**No. ___**

IN THE

# Supreme Court of the United States

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EDDIE JACKSON, *et al.*,
*Appellants,*

v.

RICK PERRY, *et al.*,
*Appellees.*

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

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## JURISDICTIONAL STATEMENT

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## QUESTIONS PRESENTED

1. Whether the 2003 Texas congressional redistricting plan is an unconstitutional partisan gerrymander.

2. Whether the Constitution prohibits States from redrawing lawful congressional redistricting plans in the middle of a decade for the sole purpose of partisan maximization.

3. Whether the Voting Rights Act and the Equal Protection Clause permit a State to deliberately destroy a district in which African-American voters, though lacking a literal mathematical majority of the population, have previously been able to nominate and elect their preferred candidates.

4. Whether a district that was intentionally drawn as a majority-Hispanic district by connecting two far-flung pockets of dense Hispanic population with a rural "land bridge" that is 300 miles long and in places less than 10 miles wide is an unconstitutional racial gerrymander.

## PARTIES TO THE PROCEEDING

Plaintiff-Appellants filing this Jurisdictional Statement are the "Jackson Plaintiffs" (Eddie Jackson, Barbara Marshall, Gertrude "Traci" Fisher, Hargie Faye Jacob-Savoy, Ealy Boyd, J.B. Mayfield, Roy Stanley, Phyllis Cottle, Molly Woods, Brian Manley, Tommy Adkisson, Samuel T. Biscoe, David James Butts, Ronald Knowlton Davis, Dorothy Dean, Wilhelmina R. Delco, Samuel Garcia, Lester Gibson, Eunice June Mitchell Givens, Margaret J. Gomez, Mack Ray Hernandez, Art Murillo, Richard Raymond, Ernesto Silva, Louis Simms, Clint Smith, Connie Sonnen, Alfred Thomas Stanley, Maria Lucina Ramirez Torres, Elisa Vasquez, Fernando Villareal, Willia Wooten, Ana Yañez-Correa, and Mike Zuniga, Jr.); the "Democratic Congressional Intervenors" (Chris Bell, Gene Green, Nick Lampson, Lester Bellow, Homer Guillory, John Bland, and Reverend Willie Davis); the League of United Latin American Citizens (LULAC); the "Valdez-Cox Plaintiff-Intervenors" (Juanita Valdez-Cox, Leo Montalvo, and William R. Leo); the Texas Coalition of Black Democrats (TCBD); and the Texas Conference of National Association for the Advancement of Colored People Branches (Texas-NAACP).

Other plaintiffs in the court below are Gustavo Luis "Gus" Garcia; the "Cherokee County Plaintiffs" (Walter Session, Morris Byers, and Frenchie Henderson); the "GI Forum Plaintiffs" (the American GI Forum of Texas, LULAC District 7, Simon Balderas, Gilberto Torres, and Eli Romero); Webb County and Cameron County; Congresswoman Sheila Jackson Lee and Congresswoman Eddie Bernice Johnson; and Travis County and the City of Austin.

Defendant-Appellees are Rick Perry, Governor of Texas; David Dewhurst, Lieutenant Governor of Texas; Tom

Craddick, Speaker of the Texas House of Representatives; Geoffrey S. Connor, Secretary of State of Texas; Charles Soechting, Chairman of the Texas Democratic Party; Tina Benkiser, Chairman of the Republican Party of Texas; and the State of Texas. All individual Defendant-Appellees were sued in their official capacities.

## CORPORATE DISCLOSURE STATEMENT

The League of United Latin American Citizens (LULAC), the Texas Coalition of Black Democrats (TCBD), and the Texas Conference of National Association for the Advancement of Colored People Branches (Texas-NAACP) are all nongovernmental corporations. LULAC and Texas-NAACP are non-partisan. None of these corporations has a parent corporation, and no publicly held company owns 10% or more of the stock of any of these corporations.

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## OPINIONS BELOW

The three-judge District Court's majority and dissenting opinions are reported at 298 F. Supp. 2d 451 and reprinted at pages 1a to 144a of the Appendix to this Jurisdictional Statement ("J.S. App."). The District Court's final judgment is reprinted at J.S. App. 145a.

## JURISDICTION

The District Court denied Appellants' claims for injunctive relief on January 6, 2004. J.S. App. 114a. Pursuant to 28 U.S.C. § 2101(b), Appellants filed timely notices of appeal in January and early February 2004. J.S. App. 166a-177a. By order of February 25, 2004 (No. 03A739), the time for all appellants to file jurisdictional statements was extended to April 5, 2004. This Court's jurisdiction is invoked under 28 U.S.C. § 1253.

## CONSTITUTIONAL PROVISIONS INVOLVED

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

Article I, Section 2, Clause 1 of the Constitution provides in 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, as amended by Section 2 of the Fourteenth Amendment, provides in part: "Representatives shall be apportioned among the several States according to their respective numbers . . . . 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."

The Elections Clause of Article I, Section 4 of the Constitution provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

## STATEMENT OF THE CASE

Appellants seek reversal of a divided ruling of a three-judge district court that upheld the congressional redistricting plan that the State of Texas enacted in October 2003. The majority below made three key errors.

*First*, the District Court erroneously upheld the constitutionality of the State's decision to redraw a perfectly lawful congressional districting plan in the middle of the decade for the sole purpose of partisan maximization. Prior to 2003, mid-decade congressional "re-redistricting" was unprecedented in the modern era.[1] The State of Texas has conceded that partisanship was the sole motivation behind this extraordinary change, and even the State's own expert witness testified that the new plan is an extreme and very effective partisan gerrymander that targets at least seven Democratic Representatives for defeat while protecting all fifteen Republican incumbents.

*Second*, the majority misread this Court's treatment of the Voting Rights Act in such cases as *Georgia v. Ashcroft*, 123 S. Ct. 2498 (2003), *Johnson v. De Grandy*, 512 U.S. 997 (1994), and *Thornburg v. Gingles*, 478 U.S. 30 (1986), in ruling that the only districts that "count" under the Act are those in which one minority group constitutes a literal

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[1] The only other instance in recent decades was the 2003 congressional re-redistricting of Colorado, which the state supreme court struck down on state-constitutional grounds. *See People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1235-36 (Colo. 2003), *petition for cert. filed*, 72 U.S.L.W. 3506 (U.S. Jan. 28, 2004) (No. 03-1082).

mathematical majority of the population. On that basis, the court blessed the deliberate destruction of the Dallas-Fort Worth area's District 24, where it was undisputed that African-American citizens had previously been able to nominate and elect their preferred candidates. In so doing, the court followed a Fifth Circuit interpretation of the Act that conflicts directly with the law applied in other circuits.

*Third* and finally, the court below upheld as constitutional under *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny, an absurdly noncompact district that uses a long, thin corridor of largely empty counties to connect two far-flung pockets of dense Hispanic population that are 300 miles apart. It did so in large part because that new district was created in response to efforts to protect a Republican incumbent in a nearby district – the precise kind of political justification for racial gerrymandering that this Court rejected in *Bush v. Vera*, 517 U.S. 952 (1996).

1. After the 2000 Census, Texas became entitled to 32 seats in Congress, up from 30 during the 1990s. The task of drawing a new map initially fell to the Texas Legislature. But because the Legislature was then under divided control – with a Republican Senate majority and a Democratic House majority – it failed to agree on a new congressional map in its 2001 regular session, and Governor Rick Perry refused to call a special session. The Legislature's default ultimately left the three-judge federal district court in *Balderas v. Texas* "with the 'unwelcome obligation of performing in its stead.'" J.S. App. 145a (citation omitted). On November 14, 2001, the *Balderas* court, based on findings that Texas's 30 existing congressional districts were unconstitutional, and based upon the continuing "failure of the State to produce a congressional redistricting plan," unanimously adopted a new 32-district congressional map known as "Plan 1151C" or the "2001 Plan." *Id.*; *see id.* at 161a; *see also id.* at 162a (color map of 2001 Plan).

The *Balderas* court stated that it had followed politically neutral principles in drawing the new districts and had "checked [its] plan against the test of general partisan outcome, comparing the number of districts leaning in favor of each party based on prior election results against the percentage breakdown statewide of votes cast for each party in congressional races." *Id.* at 152a. Recognizing Texas's "traditional state interest in the power of its congressional delegation" and the relationship between seniority and congressional leadership, the *Balderas* court confirmed that the plan did not pair any incumbent Representative with another incumbent and did not harm the re-election prospects of three Democrats and three Republicans holding "unique, major leadership posts" in Congress. *Id.*

Neither the State of Texas nor any other defendant appealed the court's decision. When one group of Hispanic voters appealed, the State asked this Court to summarily affirm, which the Court did on June 17, 2002. *Balderas v. Texas*, 536 U.S. 919 (2002). The court-drawn 2001 Plan governed the 2002 congressional elections in Texas.

2. Although the 2001 Plan created several potentially very competitive districts, based on recent statewide elections (for President, U.S. Senator, Governor, Lieutenant Governor, and so on) it appeared that 20 districts leaned at least somewhat Republican and 12 districts (11 of which were "majority-minority" districts) leaned at least somewhat Democratic.[2] But the November 2002 elections generated a congressional delegation with 15 Republicans and 17 Democrats.[3] The two new congressional districts that Texas gained from reapportionment elected Republicans, while the

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[2] Jackson Pls. Ex. 44 (Alford expert report) at 25.

[3] When District 4's Congressman Ralph Hall switched parties in January 2004, Texas's House delegation became evenly divided, with 16 Democrats and 16 Republicans.

other 30 districts re-elected 28 incumbents and elected one freshman from each party (each of whom replaced a retiring member of the same party).

Seven of the incumbents – six Democrats and one Republican – prevailed even as their districts were voting for senatorial, gubernatorial, and other statewide candidates of the opposite party. In other words, seven current Members of Congress won because they attracted split-ticket voters. Without that support, each would have lost to a challenger from the district's dominant political party. These seven Congressmen (most of whom represent relatively rural districts) had the closest contests of any incumbents in the State. Three of them won with less than 52% of the total vote. Aside from the seven districts where split-ticket voters played a key role, 14 of the new districts voted consistently Republican and 11 voted consistently Democratic. But because six of the seven incumbents who won the relatively competitive seats were Democrats, Texas's congressional delegation has more Democrats and fewer Republicans than the statewide balance of power alone would have suggested.

3. At the same time that Republicans were picking up two new congressional seats, they also made gains in Texas House races, winning unified control of the state government for the first time in decades. In 2003, the newly elected 78th Legislature convened and the House Redistricting Committee took the unprecedented step of considering congressional redistricting in the middle of a decade. As a critical deadline approached for passing legislation in the regular session, a group of Democratic House Members left the State and broke quorum for a week, effectively killing redistricting for that session.[4]

Governor Perry called the Texas Legislature into special session to take up congressional redistricting. During that

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

session, the Texas House, which had refused to hold public field hearings on redistricting in the regular session, reversed itself and decided to hold hearings across the State.[5] The Texas Senate also scheduled a series of field hearings. At these public hearings, thousands of Texas voters appeared and gave their views on the propriety of mid-decade congressional redistricting. The vast majority opposed it.[6]

During the first special session, Representative Phil King, the legislation's chief sponsor, initially asked the Redistricting Committee to pass a map dismantling District 24 (in the Dallas-Fort Worth area) as a minority district.[7] The next day, he reversed course and supported a plan that left intact all 11 majority-minority districts.[8] He said he did so to improve the chances of winning preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.[9]

The Senate Jurisprudence Committee also took up congressional redistricting in the first special session. But the Senate failed to pass a map in that session when 11 state senators (more than a third of the 31-member chamber) stated that they were opposed to taking up congressional redistricting legislation. It has been a long-standing tradition of the Texas Senate to require that a measure receive support of a two-thirds supermajority before the full Senate will consider it.[10] *See* Jurisdictional Statement, *Barrientos v. Texas,* No. 03-756 (U.S. filed Nov. 21, 2003).

When Lieutenant Governor David Dewhurst then announced that he would abandon the two-thirds rule in any

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5 *Id.* at 73-75, 78-79 (Rep. Richard Raymond).

6 Tr., Dec. 17, 2003, 1:00 p.m., at 115 (Sen. Royce West).

7 Tr., Dec. 18, 2003, 1:00 p.m., at 149 (Rep. Phil King).

8 *Id.* at 149-51 (Rep. Phil King).

9 *Id.* at 148-50 (Rep. Phil King).

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

future special session on congressional redistricting, 11 Texas senators left the State to deprive the Senate of a quorum.[11] But when one of them returned to the State a month later, Governor Perry called a third special session.

In that session, each house passed a map that preserved all 11 minority districts.[12] But the conference committee instead produced a map that dismantled as minority districts both District 24 in the Dallas-Fort Worth area and District 23 in South Texas, while adding a new Hispanic-controlled district running from McAllen (on the Mexican border) 300 miles north to Austin.[13] The House and Senate passed this new map, known as "Plan 1374C" or the "2003 Plan," on October 10 and 12, 2003. *See* J.S. App. 164a (color map of 2003 Plan). Every Hispanic and African-American Senator and all but two of the minority Representatives voted against the 2003 Plan.[14]

4. The new map shifted more than eight million Texans into new districts and split more counties into more pieces than did the court-drawn 2001 Plan.[15] And the 32 districts in the new map were, on average, much less compact, under either of the two standard measures that the Legislature uses.[16]

The 2003 Plan was designed to protect all 15 Republican Members of Congress and to defeat at least 7 of the 17 Democratic Members.[17] Among those targeted for

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

[12] Tr., Dec. 15, 2003, 1:00 p.m., at 83 (Rep. Richard Raymond).

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

[14] Tr., Dec. 15, 2003, 1:00 p.m., at 85 (Rep. Richard Raymond).

[15] Jackson Pls. Ex. 141 (Gaddie expert report) at 5-6; Jackson Pls. Ex. 89.

[16] Jackson Pls. Ex. 141 (Gaddie expert report) at 6-7.

[17] Jackson Pls. Ex. 44 (Alford expert report) at 30.

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

The seventh Democrat targeted for defeat was Congressman Martin Frost, an Anglo Democrat who represents District 24 in the Dallas-Fort Worth area. Under the court-drawn 2001 Plan, District 24 is a majority-minority district whose total population is roughly 23% black, 38% Hispanic, 35% Anglo (*i.e.*, non-Hispanic white), and 4% Asian or "Other." In general elections, the district is reliably Democratic. And in the Democratic primary elections, where the ultimate winners are nominated, blacks typically constitute more than 60% of the electorate, because the district's Anglo and Hispanic voters are much more likely to participate in the Republican primary, to be noncitizens (and therefore nonvoters), or simply to stay home.[18] Thus, African-American voters can consistently nominate and elect their preferred candidates within the 2001 Plan's District 24.[19] But the new 2003 Plan dismantles District 24 – which the State's own expert testified "perform[s] for African-Americans"[20] – and splinters its minority population (more than 400,000 persons) into five pieces, each of which is then submerged in an overwhelmingly Anglo Republican district.

The one Republican incumbent who had won narrowly in November 2002 by attracting ticket splitters – District 23's Congressman Henry Bonilla (the only Mexican-

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[18] Tr., Dec. 11, 2003, 1:00 p.m., at 73-75 (Prof. Allan J. Lichtman); Jackson Pls. Ex. 140 (Gaddie expert deposition) at 32-33.

[19] Jackson Pls. Ex. 1 (Lichtman expert report) at 23-26.

[20] Jackson Pls. Ex. 140 (Gaddie expert deposition) at 33.

American Republican in the House of Representatives) – was made substantially safer, as nearly 100,000 Hispanics from the Laredo area – who are roughly 87% Democratic – were removed and replaced with heavily Anglo and Republican voters.[21] As a result, the district is now concededly controlled by Anglo voters, but 359,000 Hispanics remain stranded there, with no hope of electing their preferred candidate.[22]

In an attempt to "offset" that loss of electoral opportunity for Hispanics, the Legislature drew a new, bizarrely shaped majority-Hispanic district stretching from the Rio Grande Valley, along the border with Mexico, all the way to the Hispanic neighborhoods of Austin in Central Texas. This new District 25 is more than 300 miles long and in places less than 10 miles wide. *See* J.S. App. 164a (District 25 silhouette). The two ends of the district are densely populated and contain more than 89% of its Hispanic population, as the six intervening rural counties serve primarily to "bridge" the two population centers. *See* J.S. App. 165a (color map showing population densities in and around new District 25).

5. Faced with this plan, Appellants – several dozen individual voters and officeholders, Texas-NAACP, the League of United Latin American Citizens (LULAC), and the Texas Coalition of Black Democrats – as well as other plaintiffs representing Democratic and minority interests, filed suits in the U.S. District Court for the Eastern District of Texas, seeking to invalidate the 2003 Plan and to maintain the *Balderas* injunction that had put the 2001 Plan into effect. The court consolidated the cases (including the 2001 *Balderas* lawsuit) and tried them on an expedited basis in December 2003. The Department of Justice precleared the

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[21] Jackson Pls. Ex. 44 (Alford expert report) at 15.

[22] Jackson Pls. Ex. 1 (Lichtman expert report) at 52-53.

2003 Plan under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, after the parties had rested but before closing arguments.

On January 6, 2004, the District Court issued a divided opinion upholding the 2003 Plan and effectively dissolving the 2001 *Balderas* injunction. The dissenting judge stated that the 2003 Plan violates Section 2 of the Voting Rights Act and thus should not replace the 2001 Plan, "a plan that is beyond dispute a legal one." J.S. App. 139a.

## THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The 2003 Texas congressional redistricting is proof that the redistricting process in this country has gone completely haywire. Texas's state government was mired for months in partisan fights over passage of a map that was drawn for only one purpose – to replace a fair and competitive map with a severely biased, noncompetitive one. Although it soon became clear that full achievement of that partisan goal would require depriving minority voters of an equal opportunity to participate in the political process and to elect their preferred candidates, Appellees plowed ahead and sought to transform their avowed partisanship into a justification for diluting minority rights as well as for the egregious *Shaw* violation in South Texas.

The majority below endorsed this strategy at every turn. It denied liability for mid-decade redistricting designed to lock in partisan control. It then pointed to the map-drawers' partisanship as a reason for denying liability for their intentional elimination of minority districts. It went on to limit severely the protections of Section 2 of the Voting Rights Act. And finally, the partisan gerrymander became an answer to a *Shaw* violation, as well.

This combination of rulings, if upheld, will unleash a festival of partisan gerrymandering without limits. Even the rights of racial and ethnic minorities will be at risk if they get

in the way of partisan goals. The resulting maps will resemble Texas's 2003 Plan, which takes racial and political balkanization to new depths.

As we show, a partial answer to these problems would be to put some meaningful limit on partisan gerrymandering – either generally, *see Vieth v. Jubelirer,* No. 02-1580 (U.S. argued Dec. 10, 2003), or perhaps, as the District Court suggested, by barring unnecessary *mid-decade* line changes, s*ee* J.S. App. 2a. But regardless of how the Court addresses that issue, it must correct the erroneous rulings below rejecting claims of racial vote dilution and racial gerrymandering. Those rulings not only leave minority voters unprotected from the kind of deliberate mistreatment shown in this record but will actually encourage line-drawers to continue to segregate our society along racial lines in the service of an extreme partisan agenda.

## I. THE CONSTITUTION BARS MID-DECADE CONGRESSIONAL "RE-REDISTRICTING" MOTIVATED *SOLELY* BY PARTISANSHIP.

Given the undisputed partisan intent and effects of the 2003 Plan, the Court clearly should reverse the judgment below if the appellants in *Vieth v. Jubelirer* prevail. But regardless of the outcome in that case, the 2003 Plan should be struck down under a rule that is crisp and eminently administrable: *The Constitution bars congressional redistricting motivated* ***solely*** *by partisanship*. That rule will almost never apply to normal decennial redistricting, which serves to equalize district populations and thus vindicate the "one person, one vote" principle. But the mid-decade replacement of a perfectly lawful plan has nothing to do with population equality and hence can be motivated solely by partisanship. Here, Appellees admitted that partisan

maximization was "'the *single-minded* purpose of the Texas Legislature.'"[23] That surely violates the Constitution.

As the District Court expressly found, the Republican leadership in 2003 was not content with a court-drawn map in which "20 of the 32 seats offer[ed] a Republican advantage," because 6 of those 20 seats were sufficiently competitive to allow popular Democratic incumbents to squeak through the November 2002 elections with the aid of split-ticket voters. J.S. App. 29a. As soon as they won control of the Texas Legislature, the Republican leaders took the unprecedented step of redrawing a perfectly lawful congressional districting plan in the middle of a decade "'solely for the purpose of seizing between five and seven seats from Democratic incumbents.'" *Id*. at 32a-33a (citation omitted). They thus "set out to increase their representation in the congressional delegation to 22." *Id*. at 29a. That objective, the court below explained, "was 110% of the motivation for the Plan." *Id.* at 33a. Indeed, the court felt "compelled to conclude that this plan was a political product from start to finish." *Id.*

Moreover, the 22 seats were designed not merely to *tilt* Republican, but rather to lock in a safe 22-to-10 advantage that, in the words of one Republican staffer, "should assure that Republicans keep the House [of Representatives] no matter the national mood."[24] As the dissenting judge below put it, the State of Texas sought to "'dictate electoral outcomes'" in these 22 districts. J.S. App. 115a (citation omitted). The State's own expert, Professor Ronald Keith Gaddie, testified that the State would achieve this objective, concluding that the 2003 Plan "creates ten Democratic

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[23] State Defs.' Opp'n to Stay App. at 23-24, *Jackson v. Texas,* No. 03A581 (U.S. filed Jan. 14, 2004) (quoting J.S. App. 29a (emphasis added by Appellees)).

[24] Jackson Pls. Ex. 129 (Joby Fortson e-mail message).

districts and twenty-two Republican districts; disrupts numerous Democratic incumbents from their constituencies; and pairs many Democratic incumbents in Republican districts with Republican incumbents."[25] Another expert's analysis showed that Republicans would likely retain all 22 seats even if Democrats made substantial gains throughout the State and once again became the majority party in the Texas electorate.[26] Thus, the 2003 Plan was designed to assure that one political party could control at least 69% of the seats (22 out of 32) with 49% or less of the votes – a remarkable partisan skew that was never seriously contested in the court below.[27]

That is why the Texas map would clearly run afoul of the constitutional limits claimed by the appellants in *Vieth v. Jubelirer*. But this case is actually much simpler. While partisan-gerrymandering cases can present thorny questions about "how much partisanship is too much," arguably raising issues of judicial manageability, here the bias in the map was conceded and the central issue is whether a State can replace a lawful congressional districting plan in the middle of a decade, for no reason other than partisan maximization.[28]

Redrawing a map in the middle of a decade solely for partisan gain is the ultimate affront to traditional neutral

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[25] Jackson Pls. Ex. 141 (Gaddie expert report) at 24; *see id.* at 3, 19 & 36 (Figure 1); *see also* Tr., Dec. 18, 2003, 1:00 p.m., at 142 (State Rep. Phil King) (confirming that the Republican leadership set out to "get as many seats as we could").

[26] Jackson Pls. Ex. 44 (Alford expert report) at 23-28, 34, 38.

[27] By contrast, both sides' experts testified that the court-drawn 2001 Plan contained only a slight pro-Republican bias. Jackson Pls. Ex. 141 (Gaddie expert report) at 18-19; Jackson Pls. Ex. 44 (Alford expert report) at 27.

[28] If Appellees were dissatisfied with the court-drawn 2001 Plan, they were free to amend or replace it *before* elections were held under that map in 2002. But they chose not to do so.

districting principles. Indeed, in real-world redistricting, no principle is more firmly ensconced than the notion that districts may be redrawn *only* when population shifts, reflected in the federal decennial census, *require* them to be redrawn. But if congressional districts can be tweaked every two years, when there is no population-based justification, endangered incumbents from the favored party can be shielded from changing public opinion, while popular incumbents from the rival party can be targeted for defeat.

That turns on its head the Framers' design, in which the House of Representatives was to be the most responsive and democratic organ of our national government. In designing the House to foster democratic accountability, the Framers had to accommodate, on the one hand, the need for equal representation for equal numbers of people, and on the other hand, the need for stability in relations between the Representatives and the represented.[29] Stability in districts allows voters to reward effective Representatives with re-election, while weeding out those who have fallen out of step or proved to be ineffective.[30] But over time, a completely

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[29] *See, e.g.*, The Federalist No. 53, at 332 (James Madison) (Clinton Rossiter ed., 1961); *id.* No. 36, at 220 (Alexander Hamilton).

[30] *See White v. Weiser*, 412 U.S. 783, 791, 797 (1973) (applauding the State of Texas's good-faith efforts, when redistricting is mandated by new census results, to "maintain[] existing relationships between incumbent congressmen and their constituents"), *cited favorably in Bush v. Vera*, 517 U.S. at 964-65 (O'Connor, J., principal opinion) (holding that maintenance of the unique relationship between a Member of Congress and his constituents is a "legitimate state goal" and a "traditional districting principle"). As Justice Story explained, "a fundamental axiom of republican governments [provides] that there must be a dependence on, and responsibility to, the people, on the part of the representative, which shall constantly exert an influence upon his acts and opinions, and produce a sympathy between him and his constituents." 2 Joseph Story, *Commentaries on the Constitution of the United States* § 586 (1833).

stable set of constituencies can become wildly unequal in population and thus undermine the Framers' other goal – equal representation. *See Wesberry v. Sanders*, 376 U.S. 1, 7-15 (1964). The Framers considered leaving to Congress the job of reconciling these partially conflicting goals of stability and equality, but ultimately rejected that approach because its Members would have too much of a vested interest in the status quo and equality therefore would suffer.[31]

Instead, the Framers set up a rigid, fixed calendar of biennial House elections and decennial reapportionment of Representatives among the States. U.S. Const. art. I, § 2, cls. 1 & 3. Four out of every five elections would promote stability; and every fifth election (after the decennial census) would promote equality through use of districts adjusted to reflect population shifts that had occurred in the previous ten years. Article I thus establishes a rhythm: one post-reapportionment election cycle, followed by four regular election cycles.

But the court below effectively held that congressional redistricting *within* a given State can occur any time in the decade, for any reason, including raw partisan greed. If Article I places temporal constraints on congressional reapportionment but not on congressional redistricting, then what happened in Texas in 2003 will soon become the norm. *Biennial* redistricting will allow any political party that wins momentary control of the legislature and governorship to entrench its power through an initial gerrymander, and then to "fine tune" the gerrymander every two years. Partisan cartographers will stay one step ahead of the voters and thus insulate their congressional allies from all but the strongest electoral tides. Such a distorted and fundamentally

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[31] *See, e.g.*, 1 The Records of the Federal Convention of 1787, at 578-79 (Max Farrand ed., rev. ed. 1966) (Madison).

antidemocratic process cannot be squared with the Framers' vision of a House of Representatives controlled by "the People of the several States." U.S. Const. art. I, § 2, cl. 1.

This Court has repeatedly derived from Article I implicit limitations on state control over congressional elections: the exacting standards of population equality that apply only to congressional districting plans, *see Wesberry v. Sanders*, 376 U.S. 1 (1964), and *Karcher v. Daggett*, 462 U.S. 725 (1983); the rule that States may not establish term limits for Members of Congress, *see U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); and the rule that States may not seek to dictate electoral outcomes by noting on the ballot each congressional candidate's position on a controversial issue, *see Cook v. Gralike*, 531 U.S. 510 (2001). In sum, Article I guarantees "the People of the several States" the right to choose their Representatives in Congress through free and fair elections. When a legislature redraws congressional district lines based not on new decennial census results, but rather on new biennial election returns, and thus dictates electoral outcomes, it usurps the power that Article I reserves to the people. Just as the Constitution prohibited the passive malapportionment that occurred when state legislatures refused to redraw congressional district lines after each federal decennial census, it also prohibits the active gerrymandering that occurs when they illegitimately manipulate lines more than once a decade for no purpose but partisanship.

## II. THE DISTRICT COURT ERRED IN UPHOLDING THE DELIBERATE DESTRUCTION OF A COALITIONAL DISTRICT WHERE AFRICAN-AMERICANS COULD CONSISTENTLY ELECT CANDIDATES OF THEIR CHOICE.

The court below also erred in holding that the deliberate elimination of a "coalitional" district where African-

American voters can consistently elect their preferred candidates is immunized from scrutiny under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the Equal Protection Clause because African-Americans do not constitute a literal mathematical majority of the district's adult citizen population. As this Court recently explained when interpreting Section 5 of the Act, *id.* § 1973c, States marked by long-standing minority under-representation may choose whether to create "safe" majority-black districts or coalitional districts. *Georgia v. Ashcroft*, 123 S. Ct. at 2511-13. But they are not free to choose "neither route," J.S. App. 142a, particularly where they are destroying an existing, functional coalitional district.[32] And the Fifth Circuit rule used to justify such an action in this case – which denies statutory protection to any district lacking an absolute majority of citizen adults from a single minority group – has been rightly recognized as erroneous by other federal courts around the country.

It was undisputed below that voting throughout Texas is racially polarized and that the number of districts where African-American voters will have a realistic opportunity to elect their preferred candidates in the 2003 Plan (three) falls short of a proportional share (four).[33] Under the court-drawn 2001 Plan, District 24, which encompasses the African-American community of southeast Fort Worth (in Tarrant

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[32] In addition to destroying an African-American coalitional district in the Dallas/Fort Worth area, *see infra* pages 18-19, and a majority-Hispanic district in South and West Texas, *see infra* note 41, the 2003 Plan eliminated half a dozen other districts where African-Americans and Hispanics, though not a numerical majority, had exerted significant electoral influence by providing the margin of victory. *See Georgia v. Ashcroft*, 123 S. Ct. at 2512-13 (discussing influence districts); Jackson Pls. Ex. 1 (Lichtman expert report) at 70-73.

[33] *See* Jackson Pls. Ex. 1 (Lichtman expert report) at 16-17 (citing the State's letter to the Justice Department); *id.* at 17-18.

County) and African-American and Hispanic neighborhoods in Dallas County, provided a fourth such opportunity. Although this is a majority-minority district, African-Americans do not constitute close to half of the population on their own. Nevertheless, the district functions, for all practical purposes, as an *effective* African-American-controlled district.[34] Because Hispanics vote in low numbers and most Anglos are Republicans, African-Americans constitute about 64% of the Democratic primary electorate, so their preferred candidate almost always prevails at this stage. J.S. App. 141a. In the general election, they constitute about 33% of the voters. *Id.* at 55a. An additional 6% are Hispanics who, like the African-Americans, vote almost unanimously for the Democratic nominee in this district, according to the State's own expert analyses. Thus, for the African-American candidate of choice to be elected, there need only be "crossover" support from about a fifth of the Anglo voters. In practice, although a large majority of Anglos vote against Democratic nominees in general elections, the crossover rate is high enough that the African-American candidate of choice wins consistently.[35] Indeed, in the 20 general elections for statewide office during the last five years, the candidate preferred by black and Hispanic voters carried this district 19 times.[36]

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[34] *See generally* Bernard Grofman, Lisa Handley & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. Rev. 1383 (2001) (explaining how African-Americans can control a district politically without dominating numerically), *cited in Georgia v. Ashcroft*, 123 S. Ct. at 2513.

[35] *See Thornburg v. Gingles*, 478 U.S. at 80-82 (finding legally significant white bloc voting even where the fraction of white voters who "crossed over" and supported minority candidates in general elections was as high as 42%).

[36] The District Court suggested that there was some doubt about whether current District 24 actually elects candidates preferred by black

The 2003 Plan eliminates this district, which constitutes one of only two in the entire Dallas/Fort Worth Metroplex where minority voters play a significant role. Its population is split among five districts, each of which is dominated by Anglo Republican voters. A particularly egregious feature of the plan is District 26, which is based in suburban (and heavily Anglo) Denton County but shoots a long finger down into Tarrant County to scoop up the politically active African-American community in southeast Fort Worth. There could hardly be a clearer example of deliberate fracturing of a minority community.[37]

The District Court rejected Appellants' challenge to the intentional elimination of coalitional District 24 by invoking the Fifth Circuit's "Fifty Percent Rule." J.S. App. 40a (citing *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 852-53 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000)). The Fifty Percent Rule reads Section 2 of the Voting Rights Act as imposing no duty to create or preserve any district in which the plaintiff group lacks a literal,

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voters, given that incumbent Congressman Frost, an Anglo, has not been challenged in a primary. J.S. App. 55a. But there was unchallenged testimony from local African-American leaders that he is the candidate of choice, *see id*. at 143a-144a, and African-American candidates of choice usually carry the district in contested Democratic primaries for other offices. In two of the three black-white primary contests available to study, African-Americans voted overwhelmingly for African-American candidates opposed by Anglo candidates.

[37] At trial, the State emphasized that the new map created a modified version of existing District 25 in the Houston area (renumbered as District 9) in which the African-American population (although not a majority) would have enhanced control of electoral outcomes. But that Houston district has no relevance to a Section 2 challenge to the elimination of a district in Dallas-Fort Worth, especially given the statewide under-representation of African-Americans in the 2003 Plan. *See Johnson v. De Grandy*, 512 U.S. at 1014-21; Jackson Pls. Ex. 1 (Lichtman expert report) at 18, 39-40, 48.

mathematical majority of the citizens of voting age. *See id.*[38] But that rule has no basis in the text of the Act, conflicts with this Court's precedents, has not been followed in other circuits, and makes little sense.

Indeed, the rule can have the perverse effect of preventing minorities from achieving the statutory goal of an equal opportunity "to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). It does so by demanding the unnecessary packing of minority voters into majority-black or majority-Hispanic districts wherever that is possible, and by withdrawing all protection from minority voters living outside those districts.

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

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[38] In 1999, the Solicitor General filed briefs in this Court strongly disagreeing with the Fifth Circuit's "flat 50%," or "absolute numerical majority," rule and arguing instead that Voting Rights Act plaintiffs can make out a claim of vote dilution by showing that the minority voters in the plaintiffs' proposed district have the potential to elect a representative of their choice with the assistance of limited but predictable crossover voting from the white majority (or from other racial or language minorities) – regardless of whether members of the plaintiffs' minority group constitute an arithmetic majority in the district. *See, e.g.*, Br. for the United States as Amicus Curiae at 6-14, *Valdespino v. Alamo Heights Ind. Sch. Dist.*, 528 U.S. 1114 (2000) (No. 98-1987). The Justice Department had taken the same position for more than a decade. *See* Br. for the United States at 52-56, *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991).

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

A few years later, in *Growe v. Emison*, 507 U.S. 25 (1993), the Court again focused on actual electoral opportunities, not arbitrary mathematical cut points, when it explained that proof of *Gingles*'s first prong was needed to "establish that the minority has the *potential to elect* a representative of its own choice in some single-member district." *Id.* at 40 (emphasis added). And in *Voinovich v. Quilter*, 507 U.S. 46 (1993), the Court assumed, without deciding, that less than a literal majority was sufficient for a Section 2 claim. *See id.* at 154, 158.

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

communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice." *Id*. at 1020.[39] In interpreting the Voting Rights Act, the Court thus sought not to "promote and perpetuate efforts to devise majority-minority districts . . . where they may not be necessary to achieve equal political and electoral opportunity." *Id.* at 1019-20.

Most recently, in *Georgia v. Ashcroft*, 123 S. Ct. 2498 (2003), the Court returned to the theme of "coalitional" districts. Citing *De Grandy* and Justice O'Connor's concurrence in *Gingles*, the Court held that Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, does not require the State to create or maintain majority-minority districts where minority control is assured, if voting patterns allow instead the creation of coalitional districts where minority voters can elect their preferred candidates in combination with other voters in the district. 123 S. Ct. at 2511-12; *see also id*. at 2518 (Souter, J., dissenting on other grounds) ("[A] State can show that a new districting plan shifts from supermajority districts, in which minorities can elect their candidates of choice by their own voting power, to coalition districts, in which minorities are in fact shown to have a similar opportunity when joined by predictably supportive nonminority voters."). Not one Justice found a meaningful distinction between majority-black districts where African-Americans have a realistic opportunity to nominate and elect their preferred candidates and "coalitional" districts where

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

African-Americans have similar opportunities notwithstanding the absence of a mathematical majority.

Taking these cues, a number of lower courts have rejected the Fifth Circuit's rigid Fifty Percent Rule in applying Section 2 of the Voting Rights Act. In *Martinez v. Bush*, 234 F. Supp. 2d 1275 (S.D. Fla. 2002), for example, the three-judge court expressed doubt that the first *Gingles* factor "was intended as a literal, mathematical requirement" and instead focused on what it called "performing minority districts," which "may or may not have an actual majority . . . of minority population, voting age population, or registered voters." *Id.* at 1320 n.56, 1322. Similarly, in *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991), the three-judge court first noted that the pertinent issue under Section 2 is "not whether [black voters] can elect a black candidate, but rather whether they can elect a *candidate of their choice*," and went on to decide that with slightly less than one third of the voting-age population in a particular district, this requirement was satisfied. *Id*. at 1059-60.[40]

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[40] *See also Page v. Bartels*, 144 F. Supp. 2d 346, 363 (D.N.J. 2001) (three-judge court) (noting that minority groups can elect candidates of their choice in some majority-Anglo districts); *West v. Clinton*, 786 F. Supp. 803, 807 (W.D. Ark. 1992) (three-judge court) (assuming that districts where minority voters constitute less than an absolute majority of the voting-age population ("VAP") are cognizable under Section 2); *Puerto Rican Legal Def. & Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 681, 694 (E.D.N.Y. 1992) (three-judge court) (stating that there is no bright-line rule for an appropriate VAP level); *Jordan v. Winter*, 604 F. Supp. 807, 814-15 (N.D. Miss.) (three-judge court) (recognizing that Section 2 protects a 41.99% black district), *summarily aff'd sub nom. Mississippi Republican Exec. Comm. v. Brooks*, 469 U.S. 1002 (1984). State courts, too, have recognized the political reality that minority voters can effectively control some districts even where they are outnumbered by whites. *See, e.g., McNeil v. Legislative Apportionment Comm'n*, 828 A.2d 840, 853-54 (N.J. 2003) (holding that Section 2 claims are not limited to districts involving literal majorities of minority voters), *cert. denied*, 124 S. Ct. 1068 (2004).

Most recently, in *Metts v. Murphy*, No. 02-2204, — F.3d —, 2004 WL 626716 (1st Cir. Mar. 30, 2004) (*per curiam*), a 5-judge majority of the *en banc* First Circuit rejected the Fifty Percent Rule and expressly acknowledged the possibility that a successful vote-dilution claim could be brought by a racial minority group "that was a numerical minority but had predictable cross-over support from other groups." *Id.* at *2; *see id.* at *3. Even the two dissenting judges in *Metts* , noting that this Court's caselaw interpreting Section 2 "leaves many questions unanswered," recognized the potential legal significance of *limited* crossover voting and thus refused to endorse the Fifth Circuit's strict Fifty Percent Rule. *Id.* at *4 (Selya, J., dissenting); *see also id.* at *4-*6 (focusing on the "magnitude" of the crossover voting). Given the split among the lower courts, the Court should take this opportunity to clarify that the absence of a mathematical majority in a given area does not negate all rights under Section 2 to create an effective "coalitional" district like District 24.

As the First Circuit suggested, *see id.* at *1, *3 (majority opinion), the Fifty Percent Rule is particularly inapt where, as here, plaintiffs seek not to create an entirely new coalitional district, but rather to *reinstate* a preexisting, functioning coalitional district that was destroyed precisely because it had proved successful in electing minority-preferred candidates. Even if the Court were inclined to require that Section 2 plaintiffs challenging at-large electoral systems be able to draw *hypothetical* districts with a majority of blacks or Hispanics, it makes no sense to read the Act as denying protection to an existing coalitional district effectively controlled by one minority group.

Moreover, the District Court's reading of the Voting Rights Act unwisely elevates race to an "all or nothing" proposition in redistricting: African-Americans and Hispanics who cannot be corralled into majority-black or

majority-Hispanic districts become legally irrelevant, and the State is then free to take any and all steps to render them *politically* irrelevant as well. By contrast, Appellants' reading of the law allows the strictures of the Voting Rights Act to ratchet down as politics and housing patterns become increasingly integrated and as minority leaders build their capacity to "pull, haul, and trade" with their Anglo counterparts. *See De Grandy*, 512 U.S. at 1020. Unlike the District Court's approach, a proper interpretation of the Voting Rights Act and the Equal Protection Clause encourages "the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life." *Georgia v. Ashcroft*, 123 S. Ct. at 2517 (citing *Shaw v. Reno*, 509 U.S. at 657).

The dissenting judge below recognized the existing District 24 as "a district that fostered our progression to a society that is no longer fixated on race. . . . [T]he black voters in old District 24 repeatedly nominated and helped to elect an Anglo congressman with an impeccable record of responsiveness to the minority community." J.S. App. 143a. Interpreting Section 2 to deny black voters that right perverts Congress's intent and promotes racial balkanization.

## III. DISTRICT 25 IS AN UNCONSTITUTIONAL RACIAL GERRYMANDER THAT CONNECTS TWO FAR-FLUNG POCKETS OF DENSE HISPANIC POPULATION WITH A RURAL "LAND BRIDGE" THAT IS 300 MILES LONG AND IN PLACES LESS THAN 10 MILES WIDE.

In a vain attempt to offset the transformation of District 23 from one potentially controlled by Hispanic voters to one indisputably controlled by Anglos,[41] the designers of the

[41] Appellees also violated both the Voting Rights Act and the Equal Protection Clause by intentionally stranding 359,000 Hispanics in

2003 Plan created a new Hispanic District 25 running from McAllen on the Mexican border to the heavily Hispanic neighborhoods of Austin, in Central Texas, 300 miles away. In the new District 25, ethnicity is the only common thread. Thus, the State violated the racial-gerrymandering doctrine established in *Shaw v. Reno*, 509 U.S. 630 (1993), *Miller v. Johnson*, 515 U.S. 900 (1995), and their progeny.

The new District 25 grabs two dense pockets of Hispanic population – in the northern part of the district (in the city of Austin) and along the Mexican border (in and around the city of McAllen). J.S. App. 89a. More than 89% of the district's Hispanics reside at either end of the district (in Travis County at the northern tip and in Hidalgo and Starr Counties at the southern tip), with sparsely populated counties in between serving as little more than a rural "land bridge." *Id.* at 89a, 98a-99a; *see also id.* at 165a (color map showing population densities in and around new District 25). The court below found that these two far-flung population centers, although both heavily Hispanic, lack common needs and interests, given the glaring "differences in socio-economic status, education, employment, health, and other characteristics between Hispanics who live near Texas's southern border and those who reside in Central Texas." *Id.* at 107a-108a.[42]

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District 23, where they have virtually no hope of influencing, much less controlling, electoral outcomes. Those violations are thoroughly addressed in the dissent below, *see* J.S. App. 119a-122a, and in the Jurisdictional Statement filed today by the Mexican American Legal Defense and Educational Fund on behalf of several of Appellants' Hispanic co-plaintiffs (the "GI Forum Plaintiffs").

[42] In fact, the evidence showed that Hispanics in Austin had formed working coalitions with African-American and Anglo voters, jointly supporting candidates of choice from all three groups in an example of the kind of voting behavior the Voting Rights Act is supposed to encourage. The 2003 Plan trisects Austin, with the predominantly Hispanic areas tied to the border region 300 miles away

That finding was reminiscent of *Miller v. Johnson, supra*, in which this Court found Georgia's Eleventh Congressional District to be an unconstitutional racial gerrymander because it combined two large concentrations of black population in Atlanta and coastal Chatham County that were "260 miles apart in distance and worlds apart in culture." 515 U.S. at 908. The "social, political, and economic makeup of the Eleventh District," like that of Texas's new District 25, told "a tale of disparity, not community." *Id.* *Compare id*. at 928 Appendix B (color map showing population densities within Georgia's District 11) *with* J.S. App. 165a (identically formatted map for Texas's new District 25). Furthermore, Texas's new District 25 is not functionally compact, as it covers parts of four media markets and demands what is (for a district most of whose constituents are urban) an absurd amount of long-distance driving for any Representative or candidate.

The trial court, based largely on its analysis of the compactness scores computed by the nonpartisan, bicameral Texas Legislative Council (TLC), concluded that District 25 was not a racial gerrymander. In doing so, the majority found that the scores did not "approach those of [the] districts [that were] so bizarrely and irregularly drawn" in the 1990s that they triggered strict scrutiny as presumptively unconstitutional racial gerrymanders. J.S. App. 97a.

But the testimony of the State's own expert, Todd Giberson, contradicts that conclusion.[43] He testified that the TLC routinely calculates, for every district, a "Smallest Circle" score, which is the ratio of the area of the smallest circle that could circumscribe the district to the area of the district itself. This score measures how elongated, or stretched out, a district is. A district that is roughly circular, or square, would score very well, and a district shaped like a

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[43] *Id.* at 40 (Todd Giberson).

toothpick, a snake, a barbell, or a bacon strip would score poorly. *See* J.S. App. 164a (silhouette of District 25).[44] Using this measure, District 25 scored worse than half a dozen congressional districts that were determined to be racial gerrymanders subject to strict scrutiny in the 1990s.[45] Furthermore, District 25's low score cannot be attributed to the peculiar geography and population distribution of South and Central Texas: As Mr. Giberson conceded, other districting plans covering precisely the same territory are not

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

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

afflicted by similar levels of noncompactness.[46] Thus, the court below erred when it relied on compactness scores to rebut Appellants' claim of racial gerrymandering.

Furthermore, the trial court ignored direct testimony from the State's own witnesses admitting that the intent in creating new District 25 was racial, not political. An example was this portion of the examination of Mr. Giberson:

> Q. Now District 25 was drawn intentionally to create an eighth majority Hispanic district in the State, wasn't it?
>
> A. I believe that's the testimony, that they were trying to draw a Hispanic district.
>
> Q. And you'd agree that race predominated over partisan politics in constructing District 25, wouldn't you?
>
> A. I would say – I would say so. It was more important to create a Hispanic district than a Democratic district, for example.[47]

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

[47] *Id.* at 47 (Todd Giberson). Likewise, the plan's House sponsor, Representative King, admitted that the creation of District 25 was intended to add an additional Hispanic district between the border and Travis County. Tr., Dec. 18, 2003, 1:00 p.m., at 152-54.

Thus, while partisan maximization was the driving motivation behind the plan as a whole, race was the key to District 25's bizarre configuration. And racial-gerrymandering claims under the *Shaw* doctrine are always district-specific. *See, e.g., Bush v. Vera*, 517 U.S. at 957-58; *Shaw v. Hunt*, 517 U.S. 899, 902-04 (1996); *Miller v. Johnson*, 515 U.S. at 917-20.

Moreover, the court further erred in concluding that the claim of excessive race-consciousness was negated by the fact that District 25's elongated shape flowed from the "political goal of increasing Republican strength in congressional District 23" – to allow reelection of Congressman Bonilla – and maintaining Republican strength in nearby District 21. J.S. App. 105a. *Bush v. Vera* expressly rejected the argument that race-based line-drawing can be excused when it results from a desire to protect a nearby incumbent. *See* 517 U.S. at 967-70 (O'Connor, J., principal opinion). There, the irregular shape of a challenged African-American district in North Texas had been defended as necessary not to capture African-American voters *per se*, but to do so consistent with the interests of adjacent Anglo Democratic incumbents. *See id.* The Court rejected such a justification for racial gerrymandering, in a decision utterly inconsistent with the ruling at issue here. *See id.*

## CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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April 5, 2004