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

REPLY BRIEF FOR APPELLANTS

J. GERALD HEBERT
J. GERALD HEBERT P.C.
5019 Waple Lane
Alexandria, VA 22304
(703) 567-5873
Counsel for the "Democratic Congressional Intervenors"

PAUL M. SMITH
Counsel of Record
SAM HIRSCH
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000
Counsel for the "Jackson Plaintiffs"

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REPLY BRIEF OF THE JACKSON APPELLANTS

Appellees go to great lengths to portray the Texas Legislature's 2003 redistricting efforts as a laudable exercise in fostering good government and restoring democratic accountability. *See, e.g.*, State Br. at 18 ("This case is fundamentally about democracy."). That is nonsense. This was not some bipartisan effort to reallocate districts equitably. Orchestrated from Washington, it was one of the most notorious partisan power grabs in our history, designed to cement the narrow Republican majority in the U.S. House of Representatives. In pursuit of that goal, the Republicans in the Legislature fought tooth and nail, through months of parliamentary maneuvering, to replace a districting plan that was fair and lawful with one designed solely to maximize the number of Republicans that Texas would send to Congress.

Thus, far from being erroneous as appellees claim, the District Court's finding that the "single-minded purpose of the Texas Legislature . . . was to gain partisan advantage," J.S. App. 85a, was the only conclusion that the record could support. It follows that this abuse of governmental power was invalid under the Equal Protection Clause because it served no legitimate and rational public purpose. To allow such an illegitimate state action to stand would depart from our most cherished constitutional principles.

The Republican legislators pursuing their purely partisan agenda hesitated for months about how far they should go. But they ultimately decided to go for broke. Seeking to maximize their gains, they were willing (1) to eliminate one of only four districts where African-Americans had an opportunity to elect candidates of their choice and (2) to eliminate a Latino opportunity district and try to replace it with a "land bridge" district linking urban concentrations of Latinos in Austin and McAllen, 300 miles apart.

The bottom line is that upholding the 2003 Texas redistricting would give legislatures a green light to change district lines at will, whenever necessary to produce whatever electoral outcomes they favor. Far from promoting democracy, that result would subvert it, as voters are shifted from district to district and Representatives are chosen not "by the People of the several States," but by the politicians. U.S. CONST. art. I, § 2, cl. 1; *see People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1242-43 (Colo. 2003).

I. Texas Violated the First and Fourteenth Amendments by Enacting a Redistricting Law Solely to Benefit One Political Party at the Expense of Another.

Appellees devote many pages to trying to explain why it was constitutionally legitimate for the Legislature to redraw congressional districts for partisan reasons in 2003, just two years after lawmakers made no effort to draw a map and forced the courts to do so. But appellees' rationalizations fail because they ignore both the law and the undisputed facts.

1. Appellees' primary justification is the one suggested by the District Court in its opinion on remand — the notion that the 2003 plan sought to eliminate vestiges of the 1991 Legislature's supposedly pro-Democratic gerrymander that had made their way into the court's map 10 years later. State Br. at 41-45. That argument fails as a matter of law because it is just another way of saying that the Legislature did not like the partisan composition of Texas's congressional delegation and set out to use its control over district lines to defeat specific Representatives by breaking up the particular political communities where they enjoyed majority support.

Pure partisanship does not become a legitimate state interest just because the current delegation does not match the Legislature's assessment of the political leanings of

voters statewide. Legislators are not free to recalibrate the machinery of democracy whenever election outcomes strike them as "unbalanced." The Elections Clause delegates power to the state legislatures "'to issue procedural regulations,'" not "'to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.'" *Cook v. Gralike*, 531 U.S. 510, 523 (2001) (citation omitted).[1]

Nor can purely partisan goals be repackaged as a response to the prior acts of political opponents. Such a defense is particularly inapt after *Vieth v. Jubelirer*, 541 U.S. 267 (2004), where the plurality cautioned that it is difficult to determine which party has "majority status" statewide and, more importantly, that it is folly to expect that candidates winning in separate winner-take-all districts will always reflect statewide trends. *Id.* at 288-90. For those reasons, it is absurd to call a districting plan a "gerrymander" just because, in a given year with one set of candidates, it produces results diverging from the perceived partisan balance statewide.

In any event, this "corrective partisanship" argument also fails as a matter of fact. As the District Court expressly found in 2004, the 2001 court-drawn map was not biased. J.S. App. 85a. To the contrary, it reflected the "strength of the Republican Party in Texas, with 20 of the 32 seats

[1] Appellees invoke the Court's statement in *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973), that "judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength." State Br. at 45. But *Gaffney* does not stand for the proposition that achieving partisan balance can be the sole motive justifying an otherwise unnecessary mid-decade redistricting. Nor were the facts there remotely like those presented here, where the Legislature attempted to maximize Republican advantage at all costs.

offering a Republican advantage." *Id.* That means that in the 2002 election using that map, a large majority of the State's Representatives were elected in Republican-leaning districts.

The accusations in the District Court's 2005 opinion and in appellees' briefs that the court-drawn 2001 map was biased are premised on a single fact: The 2002 elections produced a congressional delegation with 17 Democrats and 15 Republicans. But as the District Court recognized in 2004, that occurred only because "voters in 2002 split their tickets" and "[s]ix incumbent Anglo Democrats were elected by narrow margins in Republican-leaning districts." *Id.* Despite that undeniable reality, the court a year later characterized its own map as "perpetuating" a prior Democratic gerrymander and accepted the notion that the 2003 map "dismantl[ed] a prior partisan gerrymander." *Id.* at 21a, 25a. That is just unfounded rhetoric. The Democrats who won in Republican-leaning districts did so because they were moderate-to-conservative incumbents who had earned their constituents' trust. They had been first elected years before, in mainly rural parts of the State that had never sent a Republican to Congress. And when they were narrowly reelected in 2002, it was not because some prior gerrymander, real or imagined, remained in place. It was because a majority of their constituents, who had gradually moved toward the Republican Party over the years, continued to want these lawmakers to represent them in Congress.

At trial, the State failed to put on a shred of evidence supporting the notion that the court's 2001 map was biased and required correction. To the contrary, appellees chose not to call to the stand their electoral expert, Professor Keith Gaddie. That no doubt was because he had testified in deposition that the 2001 map was fair or slightly favored the

Republicans, while the 2003 map was very biased. JA 189-93, 216, 224-25, 228-30.[2] The court, however, let *appellants* introduce Gaddie's expert report and deposition as exhibits. *Id.* at 173-230. So they became part of the trial record.

Although the record contained no evidence supporting claims of bias in the 2001 map, the District Court concocted its own "expert analysis," simplistically comparing the composition of the Texas delegation with the outcomes of statewide races. J.S. App. 42a. An *amicus* brief in this Court goes further, offering a completely untested and unverified "factual" analysis (complete with charts and graphs purporting to show that the 2001 court-drawn map was a "gerrymander") that the State chose not to submit to adversarial testing at trial. *See* Heslop Br. at 1a-23a.

But all these efforts are just fancy ways of saying that a delegation with 17 Democrats out of 32 does not reflect statewide voter preferences in Texas. Even assuming that is true, the results by themselves cannot show that the *map* is biased. Bias is reflected in the *opportunities* a map offers to each party, separate and apart from how particular candidates happen to do in a given year. Here, as the court found, the opportunities were there for the Republicans in 2002. J.S. App. 85a. But voters in six Republican-leaning districts chose to split their tickets and narrowly reelect Democrats.

Another way to show the flaws in labeling the 2001 plan a "gerrymander" based on the 2002 election results is to ask what would happen if that plan were reinstated. It is nearly

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[2] Gaddie agreed with appellants' expert, Professor John Alford, who testified that if votes statewide were divided 50-50, the 2001 map likely would have given the Republicans slightly more districts than the Democrats, while the 2003 map likely would have given the Republicans an 8- to 12-seat advantage. *See* JA 34-42, 48-55, 216, 229-30.

certain, with all the Republican incumbents elected in 2004, that elections using the 2001 map would now produce a majority-Republican delegation.[3] But that would not make the same court-drawn map a pro-*Republican* "gerrymander."

By contrast, the record leaves no doubt that the replacement map passed by the Legislature in 2003 was extremely biased and anticompetitive. The State's expert, Professor Gaddie, testified that the new map would give Republicans an advantage in 22 of 32 seats even if they were to receive only 52% of the vote statewide. JA 216, 229. And they would carry 20 of 32 seats even if the statewide vote split 50-50. *Id.* Moreover, as appellants' expert Professor Alford testified a year later, the map was remarkably successful in moving toward a 22-10 division of seats in its very first election, and the prospect for the rest of the decade is extremely noncompetitive elections in nearly every district, with incumbents winning by margins of 40% or more. J.S. App. 225a-226a. It is hard to imagine a clearer example of legislators deciding in advance of any voting how many seats should go to each party and where they should come from. Such rigging of elections is the antithesis of "restoring democratic accountability." State Br. at 19.

If the Court, on this record, were to hold that Texas's

[3] A final flaw in the argument about vestiges of a prior gerrymander in the 2001 map is the fact that the District Court in 2001 specifically "eschewed an effort to treat old lines [from the 1990s maps] as an independent locator." J.S. App. 207a; *see* Jackson Br. at 4-5, 28. Instead, it emphasized neutral and traditional criteria like compactness and following local political boundaries. J.S. App. 207a-208a. The most that can be said is that the court created a separate district for each incumbent, regardless of party. *Id.* at 208a. That is not surprising, since a court is hardly going to pick and choose which incumbents to "pair" in one district. But avoiding needless pairings is a far cry from reproducing the prior map.

2003 plan served a legitimate governmental purpose because it restored partisan balance, it would be making legal and factual errors and giving *carte blanche* to legislators elsewhere to follow suit. For decades, our Nation has been well served by the tradition that lines should not be redrawn for political reasons in mid-decade. The Court should not stretch basic constitutional principles to bless the departure from that tradition that Texas saw fit to initiate in 2003.

2. Appellees also argue that a showing of purely partisan *motives* does not suffice to invalidate a redistricting law and that sufficiently severe *effects* also must be shown. State Br. at 36-41. That assertion lacks any basis in law or logic. Some consideration of politics is permissible when enacting a map that also serves legitimate governmental purposes. But the new map must, in fact, serve some legitimate governmental purpose to pass muster under the First and Fourteenth Amendments. A desire to replace Democrats with Republicans cannot provide the requisite justification.

Our claim does not depend on the proposition that such partisan legal classifications are inherently "invidious," *see* State Br. at 38 — although there are strong arguments to that effect. *See, e.g.*, *Larios v. Cox*, 300 F. Supp. 2d 1320, 1329-34, 1347-49 (N.D. Ga.) (invalidating a plan because otherwise-permissible population disparities systematically discriminated against one political party), *summarily aff'd*, 542 U.S. 947 (2004). Rather, we rely on the straightforward idea that securing partisan gain, standing alone, can never be a legitimate and rational basis for official action. *See id.* at 1338 ("The population deviations in the Georgia House and Senate Plans are not the result of an effort to further any legitimate, consistently applied state policy."). If the law were otherwise, there would be no basis for invalidating any state action favoring one political party over another — such as political litmus tests for civil-service hiring or for access to

public fora. Remarkably, in their 123-page brief, appellees never even mention the cases cited by appellants holding that state power may not be used solely to benefit a favored private interest or to harm a disfavored one — cases ranging from *Romer v. Evans*, 517 U.S. 620 (1996), to the political-patronage cases. *See* Jackson Br. at 18-21.

Where such single-minded intent exists, there is no need for a plaintiff to establish any particular *degree* of actual discriminatory effects. At least where, as here, there is no doubt that an intentional effort to redesign the electoral system to benefit one party had some effect (shifting six seats in Congress), the plaintiff has a right to redress.

3. Appellees' third response is to try to walk away from their concession and the District Court's finding that the *only* reason the Legislature acted in 2003 was to add as many Republicans to the State's congressional delegation as possible. *See* State Br. at 9-11, 33-35. They point to a list of more parochial political considerations that affected the location of particular lines once the decision to redraw the map was made. But nothing in the record even hints that the Legislature went through nearly a year of unparalleled wrangling, including three special sessions, for such trivial purposes as putting the city of Arlington into one district or keeping State Representative Lewis's district whole or uniting Parker and Wise Counties. As the District Court found, the *only* reason the Legislature acted at all was to engineer the replacement of targeted Democratic Congressmen with Republicans. J.S. App. 85a, 88a-89a.

Appellees claim that these findings did not mean what they said because they came when the court was rejecting charges of racial animus. State Br. at 28. But the court easily could have found that there was no racial animus without going on to say that the Legislature's actual motives

were purely partisan. Instead, the court said "[t]here is little question but that the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage." J.S. App. 85a. It added: "With Republicans in control of the State Legislature, they set out to increase their representation in the congressional delegation to 22. As we will explain, *all that happened thereafter flowed from this objective . . . .*" *Id.* (emphasis added); *see also* JA 195-96. These and other passages in the court's opinion leave no doubt that the court knew precisely what it was saying.

4. Finally, appellees suggest there is a legitimate state interest in passing a new map just so there will be a map that was passed by the Legislature. They cite a Texas Attorney General's opinion in an attempt to show that the Legislature still had a duty to redistrict even after the courts had remedied its failure to do so in 2001. State Br. at 30-31 (quoting Op. Tex. Att'y Gen. No. GA-0063 (2003)). But the Attorney General said only that the Legislature retained the "authority" to act in 2003. He did not say that leaving the 2001 map in place would have violated any law, state or federal.[4] *See generally* JA 18-26.

Appellees point to language in prior cases that they say recognizes a legislative right to alter a court-drawn remedial plan. State Br. at 52-55. But this Court has never held that a legislature may sit on its hands when it has a constitutional duty to draw a map and then claim a right to alter a court-drawn remedial map years later when the duty has expired. *See Growe v. Emison*, 507 U.S. 25, 34-35 (1993)

[4] Even if state law had imposed such a duty, that cannot supply an independent justification for dramatically revamping the map. The fact that the Legislature shifted more than eight million Texans into new districts had nothing to do with a professed desire to enact a plan legislatively and everything to do with maximizing partisan advantage.

(recognizing States' constitutional duty "timely" to redistrict, "during the brief interval between completion of the decennial federal census and the [next] primary [election]"). And even assuming that such authority exists, it could only be exercised consistent with the Legislature's constitutional duty to avoid passing laws that lack a legitimate public purpose. Once the lawful court-drawn map "altered the status quo," *id.* at 35, the Legislature no longer could point to any legal duty to justify changing the status quo again. Nor could it exercise its redistricting power just to replace Representatives of a disfavored party, any more than Congress may exercise its power to regulate interstate commerce solely to help Democrat-owned businesses at the expense of competitors.

The Court's summary affirmance in *Cox v. Larios*, 542 U.S. 947 (2004), demonstrates this point. The Court has long held that States may redraw their legislative districts without having to justify population disparities of less than 10%. *See id.* at 951 (Scalia, J., dissenting) (citing cases). But *Cox* held that a legislature's exercise of that power cannot be designed to favor one political party by making all Republican-leaning districts more populous than Democratic-leaning districts. *See id.* at 947-51 (Stevens, J., concurring).[5]

II. The 2003 Plan Dilutes African-American Voting Strength and Violates the Voting Rights Act.

Unable to refute appellants' legal argument that the Fifth Circuit's "50% Rule" misinterprets Section 2 of the Voting Rights Act,[6] the State and its *amicus*, the United States,

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[5] Appellants incorporate the one-person, one-vote arguments set forth in their opening brief and in Travis County's briefs in No. 05-254.

[6] *See* Jackson Br. at 32-39; *see also* Texas NAACP Br. at 17-39; LDF Br. at 6-16; North Carolina NAACP Br. at 4-17.

hardly try. State Br. at 72; U.S. Br. at 17, 23. Instead, they claim that this Court need not reach that issue because the trial court's factual findings provide an independent basis for rejecting appellants' Section 2 claim. They are wrong.

The court below clearly erred in holding that Anglos, rather than African-Americans, controlled District 24 under the 2001 plan. J.S. App. 110a-112a; *see Easley v. Cromartie*, 532 U.S. 234, 243 (2001) (under the clear-error standard, requiring "extensive review" of findings that have not been reviewed and affirmed by an intermediate court). The analyses conducted by appellees' own expert are particularly telling and therefore are presented here in some detail.[7]

A. African-American Control of General Elections

The District Court concluded that African-American voters did not control general elections in the 2001 plan's District 24 because their opportunity to elect their preferred candidates "lies in coalitions with Anglos who vote with them in the general election for Democrats." J.S. App. 111a. But contrary to appellees' characterization (*see* State Br. at 14, 73), that is not a factual finding. It is merely a restatement of the 50% Rule. All coalitional-district claims barred by the 50% Rule seek to create minority opportunities that depend on crossover support in general elections. In *Georgia v. Ashcroft*, 539 U.S. 461 (2003), this Court defined

[7] As noted above, the State chose not to call Professor Gaddie to testify, but his deposition was admitted in evidence. There, he conceded that the 2001 plan's District 24 "perform[ed] for African-Americans." JA 219. Moreover, his statistical analyses of that district — and of the five districts that replaced it in the 2003 plan — were admitted into evidence as parts of State Exhibits 1, 20 to 23, 30 to 33, and 46 to 51. Except where otherwise noted, all election statistics cited here come from those State Exhibits. These statistics are virtually identical to those derived by appellants' expert. J.S. App. 197a; *see* JA 92-119.

a "coalitional district" as one where a minority group's voters could "'form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice.'" *Id.* at 481 (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)). So a coalitional district is, by definition, one where the minority group lacks unilateral control.

If this Court agrees that Section 2 protects coalitional districts, then the proper factual inquiry as to general elections focuses on whether the crossover vote is sufficiently reliable to allow the minority group a real opportunity to elect its favored candidates. That test clearly was met here, as it was undisputed below that African-American voters in District 24 could elect their preferred candidates in general elections. *See, e.g.*, JA 100. The State's expert analyzed 20 general elections covering the entire district, 13 of which involved at least one minority candidate. Within District 24, the black-preferred candidates prevailed in all 20 general elections.

They won for four reasons. *First*, although the district is only 21.4% black in voting-age population (VAP) and (more relevantly) 25.7% black in citizen voting-age population (CVAP),[8] the actual electorate usually was slightly more than one-third black. *Second*, African-Americans voted cohesively, never giving less than 93% of their vote to their preferred candidate. *Third*, black-preferred candidates received near-unanimous support from Latinos, who constituted 3% to 7% of the electorate. *Fourth*, black-preferred candidates usually received between 15% and 25%

[8] A particularly clear example of the District Court's erroneous fact-finding is its statement that District 24 was "less than 22% [black in] CVAP." J.S. App. 110a. *But see* JA 339 (showing the district's CVAP to be 25.7% black, 20.8% Latino, and 49.8% Anglo).

of the Anglo vote.[9] Given the first three reasons listed above, that small but reliable Anglo crossover vote was enough to put the black-preferred candidate over the top every time.

African-American former Dallas Mayor Ron Kirk's 2002 campaign for U.S. Senate is instructive. In the general election, 38% of the votes in District 24 were cast by minority voters, who gave Kirk 98% of their votes. Even with the benefit of being a local Dallas-based candidate — what appellees term the "'friends and neighbors' effect" (State Br. at 80, 85) — Kirk received only 28% of the Anglo vote. But that was enough for a double-digit victory in District 24, even as Kirk was losing statewide.

B. African-American Control of Primary Elections

To the extent that the District Court found that African-American voters did not control Democratic primaries in District 24 (*see* J.S. App. 110a-112a), the court clearly erred. Appellees' own expert analyzed 11 Democratic primaries or runoffs covering all of former District 24. Nine of those 11 contests involved at least one minority candidate. Within District 24, the black-preferred candidate prevailed 10 of 11 times. The only exception was Morris Overstreet, an under-funded candidate in the 1998 primary for Attorney General, who received an abysmal 18.7% of the vote statewide.[10]

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[9] The District Court clearly erred when it found "an Anglo crossover rate of 30.75 [percent] (unweighted mean)" in general elections. J.S. App. 111a; *see* U.S. Br. at 7. That figure was taken verbatim from the State's post-trial brief, which reported the average Anglo crossover rate in four Democratic primaries and runoffs — not in general elections. *See* State Defs.' Post-Trial Br. at 34-35 (filed Dec. 22, 2003). In general elections, appellees' expert found that the Anglo crossover rate usually fell between 15% and 25%, exceeding 30% in only 2 of the 20 contests he analyzed.

[10] Appellees suggest that the 2002 Court of Criminal Appeals primary shows lack of black control and lack of black political cohesion in District 24. State Br. at 80, 85, 86 n.99. That is flat wrong. In that

Black-preferred candidates won these Democratic primaries for two reasons. The first was that, in all 11 primaries, a majority of voters were African-American — and in the most recent elections, between 61% and 69% of the voters were African-American. By contrast, no more than 16% of the voters were Anglo in any of the 11 contests — making Anglos the third largest portion of the electorate.

The District Court discounted these figures by speculating that Anglo turnout in the Democratic primary would balloon if an African-American challenged District 24's Anglo Congressman, Martin Frost. J.S. App. 111a. But the court ignored appellees' expert analysis showing that Anglo Democrats were vastly outnumbered in 11 separate contests, nine of which involved a minority candidate. Even when Anglo Congressmen John Bryant (in the 1996 primary and runoff) and Ken Bentsen (in the 2002 primary) ran for U.S. Senate against prominent minority candidates (Latino Victor Morales in 1996 and African-American Ron Kirk in 2002), Anglo voters did not rush into the Democratic primary to support them. Indeed, black voters outnumbered Anglo voters more than four-to-one in each of those elections. Although the District Court, appellees, and their *amici* all speculate about what might happen in a future biracial congressional primary, their conjecture is unsupported by any record evidence. *See* State Br. at 77-79 (predicting

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primary, pitting African-American candidate Julius Whittier against Anglo candidate Pat Montgomery, fully 60% of the district's black vote went to Montgomery, who carried the district handily. *See* J.S. App. 112a. The State focuses solely on the fact that the black candidate got only 40% of the district's black vote. But the important fact is that 60% of the black vote united behind one candidate, and that candidate won. For the State to suggest that the color of a candidate's skin bars him from being a minority-preferred candidate is "an affront to our constitutional traditions." *De Grandy*, 512 U.S. at 1027 (Kennedy, J., concurring).

unprecedented shifts in turnout patterns, but citing no evidence); U.S. Br. at 15-17 (same); J.S. App. 111a.[11]

The second reason for black success in District 24's Democratic primaries was that blacks voted cohesively for their preferred candidates. In 10 of the 11 elections, the black-preferred candidate carried more than 65% of the black vote. And in most of the more recent elections, the black-preferred candidate carried more than 80% of the black vote and thus prevailed with at least 66% of the total vote.

For example, in 2002, Mayor Ron Kirk carried the district in both the U.S. Senate primary (with 66% of the total vote) and the runoff (with 75% of the total vote), even though he was opposed both times by a majority of Latino and Anglo voters. His advantage as a local favorite therefore cannot account for his victories. The real reason why Kirk won was the cohesive support he received from the African-American community in these racially polarized contests.

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[11] The evidence from former District 25 in the Houston area further undercuts this speculation. In 2002, when that district had a hotly contested Democratic congressional runoff between an Anglo candidate and an African-American candidate, the electorate got blacker, not whiter. JA 120-21.

Likewise, the record evidence contradicts appellees' general assertion that District 25's election of an Anglo-preferred candidate in 2002 somehow shows Anglo control of District 24. State Br. at 81-82; *see also* U.S. Br. at 15 n.5. Former District 25 consistently showed much lower black primary turnout than former District 24; and in the 2002 congressional primary and runoff, the Anglo-preferred candidate prevailed only because he attracted about a third of the black vote. *See, e.g.*, JA 94-100, 121-27. And, unlike District 24, District 25 was majority-Anglo in citizen voting-age population (CVAP). *Compare* JA 339 *with* State Br. at 87 n.102 (asserting that District 24 was not majority-minority in CVAP, while citing record evidence expressly contradicting that assertion) *and* U.S. Br. at 12 & n.2 (similar).

C. African-American Cohesion

The District Court's statement that black political cohesion in the Democratic primaries was "far from certain" may or may not be a factual finding. J.S. App. 112a; *cf.* State Br. at 73, 84. But if it is, it is clearly erroneous. As discussed above, African-Americans gave no less than 93% of their vote to their preferred candidate in every one of the 20 general elections analyzed by appellees' expert. Moreover, African-Americans were cohesive in the Democratic primaries, where the ultimate winners were effectively chosen: There, the black-preferred candidate usually garnered more than 80% of the black vote and almost always garnered more than 65%. Such landslide results establish "minority political cohesion" within the meaning of *Gingles*'s second prong. *See Growe*, 507 U.S. at 40.

D. Anglo Bloc Voting

Appellees assert that the District Court found insufficient Anglo bloc voting to satisfy the third *Gingles* prong. State Br. at 73, 88 (citing J.S. App. 111a). But here again, it is far from clear that the court intended to make such a finding. And if it did, that finding again was clearly erroneous. The question under *Gingles*'s third prong is whether, absent a district drawn to bring minority voters together, Anglo bloc voting will usually defeat the minority's preferred candidates. Here, the minority population from District 24 was split among five new districts, each of which is dominated by Anglo Republicans. JA 102-06. In these five districts, appellees' expert analyzed 19 general elections, 12 of which involved a minority candidate. In all five new districts, the candidates preferred by black voters lost *every* general election by double-digit margins, for two reasons.

First, in each of the five new districts, the electorate typically is less than one-fifth black — by contrast with former District 24, where the electorate typically was more

than one-third black. So in each of the five new districts, there are four or five Anglo voters for every black voter, while in District 24 the ratio was always below two-to-one.

Second, Anglos voted as a bloc to defeat black-preferred candidates in all five new districts, in all 19 elections. For example, in new District 26, which now includes southeast Fort Worth's black community (J.S. App. 199a; Fort Worth NAACP Br. at 13), on average only 18% of Anglo voters supported the black-preferred candidate in general elections. *See Abrams v. Johnson*, 521 U.S. 74, 92 (1997) (substantially higher crossover rate); *Thornburg v. Gingles*, 478 U.S. 30, 80-82 (1986) (finding bloc voting where crossover rate was as high as 42%); *see also* U.S. Br. at 7, 24 n.13 (declining to endorse the District Court's statement that a 30.75% crossover rate establishes the absence of Anglo bloc voting under *Gingles*'s third prong (citing J.S. App. 111a)).

Tellingly, in the 2002 general election for U.S. Senate, Ron Kirk carried only 36% to 41% of the total vote in the five new districts. In sum, the cohesive African-American community that prevailed in 10 of 11 primaries and 20 of 20 general elections under the old map is now splintered among five districts where its candidates inevitably get trounced by opponents winning support almost exclusively from Anglos.

E. The 50% Rule on the Merits

For the reasons set forth in our opening brief (and in the other briefs cited *supra* note 6), the Court should reject the 50% Rule and make clear that the Voting Rights Act requires no quotas. Just as a State could not decree "that certain districts had to be at least 50 percent white," *Bush v. Vera*, 517 U.S. 952, 996 (1996) (Kennedy, J., concurring), the Court should not conclude that Congress mandated that all minority districts be at least 50% minority and that effective minority districts not meeting that test may be eliminated.

In a State like Texas, where no single race or ethnicity constitutes a majority of the population, to demand that every Member of Congress represent a majority-Anglo, majority-Latino, or majority-black district would be a travesty. The goals of the Voting Rights Act are ill served by carving our electorate into such blocs. "If our society is to continue to progress as a multi-racial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991). As Judge Ward noted below, even though "[t]he evidence demonstrate[d] that District 24 . . . functioned as a district that fostered our progression to a society that is no longer fixated on race," the Fifth Circuit's 50% Rule permitted the Legislature to dismantle that district in 2003. J.S. App. 196a, 199a. This Court should reject that Rule and hold that the 2003 plan violates Section 2 of the Voting Rights Act.

III. District 25 Is a Racial Gerrymander.

Appellees' defense of the irregularly shaped District 25 — justifying it as the byproduct of a "[p]olitical [c]hoice" to protect a nearby Republican incumbent (State Br. at 105) — runs headlong into this Court's precedent in *Bush v. Vera*, 517 U.S. 952 (1996), which held that protection of nearby incumbents cannot justify an excessively race-conscious district. Although appellants raised that legal argument repeatedly in their opening brief (*see* Jackson Br. at i, 16, 43, 48-49), none of the appellees or their *amici* has any response.

Instead, they just point to the District Court's finding that politics, not race or ethnicity, predominated in drawing District 25. State Br. at 108-18. But no one claims that the Legislature wanted to add a *Democratic* district to the map. Rather, it is undisputed that the Legislature set out to add a new majority-Latino district because it had made a political decision to destroy one elsewhere and wished to avoid a

finding of retrogression under the Voting Rights Act. In so doing, the Legislature plainly contravened *Bush v. Vera*.

As appellees concede, the map's chief sponsor in the Texas House testified at trial that the Legislature drew District 25 as a 300-mile-long majority-Latino district to avoid "'creat[ing] issues for DOJ'" under Section 5. State Br. at 115-16 (quoting Rep. Phil King). That, of course, is precisely the motive that generated the racial gerrymanders invalidated in *Miller v. Johnson*, 515 U.S. 900, 921-27 (1995), and *Shaw v. Hunt*, 517 U.S. 899, 911-13 (1996).

Appellees try to defend District 25's shape by saying that *whole* counties form the rural "land bridge" connecting the two Latino concentrations. State Br. at 111 n.114. They note that the Georgia district struck down in *Miller v. Johnson* split 8 of its 22 counties, while the Texas district splits only 2 of 9. *Id.* But the split counties contain more of the total district population here than in the Georgia district. *See* JA 28; CONGRESSIONAL DISTRICTS IN THE 1990S, at 220 (1993).

The State also argues that District 25's shape does not reflect the predominance of race because the Legislature did not "exclude" "'substantial intervening Anglo population'" when it hooked the Latino areas of Austin to the city of McAllen, 300 miles away. State Br. at 110, 114 (quoting Jackson Br. at 46). But the counties in District 25's land bridge contain fewer than 42,000 Anglos, while the parallel string of counties immediately to its east contains 138,000 Anglos and the parallel string to the west contains 162,000 Anglos.[12] The mapmakers clearly took the path from McAllen to Austin that best avoided Anglo population so as

[12] *See* Texas Legislative Council, Population Analysis (Plan 1374C), http://www.tlc.state.tx.us/redist/pdf/c1374/red100.pdf; JA 298.

to maximize the district's Latino percentage. *See Miller*, 515 U.S. at 919-25 (striking down a "max-black" district).

As shown in our opening brief, nothing about South Texas's "unique geography and population dispersion" (State Br. at 109) demanded this bizarre district. Jackson Br. at 47 & n.40. Appellees' expert conceded that prior congressional maps, as well as the current state senate, state house, and state board of education maps, avoid districts as elongated as District 25 in South Texas. *Id.* And the GI Forum's Plan 1385C shows that one can avoid such shapes even in drawing seven, rather than six, Latino districts in that part of Texas.

Finally, appellees' arguments about compactness scores (State Br. at 112-15) fail as well. Appellants highlight District 25's "Smallest Circle" score not because it is the worst in the 2003 map; as appellees note, in any map, one district has to be the worst. State Br. at 113 & n.116. Rather, appellants highlight this score because it is the worst of any district — congressional, state senate, state house, or state board of education — ever used in Texas. Indeed, the State's expert conceded that District 25's score is worse than those of the three districts this Court invalidated in *Bush v. Vera*, as well as a half-dozen congressional districts in other States that were found to be racial gerrymanders subject to strict scrutiny in the 1990s. *See* Jackson Br. at 46-48 & nn.39-40.

The creation of District 25 was nothing but "a calculated stretch to find voters of a particular ethnic makeup." J.S. App. 155a. The district needlessly heightens the significance of race and thus clearly violates the Equal Protection Clause.

CONCLUSION

The Court should reverse the judgment below and instruct the District Court to grant relief for the 2006 election.

Respectfully submitted,

J. GERALD HEBERT
J. GERALD HEBERT P.C.
5019 Waple Lane
Alexandria, VA 22304
(703) 567-5873

Counsel for the "Democratic Congressional Intervenors"

PAUL M. SMITH
Counsel of Record
SAM HIRSCH
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

Counsel for the "Jackson Plaintiffs"

February 22, 2006