No. 05-276

IN THE

Supreme Court of the United States

EDDIE JACKSON, *et al.*,
Appellants,
v.
RICK PERRY, *et al.*,
Appellees

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

BRIEF FOR THE TEXAS STATE-AREA CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

In a congressional districting plan that degraded African-American and Latino electoral opportunity throughout the State of Texas – and took special aim at districts where candidates were elected by multiracial coalitions – Texas targeted a Fort Worth-Dallas district in which the black community had consistently been able to elect preferred candidates, dispersing those African-American voters to five highly-polarized districts, selected to assure that their votes would be utterly ineffective. The question presented is:

> Whether the district court erred in construing Section 2 to deny protection to minority voters who constitute less than 50% of district population – even when they demonstrate that they are, in fact, able to elect their preferred candidate – and thereby pretermitting any consideration of the totality of the circumstances.

PARTIES TO THE PROCEEDING

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

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

Defendant-appellees are Rick Perry, Governor of Texas; David Dewhurst, Lieutenant Governor of Texas; Tom Craddick, Speaker of the Texas House of Representatives; Roger Williams, Secretary of State of Texas; Tina Benkiser, Chairman of the Republican Party of Texas; Charles Soechting, Chairman of the Texas Democratic Party; and the State of Texas. All individual defendants were sued in their official capacities.

RULE 29.6 STATEMENT

The Texas State-Area Conference of the National Association for the Advancement of Colored People is a § 503(c)(4) affiliate of the National Association for the Advancement of Colored People, Inc., which is a not-for-profit corporation organized under the laws of New York and does not issue shares to the public.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

OPINIONS BELOW

The three-judge district court's majority and concurring opinions are reported at 399 F. Supp. 2d 756 and reprinted at page 1a of the Appendix to the Jackson Appellants' Jurisdictional Statement ("J.S. App."). The district court's final judgment is reprinted at J.S. App. 56a. The district court's earlier majority and dissenting opinions are reported at 298 F. Supp. 2d 451 and reprinted at J.S. App. 57a-200a.

JURISDICTION[1]

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

STATUTORY PROVISION INVOLVED

Section 2 of the Voting Rights Act, 42 U.S.C. 1973, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political

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[1] The Texas State-Area Conference of the National Association for the Advancement of Colored People (then known as The Texas State Conference of NAACP Branches) ("Texas NAACP") was a plaintiff-intervenor in the both the original and remand proceedings before the three-judge district court and appealed from the district court's initial ruling. Because the Texas NAACP did not file a Jurisdictional Statement after the district court's decision on remand, we submit this brief in support of Appellants pursuant to Sup. Ct. R. 18.2 and 25.1.

> processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT OF THE CASE

The actions at the center of this case represent a fundamental breach of faith, by those vested with government power in Texas, with the State's minority citizens, who struggled for decades to obtain the right to participate in the political process on an equal basis – and who, more recently, have worked alongside many white citizens – to forge an inclusive, multiracial, multiethnic Texas.

The congressional redistricting plan devised by defendants – and sustained by a divided court below – is in spirit and effect the very antithesis of the one considered in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). For no legitimate reason, it drastically diminishes the opportunities of African-American and Latino voters to equal political participation. Far from embodying the Civil Rights Movement's vision of an "'interracial democracy,'" *Ashcroft*, 539 U.S. at 490-91 (quoting Congressman John Lewis), it replaces an arrangement where minority voters elected or substantially influenced the election of 17 of 32 members of the State's congressional delegation with one that divides the State into 10 "minority" districts and 22 Anglo Republican districts; in which African-American votes will be effectively irrelevant in almost all congressional elections (because three districts are ostensibly "safe," and 29

are designed in a way that black voters have no potential to influence the outcome); and in which residents of the State's third-largest black community, who had previously been assigned to a district in which they were effectively able to choose their representative, were splintered into five districts.

1. The story of the struggle for minority voting rights in Texas is one told largely in the decisions of this Court and the lower federal courts. See *White v. Regester*, 412 U.S. 755 (1973); *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); see also *Graves v. Barnes*, 343 F. Supp. 704, 731 (W.D. Tex. 1972) (after a constitutional amendment and a Justice Department lawsuit finally eliminated the poll tax in Texas, the State adopted "the most restrictive voter registration procedures in the nation").[2]

The distorting effects of longstanding disenfranchisement are likewise evident from the law reports: the tax dollars contributed by African Americans and Latinos were spent to defend not only their government's intentional discrimination in voting, but also its segregated schools and housing, and its discriminatory law enforcement. *E.g.*, *Sweatt v. Painter*, 339 U.S. 629 (1950); *Cassell v. Texas*, 339 U.S. 282 (1950); *Hernandez v. Texas*, 347 U.S. 475 (1954); *Walker v. HUD,* 912 F.2d 819 (5th Cir. 1990).

2. The effects of stark racial inequality in Texas persist to this day. According to the 2000 census, African Americans (23.4%) and Latinos (25.4%) are three times as likely to live

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[2] See also Senate Report No. 94-295 at 27-28 (1975) ("Election law changes which dilute minority political power in Texas are widespread in the wake of recent emergence of minority attempts to exercise their right to vote * * * These structures effectively deny Mexican American and Black voters in Texas political access in terms of recruitment, nomination, election and, ultimately, representation").

below the poverty line than are Anglos (7.8%). JA 167. Unemployment rates for both minority groups are more than twice the rate for white Texans. *Id*. A white Texan over 25 is approximately twice as likely as a black person, and more than three times as likely as a Latino to hold a bachelors or higher degree. *Id.* See Dec. 17, 2003 Trial Tr. 20-88 (expert testimony of Dr. Orville Vernon Burton describing extent of racial inequality in Texas and adverse effects on political participation).

3. Voting throughout Texas remains racially polarized. The Jackson Plaintiffs documented a "clear pattern of minority voter cohesion and Anglo bloc voting in both primary and general elections" for "a range of federal and state legislative elections, as well as state executive and judicial contests, across regions of the state of Texas." JA 86. Indeed, there is "broad agreement" among experts retained by civil rights groups, by both political parties, and by the State itself "that voting is polarized along racial lines in the state of Texas, with minorities usually cohesive in support of candidates of their choice and Anglos usually bloc voting against the minority candidates of choice."[3]

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[3] JA 86. As detailed below by Dr. Allan J. Lichtman, experts retained by the Associated Republicans of Texas and former (Republican) Lt. Governor Ratliff in connection with Texas's 2001 redistricting litigation concluded "that voting in [areas including Bexar, Dallas, El Paso, Harris, Tarrant, and Travis counties] is racially polarized" and that ecological regression analysis "demonstrate[d] the presence of racially polarized voting on the part of whites, as well as Hispanics and African-Americans," and John Alford, the expert for the Governor and Secretary of State had found that, in general elections, black and Hispanic voters "typically vote cohesively in support of black and Hispanic Democratic candidates" and that Anglos "typically vote cohesively for the Republican opponents of minority candidates." JA 87. In primaries, Alford found that blacks "typically vote cohesively in support of black candidates," that "Hispanics typically vote cohesively in support of Hispanic candidates," and that "Anglo voters do not typically vote cohesively for either black or Hispanic candidates." JA 88.

4. The 2001 Plan

a. After the 2000 census expanded Texas's entitlement from 30 to 32 congressional districts, the state legislature was unable to produce the new redistricting plan required under the Constitution. As a result, a three-judge district court unanimously adopted a plan, known as Plan 1151C. *Balderas v. Texas*, No. 6:01-CV-158, (E.D. Tex. Nov. 14, 2002) (J.S. App. 202a). That plan – based upon district map-drawing principles developed by the State's expert and designated as "politically neutral" (*id.* 205a) by the three-judge court – reflected the strength of the Republican Party in Texas, "with 20 of the 32 seats offering a Republican advantage." *Id.* 85a. The court's adoption of Plan 1151C was supported by the State and, on appeal by one group of Latino voters, summarily affirmed by this Court. 536 U.S. 919 (2002).

b. The map promulgated by the district court in 2001 was by no means a "political feast" for minority voters. *Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994). It included only four districts (Nos. 18, 24, 25, and 30) in which African-American voters had the opportunity to elect congressional candidates of choice, in a State where African Americans account for roughly than 1/8 of the citizenry. See JA 90-91. Although each these four districts was "majority-minority," in none did African-American voters constitute a numerical majority. JA 98; see n. 13, *infra*.

On the contrary, these districts could "perform" because distinct patterns of registration and turnout enabled African-American voters to select the Democratic nominee, who could then prevail (even with only modest white crossover support) in the general election. See J.S. App. 197a (Ward, J., concurring in judgment) ("Under Texas's election scheme, in a Democratic leaning district, the key to a minority group's ability to elect a candidate of its choice * * * is in the Democratic primary. The ability to nominate in such districts is tantamount to the ability to elect").

c. The 2001 plan also included five other districts (1, 2, 9, 10, 11) in which the African-American population was not large enough to enable black voters to choose who would represent them in Congress – but in which their numbers (and electoral behavior) were such that their interests and preferences could not be ignored.[4] Consistent with this reality, representatives elected from these districts received generally high marks on the NAACP Report Card, which assigns a numerical "grade" to members of Congress based on their votes on matters of importance to African Americans. In 2001-2002, Representatives Sandlin, Turner, Lampson, Doggett, and Edwards, received grades of 83, 72, 83, 89, and 78, respectively – and even the score of 33 given Representative Hall – whose relationship with African-American constituents has long been difficult – was higher than the mean rating (24.8) for Anglo Republicans in the State's congressional delegation. NAACP National Scorecard, 107th Congress, 2d Sess. JA159. Texas's two African-American members of Congress, by comparison, had a mean rating of 91.5 – slightly below the 94 earned by Rep. Martin Frost of the 24th District. JA 107-108.

5. The 2003 Plan

a. Central facts about the challenged redistricting plan are likewise not in dispute. To state the obvious, the 2003 plan was *not* enacted to implement any new "theory of effective [minority] representation," *Ashcroft*, 539 U.S. at 482. It was passed over the strong opposition of 53 of the 55 minority members of the Texas Legislature, including every African-American and Latino member of the State Senate, contrast *id.* at 484 (the only African-American legislator to vote in favor of

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[4] Although, with the exception of District 10, these congressional districts usually vote Republican in statewide elections (and Republican congressional candidates receive the majority of the Anglo votes), virtually unanimous support from minority voters, along with limited ticket-splitting by Anglos, resulted in the reelection of Democrats in 2002. See JA 159-162.

the plan was turned out of office in the next election), and it was opposed by every major civil rights organization in the State. The hundreds of comments submitted in connection with the Department of Justice's Section 5 review were similarly one-sided, unanimously urging the Department to deny preclearance.

b. Nor was the plan drawn pursuant to any constitutional duty to draw equipopulous districts. The court-ordered plan had already drawn districts that reflected the population as reported in 2000 census. Indeed, the new plan's proponents sought simultaneously to take advantage of what they knew to be changing demographic realities (in order to optimize partisan edge) while relying on the fiction of census accuracy to crowd fast-growing subpopulations in increasingly underrepresented districts. See J.S. App. 49a (opinion of Ward, J.).

c. Rather, the plan's *proponents and defenders* insisted repeatedly that it had only one object: to maximize partisan advantage. As the court below put it, maximizing Republican gains was "the single-minded purpose of the Texas Legislature." J.S. App. 85a.

d. While the plan's architects recognized the Voting Rights Act's nonretrogression requirement as a source of constraint, their goal was to do the bare minimum to escape preclearance denial, viewing such a Voting Rights Act violation as just another risk – one that could be traded off (and ultimately was) if the partisan payoff was sufficiently attractive.

e. A primary civil rights "problem" for the map drawers was the court's 24th District. Although the desire to eliminate the incumbent Congressman, Democrat Martin Frost, was strong, the plan's drafters recognized that the district was one in which African Americans, who had typically accounted for more than 60% of the electorate in Democratic primaries, had

been able to nominate and elect their preferred candidates.[5] Martin Frost's voting record placed him among the most responsive in all of Congress on issues of greatest concern to African Americans, and he enjoyed strong support in that community. Testifying about Frost's "incredible following and amount of respect among the African-American community," Ron Kirk, the 2002 Democratic Nominee for the U.S. Senate and the only African American to serve as Mayor of Dallas, described him as a rare Anglo legislator who could "validate [Kirk's candidacy] before Black voters in Fort Worth." JA 239.[6]

b. The State's expert acknowledged that the 24th district "performed" for African Americans, JA 218-19 – and for that reason, recommended against dismantling it. Consistent with these concerns, proposals to dismantle the 24th District were withdrawn almost immediately after being floated after sharp

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[5] Based on population figures from the 2000 Census, District 24 under the 2001 Plan was 22.7 percent black and 38.0 percent Hispanic, with a combined black and Hispanic population of 60.2 percent and a combined minority population (black, Hispanic, Asian, and others) of 64.7 percent. By voting-age population (VAP), it was 21.4 percent black and 33.6 percent Hispanic, with a combined minority population of 59.3 percent. By citizen voting-age population (CVAP) the district was 25.9 percent black and 20.8 percent Hispanic with a combined minority population of 50.1 percent. See JA 97-98.

[6] Mayor Kirk further explained that Frost "has gained a very strong base of support among African-American and Hispanic voters because of his strong voting records, his stance in favor of affirmative action, Voting Rights Act, increased funds for education, openness and opportunities,* * * * And his support was critical, I think, to the strength of the African-American turnout in both the Primary and in the Runoff in my [mayoral] election." JA 239. See also JA 107-108 (comparing Frost's NAACP scores to other representatives); see Dec. 16, 2003 Trial Tr. at 120 (testimony of State Representative Glenn Oliver Lewis regarding Frost's support in African American community); JA 257 (testimony of State Senator Royce West).

protests from the affected African- American community.[7] And the redistricting bills enacted by both houses of the Texas Legislature preserved CD 24 as a minority opportunity district.

c. But this was not the end of the story. The map that emerged from a "conference committee," unlike those which had passed any chamber, took square aim at the 24th District. Worse still, it was later revealed that this was no unforeseen twist: the "new" map had been drawn months earlier and extensively "vetted" by associates of House Majority Leader Tom Delay.[8] Thus, while defenders would later tout the various public hearings that preceded the plan's adoption, the cynicism of this exercise was laid bare: proponents of the plan did not respect the citizens of Texas (or even their representatives) enough to seek their opinions on the plan they intended all along to adopt.[9]

d. The means used to dismantle the 24th District were simple: the African-American voters who had sent Representative Frost to Congress found themselves splintered among five different districts, represented by Anglo Republicans whose districts were drawn such that they could afford to be indifferent to their new minority constituents. The

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[7] State Representative Phil King, House leader of the Republican redistricting effort, withdrew from consideration in July 2003 a plan aimed at redrawing CD 24 as a Republican district out of concerns that even a modest reduction in minority voting strength would "potentially" violate the Voting Rights Act. JA 117.

[8] See Ratcliffe, *Redistricting Memo Leaked on Eve of Trial: DeLay's Intervention Blasted*, Houston Chronicle 1 (Dec. 11, 2003) (Mr. DeLay's aide was quoted as having informed state legislators: "The pre-clearance and political risks are the [Texas congressional] delegation's, and we are willing to assume those risks, but only with our map").

[9] On the eve of passage of Plan 1374C King once more raised doubts about tampering with this district, citing an opinion from consulting lawyers that the dismantling of District 24 could not legally be offset by augmenting the black population of a congressional district in Houston. JA 118-19.

ratio of Anglos of voting age to blacks of voting age in the five districts ranges from 4.6:1 to 12.3:1. JA 102. Four of the five districts include Republican incumbents; one was an open seat under the new plan, with nearly a 70 percent Republican majority based on statewide elections. Of these four incumbents, Representative Barton received a rating of 33% from the NAACP, Representatives Granger and Sessions 22% (*i.e.*, 72 points lower than Frost). JA 108. (Representative Burgess did not receive a rating in 2001-2002; his rating for 2003 was 20).

Under the new plan, CD 24 retained only 22.6 percent of its former black population. JA 109. Yet rather than improving the geographic compactness of this district – as is often the case when the minority population of a district is decreased – CD 24 and the surrounding districts to which African Americans were shunted are now less compact. JA 110. Indeed, the districts created by the 2003 legislative map were, on average, much less compact than those under the 2001 plan. See JA 178 (report of State's expert, Dr. Keith Gaddie).

Fully 79,170 African Americans from District 24 – 53.7 percent of its black population – were reallocated into CD 26, a district with a Republican incumbent, dominated by conservative suburban and rural Anglos. JA 111. To incorporate these voters (yet assure that their votes would be ineffectual) required simultaneously extending a long finger deep into Tarrant County, while stretching all the way to the Oklahoma border to take in conservative, Anglo voters.[10]

e. Minority voters throughout the State shared a similar fate: African-American and Latino voters who had determined the balance of power found themselves in districts represented

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[10] See J.S. App. 219a (map). As an editorial in a local newspaper put it, these "low-income, minority voters" from "East and southeast Fort Worth" had been "shoved into a district dominated by affluent suburbs and Denton County and extending to the Oklahoma border." JA 113.

by Anglo Republicans with dismal records of responsiveness to minority voters' concerns – and no incentive to do better.[11]

Under the new plan, the votes of millions of the State's African-American citizens, including many who have struggled to forge coalitions across racial and ethnic lines, are almost entirely irrelevant. In three districts, African Americans' votes are not urgently needed because the seats are relatively "safe";[12] in the remaining 29 districts – where most of the State's black citizens of voting age reside – minority voters are in no position to influence outcomes, let alone elect candidates of choice.

Proceedings Below

When the legislation was signed, various parties filed suit, alleging that the Legislature's mid-decade redistricting was unauthorized under Article I of the Constitution; that the plan violated Section 2 of the Voting Rights Act and the Equal

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[11] The State sought expedited Section 5 preclearance from the Department of Justice, portraying the 2003 plan as serving the state's "public policy goal" of creating "an additional African-American" and "an additional Hispanic District," and asserting that the plan had "increased the opportunities for the minority communities to elect candidates of choice, and has created districts of better quality than the districts which previously existed." Andy Taylor & Assoc., "28 C.F.R. 51.27(m) and (n) Voting Rights Analysis Submitted October 20, 2003 for the State of Texas," at 6,15 (App. 2 to Expert Report of Dr. Allan J. Lichtman). Although all 335 public comments opposed the plan, and career Justice Department attorneys unanimously recommended denial of preclearance, that recommendation was overruled, and the civil servants who had recommended denial were reportedly subjected to an "unusual gag order." See *Justice Staff Saw Texas Districting as Illegal: Voting Rights Finding on Map Pushed by DeLay was Overruled*, Wash. Post A2 (Dec. 2, 2005).

[12] Even CDs 18 and 30 (which the district court described as "*Gingles*-mandated," J.S. App. 111a n.116), which had sent African-American Representatives to Congress, were altered in ways that adversely affected black voting strength. Indeed, the only arguable exception occurred in a single district, former CD 25, renamed CD 9, in which the African-American population was augmented. But see n.13, *infra.*

Protection Clause; that certain districts reflected an improper use of race, in violation of *Shaw v. Reno* and progeny; that the plan was an impermissible political gerrymander; and that it should be enjoined for failure to comply with the one-person, one-vote requirement.[13]

Plaintiffs presented evidence of Texas's long history of discrimination relating to the political process; of recent examples of race-based electoral appeals and voter intimidation; of persistent barriers to political participation; and patterns of deep socioeconomic inequality along racial lines. See Dec. 17, 2003 Tr. 20-88 (Burton).[14]

With respect to the dismantling of the 24th District, plaintiffs presented expert and lay testimony concerning racially polarized voting and minority political cohesion, as well as

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[13] The Texas NAACP, appearing as a plaintiff-intervenor, was in substantial agreement with the various original plaintiffs' legal claims. However, the NAACP disavowed claims that Democratic Congressman Hall was responsive to African-American interests.

The NAACP presented the court with a map, Plan 1251C, supported by the Legislative Black Caucus, that both preserved the Tarrant County district and augmented African-American voting strength in the 2001 District 25. This map definitively belied the State's attempts to portray the destruction of District 24 as somehow necessitated (or justified) by increasing the black population in District 25 (renamed CD 9 in the new plan), more than 200 miles away.

[14] See, *e.g.*, TX-NAACP Exh. 1 (transcripts of NAACP Voter Hearings in Texarkana, Houston and Fort Worth). Numerous witnesses testified to troubling recent instances of voter intimidation and harassment and about the use of overt and subtle racial appeals, including in the 2002 races for United States Senate and Governor and in local elections in Tarrant County. See Texas-NAACP Post Trial Br. 10-11 (Dec. 3, 2003); Jackson Plaintiffs Exh. 138. Congressman Max Sandlin told the court that only the day before his testimony, a polling place long maintained in the oldest African-American college west of the Mississippi River had been moved to a white Baptist college on the other side of town and that the number of voting sites for the then-impending special election to replace Senator Bill Ratliff had been reduced from 29 to 7, *id.*

extensive testimony establishing that African-American voters had effectively controlled elections in the district: Because African-American voters accounted for nearly two- thirds of the votes cast in Democratic primaries, and because the nominee "would likely win overwhelming support from blacks and Hispanics * * * as well as some support from Anglo voters," the black-preferred candidate had "an excellent opportunity for election to office." JA 100.[15] This description was confirmed by evidence that 19 of 20 black-preferred candidates had prevailed in general elections in District 24, and by African-American legislators and community leaders familiar with local political dynamics, who confirmed African-Americans' effective control and attested to Frost's strong, longstanding ties to the African-American community. See n.6, *supra.*

The State's submission was almost entirely negative in character: unable to plausibly describe the plan as enacted for any traditional purpose or neutral districting reason, the State primarily argued that the plan's partisan gerrymandering was no worse than in other cases; that dismantling minority opportunity districts raised no Voting Rights Act concern, because Fifth Circuit precedent attached dispositive significance to whether a single minority group accounted for more than 50% of CVAP (which was not the case in the 24th District or any of the others under the 2001 plan); the State also claimed that African-American voters could not elect preferred candidates in the former 24th District. Finally, the State trumpeted the then-recent decision in *Georgia v. Ashcroft* as announcing a new regime of judicial nonintervention: if, Texas argued, the Voting Rights Act did not stand in the way of Georgia's dismantling of "safe districts," unfettered authority to deny minority voters an existing "influence district" followed "a fortiori."

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[15] Estimates indicated that Democratic general election candidates in Tarrant County received nearly all votes from African-American and Hispanic voters and an average of 27% from Anglos. See JA85.

Over a partial dissent by Judge Ward, the three-judge court upheld the plan in toto. Expressing its "aware[ness] of discrimination against Latinos and Blacks in Texas," J.S. App. 89a, the court rejected plaintiffs' Equal Protection race discrimination claim, reasoning that "the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage," and that "all that happened thereafter flowed from this objective." *Id.* 85a. "The result disadvantaged Democrats," the court explained, and "a high percentage of Blacks and Latinos are Democrats." *Id.* 85a.

The district court then rejected plaintiffs' claims under the Voting Rights Act. The cracking of minority voting strength in District 24, the district court held, was beyond the reach of Section 2 because African-American voters did not comprise a majority of the district's citizen voting age population. Rejecting plaintiffs' arguments that the required showing of a minority group's "potential to elect" preferred candidates in a proposed district, *see Thornburg v. Gingles*, 478 U.S. 30, 50 (1986) (emphasis omitted), could be made by evidence of *actual* electoral success, the court adhered to circuit precedent holding that Section 2 imposes a "50% standard," characterizing that cutoff as a "critical" part of the *Gingles* decision's "studied effort to confine the limits of the Act to those situations that dilute minorities' opportunity to vote without protecting coalitions that may be helpful or even essential to the leveraging of their strength." J.S. App. 109a.[16] The district court also doubted plaintiffs' evidence of effective African-American control. The majority opined that "Black

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[16] Relying on circuit precedent, the district court also concluded that "the majority requirement of the first *Gingles* precondition cannot be met" in the districts in question "by summing Black and Hispanic voter populations," because "Blacks and Hispanics do not vote cohesively in primary elections, where their allegiance is free of party affiliation." J.S. App. 99a (citing *Valdespino v. Alamo Heights Ind. Sch. Dist*., 168 F.3d 848, 852-53 (5th Cir. 1999)).

opportunity lies in coalitions with Anglos who vote with them in the general election for Democrats," and stated that plaintiffs' evidence of electoral power was undermined by the fact that Representative Frost had "not had a primary opponent since his incumbency began." *Id.* at 111a. According to the court, "[t]hat Anglo Democrats control this district is the most rational conclusion." *Id.* at 111a-112a.[17]

Because District 24 was a "[p]ure influence district," the court explained, it was "unprotected by § 2," and its dismantlement raised no claim under that provision. J.S. App. 113a. See also *id.* at 110a n.114 (if there is "no obligation to create an influence district, there is no obligation to retain one"). This conclusion was supported by references to *Ashcroft*, which the majority read as affording States greater "latitude," *id.* at 112a, and to the Justice Department's grant of preclearance, *id*. at 113a ("we are persuaded that alterations to [CD24] raise[] questions primarily of § 5, which have been answered by the Department of Justice").

The court proceeded to reject plaintiffs' challenges to the elimination of minority influence districts, reasoning again that "the State was under no § 2 obligation to create these districts, and we find that the State labors under no corresponding compulsion to preserve these districts." J.S. App. 115a.[18]

Judge Ward filed an opinion concurring in part and dissenting in part. He "reluctantly concur[red]" with the majority's decision to uphold "dismantling of District 24,"

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[17] The court also declared it "far from certain" that African Americans voted cohesively in District 24 primaries. J.S. App. 112a.

[18] The three-judge court also rejected plaintiffs' claims that the 2003 plan had violated Section 2 by diluting Latino voting strength in South and West Texas, as well as their claim that the Plan had relied on ethnicity overwhelmingly to produce bizarrely configured "bacon strip" districts in violation of *Shaw* – and had impermissibly sought to "trade off" the voting rights of Latino voters in different parts of the state.

making clear that he did so not out of "agreement with the majority's assessment of the facts," but because of the "lack of clear guidance from the Supreme Court or the circuits regarding the extent to which *Ashcroft*'s recognition of the value of coalition and influence districts carries over into the § 2 context." J.S. App. 196a.

Judge Ward began by recognizing that, contrary to the premise of treating 50% population as "sacrosanct," District 24 had provided African-American voters opportunity to elect candidates of choice, noting the evidence concerning their control of the Democratic primary and that the "ability to nominate in [the district] is tantamount to the ability to elect," J.S. App. 196a-197a.[19] He then explained why *Ashcroft* provided no support for the State's action. The "flexibility" recognized in *Ashcroft,* to choose [between] "creating * * * a greater number of influence or coalition districts [and] * * * strengthen[ing] existing majority-minority districts," does not cover what the State had done"[i]n the Dallas-Fort Worth area"; "Texas chose neither route." *Id.* at 198a.

Judge Ward concluded by describing ways in which the dismantling of District 24 was "inconsistent with the purposes of the Voting Rights Act." J.S. App. 199a. Invoking *Ashcroft*'s "understanding that power at the polls and participation in the political process is not always measured by mathematical majorities," he maintained that, by eliminating a district in which "black voters in old District 24 repeatedly nominated and helped to elect an Anglo congressman with an impeccable record on responsiveness to the minority community," the State had not only diluted "the political influence of that minority community," but had undermined "our progression to a society

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[19] Judge Ward noted that "blacks and Latinos vote largely Democratic in the general elections * * * [b]ecause, at least in Texas, the Democratic candidates are generally more responsive to the concerns of these minority communities." J.S. App. 197a.

that is no longer fixated on race." *Id.* at 199a-200a.[20]

After this Court vacated the three-judge court's decision and remanded for reconsideration in light of *Vieth v. Jubelirer*, 541 U.S. 267 (2004), the three-judge court once again upheld the 2003 plan, expressly adopting, without further analysis, the prior decision's rejection of plaintiffs' constitutional claims of racial discrimination and their Voting Rights Act claims. See J.S. App. 39a-40a. See *id*. at 55a n.6 (Ward, J) (re-affirming objections expressed in his prior opinion).

SUMMARY OF ARGUMENT

Plaintiffs in this case presented a classic Section 2 grievance: a politically cohesive and geographically compact group of African-American Fort Worth residents showed that the challenged practice operates, in conjunction with bloc voting, to deny them the opportunity to elect their candidate of choice to Congress. The "dispersal of blacks into districts in which they constitute an ineffective minority of voters," *Gingles*, 478 U.S. at 46 n.11, in issue here was not an unintended consequence of geography or neutral districting principles. It resulted from the State's intentional effort to dismantle an already-existing district in which African-American voters had in fact elected candidates of choice – and their new district assignments were chosen with an eye toward minimizing these voters' opportunity to affect electoral outcomes.

Moreover, plaintiffs showed that the cracking of District 24 was not an aberration; it was part of a larger effort in which Texas ran roughshod over the voting rights of African-American and Hispanic citizens throughout the State. Plan

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[20] Judge Ward dissented from the majority's rulings rejecting the plaintiffs' Section 2 claims regarding District 23, concluding that changes to to that district under Plan 1374C were not, as advertised, "intended to increase minority voter participation," but instead "to crush these minority voters' participation in the political process." J.S. App. 175a.

1347C systematically altered every other district in the State in which black or Latino voters had been able to exercise meaningful influence, but not control. The feat was accomplished over the strong objection of minority voters and their Representatives in the State Legislature – whose views were ignored.

The district court's conclusion that this evidence did not establish a Section 2 violation depended on a construction of the Voting Rights Act that is fundamentally inconsistent with the text and purposes of the statute and with this Court's governing law.

First, the majority opinion below erroneously cast its lot with others which have construed the Voting Rights Act as requiring dismissal whenever a minority group would not literally constitute a "majority" of the population in the remedial district they seek – irrespective of evidence establishing the other *Gingles* preconditions and what "the totality of the circumstances" would show – and even when, as here, plaintiffs show not just the "potential," but the proven ability to elect preferred candidates.

The decision also erred in reading the Voting Rights Act as providing no protection for minority voters who elect candidates in coalition with Anglo crossover voters, let alone as treating such districts as proper targets for dismantlement (while more homogenous districts are "*Gingles*-protected"). This, too, is entirely out of step with this Court's case law: in *Ashcroft* and even before (indeed as early as *Gingles* itself), this Court was unanimous in recognizing that minority voters *elect* candidates within the meaning of the statute in instances where white crossover votes provide the margin of victory. Although *Ashcroft* affirmed that "coalition" districts are not the *only* permissible means of pursuing "effective [minority] representation," it stands at every turn against rules, like the district court's, that create strong incentives to seek, and create, homogeneous districts.

And the opinion's characterization of District 24 as a "pure influence" district and its bald assertion of "Anglo Democrat" control are, as a matter of both law and fact, manifestly wrong. Essentially undisputed testimony established that African-American voters effectively controlled elections in District 24, and that Representative Frost was, in fact, African-American voters' preferred candidate.

The district court further erred in treating as irrelevant the evidence concerning the plan's broader, eviscerating effect on African-American electoral influence. Once again, *Ashcroft* is to the contrary: whether or not that decision is read as recognizing a Section 2 claim grounded in dilution of a minority group's influence in the electoral process, it must be understood as settling that such effects may not be ignored by a court assessing the "totality of the circumstances."

And the decision erred fundamentally in its treatment of the one factor it did acknowledge to be relevant: partisan purpose. The majority's broad announcement that government actions targeted at minority voters' political participation raise no special concern so long as the ultimate motivations are "partisan" is wrong by its terms, and – paired with the decision's refusal to provide protection for minority voters' right to elect through coalitions – it establishes a rule that is as ominous to the purposes of the Voting Rights Act as it is wrong: that *government* may act for partisan purposes, but minority *voters* may not.

Finally, the district court's suggestions that this lawsuit somehow "use[s] race" inappropriately should not go unanswered. Although this case is "political," as every dispute over voting rights will be, the suggestion that the Texas NAACP and the State's African-American citizens raise their claims here as "partisans" betrays an insufficient "aware[ness] of the long history of discrimination against Latinos and Blacks in Texas," J.S. App. 89a, which includes a thirty-year struggle with the State's Democratic Party. That "Democratic

candidates are generally more responsive to the concerns of these minority communities," J.S. App. 197a (Ward, J.), is a remarkable testament to the success of that struggle (although Republicans who have been responsive have earned substantial minority support), but it would be a bitter irony if the "political reality that blacks and Latinos in Texas vote largely Democratic in the general elections," *id*., has become a legitimate ground for government actions aimed at denying their voting rights.

ARGUMENT

I. THE PROTECTIONS OF SECTION 2 APPLY WHEN A DISTRICT IN WHICH AFRICAN-AMERICANS VOTERS HAVE BEEN ABLE TO ELECT CANDIDATES OF CHOICE IS DISMANTLED, WHETHER OR NOT THEY COMPRISED A PARTICULAR SHARE OF DISTRICT POPULATION

The court below rejected plaintiffs' Section 2 challenge to the legislature's dismantling of an effective minority-controlled district and the careful dispersion of its African-American residents, spurning an analysis of the totality of the circumstances in favor of a rigid rule that districts where black voters account for less than a numerical majority are "unprotected" under Section 2 – and refusing to recognize that the former District 24 had in fact enabled African American voters the ability to elect their candidate of choice. These rulings reflected fundamental errors of law.

A. The Tarrant County Voters' Proof That They Could *In Fact* Elect Candidates of Choice In District 24 Was Sufficient To Cross The *Gingles* Threshold

In sustaining the dismantling of the 24th District, the district court (J.S. App. 107a-108a) invoked the "50 percent rule," whereby the Fifth Circuit – and other courts – have held that Section 2 requires minority voters to establish that they would account for 50% of the Citizen Voting Age Population in a single-member district. See *Valdespino*, 168 F.3d at 855

(rejecting Mexican-American plaintiffs' challenge to at-large election, because minority group members would comprise 48.3% of CVAP in proposed district); *Perez v. Pasadena Independent School Dist*., 165 F.3d 368 (5th Cir.1999); accord *Hall v. Virginia*, 385 F. 3d 421, 429 (4th Cir. 2004); *McNeil v. Springfield Park District*, 851 F.2d 937 (7th Cir. 1988); *Cousin v. Sundquist,* 145 F.3d 818, 827-29 (6th Cir.1998); *Colleton County Council v. McConnell,* 201 F. Supp.2d 618, 643 (D. S.C. 2002); *Parker v. Ohio*, 263 F. Supp. 1100, 1104-05 (S.D. Oh.), *aff'd*, 124 S. Ct. 574 (2003).[21]

These courts have held that a Section 2 claimant's threshold showing – that a minority group "would have been able to elect representatives of their choice in the absence of the [challenged practice]" may *only* be established by demographic statistics that the group constitutes an arithmetic majority in the district. See J.S. App. 96a (rule requires that a minority group's "potential to elect a candidate of its choice" be shown "by proof that it could constitute 50% of the district"). "[E]vidence that [a minority] group [will actually] succeed in electing preferred candidates," *Perez*, 165 F.3d at 373 – or, as here, actually *have succeeded* in doing so – is deemed insufficient as a matter of law, and Section 2 claimants' "failure" to propose a district with 50% or greater minority CVAP obviates any inquiry into the totality of the circumstances. *id. Compare* J.S. App. 96a (asserting that "there are powerful reasons to be exacting" in enforcing the rule) *with id.* At J.S. App. 196a (Ward, J) (describing concurrence as "reluctant" and based on conclusion that 50% requirement is settled law). Other courts have held – and the Department of Justice has long maintained – that Section 2 contains no "50% requirement," and that *Gingles* and

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[21] The opinion below, while adverting to "powerful reasons" for an iron-clad rule, J.S. App. 96a, declined to hold that the "rule" could never yield, characterizing its decision as holding that plaintiffs had not established entitlement to an exception. *Id.*

its progeny are not properly understood as establishing one.[22]

1. This Court's Voting Rights Act Decisions Provide No Support for a "Fifty Percent Rule."

Although the text of Section 2 is fairly read as requiring plaintiffs to make a threshold showing of their "potential to elect" – otherwise their inability to elect could not be said to "result" from the challenged practice, 42 U.S.C. § 1973(a) – the plain language of the statute nowhere hints that *actual evidence* of a minority group's ability to elect in the absence of a challenged practice is incompetent to make that showing. *Martinez,* 234 F. Supp. 2d at 1334 (the "*Gingles* preconditions establish[] a causal link between the challenged electoral scheme and the vote dilution injury plaintiffs allege").[23]

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[22] In *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1222 (S.D. Fla. 2002), for example, the three-judge district court defined "performing minority district" as one "likely * * * to result in the election of []minority candidates of choice, *whether or not* "it has 'an actual majority * * * of minority population, voting age population, or registered voters," *id.*, reasoning that "focusing mechanically on the percentage of minority population * * * in a particular district, without assessing the actual voting strength of the minority in combination with other voters, has been justly criticized," *id.*

See also *Metts v. Almond*, 363 F.3d 8, 10-12 (1st Cir. 2004) (*en banc*) (per curiam); *McNeil v. Legislative Apportionment Comm'n*, 828 A.2d 840 (N.J. 2003); Brief *Amicus Curiae* of United States, *Valdespino v. Alamo Heights Indep. Sch. Dist.*, No. 98-1987, at 11(citing prior Government briefs); *id.* at 13 (*Gingles* preconditions "do not lend themselves to strict numerical cutoffs, but rather require the application of judgment to the facts of each case"). Cf. *Romero v. Pomona,* 883 F.2d 1418, 1424 n.7 (9th Cir. 1989) (indicating majority might not be required "where candidates are elected by plurality"); *Dillard v. Baldwin County Comm'rs,* 376 F.3d 1260, 1269 n.7 (11th Cir. 2004) (describing the issue as unresolved).

[23] In fact, the Congress that enacted the 1982 Amendments was well aware of circumstances – such as in elections in which a plurality of the votes was sufficient – in which groups that constituted less than an arithmetic majority of the relevant population could elect candidates of choice. See H.R. Rep. No. 97-227 at 18 (1982) (identifying "majority-vote requirements, numbered posts, staggered terms," among practices that "'individually or in

The notion that Section 2 embodies an "inflexible rule," requiring courts to disregard evidence that a remedial district would, in fact, enable minority voters to elect a preferred candidate – and makes the single 50% population statistic determinative of a vote dilution claim – is inconsistent with Congress's directive that Section 2 courts take a "'functional' view of the political process," *Gingles*, 478 U.S. at 50 n.15 (quoting S. Rep. 97-714 at 30 n.120 (1982)), and that they take account of its "practical realities," *De Grandy*, 512 U.S. at 1000; see *id.* at 1020-21 ("[n]o single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilutes minority voting strength").

Rather than the text or purposes of the Act, the purported basis for the "50% rule" has been the statement in *Gingles* that, to establish a dilution claim under Section 2, a minority group must be "sufficiently large and cohesive *to constitute a majority* in a single-member district." 478 U.S. at 50 (emphasis added). But even if Justice Brennan's *Gingles* opinion had been the Court's last word on the subject, it would be poor authority for a peremptory "50%" threshold for vote dilution claims.

A rigid rule removing Section 2 protection from minority groups with under half the district's population would be conspicuously out of place in an opinion that warned against "'simple doctrinal test[s],'" *Metts*, 363 F.3d at 12 (quoting 478 U.S. at 58), and emphasized Congress's instruction that claims should be decided based on a "searching practical evaluation of the past and present reality, * * * [a] determination is peculiarly dependent upon the facts of each case * * * and requir[ing] an intensely local appraisal of the design and impact of the contested electoral mechanisms." 478 U.S. at 79.

But the question the *Gingles* language has been read to

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combination result in inhibiting or diluting minority political participation and voting strength'"); see also, *e.g.*, *City of Rome v. United States,* 446 U.S. 156 (1980).

resolve – whether demographic evidence is the sole and exclusive means of establishing minority voters' "potential to elect" a preferred candidate – was not squarely presented in that case. *Gingles* did not involve a claim by a group that fell short of 50% of district population but sought to prove their ability to elect by other means; it *sustained* a claim by plaintiffs who had shown that they would constitute an arithmetic popular majority in a single member district. See 478 U.S. at 51 n.16; see *id.* at 89-90 (O'Connor, J., concurring in the judgment) (declining to "express [a] view as to whether the ability of a minority group to constitute a majority in a single-member district should constitute a threshold requirement").[24]

Although courts have suggested that a 50% rule is somehow imminent in Section 2's reference to the "right to elect candidates of choice," – *i.e.*, that a minority-preferred candidate who achieves victory with crossover is not "elected" by the minority group or cannot have been the "candidate of choice" of the minority, see, *e.g.*, *Hall*, 385 F.3d at 429 – Justice Brennan's opinion certainly did not rest on that view.

The opinion plainly recognizes that, even in "majority" districts, black voters' preferred candidates can – and usually are – elected with the votes of white district residents. That proposition follows logically from recognizing that the *second Gingles* prong – minority voter cohesion – does not require complete unanimity, see 478 U.S. at 59 (describing black support ranging "from 71% to 92%" as "overwhelming" evidence as to second prong); see also *Sanchez v. Colorado*, 97 F.3d 1303, 1319 (10th Cir. 1996): in a district where minority voters account for 51% of district population and are 80%

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[24] Justice O'Connor noted that "if a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming * * * to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that * * * it would be able to elect some candidates of its choice," 478 U.S. at 89-90 n.1.

cohesive, their ability to elect candidates of choice depends on the willingness of some white voters (*e.g.*, 20% of the 49%) to cast votes for that candidate – and another jurisdiction, with a 45% African-American population, but 91% cohesion, would require fewer white votes.

Moreover, the *Gingles* opinion's discussion of minority voters' electoral *successes* recognized that white crossover support – and even decisive white support – did not mean that they had not elected their candidates of choice. See 478 U.S. at 89-90 n.1 (O'Connor, J., concurring in judgment) ("the Court recognizes that when the candidates preferred by a minority group are elected in a multimember district, the minority group has *elected* those candidates, even if white support was indispensable to these victories"); *Cano v. Davis*, 211 F. Supp. 2d 1208, 1231 (C.D. Cal. 2002) ("if minority-preferred candidates actually win elections, then the minority is able to elect representatives of its choice"). And *Gingles* likewise explained that voting is racially polarized when "a white bloc vote * * * normally will defeat the combined strength of minority support *plus white 'crossover' votes*," 478 U.S. at 56 (emphasis added).

Nor is it any more plausible to read Justice Brennan's opinion as recognizing the need for "a bright-line rule to act as a gatekeeper," *Rodriguez*, 308 F. Supp. 2d 346, 383 (S.D.N.Y. 2004). Justice Brennan's opinion specifically treated as open "whether § 2 permits, and if it does, what standards should pertain to, a claim * * * alleging that the use of a multimember district impairs its ability to influence elections." *Gingles*, 478 U.S. at 46 n.12. A Court concerned with closing "floodgates" and assuring that claims could be dismissed at the threshold – would surely have shut the door on claims that are widely seen as thornier and more open-ended than claims of ability-to-elect. See *Ashcroft*, 539 U.S. at 494 (Souter, J., dissenting).

Finally, and consistent with the preconditions' role as establishing a threshold, rather than a standard for imposing

liability, see *De Grandy*, 512 U.S. at 1011, equating 50% in a district with "*potential* to elect" was, at a time when effective minority districts were widely understood to require substantial supermajorities*, less demanding* than requiring actually elect candidates of choice. See *McDaniels v. Mehfoud,* 702 F. Supp. 588, 592 (E.D. Va. 1988) ("Plaintiffs * * * need not demonstrate that the minority will have a 'safe seat' in the proposed district, or even that they will constitute a majority of voters turning out on election day"); *Old Person v. Cooney*, 230 F.3d 1113, 1121 (9th Cir. 2000).[25]

2. As A Matter of Empirical Fact – and Law – Groups Who Do Not Account for a Numerical Majority of District Population Can And Do "Elect Candidates of Choice"

The notion that *Gingles* had *decided* that 50% was required would have been hard to reconcile with this Court's later decision in *De Grandy,* which both emphasized the general incompatibility of peremptory "shortcuts" with the text and structure of the statute, 512 U.S. at 1011, and expressly "assume[d] without deciding," that the first *Gingles* condition could be satisfied in a case where the minority group was "not an absolute majority of the relevant population in the additional [proposed] districts." *Id.* at 1009.[26]

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[25] When the Act was amended, effective minority districts were widely understood to require substantial *super*majorities. See *Ketchum v. Byrne*, 740 F.2d 1398, 1408 n.7 (7th Cir. 1984) (noting that sixty-five percent of district population was "considered necessary to ensure blacks a reasonable opportunity to elect candidates of their choice"); *United Jewish Orgs. v. Carey*, 430 U.S. 144, 162-66 (1977) (plurality opinion); Bullock & Dunn, *The Demise of Racial Districting and the Future of Black Representation*, 48 Emory L.J. 1209, 1214 (1999) ("by 1990 the [Justice Department] had recanted its commitment to [the sixty-five percent] standard").

[26] *De Grandy* also joined prior decisions refusing to settle a question that would be of indispensable significance in administering a rigid 50% "rule": which measure of population is appropriate. See, *e.g.*, *De Grandy*,

But decisions locating a district-majority "requirement" in the statutory reference to minority voters' "elect[ing] candidates of choice" cannot be reconciled with this Court's watershed decision in *Georgia v. Ashcroft*. Although the Court divided over the significance, for section 5 purposes, of districts in which minority voters can influence electoral outcomes, but are unable elect their own candidates of choice – and whether ability to elect may be traded against "substantive representation," *i.e.*, greater likelihood that governance outcomes will be in line with minority voters' preferences – it was unanimous in recognizing, as a matter of fact and of law, that minority groups accounting for less than 50% of district population do "elect candidates of choice." See 539 U.S. at 472 (citing expert testimony that in Georgia "African-American voters have an equal chances of electing their preferred candidate when the black voting age population of a district is at 44.3%); *id*. at 481 (noting districts in "'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*'") (quoting *DeGrandy*, 512 U.S. at 1020) (emphasis supplied); *id.* at 492 (Souter, J., dissenting) (defining "coalition districts" as those "in which minorities are in fact shown to have a similar opportunity [to elect candidates of their choice as majority-minority districts] when joined by predictably supportive nonminority voters").[27]

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512 U.S. at 1018 n.18. Indeed, decisions like *Valdaspino* which treat less-than-50% of CVAP districts as inadequate can be even stricter than *Gingles* itself, which considered only VAP data.

[27] Both the majority and dissenting opinions cited social science evidence and commentary that had emphasized both the inadequacy of demographic statistics alone as a predictor of a minority group's ability to elect and the empirical reality that 50% of population was not a floor. Grofman, *et al.*, *Drawing Effective Minority Districts: a Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1401

Both opinions make clear that a minority group's share of district population is, standing in isolation, an extremely poor predictor of its "potential to elect." 539 U.S. at 480 (recognizing that "[t]he ability of minority voters to elect a candidate of their choice is * * * often complex in practice to determine"); *id.* at 504 (Souter, J, dissenting) (black VAP alone is not meaningful without considering "evidence of likely voter turnout among minority and majority groups, patterns of racial bloc voting, [and] likelihood of white crossover voting").[28]

At least as important are the explanations of *why* the 50% figure (or any other single metric) is a poor indicator of a group's "potential to elect" its preferred candidate in a particular district. As participants in the political process are well aware, a minority group's electoral power depends on a series of variables, including whether the election is held in one or more stages and whether there are party primaries. See Grofman *et al.*, 79 N.C. L. Rev. at 1393 (determining the

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(2001) (estimating that, for congressional races in the South during the 1990s, 33% to 39% of a district's registered voters generally had to be black for a black candidate to be elected) (cited at 539 U.S. at 483); Cameron *et al.*, *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 Am. Pol. Sci. Rev. 794, 804 (1996) (estimating in northeastern United States, black voting-age population of 28.3% gives black voters a fifty-fifty probability of electing a black candidate to Congress) (cited at 539 U.S. at 482); Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. Rev. 1517 (2002) (cited at 539 U.S. at 480, 483; *id.* at 493 (Souter, J., dissenting)).

[28] See *Martinez,* 234 F. Supp. 2d at 1307, 1314 (noting legislative district with "black voting age population [of] 31.6% elected black candidate of choice in four preceding elections" and that new district "with a 41.8% black voting age population will afford black voters a reasonable opportunity to elect candidates of their choice and probably will in fact perform for black candidates of choice"); *Page v. Bartels,* 144 F. Supp. 2d 346, 365 (D. N.J. 2001) (three-judge court) (noting that 15 African American legislators had been elected from districts with less than 30% BVAP).

"percentage * * * needed to create an effective minority district" requires considering "the likely impact of the primary (and runoff) election on the ultimate electoral outcome"); Pildes, 80 N.C. L. REV. at 1534 ("[I]f black voters have effective control-of-the- primary election, those voters will determine who represents the district, even if black voters are not a majority of the district overall").[29] Given the realities of primaries and coalitions a fifty percent requirements does not bear any reasonable relationship to minories' ability to elect candidates of their choice. See *id.* at 1553 ("What should be so magical, then, about whether there are enough black voters to become a formal majority* * * ? If a safe and a coalitional district have the same probability of electing a black candidate, are they not functionally identical, by definition, with respect to electing such candidates?").

These insights and the functional view they embody are not novel. On the contrary, this Court's White Primary Cases recognized that in one-party jurisdictions, exclusion from the processes by which candidates were selected made the right to cast a ballot in a general election a hollow one. *Terry v. Adams*, 345 U.S. 461, 469 (1953) ("The Democratic primary and the general election have become no more than the perfunctory ratifiers of the choice that has already been made in Jaybird

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[29] *Martinez*, 234 F. Supp. 2d at 1304, 1315 (finding, for district that was 41.8% African-American, that because "blacks constitute 61.3% of registered Democrats [in the district], and Democrats constitute 63.8% of registered voters[,] * * * [t]he black candidate of choice is likely to win a contested Democratic primary, and the Democratic nominee is likely to win the general election" and that State House District in which African-Americans were about 32% of district population – but 64.4% of registered Democrats, had "performed for the black candidate of choice in every election from 1992 through 2000"). See also Brief of Appellant State of Georgia, *Georgia v. Ashcroft*, No. 02-182, at 15 n.7 (noting that "[w]inning the Democratic primary * * * allows African-American nominees a greater chance of election in a partisan general election because carrying the Democratic nomination brings additional white voters to his/her candidacy").

elections"); *Smith v. Allwright*, 321 U.S. 649 (1944). Cf. *Morse v. Republican Party of Virginia* , 517 U.S. 186, 217 (1996) ("It strains credulity" that Congress "did not mean [the Voting Rights Act] to cover the cases that capped the struggle to end the white primary").

Even if it were not foreclosed by *Georgia v. Ashcroft* (and *Gingles* itself), the notion that minority voters do not elect candidates of their choice when crossover provides a part of the winning total would be at war with common sense. On this understanding, Harold Washington's election as Mayor of Chicago would not represent an instance of African-American voters' electing a candidate of choice – because his victory depended on the 4.6% of the vote he received from Chicago's "white wards," see Starks & Preston, *Harold Washington and the Politics of Reform in Chicago: 1983-1987*, in RACIAL POLITICS IN AMERICAN CITIES 88, 97 (R. Browning et al., eds., 1990), and David Dinkins (who is estimated to have received 94% of African-American votes in the 1989 New York City mayoral election) would be similarly discounted, because his 51.1% vote total included white crossover votes.

3. Policies at The Core of The Voting Rights Act Compel Rejection of A "Fifty-Percent" Rule

If districts in which minority voters account for a 50% majority and those in which a smaller-sized group actually elects candidates of choice were – as opinions seeking to prop up the 50% rule have strained to show – different in kind for Section 2 purposes, that would have far-reaching consequences, including in this case. For example, if it were really true that only voters whose minority group accounts for a 50% or greater share of district CVAP can elect candidates of choice for purposes of Section 2, any arguable claim to "rough proportionality" that Texas could assert with respect to African-American voters, see *De Grandy*, 512 U.S. at 1000, would be suffer a fatal blow. In only one of the 32 districts under the 2003 plan does the African-American population meet the

Valdaspino "bright line rule." J.S. App. 168a. Obviously, the Texas NAACP would make no such claim, but that is because we recognize that Section 2 is properly construed as requiring a *consistently* functional, rather than a formal, approach.

A second consequence of the reasoning embraced by the district court is at least as serious. By drawing a bright line between districts based on the percentage of minority voters – and affording differential protection to those in which winning candidates prevail on the strength of minority votes alone, the decision gives minority voters strong reason to seek districts of the latter sort (either by "packing" districts with voters who might effectively participate in two adjacent districts and/or by altering proposed district geography in ways aimed at "improving " the demographic bottom line, at least to the degree permitted by *Gingles* and *Shaw* limitations).[30]

This Court's Voting Rights Act precedents (and its Equal Protection jurisprudence) make clear, such a rule is worse than "second best." See, *e.g.*, *De Grandy*, 512 U.S. at 1019-20 (rejecting "safe harbor rule" based on "a tendency to promote and perpetuate efforts to devise majority minority districts even in circumstances where they may not be necessary to achieve equal political and electoral opportunity"). There are, to be sure, jurisdictions where solidly majority-black or supermajority districts are appropriate and necessary, and *Ashcroft* properly affirmed that such districts remain a *permissible* alternative when created in pursuit of "effective minority representation." But the decision obviously does not sanction treating coalition districts, as would the district court's approach, as the *disfavored* alternative. See 539 U.S. at 481; *Shaw v. Reno,* 509 U.S. 630, 650 (1993); *Uno v. Holyoke*, 72 F.3d 973, 991 (1st

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[30] Indeed, the Jackson Plaintiffs undertook precisely such an exercise, drawing a "demonstration district" that was functionally identical to the 24th – but which might more readily satisfy the district court's (and Fifth Circuit's) numbers-driven requirements. See Jackson Pl. Ex. 116.

Cir. 1995) ("Influence districts, * * * are to be prized as a means of encouraging both voters and candidates to dismantle the barriers that wall off racial groups and replace those barriers with voting coalitions"). Under the district court's approach, minority voters in such districts must forfeit the protections of Section 2.

The decision below not only saw nothing wrong with government's targeting a coalition district, it suggested that such districts *rightly* belong in "the bull's eyes of partisan redistricting." J.S. App. 105a. If that were correct (and the Fifth Circuit's "bright line" distinction between districts above and below the 50% population line were meaningful), two of the only three districts in which black Texans still have meaningful electoral power would be proper – indeed preferred – targets for intentional dismantlement.

Indeed, the district court seemed to construe *Ashcroft* as supporting such a rule, quoting with apparent approval the State's argument "that if [as *Ashcroft* established] majority-minority districts may be altered without running afoul of the Voting Rights Act, then *a fortiori* an influence district may be altered.'" J.S. App. 103a-104a. But that reasoning supplies yet another example of the court's thorough misreading of *Ashcroft*. As Judge Ward recognized, *Ashcroft* did not grant States a license to eliminate districts, whether majority-minority or influence; instead, it allowed for deference to a jurisdiction's choice as to the *means of pursuing of effective minority representation*. Under *Ashcroft*, he explained, "[a] state enjoys the flexibility to choose [between] creating * * * a greater number of influence or coalition districts [and] strengthen[ing] its existing majority-minority districts," but the decision does not authorize jurisdictions to "ch[o]ose neither route." *Id.* at 198a. As Judge Ward explained, the "latitude" granted for plans, like Georgia's, that seek to augment "minority voter influence," is of no help to the Texas legislature's plan here, which makes changes "to crush * * * minority voters'

participation in the political process." *Id*. at 175a (discussing changes to District 23); see *id.* at 199a ("It is not accidental that, unlike the plan in *Ashcroft,* the present plan had overwhelming opposition from the minority legislators").

4. The 50% Rule Serves No Legitimate Function

Some courts have indicated that, even if unsupported by statutory text or by a proper reading of *Gingles*, a rigid 50% requirement can be defended as a simple means of screening out "the most marginal section 2 claims," *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 947 (7th Cir. 1988). But this Court has explained that such judicially-devised statistical "shortcuts" are at odds with the statute that Congress enacted. See *De Grandy*, 512 U.S. 1011; *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) ("Even if serious problems lie ahead in applying the 'totality of the circumstances' standard described in § 2(b), that task, difficult as it may prove to be, cannot justify a judicially-created limitation on the coverage of the broadly worded statute, as enacted and amended by Congress").

Even if simplicity could be counted as a virtue, however, the rule would have the vice not merely of "artificial[ity]," *Gingles*, 478 U.S. at 89 n.1 (O'Connor, J., concurring), but of irrationality. As shown above, the problem with a 50% cutoff is not that there is no principled or functional difference between districts slightly above and below the line – a problem with any cutoff – but rather that the statistic does not do even a passable job of "weeding out" districts in which minority voters are more or less likely to elect candidates of choice, let alone of identifying claims minority voters' claims are, under the "totality of the circumstances," weaker or stronger. See Pildes, 80 N.C. L. REV. at 1555 (referring to fifty-percent rule as a "talismanic requirement, divorced from any underlying

functional reasons").[31]

5. The Voting Rights Act Protects The Rights of Minority Voters to Elect Candidates of Choice and Participate in The Political Process Through Coalitions

In large part, the district court's assertion that the Voting Rights Act does not "protect * * * coalitions," J.S. App. 109a, simply restates the claim, rejected in *Ashcroft* (and unsupported in *Gingles*) that there is some essential difference, for purposes of the Voting Rights Act, between an election in which minority voters' candidate of choice prevails based only on minority vote totals and one where the same candidate's winning vote includes white crossovers.

That such white voters benefit from a remedy implemented to vindicate minority voting rights does not mean that they are "protected" by the statute, any more than would be white voters benefitted by a decision enjoining enforcement of a law intended to disenfranchise African Americans. Cf. *Hunter v. Underwood*, 471 U.S. 222 (1985). On the contrary, the statute, supported by exhaustive congressional findings, provides protection to members of groups that have been subject to "[g]enerations of rank discrimination," J.S. App. 90a (quoting *Miller v. Johnson*, 515 U.S. 900, 934 (1995) (Ginsburg, J., dissenting)), and it focuses on *their* opportunity to elect

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[31] The district court decision advanced another rationale for enforcing a rigid 50% rule – to assure that there are three *Gingles* preconditions, rather than two But it is not arithmetically impossible (or even empirically uncommon) that a district in which minority voters constitute less than 50% of the voting age population – and where white bloc voting is established – could elect minority-preferred candidates. See Grofman, et al, 79 N.C. L. REV. at 1401 (noting "clear pattern of racial bloc voting" in elections in which minority candidates were elected from less-than-50% minority districts). On the other hand, the tension between the two required showings *does* help to identify claims where closer judicial scrutiny is needed – and the strength of the showing on the third prong can affect the likelihood that the plaintiffs will establish liability.

candidates of choice.

And even when Section 2 claimants establish – through demographic evidence or electoral analysis – that they would be able to elect in a remedial district (and the other *Gingles* factors), they have merely crossed the threshold. Judicial relief depends on a further assessment of the totality of the circumstances. See generally *De Grandy*, 512 U.S. 1011. Far from "fencing [additional] territory from legislative reach," J.S. App. 113a, rejecting the 50% rule merely affirms the boundary established by Congress: jurisdictions may not pursue practices that, under the totality of the circumstances, deny minority citizens equal political opportunity.

To the extent that the district court decision reflects a distinct premise – that protection of "political coalitions" is somehow illegitimate under the Voting Rights Act, see J.S. App. 113a, it is also refuted definitely by *Ashcroft*. Under any circumstances, the district court's distrust of "political coalitions" – and sharp distinction between "partisan" voting and "racial bloc" voting – would be puzzling, given a statutory regime intended to promote *political* participation on an equal basis and that looks to evidence of "*political*" cohesion.

But *Ashcroft* stands opposed to the notion that minority voters' "racial" and political interests can – or should – be disentangled. Far from using "political coalitions" as a term of obloquy, to be viewed with suspicion in Voting Rights Act, the Court recognized them as both practically important, see 539 U.S. at 482 (citing social science evidence "that the most effective way to maximize minority voting strength may be to create * * * coalitional districts"); *id.* at 481 (describing "coalitions of voters who together will help to achieve the electoral aspirations of the minority group"), and more in keeping with the ultimate purposes of the Act than approaches that divide the electorate into homogeneous racial groups.

Nor did the Court balk at the reality that in "representative democracy," 539 U.S. at 483, minority citizens participate and

elect candidates though political *parties*. On the contrary, it recognized that the core concerns of the Act can be advanced by "increasing the number of representatives sympathetic to the interests of minority voters," *id.*, and, explicitly (and on the facts before it) by the likelihood of Democratic Party legislative control. See 539 U.S. at 469. Thus, the Court treated the election of Democrats as relevant to the "totality of circumstances" in Georgia, citing testimony that "'African-Americans have a better chance to participate in the political process under the Democratic majority than * * * under a Republican majority,'" 539 U.S. at 470.

This benefit, *Ashcroft* made clear, was not marginal or suspect under the Voting Rights Act:

> in a representative democracy, the very purpose of voting is to delegate to chosen representatives the power to make and pass laws. The ability to exert more control over that process is at the core of exercising political power.

539 U.S. at 483.

The dissenters in *Ashcroft* did not dispute this central point. The nub of Justice Souter's dissent was not that Georgia's black citizens' interest in electing (sympathetic) Democrats was illegitimate under the Voting Rights Act, but rather that a jurisdiction subject to Section 5 coverage should not be permitted to justify sacrificing more concrete benefits – ability to elect through "safe" *or* coalition districts – for ones that, are, by their nature, difficult to quantify. See 539 U.S. at 494-95 (emphasizing problems of "comparability and administrability").[32]

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[32] Even if there had been no such emphatic recent decision of this Court, we would take strong exception to the district court's suggestion that the voter plaintiffs in this case – or the NAACP – are "us[ing] race" in an inappropriate way. J.S. App. 105a-106a. See also *id.* at 90a & n.69 (castigating litigants who would "turn[] to" claims of racial discrimination "to heel radical partisan line-drawing"). Just as African-American voters can

B. District 24 Was Not A "Pure Influence District"

In rejecting the Tarrant County voters' claims, the majority opinion announced that the prior district was not, in fact, a "Black opportunity district," J.S. App. 110a, but rather a "[p]ure influence district," J.S. App. 113a. But its discussion was inconsistent with the plain facts about the district's political record and suggests an important misunderstanding of the meaning of the Section 2 guarantee.

In District 24 as drawn in 2001, African Americans were consistently large majorities of voters in the Democratic primary (64%), J.S. App. 197a, and they supported Democrats in the general election. J.S. App. 111a. African Americans could elect their preferred candidate with the support of only a small fraction of crossover Anglo voters. In practice, although a substantial majority of Anglos voted against Democratic nominees in general elections, the crossover rate was high enough that the candidates nominated by and preferred by black voters won consistently. In 20 general elections for statewide office, the candidate preferred by black voters carried this district 19 times.

Indeed, the State's expert expressly acknowledged that the 24th District had "performed" for African Americans," JA 219, and local elected officials testified knowledgeably and without contradiction as to the reality of African-American control. See JA 239-40 (Mayor Ron Kirk), JA 257 (State Senator Royce West); JA 241-43 (Tarrant County Precinct Administrator Roy Brooks); Trial Tr. Dec. 16, 2003 at 120 (State Representative

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be expected to welcome voting arrangements that enhance their effective representation whose ultimate aim is partisan (and sometimes because of that objective, see *Ashcroft*), when government officials take actions directed at *diminishing* minority voters' rights to cast a meaningful ballot, nothing in the purposes or the text of an Act which is concerned foremost with "results" – requires those affected to grant "a pass," based on assurances that the ultimate aim was to destroy the power of the political party the voters support.

Glenn Oliver Lewis).

The district court majority drew remarkable, and plainly wrong, inferences from this evidence, asserting that the "most rational conclusion" was "that Anglo Democrats control" CD 24. J.S. App. 111a-112a. See also *id.* at 111a (questioning Congressman Frost's status as a minority-preferred candidate, noting that he had never faced a primary challenge by a "Black candidate").

The solid evidence of African-American voters' ability to determine who would be elected in District 24 defies the characterization as a mere "influence" district, see *Ashcroft*, 539 U.S. at 482. And because Anglo *Democrats* constituted a far smaller share of the electorate than African-Americans Democrats under the 2001 plan, *e.g.*, JA 88, 97-99, J.S. App. at 197a (Ward, J.), the conclusion that they somehow "controlled" elections was not rational at all.

To the extent that this counterfactual assertion was an expression of doubt as to whether Congressman Frost was, in fact, African-American voters' preferred candidate, such skepticism was wrong as a matter of fact and law. Frost had consistently performed extraordinarily well on issues of special concern to African-Americans, earning exceptionally high NAACP scores (see JA 108-109), and the court heard testimony from African-American elected officials and other community leaders that Frost's ties to the Fort Worth black community ran deep, see pp. 8, 13, *supra* – and that he was, in fact, the black community's candidate of choice. See, *e.g.*, JA 242-243.

In this light, the district court's demand for a black primary challenger to confirm the authenticity of preferences actual African-American voters themselves had repeatedly registered at the polls is exceedingly odd.[33]

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[33]To the extent that the district court assumed that only election of a black candidate would demonstrate that African-American control was a reality, Tarrant County Precinct Administrator Roy Brooks testified that,

It should go without saying that the right of minority citizens to elect "representatives of *their* choice," 42 U.S.C. 1973(b), comprehends the right to choose a white candidate. See *Niagara Falls*, 65 F.3d at 1016 (rejecting suggestion that a white candidate cannot be "the actual and legitimate choice of minority voters"). While sopping short of treating the race of a candidate as categorically "irrelevant," the courts of appeals have overwhelmingly and correctly "reject[ed] the position that the minority's preferred candidate *must* be a member of the racial minority." *Ruiz v. City of Santa Maria*, 160 F.3d 543, 551-52 (9th Cir. 1998); see also *id.* at 551-52 ("Conversely, a candidate is not minority-preferred simply because the candidate is a member of the minority") (citation omitted).[34]

These courts have recognized that the Act was designed for voters, not candidates, and that a rule which refused to count candidates as minority-preferred unless they were themselves members of that minority would both contravene the Act's language and imperil its larger purposes. *Niagara Falls*, 65 F.3d at 1016 ("Such an approach would project a bleak, if not hopeless, view of our society-a view inconsistent with our with our people's aspirations for a multiracial and integrated constitutional democracy"); see also *Ashcroft*, 539 U.S. at 490-91 (quoting Congressman John Lewis's testimony).[35]

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based on his knowledge of political behavior of the district, Frost's successor would be African-American. JA 243.

[34]See also *Lewis v. Alamance County,* 99 F.3d 600, 607 (4th Cir. 1996); *Sanchez v. Colorado,* 97 F.3d at 1320; *Uno,* 72 F.3d at 988 n. 8; *NAACP v. City of Niagara Falls,* 65 F.3d 1002, 1016 (2d Cir.1995); *Clarke v. City of Cincinnati,* 40 F.3d 807, 812 (6th Cir.1994); *Nipper v. Smith,* 39 F.3d 1494, 1540 (11th Cir.1994) (en banc); *Jenkins v. Red Clay Consol. Sch. Dist.,* 4 F.3d 1103, 1125 (3d Cir.1993).

[35] The district court's doubts concerning bloc voting (J.S. App. 111a-112a) were also unfounded. First, under conventional Section 2 principles, the relevant question is not whether there would be bloc voting in the *remedial* district – but rather whether voting in the overwhelmingly Anglo,

II. THE LOWER COURT'S TREATMENT OF THE PURPOSE AND STATEWIDE EFFECTS EVIDENCE REFLECTED MISUNDERSTANDING OF SECTION 2

Because the district court was confident of its conclusion that the plaintiffs in this case were not entitled to the protection of Section 2 as a matter of law, it did not undertake a comprehensive "totality of the circumstances" examination. But the decision nonetheless made a series of broad and erroneous rulings, construing Section 2 in ways that would weaken its protection and that prevented the court from appreciating the full strength of plaintiffs' Voting Rights claim.

A. The Evisceration of African-American Political Influence Statewide Was Legally Significant

As undisputed evidence established, the plan's adverse effects on black Texans' exercise of the electoral franchise and their opportunity to participate in the political process were not limited to the residents of Tarrant County.

While minority voters in former Districts 1, 2, 9, 10, and 11 could not claim that they could control electoral outcomes under the court-ordered plan, they indisputably "play[ed] a

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Republican, and Suburban districts to which Tarrant County voters were *dispersed* was along racial lines.

But even on its own terms, the fact that roughly 30% of Anglo voters regularly supported black-preferred candidates in the general elections would hardly preclude finding racially polarized voting. See *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%). The district court's assertion that a 30% "crossover rate has been found to establish the absence of Anglo bloc voting * * * as a matter of law," J.S. App. 111a & n.115 (citing *Abrams v. Johnson,* 521 U.S. 74, 92 (1997)), was simply wrong. *Abrams* did not announce any such rule of law: it affirmed a district court finding of fact, determining that it was *not clearly erroneous*. See *id.* at 93 (citing 864 F. Supp. at 1390-91). Cf. *De Grandy*, 512 U.S. at 1011 ("bloc voting [is] a matter of degree, with a variable legal significance depending on other facts").

substantial, if not decisive, role in the electoral process," *Ashcroft*, 539 U.S. at 482. Elections conducted in these districts in 2002 were the closest in the State, and in all but one case the winning candidate lost among Anglo voters.[36]

The effect on political participation of shifting millions of voters to unfamiliar congressional districts itself represented a serious impairment of their ability to affect the political process. As Judge Ward explained (J.S. App. 196a-197a):

> Participation in the political process is hard work. It is harder for minority groups who have suffered the legacy of a history of official discrimination. We heard compelling testimony from Deralyn Davis, the Chairman Emeritus of the Texas Coalition of Black Democrats, about just how hard it is for minority voters in the state of Texas. She described the grassroots efforts of her and others to build coalitions, mobilize, and increase the African American influence in the state's political machine. The efforts did not focus on one location in the state, but extended statewide.

See *Gingles*, 478 U.S. at 99 (O'Connor, J., concurring in judgment) ("'[T]he power to influence the political process is not limited to winning elections'").

Finally, as documented above, the Plan resulted in a precipitous drop of responsiveness of individual representatives and the delegation as a whole to the interests of African American and Hispanic Texans. *Gingles*, 478 U.S. at 51 (calling for inquiry into "'whether there is a lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group'") (quoting S. Rep. 97-417 at 29 (1982)). Representatives who would often stand for African American interests in Congress – and could be counted upon to give those interests a

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[36] See Jackson Pls. Ex. 44 at 39; Jackson Pls. Ex. 75.

sympathetic hearing – were replaced by individuals whose track records were poor, and whose districts had been created with the express aim of ensuring that they would not have to answer at the ballot box to their newly acquired minority constituents. *Id.* at 100 (O'Connor, J., concurring in judgment) (emphasizing importance of considering "the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account").

Indeed, the State's explanation of how Tarrant County's African-American community became part of District 26, which the district court credited fully, in order to exonerate defendants of a *Shaw* violation, is, from this vantage point, inculpatory. The central thrust – that because *no* Representative wanted these voters in his district, they were passed around until they landed where they could be "absorbed" relatively painlessly by a safe incumbent – does not speak of a model of "effective minority participation." See J.S. App. 87a-88a ("'the political structure of [District 26] could handle that particular component of the Tarrant County population and still produce Republican results'") (quoting Bob Davis, the government's primary redistricting map drawer).

The district court blithely dismissed these effects as beside the point, on the grounds that "even a cursory glance at the population data reveals that none of these districts passes muster under *Gingles*'s first prong," J.S. App. 113a; that *Ashcroft* could not be read as announcing an affirmative Section 2 obligation to create influence districts; and that "if there is no obligation to create an influence district, there is no obligation to retain one," J.S. App. 110a n.114.

Whether or not *Ashcroft* should be read as affirmatively resolving the previously-reserved question whether Section 2 allows minority voters to establish, by the totality of the circumstances, their entitlement to a judicially-drawn influence district, see *Gingles* 478 U.S. at 46 n.12, *Ashcroft* and *De Grandy* make clear that such evidence of systematic

degradation of minority voters' influence may not be ignored in the Section 2 "totality of the circumstances" inquiry. See generally *De Grandy*; *Rural West Tennessee African-American Affairs Council, Inc. v. McWherter*, 877 F. Supp. 1096, 1101 (W.D. Tenn.), *aff'd* 516 U.S. 801(1995) (court must consider influence districts in assessing the totality of the circumstances).

To be sure, *Ashcroft* involved Section 5, not Section 2, but it is implausible to suggest that the two provisions differ in ways that make *Section 2* review more narrow or cursory. On the contrary, review under Section 5 is *more* "limited" in concept and operation, see *Miller,* 515 U.S. at 926 (emphasis added); see also *Reno v. Bossier Parish School Board*, 528 U.S. 320, 335 (2000) ("preclearance under § 5 affirms nothing but the absence of backsliding"), meaning that at least the full range of evidence judged relevant to the "totality of circumstances" in *Ashcroft,* see 539 U.S. at 464, 480, 484, must be cognizable under Section 2 – the provision, after all, in which the phrase "totality of the circumstances" actually appears. *See* 42 U.S.C. 1973(b). (Notably, the discussion in *Ashcroft* is supported almost exclusively with citations to Section 2 vote-dilution case law and two factors *Ashcroft* treats as especially important – the ability to "elect candidates of * * * choice," and the "opportunity to participate in the political process" – are likewise codified in the text of Section 2).

B. The Court Erred In Treating Partisan Motivation As Excusing Intentional Vote Dilution

1. Partisan Motivation And Discriminatory Intent Are Not Mutually Exclusive Alternatives

An organizing theme of the district court decision was that government actions motivated by pursuit of partisan advantage – whatever the effect on minority voting power – cannot be racially discriminatory: "There is little question but that the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage. The result disadvantaged Democrats. And a high percentage of Blacks

and Latinos are Democrats," J.S. App. 85a.

But this was not a case where government actors *just happened* to draw lines which resulted in African Americans voters' being left to "'to pull, haul, and trade to find common political ground'" with other voters in a new district. *De Grandy*, 512 U.S. at 1020. Rather, they placed a cohesive and compact group in the "bull's eye[]," J.S. App. 105a, and chose a new district in which they would be *least effective*.

As other courts have recognized, the analogy to the law of unintended disparate impact cannot be readily transplanted to the context of minority voting rights. First, were partisan motive really a complete defense, (Republican) government officials could single out African-American neighborhoods for disadvantageous treatment in the electoral process – and defend against a charged Equal Protection violation by asserting (truthfully) that their *motives* were partisan. Under that approach, the very same practices that gave rise to the Voting Rights Act – largely perpetrated by white Democrats in the One-Party South, to maintain their control of that party in the face of growing African-American empowerment – would be permissible in the two-party South if committed by (Anglo) Republicans for "partisan" reasons.

Moreover, the franchise is fundamentally different from other areas where the intent/impact construct holds sway, both because the right to vote is itself fundamental – see *Mobile v. Bolden*, 446 U.S. 55, 113 (1980) (Marshall, J., dissenting), and because it is impossible, as a practical matter, to accomplish the "political aim" of preserving or defeating an incumbent representative without targeting the rights and interests of her supporters in electing her. Cf. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (disparate treatment is impermissible means of accomplishing "benign" object). Where the right of minority voters to cast an undiluted vote is protected, moreover, such aims veer into even more sensitive terrain.

In *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir.

1990), the court sustained a finding of intentional discrimination in a case where a cohesive, geographically compact Hispanic community had been fractured with the purpose of preserving the map drawers' incumbency. See 918 F.2d at 771.[37] Judge Kozinski filed a concurrence, placing this fact pattern in the broader context of "federal discrimination law." *Id.* at 778. First, he dismissed the argument that there can be no "intentional discrimination"without an invidious motive:

> Indeed there can. A simple example may help illustrate the point. 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. Have you engaged in intentional racial and ethnic discrimination? Of course you have. Your personal feelings toward minorities don't matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood.

Id. at 778 & n.1. That (as the district court had expressly found) defendants would have drawn the map to *increase* Hispanic voting strength had that goal been compatible with their *political* aim of preserving their own incumbencies, Judge Kozinski explained, did not acquit their actions. What mattered was "that elected officials engaged in the single-minded pursuit" of political advantage had "run roughshod over the rights of protected minorities." *Id.* Where "the record shows

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[37] Even though the *Garza* plaintiffs could not claim that they would constitute a majority of the citizen voting-age population in a properly drawn district, the court held that it was sufficient in a case of intentional dilution to produce an alternative in which their voting strength would be meaningfully augmented.

that ethnic or racial communities were split to assure a safe seat for an incumbent," he concluded, "there is a strong inference – indeed a presumption – that this was a result of intentional discrimination." *Id.*; accord *Ketchum*, 740 F.2d at 1408 ("Since * * * many devices employed to preserve [white incumbencies amid a high black-percentage population] are necessarily racially discriminatory. 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").[38]

Finally, the interest in disadvantaging African-American voters "as Democrats" rather than "as African-Americans" are not cleanly separated the way that "women as women" and "women as non-veterans" could be distinguished in *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979). As Judge Ward recognized, the "political reality that blacks and Latinos in Texas vote largely Democratic in * * * general elections," cannot be explained by saying that minority individuals happen to be Democrats; rather, they do so "because, at least in Texas, the Democratic candidates are generally more responsive to the concerns of these minority communities." J.S. App. 197a (Ward, J.).

> Race is closely correlated with partisan affiliation and attitudes about race play a crucial role in structuring beliefs

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[38] Nor is it right that a voting practice adopted with the intent to dilute minority votes is lawful unless a plaintiff establishes that a racial motive were "predominant." See *Miller*, 515 U.S. at 918. That ignores the stated rationale for the exceptionally high intent showing in the *Shaw* line: precisely because they involve equal protection claims "analytically distinct" from vote dilution. *See Shaw v. Reno*, 509 U.S. at 641 (explaining that plaintiffs had not alleged "that the * * * reapportionment plan unconstitutionally 'diluted' white voting strength" and that "[d]ifferent standards apply" to vote dilution claims); *Cano*, 211 F. Supp. 2d at 1216 ("The *Shaw* doctrine is unusual in that, unlike most constitutional doctrines, it requires no concrete injury").

> about politics and public policy in many jurisdictions. Currently, African-Americans are disproportionately associated with the Democratic Party, while the Republican Party is overwhelmingly white. As African-Americans have come to play a more significant role in the Democratic Party, the percentage of whites voting Republican has risen sharply. According to Thomas and Mary Edsall, "[r]acial divisions have become ingrained in partisan politics in the deep South and, increasingly, across the urban and suburban wards of all major metropolitan areas." They contend that "in the South, race has increasingly become the defining characteristic of partisanship," so that, although "the South has produced more examples of biracial coalition than any other region, the general thrust in the South is a steady movement toward a politics of black and white."

Briffault, *Race and Representation After Miller v. Johnson*, 1995 U. CHI. LEGAL F. 23, 56-57 (quoting Edsall & Edsall, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 259, 284-85 (1991)).

2. The Government Interest Advanced Is Not Merely Tenuous, But Illegitimate

But even if the district court's approach were tenable, and it were right to credit the State's insistent claim that its only purpose for burdening those voters is bare partisanship, it would understate matters to say that "'the policy underlying'" Texas's districting scheme is "'tenuous.'" See *Gingles*, 478 U.S. at 37 (quoting Sen. Rep. No. 97-417 at 29 (1982)); cf. *Houston Lawyers' Ass'n v. Att'y Gen.,* 501 U.S. 519, 526 (1991) (whether governmental interest is legitimate "is merely one factor to be considered in evaluating the 'totality of the circumstances,' that interest does not automatically, and in every case, outweigh proof of racial vote dilution").

The principle that burdens on minority voting rights become less permissible when the government's reasons for

imposing them wanes is squarely implicated here. As other parties explain in depth, this Court's case law gives every reason to conclude that the actions at issue were not merely tenuous, but unconstitutional. Even if the Constitution permitted Texas to take up the federally-delegated authority to draw congressional district lines in the wake of a court-imposed plan, the State had no legitimate reason for doing so here. And unlike cases that treat partisanship in congressional districting as a necessary – (nearly) intractable – evil, see *Vieth*, 541 U.S. at 292 (plurality opinion) (acknowledging that "severe partisan gerrymanders violate the Constitution"), this case involves the "evil" without any necessity, *i.e.*, a bare desire to disadvantage others, without any accompanying public purpose.

The extraordinary, gratuitous, mid-decade nature of the partisan redistricting here compounds its invidiousness. The already "hard work" of political participation in a State where racial discrimination and inequality remain potent, see J.S. 196a (Ward, J., dissenting), becomes intolerably difficult when the individuals entrusted with government power use it capriciously to upset lawful political arrangements, to the intended disadvantage of minority citizens.

C. The Section 5 Preclearance Process Cannot Substitute For Full Section 2 Review

In holding that the serious and uniformly negative effects on minority voting raised no Section 2 concern, the district court invoked the availability of Section 5 review and the fact that the Justice Department had rendered no objection. See J.S. App. 113a (court was "persuaded that alterations to [CD 24] raised questions primarily of § 5, which have been answered by the Department of Justice"). This was serious error.

Although Section 2 litigation frequently asks a court to do more than reverse a departure from a fairer status quo, the fact that a prior, lawful plan supplies the "benchmark" for a vote dilution claim cannot mean that the claim does not sound in Section 2. (Indeed, that proposition would treat what *Holder v.*

Hall, 512 U.S. 874 (1994), identified as a recurring difficulty of some Section 2 claims as their defining feature).

Nor is a positive result in the Section 5 administrative process entitled to any legal effect under Section 2. See, *e.g.*, *Gingles*, 478 U.S. at 34 (invalidating districts in a state-legislative plan that had been precleared); 42 U.S.C. 1973c (preclearance shall not "bar a subsequent action to enjoin enforcement" of the precleared voting change"); 28 C.F.R. 51.49 (preclearance "does not constitute the certification that the voting change satisfies any other requirement of the law beyond that of section 5"); *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 485 (1997) (noting that "a private plaintiff remains free to initiate a § 2 proceeding"). This is no not only because of the significant differences in the provisions' substantive focus, see *id.* at 477, but also because of the expedited time frame in which such decisions are made, and the very limited rights afforded to those who stand to be most affect. cf. *Morris v. Gressette*, 432 U.S. 491 (1977). And as what happened in this case illustrates, the reasoning supporting a grant of preclearance is not always self-evident.

If anything, the circumstances that gave rise to this case highlight the danger that importing any such notion of "field preemption" into the Voting Rights Act would carry. As the evidence showed, the fact that they would ultimately have to run the preclearance gauntlet assured that decision makers here were at least *aware* that they had responsibilities under the Act – though, in the end, they could not resist breaching even that restraint. In jurisdictions where even that mild deterrent is absent, the dangers posed the rules of law embraced below would be even greater.

* * *

The decision below quoted Justice Ginsburg's explanation for close federal judicial review in this area – "'[g]enerations of rank discrimination" against minorities, "as citizens and as voters," *Miller*, 515 U.S. at 934 (Ginsburg, J., dissenting). But

the broad rules of nonintervention it read into the Voting Rights Act – designed to liberate more "territory," J.S. App. 113a, from the reach of Section 2 – are not consistent with that acknowledgment.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully Submitted.

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