that a reapportionment will consign a political party to the minority during a decade or that that party "has no hope" of doing better in the next round of redistricting, it is an error to find an equal protection violation. *Id.* at 135-36; *cf.* *Vieth*, 541 U.S. at 363-64 (Breyer, J., dissenting). Appellants do not, because they cannot, demonstrate anything of the sort.

12** ***There is No Indicia of Lack of Political Power and Denial of Fair Representation.

In order to demonstrate lack of political power and denial of fair representation, a plaintiff must show that his or her political group has "essentially been shut out of the political process." *See id* at 139. Yet Appellants have offered no evidence, nor have they alleged, that there has been any interference with their fundraising, registration, organizing, voting, campaigning, or other activities. *See Badham*, 694 F. Supp. at 671-72. Indeed, despite their recent lack of success at the polls, the Texas Democratic Party has successfully raised money, registered voters, organized, and mounted vigorous campaigns up and down the ballot in Texas in 2004. Rather than being shut out from the process, the Texas Democratic Party is fully engaged in it. For example, on January 7, 2006 the Galveston County Democratic Party hosted a "Turn Texas Blue" event. *See* http:// www.galvestoncountydemocraticparty.com/Special/TTB/index.htm. "Turn Texas Blue" featured prominent national and state Democratic speakers such as Democratic National Committee Chairman Howard Dean, Texas Democratic Party Chairman Charles Soechting, 2004 Democratic vice-presidential nominee John Edwards, General President of the United Steelworkers Union Leo Gerard, and - notably - 2006 Texas Democratic *congressional candidates* Nick Lampson and Shane Sklar. *See Texas Democrats To Meet On The Island*, THE [Galveston County, TX]

DAILY NEWS, ***13** Dec. 28, 2005. Finally, reports indicated strong grassroots and registration activity by the Texas Democrats in 2004. [13]

1. The *Vieth* Plaintiffs' Standard.

In *Vieth*, the plaintiffs' suggested test used *Bandemer's* two-prong framework and identified specific factors for determining whether a discriminatory effect had been visited upon the purportedly disadvantaged political party. Under this test, the requisite effect would be shown when (1) the plaintiffs show that the districts systematically "pack and crack" the rival party's voters, and (2) the court's examination of the "totality of the circumstances" confirms that the map can thwart the plaintiff's ability to translate a majority of votes into a majority of seats. *See Vieth*, 541 U.S. at 286. Even setting aside the Court's unwillingness to view the results of a single election as sufficient evidence of discrimination, Appellants have not, because they cannot, demonstrate that the Texas Map systematically cracks and packs Democratic voters. Justice Scalia noted about this test in *Vieth* that plaintiffs' test would invalidate a map only "when it prevents a majority of the electorate from electing a majority of the representatives." *Id.* at 287. Yet Appellants cannot make such a showing here; the ***14** most they can show is that the Texas Map brings the state's congressional representation closer to proportionality than virtually any Texas map in decades. Indeed, under the *Vieth* plaintiffs' standard the Texas 2001 interim court drawn map would likely have been *overturned* as a partisan gerrymander.

2. The *Vieth* Dissenters' Standards.

In *Vieth*, Justice Souter's dissent articulated a standard for identifying unconstitutional partisan gerrymandering that focused on individual districts, rather than on an entire statewide map. *Vieth*, 541 U.S. at 343-55. This standard offered a five-step prima facie test for adjudicating partisan gerrymandering claims. To meet this test, Appellants would be required to show that (1) they are members of a cohesive political group; (2) that the district of their residences paid little or no heed to traditional districting principles; (3) that there were specific correlations between the district's deviations from traditional districting principles and the distribution of the population of their group; (4) that a hypothetical district exists which includes the plaintiff's residence, remedies the packing or cracking of their group, and deviates less from traditional districting principles; and (5) that Appellees acted intentionally to manipulate the shape of the district in order to pack or crack their group. First, the Court has indicated that packing and cracking must be dilutive in order to trigger a violation, *see Shaw v. Reno,* 509 U.S. 630 (1993), and as discussed above, the Texas Map is not dilutive. Second, it is illogical to believe that the Texas Map fails this test when the very relief that Appellants ask this Court to grant is a return to a map - the 2001 court drawn interim map - that under this test is *more* of a partisan gerrymander.

The standard outlined in Justice Stevens's dissent also focuses on individual districts, rather than on an entire statewide map. *Vieth*, 541 U.S. at 317-41. Under this standard, ***15** partisan gerrymandering claims would be analyzed under strict scrutiny - if partisan motivation was the predominant consideration in drawing district lines, absent a showing of neutral justificatory criteria, the district would be invalid. In this case, however, no sophisticated analysis is necessary to demonstrate that the Texas Map passes the test. A cursory visual inspection of the Texas Map suffices to show that the Texas Legislature adhered to traditional redistricting criteria, particularly when compared to Texas's last legislatively enacted congressional map, the 1992 map. [14]

Justice Breyer's dissent sets forth several hypotheticals, arranged on a continuum, which might indicate unconstitutional political gerrymandering. *Vieth*, 541 U.S. at 355-68. The first scenario, one sufficient to support a claim, would require Appellants to show that (1) they failed to win a majority of the seats after winning a majority of the votes in two consecutive elections; and (2) that no neutral explanation for this situation exists. Each of Justice Breyer's other scenarios

fall further from supporting a claim, but all search for the same thing - "unjustified entrenchment." But the evidence is clear that, if anything, it was the *Democratic* congressional delegation that had been unjustifiably entrenched, and that the Texas Map merely dislodged their entrenchment. Since 1994, or *five* election cycles, Republicans have won a majority of the votes for congress, but until 2004 failed to win a majority of the seats. The Democrats, conversely, have not won a majority of ***16** the Texas congressional vote since 1992, yet they held a majority of the seats until 2004. [15]

II. THE VOTING RIGHTS ACT OF 1965 IS A STATUTORY SHIELD TO PROTECT MINORITY POPULATIONS, NOT A PARTISAN SWORD.

District 23 is represented by Henry Bonilla, a Hispanic Republican. Appellants argue that Mr. Bonilla does not constitute a "candidate of choice" for Hispanic-Americans because he is a Republican. Conversely, Appellants argue that Martin Frost, an Anglo Democrat who represented District 24 under the 2001 map, was a minority candidate of choice … because he is a Democrat. These odd results are brought about by Appellants' interpretation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (§ 2) (the "Act"), which says that in order for a congressional district to "perform" for minorities the district must elect a Democrat. Case law, together with the Act's language and legislative history, leave Appellants without support. If Appellants' interpretation of Section 2 is endorsed, the Act's role in protecting and increasing minority participation and access would be undermined. Moreover, interpreted in this manner, the Act's constitutionality would be drawn into question.

Such a theory of partisan-blind racial bloc voting was expressly rejected by Justice White's and Justice O'Connor's concurring opinions in *Thornburg v. Gingles.* 478 U.S. 30, 83 (1986) (White, J., concurring); *id.* at 100-02 (O'Connor, J., concurring in judgment). In fact, the hypothetical set forth in ***17** Justice White's concurrence is *virtually identical* to Texas District 23:

> I take it that there would also be a violation in a single-member district that is 60% black, but enough of the blacks vote with the whites to elect a black candidate who is not the choice of the majority of black voters. This is interest-group politics rather than a rule hedging against racial discrimination. I doubt that this is what Congress had in mind in amending § 2 as it did… [16] *Id.* at 83.

Appellants' argument, that in every area where there is a cognizable minority population Section 2 requires districts be drawn so that the minority-*preferred* Democrat usually wins, has also been consistently recognized and rejected by lower courts with the same justification. [17]

***18** Appellants also argue that former District 24 should be protected by Section 2. In short, that minority-majority districts - the method by which the Texas legislature here chose to comply with the Act - actually *violate* Section 2. [18] The record is clear, however, that District 24 was *never* a minority performing district, it was merely a *Democratic* one. [19] Further, the record is clear that the Texas legislature took care to comply with the Act's requirements. For example, a new Hispanic controlled district, District 25, was drawn, and a new Democratic district was created, District 9, that elected an African-American Democrat. All of the other performing minority districts, including Congressman Bonilla's district, were drawn in a manner so that they would continue to elect minority representatives as they had previously. Indeed, the Texas Map enhances minority representation. The prior map had resulted in five Hispanic Democrats, one Hispanic Republican, and two African-American Democrats, being elected - a total of eight. Under the current map, five Hispanic Democrats, three African-American Democrats, and one Hispanic Republican, were elected - for a total of nine. Plus an ***19** additional seat controlled by the Hispanic electorate was created, District 25.

That the Act cannot be used to aid one political party at the expense of another, even if one party is supported by some minority groups, is only further underscored by its legislative history. Resulting from the violence that surrounded efforts in early 1965 to register African-American voters in Selma, Alabama, the Act was clearly meant to address matters of race, not political party affiliation. Indeed, President Lyndon Johnson was focused solely on ending practical barriers to minority voting - which he identified and broke into three categories: (1) technical, (*e.g.*, poll taxes) (2) non-cooperation, and (3) subjective (*e.g.*, literacy tests). *See* Message From The President of The United States Related to The Right to Vote, 89th Cong. (1st Sess. 1965). This singular focus on ending the practical barriers to voting faced by minorities is further demonstrated by President Johnson's speech to a special joint-session of Congress concerning the Act, in which he stated:

> The issue of equal rights of American Negroes is [a challenge to the values and purposes of America.] And should we defeat every enemy, and should we double our wealth and conquer the stars and still be unequal to this issue, then we will have failed as a nation. And we meet here tonight as Americans - *not as Democrats or Republicans* - we are met here as Americans to solve that problem.[20] *Id.* (emphasis added).

***20** The Act's legislative history, saturated with discussion about ending barriers to minority voting, is virtually absent of any reference to political party representation. Indeed, the legislative history expressly disclaims congressional intent to establish any right to have members of even protected classes elected in numbers equal to their proportion in the population.[21] In fact, "it was generally agreed that the concept of certain identifiable groups having a right to be elected in proportion to ***21** their voting potential was repugnant to the democratic principles upon which our society is based. Citizens of all races are entitled to have an equal chance of electing candidates of their choice, but if they are fairly afforded that opportunity, and lose, the law should offer no redress." S. Rep. No. 97-417, at 193 (1982) (additional views of Senator Robert Dole), *as reprinted in* 1982 U.S.C.C.A.N. 177, 364.

Finally, to argue that elected Republicans would play such an integral role in legislation designed to elect more Democrats defies common sense. The Act itself, it is widely acknowledged, was *drafted* in Senator Everett Dirksen's office, the Republican Senate Minority Leader from Illinois.[22] One historian describes the Republican Senator's role as follows:

The Civil Rights Acts of the 1960s were [Dirksen's] Acts. He did more than sponsor them. He did more even than produce the necessary votes to enact them. He also did what few of his colleagues were capable of doing: he played the principal role in drafting their language, and *thus determined their exact legislative thrust and intent.* Neil MacNeil, Dirksen: Portrait of A Public Man 4 (The World Pub. Co. 1970) (emphasis added).

It is hard to imagine that Senator Dirksen intended for the Act to benefit his opposing political party. Indeed, by one ***22** account, in a conversation with his Republican Senate colleagues Senator Dirksen stated: "Republican senators [will] have to assume leadership because the Democrats [will] not do so." Byron C. Hulsey, Everett Dirksen And His Presidents: How A Senate Giant Shaped American Politics 210-11 (Univ. Press of Kansas 2000). The Act is not a partisan tool. There is no reason for the Court to depart from the meaning given to the Act by Congress and the courts - the protection of racial minorities.

CONCLUSION

For the reasons set forth above, *amicus* RNC urges the Court to affirm the District Court decision.

Footnotes

* Authorities principally relied upon are denoted by an asterisk ("*").

1 The parties have consented to the filing of this brief. Their letters are on file with the Clerk of the Court. Pursuant to Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amicus* made a financial contribution to the preparation or submission of this brief.

2 Despite the Court's decision in *Vieth v. Jubelirer,* 541 U.S. 267, the justiciability of political gerrymander claims has not been foreclosed. 541 U.S. at 306-17 (Kennedy, J., concurring).

3 Notably, the Democratic Party has failed to hold a consistent view; for example, in *Bandemer*, the Democratic Party filed an *amicus* brief that argued Indiana's map was unconstitutional - yet application in this case of the very standard argued for in that brief would likely have led to the Court's invalidating the Texas map that Appellants *favor* - the 2001 court drawn interim map. Moreover, it is notable that Democrats and/or their associated parties have not challenged maps in states such as California or Massachusetts - states in which the Democratic percentage of the congressional delegation far exceeds the Democrats' share of the popular vote.

4 Political gerrymandering equal protection claims have consistently been analyzed under rational relationship level of scrutiny, and the RNC does not argue here for the Court to apply a different level of scrutiny in this context. The Court has steadfastly refused to apply strict scrutiny to redistricting maps challenged on equal protection grounds on the basis of political gerrymandering. *See, e.g., Vieth*, 541 U.S. 267, 313-14 (Kennedy, J., concurring) ("[t]he Fourteenth Amendment standard governs [political gerrymandering claims]; and there is no doubt of that"); *Bush v. Vera,* 517 U.S. 952, 964 (1996) (plurality opinion) ("[w]e have not subjected political gerrymandering to strict scrutiny"); *see also Johnson-Lee v. City of Minneapolis,* 2004 WL 2212044 (D.Minn.) (2004) ("[t]his Court interprets Justice Kennedy' s choice of language [in *Vieth*]…as referring to the rational relation standard").

5 In addition, the *Bandemer* plurality held it would not be enough even to establish that the purportedly disadvantaged party had been "placed in a district with a supermajority of other [of that party's] voters" or that the district "departs from pre-existing political boundaries." See *Bandemer*, 478 U.S. at 140-41.

6 *Bandemer* articulated a different inquiry for challenges directed at individual districts rather than those, such as in this case, which are directed at a statewide map. *See Bandemer*, 478 U.S. at 133. Since this case involves a congressional map, the relevant inquiry must be the Texas's voters' influence on the makeup of the United States House of Representatives as a whole. Appellants' challenge would therefore be properly supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process *nationwide*, rather than simply within the state of Texas. *Id.* at 133. Regardless of which point of reference is used, however, the threshold is not met in this case.

7 This standard was rejected by the Court in *Vieth*: "Fairness is compatible with noncontiguous districts, it is compatible with districts that straddle political subdivisions, and it is compatible with a party not winning the number of seats that mirrors the proportion of its vote. Some criterion more solid and more demonstrably met than that seems to us necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decision making." 541 U.S. at 292.

8 *The Henderson* Court cited multiple sources in support of its view of past Texas redistricting maps as highly partisan gerrymanders. *See Henderson*, 399 F. Supp. 2d at 768 n. 47 (citing Michael Barone, The Almanac of American Politics 2004, at 1510 (2003) ("The plan carefully constructs democratic districts with incredibly convoluted lines and packs heavily Republican suburban areas into just a few districts") and Brian P. Marron, *Doubting America's Sacred Duopoly: Disestablishment Theory and the Two-Party System*, 6 Tex. F. On C.L. & C.R. 303, 307 (2002) ("Texas experienced what is sometimes referred to as 'the great partisan gerrymander of '91' … this 'packing' strategy helped the Democrats in the 1992 election to win 21 of the other 22 districts")).

9 During oral argument in *Vieth*, the following colloquy took place between Appellant's counsel, Paul M. Smith and Chief Justice Rehnquist:

Mr. Smith: But the lower courts have since effectively overruled *Bandemer* by requiring factual showings of plaintiffs that are impossible and I submit irrational…

The Chief Justice: Do you think the lower courts didn't follow *Bandemer* then? I mean, *Bandemer* set a very high standard. MP3 File: Oral Argument in *Vieth*, 541 U.S. 267 (argued Dec. 10, 2003), *available at* http:// www.oyez.org/audio/cases/1648/argument.mp3.

10 This Court has repeatedly rejected any claim that the Constitution "requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *See Vieth*, 541 U.S. at 288 ("[the constitution] guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups"); *see also Whitcomb v. Chavis,* 403 U.S. 124, 160 (1971) ("we are unprepared to hold that district-based elections decided by plurality vote are unconstitutional in either single or multi-member districts simply because the supporters of losing candidates have no legislative seats assigned to them").

11 *See, e.g.*, Michael Barone, The Almanac of American Politics 2004, (2003) at 1508 ("In the U.S. House races, as they have since 1994, Republicans won more votes than Democrats, but fewer seats, thanks to a 1991 Democratic redistricting plan which was closely followed by a court in 2001").

12 *In Bandemer*, the Democrats had received 51.9% of the votes cast for the State House of Representatives statewide to the Republicans' 48.1%, yet out of 100 available seats, the Democrats had won only 43 to the Republicans' 57. Despite these results, the Court refused to find Indiana's map in violation of the Equal Protection Clause. *Bandemer*, 478 U.S. 109. Such quantitative "unfairness" also existed under the 2002 Pennsylvania congressional redistricting map challenged in *Vieth.* 541 U.S. 267. The *Vieth* map resulted in Republicans controlling 63% of Pennsylvania's congressional seats despite the fact that Republican statewide candidates captured only 46% of the vote against 51% for the Democrats. *See* Bureau of Commissions, Elections and Legislation, Pennsylvania Department of State, 2004 General Election Returns, *available at* http://web.dos.state.pa.us/cgi-bin/ElectionResults/elec-archive.cgi?which=Archive (last visited Jan. 26, 2006).

13 Travis County Democratic Party Chairman Chris Elliot issued a glowing press release with respect to this activity, stating: "I cannot stress enough how great [the 2004] election was for the Travis County Democratic Party as a whole. We saw more grassroots enthusiasm and anticipation in this election than in any other in recent memory. In addition, the Democratic enthusiasm in Travis [County] *seems to be spreading to neighboring counties as* Hayes and Williamson [counties] ramped up their Democratic activism during this election cycle." Chris Elliot, *A Message from TCDP Chair Chris Elliot*, Travis County Democratic Party Press Release, Nov. 2004 (emphasis added). This view was supported by the Travis County Constable, Bruce Elfant, who stated: "I think the Texas Democratic Party is on the rebound…[w]e're seeing record voter registration drives and an interest level that I haven't seen in years." April Castro, *Texas Democrats Hopeful Despite Low Point*, The Associated Press, July 30, 2004.

14 The Texas Map is also superior in this regard to the court approved 1996 Texas map that resulted from the Court's decision in *Bush v. Vera,* 517 U.S. 952 (1996).

15 *See, e.g.*, Michael Barone, The Almanac of American Politics 2004, at 1508 ("In the U.S. House races, as they have since 1994, Republicans won more votes than Democrats, but fewer seats, thanks to a 1991 Democratic redistricting plan which was closely followed by a court in 2001").

16 Justice White's opinion is the controlling opinion on this issue. *See Gingles*, 478 U.S. at 83 (White, J., concurring); *id.* at 100-02 (O'Connor, J., concurring in judgment). *See also Uno v. Holyoke,* 72 F.3d 973, 981 (1st Cir. 1995) ("[W]hen racial antagonism is not the cause of an electoral defeat suffered by a minority candidate, the defeat does not prove a lack of electoral opportunity but a lack of whatever else it takes to be successful in politics"). Given the Court's ruling on what constituted a cohesive voting group in *Quilter v. Voinovich,* 981 F. Supp. 1032 (N.D.Ohio 1997), *aff'd*, 523 U.S. 1043 (1998), it is questionable whether polarized voting even exists in District 23.

17 *See, e.g., Hall v. Virginia,* 276 F. Supp. 2d 528, 530 (E.D. Va. 2003), *aff'd*, 385 F.3d 421 (4th Cir. 2004); *Lewis v. Alamance County,* 99 F.3d 600, 617 (4th Cir. 1996); *Rodriguez v. Pataki,* 308 F. Supp. 2d 346, 382, 386, 401, 403, 427 n.134 (S.D.N.Y. 2004); ("The Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates."); *Nixon v. Kent County,* 76 F.3d 1381, 1392 (6th Cir. 1996) (A "group that is too small to be expected to win a seat, were it purely a political group, cannot legitimately have heightened expectations because the basis for the group's existence is tied to the race of its members"); *Baird v. Consol. City of Indianapolis,* 976 F.2d 357, 361 (7th Cir. 1992); *see also* Michael A. Carvin and Louis K. Fisher, *A Legislative Task: Why Four Types Of Redistricting Challenges Are Not, or Should Not Be, Recognized by Courts*, 4 ELECTION L.J. 2, 12-27 (2005).

18 Minority-majority districts are districts in which a majority of the voting age population are a racial minority. *See Johnson v. De Grandy,* 512 U.S. 997, 1023 (1994).

19 The trial record offers the following support for this contention. First, African-Americans constituted only 21.4% of the population in District 24. *See* Joint Appendix, at 51a. Second, Anglos constituted the District's largest ethnic group, and made up a majority of the District's voting age population. Finally, no African-American candidate ever challenged Martin Frost in a Democratic primary, so there is no baseline against which to test Frost's African-American support. *See id.*, at 55a.

20 In this same statement, President Johnson goes so far as to name legislators from both parties in calling for the Act's passage: "[a]nd so at the request of your beloved Speaker and Senator from Montana, the Majority Leader, Mr. Mansfield, and the Senator from Illinois, the Minority Leader, Mr. Dirksen, and Mr. McCullouch and others, Members of both parties…I come here to ask you to share this task with me and to share it with the people we both work for." Message From The President of The United States Related To The Right to Vote, 89th Cong. (1st Sess. 1965).

21 It is abundantly clear that "during the hearings, a unanimous consensus was established, among both the opponents and proponents of the results test, that the test for Section 2 claims should not be whether members of a protected class have achieved proportional representation." S. Rep. No. 97-417, at 193 (1982) (additional views of Senator Robert Dole), *as reprinted in* 1982 U.S.C.C.A.N. 177, 364. This is so because "[t]he fifteenth amendment and the Voting Rights Act of 1965 protect voter access only…. Neither the Amendment nor Section 2 of the Act explicitly or impliedly asserts that the voter is entitled to any additional rights or privileges after his vote has been taken, or that the outcome or result of the election with respect to the success or failure of minority candidates bears any relation to an individual's right to vote.… Why? Because the right to vote is an individual right of equal access to the ballot, not the collective right of a particular [group] to a certain share of elected officials after each individual has exercised his right to vote and gone home." S. Rep. No. 97-417, at 221-22 (1982) (minority views of Senator John P. East), *as reprinted in* 1982 U.S.C.C.A.N. 177, 391-92; *see also id.* at 28 (Judiciary Committee Report), *as reprinted in* 1982 U.S.C.C.A.N. 177, 206 ("Section 2 protects the right of minority voters to be free from election practices, procedures or methods, that deny them the same opportunity to participate in the political process as other citizens enjoy."); *id.* at 16 (Judiciary Committee Report), as reprinted in 1982 U.S.C.C.A.N. 177, 193 ("[T]he Committee has amended Section 2 to permit plaintiffs to prove violations by showing that minority voters were denied an equal chance to participate in the political process"); *accord* H.R. Rep. No. 97-227, at 30 (1981) ("The proposed amendment does not create a right of proportional representation. Thus, the fact that members of a racial or language minority group have not been elected in numbers equal to the group's proportion of the population does not, in itself, constitute a violation of the section although such proof, along with other objective factors, would be highly relevant. Neither does it create a right to proportional representation as a remedy.").

22 Not only did Senator Dirksen play a large role in the Act's drafting, but he actively lobbied his colleagues to support it. *See* Byron C. Hulsey, Everett Dirksen And His Presidents: How A Senate Giant Shaped American Politics 210-11 (Univ. Press of Kansas 2000) ("Legislative aides and lawyers from the Justice Department gathered daily in Dirksen's office to draft the legislation. At the close of every day Dirksen would return from the Senate floor and ask, 'well, boys, what have you done today?' After he was briefed, he would open up the bar, and when one or two conservative Republicans stopped by for a drink, the lawyers from Justice had a chance to lobby for the bill").