Nos. 05-204, 05-254, 05-276, 05-439

IN THE

Supreme Court of the United States

LEAGUE OF UNITED LATIN AM. CITIZENS, ET AL., *Appellants*,
v.
RICK PERRY, ET AL., *Appellees*.

TRAVIS COUNTY, TEXAS, ET AL., *Appellants*,
v.
RICK PERRY, ET AL., *Appellees*.

EDDIE JACKSON, ET AL., *Appellants*,
v.
RICK PERRY, ET AL., *Appellees*.

GI FORUM OF TEXAS, ET AL., *Appellants*,
v.
RICK PERRY, ET AL., *Appellees*.

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

BRIEF OF APPELLEES TINA BENKISER, Chairman, Republican Party of Texas, AND JOHN DeNOYELLES

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PARTIES TO THE PROCEEDING

Appellants in No. 05-276 list Appellee Tina Benkiser and the other parties to the four consolidated cases filed in 2003: *Session v. Perry* (No. 2:03-CV-354) (lead case); *Jackson v. State of Texas* (No. 2:03-CV-356) (consolidated by order of Oct. 23, 2003); *GI Forum of Texas v. State of Texas* (No. 2:03-CV-367) (order of Oct. 27, 2003); and *LULAC v. State of Texas* (No. 2:03-CV-380) (order of Nov. 6, 2003).

The district court also consolidated with *Session v. Perry* three cases filed in 2001, including *Balderas v. State of Texas* (No. 6:01-CV-158) (order of Oct. 23, 2003). Parties to the *Balderas* case include Appellee John DeNoyelles; Emily Amps; John Archer; Rolando Arriola; Associated Republicans of Texas; Atascosa County, Texas; Congressman Joe Barton; Bell County, Texas; Congressman Ken Bentsen; Congressman Kevin Brady; Bonnie Breazeale; Boyce T. Breedlove; David Brown; Tony Campos; Congressman John Culberson; Congressman Tom Delay; Jesse Diaz; Gina Dixon; Pauline Dixon; Bennie Escobar; Denise Escobar; Ed Gonzales; Grayson County, Texas; Vivian Harris; Stephan Leroy Honore; Howard County, Texas; Guy C. Jackson III; Congressman Sam Johnson; Johnson County, Texas; Louis Laster; Ledbetter Neighborhood Association; Dorothy M. Lee; LULAC 4496 of Dallas; Henry Martinez; Ralph McCloud; Mexican-American Legislative Caucus, Texas House of Representatives; Terry Meza; Roy Millner; Michael Moon; Morris Overstreet; Eugene Pack; Dan Pedroza; Raphael Quintanella; George Rios; Margaret P. Rodriguez; Frank D. Sandoval Jr.; Hargie Faye Savoy; Joy Smith; Roy Stanley; Phil Sudan; Texas Farm Bureau Mutual Insurance Company; The Texas Legislative Black Caucus; Alex Vidales Sr.; Dianna Villasana; Charles E. Vinn Sr.; Wichita County, Texas; Molly Woods; Williamson County, Texas; David O. Zambrano; the Attorney General of Texas; the Comptroller of Public Accounts of Texas; and the Texas Land Commissioner.

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SUMMARY OF ARGUMENT

The redistricting plan entered by the three-judge court in 2001 indisputably perpetuated an egregious Democratic gerrymander from the 1990s, thus virtually insuring that the "party with a minority of the popular vote within the State in all likelihood [would retain] a majority of the seats" in the Texas congressional delegation for the second consecutive decade. *Vieth v. Jubelirer*, 541 U.S. 267, 367 (2004) (Breyer, J., dissenting). Although the Pennsylvania Democrats in *Vieth* attacked this situation as a constitutionally impermissible denial of majority rule, *id.* at 271-73 (plurality op.), Texas Democrats now suggest that this situation is constitutionally and statutorily required.[1]

Specifically, they contend that the Texas Legislature's effort to ameliorate this "entrenchment" of a "party that enjoys only minority support" is facially illegitimate because it reflects a purely political desire to "augment the influence" of the majority Republican party by achieving representation roughly commensurate with the level of the party's support in Texas. *Id.* at 360 (Breyer, J., dissenting); Brief of Jackson Appellants ("App. Br.") at 18 n.17. But, while the Constitution does not require redistricting plans to provide roughly proportional representation or majority rule, it most certainly does not prohibit such efforts at political equality, regardless of when this curative effort occurs. Appellants' contention that such ameliorative redistricting is facially impermissible after the first election of the decade makes a mockery of the plain text of the Elections Clause, perverts the limited remedial role of the judiciary in redistricting, and

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[1] Ms. Benkiser, Chairman of the Republican Party of Texas, believes that she should not have been sued as a defendant in this case because the Party was not involved in or responsible for the challenged redistricting, but she has been named as a defendant and appellee in this case and, consequently, files this responsive brief with Mr. DeNoyelles, who had intervened in the district court in 2001 to assert his interests as a voter.

does not rationally serve any norm of equality enshrined in the First or Fourteenth Amendments because it condemns plans that provide "fair and effective representation" under any conception of that term.

Worse still, Appellants contend that the Voting Rights Act's command of equal minority opportunity prevents alteration of one of the worst examples of the brazen 1990s Democratic gerrymander—District 24—solely because the white Democratic representative who drew the district for himself, like virtually all Democrats, enjoys the support of black voters, who comprise 21.4% of the district's voting age population. The notion that Section 2 requires the creation or retention of districts where black voters constitute just over one-fifth of the electorate because they are part of a successful bi-racial coalition which elects a Democrat is irreconcilable with any rational understanding of *minority* vote *dilution*, the language and equal opportunity mandate of the Voting Rights Act, this Court's seminal decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and the bedrock principle that the federal judiciary cannot and should not advance the partisan interests of a particular party merely because most minorities belong to it.

I. THE POLITICAL GERRYMANDERING CLAIMS LACK MERIT

A. Appellants' Proposed Test Is Invalid

Appellants do not and cannot contend that the Texas Legislature's plan would have constituted an unconstitutional gerrymander under any standard articulated by any Justice, if it had been enacted in 2001. *See infra* § I.D. Yet they advance the astounding and quite perverse notion that an otherwise perfectly valid redistricting plan becomes invalid simply because the Texas Legislature acted after the first election of the decade. App. Br. at 30. They contend that the timing of the redistricting renders wholly impermissible a legislature's desire to "augment the influence" of one party *relative* to the pre-existing plan, even

if a legislature's plan *improves* "partisan balance," because an effort to cure a "current map [that] is 'unfair' or 'skewed'" is impermissible "state action aimed solely at altering the partisan outcome of elections." *Id.* at 18 n.17, 27-28. To the contrary, if the Equal Protection and First Amendment rights of voters in a political party are not violated by a plan when used for the first election of the decade, then the same plan cannot possibly violate those rights when used in later elections. That is because adherence to these rights can be adjudged based only on what a plan *does*, not *when* it is used.

1. *First*, there is no rational basis for having the constitutional right of voters to "fair and effective representation," *Vieth*, 541 U.S. at 307-09 (Kennedy, J., concurring), turn on whether the Texas Legislature avoided "one-person, one-vote" liability by enacting a plan before the first election in the decade or, instead, performed its constitutionally prescribed responsibility under the Elections Clause, U.S. Const. art. I, § 4, cl. 1, *after* a plan with population equality had been entered. That is why no Justice has ever suggested that a plan's compliance with equal population mandates is even *relevant* in assessing whether it is an unconstitutional gerrymander. Even those Justices who believe that gerrymandering claims should be assessed principally in terms of whether district lines reflect solely a political purpose acknowledge that a plan's adherence to the "one-person, one-vote rule" should *not* be "one of the traditional criteria that may serve to defeat a claim that a district has been gerrymandered on a [political] basis." *Vieth*, 541 U.S. at 339 n.33 (Stevens, J., dissenting). Indeed, a later-enacted "gerrymander" is in place for *less* time, so would, if truly "unfair," be preferable to one that affects all five of the decade's elections.

More fundamentally, preventing a legislature from redistricting unless it has some "*constitutional obligation*" (App. Br. at 26 (emphasis added)) to cure legal *deficiencies* in a court-drawn plan turns the judicial and legislative roles

in redistricting on their heads. The very text of the Constitution commits the task of federal redistricting to "the *Legislature*," U.S. Const. art. I, § 4, cl. 1 (emphasis added), and a court-drawn plan thus is merely a temporary remedial measure that necessarily loses force upon the enactment of a plan that itself is free of the population inequality defect being remedied. *See, e.g., Burns v. Richardson*, 384 U.S. 73, 85 (1966) ("The State remains free to adopt other plans for apportionment, and the present interim plan will remain in effect no longer time than is necessary to adopt a permanent plan.").[2] It is the constitutionally compliant legislative plan, not the constitutionally compliant court plan, that governs.

In short, since it will be a rare case indeed where a court-drawn plan affirmatively *violates* federal or state standards for redistricting, Appellants' proposal is transparently and concededly an effort to impose a *de facto* ban on mid-decade redistricting. *See* App. Br. at 26. For all the reasons the court below correctly rejected (and this Court declined to entertain) Appellants' effort to suggest that Article I somehow prohibits mid-decade redistricting, this Court should reject Appellants' effort to achieve the same result through the back door. There is no reason or constitutional basis to penalize the Texas Legislature for performing its constitutional duty to create congressional districts simply because it has fulfilled that responsibility belatedly.

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[2] *See also Branch v. Smith*, 538 U.S. 254, 261 (2003) ("[Redistricting] is primarily the duty and responsibility of the State through its legislature."); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804 (1995); *Miller v. Johnson*, 515 U.S. 900, 936 (1995); *Smiley v. Holm*, 285 U.S. 355, 365 (1932) (Elections Clause not only "invests the Legislature with a particular authority" but also "imposes upon it a corresponding duty"); *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) ("unwelcome obligation of the federal court [is] to devise and impose a reapportionment plan *pending later legislative action*") (emphasis added); *cf. Upham v. Seamon*, 456 U.S. 37, 43 (1982) (remedial plan may displace legislative plan only to extent necessary to prevent violation).

Finally, as a purely practical matter, a legislature acting *before* the first election faces essentially the same choice as one acting subsequent to that election: whether to enact its *own* redistricting plan, where "politics" is a factor, rather than accept the politically neutral court plan that will be imposed absent legislative action. Thus, just like legislative plans enacted after the first election, it will be fair to assume that politics played a dispositive role in a legislature's decision to engage in its own politically based redistricting, rather than to allow a neutral plan to be drawn by a court. The Pennsylvania Republicans' decision to draw their own plan in 2001 assuredly was not affected by any concern that elections would be held in malapportioned districts absent such action, so their decision to engage in redistricting was at least as "political" as that of the Texas Legislature here.

2. *Second*, Appellants' proposed "sole purpose" standard does not focus on any legislative purpose remotely relevant to any cognizable constitutional injury. The standard focuses not on a legislature's purpose in configuring a particular district or all districts—but, instead, on a legislature's "reason for taking any action at all" on redistricting. App. Br. at 22. Thus, if the Texas Legislature had provided for redistricting to be performed by a bipartisan commission "solely" because it believed a commission-drawn plan likely would "augment the influence" of the Republican party relative to the prior plan, Appellants' test would invalidate that action *regardless* of the purpose or effect of the lines that the commission ultimately drew. Equal protection analysis, however, focuses exclusively on the purpose of a challenged *classification*—how it categorizes citizens—not a legislature's general purpose in deciding whether to legislate at all. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 645-47 (1993); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271-72 (1979); *Yick Wo v. Hopkins*, 118 U.S. 356, 367 (1886). Because the only classifications in redistricting legislation are the lines that separate people into different districts, *see Shaw*, 509 U.S. at 646, the only relevant question is whether

those classifications have an impermissible purpose or effect. Thus, as even Appellants implicitly concede, all Justices have recognized that the examination of unconstitutional purpose necessarily "target[s] *maps*" themselves, rather than the legislature's motive for having a legislatively enacted map at all. App. Br. at 23 (citing *Vieth* concurrence) (emphasis added). All proposed standards for examining a legislature's redistricting purpose focus on whether the plan's district *lines* comply with neutral criteria. *See Davis v. Bandemer*, 478 U.S. 109, 165 (1986) (Powell, J., concurring); *Vieth*, 541 U.S. at 321-23 (Stevens, J., dissenting); *id.* at 347-49 (Souter, J., dissenting).

If Appellants' test were refined to focus on the relevant issue—the purpose underlying district lines that classify persons—it would become utterly toothless because no plaintiff could ever complete the Sisyphean task of showing that a legislature *solely* followed politics in derogation of *all* neutral criteria, including contiguity. Here, Appellants do not and cannot contend that the *sole* purpose of every district line statewide in the Texas Legislature's plan was political, since it is clear and undisputed that the plan did create contiguous, equally populated districts, preserved some political subdivisions, and paid attention to the Voting Rights Act. And, of course, it is quite impossible to assess a legislature's purpose for engaging in redistricting without examining *how* it actually redistricted.

3. *Finally*, Appellants' exclusive focus on whether a legislature seeks to alter the *status quo* is inherently misguided because it does not ask whether the disadvantaged party has "fair and effective representation," but only whether that party retains the level of representation provided by the prior plan. The representation provided to the disfavored party by a pre-existing plan plainly is not a constitutional *minimum* which must be provided throughout the decade: There is no nonretrogression principle for political parties analogous to that which Section 5 of the Voting Rights Act creates for racial minorities.

Using the prior plan as the floor for the disfavored party's representation would also condemn plans that provide "fair and effective representation" under any conception of that term. First, Appellants' proposed standard would, contrary to the Court's express holding in *Gaffney v. Cummings*, 412 U.S. 735 (1973), invalidate legislative efforts to augment the majority's political influence for the purpose of "provid[ing] a rough sort of proportional representation" for both major parties—which plainly is a permissible, albeit not mandated, conception of "fair and effective representation." *Id.* at 754; *see also Vieth*, 541 U.S. at 313 (Kennedy, J., concurring) (allegation that legislature "adopted political classifications . . . describes no constitutional flaw" under *Gaffney*'s "governing Fourteenth Amendment standard"). And Appellants even concede that their standard would invalidate a legislature's effort to clearly *enhance* "fair and effective representation" by correcting a plan that is unfairly "skewed" against one party because of a prior legislative gerrymander or, as here, judicial perpetuation of a prior Democratic gerrymander. App. Br. at 27-28. These corrective legislative plans would be condemned even though they are indistinguishable in both purpose and effect from any *judicial* remedy to a meritorious gerrymandering claim under *Bandemer*, the "sole purpose" of which is to "lessen the power" of the gerrymandering party by "altering the future partisan outcome of elections." App. Br. at 17, 27. Appellants' test would also condemn the "common practice" of "choos[ing] a redistricting plan that gives [a party] an advantage at the polls," without "distort[ing]" districts through irregular "configurations" or failure to adhere to other neutral "criteria" such as "the observance of political subdivision lines," simply because the party's representation exceeded that of the prior plan. *Bandemer*, 478 U.S. at 165 (Powell, J., concurring); *see Vieth*, 541 U.S. at 321-23 (Stevens, J., dissenting). Indeed, Appellants' proposal would condemn all mid-decade plans even when they *better* adhere to traditional districting criteria than the existing plan, if the

motive for adopting the substitute plan was "solely [to] alter[] the future partisan outcome of elections." App. Br. at 27. At the same time, it concededly would not touch *any* gerrymanders enacted before the first election, such as that in *Vieth*, because such plans purportedly "cannot serve *solely* partisan purposes" since they correct population inequality. *Id.* at 26 (emphasis in original).[3]

Thus, the inherent, insoluble problem with Appellants' proposal is that it asks whether a legislature had an impermissible purpose in isolation and defines "impermissible" as seeking to improve the majority party's position relative to the *status quo*, without regard to whether the plan had a dilutive or impermissible effect on voting power at even the district level. Appellants make the almost comical assertion that this is somehow a *virtue*, because it eliminates the need to articulate a comprehensible standard concerning "how much bias is too much." *Id.* at 17. Thus, the "solution" to the intractable problem of defining whether and when politically motivated redistricting imposes a constitutional injury is simply to strike down such plans *regardless* of whether there is any such constitutional injury. As we presently show, however, it is well established that

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[3] Nor can Appellants' test be coherently altered to permit mid-decade redistricting where the legislative plan replaces a "politically unfair" plan. While this would eliminate the facially absurd results described above, it would require this Court to establish standards both for what constitutes a plan that is sufficiently "unfair" to be "replaceable" and for the "political fairness" limits governing the replacement plan. By definition, articulating a judicially manageable standard for assessing the fairness of both the pre-existing and the substitute legislative plan would be twice as difficult as the heretofore elusive effort to establish manageable standards for assessing whether a single legislative plan violates constitutional norms of "fairness." *See Vieth*, 541 U.S. at 281-84 (plurality op.); *cf. Gaffney*, 412 U.S. at 750-51 (even though judicially manageable standards exist for examining one plan's compliance with *population equality* requirements, courts "should never begin" assessing a plan's compliance by comparing it to competing plan).

allegations of purpose alone are insufficient to state a viable gerrymandering claim and it is equally clear that the only even potentially impermissible effect is statewide dilution of the disfavored party's overall voting strength.

B. Impermissible Statewide Effect Is A Necessary Element Of Any Conceivable Constitutional Challenge To Politically Motivated Redistricting

All Justices recognize the seemingly self-evident proposition that a redistricting plan cannot even potentially offend the rights to vote or political association unless it actually *burdens* those rights—*i.e.*, has an impermissible *effect*—and thus every Justice has rejected the notion that a constitutional violation can be premised on purpose alone. They recognize that it is quite impossible to analyze whether a legislature intended to achieve an unconstitutional result without defining what that result is, that "political" purposes are inevitably and permissibly part of legislative redistricting and, most obviously and importantly, that there can be neither a violation nor a remedy if there is no unconstitutional effect. If the Court cannot say that a plan has the effect of visiting a constitutionally impermissible burden on "fair and effective representation," it cannot say that the legislature imposed such a burden or determine how a remedy can properly alleviate such a burden.

1. *Every* Justice in *Bandemer* rejected the notion that a constitutional violation can be found based on partisan purpose alone.[4] In *Vieth*, moreover, at least five Justices

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[4] The plurality stated that "plaintiffs were required to prove both intentional discrimination against an identifiable political group *and an actual discriminatory effect on that group*," which could occur only "when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." 478 U.S. at 127, 132 (emphasis added). Justice Powell, joined by Justice Stevens, suggested "that the ultimate inquiry ought to focus on whether district boundaries had been drawn solely for partisan

held that partisan purpose alone—even "sole purpose"—does not state a cognizable constitutional claim. The Court's core holding necessarily was that "the *facts alleged by the plaintiffs* [were] . . . inadequate to state a claim." 541 U.S. at 301 (plurality op.) (emphasis added). And "the complaint alleged that the districts created by the [challenged plan] were 'meandering and irregular,' and 'ignor[ed] all traditional redistricting criteria . . . *solely for the sake of partisan advantage*.'" *Id.* at 272-73 (emphasis added); *see also id.* at 313 (Kennedy, J., concurring) ("Appellants' complaint alleges no impermissible use of political classifications and so states no valid claim upon which relief may be granted."). The plurality also expressly rejected the "sole purpose" tests suggested by Justice Stevens' *Vieth* dissent and Justice Powell's *Bandemer* concurrence. *Id.* at 290-95.[5] And Justice Kennedy agreed that the *Vieth* appellants' test and Justice Stevens' and Justice Powell's standards are "either unmanageable or inconsistent with

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ends," *Vieth*, 541 U.S. at 290-91 (plurality op.) (describing Justice Powell's *Bandemer* opinion), but expressly agreed with the plurality "that a partisan political gerrymander violates the Equal Protection Clause *only* on proof of *both* intentional discrimination against an identifiable political group *and an actual discriminatory effect on that group*." 478 U.S. at 161 (emphasis added). Justice O'Connor's concurrence concluded that allegations of political purpose and effect failed to state a viable or manageable claim. *Id.* at 144-45.

[5] Justice Stevens extensively cited the appellants' "sole purpose" allegations and proposed his own "sole purpose" test. 541 U.S. at 321, 326, 338, 334. Yet the plurality concluded that Justice Stevens' "sole purpose" test is not a justiciable standard in the context of political gerrymandering and, in all events, does not identify any constitutionally cognizable harm. *Id.* at 292-95. The plurality similarly rejected Justice Powell's test in *Bandemer*, under which "the ultimate inquiry . . . focus[es] on whether district boundaries had been drawn *solely for* partisan ends to the exclusion of all other neutral factors relevant to the fairness of redistricting." *Id.* at 290-91 (emphasis added).

precedent, or both." *Id.* at 308.[6] Moreover, the Court's rejection of the *Vieth* appellants' "predominant purpose" test as inherently "vague" and unworkable applies *a fortiori* to the "sole purpose" variation offered here, because "we are sure appellants do not think" that their test is satisfied if there is a *single* apolitical district line in the challenged plan. *Id.* at 285 (plurality op.); *see id.* at 308 (Kennedy, J., concurring).

Moreover, Justice Kennedy's concurrence in *Vieth*, in discussing potentially cognizable claims, agreed that constitutional "concerns arise where an apportionment has the purpose *and effect* of burdening a group of voters' representational rights." *Id.* at 314 (emphasis added); *accord id.* at 315. Thus, the availability of a constitutional claim "[o]f course . . . depends first on courts having available a manageable standard by which to measure the *effect* of the apportionment and so to conclude that the State did impose a burden or restriction on the rights of a party's voters." *Id.* (emphasis added); *accord id.* at 308. The absence of an allegation of impermissible effect mandated dismissal: "[A]ppellants' evidence at best demonstrates only that the legislature adopted political classifications," and this political purpose alone "describes no constitutional flaw." *Id.* at 313; *accord id.* at 315 ("The inquiry is not whether political classifications were used. The inquiry instead is whether political classifications were used to burden a group's representational rights."); *id.* at 307 (same).

Appellants nonetheless suggest that Justice Kennedy's statement that a gerrymander may violate the law if

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[6] Justice Breyer also made clear that "[t]he use of purely political considerations in drawing district boundaries" is not an "evil" absent constitutionally cognizable "harm"—the unjustified entrenchment of the minority party in power. 541 U.S. at 355; *see also id.* at 366. Justice Souter, joined by Justice Ginsburg, similarly stated that "[t]he harm from partisan gerrymandering is . . . a species of vote dilution." *Id.* at 354.

classifications are applied "in a way unrelated to any legitimate legislative objective" somehow supports their test. 541 U.S. at 307. But Justice Kennedy made clear in the very next sentence, and elsewhere, that a classification is unrelated to legitimate aims of apportionment only when it denies "fair and effective representation for all citizens." *Id.*; *see id.* at 312. And Justice Kennedy's basic thesis was that a political gerrymandering claim cannot prevail when "there are yet no agreed upon substantive principles of fairness in districting" and, thus, no "standards for measuring the particular burden a given partisan classification imposes on representational rights." *Id.* at 308. That is why a court can act only in the purely hypothetical scenario where it can determine that fair and effective representation is denied without making any determination as to what fair and effective representation might be. *See id.* at 312 (law declaring that "'all future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles . . . .'"). Unquestionably, a demonstration only of political purpose cannot make the requisite showing that there is a "burden" on representational rights or the "fair and effective representation" that was central to Justice Kennedy's analysis. In any event, as Appellants elsewhere concede, it is clear that Justice Kennedy, in the relevant passage, was discussing "maps driven purely by politics," and thus inherently said nothing to support Appellants' condemnation of a legislative effort to engage in a redistricting effort solely because of politics. App. Br. at 26.

2. These various opinions reflect the obvious point that politically based redistricting cannot possibly impair any constitutional interest in voting or representation unless, at a bare minimum, the overall result of the plan is an "extreme form of disproportionate representation." *Id.* at 352 n.7 (Souter, J., dissenting). Political gerrymandering cannot burden the weight or availability of an individual's vote because (1) each member of the allegedly victimized party

remains equally able to register and cast their ballots on election day; and (2) where districts are equal in population, each vote has the same weight whether it is cast by a Republican, a Democrat, or a voter from some other party. *See Bandemer*, 478 U.S. at 150 (O'Connor, J., concurring). Assigning voters to separate yet equally populated districts based on political affiliation, like a requirement that Republicans register on red paper and Democrats register on blue paper, is a political classification, but imposes no cognizable burden on the individual right to vote, and so is not potentially unconstitutional unless some electoral or representational harm results from the separation.

Rather, the *only* difference between the vote of a member of the disfavored party and a member of the favored party is the probability that it will be part of an "effective aggregation . . . of like-minded voters to claim a just share of electoral results"—*i.e.*, the "group right" to elect one's preferred candidates. *Bush v. Vera*, 517 U.S. 952, 1049 (1996) (Souter, J., dissenting). This group-based interest in electing candidates is not infringed simply because a *particular district* is configured in a way that prevents one party's candidate from being elected, since there is no "right" to elect one's preferred candidate in any particular district. *See Vieth*, 541 U.S. at 288 (plurality op.); *Bandemer*, 478 U.S. at 131-33, 140-41 (plurality op.); *cf. United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 166 (1977); *Whitcomb v. Chavis*, 403 U.S. 124, 154-55 (1971).[7] If a group can elect candidates in numbers

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[7] Since there cannot be any cognizable injury to a group's voting strength at the district level, the only conceivable injury is a "different type of 'representational' harm." *Vieth*, 541 U.S. at 328 (Stevens, J., dissenting). A majority in *Vieth*, however, squarely rejected this vaguely defined "representational" harm to a political group as not constitutionally cognizable and, in all events, Appellants do not allege it here. *Id.* at 288-90 (plurality op.); *id.* at 313 (Kennedy, J., concurring).

proportionate to the percentage of that party's voters in the State, there is no conceivable constitutional claim.

In *Gaffney*, for example, a consistent pattern of intentionally designing a series of individual districts to ensure the election of one party's candidate in those districts did not raise a cognizable equal protection concern because the overall result of the partisan-designed districts was to produce a "rough sort of proportional representation." 412 U.S. at 754; *see id.* at 752; *see also Vieth*, 541 U.S. at 351 n.6 (Souter, J., dissenting) (*Gaffney*'s "approval of a bipartisan gerrymander" is "settled law"). Even more obviously, no one could argue that a *Republican* voter in Pennsylvania, whose group benefited statewide from the "packing" of Democrats, suffered cognizable harm because he had intentionally been shunted, on the basis of his political affiliation, into a "packed" Democratic district where he had no hope of electing his preferred candidate. Rather, as the counsel for the Democrats in *Vieth* and for the Jackson Appellants here aptly stated, the "only way to assess packing and cracking is on a statewide level" because "[t]he fact that a given district may favor a given party is of no significance by itself, absent statewide effects." Brief of Appellants at 39, *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (No. 02-580); *see Bandemer*, 478 U.S. at 127, 136 (plurality op.) ("[T]he only way to assess [gerrymandering] is on a statewide basis."); *cf. Easley v. Cromartie*, 532 U.S. 234, 243 (2001) (unlike partisan gerrymandering, racial gerrymandering can be confined to one district).[8] Plans that

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[8] This is also the consensus view of redistricting commentators. *See, e.g.*, Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28, 73 (2004); Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. Pa. L. Rev. 503, 510 (2004); Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. Rev. 77, 92 (1985); Note, *The Implications of Coalitional and Influence Districts for Vote Dilution Litigation*, 117 Harv. L. Rev. 2598, 2613 (2004).

provide "fair and effective representation," just like "politically unfair" plans, place voters in districts where there is no reasonable opportunity to elect their preferred candidate—the only difference is *how many* such districts there are for each party statewide.

3. For similar reasons, Appellants' effort to rely on First Amendment and related cases condemning discriminatory exclusion based on a "bare . . . desire to harm a politically unpopular group" because of political affiliation is unavailing. App. Br. at 20 (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973)). First, unlike in civil service employment and similar situations, "[p]olitics and political considerations are inseparable from districting and apportionment." *Gaffney*, 412 U.S. at 753; *accord id.* at 752, 753; *Vieth*, 541 U.S. at 285 (plurality op.); *id.* at 358 (Breyer, J., dissenting); *Miller*, 515 U.S. at 914. Therefore, even Appellants concede that while it is improper to use political affiliation as a significant or dispositive factor in the civil service context, *see, e.g., Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), such political considerations are permissible in redistricting, so long as they are not the "sole purpose." App. Br. at 17. Equally important, denial of a job or government benefit or contract because of political affiliation visits a tangible harm on the individual, which does not occur when voters are separated into fungible districts on that basis. *Cf. O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1993); *Elrod v. Burns*, 427 U.S. 347 (1976). Consequently, to establish any injury even remotely comparable to the political patronage cases, redistricting plaintiffs must establish that the plan created a "harm" to the "group" by unfairly diluting their party's voting strength statewide. *Moreno*, 413 U.S. 528. That is why, as Justice Kennedy noted, any potential First Amendment claim "[o]f course . . . depends first on courts' having available a manageable standard by which to measure the *effect* of the apportionment and so to conclude that the

State did impose a burden or restriction on the rights of a party's voters." *Vieth*, 541 U.S. at 315 (emphasis added).

In short, under either the First or Fourteenth Amendment, the requirement that plaintiffs show a discriminatory statewide effect is simply a requirement that they establish some cognizable harm. And, of course, one cannot establish impermissible dilutive effect unless one specifies the benchmark for undiluted voting strength. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997) ("[T]he very concept of vote dilution implies—and, indeed, necessitates—the existence of an 'undiluted' practice against which the fact of dilution may be measured . . . ."). Here, Appellants do not and cannot allege any district-specific harm, and they suggest that Republicans have "too many" seats statewide only in the sense that Republicans have more seats than under the court-drawn plan. But a Democrat's vote in Texas can be potentially "minimized" or "diminished" only if the cumulative effect of those votes secures proportionately fewer seats than the cumulative Republican votes, so the only possible benchmark for statewide dilution is whether the percentage of seats equals the percentage of votes. In light of Appellants' failure to allege that the Republican share is severely disproportionate or otherwise violative of some well-accepted standard of minimum partisan fairness, they have simply failed to contend that there is any statewide dilution of Democratic voting power and, consequently, any cognizable impairment of the right to vote or associate.

C. Political Gerrymandering Does Not Offend Any Constitutionally Cognizable Value And Such Claims Are Nonjusticiable

Allegations of a political gerrymander can never state a viable constitutional claim because (1) a gerrymander's only effect on the right to vote or associate is on the group's ability to secure representation commensurate to the group's proportion of the electorate; (2) there is no constitutional right to proportional representation or roughly proportional

representation; and (3) there is no principled or manageable basis for establishing when disproportionate representation "goes too far." This is especially obvious where, as here, the claims focus on *one* State's representatives to a *national* legislature. Although the Court need not reach the issue because Appellants allege no statewide dilution or disproportionality, it should nevertheless make clear that allegations of political gerrymandering do not state an acceptable claim because they allege no constitutional injury and certainly not one capable of consistent, manageable judicial definition.

At least 7 of 9 Justices in *Bandemer* and 8 of 9 Justices in *Vieth* explicitly rejected the notion that the Constitution requires proportional representation.[9] Indeed, the residents of small States have grossly disproportionate representation in the Senate and, to a lesser extent, in the Electoral College as well. Moreover, at-large elections, which allow a party with a bare majority of votes to win all elections, are used for all Senate elections, were frequently used for congressional elections in earlier times, and would be *required* for congressional elections where neither the state legislature nor courts redistricted in time for an election. *See Branch*, 538

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[9] *Bandemer*, 478 U.S. at 130 (plurality op.) ("Our cases . . . clearly foreclose any claim that the Constitution requires proportional representation . . . ."); *id.* at 155 (O'Connor, J., concurring) (political gerrymandering claims nonjusticiable because such claims ultimately "evolve towards some loose form of proportionality"); *Vieth*, 541 U.S. at 288 (plurality op.) ("[T]he Constitution nowhere says that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers."); *id.* at 352 n.7 ("I agree with this Court's earlier statements that the Constitution guarantees no right to proportional representation.") (Souter, J., dissenting); *id.* at 357-58 (Breyer, J., dissenting). Five Justices also rejected the *Vieth* appellants' similar claim that the majority is entitled to a majority of representatives. *Id.* at 288-89 (plurality op.); *id.* at 308 (Kennedy, J., concurring).

U.S. at 275. A proportionality mandate, therefore, would invalidate the elections for at least two, and potentially all three, political institutions of the federal government.[10]

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[10] The proposed "symmetry standard" of *Amici* Gary King *et al.* also rests upon the same discredited notion of "equal representation in government [for] equivalently sized groups" that five Justices in *Vieth* rejected as a constitutional standard. 541 U.S. at 288 (plurality op.); *id.* at 308 (Kennedy, J., concurring); *see* King Br. at 9. This standard asks whether the parties achieve the same proportion of seats to votes at equivalent voting levels. Thus, a plan under which a party receives 55% of votes and wins 55% of seats is "biased" and impermissible if the other party would win 45% (or 65%) of seats with 55% of votes. While assessment of this "partisan bias" may be an interesting academic exercise, it has no utility for assessment of a plan's fairness in real-world adjudication. By definition, it does not assess the electoral results that will actually be produced by a plan, but makes its validity turn on theoretical results that might occur if political circumstances significantly change. But if Democrats in Texas and Republicans in New York actually receive a proportionate share of seats under a plan, it should not matter whether the same share of seats would result if the situation was reversed and the minority parties began receiving 60% of the vote. This is particularly true if, as here, there is no allegation or empirical basis for suggesting that this dramatic reversal will occur. As the *Vieth* appellants themselves put it, a claim should not be assessed by whether "the rival party would get a majority of seats if it increased its vote share to a level that history shows to be improbable." *Vieth* App. Br. at 35 n.30. Moreover, even if it were relevant, the judiciary is simply not able to accurately assess not only the decade-long results that a plan will produce if then-current political circumstances persist, but *also* how many seats will result for the other party if circumstances change in a myriad of ways. *Cf. Vieth*, 541 U.S. at 289 (plurality op.) (noting how, when circumstances change, "the candidates change, their strengths and weaknesses change, their campaigns change, their ability to raise money changes, the issues change—everything changes"). This is particularly true since *amici* admit that there is no professionally accepted standard as to how any of a wide variety of extremely amorphous "inputs" should be used to estimate these widely divergent results. King Br. at 9-10. And even if "asymmetry" or "bias" were the standard for assessing a plan's fairness, courts would still have to answer "the original unanswerable question" of "[h]ow much [asymmetry or bias] is too much" and *amici*

Moreover, the concept of statewide proportionality has no relevance in assessing seats for a *federal* legislature for all 50 States. Even if a party's lack of proportional representation in a state legislature were a cognizable deprivation of "majority rule," lack of proportional representation on a State's congressional delegation, which decides nothing, is meaningless.[11] Examining congressional representation only with respect to certain States would be as myopic as analyzing a state legislature's redistricting only with respect

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acknowledge that there is no professionally accepted standard on this question. *Vieth*, 541 U.S. at 296 (plurality op.); King Br. at 9.

[11] Nor is there anything to the shibboleth that partisan gerrymanders offend the Constitution because they reduce the number of "competitive" districts and therefore reduce the "responsiveness" of legislators to their constituents. First, this Court has upheld the creation of safe districts for both Republicans and Democrats, *see Gaffney*, 412 U.S. 735, and, relatedly, districts that protect the parties' incumbents. *See Vera*, 517 U.S. at 967-68; *Miller*, 515 U.S. at 916; *Shaw*, 509 U.S. at 646; *Karcher v. Daggett*, 462 U.S. 725, 755 (1983) (Stevens, J., concurring). Moreover, even if a less competitive district causes a representative to focus more on the shared policy interests of his own party, rather than respond more to the opposition, there is simply nothing in the text or history of the Constitution that prohibits this result. *See Vieth*, 541 U.S. at 288 n.9 (plurality op.) (no constitutional distinction between "10 wishy-washy Democrats" and "5 hardcore Democrats"). Third, there is no basis to assume that an elected official who faces "competitive" elections—such as Senator Jesse Helms of North Carolina, former President Reagan, or current President Bush—will be more responsive to the views of the minority party than to his political base, which may be energized by "wedge issues" that *alienate* the opposing party. Finally, unlike a "*bipartisan* gerrymander" such as the one sanctioned in *Gaffney*, which makes all districts safe for one party and especially for incumbents, a *partisan* gerrymander usually displaces incumbents and contains a greater number of competitive districts that "lean" for the favored party, rather than a smaller number of districts that are "safe" for that party and potentially waste its votes. And the "safest" districts are those that "pack" the *disadvantaged* party's voters, so it is the *advantaged* party's voters that suffer from any resulting lack of responsiveness.

to certain *counties*' delegations. The current situation, in fact, confirms that a party's ability to win a few seats in excess of strict proportionality in one State typically will be offset by the other party's excess in another State: Republicans currently hold approximately 53% of the seats in the House of Representatives, receive about 51% of the nationwide congressional vote, and hold 55% of the seats in the Senate, a body whose composition is entirely immune from the effects of line-drawing. *See infra* n.13. Thus, accepting a gerrymandering challenge to congressional districts in one State necessarily would require the federal judiciary to analyze such districts in all States, and this Court to review all of the lower court decisions to ensure an overall "fair" result. *See Bandemer*, 478 U.S. at 153 (O'Connor, J., concurring) (if individual voter can bring statewide challenge to state legislative redistricting, "members of a political party in one State should be able to challenge a congressional districting plan adopted in any other State, on the grounds that their party is unfairly represented in that State's congressional delegation, thus injuring them as members of the national party"). Finally, for problems in congressional redistricting, "the Framers provided a remedy ... in the Constitution." *Vieth*, 541 U.S. at 275 (plurality op.).[12]

In any event, as we presently show, the quite "fair" plan challenged here cannot possibly constitute a proscribed "gerrymander" under any standard.

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[12] The Elections Clause, Article I, § 4, cl. 1, which permits "Congress to 'make or alter' [congressional] districts if it wished," was designed to allow Congress to remedy partisan gerrymandering, and Congress repeatedly has considered using its authority to that end. *Vieth*, 541 U.S. at 275-76 (plurality op.). Thus, the Framers anticipated the issue, debated how to address it, and specifically gave Congress, not the judiciary, authority in this area.

D. The Texas Legislature Enacted A Politically Fair Plan To Replace A Politically Unfair Plan

The Legislature's plan is "fair" to Democrats under any accepted standard and the plan it replaced was palpably "unfair" to Republicans. In the 2004 Texas elections, Republican candidates for Congress received approximately 60% of the two-party vote (58% of the total vote), reflective of their statewide voting support over at least the last decade.[13] Even a concededly fair and completely neutral plan typically will result in a "bonus" for the majority in the form of a larger percentage of seats than its percentage of statewide votes. *See Bandemer*, 478 U.S. at 130 (plurality op.); *id.* at 159 (O'Connor, J., concurring); *Vieth*, 541 U.S. at 357 (Breyer, J., dissenting).[14] Thus, the challenged

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[13] All congressional data cited herein are available at <http://clerk.house.gov/members/electionInfo/elections.html>. A party's voting strength is best "measured by the votes actually cast for all candidates who identify themselves as members of that party in the relevant set of elections; *i.e.*, in congressional elections if a congressional map is being challenged." *Vieth*, 541 U.S. at 366 (Breyer, J., dissenting); *see Bandemer*, 478 U.S. at 134 (plurality op.); *see generally* Edward R. Tufte, *The Relationship Between Seats and Votes in Two-Party Systems*, 67 Am. Poli. Sci. Rev. 540 (1973). Because most voters are "ticket-splitters," statewide contests for *different* offices do not shed light on statewide voting strength in congressional elections. *See Vieth*, 541 U.S. at 288 (plurality op.). In any event, Republican candidates in Texas received essentially the same percentage of votes in the 2004 congressional elections as they did in statewide elections in 2004 and recent years (not including Presidential elections, in which the Republican vote share was even higher). All data for statewide contests cited herein are available at <http://elections.sos.state.tx.us/elchist.exe> and summarized by the district court at J.S. 41-43a. In all elections, each major party's percentage of the total vote generally is slightly lower than its percentage of the two-party vote, which is the more standard measure for comparing votes received to seats won. *See* Tufte, *supra*, at 540 n.1; Br. of *Amici Curiae* Alan Heslop *et al.*, § I.A.

[14] *See also* King Br. at 8; Heslop Br. § I.A; *Vieth* App. Br. at 34; Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. Rev.

enactment achieved indisputable partisan fairness when Republicans won 66% of the seats with 60% of the two-party congressional vote statewide. Indeed, given the "winner's bonus," a party with 60% of the vote would more naturally be expected to win *70%* to *80%* of the seats in a neutral, fair plan.[15] *See, e.g.*, King Br. at 8 n.4 ("two to three percent increase in seats" for every "one percent increase in votes [above 50%]"); Heslop Br. § I.A; Tufte, *supra*, 67 Am. Poli. Sci. Rev. at 546 ("change of 2.5 per cent in seats" for each "1.0 per cent change in votes [above 50%]").

The partisan fairness of the challenged plan is confirmed by comparison to bipartisan redistricting plans specifically approved by the Court and those enacted in other States. In the 1972 elections under the plan approved in *Gaffney*, Republican candidates received 53% of votes, and thus would have been expected to win 56% to 59% of seats, and actually won 62% of seats. Reply Br. for Appellant at 18-21, App. 3a, *Gaffney v. Cummings*, 412 U.S. 735 (1973) (No. 71-1476). In the 2004 congressional elections under California's 2002 bipartisan plan, Democratic candidates received 55% of the two-party vote (53% of the total vote), and thus would have been expected to win 60% to 65% of seats, and actually won 62% of seats. And in 2002 in New York, a divided state government enacted a bipartisan congressional plan under which Democrats received 60% of the two-party vote (59% of the total vote), roughly the same as the Republicans in Texas, and won 69% of seats, or 3% more than the Republicans in Texas, in the 2004

751, 765 (2004); Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 Election L.J. 179, 198 (2003).

[15] The 10% Republican margin above 50% of votes would be expected to produce a margin of seats 2 to 3 times greater (20% to 30%) above 50%, or 70% to 80%. These percentages translate to 22.4 (70% of 32) or 25.6 (80% of 32) Republican seats, compared to the 21 actually garnered.

congressional elections. The Texas redistricting legislation of 2003, therefore, achieved the fairness of a bipartisan plan.

Indeed, the Texas plan is comparable to or *more* fair than the overwhelming majority of redistricting plans nationwide. For example, in Massachusetts, where Democratic support is roughly similar to Republican support in Texas, Democrats control *all* of the congressional districts, even though the Democrats garnered only 70% of the total statewide vote. More generally, in the 2004 elections, the party receiving more than 50% of the two-party vote won a higher percentage of seats (*i.e.*, a "winner's bonus") in 31 of the 40 States which have more than one Representative and tabulate election results for all districts. The Texas plan's minor departure from strict proportionality (6% more seats than votes) *and* its minor "winner's bonus" (1.6% of seats for every 1% of votes over 50%) were *roughly the same or smaller than those produced by the plans in more than 80% of these States*. *See* Heslop Br., Chart TX-22 (summarizing official election results). Furthermore, it is not and cannot be contended that any other standard, including the "symmetry standard" proposed by *amici* (*see supra* n.10), suggests that the challenged plan is unfair to Democrats.

Redistricting was necessary to achieve this partisan fairness because the 2002 plan "perpetuated much of" the "prior partisan gerrymander" that had been enacted by the Democrats in 1991. J.S. 12-13a.[16] The Democrats'

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[16] Notwithstanding Appellants' absurd claim that the district court erred in describing *its own* map-drawing methodology, there can be no dispute that even though the court did not *intend* this result, "[t]he *practical effect* of [its] effort was to leave the 1991 Democratic Party gerrymander largely in place as a 'legal' plan." J.S. 22a (emphasis added); *see* Michael Barone, *The Almanac of American Politics 2004*, at 1508 (2003) ("Republicans won more votes than Democrats, but fewer seats, thanks to a 1991 Democratic redistricting plan which was closely followed by a court in 2001.").

gerrymander had been "the shrewdest of the 1990s," *id.* at 20a (quoting Michael Barone, *The Almanac of American Politics 2002*, at 1448 (2001)), as evidenced by the fact that the Democrats in 1992 received 51% of the two-party congressional vote (50% of the total vote)[17] but nevertheless won *70%* of the seats. By 2000, the Democrats' share of the congressional vote had dropped to 49% of the two-party vote (47% of the total vote),[18] which ordinarily would translate into 47% to 48% of seats, but they nevertheless retained 57% of the seats. Similarly, under the court-drawn plan in 2002, the Democrats won 53% of the seats even though they received 45% of the two-party congressional vote (44% of the total vote),[19] which ordinarily would translate into 35% to 40% of seats. Thus, in both 2000 and 2002 a Republican *majority* won a *minority* of seats. This frustration of "majority rule," which otherwise occurred only a handful of times across the United States in the two election years combined,[20] was condemned in *Vieth* by the Democratic appellants and Justice Breyer as a clear sign of an unconstitutional gerrymander. *See* 541 U.S. at 287 (plurality op.); *id.* at 366 (Breyer, J., dissenting).

Indeed, the deprivation of the Republican majority's "fair share" in Texas was the "worst" in the Nation because both

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[17] Democrats received about 50% of the two-party vote (49% of the total vote) in statewide elections.

[18] In 2000 statewide elections, the Democrats received a much smaller vote share: 39% of the two-party vote (38% of the total vote) in the Presidential election and about 40% of the two-party vote (and 40% of the total vote) in other statewide contests.

[19] Again, the Democrats received a smaller share—about 42% of the two-party vote (41% of the total vote)—in statewide elections.

[20] In several cases the "majority" party received only about 51% of the two-party vote, and in all cases the majority party would have won the majority of districts if only one seat had gone the other way. *See* Heslop Br., Charts TX-51-52 (summarizing official election results).

the 2000 and 2002 plans resulted in the Republicans winning far fewer seats than expected with the winner's bonus—9% to 10% (roughly 3 seats) fewer in 2000, and 13% to 18% (roughly 4 to 6 seats) fewer in 2002. As noted, the 2003 enactment merely reduced but did not eliminate the unfairness for Republican voters in congressional elections, and, wholly apart from the winner's bonus, the divergence from strict proportionality in Texas congressional districts was greater in 2000 and 2002 (8%) than 2004 (6%).

Appellants' only feeble response is that the 2001 court-drawn plan would not be "unfair" if, hypothetically, Texas' citizens voted in congressional elections in the same way they do for *statewide* offices. App. Br. 27-28. But it is plainly erroneous "to think that majority status in statewide races establishes majority status for district contests" since it "assuredly is not true" that "the only factor determining voting behavior at all levels is political affiliation." *Vieth*, 541 U.S. at 288 (plurality op.). For example, the results of gubernatorial contests in Massachusetts, which Republicans have won for the past 15 years, would shed no light on the fairness of congressional districts under which all 10 Representatives for Massachusetts are Democrats. At a minimum, it was surely reasonable for the Texas Legislature to "measure" fairness by the traditional method of looking at the "*relevant* set of elections, *i.e.*, congressional elections if a congressional map is being challenged." *Vieth*, 541 U.S. at 366 (Breyer, J., dissenting) (emphasis added). Since voters in Texas are concededly "ticket-splitters" who vote differently for Congress than for other offices because of incumbency effects or other factors (App. Br. at 29), it is quite beside the point that the court-drawn plan would have been marginally "fairer" to Republicans if congressional voting mimicked other voting.[21] And if statewide votes *were*

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[21] For the same reason, the State's expert's analysis of the results produced by the various plans if one disaggregated various *statewide*

the proper measure, there is only a one- or two-seat difference between the legislative and court-drawn plans—hardly a difference of constitutional magnitude.[22]

In addition, the challenged plan is more politically fair, and the prior Texas plan much less politically fair, than the Pennsylvania plan upheld in *Vieth*. Under the *Vieth* plan in 2004, Republicans won 63% of the seats with only 51% of the two-party congressional vote,[23] which ordinarily would yield only 52% to 53% of seats. Thus, the Republican plan in Pennsylvania yielded 2 more seats for Republicans than the norm for their vote share. This outcome was far more favorable for their own party than what the Republican plan in Texas yielded for Republicans (1.4 to 4.6 *fewer* seats than the norm). In contrast, the 2000 and 2002 plans favored Texas Democrats (by yielding roughly 3 to 6 seats more than the norm) to a *greater* degree than the challenged *Vieth* plan favored Republicans. Thus, "the 2003 Texas legislative plan . . . dismantl[ed] a prior partisan gerrymander that had entrenched a minority party . . . ," J.S. 25a, and achieved remarkably fair partisan balance.

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elections into congressional districts says nothing about the plans' *actual* results and fairness. Moreover, even under this artificial analysis, the court-drawn plan produced *less* than the normal share of seats for the majority party. In 2000 statewide elections, Republican candidates received an average of 60% of two-party votes, which would translate to 70% to 80% of seats, and those candidates' average votes "carried" 66% of the court-drawn districts. In 2002 statewide elections, Republican candidates received an average of 58% of two-party votes, which would translate to 66% to 74% of seats, and those candidates' average votes "carried" 62.5% of the court-drawn districts. J.A. 207-10; J.S. 42a.

[22] Based on results in the statewide races, Democrats would have "won" 11 seats in 2000 and 12 in 2002 under the court's plan, while receiving 10 seats under the legislative plan in both years. J.A. 207-10.

[23] The outcomes of statewide elections in Pennsylvania likewise have been, on average, roughly 50-50. *See Vieth* App. Br. at 43.

II. SECTION 2 DID NOT MANDATE RETENTION OF THE 21% BLACK DISTRICT AT ISSUE HERE

A. Former District 24 Was Not A Black "Opportunity District"

Appellants contend that Section 2 does not "exclude from statutory protection districts that operate as minority opportunity districts even though the relevant group lacks an absolute majority of the population." App. Br. at 16. This legal question, however, is not presented here because the district court squarely found that District 24 is not a "Black opportunity district," but "a strong Democratic district" which "Anglo Democrats control," and Appellants do not challenge that finding as clearly erroneous. J.S. 111-12a. Nor could they since black voters in this district clearly could not elect a preferred *black* candidate for Congress.

The potential for a black candidate's success is necessary because, without it, blacks do not have an equal opportunity to elect their preferred candidate. Rather, "candidates favored by blacks can win, but only if the candidates are white." *Jeffers v. Clinton*, 730 F. Supp. 196, 209 (E.D. Ark. 1989), *aff'd*, 498 U.S. 1019 (1991). If the ability to elect black-preferred white Democrats constituted equal opportunity, then black voters in the South had an equal opportunity in the 1960s and 1970s because white Democrats overwhelmingly supported by blacks were routinely able to win in districts, like the district here, where blacks comprised only 21.4% of the voting age population. *Cf.* Chandler Davidson, *The Voting Rights Act: A Brief History, in Controversies in Minority Voting: The Voting Rights Act in Perspective* 7, 24 (Bernard Grofman & Chandler Davidson eds., 1992).

Here, as the district court correctly noted, there is no evidence that blacks have an opportunity to elect a candidate of their own race, if they so choose. No black candidate has ever even tried to run in this district or any of its predecessor districts. As Representative Johnson, a black Democrat in

the adjacent congressional district, testified, the district was drawn by white Democrat Representative Frost to ensure his own reelection. J.S. 111a; *see also Vera v. Richards*, 861 F. Supp. 1304, 1319-22 (S.D. Tex. 1994); J.A. 264-66. Moreover, in statewide races, the only black candidate to receive a majority of votes in this district was Ron Kirk, and this result was anomalous because he was the "former popular Mayor of Dallas" who received an astonishing *99%* of the black vote in the primary. J.S. 112a; J.A. 92-94. The other two black candidates analyzed both lost decisively in the Democratic primary, although black voters gave overwhelming (roughly 72%) support to Judge Morris Overstreet. J.A. 75-76; *see also* J.S. 112a. This belies Appellants' suggestion that constituting a majority in a primary somehow suggests black control of even that primary election. And, as the district court correctly noted, these *statewide* races say virtually nothing about what would happen in a real, contested Democratic primary conducted in District 24, where Anglo turnout would dramatically increase, particularly if the white candidate was well-financed Representative Frost, who had insured that the district includes "many communities that had been loyal to him in the past." J.S. 106-07a; *Bush v. Vera*, 517 U.S. at 1015 (Stevens, J., dissenting).

Thus, there is no basis for concluding that Appellants proved that the small black population here could "usually" defeat the combined voting of the two larger Anglo and Hispanic groups in the district, *Gingles*, 478 U.S. at 49, or for overturning the district court's well-supported finding. In any event, as we discuss at length, Appellants are quite wrong in suggesting that Section 2 requires the creation of districts where minorities constitute a minority simply because the minority-preferred candidate will usually win in

that district, but usually lose in the alternative district created by the legislature.[24]

B. Section 2 Does Not Authorize "Coalition/ Opportunity" Claims

Appellants' claim is premised on the principle that minority voters have a presumptive "right" to districts where their party's candidates will usually win whenever it is feasible to create or preserve such a district, at least up to the

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[24] Even if Appellants' "coalitional district" theory is accepted, their complaint is legally insufficient for another reason. As this Court has made clear, "the inability to elect representatives of their choice is not sufficient to establish a violation [of Section 2] unless, under the totality of circumstances, it can also be said that members of the protected class have less opportunity to participate in the political process." *Chisom v. Roemer*, 501 U.S. 380, 397 (1991). The plain language of Section 2 requires a showing that members of the protected group have "less opportunity" than others "to participate in the political process *and* to elect representatives of their choice." 42 U.S.C. § 1973(b) (emphasis added). *Chisom* squarely held that "[i]t would distort the plain meaning of [Section 2] to substitute the word 'or' for the word 'and'. Such radical surgery would be required to separate the opportunity to participate from the opportunity to elect." 501 U.S. at 397. Here there is no evidence that minority voters lack a full opportunity to participate in the political process under the legislative plan. As the Court recently noted, "'the power to influence the political process is not limited to winning elections.'" *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003) (quoting *Gingles*, 478 U.S. at 99 (O'Connor, J., concurring)). There is no suggestion here, for example, that members of the minority group "lack access to or influence upon representatives that it did not support as candidates." *Gingles*, 478 U.S. at 99 (O'Connor, J., concurring); *see also Ashcroft*, 539 U.S. at 482 ("[I]t is important to consider 'the likelihood that candidates elected without decisive minority support would be willing to take the minority's interest into account.'") (quoting *Gingles*, 478 U.S. at 100). Thus, even if Appellants were to prevail with respect to the opportunity to elect, they would be entitled to no relief because they have not shown that minority voters lack the opportunity to participate in the political process.

point of proportionality.[25] They purportedly have such a right in every district where minorities constitute a cognizable percentage of a successful bi-racial political coalition, even those such as old District 24, where blacks constituted just over one-fifth of the voting age population and were a smaller portion of the population than *both* Anglos and Latinos, where no black candidate had ever even run for office, and the district had been personally drawn by the long-standing white incumbent. Since blacks and Hispanics in virtually every State strongly support the Democratic party, this means that the federal judiciary must force state legislatures to create any reasonably compact district which provides the Democratic candidate with a likely opportunity to win. And, because Section 2 does not permit a dilutive "result" even if the district is drawn for entirely race-neutral reasons, this Democratic-leaning district is mandated regardless of whether the challenged district better complies with neutral districting criteria.

Appellants' syllogism, however, is plainly based on a false premise—*i.e.*, that minority voters must have the ability to elect their preferred candidate as part of a bi-racial political coalition to achieve the equal opportunity to "elect"

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[25] There is serious potential for semantic confusion concerning how districts are described or labeled. In *Ashcroft*, the Court seemed to suggest that a "coalition" district is one in which minorities are a minority, but they can nonetheless "elect a candidate of their choice" because white crossover voting "will help to achieve the electoral aspirations of the minority group." 539 U.S. at 481. The opinion indicated that there are also "influence districts" where the minority group is probably "not able to elect a candidate of choice," but where minorities can nevertheless "play a substantial, if not decisive, role in the electoral process." *Id.* at 482. But the type of district *Ashcroft* described as a "coalition" district is the same type of district that the Court said was an "influence" district in *Voinovich v. Quilter*, 507 U.S. 146 (1993). Specifically, "in such influence districts," minorities "could elect their candidate of choice . . . if they are numerous enough and their candidate attracts sufficient cross-over votes from white voters." *Id.* at 154.

guaranteed by Section 2. Acceptance of this principle would convert the equal opportunity mandate of the Act into a requirement for preferential treatment of whatever party is supported by most minority voters. Further, if districts where minorities constitute a significant percentage of a winning bi-racial coalition really did provide them with the opportunities required by the Act, then the Legislature's 2003 plan, and virtually every plan, would not deny any such opportunity on a statewide basis because the number of such districts in the plan is equivalent to the percentage of blacks and Hispanics in Texas' electorate. In short, Appellants' assertion that Section 2 requires districts where a minority-preferred candidate can be elected by a bi-racial coalition is fundamentally at odds with any reasonable understanding of *minority* vote *dilution*, the language of the Voting Rights Act, and the reasoning of *Gingles*.

1. The plain language of Section 2 clearly establishes that there is no right, or presumptive right, of a minority-supported political coalition to usually elect its preferred candidate. It is obviously true that a minority-preferred candidate can be elected in a majority-white district through a bi-racial coalition, but the language of Section 2 clearly does not grant any *right* to have the federal judiciary create such districts so that the candidate preferred by that bi-racial coalition will usually win.

Under Section 2, plaintiffs must show that a redistricting plan results in minorities suffering a disadvantage, relative to non-minorities, "on account of race or color." 42 U.S.C. § 1973(a). Thus, "a violation of" Section 2 is established only if "the political processes leading to nomination or election ... are not *equally* open to participation by [minorities]." *Id.* § 1973(b) (emphasis added). Relatedly, the Act is violated only if members of a "protected" "class of citizens" "have *less* opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* (emphasis added). Depriving minorities of the ability to form a winning

coalition does not "result[]" in vote dilution "on account of *race*" and does not mean that minorities have "*less* opportunity than other members of the electorate . . . to elect representatives of their choice." *Id.* § 1973(a) & (b) (emphasis added).

Bi-racial coalitions are not defined by "race" and are not protected by the Voting Rights Act; racial groups are. Minorities are not provided with "less opportunity than other members of the electorate" if they are unable to form a winning coalition, because *no* racial group (or group defined by any other characteristic) has a right to form a winning coalition.[26] To the contrary, they would be in precisely the same position as all groups constituting a minority of the population: their ability to elect their preferred candidate will be frustrated unless they are able to persuade the majority of the relative merits of their candidate. Granting minorities a right to rearrange districts so that their political coalition will usually win has nothing to do with equal opportunity, but is preferential treatment afforded to no others. "Section 2's proviso against finding a right to proportional representation merely confirms what is otherwise clear from the text of the statute, namely, that the ultimate right of § 2 is equality of opportunity, not a

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[26] *See UJO*, 430 U.S. at 166-67 (White, J.) (voters whose "candidate has lost out at the polls" have "no constitutional complaint" because "[t]heir position is similar to that of the Democratic and Republican minority that is submerged year after year by the adherents of the majority party who tend to vote a straight party line"); *Whitcomb*, 403 U.S. at 153 (no vote dilution claim when a minority group, "*along with all other Democrats*, suffers the disaster of losing too many elections") (emphasis added); *City of Mobile v. Bolden*, 446 U.S. 55, 109 (1980) (Marshall, J., dissenting) (no Section 2 claim where minorities' "lack of success at the polls was the result of partisan politics, not racial vote dilution"); *Nixon v. Kent County*, 76 F.3d 1381, 1392 (6th Cir. 1996) (A "group that is too small to be expected to win a seat, were it purely a political group, cannot legitimately have heightened expectations because the basis for the group's existence is tied to the race of its members.").

guarantee of electoral success for minority-preferred candidates of whatever race." *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994); *see id.* at 1020 ("minority voters are not immune from the obligation to pull, haul, and trade to find common political ground" to elect their preferred representatives).

Equally important, an electoral device is illegal only if it deprives a "class of citizens protected by subsection (a)"—*i.e.*, a racial or language minority group—of the ability "to elect representatives of their choice." 42 U.S.C. § 1973(b). If minorities cannot constitute a potential majority, then a redistricting plan has not denied *that* class the ability "*to elect* representatives of *their* choice." *Id.* (emphasis added). Since only a majority can elect,[27] and since the protected class cannot constitute a majority under any proper alternative, the enacted redistricting plan has not *denied* the protected class an ability to elect that they would otherwise possess. The only group "denied" the ability to elect (relative to the alternative redistricting plan), is the political coalition comprised of the protected class *plus* an additional group of nonminority citizens who happen to share the protected group's political preferences. Since Section 2 does not mandate preferential treatment of any political coalition, regardless of the extent to which that coalition is supported by minorities, and basic principles of judicial neutrality foreclose such preferences, it is clear that any harm to the bi-racial political coalition's potential electoral success is not an injury cognizable under Section 2. A bi-racial coalition that

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[27] Although a *plurality* can elect a candidate in a *three-way* race, this is of no significance under Section 2 because vote dilution necessarily deals with "structural" barriers that need to be assessed in terms of the "usual" situation, not "special circumstances" such as a three-candidate race, which will lead to "the success of a minority candidate in a particular election." *Gingles*, 478 U.S. at 51, 57; *see McNeil v. Springfield Park Dist.*, 851 F.2d 937, 944 (7th Cir. 1988).

loses elections is "indistinguishable from political minorities as opposed to racial minorities." *See Nixon*, 76 F.3d at 1392.

2. This is precisely the point made in *Gingles*: unless minorities have the potential to constitute a majority, then demography, not the redistricting plan, has deprived them of the potential to elect, since majority status is necessary to elect representatives of choice. 478 U.S. at 50 n.17 ("[I]f . . . the minority group is so small in relation to the surrounding white population that it could not constitute a *majority* in a single-member district, these minority voters *cannot* maintain that they would have been able to elect representatives of their choice in the absence of [the challenged plan].") (emphasis added); *see Growe v. Emison*, 507 U.S. 25, 40 (1993) ("The 'geographically compact majority' and 'minority political cohesion' showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district.") (quoting *Gingles*, 478 U.S. at 50 n.17).

Contrary to Appellants' contention, the *Gingles* Court was not somehow unaware that minority groups comprising 30% or 45% of the polity often are able to form coalitions to elect their preferred representatives when it unequivocally stated that minorities constituting a numerical minority *cannot* elect their preferred representatives. All members of the Court have always recognized that "there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice." *De Grandy*, 512 U.S. at 1020. *Gingles* itself directly ruled on such a district; one of the districts in that case had consistently elected a black candidate even though blacks constituted only 36.3% of the population. *Gingles*, 478 U.S. at 77; *see also id.* at 74 & n.35. And the *third Gingles* precondition directly recognizes this possibility, for a district without legally significant racial bloc voting is one where bloc voting by the white majority

does not "defeat the combined strength of minority support plus white 'crossover' votes." *Id.* at 56.

Consequently, contrary to Appellants' starkly revisionist history, *Gingles* consciously excluded coalition districts in expressly holding that the first "necessary precondition" to mounting a viable vote dilution claim is that the minority group be "sufficiently large and geographically compact to constitute a *majority* in a single member district." 478 U.S. at 50-51 (emphasis added). While *Gingles* (and subsequent opinions) reserved the question of what standards applied to "influence" claims (*id.* at 46 n.12; *Voinovich*, 507 U.S. at 158; *Growe*, 507 U.S. at 41-42 & n.5; *De Grandy*, 512 U.S. at 1008-09), nowhere does the opinion suggest that the word "majority" somehow connotes a district with a sufficient minority population to ensure that minority voters have the ability to "elect[] their preferred candidates." App. Br. at 9, 16, 32.

Other decisions of the Court similarly recognize that only in a majority-minority district can the minority group "elect a representative of its *own* choice" because only then can it "dictate outcomes independently." *Growe*, 507 U.S. at 40 (emphasis added); *Voinovich*, 507 U.S. at 154. By contrast, a smaller minority group that is part of a winning bi-racial coalition merely "influences" electoral outcomes. *Gingles*, 478 U.S. at 46 n.12 (group able to allege "that the [challenged practice] impairs its ability to *influence* elections") (emphasis in original); *accord De Grandy*, 512 U.S. at 1009 (where "members of a minority group are a minority of the voters," they allege that their group is "potentially influential"); *Voinovich*, 507 U.S. at 154 (voters allege "influence-dilution" where they "do not allege that [the challenged plan] prevented black voters from constituting a *majority* in additional districts") (emphasis in original); *Growe*, 507 U.S. at 41 n.5 ("a minority group not sufficiently large to constitute a majority" alleges an "ability to influence, rather than alter, election results").

These cases confirm that the relevant focus under Section 2 is the power of the minority group, not the larger political coalition to which it belongs. Section 2 protects only against *minority* vote dilution or denial of *equal* opportunity, so does not grant to political coalitions supported by minorities any preferential right to representation, proportional or otherwise. Thus, as *Gingles* also emphasized, the "reason" that Section 2 authorizes vote dilution claims only "in districts in which members of a racial minority would constitute a majority of the voters" is to insure that Section 2 will "only protect racial minority votes from diminution proximately caused by the [re]districting; [but] *would not assure racial minorities proportional representation.*" 478 U.S. at 50 n.17 (emphasis in original).

In short, although *Gingles* and subsequent cases technically reserve the question, the opinion's unequivocal statement that only a majority can "elect" within the meaning of Section 2 forecloses the assertion that the statute's prohibition against vote dilution extends to minority groups that can "elect" their preferred representatives only in combination with nonminorities.

3. Moreover, any revision of the first prong of *Gingles* makes nonsense of the other *Gingles* preconditions and converts them into precisely the mandate for proportional representation that the *Gingles* majority eschewed, that the *Gingles* concurrence strongly condemned, and that Section 2 expressly prohibits. 478 U.S. at 75-76; *id.* at 96-97 (O'Connor, J., concurring); *see also* 42 U.S.C. § 1973(b); S. Rep. No. 97-417 (1982), at 28, *reprinted in* 1982 U.S.C.C.A.N. 177, 202-03. According to Appellants, *Gingles* purportedly required a finding of "Section 2 liability where the Anglo bloc 'normally will defeat the *combined* strength of minority support *plus white crossover votes.*'" App. Br. at 34-35 (quoting *Gingles*, 478 U.S. at 56) (emphasis added by Appellants). But this is a quotation of the *third Gingles* precondition—the test for legally

significant white bloc voting—which plaintiffs must always demonstrate in any voting rights case. If all that is required is the *third Gingles* precondition to establish *prima facie* vote dilution, then the first precondition is utterly superfluous and nonsensical.

More important, this *de facto* elimination of the first *Gingles* precondition means that Section 2 effectively requires creation of districts where minorities' preferred representatives are usually elected, at least up to the point of proportionality.[28] Under the other *Gingles* preconditions, all the plaintiff need show is that the minority "supported certain candidates and that those candidates have not usually been elected." *Gingles*, 478 U.S. at 92 (O'Connor, J., concurring). Thus, as Justice O'Connor's *Gingles* concurrence correctly cautions, the *Gingles* preconditions, even *with* the majority-in-a-district requirement, "result[] in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups that are large enough to constitute majorities if concentrated within one or more single-member districts." *Id.* at 85. *Weakening* that threshold showing by eliminating the first *Gingles* precondition would greatly expand the rough proportionality requirement of *Gingles* beyond areas where a compact minority community can constitute a natural majority, to every area where there is a

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[28] The *Gingles* preconditions do not technically establish a Section 2 violation, since the totality of circumstances must be further analyzed. But where minorities can establish the availability of a compact, "performing" majority district, such a defense succeeds in "only the very unusual case." *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1135 (3d Cir. 1993); *see De Grandy*, 512 U.S. at 1012 ("lack of equal electoral opportunity may be readily imagined and unsurprising when demonstrated under circumstances that include the three essential *Gingles* factors"). The only defense that will usually work is that proportionality has been achieved under *De Grandy*, thus confirming that Appellants require representation up to the point of proportionality.

sufficient number of minorities to form any cognizable part of a successful bi-racial coalition electing Democrats.

Furthermore, there simply is no logical stopping point or principled boundary to contain this otiose concept of "dilution." Just as the Legislature was allegedly obliged to choose a 21.4% black voting age population ("VAP") district over a 15% black VAP district (in adjacent District 26), so too must legislatures "increase" black VAP from 5% to 11% if this will provide the winning margin for a Democratic candidate who usually receives 45% to 46% of the vote. *See McNeil*, 851 F.2d at 947. Indeed, there is no reason that "dilution" of a bi-racial political coalition depends at all on any diminution in *minority* percentages, as opposed to diminution of the Anglo members of the Democratic coalition. If minority voters really do have a right to districts where their preferred candidates prevail, this right is plainly violated if the legislature opts for a 20% black district where nonminority voters are predominantly Republican over one with the *same* black percentage, but where nonminorities are principally Democratic (and thus supportive of the minority-preferred candidate). *See O'Lear v. Miller*, 222 F. Supp. 2d 850, 860-61 (E.D. Mich.) (three-judge court) (rejecting this claim brought by counsel for Jackson Appellants), *aff'd*, 537 U.S. 997 (2002).

Thus, far from being an "arbitrary" barrier, the first *Gingles* precondition is a necessary bulwark against an otherwise unbridled concept of minority voting rights, which equates impermissible vote dilution with the failure to maximize the representation of minority-supported candidates, at least up to the point of proportionality. Moreover, the *Gingles* requirement that minorities constitute a potential numerical majority of the population is straightforward and readily calculable, whereas the "coalition" theory would require courts constantly to assess *whether* a certain minority percentage will affect an electoral outcome. This would involve, as then-Judge Breyer aptly noted in rejecting a similar claim, "the very finest of political

judgments about possibilities and effects—judgments well beyond their capacities." *Latino Political Action Comm., Inc. v. City of Boston,* 784 F.2d 409, 412 (1st Cir. 1986).[29] More important, the *Gingles* majority requirement is politically neutral and, as noted, is actually tied to the statutory language because it looks at the opportunities of a protected racial group, not a political coalition. *See supra* pp. 31-34.

C. This Case Illustrates The Invalidity Of The "Coalition" Theory

Appellants' claim here vividly exemplifies all of the inherent problems with trying to construct a "coalitional/effective" or "influence" claim that is not inherently partisan and amorphous.

First, this case demonstrates that Appellants' "coalition" theory either requires a gerrymander on behalf of minority-preferred parties in every district containing any minorities or is essentially incomprehensible. For example, it seems quite clear that Appellants' "coalitional/opportunity" label is equally applicable to the six "other districts where African-Americans and Latinos had exerted significant electoral influence by providing successful candidates their margins of victory." App. Br. at 33 n.26. These districts have combined black and Hispanic VAP ranging from 20.6% to 39.5%, and have black populations up to 20.3% VAP, and Hispanic VAP up to 29%. J.S. 113a (listing "influence" districts); *see* J.A. 337-38. All these districts, like

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[29] *See also Gingles v. Edmisten*, 590 F. Supp. 345, 381 (E.D.N.C. 1984), *aff'd in part, rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986) ("Nothing but raw intuition could be drawn upon by courts to determine in the first place the size of those smaller aggregations having sufficient group voting strength to be capable of [vote] dilution in any legally meaningful sense and, beyond that, to give some substantive content other than raw-power-to-elect to the concept as applied to such aggregations."); *Ill. Legislative Redistricting Comm'n v. LaPaille*, 786 F. Supp. 704, 715 (N.D. Ill.) (three-judge court), *aff'd*, 506 U.S. 948 (1992); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 654 (N.D. Ill. 1991).

"coalitional/opportunity" Districts 24 and 25, have consistently elected white Democrats preferred by minority voters since at least 1992, although, also like Districts 24 and 25, none has elected a black Democrat. Since minorities are a concededly "significant" component of a winning bi-racial coalition in all six of these districts, and are unable to elect their preferred candidate under the legislative plan, it seems clear that they are "coalitional" districts and that their elimination violates Appellants' interpretation of *Gingles*. Yet in the court below and in prior filings in this Court, Appellants seem to dismiss these districts as "influence districts," which do not seem to be independently protected by the Voting Rights Act. J.S. 113a; *see also* J.S. in *Jackson v. Perry*, No. 03-1391, at 17 n.32. But these districts cannot be "influence districts" as that phrase is used in *Ashcroft*, because such districts, unlike "coalitional districts," are ones in which minority voters may well "*not* be able to elect a candidate of choice." 539 U.S. at 482 (emphasis added). Since Appellants can neither articulate nor apply a coherent description of which districts satisfy their understanding of the first *Gingles* precondition, courts obviously cannot apply a limiting principle and thus must find vote dilution everywhere minorities could be the "swing vote" to elect a preferred Democrat, but are not given that opportunity under the challenged plan.

Appellants make much of the fact that black voters allegedly constitute a majority of voters in the Democratic primary in District 24, as if this is somehow talismanic, but it is difficult to see how it is even relevant. Most obviously, no group is ever even potentially able to "control" the electoral process unless it is a majority of voters in *both* the primary and general elections. Here, black voters constitute, at best, only 30% to 33% of voters in the general election and, as noted, do not "control" even the primary. *See* J.S. 110-12a; *supra* pp. 27-29. Consequently, under Appellants' theory, the dividing line between protected "coalition" districts and presumably unprotected "influence" districts is either

unknowable or turns on factors incapable of consistent, principled judicial articulation.

Second, this case well illustrates the inherently imprecise and speculative nature of estimating the minority percentage which will actually provide minorities with a realistic opportunity to elect their preferred candidate. As noted, no black Democrat has even run in District 24, rendering it impracticable to make even a reliable estimate of whether it would be feasible for a black Democrat to be elected. Although District 24 is usually a 55% district for white Democrats (J.A. 100), it might well not be sufficient for a black Democrat because (1) a black v. white Democratic primary contest would likely significantly increase non-black turnout and (2) if there is racial bloc voting where white voters are more reluctant to vote for black candidates, then the vote tallies achieved by white Democrats in general elections will be higher than what a black candidate would receive. Accordingly, estimating the minority and Democratic percentages needed to elect a black candidate in this district is based only on "raw intuition," and requires indulging the fiction that a black Democrat could possibly be elected so long as former Representative Frost is a candidate. *See supra* p. 28.

Third, it is clear that Appellants' conception of minority vote dilution turns far more on the *partisan* composition of the *nonminority* electorate than it does on the percentage of minority voters in the district. Indeed, the only difference between the court-drawn plan and the legislative plan is the partisan composition of Anglos in the various districts, for there is no cognizable difference between the *racial* percentages in the plans. Most generally, the legislature's plan *increased* the number of Hispanic majority districts from 7 to 8, *increased* the number of black representatives from 2 to 3, and maintained the number of Hispanic Democrats elected. Both plans have 11 districts where blacks and Hispanics constitute a majority of the voting age population and 7 districts where those combined groups

comprise from 20% to 25% of the VAP. J.A. 337-38. The legislative plan, in addition, has two *more* districts where the combined black and Hispanic percentage is between 25% and 40%, reflecting, if anything, that it is superior to the court-drawn plan in terms of the minority percentages in the districts. *See id.*

As this reflects, the only alleged flaw in the plan is that the minority community is "submerg[ed]" into a district "dominated by Anglo *Republican* voters" rather than Anglo Democrats. App. Br. at 43 (emphasis added). For example, District 26, which is adjacent to old District 24 and supposedly is a "particularly egregious" example of minority vote dilution, has a black VAP of 15% and a Hispanic percentage of 12.5%, for a combined 27.5% minority representation, which *exceeds* the minority percentage in four of the seven districts which, Appellants said in district court, had provided minorities with "significant electoral influence" in the old plan. J.A. 337-38; App. Br. at 33 n.26; J.S. 113a (identifying Districts 1, 2, 4, 9, 10, 11 and 17 as claimed electoral influence districts). The same is true of six other districts in the Legislature's plan (1, 2, 10, 11, 24 and 32), which have minority representation in excess of 4 to 6 of the old plan's "significant influence" districts.[30] Perhaps most revealingly, District 4 supposedly fails to remain a district where minorities have "significant electoral influence," not because of any appreciable change in minority population, but simply because Representative Hall switched from the Democratic to the Republican party. J.A. 337-38; *compare* J.S. 113a (Appellants included District 4 as one of *seven* influence districts), *with* App. Br. at 33 n.26

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[30] Under the court-drawn plan, Districts 1, 2, 4, and 17 had a combined black and Hispanic VAP of 21.4% or lower, which is less than all six of these legislative districts. *See* J.A. 337-38, *id.* at 338 (legislative District 32 has combined 39.2% VAP, which exceeds that of court-drawn Districts 9 (33.2%) and 11 (29.1%)).

(now arguing that there were "*half a dozen* . . . [influence] districts") (emphasis added). Thus, "submergence" of minority voters into majority-*Democrat* districts purportedly *fulfills* the mandate of the Voting Rights Act, but placing precisely the same minority voters into a majority-*Republican* district is, *ipso facto*, a violation of the Act.

The fact that Appellants' complaint is, at bottom, that the white majorities in the new plan, unlike the court-drawn plan, tend to vote Republican reveals that their challenge has very little to do with minority vote dilution, and everything to do with insuring that the federal judiciary guarantees a certain level of success for the minority-preferred Democratic party.

D. The "Coalition" Theory Is Inconsistent With The Purposes Of Section 2

Appellants' theory is also irreconcilable with the basic purposes of Section 2 and produces results that may actually harm minorities' quest for equal electoral opportunity. First, acceptance of Appellants' conception of "coalitional/ opportunity" districts would mean that here, as in the vast majority of cases, minorities would enjoy proportional or extra-proportional representation under the plan. Under the court-drawn plan, blacks and Hispanics were able to elect their preferred representatives in 17 of 32 districts (53%), but those groups combined constitute only 34.6% of the State's citizen voting age population, which is almost exactly the percentage at which their preferred representatives are elected under the legislature's plan—34.4% (11 of 32). J.A. 188; J.S. 22a. Appellants cannot, of course, contend that Anglo-majority districts which elect minority-preferred candidates are equivalent to majority-minority districts under the *Gingles* preconditions, but somehow suggest that they are not equivalent when assessing the plan's overall proportional representation. If Appellants' idiosyncratic understanding of districts providing an "opportunity to elect" is accepted, virtually every plan will have a number of "opportunity"

districts equal to or exceeding the minority percentage of the population.

Appellants' proposal also departs from the underlying purposes of Section 2 because it is necessarily directed at areas where race-conscious voting by nonminorities is not a serious problem, but would do nothing to provide minority voters relief where white bloc voting remains a persistent barrier. If the area surrounding old District 24 is truly one in which black candidates can be elected when the black voting age population is only 21.4%, then this is necessarily an electorate where white voters will willingly support a minority candidate and thus does not present the sort of "racial and ethnic cleavages" that the Act was designed to eradicate. *De Grandy*, 512 U.S. at 1020. This is in stark contrast to the districts in *Gingles* and elsewhere, where whites would not vote for minority candidates, so there was a demonstrable need for minorities to constitute a majority in order for them to elect their preferred candidate. Indeed, under Appellants' own estimates, the white "crossover rate" in District 24 is "roughly 30%." App. Br. at 42 n.34. As the court below correctly noted, this Court has held that crossover voting of between 22% and 38% is not racial bloc voting as a matter of law. *See Abrams v. Johnson*, 512 U.S. 74, 92-93 (1997); J.S. 111a n.115 (citing *Abrams*); *see also Voinovich*, 507 U.S. at 151-52, 158 (affirming lower court finding of no racial bloc voting where "black candidates have been repeatedly elected from districts with only a 35% black population"). As this reflects, Appellants' proposed rule has the perverse effect of penalizing those areas where colorblind, high-"crossover" voting by whites enables minority-preferred candidates to win in majority-white districts, while simultaneously exempting those areas where whites continue to refuse to vote for candidates of a different race because, in those jurisdictions, there will not be sufficient white crossover to aid minorities in the proposed bi-racial coalition.

Moreover, as virtually every lower court has noted, Appellants' theory is contrary to Section 2's purpose because it requires the federal judiciary to create or preserve districts that tend to favor Democrats, especially white Democrats. Here, Appellants contend that the failure to preserve or create the Democratic-gerrymandered District 24 constitutes vote dilution requiring judicial correction. The lower courts have consistently rejected this transparent effort to conscript the federal judiciary into rearranging districts "to make the congressional races more competitive for [D]emocratic candidates" because the "Voting Rights Act does not guarantee that the nominee of the Democratic party will be elected, even if black voters are likely to favor that party's candidates." *Smith v. Clark*, 189 F. Supp. 2d 529, 537 (S.D. Miss. 2002); *Baird v. City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992); *see also Hall v. Virginia*, 385 F.3d 421, 430-32 & n.13 (4th Cir. 2004), *cert. denied*, 125 S. Ct. 1725 (2005); *Nixon*, 76 F.3d at 1392; *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 643-44 (D.S.C. 2002) (three-judge court).

Finally, Appellants' theory is contrary to the purposes of the Act and the Fourteenth Amendment because it requires that courts and legislatures become "fixated on race" in drawing virtually every district. App. Br. at 42 (quoting dissenting opinion below). Contrary to Appellants' absurd contention, race-conscious line-drawing and balkanization is necessarily *increased* if courts require "coalitional" districts wherever there is any minority presence and a preferred Democratic candidate can win, *in addition* to areas where minorities form a natural majority. If a legislature must constantly tinker with minority percentages between 15% and 40% to avoid liability, then race will be a "predominant factor" in virtually every redistricting decision. *See Miller*, 515 U.S. at 916. Consequently, virtually every redistricting decision will pose a Hobson's choice between violating *Shaw* or defending against a Section 2 challenge. In addition, the federal judiciary is not equipped, or authorized

under *Ashcroft*, to dictate to state legislatures whether racial harmony is better achieved in a 15% black VAP district than it would be in a 21.4% district mandated by judicial fiat. If the Court is concerned, as was the *Gingles* concurring opinion, that the *Gingles* preconditions tilt too far towards requiring a proportional number of majority-minority districts, this situation can only be exacerbated by, as Appellants suggest, eliminating the first *Gingles* prong and mandating "coalitional" districts everywhere there is a cohesive minority group of any size.

E. The "Coalition" Theory Is Inconsistent With Other Precedent

Contrary to Appellants' misleading brief, no decision of this Court has ever suggested any support for Appellants' proposed revision of the first *Gingles* prong, and every circuit court and three-judge court confronting such an argument, save one, has expressly rejected it. All of the cases cited by Appellants reflect, at most, the universally accepted reality that a candidate preferred by minority voters *can* succeed in a majority-white district, but none suggest any *right* to such districts, or that such a right can be reconciled with the first *Gingles* precondition.

Most obviously, as the court below correctly noted, Appellants' contention that the *Ashcroft* decision somehow authorizes Section 2 "coalition" suits "turns the principle of [that case] on its head." J.S. 112a. Specifically, *Ashcroft* authorized state legislatures, even under the stringent requirements of Section 5 of the Voting Rights Act, to *voluntarily* create "coalitional" or "influence" districts *in place of* majority-minority districts—thus substantially *enhancing* state legislative autonomy to redistrict free from federal judicial interference. Although Section 5, unlike Section 2, bluntly "insure[s]" preservation of "current minority voting strength," States are nevertheless free to *reduce* the number of majority-minority districts, creating "fewer minority representatives" and more districts where

"minority voters may not be able to elect a candidate of choice." *See Ashcroft*, 539 U.S. at 477, 482-83; *see also id.* at 491 (Kennedy, J., concurring) ("[C]onsiderations of race that would *doom* a redistricting plan under the Fourteenth Amendment or *§ 2* seem to be what save it under § 5.") (emphasis added). Such redistricting decisions constitute a "political choice," and state legislatures, not the federal judiciary, are the entities empowered in a democratic society to "choose one theory of effective representation over the other." *Id.* at 482-83 (majority op.). Accordingly, "Section 5 does not dictate" whether the State "chooses to create a certain number of 'safe' districts" or "choose[s] to create a greater number of districts in which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice." *Id.* at 480.

Here, the Texas Legislature, like the Georgia Legislature in *Ashcroft*, simply chose among competing theories of effective representation and, unlike Georgia, chose a plan which optimized minority voting power in the traditional sense. That is, it opted for a plan which replaced two districts—Districts 24 and 25—where a black candidate had never been elected, with District 9, which predictably resulted in the election of a black-supported black candidate over a white incumbent. J.A. 338. Since Appellants concede that the 2001 judicial plan complies with Section 2 (and advance it as a remedial alternative), this necessarily means that the legislative plan also complies because it simply modifies the 2001 plan to exercise the choice expressly blessed by *Ashcroft*. That is, it simply replaced two districts where the ability of black voters to elect a preferred candidate of their own race was (at least) doubtful, with one where the black-preferred black candidate is quite likely to be elected. Since that decision does not violate even the stringent non-retrogression commands of Section 5,

a fortiori it cannot violate Section 2's equal opportunity requirement.[31]

Nor does the *De Grandy* opinion in any way relax the first *Gingles* precondition. Appellants focus on a sentence in *De Grandy* that states that the first *Gingles* prong requires "the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." 512 U.S. at 1008; App. Br. at 35. This sentence, however, is fully consistent with the holding of *Gingles* that the minority population must constitute a numerical majority in order to be "sufficiently large . . . to elect the candidates of its choice." 478 U.S. at 50 & n.17. Indeed, the sentence in *De Grandy* directly preceding the quoted sentence establishes that *De Grandy* was not seeking to relax the numerical majority requirement: "The dispute in this litigation centers on . . . whether Hispanics are sufficiently numerous and geographically compact to be a *majority* in additional single-member districts, as *required* by the first *Gingles* factor. . . ." 512 U.S. at 1007 (emphasis added); *see also id.* at 1014 n.11 ("'Proportionality' as the term is used here links the number of *majority-minority* voting districts to minority members' share of the relevant population.") (emphasis added).

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[31] Appellants assert that the "Houston district has no relevance to a Section 2 challenge to the elimination of a district hundreds of miles away." App. Br. at 40 n.31. But *Ashcroft* made clear that states are entitled to choose a plan with one stronger black opportunity district rather than two weaker districts. *Ashcroft*, 539 U.S. at 481-83. Since the State could not have increased black voting strength in the Dallas/Fort Worth district, Appellants' claim is that it was required *both* to enhance the Houston district *and* to preserve District 24. This cannot be correct. It both runs afoul of *Ashcroft*'s holding that "gains in the plan as a whole" may offset losses in particular districts, 539 U.S. at 479, and impermissibly establishes maximization as the Section 2 mandate, *see De Grandy*, 512 U.S. at 1017 ("Failure to maximize cannot be the measure of § 2.").

Equally inapposite are the lower court cases simply holding either that the racial percentages of majority-minority districts may be reduced if white bloc voting is insufficient to defeat the minority-preferred candidate in the new districts, or that the presence of such less-than-majority districts should be considered as defenses in evaluating Section 2 challenges.[32] The fact that States are free to create minority-minority districts, and to use such districts as an affirmative defense to Section 2 challenges, cannot rationally suggest that such districts may be imposed by judicial fiat. Although legislatures are free to seek proportionality and may cite proportional representation as a defense to a Section 2 claim, Section 2, by its terms, does not *require* such proportionality. *See De Grandy*, 512 U.S. at 1020 n.17. Moreover, contrary to Appellants' knowingly false assertion that the Justice Department has consistently opposed the *Gingles* majority-in-a-district requirement, it has, in fact, urged this Court to "agree with those courts who have rejected [the] notion" that "Section 2 requires creation of districts in which minorities are demonstrably *not* the majority of the voting age population." Br. of the United States as *Amicus Curiae*, *Voinovich v. Quilter*, 507 U.S. 146 (1993) (No. 91-1618) (emphasis in original). Finally, although Appellants simply ignore this tsunami of precedent, the lower federal courts, with one insignificant exception,

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[32] *See Page v. Bartels*, 144 F. Supp. 2d 364, 366 (D.N.J. 2001) (three-judge court) (plaintiffs failed to establish "a white bloc vote . . . [that] normally will defeat the combined strength of minority support plus white 'crossover' votes"); *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1322 (S.D. Fla. 2002) (three-judge court) (rejecting claim where *challenged* district would "usually . . . result in the election of [] minority candidates of choice"); *Rural W. Tenn. Af.-Am. Affairs Council, Inc. v. McWherter*, 877 F. Supp. 1096, 1101 (W.D. Tenn.) (deciding that influence districts weigh against finding of Section 2 violation, but not deciding whether "§ 2 entitles minority groups to an influence district even if they cannot satisfy the first *Gingles* precondition"), *aff'd*, 516 U.S. 801 (1995).

have uniformly and consistently rejected claims challenging the failure to create districts where minorities are less than a majority, but can form a winning bi-racial coalition.[33]

CONCLUSION

The judgment should be affirmed.

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[33] Significantly, the Court has summarily affirmed two of these decisions where the issue was presented on appeal. *Parker v. Ohio*, 263 F. Supp. 2d 1100, 1104-05 (S.D. Ohio) (three-judge court), *aff'd*, 540 U.S. 1013 (2003); *Turner v. Arkansas*, 784 F. Supp. 553, 569-70 (E.D. Ark. 1991) (three-judge court), *aff'd*, 504 U.S. 952 (1992); *see also Hall*, 385 F.3d at 430-31; *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 851, 852-53 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000); *Cousin v. Sundquist*, 145 F.3d 818, 828-29 (6th Cir. 1998), *cert. denied*, 525 U.S. 1138 (1999); *Negron v. City of Miami Beach*, 113 F.3d 1563, 1569 (11th Cir. 1997); *Nixon*, 76 F.3d at 1389; *Romero v. City of Pomona*, 883 F.2d 1418, 1424 n.7 (9th Cir. 1989); *McNeil*, 851 F.2d at 942; *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 374-79 (S.D.N.Y.) (three-judge court), *aff'd*, 543 U.S. 997 (2004); *O'Lear*, 222 F. Supp. 2d at 861; *Cano v. Davis*, 211 F. Supp. 2d 1208, 1231 (C.D. Cal. 2002) (three-judge court), *aff'd*, 537 U.S. 1100 (2003); *Colleton County Council*, 201 F. Supp. 2d at 642-44; *Smith*, 189 F. Supp. 2d at 537; *Balderas v. Texas*, No. Civ. A. 6:01CV158, 2001 WL 34104836, at *2 (E.D. Tex. Nov. 28, 2001) (three-judge court), *aff'd*, 536 U.S. 919 (2002). Indeed, only one court of appeals has allowed for the theoretical possibility that a vote-dilution claim may be brought by a numerical minority. *See Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004) (en banc). But the divided *Metts* court did so only tentatively, until "courts get more experience dealing with these cases and the rules firm up," and it failed to articulate any standard that would govern such a claim. *See id.* at 11. Moreover, *Metts'* conclusion that the minority percentage issue be resolved under "totality of circumstances" analysis cannot be reconciled with the fact that "[t]he *Gingles* preconditions act as a sentry at the gates—a bright-line rule that must be satisfied *before* the totality of circumstances comes into play." *Metts v. Murphy*, 347 F.3d 346 (withdrawn following grant of reh'g en banc), 2003 WL 22434637, at *17 (1st Cir. Oct. 28, 2003) (Selya, J., dissenting).

Respectfully submitted,

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