No. _____

In The
Supreme Court of the United States

GI FORUM OF TEXAS, ET AL.,

Appellants,

v.

RICK PERRY, ET AL.,

Appellees.

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

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether political partisanship is sufficient justification, under section 2 and the Constitution, for dismantling a Latino-majority congressional district in order to elect the Anglo-preferred candidate.

2. Whether section 2 permits a state to eliminate a majority-minority district located in one area of the state and create another majority-minority district in a different area of the state.

3. Whether the District Court erred by requiring section 2 demonstrative districts to be more compact and to offer greater electoral opportunity to minority voters than the corresponding districts in the challenged redistricting plan.

4. Whether the number of majority-minority districts that can be created in the state functions as the upper limit of permissible political opportunity when assessing proportionality under *Johnson v. DeGrandy*.

LIST OF PARTIES

Plaintiffs and Plaintiff-Intervenors below:

American GI Forum of Texas; Simon Balderas; Gilberto Torres; Eli Romero; League of United Latin American Citizens District 7; 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; League of United Latin American Citizens of Texas; 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 Congress-members 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

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The District Court's majority and concurring opinions following remand are reprinted in full in the Appendix to this Jurisdictional Statement ("J.S. App."). J.S. App. at 1. The District Court's final judgment is reprinted in full in the Appendix. J.S. App. at 59. The Order following trial of the case is reported at 298 F. Supp. 2d 451 (E.D. Tex. 2004) and is reprinted in full in the Appendix. J.S. App. at 61.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1253 to review the District Court's order. GI Forum, *et al*. Appellants ("GI Forum Appellants") filed their timely notice of appeal on August 2, 2005. *See* 28 U.S.C. § 2101(b). J.S. App. at 60.

CONSTITUTIONAL AND STATUTORY PROVISIONS

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 Fifteenth Amendment to the United States Constitution provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, is reprinted at J.S. App. at 218.

STATEMENT OF THE CASE

Following the Texas Legislature's redistricting of congressional boundaries in 2003, the District Court in this case ruled twice that partisanship rendered acceptable the dismantling of a Latino-majority electoral district and the concentration of Latino voters into six instead of seven opportunity districts in the southern region of the

state. The decisions of the District Court raise critical issues that require this Court's guidance.

The intentional discrimination and vote dilution claims raised in this case are very likely to recur, particularly as more states struggle to resolve three redistricting doctrines affecting minority voting rights: the mandate to avoid minority vote dilution, the flexibility granted to states to alter district lines for partisan purposes granted in cases such as *Davis v. Bandemer,* 478 U.S. 109 (1986) and *Vieth v. Jubelirer*, 541 U.S. 267 (2004) and the limits on race-conscious redistricting set out in this Court's line of cases beginning with *Shaw v. Reno*, 509 U.S. 630 (1993).

More and more states attempting to balance their partisan goals with the voting power of a growing minority group will seek to determine whether they may, under the Equal Protection Clause and section 2, disperse these populations and dismantle their districts as the means to ensure the election of non minority-preferred candidates. This increasingly likely scenario exposes issues left unresolved by the Court's line of decisions defining unconstitutional racial gerrymandering, beginning with *Shaw*, and continuing through *Miller v. Johnson*, 515 U.S. 900 (1995).

GI Forum Appellants appeal the decision of the District Court following a remand by this Court to reconsider its ruling in light of *Vieth.* On remand, the District Court declined to reconsider the claims of Latino voters and organizations that the 2003 Texas congressional redistricting scheme discriminates against Latino voters, relying instead on its prior ruling that an asserted partisan motivation shields the State from liability even when the State intentionally limited Latino political opportunity. The District Court further declined to reconsider its prior ruling that the loss of a Latino-majority district was properly "offset" by the creation of another Latino-majority district elsewhere in the state even though the GI Forum Appellants demonstrated that the State could both preserve the existing district and create the new Latino district. These substantial questions require Court guidance.

I. Factual Background

Following the 2000 Census, the task of drawing a congressional district map in Texas fell to the federal court in *Balderas v. Texas*. After trial, the three-judge District Court issued its congressional plan on November 14, 2001, and that plan was used by Texas for its 2002 congressional elections. *Balderas v. Texas*, No. 6:01-CV-158, slip op. (E.D. Tex. Nov. 14, 2001), *aff'd mem.*, 536 U.S. 919 (2002).

However, in 2003, Governor Perry called three separate special sessions to take up and alter the court-drawn map. In this process, as they had since the release of the 2000 Census data, Latino advocates sought an increase in congressional districts in the South Texas region.[1] The *Balderas* court had declined to create a seventh Latino-majority district in South Texas, stating that it was up to the Legislature to create such a district, and maintained the six-district configuration of the 1990's.

In 2003, the Texas Legislature, taking up what the *Balderas* court had left undone, decided to expand the South Texas congressional districts, adding geographic territory and Latino population. The new redistricting plan significantly expanded the area of South Texas congressional districts from 44 to 58 counties. The Legislature's redistricting plan in South Texas now encompassed enough population for seven congressional districts, with an overall Latino citizen voting age majority of 58 percent. J.S. App. at 124. Thus, the plan demonstrated that it is possible to create seven districts – each compact and wholly within the South Texas region – that would offer the opportunity to elect the Latino candidate of choice.

However, by concentrating that Latino population eastward into only six districts, the State minimized Latino political strength. The result was to squeeze seven

[1] Because Latino population dominates the southern portion of the state, South and West Texas contain all of the State's Latino citizen voting age majority districts.

districts of Latino population into only six districts offering the opportunity to elect the Latino candidate of choice.

A. The State Dismantled District 23 as an Effective Opportunity District for Latinos

The Legislature radically reconfigured District 23 because it wanted to preserve the incumbency of Henry Bonilla, a Republican congressman whose declining support among Latino voters had placed his continued reelection in doubt.

The Legislature's changes to District 23 reduced the Spanish-surnamed registered voters from 55.3 percent to 44 percent, rendering the district incapable of electing the Latino-preferred candidate.

The Legislature chose to slice through Webb County and the City of Laredo, both of which have greater than 90% Latino population. Severing this tightly knit U.S.-Mexico border community in half, Texas mapmakers ignored traditional race-neutral considerations such as respect for political subdivisions and maintaining communities of interest. The result was 359,000 Latinos left stranded in a district in which they were "clearly not a majority of citizen voting age population and certainly not an effective voting majority." J.S. App. at 146.

The *Balderas* court had crafted District 23 in 2001 with 57.5 percent Hispanic citizen voting age population and 55.3 percent Spanish-surnamed registered voters. After placing this Latino-majority District 23 in its redistricting plan, the *Balderas* court referred to the six Latino-majority districts it created as "protected." *Balderas*, No. 6:01-CV-158, Slip Op. at 5, 9 and 12. As explained by Judge Ward, a member of the *Balderas* three-judge court:

> [Under] Plan 1151C, District 23 was a protected Latino opportunity district . . . The *Balderas* court implicitly recognized that District 23 under Plan 1151C was a protected minority opportunity district when it maintained only six Latino majority citizen voting age districts. A review of the

> statistical package for Plan 1000C reveals that District 23 was one of those six districts.

J.S. App. at 190 (Ward, J., dissenting in part).

In the 2003 challenge to the Legislature's redistricting plan, the parties were in universal agreement that District 23, as created by the *Balderas* district court, was an effective opportunity district for Latino voters in 2002. Dr. Keith Gaddie, testifying for Defendants, found that District 23 in Plan 1151C "performed" for Latino voters in 2002, *i.e.*, elected the Latino candidate of choice in 13 of 15 statewide general elections; Dr. Gaddie further testified that a district that elects the Latino-preferred candidate in 13 out of 15 elections offers Latinos the opportunity to elect their candidate of choice.[2] Dr. Richard Engstrom, testifying for the GI Forum Appellants, and Dr. Alan Lichtman, testifying for Democratic Congressional incumbents, found similarly that District 23 in the court-drawn plan offered Latino voters the opportunity to elect their candidate of choice.[3]

Like many voters in Texas, Latinos in District 23 would "split" their tickets to support both Republican and Democratic candidates to statewide office. For example, in 2002, a majority of District 23 voters supported Republican candidates for Texas Comptroller and State Agriculture Commissioner and Democratic candidates for U.S. Senator and Governor. The District Court created District 23 in 2001 with election data showing that this collection of precincts gave a majority of its votes to Republican President George Bush and Republican Senator Kay

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[2] Jackson Pls. Ex. 140 (Gaddie deposition) at 128-29. Dr. Gaddie also noted that a different configuration of District 23 during the 1990's, which contained far lower levels of Latino voter registration and voting age population, had not been effective to elect the Latino-preferred candidate. *Id.* at 132. To the extent that the District Court relied on this testimony in its discussion of District 23 in the 2001 court-drawn plan, it was error.

[3] Jackson Pls. Ex. 1 (Lichtman expert report); GI Forum Pls. Ex. 86 (Engstrom expert report).

Bailey Hutchinson in 2000; the precincts comprising District 23 also gave a majority of their votes in 1998 to Republican candidates for Governor and Attorney General and to Democratic candidates for Comptroller and Lt. Governor.[4]

Congressman Henry Bonilla represented District 23 during the 1990's as the number of Spanish-surnamed registered voters in the district rose from 46 percent to 53 percent and, as found by the District Court, Latino voters gave less and less of their support to Congressman Bonilla. J.S. App. at 145. In 2002, although he was the incumbent, Henry Bonilla received the lowest level of support from Latino voters that he had ever received. *Id.* at 128. As a result, he almost lost his seat, garnering a slim 51.5 percent of the overall vote.

The crisis that had developed for Mr. Bonilla by 2002 was the shift of Latino voters away from him, not a shift in the partisan composition of his district. In fact, the Republican performance of District 23 was enhanced by the *Balderas* district court when compared to District 23 in the previous (1990's) plan.[5] In spite of the fact that District 23 had become more Republican after the three-judge court redrew it in 2001, Mr. Bonilla's margin of victory had diminished to less than 2 percentage points in 2002.

Throughout the 1990's, Mr. Bonilla had been successfully re-elected with strong Anglo support and a portion of Latino support. However, it was the willingness of Latino voters to vote for Mr. Bonilla during the 1990's that allowed him to remain in office as his district grew into one with a majority of Spanish-surnamed registered voters.

By 2002, Mr. Bonilla was losing more support among Latino voters in District 23 than other Republican

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[4] GI Forum Pls. Ex. 3 (Texas Legislative Council RED-M205 reports for Plan 1151C: 2002, 2000 and 1998 General Elections).

[5] GI Forum Pls. Ex. 3, 4 (Texas Legislative Council RED-M200 reports for Plans 1151 and 1000).

candidates for office. For example, one of the State's mapmakers acknowledged that the Republican statewide candidate for Comptroller in 2002, Carol Keaton Rylander, received twice as much support from Latino voters in District 23 as Mr. Bonilla.[6]

State mapmakers and legislators openly stated that their reason to reconfigure District 23 was to ensure the election of Mr. Bonilla. Representative Phil King, chief map drawer in the Texas House, testified that the Legislature altered District 23 to make sure Mr. Bonilla was re-elected. J.S. App. at 229. The Texas Senate's chief redistricter, Bob Davis, similarly testified that the goal in changing District 23 was to ensure the re-election of Mr. Bonilla.[7]

The State's expert testified at trial that the bolstering of Mr. Bonilla's re-election chances and the reduction of Latino population in District 23 "happen together, [and] one is a consequent of the other." J.S. App. at 222.

The District Court concluded that the State's drastic reconfiguration of District 23 was intended to ensure the re-election of Mr. Bonilla, as well as the other Republican incumbents in Texas, with the ultimate goal of building the State's Republican delegation to 22. *Id.* at 90-91.

As explained by Judge Ward, a member of the *Session* panel:

> The State's solution to this political problem was brutal, yet simple: destroy the opportunity district. The state did so by cracking a cohesive Hispanic community out of Webb County and taking in Anglos from the Texas Hill Country to build a district in which the Hispanic community will not be able to influence the outcome of the election.

J.S. App. at 191 (Ward, J., dissenting in part).

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[6] Tr., Dec. 18, 2003, 1:00 p.m., at 55 (Bob Davis).

[7] Tr., Dec. 18, 2003, 8:30 a.m., at 114 (Bob Davis).

Texas legislators dismantled District 23 with a second race-based goal – to ensure that Mr. Bonilla was re-elected in a nominally Latino-majority district. The District Court found that District 23 was intentionally constructed with enough Latinos for a bare voting age majority but not enough to elect the candidate of choice. J.S. App. at 145-46.

State map drawers also admitted that one of their goals was to ensure that District 23 contained a nominal majority of Latinos. *Id.* at 229. The State's expert witness testified that, despite his warnings to the Legislature that they were creating a District 23 that would not perform for Latino voters, every version of District 23 he saw maintained a voting age majority of Latinos. *Id.* at 220.

Thus, the State's map drawers articulated a carefully balanced and profoundly racial motive: reduce the Latino population of Congressional District 23 so that it could not elect the Latino-preferred candidate, but ensure that the district was nominally Latino so that Mr. Bonilla could still claim to be elected from a Latino-majority district. Representative Phil King, chief map drawer in the Texas House, put it this way: "Well, we tried the keep it above 50 percent Hispanic VAP, and we tried to make it a District that [had] some more Republicans in it so that Henry Bonilla could have an easier time with re-election because we didn't want to lose him." *Id.* at 229. *See also id.* at 230.

B. The State Crafted Seven Latino-Majority Districts in South Texas but Only Provided Political Opportunity in Six

The State's decision to create seven congressional districts in an area featuring a 58 percent Latino citizen voting age majority brought with it the ease of creating seven congressional districts that would offer the opportunity to elect the Latino candidate of choice. Instead, the State gave with one hand and took away with the other. It diminished District 23 to the point of ineffectiveness and then rearranged the remaining counties to insert District 25. The net result was six minority opportunity districts

located in a larger, expanded area of the state that could support seven such districts.

II. Procedural History

GI Forum Appellants filed their challenge to the 2003 congressional redistricting in the United States District Court for the Southern District of Texas on October 14, 2003. That case, *GI Forum v. Texas*, No. CV-03-124 (S.D. Tex. 2001) was consolidated with other redistricting challenges in the Eastern District of Texas on October 23, 2003. Trial went forward on December 11, 2003.

The District Court upheld the State's congressional redistricting plan in an opinion dated January 6, 2004 and issued its final judgment on January 15, 2004. J.S. App. at 217. On appeal, this Court vacated that ruling and remanded the case for reconsideration in light of *Vieth,* 541 U.S. at 267. *See Jackson v. Perry*, 125 S.Ct. 351 (2004).

A. District Court's Opinion

On remand, the District Court declined to consider whether, in its pursuit of a partisan goal, the State violated the rights of Latino voters. Instead, the District Court dismissed such claims as "beyond the scope of the mandate."[8]

Following trial, the District Court had found that Latino population was removed from District 23 in order to ensure the re-election of incumbent Henry Bonilla, who was not the preferred candidate of Latino voters: "The

[8] "The GI Forum . . . return to their claims that the Texas plan impermissibly burdens minority voters in violation of the Voting Rights Acts [sic] and the Equal Protection Clause of the Fourteenth Amendment. Each would tie these claims to partisan gerrymandering. The contention is that these violations occurred in the effort to gain partisan advantage, however else the effort may be flawed. We examined and rejected all of the claims in detail in our previous opinion. As these claims are beyond the scope of the mandate we are not persuaded that we should revisit them." J.S. App. at 42.

evidence showed that Bonilla had lost a larger amount of Hispanic support in each successive election. In 2002, Bonilla attracted only 8 percent of the Latino vote." J.S. App. at 145, 128. In order to "shore up" District 23 for the incumbent, the District Court found that the State removed 99,766 people, who were more than 90% Hispanic, from the district and added 101,260 largely Anglo residents of the Texas Hill Country. *Id.* at 128. The State accomplished this removal of Latino population by slicing through the middle of the City of Laredo and Webb County, a U.S.-Mexico border community that was previously included whole in District 23. *Id.* at 128.

The District Court found that: "Congressional District 23 is, unquestionably, not a Latino opportunity district under Plan 1374C. The map drawers divided Webb County, which is 94 percent Latino." *Id*. at 144.

Despite these findings and conclusions, the District Court accepted the partisan justification offered by the State for eliminating District 23 as a Latino opportunity district but maintaining it as nominally Latino-majority.

The District Court further concluded: "The change to Congressional District 23 served the dual goal of increasing Republican seats in general and protecting Bonilla's incumbency in particular, with the additional political nuance that Bonilla would be reelected in a district that had a majority of Latino voting age population – although clearly not a majority of citizen voting age population and certainly not an effective voting majority." *Id*. at 145-46. Thus, even the court acknowledged that the State's partisan goal was infused with race.

The District Court, struggling to reconcile its identified dual goals, and to provide appropriate weight to the racialized element of even the partisan goal standing alone, ended up effectively deferring to the Legislature, concluding that "this plan was a political product from start to finish." *Id.* at 96. The District Court concluded that, in its view, holding otherwise would "inject the federal courts into a political game for which they are ill-suited." *Id*. at 96. Still, the District Court expressed at

length its discomfort with this solution, explicitly noting the lack of adequate guidance on reconciling dual racial and non-racial motivations. J.S. App. at 96-97. Nevertheless, on remand the District Court declined to consider whether the standards discussed in *Vieth* required a different conclusion.

With respect to GI Forum Appellants' challenge to the configuration of districts in South and West Texas, although conceding that it was bound by this Court's rulings in *Shaw v. Hunt*, 517 U.S. 899 (1996) (*Shaw II*) and *Johnson v. DeGrandy*, 512 U.S. 997 (1994), J.S. App. at 44-46, the District Court after trial concluded that the State could permissibly offset the vote dilution caused by the loss of District 23 by creating District 25 located to the east of District 28. Limiting the holding of *Shaw II* to the creation of non-compact districts, the District Court held that the State's creation of District 25 in South Texas, which was intended to cure the retrogression caused by eliminating District 23, also offsets any vote dilution, otherwise actionable under section 2.

B. Judge Ward Issued a Strong Dissent on GI Forum Appellants' Claims

Judge Ward, who was a member of the *Balderas* panel in 2001 that drew the previous map, wrote separately in dissent from the majority's January 2004 opinion. Explaining that District 23 was created by the *Balderas* three-judge panel in 2001 as a "protected Latino opportunity district," Judge Ward concluded that, in reconfiguring District 23, the State had made

> . . . the conscious choice to dismantle a minority opportunity district to thwart the growing Latino dissatisfaction with an incumbent Congressman. Just when it became apparent that District 23 was becoming more effective for the class it was intended to protect, the State intentionally altered it.

J.S. App. at 207 (Ward, J., dissenting in part).

Judge Ward also rejected the State's attempt to offset the loss of District 23 as an effective Latino district through the crafting of a new District 25:

> Although I recognize that 'States retain broad discretion in drawing districts to comply with the mandate of § 2,' I do not read the Court's cases to mean that the 'effects' test of § 2, if satisfied, may be defended against by pointing to a political agenda in the affected portion of the jurisdiction and compensation, over the long haul, to other members of the injured group residing elsewhere in the jurisdiction.

J.S. App. at 194 (Ward, J., dissenting in part) (internal citations omitted).

Positing that increasing Latino population in another Texas congressional district could threaten an incumbent, Judge Ward concluded, "To use *DeGrandy* to permit the State at that stage to dismantle [such a district] and create a new district somewhere else has a tendency to perpetuate the legacy of discrimination, not to thwart it." *Id.* at 208.

Finally, Judge Ward wrote that the GI Forum Appellants had proved their vote dilution claims under section 2. *Id.* at 197-208. Noting that the State had included 14 new counties into its configuration of South Texas congressional districts, and reviewing the GI Forum Appellants' suggested rearrangement of district boundaries in this same territory, Judge Ward wrote that the "evidence is undisputed that, under Plan 1385C, sponsored by the GI Forum Plaintiffs, Latino voters constitute the majority of citizen voting age population in seven congressional districts in South and Central Texas." *Id.* at 208. Having met the standard set out in the first *Gingles* precondition, Judge Ward further found that the GI Forum Appellants' districts were effective, concluding that, "[v]iewed in light of these election returns, as opposed to simply looking at the CVAP content or any other single statistic, all of these districts perform, in terms of winning elections, at least as well as their counterparts in Plan 1374C." *Id.* at 199. *See Thornburg v. Gingles*, 478 U.S. 30 (1986).

Judge Ward further concluded that the proposed seven Latino opportunity districts were compact and met the *DeGrandy* proportionality test and that the 2001 decision in *Balderas* did not compel the outcome of the GI Forum Appellants' vote dilution claim because *Balderas* dealt neither with Plan 1374C nor the newly available census data on citizen voting age population. *Id.* at 202-10.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Following remand of this case for reconsideration in light of *Vieth v. Jubelirer*, the GI Forum Appellants offered, and the District Court rejected, the suggestion that at least one workable standard for unconstitutional partisan gerrymandering is the purposeful manipulation of minority voter population in order to limit the number of districts in which minority voters could elect their preferred candidates. The District Court rejected the argument that it is unconstitutional to remove minority voters from an opportunity district in order to ensure the re-election of a candidate who had come to be strongly disfavored by minority voters.

In spite of evidence to the contrary, the District Court forced itself to assume that Latino voters are Democrats and Democrats are Latino voters in order to conclude that partisanship justified the removal of Latino voters from District 23 for the purpose of ensuring the re-election of Henry Bonilla. Similarly, the District Court improperly accepted partisanship as sufficient justification for minimizing Latino voting strength across the southern portion of the state.

The District Court ruling has serious implications for states across the country where voting is still racially polarized and where many of today's minority voters experienced first hand the exclusion of the poll tax, literacy tests and other measures intended to frustrate their vote. To give states free license to eliminate minority voting opportunities with only vague and generalized references to incumbency protection or partisanship

creates an unworkable legal standard for mapmakers who are currently attempting to juggle the prohibitions of the Voting Rights Act and the Fourteenth Amendment with the flexibility granted to them under *Georgia v. Ashcroft,* 539 U.S. 956 (2003) to shape minority political opportunities and elected officials' desires to maximize partisan political advantage.

The Court should grant plenary review in this case in order to clarify the proper application of the prohibition against partisan gerrymandering and its interaction with section 2, the rapid doctrinal development in race conscious redistricting, as well as the Court's recent decision in *Georgia v. Ashcroft*. Without clarification before the next round of redistricting in 2010, map drawers will remain at a loss as to how to understand the limits of partisan gerrymandering, both with respect to intentional vote dilution, as well as the effects standard of *Thornburg v. Gingles,* 478 U.S. at 30.

I. TEXAS MAY NOT DISMANTLE A LATINO OPPORTUNITY DISTRICT FOR THE SOLE PURPOSE OF ELECTING THE CANDIDATE DISFAVORED BY LATINO VOTERS

The District Court recognized that District 23 was dismantled precisely to ensure that Latinos, who had increasingly withdrawn their support from Mr. Bonilla, would lose their ability to influence the outcome of the election. Latino pressure on Mr. Bonilla to adopt different stances in Congress, itself a form of influence over the political process, was met by the Texas Legislature with a revision of District 23's boundaries that denied Latinos any chance at all of electing their candidate of choice.

When the record in the case showed, and the District Court acknowledged, that Latino voters had been fluid in their support of the Republican incumbent in the preceding decade, the District Court erred when it considered Latino voters and Democratic voters as interchangeable in its analysis of the alterations to District 23. State

legislatures have never been permitted to treat race and partisan affiliation as interchangeable in redistricting. Nevertheless, the District Court approved, and even described, the dismantling of District 23 as the removal of Latino voters in order to ensure the re-election of a candidate from a particular political party.

It has long been established that using political boundaries to "fence out" racial minorities from political opportunities violates the Constitution. *See Gomillion v. Lightfoot*, 364 U.S. 339 (1960). Redistricting that treats people of one race differently is prohibited because "classifications of citizens solely on the basis of race . . . threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Shaw v. Reno*, 509 U.S. at 643.

Similarly, drawing district lines on the assumption that people of the same race vote together "reinforces the perception that members of the same racial group – regardless of their age, education, economic status, or the community in which they live – think alike, share the same political interests, and will prefer the same candidates at the polls." *Id.* at 648.

> It is true that redistricting in most cases will implicate a political calculus in which various interests compete for recognition, but it does not follow from this that individuals of the same race share a single political interest. The view that they do is "based on the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens," the precise use of race as a proxy the Constitution prohibits.

Miller, 515 U.S. at 914 (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting)).

Justice Kennedy wrote in *Vieth* that race in redistricting cannot be tolerated in the same way that courts tolerate partisanship:

> That courts can grant relief in districting cases where race is involved does not answer our need

> for fairness principles here. Those controversies implicate a different inquiry. They involve sorting permissible classifications in the redistricting context from impermissible ones. Race is an impermissible classification. See *Shaw v. Reno*, 509 U.S. 630 (1993). Politics is quite a different matter.

Vieth, 541 U.S. at 307 (2004) (citation omitted).

See also Shaw v. Reno, 509 U.S. at 650 (1993) ("[N]othing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting – as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race . . . would seem to compel the opposite conclusion.").

The *Vieth* decision tells us that the question of "how much is too much" is one applied to partisanship, not race. Race is never a permissible redistricting criteria, even when there are permissible co-existing motives. *Vieth*, 541 U.S. at 344.

Nevertheless, declaring in its 2004 opinion that, "a high percentage of Blacks and Latinos are Democrats," the District Court proceeded to analyze the changes to District 23 without reference to the partisan composition of the district or the likelihood that Latino voters would support candidates of one party or another. J.S. App. at 90-91.

Throughout its discussion of the dismantling of District 23, the District Court systematically confounded the notions of race and partisan affiliation:

> The record presents undisputed evidence that the Legislature desired to increase the number of Republican votes cast in Congressional District 23 to shore up Bonilla's base and assist in his re-election. The evidence showed that Bonilla had lost a larger amount of Hispanic support in each successive election. In 2002, Bonilla attracted only 8 percent of the Latino vote.

J.S. App. at 128. In spite of its finding that Latino voters supported Mr. Bonilla at higher levels in the past, thus demonstrating their willingness to vote for the Republican candidate, the District Court accepted the State's proffered solution of removing Latino voters from District 23 in order to "shore up" the base of Mr. Bonilla.

In order to "shore up" District 23 for the incumbent, the District Court found that the State removed 99,766 people, who were more than 90 percent Hispanic, from the district and added 101,260 largely Anglo residents of the Texas Hill Country. *Id.*

Noting that it was the drop in support among Latino voters that had caused the re-election crisis for Mr. Bonilla, the court proceeded seamlessly to the idea that removing Latino voters from the district was permissible partisan redistricting. Judge Higginbotham, commenting from the bench during trial, summarized his view that the State had responded to the decline in Latino voter support for Mr. Bonilla by removing them from the district and replacing them with voters who would more reliably support Mr. Bonilla. "The blunt purpose was to assist Congressman Bonilla because he was down to about 8 percent [Latino voter support]. Put in some Alamo Heights, that area of the Republican vote. But then having done that, and to avoid the obvious problems of diluting that District, you draw another District. What's the problem with that?"[9]

The District Court never discussed the substantial rates of ticket-splitting by Latino voters in Webb County, or tested the State's assertion that it had to locate the district's boundary in the middle of the City of Laredo and Webb County. Instead, after examining racial voting trends, the District Court concluded that the threat to Mr. Bonilla's re-election was decreasing support among Latino voters. Despite its conclusion that "the Texas Legislature sought to apply to South and West Texas its primary

[9] Tr., Dec. 15, 2003, 8:30 a.m., at 63 (Hon. Patrick Higginbotham).

partisan goal of increasing the likelihood that Republican candidates would be elected to Congress," the District Court never found that Webb County or District 23 was trending more Democratic; on the contrary, District 23 performed better for Republican statewide candidates in 2002 than its predecessor district.[10] No party at trial testified to a surge of Democratic voting in District 23 prior to the Texas Legislature's decision to radically redraw its boundaries. The District Court also did not address testimony by State witnesses that other Republican candidates garnered more than twice the Latino support as Mr. Bonilla in the 2002 election.[11]

The District Court consistently discussed District 23 in terms of its Latino composition and analyzed the changes made by the Texas Legislature in terms of its effect on Latino voters. The District Court focused on the facts that the Legislature's changes to District 23 reduced the Hispanic citizen voting age population of the district from 57.5 percent to 46 percent and reduced the Spanish-surnamed registered voters from 55.3 percent to 44 percent. J.S. App. at 128-29. The District Court concluded: "The map drawers divided Webb County, which is 94 percent Latino." *Id.* at 144.

The "problem" being addressed by Texas redistricters in 2003 was not the behavior of people who voted Democrat (who by definition did not support Mr. Bonilla) but the behavior of people who voted Republican – those ticket-splitting Latinos who formerly voted for Mr. Bonilla but who had become disenchanted and started voting for his opponents.

The District Court improperly rejected the argument that Mr. Bonilla's incumbency could have been preserved

[10] GI Forum Pls. Ex. 3, 4 (Texas Legislative Council RED-M200 reports for Plans 1151 and 1000).

[11] Tr., Dec. 18, 2003, 1:00 p.m., at 54-55 (Bob Davis).

by placing him into a district other than District 23, thus allowing District 23 to continue to function as a Latino opportunity district and obviating the need to create the new District 25 to the east. Such a measure would have resulted in the same number of Republican and Democratic districts in the plan. For example, Texas mapmakers created District 11 as a heavily Republican seat with no incumbent directly to the north of District 23. The District Court relied instead on testimony by witnesses for the State who claimed that their goal was to keep Mr. Bonilla in a district that was heavily Latino, even if it failed to elect the Latino candidate of choice.[12] Texas mapmakers from the House and Senate both articulated the desire to recruit more Latinos into the Republican party by placing them into a district that would elect Mr. Bonilla.[13]

Based on its findings that Latino voters in District 23 had supported Mr. Bonilla at greater levels in the past but in 2002 had withdrawn their support and were more likely to vote for Republican candidates who were not Mr. Bonilla, the District Court should have required a non-racial explanation when Texas mapmakers excised more than 75,000 Latinos from the district.

Texas mapmakers understood well that District 23 was a minority opportunity district in 2003 and the District Court accepted their explanation that the district had to be dismantled to ensure the re-election of the candidate not preferred by Latino voters, *i.e.*, to prevent Latinos from electing their preferred candidate. Thus, the decision to dismantle District 23 was driven by race – not just an awareness of race, but the intent to thwart the will of a cohesive bloc of minority voters. Furthermore, by denying District 23's Latino voters the opportunity to encourage their representative in Congress to shift his positions on public policy, Texas mapmakers stole from

[12] Tr., Dec. 18, 2003, 8:30 a.m., at 113-14 (Bob Davis); Tr., Dec. 18, 2003, 1:00 p.m., at 164 (Rep. Phil King).

[13] Tr., Dec. 18, 2003, 8:30 a.m., at 113-14 (Bob Davis); Tr., Dec. 18, 2003, 1:00 p.m., at 165-66 (Rep. Phil King).

them the ability to affect the political process through their vote. "This is altogether antithetical to our system of representational democracy." *Shaw v. Reno,* 509 U.S. at 648. Ultimately, the configuration of District 23 violates the statutory and constitutional "obligation not to create . . . districts for predominantly racial, as opposed to political or traditional, districting motivations." *Easley v. Cromartie*, 532 U.S. 234, 249 (2001).

Having concluded, as the District Court did in this case, that the State purposefully created District 23 so that "Bonilla would be reelected in a district that had a majority of Latino voting age population – although clearly not a majority of citizen voting age population and certainly not an effective voting majority," the District Court should have also concluded that the State alteration of District 23 violated section 2 and the Constitution. J.S. App. at 145-46.

Incumbency protection is not a permissible motive when diluting minority votes is chosen as the means to protect the incumbent. *Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991) (although line drawers acted primarily to protect incumbents, their knowledge that they were preventing the emergence of a Latino-majority district together with other aspects of the process leading to the decision were sufficient to require a finding of racial intent). Judge Kozinski aptly illustrated how intentional discrimination can intersect with legitimate motives:

> Assume you are an anglo homeowner who lives in an all-white neighborhood. Suppose, also, that you harbor no ill feelings toward minorities. Suppose further, however, that some of your neighbors persuade you that having an integrated neighborhood would lower property values and that you stand to lose a lot of money on your home. On the basis of that belief, you join a pact not to sell your house to minorities. Your personal feelings toward minorities don't matter; what matters is that you intentionally took

> actions calculated to keep them out of your neighborhood.

Garza, 918 F.2d at 778 n.1 (Kozinski, J., concurring in relevant part).

Judge Kozinski explained that where "the record shows that ethnic or racial communities were split to assure a safe seat for an incumbent, there is a strong inference – indeed a presumption – that this was the result of intentional discrimination, even absent . . . smoking gun evidence." *Id.* at 779.

Lower courts have consistently followed the prohibition on mixed motive race discrimination in redistricting even when the state articulates a non-racial motivation for its actions. *Rybicki v. State Board of Elections*, 574 F. Supp. 1082, 1109 (N.D. Ill. 1982) (three-judge panel) ("under the peculiar circumstances of this case, the requirements of incumbency are so closely intertwined with the need for racial dilution that an intent to maintain a safe, primarily white, district for Senator Joyce is virtually coterminous with a purpose to practice racial discrimination"). *See also Ketchum v. Byrne*, Nos. 83-2044; 83-2065; 83-2126, 1984 U.S. App. LEXIS 19572, at *28 (7th Cir. 1984) ("We think there is little point for present purposes in distinguishing discrimination based on an ultimate objective of keeping certain incumbent whites in office from discrimination borne of pure racial animus.").

Similarly, in *Bush v. Vera*, 517 U.S. 952 (1996), this Court held that racial motivations are not overcome with a blanket justification of partisanship, particularly when there is no specific proof that partisanship, as opposed to race, was the predominant motive. "[T]o the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation." *Id.* at 968. This Court in *Vera* specifically forbade, in the context of redistricting, "political gerrymandering [that is] accomplished in large part by the use of race as a proxy." *Id*. at 969. *See also Diaz v. Silver*, 978 F. Supp. 96, 123 (E.D.N.Y. 1997), *aff'd without opinion*, 522 U.S. 801 (1997) ("while incumbency explains, in major part, the final boundaries

of various districts, without the factor of race, the 12th District, as a majority Latino district, would never have been created").

GI Forum Appellants suggest that this case requires a ruling, consistent with *Vieth*, that race played an impermissible role in the Texas redistricting plan. The dismantling of a minority opportunity district, with the goal that it no longer provide the opportunity to elect the minority-preferred candidate is not only "rare," as the term is used by Justice Scalia in *Vieth*, but may very well be unique in redistricting history to date. *See Vieth*, 541 U.S. at 286. The startling facts surrounding the use of race in dismantling District 23 more than meet the standard for unconstitutional gerrymandering sought by Justice Kennedy in *Vieth* and further satisfy the need for an objective, neutral approach to evaluate the existence of a constitutional violation.

II. THE DISTRICT COURT ERRED WHEN IT RULED THAT SECTION 2 DID NOT REQUIRE THE CREATION OF A SEVENTH LATINO OPPORTUNITY DISTRICT IN THE SOUTHERN PORTION OF THE STATE

When this Court vacated and remanded the District Court's 2003 decision, it did not reach the question of vote dilution raised by the GI Forum Appellants. Appellants therefore ask the Court to address this serious claim raised by GI Forum Appellants.

In Texas, the Legislature chose to expand the territory in which it drew Latino-majority districts by adding 14 whole or partial counties. The population of this newly-expanded territory required the creation of seven congressional districts and overall contained a Latino citizen voting age majority of 58%. After sweeping in greater numbers of Latino voters, however, State mapmakers artfully crafted only six districts in which Latinos enjoyed the opportunity to elect their candidate of choice. This dilutive construction of districts may have been motivated by the State's intent to benefit one political party but it

also limited the voting strength of Latinos by packing and fracturing them across South Texas.

The State's redistricting plan shifts and squeezes Latino population into only six opportunity districts among the seven districts located in the southern portion of the state. A simple rearrangement of the boundaries of these seven districts yields the more rational and compact seven Latino opportunity districts proposed by the GI Forum Appellants. As noted by Judge Ward of this panel, the "evidence is undisputed that, under Plan 1385C, sponsored by the GI Forum Plaintiffs, Latino voters constitute the majority of citizen voting age population in seven congressional districts in South and Central Texas." J.S. App. at 198 (Ward, J., dissenting in part). Election analysis performed by Dr. Richard Engstrom, and relied upon by the District Court in its order of January 2004, demonstrates that all seven opportunity districts proposed by the GI Forum Appellants offer the opportunity to elect the Latino-preferred candidate.

A. *Shaw II* And *Johnson v. DeGrandy* Do Not Permit Vote Dilution In One Area Of The State To Be "Offset" By The Creation Of Another Majority-Minority District In A Different Part Of The State

This Court's rulings in *Shaw II* and *DeGrandy* make clear that states may not trade-off the voting rights of people in one region for those in another region:

> If a § 2 violation is proved for a particular area, it flows from the fact that individuals in this area 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.' 42 U.S.C. § 1973(b). The vote-dilution injuries suffered by these persons are not remedied by creating a safe majority-black district somewhere else in the State. . . . To accept that the district may be placed anywhere implies that the claim, and hence the coordinate right to an undiluted vote

> (to cast a ballot equal among voters), belongs to the minority as a group and not to its individual members. It does not.

Shaw II, 517 U.S. at 917. *See also DeGrandy,* 512 U.S. at 1019 (it is "highly suspect" to hide behind proportionality if "in any given voting jurisdiction, the rights of some minority voters under Section 2 [are] traded off against the rights of other members of the same minority class . . . ") (parenthetical omitted); *Rural W. Tennessee African-American Affairs Council v. Sundquist*, 209 F.3d 835, 844 (6th Cir. 2000) (relying on *DeGrandy* and *Shaw II* to refrain from analyzing minority opportunity to elect in other parts of the state "because to do so would require us to trade the § 2 rights of individual African-Americans in rural west Tennessee against those of African American groups elsewhere in the State"); *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va. 1997) (three-judge panel) (rejecting claim that racially-motivated district was compelled by section 2 where district was not located in geographic area of vote dilution).

In the case at hand, the State asserted, and the District Court erroneously accepted, that the State could remedy, under section 2 as well as section 5, the loss of District 23 as a majority-minority district by creating District 25.

B. The District Court Erroneously Required GI Forum's Demonstrative *Gingles* Districts To Be More Compact And Provide Greater Electoral Opportunity Than Their Counterparts In The State's Plan

1. Compactness

Fifth Circuit precedent required the District Court to apply the compactness test of the first *Gingles* precondition only to evaluate whether an additional Latino-majority district was achievable. *See Houston v. Lafayette County*, 56 F.3d 606, 611 (5th Cir. 1995) (en banc) ("[T]he question is not whether the plaintiff residents' proposed

district was oddly shaped, but whether the proposal demonstrated that a geographically compact district could be drawn."); *Clark v. Calhoun County, Miss*., 21 F.3d 92, 95 (5th Cir. 1994) ("[P]laintiffs' proposed district is not cast in stone. It was simply presented to demonstrate that a majority-black district is feasible").

Relying upon well-accepted quantitative measures of compactness generated by the Texas Legislative Council, the District Court found that all of the seven districts proposed by GI Forum Appellants were more compact than the State's District 15 in South Texas, which stretches from Hidalgo County on the U.S.-Mexico border to Bastrop County.[14] In addition, the District Court found that four of the seven districts proposed by GI Forum Appellants were as compact or more compact than their counterparts in the State's plan. However, the District Court then concluded, without reference to any objective measures of compactness, that the GI Forum Appellants' demonstration plan would not satisfy the first *Gingles* precondition because "Plan 1385C proposes districts that are more unusually shaped" than the challenged Plan 1374C. J.S. App. at 74.[15] None of the Court's factual findings addressed whether the Latino community of South and West Texas, which fits neatly into the 58 county area identified by the District Court, is sufficiently numerous and compact to comprise

[14] Plaintiffs here refer to the mathematical measures of compactness known as "perimeter to area" and "smallest circle." *See* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 Mich. L. Rev. 483, 554-55, n.203 (1993).

[15] For example, the District Court criticized GI Forum Appellants' demonstrative Congressional Districts 15 and 25 as "unusually shaped" despite the fact that they are *more* compact than the State's challenged Districts 15 and 25. J.S. App. at 134-35 n.125. The District Court also compared GI Forum Appellants' demonstrative Congressional District 28, which spans the relatively short distance between San Antonio and Austin, unfavorably with the State's Congressional District 28, which stretches more than three times the distance to connect Zapata County with Hays County. *Id.*

the majority of seven districts. *See Vera*, 517 U.S. at 997 (1996) (Kennedy, J., concurring) ("The first *Gingles* condition refers to the compactness of the minority population, not to the compactness of the contested district.").

Instead, the District Court erroneously required GI Forum Appellants' demonstrative districts not just to meet but exceed in every instance the compactness of the State's districts in the region and then further satisfy an ill-defined "eyeball" test applied subjectively by the District Court. As this Court stated in *Vera*, "a Section 2 district that is reasonably compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries, may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless beauty contests." *Id.* at 977.

2. Effectiveness

The District Court found that GI Forum Appellants' demonstration of seven congressional districts satisfied the Fifth Circuit's own bright-line numerosity test for the first *Gingles* precondition.[16] J.S. App. at 133 ("The GI Forum Plaintiffs present a demonstration district [sic], Plan 1385C, that shows an additional Latino citizen voting age majority district in South and West Texas"); and *id.* at 140 n.133 (citing *Valdespino v. Alamo Heights Indep. Sch. Dist*, 168 F.3d 848, 852-53 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000) (applying "a bright line test" of greater

[16] The District Court opinion suggests that the decision in *Balderas v. Texas* regarding whether plaintiffs could demonstrate seven Latino-majority congressional districts in South Texas dictates an identical finding in the case at hand. J.S. App. at 133-34. This suggestion is clearly erroneous. The task before the *Session* District Court was to evaluate whether the State's unprecedented use of 58 counties in its redistricting of South Texas diluted minority voting strength in that region. GI Forum Appellants' demonstration in *Session* of how this expanded region can yield seven minority opportunity districts was completely different from the districts proposed by plaintiffs in *Balderas* to remedy malapportionment.

than 50% citizen voting age population to determine whether plaintiffs constitute a majority in their demonstration district)). The District Court further found that GI Forum Appellants had satisfied the second and third *Gingles* preconditions and demonstrated the existence of critical Senate Factors. "This court recognizes that Plaintiffs have established racially polarized voting and a political, social and economic legacy of past discrimination." J.S. App. at 136.

Nevertheless, the District Court held that GI Forum Appellants could not prove, under the totality of circumstances, that Latinos will suffer vote dilution in the absence of seven Latino-majority districts in South Texas. The District Court based its "totality of circumstances" conclusion on a finding that not all seven of the districts proposed by GI Forum Appellants in its demonstrative plan offered Latinos the opportunity to elect their candidate of choice.

Once again, use by the District Court of different standards for evaluating the State's challenged districts and GI Forum Appellants' proposed districts demonstrates the District Court's incorrect application of *Thornburg v. Gingles* to this redistricting challenge.

In deciding whether or not the State's configuration of Latino-majority districts in Plan 1374C would offer Latinos the opportunity to elect their candidate of choice, the District Court properly examined the election performance of the challenged districts and rejected testimony by those critics of Plan 1374C who argued that a district's effectiveness turns on super-majority demographics.[17] Nevertheless, the District Court summarily

[17] For example, in evaluating the effectiveness of the State's Latino-majority districts, the District Court rejected the non-statistical testimony of expert witness Dr. Polinard who stated that there is no "magic number" that tells you when a district's Spanish-surnamed voter registration becomes effective, but "you become more comfortable with opportunity districts once you break into those 60%-plus ranges." J.S. App. at 141 n.136. Instead, the District Court used functional

(Continued on following page)

concluded that GI Forum Appellants' District 28 was not effective "because . . . a low majority of the Hispanic citizen voting age population does not produce an *effective* Latino opportunity district." J.S. App. at 140-41 (emphasis in original). However, the District Court's own test of functional effectiveness (based on election analyses by experts for both the State and GI Forum Appellants) showed that the seven GI Forum Appellants' proposed districts were similarly or more effective to elect the Latino-preferred candidate than those enacted by the State.[18]

Once again, use by the District Court of different standards for evaluating the State's challenged districts and GI Forum Appellants' proposed districts demonstrates the District Court's incorrect application of *Thornburg v. Gingles* to this redistricting challenge.

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election performance to conclude that districts in the State's plan were effective with far less than the 60% Spanish-surnamed voter registration suggested by Dr. Polinard. *Id*. at 151, 152 n.151. The District Court nevertheless quoted this very same discredited testimony to suggest that the GI Forum Appellants' proposed District 28 would not offer an opportunity to elect the Latino-preferred candidate, despite the fact that it elected the Latino-preferred candidate at the same rate as State's District 28 (eight out of eight racially contested elections). *Compare* J.S. App. at 140-41 *with* J.S. App. at 92 n.151.

[18] The District Court relied upon and reprinted in its opinion the GI Forum Appellants' statistical table showing six effective Latino districts in Plan 1374C but excised the portion of that same table showing seven effective Latino districts in the GI Forum Appellants Plan 1385C. J.S. App. at 152 n.151. Similarly, the District Court relied upon the testimony of GI Forum Appellants' expert witness, the nationally recognized political scientist Dr. Richard Engstrom, to conclude that the State's Plan 1374C contained six effective Latino districts while ignoring those portions of his analysis showing that the GI Forum Appellants' plan contained seven effective Latino districts. *See, e.g.,* J.S. App. at 151 n.150, 154, 158 n.171, 159 n.175.

C. The District Court Misapplied *DeGrandy* In Concluding That The First *Gingles* Precondition Operates As A Cap On The Proportionality That Can Be Achieved By Minority Voters In A Redistricting Plan

The District Court applied the traditional proportionality test articulated in *Johnson v. DeGrandy,* 512 U.S. at 997, to the State's redistricting plan and concluded that "Plaintiffs are correct in their calculation that six districts in which Latinos hold a majority of citizen voting age population, out of thirty-two districts that comprise Texas, do not equate to arithmetic proportionality between the number of Latino majority-minority districts and the Latinos' percentage of the citizen voting age population in the State." J.S. App. at 139-40. Nevertheless, after applying the correct proportionality standard under *DeGrandy* and finding that Latinos do not enjoy proportional political strength, the District Court applied a new and different standard to conclude that Latinos in Texas enjoy proportional political strength.

The District Court held that, in the proportionality analysis, the overall number of districts in the redistricting plan should be limited to the number of minority opportunity districts that can be created in the redistricting plan, improperly tying the question of proportionality back into the first *Gingles* precondition: "*DeGrandy* requires an examination of whether the totality of circumstances includes rough proportionality between the number of *effective* majority minority districts that can be drawn meeting the Gingles factors and the minority-members' share of the relevant population." J.S. App. at 140 (emphasis in original). *But see DeGrandy*, 512 U.S. at 1013 n.11 ("'Proportionality' as the term is used here links the number of majority minority voting districts [in the geographic area at issue] to minority-members' share of the relevant population.").

The District Court concluded that because, under the first *Gingles* precondition, no more than six Latino citizen voting age majority districts could be created in Texas, the number six functions as the upper limit of permissible

political opportunity. Thus, the District Court concluded that Latinos enjoyed proportionality when they comprised the majority of six districts, regardless of the number of districts in the statewide redistricting plan, or the Latino population proportion of the state.

This Court has never imposed the cap on political opportunity espoused by the District Court and has never suggested that the first *Gingles* precondition plays a role in evaluating whether minority voters possess, under the totality of circumstances, an equal opportunity to participate in the political process. *See also DeGrandy*, 512 U.S. at 1011 ("[T]he ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts"). The first *Gingles* precondition addresses whether minority voters are geographically concentrated in such a way that the proposed remedy will address their vote dilution; proportionality addresses a very different issue – whether minorities enjoy political opportunity regardless of geographic dispersion. To make the latter dependent on the former is circular logic, collapses the broader inquiry of totality into the specific test of the first *Gingles* precondition and defeats the purpose of looking beyond the *Gingles* preconditions to make an overall assessment of opportunity to participate in the political system.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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