No. _____

In The
Supreme Court of the United States

TRAVIS COUNTY, TEXAS, GUSTAVO LUIS "GUS" GARCIA, and CITY OF AUSTIN, TEXAS,

Appellants,

v.

RICK PERRY, Governor of Texas, *et al.*,

Appellees.

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

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Does the Texas legislature's 2003 replacement of a legally valid congressional districting plan with a statewide plan, enacted for "the single-minded purpose" of gaining partisan advantage, satisfy the stringent constitutional rule of equipopulous districts by relying on the 2000 decennial census and the fiction of inter-censal population accuracy?

LIST OF PARTIES

Plaintiffs and Plaintiff-Intervenors below:

Travis County, Texas; City of Austin, Texas; Gustavo Luis "Gus" Garcia; 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; Mike Zuniga, Jr.; Frenchie Henderson; American GI Forum of Texas; Simon Balderas; Gilberto Torres; Eli Romero; League of United Latin American Voters District 7; League of United Latin American Voters; Webb County; Cameron County; Juanita Valdez-Cox; Leo Montalvo; William R. Leo; Coalition of Black Democrats; Texas NAACP; Lester Bellow; Homer Guillory; John Bland; Rev. Willie Davis; and Congressmembers Sheila Jackson Lee, Eddie Bernice Johnson, Chris Bell, Gene Green, and Nicholas Lampson

Defendants below:

State of Texas; Rick Perry, Governor of Texas; Geoffrey S. Connor, Secretary of State of Texas; David Dewhurst, Lieutenant Governor of Texas; Tom Craddick, Speaker of the Texas House of Representatives; Charles Soechting, Chair of the Texas Democratic Party; Tina Benkiser, Chair of the Texas Republican Party

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

JURISDICTIONAL STATEMENT

Travis County, Gus Garcia, and the City of Austin (collectively, "Travis County appellants") urge the Court to take jurisdiction over this appeal and reverse the judgment below.

OPINIONS BELOW

The district court's unreported opinion, on remand from this Court, is reprinted as Appendix A at App. 1a-58a. The district court's pre-remand opinion is reported at 298 F.Supp.2d 451 (E.D. Tex. Jan. 6, 2004) and reprinted as Appendix B at App. 59a-214a.

JURISDICTION

Acting under 28 U.S.C. § 2284, the three-judge district court issued its opinion and judgment on remand on June 9, 2005, adhering to its earlier judgment and denying the injunction requested by the plaintiffs and plaintiff-intervenors. App. 42a, 230a. Travis County and the City of Austin filed their notice of appeal on June 25, 2005. App. 231a. Gus Garcia filed his notice of appeal on July 5, 2005. App. 233a-235a. The Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Article I, section 2, clause 1, of the Constitution of the United States provides in relevant part:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . .

Article I, section 2, clause 3, of the Constitution of the United States provides in relevant part:

> Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. . . .

Section 2 of the Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. . . .

STATEMENT OF THE CASE

This appeal is from the district court decision on remand upholding the validity of the 2003 statewide Texas congressional redistricting plan – designated Plan 1374C – enacted in the third special session of the 78th Texas Legislature. 2003 Texas House Bill 3, 78th Leg., 3d C.S. (Oct. 12, 2003). The court's initial decision on the various challenges to the 2003 Plan inexplicably ignored the one

person, one vote issue urged by the Travis County appellants and other voters.[1] This Court, however, vacated the initial judgment and remanded the case for consideration in light of *Vieth v. Jubelirer*, 541 U.S. 267 (2004). *Travis County v. Perry*, 125 S.Ct. 352 (2004).

The district court did address the issue extensively on remand, dividing over it by a 2-1 vote. Two members of the court declined to adopt the argument. App. 33a-42a. The other member of the district court found the argument valid, concluding that the 2003 redistricting plan violates the one person, one vote requirement. App. 47a-56a.[2]

Redistricting in 2001

Federal reapportionment of congressional seats following the official 2000 census gave Texas two additional seats, bringing its total to thirty-two. *Perry v. Del*

[1] Travis County and Austin raised the one person, one vote issue from the inception of the case. App. 5a, 33a-34a, 47a; *see* Joint Final Pretrial Order ¶ D.10(a). Gus Garcia, a citizen and registered voter residing in Austin in Travis County, as well as other voters spread across the state, also joined in the challenge. *Id*., ¶ D.1(h) (adopting ¶ D.10(a)); Stip. E.23.

[2] This judge, however, specially concurred instead of dissenting because he concluded that the scope of this Court's remand did not extend to the impact of the post-*Vieth* summary affirmance in the one person, one vote case of *Cox v. Larios*, 124 S.Ct. 2806 (2004), and, hence, did not extend to the one person, one vote issue. App. 58a. The district court majority was uncertain whether the equal population issue was within the remand's scope. App. 41a-42a. Regardless of whether the remand for consideration of *Vieth*'s impact also embraced the impact of *Cox v. Larios*, the one person, one vote issue is properly before *this* Court. It has been an issue from the case's beginning, and the Travis County appellants' initial appeal, from the first district court decision in this matter, raised the equal population issue. In fact, it is the *only* issue raised by these appellants.

Rio, 66 S.W.3d 239, 244, 254 (Tex. 2001). By early spring of 2001, the state had sufficient block-level census data to redistrict Texas' then-malapportioned districts. *Del Rio*, 66 S.W.3d at 244, 254; Joint Pretrial Order Stip. E.82; App. 3a.

The Texas legislature, however, was unable to pass the necessary new congressional plan by the end of its regular session in late May of 2001. *Del Rio*, 66 S.W.3d at 246. The Governor ended any possibility of legislative action before the 2002 congressional elections on July 3, 2001, when he formally announced his decision not to call a special session on congressional redistricting. *Del Rio*, 66 S.W.3d at 243 & n.7.

Following state court proceedings that ended without a congressional plan, a three-judge federal court for the Eastern District of Texas, in *Balderas v. Texas*, stepped forward to perform the redistricting task to, among other things, "bring the district map into line with the equal population rule[.]" App. 83a. The *Balderas* decision and accompanying congressional map, designated Plan 1151C, issued in late 2001, and the plan was used for the 2002 congressional election cycle. Joint Final Pretrial Order Stips. E.2, E.70.[3] The state did not appeal but others did, and this Court summarily affirmed the decision and Plan 1151C's validity. *Balderas v. Texas*, 536 U.S. 919 (2002).

[3] The 2001 *Balderas* decision is Appendix C to this jurisdictional statement. App. 215a-229a. The district court consolidated the cases involved in the instant appeal with the *Balderas* cases.

Redistricting in 2003

The 2002 elections changed partisan control of the Texas legislature, but not the partisan balance of the Texas congressional delegation, where ticket-splitters maintained Democratic members in a tenuous majority. App. 89a. Early in the 2003 regular session, in response to a legislative request, the Texas Attorney General formally determined that state law did not mandate any legislative action on congressional redistricting and that the *Balderas* plan would remain effective for the remainder of the decade in the absence of state legislative action. Tex. Att'y. Gen. Op. GA-0063 (April 23, 2003).

The legislature moved forward with the task anyway. After failing to enact a new congressional redistricting plan in the regular session and two special sessions of the legislature, the new majority prevailed in a third called session.[4] Two years and seven months, and one full round of elections, after receiving census numbers sufficient for redistricting, the Texas legislature enacted Plan 1374C. As the district court determined in its initial decision, the "single-minded purpose" behind Plan 1374C was "to gain partisan advantage." App. 89a.

State's use of 2000 census despite evidence of significant change over three years

By its own admission, the state "did not make any effort to determine the current populations of the congressional

[4] The out-of-state flight of Democratic legislators in the Texas House and Senate to deprive the legislature of the quorum necessary to enact the congressional redistricting legislation was widely chronicled. *See* App. 62a-63a (summarizing efforts).

districts" as of the date of enactment of the 2003 Plan. Joint Final Pretrial Order Stip. E.85. Instead, it relied exclusively on the uncorrected census numbers from before the 2002 elections. *Id*.[5]

Undisputed trial evidence, though, from Austin's official demographer shows huge changes in the size and dispersion of Texas population between the March, 2001, release of the official census data for redistricting and Plan 1374C's enactment. *See* Travis County/City Exh. 1.[6] "[R]apid and spatially uneven population surges and declines" made the 2000 block-level population data from the census "old and specious" both statewide and in local communities. *Id.* More than a million persons had been added to the Texas population in the interim. *Id.* And the rapidly rising Hispanic share of the population meant that Plan 1374C districts were drawn that "do not fully reflect the current size and spatial scope of the state's largest and most rapidly expanding minority community[.]" *Id.* The result of all this growth and its uneven spread was that, in actuality, Plan 1374C's use of 2000 census block data left the "resultant districts . . . not balanced with each other in terms of population." *Id.*[7]

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[5] Before enactment of Plan 1374C, the Census Bureau issued corrected (not updated) official census numbers for Texas, adding thirty people to the state's total population count. *See* Travis County/City of Austin Exh. 2.

[6] Declaration of Ryan Robinson: Post-Census 2000 Demographic Change in Texas. The state offered no contrary evidence at either the initial trial or on remand.

[7] One of the few exhibits admitted on remand – LULAC Exh. 2 – highlights the dramatic intra-state population shifts and growth between the 2000 census and 2003. Drawn from the estimates of the Texas State Demographer, *see* http://www.txsdc.tamu.edu/tpepp/txpo

(Continued on following page)

Contrast between contemporary political considerations and complacent acceptance of stale census numbers

Plan 1374C may have ignored these population changes in its one person, one vote calculus, but those charged with redrawing the lines assuredly did not in their political calculus. Representative King sponsored the redistricting bill in the House and led the House's map-drawing effort. App. 93a, 171a. He testified at trial, for example, about his concerns during the mapping effort about whether new Congressional District 4 (running along the Red River) would fall into the Republican column in the upcoming election and explained that he designed it so that the population growth he saw there would let it "grow into" a Republican district during the decade. Trial Tr., 12/18/03[8] He identified new Congressional District 12 as a district drawn to take advantage of quite recent trends in population shifts in Wise County not far from Fort Worth. Trial Tr., 12/18/03. The Senate's own chief staff map-drawer, Bob Davis, testified that he thought it "silly" to use 2000 census numbers to draw

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pest.php (website of Texas State Data Center and Office of the State Demographer), the exhibit has a congressional district-by-congressional district comparison of population under the 2000 census with the state demographer's 2003 estimates. As a whole, the state's population had grown an estimated 1,266,689 between the 2000 census and 2003, a 6% increase overall. The district estimated to be the most populous by 2003 (CD 3) had 84,081 more people in it than the district estimated to be the least populous by that point (CD 19). District 23 had grown by an estimated 32,253 people in the ensuing three years. The district court split, 2-1, in its initial decision over whether Plan 1374C's CD 23 violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. *Compare* App. 126a-160a (majority) *with* App. 187a-209a (dissent).

[8] "Grayson and Collin counties are fast-growing Republican areas."

congressional maps in 2003 to meet the one person, one vote standard. Trial Tr., 12/18/03.[9]

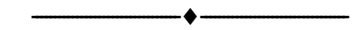
The much-contested District 23 provides further evidence of the fundamental inconsistency, blessed by the district court majority, between the legislature's use of stale demographic data for meeting its constitutional obligation of equipopulous districts and its use of contemporary understandings of demographic and political data for achieving its political objectives. District 23, stretching along the Texas-Mexico border for hundreds of miles between Laredo in the east and El Paso to the west, but also reaching into the San Antonio suburbs further north, had been a Republican district since at least 1992 when its current incumbent, Congressman Bonilla, had first been elected. App. 126a. Under the 2001 *Balderas* plan, District 23 had not performed consistently as a Hispanic opportunity district despite having a bare majority of Hispanic citizen voting age population. App. 126a. Yet, by 2003, due to Hispanic population growth, the district, as drawn in the *Balderas* plan, "was moving in th[e] direction" of becoming an effective Hispanic opportunity district. App. 128a. Recognizing what population growth was doing to the partisan make-up of the district drawn by the court, and in order to protect Congressman Bonilla, the Texas legislature in its 2003 Plan split off several hundred thousand Hispanic voters from the 2001 version of the district and "prevented it from continuing to move toward becoming an effective opportunity district." App. 142a, 166a. In other words, using 2002 election data and contemporary understandings of population trends – but

[9] "I thought it was silly to make that assumption in a state as big as Texas."

using 2000 population numbers to satisfy constitutional demands – the legislature in 2003 terminated District 23 as what the district court termed an "evolving Hispanic influence district." App. 167a n.201.

The legislative approach in 2003, therefore, was to use contemporary political and demographic understandings for purposes of meeting the overarching political objectives of the redistricting but not to bother with determining and using contemporary demographic realities for purposes of meeting the fundamental constitutional requirements for such actions. Elections in 2002 determined where lines would be drawn, as did post-2000 population trends; yet, the three-year old census reports were used to determine how many people would be inside the lines in response to the equal population rule.

The legislators, politicians, and their map-drawing staff all had an eagle-eye on post-census population developments and carefully crafted Plan 1374C to use them to further their partisan objective. The district court blessed this use of post-census population shifts and even used later elections, in 2002, to condone the lines drawn as a consequence. The district court majority's conclusion, implicit though it may have been, was that, while politics may take the reality of population shifts into account to ensure a shift of power between political parties, the Constitution may not demand that the same realities be taken into account to ensure a shift of power for the people who are to be represented.



THE QUESTION IS SUBSTANTIAL

In its first post-*Vieth* redistricting case, the Court summarily affirmed a district court decision striking down a legislative redistricting plan for violating the one person, one vote rule. *Cox v. Larios*, 124 S.Ct. 2806 (2004). Two concurring Justices explained that, after the splintered decision in *Vieth*, the equal population rule is the "only clear limitation" remaining for improper redistricting practices and cautioned that "we must be careful not to dilute its strength." 124 S.Ct. at 2808 (Justices Stevens and Breyer, concurring).

The district court's decision dilutes the strength of the one person, one vote rule for congressional districts – where the rule is supposed to be most restrictive, *see Karcher v. Daggett*, 462 U.S. 725 (1983) – in a way that opens the door wide for repeated mid-decade redistrictings to ensconce and enhance the congressional position of the party holding the reins of state power. This incentive to escalate partisan redistricting was a prime concern of the panel member who discerned a one person, one vote violation. App. 48a. He cited Justice Bryer's *Vieth* dissent: "By redrawing districts every 2 years, rather than every 10 years, a party might preserve its political advantages notwithstanding population shifts in the State." 541 U.S. at 267 (J. Bryer, dissenting).

In the post-*Vieth* world, it is critically important to the democratic functioning of the House of Representatives that one of the few constitutional restraints on unbridled partisanship in the formation of the House's membership be infused with sufficient strength to at least give pause to those who would undertake what all members of the Court

seemed to recognize in *Vieth* are troubling modern methods for reconfiguring the polity.

As part of its one person, one vote jurisprudence, the Court has long countenanced a legal fiction that populations do not shift among districts between decennial censuses. Despite its real-world understanding that "[d]istrict populations are constantly changing, often at different rates in either direction, up or down," *Gaffney v. Cummings*, 412 U.S. 735, 746 (1973), the Court has concluded that, once a state's post-census redistricting is accomplished to account for population shifts and changes, the state may "operate under the legal fiction that even 10 years later, the plans are constitutionally apportioned." *Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003).

The reason for the fiction is plain: to avoid the necessity of constant redistricting to satisfy the equal population rule. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 583 (1964) (Court's equal population rule not meant to require "daily, monthly, annual or biennial" redistricting). The district court's acceptance of the fiction in the circumstance of the Texas redistricting, though, turns the rationale upside down. Instead of using the fiction of inter-censal population stasis to avoid never-ending redistricting, the district court used it to countenance repeated mid-decade redistricting, as frequently as partisan pressures propel it.

The Travis County appellants are not asking that the fiction be abandoned. They are urging, instead, that it not be recognized in the novel circumstances of this case. When a state has a legally valid plan in place, after the decennial census numbers are published and before the first election following their publication, it should not be permitted to rely solely on the inter-censal population

stasis fiction to meet the equal population rule if it voluntarily undertakes to redraw its congressional lines after the first post-census round of elections. Not indulging the fiction in such a circumstance would put a constitutional brake on, but not necessarily halt, voluntary, partisan-driven redistricting in mid-decade.

The district court was plainly troubled by the vexing new political development presented by the Texas redistricting. It acknowledged that the "most compelling arguments" against mid-decade redistricting arise from the "impropriety . . . of frequent redistricting." App. 84a. It even mused about the desirability of judicial limitations that focus on the "time and circumstance of partisan linedrawing" as opposed to *Vieth*-type inquiries. App. 98a. Yet, in the end, two of its three members yielded to the state's request that the fiction be indulged.

Jettisoning the fiction of inter-censal accuracy would serve to revive the one person, one vote rule as a meaningful check on partisan excesses, while not rigidifying the system with broad structural prohibitions.[10] Removing the fiction as a safe harbor for the Texas Legislature's baldly partisan effort would reinforce Justice O'Connor's observation that "the one person, one vote principle safeguards the individual's right to vote, not the interests of political parties." *Davis v. Bandemer*, 478 U.S. 109, 149 (J. O'Connor, concurring).

[10] The district court asserted that "broad-spectrum responses have no place here." App. 33a. The legal principle urged by the Travis County appellants is consistent with the assertion.

THE EQUAL POPULATION RULE FOR CONGRESSIONAL DISTRICTS PERMITS ONLY UNAVOIDABLE VARIANCES FROM ABSOLUTE QUALITY, AND PLAN 1374C'S VARIANCES WERE ENTIRELY AVOIDABLE.

A. The equal population rule for congressional districts permits only "unavoidable" variances from a "good faith," absolute equality requirement.

The issue presented rises directly from the Court's one person, one vote jurisprudence in the congressional context. *Wesberry v. Sanders*, 376 U.S. 1 (1964), held that Article I, section 2, of the Constitution sets a constitutional standard of equal population among the districts. In *Karcher v. Daggett*, 462 U.S. 725, the Court held that this standard permits only limited, "*unavoidable*" variances from a good-faith, absolute equality requirement. 462 U.S. at 730 (emphasis added).

In actual fact, Plan 1374C will never have satisfied *Karcher*'s good faith, absolute equality requirement, neither at its inception and nor at any other point over the four election cycles it is designed to span. The Texas population had shifted from the census-painted picture in dramatic ways by the Fall of 2003. And, when the legislature enacted Plan 1374C, it insisted on using the increasingly stale census population data in a way that was entirely avoidable. In short, the indisputable fact of its gross departure from actually meeting one person, one vote standards directly contradicts *Karcher*'s insistence that only "unavoidable" departures are permitted.

The desire to right perceived partisan wrongs of the past that are said to have driven Plan 1374C's passage[11] cannot justify these avoidable departures. The Court has explained that "[p]roblems created by partisan politics cannot justify an apportionment which does not otherwise pass constitutional muster." *Kirkpatrick v. Preisler*, 394 U.S. 526, 533 (1966). Furthermore, the one person, one vote command is to achieve population equalization, not the equalization of political power. *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 697-698, 703 (1989). The state cannot justify dispensing with the equal population rule by claiming that its legislature was only trying to right perceived past wrongs when the chance first arose.

B. The state failed to proffer any reason, other than the legal fiction of inter-censal population stasis, for its 2003 departure from population equality among its congressional districts.

The state failed to carry its burden of demonstrating that Plan 1374C satisfies the one person, one vote standard.[12] The *Karcher* rule permits only limited departures from absolute equality among congressional districts. Such departures are permitted only if they are "unavoidable"

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[11] App. 21a-24a; 26a-27a (accepting state's argument that the 2003 Republican gerrymander was to replace the lingering effects of a 1991 Democratic gerrymander). The 1991 congressional redistricting plan was expressly held not to be a partisan gerrymander under the then-reigning *Davis v. Bandemer* rubric. *See Terrazas v. Slagle*, 821 F.Supp. 1162, 1172-1175 (W.D. Tex. 1993) (3-judge court).

[12] Travis County and Austin had introduced unrebutted evidence, in the form of the Robinson declaration, that actual population equality was not present in the Plan 1374C districts.

after a good faith effort to achieve absolute equality. 462 U.S. at 730. As already explained, the state made no effort whatever to achieve absolute equality, and its 2003 redistricting was entirely avoidable, since, as even the Texas Attorney General opined in response to legislative inquiry, the *Balderas* plan was legally valid for the rest of the decade.

In this circumstance, then, the burden shifted to the state to show that it had a basis for satisfying the strict one person, one vote rule. *Karcher*, 462 U.S. at 731. The state then had two choices. First, it could show that it updated the census numbers with substantial technical rigor. *Kirkpatrick v. Preisler*, 394 U.S. 526, 535 (1969).[13] Or, it could demonstrate that the deviations from strict equality were to achieve some otherwise legitimate goal. *Karcher*, 462 U.S. at 731. This construct explains when the state cannot use outdated numbers without bothering to explain or justify, not whether the state must use updated numbers.

In the face of these constitutional imperatives, the state retreated to the only redoubt it could find – the legal fiction of inter-censal population accuracy. The 2000 census is not a constitutional defense to the one person, one vote challenge, and applying the inter-censal fiction in these circumstances would be a perversion of the rationale for its existence.

[13] The state, for example, could contract with the Secretary of Commerce for an official, mid-decade, special census of the state. *See* 13 U.S.C. § 196.

C. There is no constitutional link between official decennial population data and the one person, one vote rule.

The Court has indicated that the link between decennial census data and redistricting is *not* a constitutionally mandated one.[14] It has observed the important consequences of census data, "*not* delineated in the Constitution" for drawing intrastate political districts. *Wisconsin v. City of New York*, 517 U.S. 1, 5-6 (1996). In *Kirkpatrick v. Preisler*, the Court acknowledged that, if established with a high degree of accuracy, intra-census population shifts may be taken into account in applying the equal population rule in congressional redistricting. 394 U.S. at 535; *see also White v. Weiser*, 412 U.S. 783, 792 n.12 (1973) (same).

Similarly, in rejecting a structural constitutional argument against mid-decade redistricting, the district court here rejected the proposition that there is a constitutional link between the Census Clause and the one person, one vote rule: "[T]he Census Clause does not mention the states or their power to redistrict[.]" App. 70a-71a.[15]

The absence of a constitutionally-mandated link between the official census numbers and the equal population

[14] If, on the contrary, there is a constitutional link, then the structural constitutional arguments against mid-decade redistricting made by some of the plaintiffs in the district court rise as a valid constitutional challenge to the Texas congressional redistricting in 2003.

[15] Consistent with this de-linkage approach, an early Texas case on redistricting after *Baker v.* Carr, 369 U.S. 186 (1962), approved the concept of the state looking beyond the increasingly stale 1960 census population numbers in drawing its congressional districts. *See Bush v. Martin*, 251 F.Supp. 484, 517 n.107 (S.D. Tex. 1966) (three-judge court).

rule, combined with the undisputed fact that the actual population numbers for Plan 1374C's districts were not equal among the districts when the plan was enacted, leaves the state only one defense: the inter-censal accuracy fiction.

The Texas experience in 2003, though, proves the wisdom of Justice Frankfurter's observation for the Court that "especially in the disposition of constitutional issues are legal fictions hazardous[.]" *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 660 (1948). It is one thing to indulge a legal fiction such as the one in question here when it is necessary to *force* legislative action, while still giving a solid reference point to meet the constitutional rule and minimize partisan manipulation. It is quite another thing to indulge the fiction to *permit* legislative action to meet the constitutional rule when the overweening aim of the action is partisan manipulation.

One of the leading scholars on legal fictions wrote that the "purpose of any fiction is to reconcile a specific legal result with some premise or postulate." L. Fuller, *Legal Fictions*, 25 Ill. L. Rev. 513, 514 (1931). He further warned that fictions should be treated as "servants to be discharged as soon as they have fulfilled their functions." L. Fuller, *Legal Fictions*, 25 Ill. L. Rev. 877, 898 (1931); *cf. United States v. Markgraf*, 736 F.2d 1179, 1187 (7th Cir. 1984) (J. Posner dissenting from denial of rehearing en banc) ("proper office of legal fictions is to prevent, rather than to create, injustices"), *cert. dism'd*, 469 U.S. 1199 (1985).

The reason for the legal fiction of inter-censal population stasis cannot be squared with its use by the state in its defense of Plan 1374C. Permitting its use in this case to uphold a factually malapportioned plan would create, rather than prevent, a constitutional injustice.

D. The Court should deny Texas's partisan gerrymander the safe harbor of the legal fiction of population stability, just as its summary affirmance in *Cox v. Larios* resulted in denying Georgia's partisan gerrymander the safe harbor of the 10% variation rule for state legislative districts.

The district court justified its refusal to ignore the fiction in the circumstances of the 2003 Plan by positing that using the 2001 *Balderas* plan would not result in any greater actual population equality among the districts than would use of Plan 1374C. App. 39a-40a. The court surmised that the actual population shifts had undermined actual equality as much for one plan as the other. *Id*.

The court's point is not really a refutation of the argument that the fiction's rationale does not apply in this situation. Instead, it is more in the nature of an explanation that absolute equality will not result from jettisoning the fiction in the circumstances of this case. Ultimately, it is an argument against the fiction more than an argument against not allowing its perversion in this circumstance. The Court already is aware that population shifts happen immediately after the census enumeration and that demographic dynamics mean that absolute equality might be momentarily achievable though never absolutely measurable.

But, beyond the tautological nature of the district court's discussion on this point, there is a more practical matter ignored by the court. When new lines are drawn after the census but before the first election following it, all the many factors impinging on where lines should be drawn – equal population, avoiding racial gerrymanders,

Voting Rights Act requirements, and, above all, politics – must be considered at the same time. *See, e.g., Bush v. Vera*, 517 U.S. 952, 1013 (1996) (J. Stevens, dissenting) (discussing how all the various factors and considerations come into play to ensure that "all competing goals were *simultaneously* accomplished) (emphasis added). In this way, there is an interlocking web of checks on unbridled partisanship. Removing one of the most basic strands – the one person, one vote requirement – from the web and permitting the partisanship to express itself undeterred by a fundamental constitutional concern would be an unnecessary encouragement of the very thing the courts, including most importantly this one in *Vieth*, have been concerned about: untrammeled partisanship in redistricting with no constitutional check.

In *Cox v. Larios*, 124 S.Ct. 2806, the Court summarily affirmed a district court decision that had thrown out Georgia's redistricting of its state legislative seats. *Larios v. Cox*, 300 F.Supp.2d 1320 (N.D. Ga. 2004). The Georgia legislature had sought to protect its partisan gerrymandering by staying in what it thought was the safe harbor of the 10% population variation rule for state legislative districts. 300 F.Supp.2d at 1325. The district court found that sheer partisanship is not a legitimate state policy and concluded that this Court had "never sanctioned partisan advantage as a legitimate justification for population deviations." 300 F.Supp.2d at 1338, 1351.

While fully aware that summary affirmances are not to be read too broadly, the Travis County appellants note the striking similarities between the plan invalidated in *Larios* and the plan under consideration here. Here, as in Georgia, the state redistricted for partisan gain. Here, as in Georgia, the state sought to protect the partisan gain by

seeking what it perceived to be a safe harbor on the equal population flank. The safe harbor in *Larios* was the 10% variation rule; the safe harbor here, the legal fiction of inter-censal population stasis.

The same principle that drove the district court to deny the safe harbor in *Larios* should be invoked by this Court to deny the safe harbor to Texas. Anything less would severely weaken one of the few remaining constitutional restraints on unbridled partisanship in redistricting.

CONCLUSION

The Court should note probable jurisdiction, reverse the decision of the district court, and enjoin any further use of Plan 1374C.

Respectfully submitted,

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