No. 03-1391

# In the Supreme Court of the United States

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

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

## MOTION TO AFFIRM


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Pursuant to Supreme Court Rule 18.6, Appellees the State of Texas, Texas Governor Rick Perry, Texas Lieutenant Governor David Dewhurst, Texas House Speaker Tom Craddick, and Texas Secretary of State Geoffrey S. Connor (collectively, "the State") move to summarily affirm the judgment of the three-judge court on the ground that the arguments presented are so insubstantial as not to warrant further argument. SUP. CT. R. 18.6.

### STATEMENT OF THE CASE

Following the 1990 decennial census, in 1991 the Texas Legislature adopted a congressional redistricting plan for the State of Texas. J.S. App., at 50a. Since Reconstruction, Texas voters had been reliably Democratic, but, in the 1980s and 90s, they began voting more and more Republican. The 1991 plan, whose design has been credited in large part to Appellant Congressman Martin Frost, has been described by neutral observers as the "shrewdest" Democratic gerrymander of the 1990s. J.S. App., at 51a (citing

MICHAEL BARONE, THE ALMANAC OF AMERICAN POLITICS 2004, at 1448).[1]

Over the next twelve years, that plan was judicially modified twice, including in 2001 when two new congressional seats were added after the 2000 census. J.S. App., at 146a. But despite those modifications, the basic plan remained the same,[2] preserving the districts of incumbent Democratic Members of Congress despite the growing Republican leanings of the Texas electorate.[3]

In 2003, for the first time in over a decade, the Texas Legislature passed a congressional redistricting plan, Plan 1374C. That plan undid the preexisting Democratic gerrymander, jeopardized the reelection chances of several incumbent Democratic Congressmen, and created an additional African-American and additional Hispanic opportunity district in Texas. This litigation immediately ensued.

Following extensive discovery, two weeks of trial, and dozens of witnesses, the three-judge federal court affirmed the legality of

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1. Appellants' jurisdictional statement will be cited as "J.S.," and their appendix items will be cited as "J.S. App." The State's appendices are cited as "App."

2. In 2001, the federal court plan added two seats while causing the least disruption to the existing plan, J.S., App., at 151a; *see also id*., 152a ("It was plain that . . . no incumbent was paired with another incumbent or significantly harmed by the plan."). As a result, all 28 incumbents who ran for reelection won back their seats.

3. By 2002, Texas voters had elected Republicans to 27 out of 27 statewide elected offices and to majorities in both Houses of the State Legislature. *See* http://www.sos.state.tx.us/elections/historical/. The Republican candidate for governor in 2002 prevailed with 58 percent of the vote, *id*., and the Republican candidate for governor in 1998 garnered 69 percent of the statewide vote, *id*. Despite these statewide voting trends, in 2002 Democrats still maintained a 17 to 15 majority in Texas's congressional delegation. *Id.*

the plan in all respects. The court carefully weighed the evidence, assessed the credibility of witnesses, sifted through the facts concerning each contested congressional district, and issued a detailed 99-page legal opinion affirming the legality of Plan 1374C.

* * * * *

This case does not fairly present the Court with most of the legal issues raised by the Appellants in their Questions Presented. Appellants have failed to acknowledge the procedural posture of the case and omitted the relevant contrary factual findings made by the district court. In some instances, facts essential to Appellants' claims have been resolved against them and stand unchallenged on appeal. In other instances, Appellants attack purported rulings of the district court on issues that the court did not, in fact, reach.

Appellants mischaracterize the three-judge court's decision as "divided" with respect to their claims. This characterization suggests that the one dissenting judge, Judge Ward, would have found for Appellants on the questions presented in this appeal. *See* J.S., at 2 ("a divided ruling"), 10 ("a divided opinion"). That suggestion is incorrect. Judge Ward ruled against the Appellants on the mid-decade redistricting issue. *See* J.S. App., at 116 ("I join the court's decision that the Election Clause does not prohibit mid-decade redistricting."). Judge Ward also indicated that Appellants failed to prove unconstitutional partisan gerrymandering, J.S. App., at 116 ("I join the court's judgement on the partisan gerrymandering issue."), and that Appellants had failed to establish a Section 2 claim as to District 24, J.S. App., at 117 ("I concur in the court's judgment insofar as it rejects the claims surrounding District 24.").[4] Consequently, with respect to all of the issues raised by the

4. To be sure, Judge Ward expressed "reluctan[ce]" about upholding the alterations in District 24, yet concluded that "controlling law compels the conclusion reached by the majority." J.S. App., at 140a.

Appellants, the opinion is not "divided." Instead, all three judges uniformly rejected Appellants' claims.

The facts of the case were decided against Appellants by the three-judge court. *See* J.S., at 2-10. Strikingly, Appellants' entire Statement of the Case contains *not one single citation* to the decision of the three-judge court; Appellants instead cite exclusively to their own trial exhibits and trial testimony. *See, e.g.*, J.S., at 8-9 nn.18-22. Instead of addressing the court's factual findings, Appellants assert as facts numerous issues that they litigated and lost in the district court.

**i. The District Court's Findings Concerning Partisanship.**

Appellants assert that the State's intent in the redistricting process was purely partisan. *See* J.S., at 2 ("The State of Texas has conceded that partisanship was the *sole* motivation behind this extraordinary change.") (emphasis added). Of course, politics mattered, but the Legislature had no singular desideratum. And the district court found other important legislative purposes. *See, e.g.*, J.S. App., at 30a (witness "credibly testified as to the various political considerations that combined to result in the lines of current . . . District 26"); *id.*, at 30 n.61 (State Representative "would not support any plan" if it split the City of Arlington.); *see id.*, at 31a ("Representative Lewis wanted his district to fall completely within one congressional district."); *id.* ("Representative Phil King . . . wanted Parker and Wise Counties to be included completely in Congresswoman Granger's District 12."); *id.*, at 32a ("District 26 was the sole product of political give-and-take by legislative members . . . ."); *id.*, at 32a n.65 ("'[W]e tried to . . . maintain the city limit lines for Ft. Worth and for Arlington . . . . And generally, you had that level of politics going on in every county . . . .'" (quoting testimony of Representative King)); *id.*, at 103a (locating part of Hays County in District 28 "resulted from the

Legislature's desire to keep Texas State University . . . out of District 21, which contains the University of Texas at Austin").[5]

In addition, what Appellants characterize as the State's "sole purpose of partisan maximization," J.S., at 2, was expressed at trial as a desire "to make the congressional delegation more reflective of state voting trends," J.S. App., at 32a, by removing the dead-hand effect of the 1991 Democratic gerrymander.

**ii. The District Court's Findings Concerning Racial Gerrymandering.**

Appellants' descriptions of District 25 consist largely of invective: "absurdly noncompact," "far flung," "absurd," and "bizarre." J.S., at 3, 9, 26-27. Appellants describe the district as "two dense pockets of Hispanic population" connected by "little more than a rural 'land bridge'" J.S., at 26. Nowhere, however, do Appellants acknowledge that what they pejoratively term a "land bridge" is not a narrow strip of land, but rather *seven contiguous, whole, undivided counties*.

Also absent from Appellants' Statement of the Case is any acknowledgment of the district court's finding that the elongated shape of District 25, like that of Districts 15 and 28, is the direct result of unique Texas geography. *See* J.S. App., at 98a ("Texas geography and population dispersion limit the availability of district compactness in the southern and western regions of the state."); *id.*, at 108a ("Plaintiffs' evidence has not demonstrated that the linking

5. Notably, all of this discussion was in the context of the court's consideration of Appellants' *racial* gerrymandering claims, where the court was making only a binary choice between politics and race. *See* J.S., at 12 (citing J.S. App., at 33 (discussing "sole" and "110%" political motive in the context of racial gerrymandering arguments); J.S., App., at 32, 33-34 ("Plaintiffs' expert's testimony supports our conclusion that politics, not race, drove Plan 1374C.").

of disparate border and Central Texas Hispanic communities was caused by the factor of ethnicity, rather than the factors of geography and population distribution. . . .").

Appellants also fail to acknowledge that the three-judge court examined the disputed evidence concerning the intent of the line drawers, assessed credibility, and made the factual finding that politics, not race, predominated in District 25. J.S. App., at 98-109.

**iii. The District Court's Findings Concerning District 24.**

Most inexplicably, however, Appellants repeatedly assert that it was "undisputed" that in District 24 "African-American citizens had previously been able to nominate and elect their preferred candidates." J.S., at 3; *id.*, at 17, 18 & n.36.

This statement is flatly wrong. Not only was it hotly disputed that "African-American citizens had previously been able to nominate and elect their preferred candidates," *the district court expressly found against Appellants on this very point*. J.S. App., at 51a ("Frost drew the 24th for an Anglo Democrat.); *id.*, at 54a ("It is argued that this is a Black opportunity district. More accurately, however, it is a strong Democratic district."); *id.*, at 55a-56a ("[T]hat Anglo Democrats control this district is the most rational conclusion.").

## ARGUMENT

The district court's judgment has yielded five separate appeals to this Court.[6] Four of those appeals challenge the issue of "mid-decade" redistricting. On that issue, there is no split of authority. Nor does this case implicate the broad policy specter repeatedly invoked—that of state legislatures returning seriatim, year after

6. In addition to this appeal, see also *American GI Forum v. Perry*, (No. 03-1396); *Jackson Lee v. Perry*, (No. 03-1399); *Travis County v. Perry*, (No. 03-1400); *Henderson v. Perry*, (No. 03-9644).

year, to redistrict throughout the decade. The facts of this case do not present the Court with an opportunity to address that question. Rather, this case concerns a factbound application of settled law to the unremarkable circumstances of a legislature adopting a redistricting plan following a judicial remedial plan that expressly invited it to do so. Given that the Texas Legislature had not adopted a congressional redistricting plan in twelve years, the issue of "mid-decade" redistricting simply is not presented.

## THE QUESTIONS PRESENTED ARE INSUBSTANTIAL

Appellants raise four issues in this appeal. Appellants' first claim, alleging partisan gerrymandering, is foreclosed by the Court's decisions in *Vieth v. Jubilerer*, 124 S.Ct. 1769 (2004), and *Bandemer v. Davis*, 478 U.S. 109 (1986).

Appellants' second claim urges the Court to announce a prohibition on "mid-decade" redistricting for the "sole purpose of partisan maximization." That question was not raised in the court below, is not presented by these facts, and is foreclosed by the text of the Constitution and this Court's precedents.

Appellants' third claim seeks a ruling on whether section 2 of the Voting Rights Act protects "coalition" districts where African-American voters, although less than a majority of the population, can nominate and elect their preferred candidates. That question is not presented by the facts of this case, since the district court made factual findings that District 24 was not an effective African-American district and that it met none of the three prongs under *Thornburg v. Gingles*, 478 U.S. 30 (1986).

Appellants' fourth claim alleges racial gerrymandering in the drawing of District 25. The court carefully weighed the evidence, assessed credibility, examined the district, and found that race did not predominate. That factbound determination is unremarkable.

All of Appellants' claims were unanimously rejected by the three-judge court below. None are substantial.

## I. THE PARTISANSHIP ARGUMENTS ARE NOT SUBSTANTIAL.

Appellants first two Questions Presented concern claims of excessive partisanship.[7] Under *Vieth*, neither claim is valid.

### A. The First Question Presented Is Foreclosed by *Vieth*.

This appeal does not present any substantial issues concerning partisan gerrymandering. It is controlled by *Vieth v. Jubelirer.* Appellants' Jurisdictional Statement, drafted before *Vieth* was decided, makes no attempt to provide a judicially administrable standard different from those rejected in *Vieth*.

Indeed, on the first Question Presented, Appellants offered no argument at all. The Argument section of their Jurisdictional Statement begins with question two. *See* J.S., at 11.

#### 1. Intent alone cannot support a claim of partisan gerrymandering.

Appellants focus a great deal on demonstrating partisan intent. But "[a]s long as redistricting is done by a legislature," the *Bandemer* Court acknowledged, partisan intent is "not . . . very difficult to prove." 478 U.S., at 128.[8] The Court in *Vieth* made plain that intent was not enough—even intent preceded by modifiers like "sole," "only," or "predominant." *See* 124 S.Ct., at 1781 (Scalia, J.) (plurality) ("Vague as the 'predominant motivation' test might be when used to evaluate single districts, it all but evaporates when applied statewide."); *id.*, at 1795 (Kennedy, J., concurring) ("That no [justiciable] standard has emerged in this

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7. Appellants' first and second questions read:

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

2. Whether the Constitution prohibits the States from redrawing lawful congressional redistricting plans in the middle of a decade for the sole purpose of partisan maximization." J.S., at i.

8. *See also id.*, at 128 (plurality opinion) ("Politics and political considerations are inseparable from districting and apportionment.").

case should not be taken to prove that none will emerge in the future.").

Even under the original *Bandemer* test, plaintiffs were required to demonstrate a consistent, long-term pattern of discriminatory effect that would not be equalized through the normal political process. 478 U.S., at 135-36 (suggesting a need to consider the effect through the 1980s as a whole and to assess whether the party would be able to recover sufficiently to improve its position in the next round of reapportionment). Under that test, allegations of bad intent are meaningless without further proof that "the redistricting does in fact disadvantage [the group] at the polls." *Id*., at 139. Appellants did not seriously maintain that they satisfied the *Bandemer* standard, and the three-judge court "ha[d] no hesitation in concluding that, under current law, this court cannot strike down Plan 1374C on the basis that it is an illegal partisan gerrymander." J.S. App., at 35a.

**2. Proportionality-based statewide claims of partisan gerrymandering cannot survive *Vieth*.**

In *Vieth*, the Court rejected the kind of proportionality-based statewide partisanship arguments offered by Appellants. *See* 124 S.Ct., at 1782 (Scalia, J.) (plurality) ("[Appellants'] standard rests upon the principle that groups (or at least political-action groups) have a right to proportional representation. But the Constitution contains no such principle."); *id.*, at 1793 (Kennedy, J., concurring) ("The fairness principle appellants propose is that a majority of voters in the Commonwealth should be able to elect a majority of the Commonwealth's congressional delegation. There is no authority for this precept."); *id.*, at 1799 (Stevens, J., dissenting) ("Plaintiff-appellants urge us to craft new rules that in effect would authorize judicial review of statewide election results to protect the democratic process from a transient majority's abuse of its power to define voting districts. I agree with the Court's refusal to undertake that ambitious project."); *id.*, at 1817 (Souter, J.,

dissenting) (rejecting statewide claims as judicially unworkable until experience is gained with district-level claims).

**3. Texas's redistricting plan is pro-majoritarian, and Appellants' proffered harms are entirely hypothetical.**

This case is substantially easier than *Vieth*. In *Vieth*, the challenged plan was alleged to be actually frustrating the will of the majority of Pennsylvania voters. Critical to appellants' challenge in *Vieth* was the proposition that "Democrats consistently constitute a majority of Pennsylvania voters in congressional elections [and yet] the predictable result of [the plan] is that Republicans will win roughly twice as many seats as the Democrats in Pennsylvania's congressional delegation." Jurisdictional Statement at 16-17, *Vieth v. Jubelirer* (No. 02-1580). Thus, the Pennsylvania plan was alleged to be in fact counter-majoritarian:

> "In the five most recent statewide races combined, Democrats had averaged 50.1% of the major-party vote, and in the most recent congressional elections (in November 2000) they had garnered 50.6% of the major-party votes cast across the State." Brief for Appellants at 43, *Vieth v. Jubelirer* (No. 02-1580).

In contrast, in Texas, the electorate is solidly Republican, having elected Republicans to majorities in "both houses of the Texas Legislature as well as control over all prominent Executive Branch positions." J.S. App., at 4a. Republicans routinely garner in excess of 55% of the statewide vote, and, in 1998, the Republican candidate for governor prevailed by nearly forty points. *See* http://www.sos.state.tx.us/elections/historical/.

Rather than thwarting majority rule—as the plan in *Vieth* was alleged to have done—Plan 1374C more closely aligns the congressional delegation with the will of the majority. Indeed, if any plan would have been subject to a *Vieth* challenge for

frustrating the will of the voters, it would have been the predecessor Plan 1151C, which the 2003 redistricting replaced.

Appellants' entire claim of partisan effect was predicated on their expert's prediction (yet unproven) that Republicans would win 22 of the 32 congressional seats under the new plan and, in turn, that "Republicans would likely retain all 22 seats *even if* Democrats made substantial gains throughout the State and once again became the majority party in the Texas electorate." J.S., at 13 (emphasis added).

Appellants' argument was thus built on a hypothetical: "*even if*" Democrats became the majority. Appellants presented no evidence that Democrats were *likely* to become the majority, in the upcoming congressional election or anytime reasonably thereafter.

Because Appellants' theorized harm depends entirely on speculation, their claim has no reasonable prospect of surviving *Vieth*. *See* 124 S.Ct., at 1778 (plurality); *id.*, at 1793 (Kennedy, J., concurring in the judgment) ("I would not foreclose the possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases."); *id.,* at 1822-23 (Breyer, J., dissenting) ("There must also be a method for transforming the will of the majority into effective government.").[9]

### B. The Test Proposed in Appellants' Second Question Presented Was Not Properly Raised Before or Ruled on by the Three-Judge Court.

With no viable partisan gerrymandering claim under *Bandemer* or *Vieth* and with no credible argument against the legality of "mid-

9. Because of the anti-majoritarian aspects of Appellants' claims, they would fail all of Justice Breyer's catalogued circumstances where he would find a violation for "actual[ly] entrench[ing]" a minority and actually frustrating the will of a majority. *See* 124 S.Ct., at 1827-28 (Breyer, J., dissenting) .

decade" redistricting, *see* Part I.C, *infra*, Appellants now seek to combine the two arguments. But the whole is not greater than the sum of its parts, and the fusion of the two theories is no more meritorious than its forebears.

As an initial matter, Appellants' second Question Presented was never properly advanced to the three-judge court. In the district court, Appellants did not advocate this "hybrid" test, and instead raised their partisanship claim and mid-decade redistricting claims separately. Appellants first advocated a two-prong partisanship test, modeled on *Bandemer*, which urged that a map with a partisan purpose and effect was unconstitutional, a test which they explicitly admitted "matches the one being proposed to the Supreme Court in *Vieth v. Jubelirer*."[10]

Indeed, counsel for Appellants returned from presenting oral argument in *Vieth* on December 10, 2003, and advanced the identical theory on December 11, the opening day of trial in Texas. Having been rejected by a majority of the Court, that argument is now foreclosed by *Vieth*.

Separately, Appellants also advocated below that mid-decade redistricting was categorically barred. They framed the issue to the district court as "Whether Article I of the United States Constitution prohibits the State of Texas from replacing a perfectly lawful congressional redistricting plan after it has been used in one or

10. This precise language appears in both the pre-trial brief and the post-trial brief of the Jackson Plaintiffs. *See* Trial Brief of the Jackson Plaintiffs and Democratic Congressional Intervenors, at 34 (Dec. 3, 2003); Post-Trial Brief of the Jackson Plaintiffs and the Democratic Congressional Intervenors, at 65 (Dec. 22, 2003).

more elections and before the next census."[11] That challenge has not been preserved by Appellants on appeal.

The hybrid theory was advanced for the first time as a Question Presented to this Court. Appellants never offered, and consequently the district court never examined, any hybrid test to determine the permissibility of the intersection of mid-decade redistricting and alleged partisan gerrymandering.[12]

### C. There Is No Prohibition on "Mid-Decade" Redistricting, Irrespective of Any Allegations of Partisan Intent.

#### 1. The Constitution gives state legislatures the primary responsibility for redistricting.

Article I, §4 of the United States Constitution, known as the Elections Clause, expressly delegates power over congressional districting to the state legislatures:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, *shall be prescribed in each*

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11. This is how the Jackson Plaintiffs described their argument to the district court. *See* The Jackson Plaintiffs' Motion for Summary Judgment, at 2 (Nov. 13, 2003). The relief they sought in that motion was not a holding that the Texas Legislature needed to have a legitimate motive to redistrict, but rather for an "Order barring Defendants from implementing Plan 1374C *or any congressional redistricting plan other than Plan 1151C* until after the 2010 federal decennial census." *Id.*, at 29 (emphasis added).

12. As this precise question was not before the trial court, it is no surprise that the parties did not build a record focused on distinguishing legitimate "partisanship" from illegitimate "partisanship" in terms of intent. Even under their own proposed test, Appellants would not be entitled to relief. If anything, the district court's acknowledgment of how *other* political motives played into particular line-drawing decisions, *see, e.g.*, J.S. App., at 25, 30, 30 n.61, 31, 33, 105, would likely foreclose any conclusion that the Legislature's sole motivating purpose in passing the plan was "illegitimate" partisanship.

> *State by the Legislature thereof*; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, §4, cl. 1 (emphasis added).

This Court has long held that the power delegated to States includes the power to draw congressional districts. *See Smiley v. Holm*, 285 U.S. 355, 366-67 (1932) (evaluating redistricting power through Article I, §4); *State ex rel. Davis v. Hildebrandt*, 241 U.S. 565, 569 (1916) (same). And, the Court has repeatedly held that, "the Constitution leaves with the States *primary responsibility* for apportionment of their federal congressional . . . districts." *Growe v. Emison*, 507 U.S. 25, 34 (1993) (emphasis added); *see also White v. Weiser*, 412 U.S. 783, 795 (1973) ("[S]tate legislatures have 'primary jurisdiction' over legislative reapportionment."); *Branch v. Smith*, 538 U.S. 254, 261 (2003) ("[Redistricting] is primarily the duty and responsibility of the State through its legislature.").

**2. Congress has not exercised any power to regulate the frequency with which state legislatures may redistrict.**

The words "Times, Places, and Manner" in the federal Elections Clause are "comprehensive words embrac[ing] authority to provide a complete code for congressional elections," subject to Congress's power also to enact laws over the same subject matter. *Smiley*, 285 U.S., at 366-67. As Alexander Hamilton explained, because it was not feasible to insert an entire election code into the Constitution, "a discretionary power over elections ought to exist somewhere." THE FEDERALIST No. 59 (A. Hamilton). The method "with reason . . . preferred by the convention" was to give power "primarily" in the state legislatures but with "ultimat[e]" oversight by Congress. *Id*.

Congress has on occasion used its power under Article I, §4 to enact "such regulations." *See* U.S. CONST. art. I, §4, cl. 1. For example, Congress has provided a uniform day for congressional

elections. *See* 2 U.S.C. §7. Congress has required that votes for congressional candidates be by written or printed ballots. *See* 2 U.S.C. §9. And, in regard to congressional districting, Congress has provided that Members of the House must be elected from single-member districts rather than the previously accepted practices of at-large statewide seats or multi-member districts. *See* 2 U.S.C. §2c ("[T]here shall be established by law a number of districts equal to the number of Representatives.").

Thus, there is no dispute that, pursuant to the second part of the Elections Clause ("Congress may at any time by Law make or alter such Regulations"), Congress could have chosen to prohibit mid-decade redistricting. But, critically, Congress has not done so. No federal statute speaks at all to *when or how often* a State can redraw its congressional districts. Absent congressional prohibition, state legislatures retain broad authority over redistricting.

**3. Federal courts have repeatedly recognized the limited nature of court-drawn plans and the primacy of state legislative plans in the constitutional scheme.**

Given this broad grant of constitutional authority, when federal courts are forced to step into redistricting they do so in a limited way that recognizes the "primary jurisdiction" of the state legislatures in this field. *See Upham v. Seamon*, 456 U.S. 37, 41-42 (1982) (per curiam). Federal courts treat it as an "unwelcome obligation [to] perform[]in the legislature's stead," because "a state legislature is the institution that is by far the best situated" to undertake redistricting. *Connor v. Finch*, 431 U.S. 407, 414-15 (1977). A federal court, meanwhile, "lack[s] the political authoritativeness that the legislature can bring to the task." *Id*., at 415. "Federal courts, unlike state legislatures, are not in a position to reconcile competing state policies on the electorate's behalf, nor to engage in political policy-making decisions. . . . [Courts] do not possess the latitude afforded a state legislature to advance political agendas." *Colleton County Council v. McConnell*, 201 F.Supp.2d

618, 628 (D.S.C. 2002); *see also Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests.").

Accordingly, federal court-ordered redistricting plans are limited to remedying violations of the Constitution and the Voting Rights Act. *See Upham*, 456 U.S., at 43 (holding that unless the plan violated the Constitution or the Voting Rights Act, "the District Court was not free . . . to disregard the political program of the Texas State Legislature"). As the Court has noted concerning the Voting Rights Act,

> "Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the 'unwelcome obligation' of the federal court to devise and impose a reapportionment plan *pending later legislative action*." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (emphasis added) (quoting *Connor*, 431 U.S., at 415).

These basic principles lead to an inexorable result: the mere fact of a court-ordered plan does not foreclose a subsequent, legislative congressional redistricting plan, even within the same decade. *See Johnson v. Miller*, 922 F.Supp. 1556, 1569 (S.D. Ga. 1995) ("We do no harm with this plan, which cures the unconstitutionality of the former and can serve in 'caretaker' status until the legislature convenes to change it. *That may occur following the millennium census, or before*.") (emphasis added), *aff'd sub nom. Abrams v. Johnson*, 521 U.S. 74 (1997).

The presence of a prior court-ordered remedial plan does nothing to alter the Legislature's authority to adopt a subsequent redistricting plan. Indeed, one need look no further than Texas's own history of congressional redistricting to find repeated examples of courts deferring to the primary responsibility of the State

Legislature to draw its own congressional districts, even immediately after a court-ordered remedial plan. *See* J.S. App., at 8a n.14 (collecting cases).

Consistent with this long line of cases, nothing in the three-judge court's 2001 *Balderas* decision purported to divest the Texas Legislature of authority to redistrict in the future. Indeed, the Legislature acted promptly, accepting the court's express invitation to undertake this "quintessentially legislative" task and create two new minority-opportunity districts in Texas through Plan 1374C. *See* J.S. App., at 153a. There is no support for Appellants' argument that the use of a court-ordered plan in the 2002 election cycle somehow precluded Plan 1374C.

**4. The added gloss of alleged "partisan intent" does not undercut the constitutional delegation of redistricting authority to state legislatures.**

Implicitly recognizing that this Court's decisions do not support their arguments (1) that mid-decade redistricting is constitutionally forbidden or (2) that gerrymandering with partisan intent is unconstitutional, Appellants seek to avoid precedent by creating a hybrid theory in which *neither* is categorically barred. Under their proposed test, mid-decade redistricting will be permissible, so long as the Legislature's motive for doing so is mixed or unclear, rather than "solely for partisan maximization." J.S., at i. Thus, it would allow partisan gerrymandering so long as it is conducted in 2001, 2011, 2021, or any other year following a census. Appellants' hybrid theory has no basis in text or precedent, and it fails to remedy the partisan ills of which they complain. At the same time, it would burden the courts and legislatures with the costs of either categorical rule. It would "inject the courts into the most heated [of] partisan issues," *Bandemer*, 478 U.S., at 145 (O'Connor, J., concurring in the judgment), and require courts to adjudicate claims for which "no judicially discernible and manageable standards" exist, *Vieth*, 124 S.Ct., at 1778.

Under the plain constitutional text, even after the entry of a court-ordered plan, state legislatures remain free to enact their own plans that take into account the political preferences of the citizenry. Here, each body has exercised its proper constitutional role. And this case is not one in which the Legislature has engaged in repetitive redistricting during the same decade by replacing one set of legislative judgments with another. *See* J.S., at 14 (raising the specter of seriatim redistricting). None of the dangers of serial redistricting raised by Appellants are properly before this Court on these facts. *See* J.S., at 14.

Here, the Legislature replaced a court-drawn plan with a legislative one, to better fit democratically expressed public policy. This was the first legislatively enacted redistricting plan in Texas since 1991, providing the first policy input that elected officials have had into the State's congressional districts in twelve years. Where, as here, the plan being replaced is a court-drawn plan, there is always a legitimate state interest in implementing the public policy choices that are reserved to legislatures rather than courts.

The anti-majoritarian effects of Appellants' proposal are vivid. The Texas Legislature had not spoken on redistricting for over a decade. Appellants' rule would lock in the policy preferences from that 1991 map, perhaps indefinitely. It is profoundly undemocratic to block the current political majority from undoing the policy preferences embodied in a previous political generation's gerrymander. Legislatures, regardless of their alleged partisan intent, must be afforded the latitude to replace court-drawn plans with their own, in order to ensure that current citizens have a voice through their Legislature into their congressional districts.

## II. THIS APPEAL DOES NOT PRESENT A MEANINGFUL OPPORTUNITY TO ADDRESS COALITION DISTRICTS.

This appeal does not afford the Court a meaningful opportunity to reach the legal hypothetical posed by Appellants as their third

Question Presented.[13] J.S., at i. First, the question suffers from a false premise—that old District 24 was able to perform for African-Americans despite their small share of the population—when the district court's factual findings establish that the district did not perform. Second, the question is not properly before the Court on appeal because it was not decided by the district court, which instead decided against Appellants on other grounds. Finally, there is no need for the Court to resolve this appeal because a summary affirmance would not change the law.

**A. District 24 Was Not a Performing District.**

The fundamental premise of Appellants' claim—that District 24 had formerly been a performing district for African-Americans—is demonstrably untrue and was, indeed, found against Appellants by the three-judge court. Appellants assert that it was "*undisputed* that African-American citizens had previously been able to nominate and elect their preferred candidates," J.S., at 3 (emphasis added). But the State vigorously contested this allegation, and the district court squarely rejected it. *See* J.S. App., at 55a-56a.

In District 24, African-American voters constituted 21.4% of the voting-age population. *See* J.S. App., at 51a. Hispanics made up 33.6% of the voting-age population and 23% of the citizen voting-age population, *id.*, and Anglos were the largest ethnic group in the district, making up a plurality of the voting-age population and a majority of the citizen voting-age population. *Id*.

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13. Appellants' third Question Presented reads:

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

Thus, Appellants' theory is that African-Americans—a population that comprises *one-fifth* of this district and is only the *third*-largest racial group in the district—should be deemed sufficiently numerous to control the district, subject to the full protections of Section 2 of the Voting Rights Act.

The district's history refutes that premise. District 24 was a product of the 1991 partisan gerrymander that was called the "'the shrewdest [gerrymander] of the 1990s.'" J.S. App., at 50a-51a (citing MICHAEL BARONE, THE ALMANAC OF AMERICAN POLITICS 2004, at 1448). The architect, both of that gerrymander and of this district, was District 24's Congressman, Martin Frost. J.S. App., at 50a. The district linked traditionally Democratic groups throughout the Dallas-Fort Worth metroplex, linking together a mix of Anglos, Hispanics, and African-Americans into a web united by party, not race. "The 24th is a Democratic district, and its 'coalitions' are simply minority Blacks joining with majority Anglos voting a Democratic ticket in the general election." J.S. App., at 49a.

That status as a Democratic district is crucial to Appellants' argument. *Id.* They reach the conclusion that it is an "African-American" district based on the following chain of reasoning: (1) African-Americans are presently the group with the largest turnout for the Democratic primary in District 24, (2) Congressman Frost has consistently won that primary with a majority of African-American support, and (3) the reliably Democratic cross-over votes from Anglo and Hispanic voters in the general election assure reelection victory to Congressman Frost.

But this does not show an African-American opportunity district; it shows a Democratic district that can reelect Congressman Frost. Based on the evidence presented, Appellants failed to prove that District 24 provided African-Americans an opportunity to nominate and elect their candidate of choice.

Looking first to endogenous races—those within the district itself—there were none that were reliable. Because "no Black

candidate has ever filed in a Democratic primary against Frost," "[w]e have no measure of what Anglo turnout would be in a Democratic primary if Frost were opposed by a Black candidate." J.S. App., at 55a. Thus, the mere fact that African-Americans have voted for Frost in the primaries (when they had no other choice), hardly demonstrates that they could elect their candidate of choice.

Looking next to exogenous races—how the various precincts that make up a congressional district cast their ballots on *other* elections, such as statewide offices—the data again do not demonstrate a performing African-American district. Appellants' principal expert, Dr. Lichtman, examined three exogenous races: the 1998 Attorney General Democratic primary, a 2002 Court of Criminal Appeals Democratic primary, and the 2002 United States Senate race; he selected those three as most relevant because they presented Black-Anglo contests, which could be used to draw inferences about African-American candidates of choice.

In the 1998 Attorney General Democratic primary, the African-American voters of District 24 gave 74.3% of their support to Black candidate "Judge [Morris] Overstreet, a widely known, respected, and distinguished lawyer and judge." J.S. App., at 56a; *see* Def. Exh. 22. Yet, African-Americans were unable to control that primary, as Hispanics and Anglos voted overwhelmingly for Overstreet's Anglo opponent.[14] *See* Def. Exh. 22.

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14. Another example of a district constructed like District 24—and that plainly cannot perform for African-Americans—is former District 25. That district (which was redrawn as new District 9) had 22% of its voting-age population as African-Americans and 31% of its voting-age population as Hispanics—numbers very similar to old District 24. In the 2002 Democratic congressional primary, the African-American candidate of choice Carroll Robinson received 69% of the African-American vote but lost the primary to Anglo Chris Bell by a combined margin of 54% to 46%. *See* Lichtman Report, Table 17.

In the 2002 Court of Criminal Appeals election, the African-American vote in Dallas and Tarrant Counties fractured, with 40% supporting Black candidate Julius Whittier, and 60% supporting his Anglo opponent, who ultimately prevailed with large percentages of the Anglo and Hispanic votes. *See* Lichtman Report, at 20.

And, in the 2002 Senate race, Black candidate Ron Kirk prevailed with 99% of the African-American vote in Dallas and Tarrant Counties, 39% of the Anglo vote, and 0% of the Hispanic vote. In that race, Anglo votes were split three ways between Kirk and an Anglo candidate and an Hispanic candidate, and Hispanic votes went 90% for the Hispanic candidate. *See id.*, at 20.

Trial testimony further indicated that the Kirk race was less probative because he had been a "popular mayor of Dallas" and so the "'friends and neighbors' effect" accounted for some of his strong performance in District 24. J.S. App., at 56a.

Thus, the three exogenous races *introduced by Appellants* yielded one (Overstreet) where the African-American candidate of choice was defeated in District 24, one (Whittier) where the African-American vote was fractured, and one (Kirk) where the African-American candidate of choice prevailed (albeit with a plurality of Anglo support for a popular former Mayor).

These mixed statistical data were supplemented by direct testimony by Congresswoman Eddie Bernice Johnson (an appellant in *Jackson Lee v. Perry*, (No. 03-1399)), a Democrat "who holds a seat in an adjacent largely Black district." J.S. App., at 55a. She testified that District 24's performance was not an accident, "that District 24 was drawn for an Anglo Democrat." *Id.* Minority voters were deliberately split in 1991 in order to elect Martin Frost:

"Q. What type of problems was the Dallas African-American population encountering in terms of being able to create [District 30]?

A. *It was split up, of course, to elect white Democrats*. . . .

Q. . . . I wanted just to ask whether it's your opinion that the Hispanic population is divided across Congressional Districts now in the current plan?
A. To—yes, to a certain degree.
Q. And what would you say is the motivation for that division?
A. I'll have to answer that the same way I answered to my attorney. It's to accommodate others.
Q. And, in particular, white Democrats?
A. Martin Frost." *See* Tr. 12/17/03 PM, at 154:18-155:1; Tr. 12/17/03 PM, at 165:17-25.

Unsurprisingly, given this record, the three-judge court found that Appellants had not proven that District 24 was a performing district for African-Americans. J.S. App., at 51a, 54a, 55a-56a. As the court found: "[T]hat Anglo Democrats control this district is the most rational conclusion." *Id.*, at 55a-56a.

### B. The Question Is Not Presented On Appeal Because It Was Not Decided By the Three-Judge Court.

#### 1. The district court did not rule.

Appellants purport to challenge whether "[t]he court below erred in holding that the deliberate destruction of a 'coalitional' district . . . is immunized from [Section 2] scrutiny." J.S., at 16.

But the district court never made such a holding. It never reached the question of whether as a matter of law coalition districts could support a cognizable Section 2 claim when the minority group is less than a majority of a hypothetical district's population. J.S., at i, 17. Instead, as the district court explained, "the facts of this case offer no occasion to decide if there is a tolerable deviation from the [majority-in-a-district] rule." J.S. App., at 40a. It could not, therefore, have "erred" in any such holding.

Because the district court did not decide that question as a matter of law, it does not even implicate the only "split" identified by Appellants, the supposed "split" with *Metts v. Murphy*, 363

F.2d 8 (1st Cir. 2004) (en banc) (per curiam); *see also* J.S., at 24. *Metts* held only that a dismissal without evidence was inappropriate; it left open the possibility of plaintiffs—such as Appellants here—failing to meet their burden. There is no "split" presented.

**2. The district court's rejection of the Section 2 claim was supported by ample alternative—and unappealed—grounds.**

Under the familiar test developed in *Thornburg v. Gingles*, 478 U.S. 30 (1986), in order to state a claim under Section 2 of the Voting Rights Act, a plaintiff must first pass a three-prong test: "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a *majority* in a single-member district." 478 U.S., at 50 (emphasis added). "Second, the minority group must be able to show that it is politically cohesive." *Id.*, at 51. "Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed . . . usually to defeat the minority's preferred candidate." *Id*. Appellants' hypothetical third Question Presented asks the Court to relax the first prong of *Gingles*—a question that the district court did not resolve as to District 24.

The district court instead focused on the second and third prongs of *Gingles*, finding on this record that Appellants had failed to make their case. *See* J.S. App., at 54a-55a. Appellants do not appeal those findings. Their request that the Court nonetheless reach the coalition-district question in effect asks for an advisory opinion.

**a. The district court found against Appellants on the second prong of *Gingles*.**

On the second *Gingles* prong—political cohesion by the minority group—the district court made a factual finding that District 24 lacked the necessary voter cohesion. Based on the trial evidence, the court found that Appellants failed to meet their burden of proof that the African-American voters in the district voted cohesively. *See* J.S. App., at 56a ("Nor is the cohesiveness of this 21.6% black voting age population clear.").

In addition, there was no possibility of aggregating votes of African-Americans and Hispanics to achieve a broader majority because there was absolutely no evidence of cohesion between minority groups; indeed, the data showed they tended to vote as polar opposites. "Here, there is no serious dispute but that blacks and Hispanics do not vote cohesively." J.S. App., at 43a. And, without cohesion within African-American voters, and without cohesion between African-American voters and Hispanic voters, the African-American candidate of choice cannot prevail if opposed by racially polarized Anglo voting. These factual findings preclude any argument that District 24 was an effective "coalition" district.

**b. The district court found against Appellants on the third prong of *Gingles*.**

The district court also found against Appellants on the third prong of *Gingles*—sufficient Anglo bloc voting to usually defeat the minority candidate of choice. Indeed, Appellants' expert established that Anglos crossed over at a rate of 30.75% to elect the supposed minority candidate of choice, Congressman Frost. *See* J.S. App., at 55a. Far from habitually voting as a bloc to defeat minority-preferred candidates, Anglo voters in District 24 generally crossed over in sufficient numbers *to enable* those candidates to prevail. The district court held that such a high crossover rate was too high to satisfy the third *Gingles* prong. *See* J.S. App., at 55a.

### C. Appellants' Theory Cannot Be Squared With Section 5.

Giving plaintiffs under Section 2 the power to *compel* the drawing of "influence" or "coalition" districts would also contradict Section 5 jurisprudence. Just last Term, the Court construed Section 5 to leave with States the choice between influence districts and majority-minority districts. The Court held that a state legislature's decision to reallocate the balance between influence districts and majority-minority districts did not necessarily retrogress: "Section 5 does not dictate that a State must pick one of these methods of redistricting over another." *Georgia v. Ashcroft*, 123 S.Ct. 2498, 2511-12 (2003). Indeed, the Court noted that "the State's choice ultimately may rest on a political choice of whether substantive or descriptive representation is preferable," a decision that state legislatures are uniquely positioned to make. *Id.*, at 2513.

But Appellants suggest that the political latitude recognized by *Ashcroft*—"the flexibility to choose one theory of effective representation over the other"—does not actually exist because it is taken away by Section 2 of the same Act. *Id.*, at 2512. The Court has made clear that it has no desire to allow rights granted by Section 2 to be taken away by Section 5, and vice versa. *See id.*, at 2511 ("We refuse to equate a §2 vote dilution inquiry with the §5 retrogression standard."). Appellants suggest that Section 2 requires that courts rather than legislatures choose among influence districts, coalition districts, and majority-minority districts. That proposition was flatly rejected by *Ashcroft*.

### D. The Court has already summarily affirmed a decision recognizing a majority-in-a-district requirement.

A summary affirmance will not change the law. This Court has already summarily affirmed that coalition district claims are not

cognizable. In *Parker v. Ohio*,[15] the jurisdictional statement squarely presented the question:

> "Whether Section 2 . . . permits minority voters to maintain a claim for vote dilution under the Act when minority voters constitute less than a majority of the voting age population, but are sufficient in number and politically cohesive to be able to otherwise elect their preferred candidate . . . in conjunction with like-minded non-minority voters with the same geographically compact area." Jurisdictional Statement at i, *Parker v. Ohio* (No. 03-411).

*See also O'Lear v. Miller*, 222 F.Supp.2d 850, 860-61 (E.D. Mich. 2002) (three-judge court) (per curiam), *aff'd*, 537 U.S. 997 (2002).

## III. THE RACIAL GERRYMANDERING QUESTION INVOLVES ONLY AN APPLICATION OF EXISTING LAW TO DISPUTED FACTS THAT WERE RESOLVED AGAINST APPELLANTS BY THE FACT-FINDER.

The fourth Question Presented asks whether the facts here are sufficient to support the district court's holding that race did not play the dominant role in the redistricting conducted by the Texas Legislature.[16] The relevant facts were disputed in the trial court, and the fact-finder resolved those disputes against Appellants.

The three-judge court correctly stated existing law:

> "States are not required to ignore race; indeed, the Supreme Court has acknowledged that states will always be aware of

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15. 263 F.Supp.2d 1100,1104-05 (S.D. Ohio 2003) (three-judge court), *aff'd*, 124 S.Ct. 574 (2003).

16. Appellants' fourth question reads: "Whether a district that was intentionally drawn as a majority-Hispanic district by connecting two far-flung pockets of dense Hispanic population with a rural 'land bridge' that is 300 miles long and in places less than 10 miles wide is an unconstitutional racial gerrymander." J.S., at i.

> race when they draw district lines. The factor of race or ethnicity may be considered in the process as long as it does not predominate over traditional race-neutral redistricting principles. The fact that race is given consideration . . . and the fact that majority-minority districts are intentionally created does not suffice to trigger strict scrutiny." J.S. App., at 95a (citing *Miller*, 515 U.S., at 916; *Shaw v. Reno*, 509 U.S. 630, 646 (1993); *Shaw v. Hunt*, 517 U.S. 899, 907 (1996); *Bush v. Vera*, 517 U.S. 952, 962 (1996)).

District 25 runs from the Mexico border to Central Texas and the City of Austin. By compactness measures, District 25 has a smallest-circle score of 8.5 and a perimeter-to-area score of 9.6. J.S. App., at 97a. The former score is moderately high, while the latter is utterly unremarkable.[17] The court considered both scores in relation to the physical and political geography of the State:

> "Texas has vast geographical areas with widely dispersed population; . . . the State is a challenge for any redistricter who cherishes compactness as a value. For example, District 23 . . . extends approximately 800 miles along the

17. These low numbers do not indicate a problem. District 25's score of 8.5 on the smallest-circle measure is approximately one-third of the 21.7 score achieved by North Carolina's District 12, which was struck down in *Shaw*. 517 U.S. 899 (1996). And District 25's smallest-circle score of 8.5 is on par with that of the reconfigured North Carolina district that was eventually upheld by the Court in *Cromartie*, which had a score of 8.6. *See Cromartie v. Hunt*, 133 F.Supp.2d 407, 415 (2000), *rev'd by Easley v. Cromartie*, 532 U.S. 234 (2001). The perimeter-to-area score of District 25 is only 9.6, an order of magnitude lower than districts that have been rejected. In the words of Appellants' expert, "it's not unusual to see this measure go up into the hundreds . . . ." Tr. 12/15 AM 80:6-20 (Alford); see also Tr. 12/15 AM 84:22-85:5 (Alford). By contrast, Texas's then-Districts 18, 29, and 30 that were struck down in *Bush v. Vera*, 517 U.S. 952 (1996), had perimeter-to-area scores of 106.3, 144.0, and 69.0, respectively. *See* Tr. 12/19 AM 12:14-25 & 13:1-25.

> border. In Plan 1151C, Congressional District 17 . . . includes 36 counties. Under Plan 1151C, Congressional District 13 in North Texas is larger than a number of states, spanning 40,000 square miles and 43 counties, but many with fewer than three thousand people." J.S. App., at 97a-98a.

The sheer open spaces of Texas explain the smallest-circle scores of District 25:

> "Texas geography and population dispersion limit the availability of district compactness in the southern and western regions of the state. Under Plan 1374C, the population densities in Congressional Districts 28, 25, and 15, both Anglo and Hispanic, are highest in the Valley and in Central Texas, separated by relatively sparsely populated areas. The high-density population pockets necessary to achieve the one-man-one-vote requirement are situated at either end of the elongated 'bacon-strip' shaped districts. As a result, the boundaries of such 'strip' districts in Plan 1374C must reach into Central Texas to obtain the requisite number of people, whether Anglo or Latino." J.S. App., at 98a.

After reviewing all the evidence, the three-judge court concluded that "[t]he smallest circle measure of compactness for the southern and western districts in Plan 1374C, examined in relation to the geography and population, reflect the sheer size and population distribution of the area, rather than a calculated stretch to find voters of a particular ethnic makeup." J.S. App., at 98a-99a.

Appellants repeatedly disparage District 25 as two separate populations connected by a "land bridge," J.S., at i, 26, without revealing that the so-called "land bridge" consists of *seven contiguous, whole, undivided counties*. Indeed, the only county splits are at both ends, in order to create a perfectly equipopulous district. J.S. App., at 165a (map of District 25). Appellants'

nomenclature strains credulity. Indeed, to call entire, discrete geographic and governmental entities a mere "land bridge" is a bit like calling Rhode Island a "land bridge" connecting Connecticut and Massachusetts.

After hearing all the evidence and assessing credibility,[18] the district court concluded that "[t]he evidence shows that the [District] lines did not make twists, turns, or jumps that can only be explained as efforts to include Hispanics or exclude Anglos, or vice-versa. . . . Plaintiffs have not met their significant burden of demonstrating racial gerrymandering." J.S. App., at 106a, 109a; *see also Easley v. Cromartie*, 532 U.S. 231, 241 (2001).

## CONCLUSION

The Court should summarily affirm the judgment of the three-judge court. SUP. CT. R. 18.12.

18. Appellants emphasize an after-the-fact statement by a statistician witness that "race was the key" and the district was "racial, not political." J.S., at 29. The trial court heard that testimony in context, and did not credit it as demonstrating any impermissible intent. J.S. App., at 109a.

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