

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

FRENCHIE HENDERSON,
Plaintiff

V.

No. 2:03-CV-00354

RICK PERRY, *et. al*

Defendants

This Filing Applies to: All Consolidated Actions

**BRIEF OF PLAINTIFF HENDERSON ON REMAND FROM
THE UNITED STATES SUPREME COURT**

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	iv
Summary of Argument.....	1
Argument.....	7
 <u>I. The Elections Clause Power.</u>	
A) The Literal Text of the Elections Clause Supports the Conclusion that the Power to Devise Congressional Districts is Commensurate with the Need for Regulation.	7
B) The District Court Disregarded a Fundamental Canon of Construction to Reach its Decision.	9
C) Frequency of Congressional Redistricting: Historical Context.	11
D) Legislative Authority to Revise Electoral Districts Has Widely Been Recognized as Only Commensurate with the Need to Provide Valid Districts.	20
 <u>II. Congressional Regulation by Title II, U.S.C. Section 2c.</u>	
A) The Text and Legislative History of Section 2c.	22

<p>B) The District Court in Balderas Exercised Elections Clause Power Delegated by Congress.</p> <p>.....</p>	28
<p>C) The Plaintiff’s Theory under Section 2c does not Advance a “Specie of Preemption”, and the State of Texas is not Entitled to Deference under any “States’ Rights” Theory or General Principles of “Comity”</p> <p>.....</p>	33
<p><u>III. The State of Texas’ Multiple Intra-decennial Congressional Redistricting is Not Supported by any Legitimate Regulatory Purpose.</u></p>	
<p>A) The Court has Judicial Power.</p> <p>.....</p>	39
<p>B) The Objective to Adjust Congressional Districts to Reflect Alleged Statewide Voting Trends is Not a Legitimate Regulatory Purpose.</p> <p>.....</p>	41
<p>C) The State’s Claimed Objective to Rectify a De Facto Gerrymander is Not Supported by the Record.</p> <p>.....</p>	45
<p>D) The Objective to Revise Valid Congressional District Boundaries to Satisfy the Personal Preferences of Individual Incumbents is Not a Legitimate Regulatory Purpose.</p> <p>.....</p>	47

E) The Objective of Revising Valid Congressional District Boundaries to Establish a “Safe” District for a Particular Candidate Favored by the Ruling Faction, under a “Incumbency Protection” Theory, is Not a Legitimate Regulatory Purpose.	48
Conclusion.....	49
Certificate of Service.....	51

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page:</u>
<u>Balderas v. Texas</u> , No. 6:01CV158 (E.D. Tex.), <i>aff. 'd</i> , 536 U.S. ___, 122 S.Ct. 2583 (2002).....	28, 38, 45, 46, 49
<u>Bowsher v. Synar</u> , 478 U.S. 714 (1986).....	38
<u>Branch v. Smith</u> , 538 U.S. 254 (2003).....	25, 27, 39
<u>Bush v. Vera</u> , 517 U.S. 952 (1996).....	48, 49
<u>Cahill v. Leopold</u> , 103 A.2d 818 (Conn. 1954).....	21
<u>Colegrove v. Green</u> , 528 U.S. 549 (1949).....	40, 45
<u>Cook v. Gralike</u> , 531 U.S. 510 (2001).....	10, 44
<u>Cox v. Larios</u> , 541 U.S. ___, 124 S.Ct. 2806 (2004).....	50
<u>Davis v. Bandemer</u> , 478 U.S. 109 (1986).....	5
<u>Department of Commerce v. United States</u> , 525 U.S. 316 (1999).....	28
<u>Denny v. Balser</u> , 42 N.E. 929 (Ind. 1896).....	21
<u>Ex Parte Yarbrough</u> , 110 U.S. 651, 660-661 (1884).....	45
<u>Gray v. Sanders</u> , 372 U.S. 368 (1963).....	10
<u>Harmison v. Ballot Commissioners</u> , 31 S.E. 394 (W.Va. 1898).....	21
<u>Harper v. Virginia Board of Elections</u> , 383 U.S. 663 (1966).....	16
<u>Harris v. Shanahan</u> , 387 P.2d 771 (Kan. 1963).....	21
<u>Henderson v. Perry</u> , 451 U.S. ___, No. 03-9644 (Oct. 18, 2004).....	<i>passim</i>
<u>Herbert v. Bricker</u> , 41 N.E. 2d 377 (Ohio 1942).....	21
<u>Jones v. Freeman</u> , 146 P.2d 564 (Okla. 1944).....	21
<u>Karcher v. Daggett</u> , 462 U.S. 725 (1983).....	49

	<u>Page:</u>
<u>Lanning v. Carpenter</u> , 20 N.Y. 447 (N.Y.1859).....	21
<u>Legislature v. Deukmejian</u> , 669 P.2d 17 (Cal. 1983).....	21
<u>Martinez v. Bush</u> , 234 F.Supp. 1275 (S.D.Fla.2002).....	48
<u>Mistretta v. United States</u> , 488 U.S. 361, 372-374 (1989).....	32, 38
<u>Noecker v. Woods</u> , 102 A. 507 (Pa. 1917).....	21
<u>Opinion of the Judges</u> , 47 So.2d 714 (Ala.1950).....	21
<u>Opinion of the Judges</u> , 246 N.W. 295 (S.D. 1933).....	21
<u>People ex. rel. Henderson v. Westchester Board of Supervisors</u> , 41 N.E. 563, 568 (N.Y. 1895)	20
<u>People v. Hutchinson</u> , 50 N.E. 599 (Ill. 1898).....	9, 11, 21, 22
<u>Reynolds v. Sims</u> , 377 U.S. 533 (1964).....	4, 5, 17, 20, 49
<u>Salazar v. Davidson</u> , 79 P.3d 1221 (Colo.2003).....	22
<u>Session v. Perry</u> , 298 F.Supp.2d 451 (E.D.Tex.2004).....	<i>passim</i>
<u>U.S. Term Limits, Inc. v. Thornton</u> , 514 U.S. 779 (1995).....	8, 44
<u>Vera v. Bush</u> , 933 F.Supp. 1341 (S.D.Tex.1996).....	46
<u>Vera v. Richards</u> , 861 F.Supp. 1304 (S.D.Tex.1994).....	48, 49
<u>Vieth v. Jubelirer</u> , 541 U.S. ___, 124 S.Ct. 1769 (2004).....	1, 2, 4, 5, 9, 11, 17, 20, 41, 42, 47-50
<u>Wesberry v. Sanders</u> , 376 U.S. 1 (1964).....	4, 11, 41, 42

<u>Statutes, Codes, Rules, and Constitutional Provisions:</u>	<u>Page:</u>
5 Stat. 491, ch. 47, Section 2 (June 25, 1842).....	24, 29
Texas House Bill 3, 78 th Leg., 3 rd Called Sess. (2003)(“Plan 1374C”).....	<i>passim</i>
Title II, U.S.C. Section 2c.....	2, 3, 6, 10, 22- 24, 27-29, 31-34, 39, 42, 44, 45
Title II, U.S.C. Section 7.....	10
Article IV of the New York Constitution, as amended (1801).....	18, 19
Article V of the New York Constitution of 1777.....	18
Article XII of the New York Constitution of 1777.....	14
Article 17 of the Pennsylvania Constitution of 1776.....	14
Article XV of the South Carolina Constitution of 1778.....	14
Article I, Section 2, Clause 1 of the United States Constitution.....	43
Article I, Section 2, Clause 3 of the United States Constitution.....	10-12
Article I, Section 3, Clause 1 of the United States Constitution.....	43
Article I, Section 4, Clause 1 of the United States Constitution.....	<i>passim</i>
Article I, Section 5 of the United States Constitution.....	29
 <u>Legislative Sources:</u>	
1 <u>Annals of Congress</u> , (1789).....	36-38
11 <u>Annals of Congress</u> , 190 (1802).....	23
25 <u>Annals of Congress</u> , 57-58 (1813).....	23
29 <u>Annals of Congress</u> , 158 (1816).....	24
29 <u>Annals of Congress</u> , 215-216 (1816).....	24
29 <u>Annals of Congress</u> , 1403-1404 (1816).....	24

	<u>Page</u>
33 <u>Annals of Congress</u> , 137, 140 (1819).....	24
40 <u>Annals of Congress</u> , 176-177 (1823).....	24
41 <u>Annals of Congress</u> , 850-851, 866 (1823).....	24
Congressional Globe, 27 th Cong., 2d Sess. App., 493 (1842).....	24, 45
Congressional Globe, 27 th Cong., 2d Sess. App., 750 (1842).....	24, 29
Cong.Globe, 37 th Cong., 2 nd Sess., 3117 (1862).....	30
<u>Cong.Globe</u> , 42 nd Cong., 2 nd Sess. 3763, 3765, 3988, 3943, 4010 (1872).....	30, 31
13 Cong.Rec. 1224, 1228, 1236 (February 16, 1882).....	31, 38
47 Cong.Rec. 674 (April 27, 1911).....	31
<u>Senate Journal</u> , 12 th Cong., 2d Sess., 235-236 (January 20, 1813).....	23
<u>Senate Journal</u> , 15 th Cong., 2d Sess., 28-31 (November 25, 1818).....	24
<u>Senate Journal</u> , 15 th Cong., 2d Sess., 55-57 (December 17, 1818).....	24
H.R. 5505, 89th Cong., 1 st Sess. (1965).....	25
H.R. Rep. No. 89-140 (March 5, 1965).....	25
H.R. 2275, 90 th Cong., 1 st Sess. (1967).....	27
H.R. No. 2508, 90 th Cong., 1 st Sess. (1967).....	25-27
H.R. Rep. No. 90-191 (April 13, 1967).....	25
S.Rep. No. 90-291 (June 1, 1967).....	26
H.R.Conf.Rep. No. 90-435 (June 27, 1967).....	26-27
H.R.Conf.Rep.No. 90-795 (Oct. 19, 1967).....	27
113 Cong.Rec. 14, 779-80 (June 6, 1967).....	26
113 Cong.Rec. 14,791 (June 6, 1967).....	26
113 Cong.Rec. 15,243-44 (June 8, 1967).....	26

	<u>Page:</u>
113 Cong.Rec. 15, 817 (June 14, 1967).....	26
113 Cong.Rec. 17, 738 (June 28, 1967).....	26
113 Cong. Rec. 31, 703 (Nov. 8, 1967).....	27
113 Cong. Rec. 31, 710 (Nov. 8, 1967).....	27
113 Cong.Rec. 31, 719 (Nov. 8, 1967).....	33
113 Cong.Rec. 34,367 (Nov. 30, 1967).....	27
<u>Standards for Congressional Districts (Apportionment): Hearings Before the</u> <u>Subcomm. No. 2 of the House Comm. on the Judiciary, 86th Cong., 36-37</u> (1959)(SuDoc No. Y 4.J89/1:C76/20)	
.....	32, 33
<u>Increasing the Membership of the House of Representatives and Redistricting</u> <u>Congressional Districts: Hearings Before the Subcomm. No. 3 of the House</u> <u>Comm. on the Judiciary, 87th Cong., 18-20 (1961)(SuDoc No. Y4 .J89/1:87/9)</u>	
.....	32
<u>Other Sources:</u>	
<i>Annot.</i> , <u>Territorial Units; Districts and Precincts; Apportionment</u> , 18 Am. Jur., Elections, § 14 (1958)	
.....	9
<i>Brant</i> , James Madison, Father of the Constitution, 264 (1950).....	37

	<u>Page:</u>
<i>Carter & Stone</i> , <u>Reports of the Proceedings and Debates of the [New York] Convention of 1821</u> , (1821)	19
Celler, <u>Congressional Apportionment—Past, Present, and Future</u> , 17 <i>Law & Contemp Probs.</i> 268, 274-275 (Spring 1952)	31
<i>Dubester</i> , <u>State Censuses: An Annotated Bibliography of Censuses of Population Taken after the Year 1790 by the States and Territories of the United States</u> , (Library of Congress 1969)	16
<i>Dructor</i> , <u>Guide to Genealogical Sources at the Pennsylvania State Archives</u> , 98 (1981)	16
<i>Griffith</i> , <u>The Rise and Development of the Gerrymander</u> , (1907).....	17
<i>Kent</i> , <u>Commentaries on American Law</u> , (1826).....	18
<i>Kent</i> , <u>Commentaries on American Law</u> , (12 th ed. 1873).....	45
<i>Martis</i> , <u>The Historical Atlas of United States Congressional Districts</u> , (1982)...	15, 16
<u>The New-York Herald</u> , (April 27, 1808).....	17
<i>Paschal</i> , <u>The House of Representatives: “Grand Depository of the Democratic Principle”?</u> , 17 <i>Law & Contemp Probs</i> 276 (Spring 1952)	8, 30
<u>Pennsylvania Septennial Census Returns</u> (1779-1863).....	16

	<u>Page:</u>
<i>Sears</i> , <u>Methods of Reapportionment</u> , (1952).....	32
<i>Story</i> , <u>Commentaries on the Constitution of the United States</u> , (1833).....	8
<i>Story</i> , <u>Commentaries on the Constitution of the United States</u> , (3 rd ed. 1858)...	44
<i>Street</i> , <u>The Council of Revision of New York</u> , (1859).....	18, 19
<i>T. Cooley</i> , <u>Constitutional Limitations</u> , (6 th ed. 1890).....	9
<i>Thorpe</i> , <u>The Federal and State Constitutions, Colonial Charters, and Other Organic Laws</u> , 3081 (1909)	
.....	13-16, 18, 20
<u>The Debates of the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787</u> , 50 (Jan. 21, 1788)(Elliott ed. 1937)	
.....	19, 34-38, 43
<u>The Federalist</u> , No. 52 (Madison, Feb. 8, 1788).....	44
<u>The Federalist</u> , No. 59 (Hamilton, Feb. 22, 1788).....	8
<u>The Records of the Federal Constitution of 1787</u> (M. Farrand ed. 1911).....	13, 19, 43

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**BRIEF OF PLAINTIFF HENDERSON ON REMAND FROM
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Comes now Frenchie Henderson, Plaintiff in the above captioned and numbered cause¹ and, pursuant to the Federal Rules of Civil Procedure, and in accordance with the Order of this Honorable Court issued October 18, 2004, files this his Brief on Remand from the United States Supreme Court, and in this connection would respectfully show unto the Court as follows:

SUMMARY OF ARGUMENT

By Order issued October 18, 2004, in Henderson v. Perry, No. 03-9644, the United States Supreme Court directed the District Court to reconsider its decision to dismiss Plaintiff's claims in light of Vieth v. Jubelirer, 541 U.S. ___, 124 S.Ct. 1769 (2004). The sole "Question Presented" by Plaintiff in his jurisdictional statement was:

¹ Walter Session and Morris Byers, who originally (along with Plaintiff Frenchie Henderson) comprised the "Cherokee County Plaintiffs" in this Court, elected not to further participate in this litigation following the District Court's decision in January, 2004, and no longer have a legal interest in this proceeding. Plaintiff Henderson has persisted in pursuing his claims, was the named party before the U.S. Supreme Court in Henderson v. Perry, No. 03-9644., and is the sole remaining "Cherokee County Plaintiff" prosecuting this case.

Whether, once a valid Congressional redistricting map has been ordered in a final judgment by a three-judge Federal District Court in accordance with authority delegated to it by Congress under Title 2, U.S.C. Section 2c (predicated upon the default of the State Legislature to timely redistrict after being afforded a reasonable opportunity to do so), a State Legislature, after Congressional elections are held under “districts so established”, may “make or alter” Congressional district boundaries before the next federal decennial enumeration and apportionment, in the absence of any substantial shift in population, a politically neutral change in circumstances, or some other event evincing a *legitimate regulatory purpose*?²

As observed by Justice Kennedy in his concurring opinion in Vieth, supra, one of the primary obstacles that resulted in the fractured disposition in Vieth was the failure of the parties to direct the Supreme Court’s attention to ““helpful discussions on the principles of fair districting discussed in the annals of parliamentary or legislative bodies...[or] statements of principled, well-accepted rules of fairness that should govern districting, or ... helpful formulations of the legislator's duty in drawing district lines.” *Id.*, 124 S.Ct. at 1794 (Kennedy, J. concurring in judgment). The Plaintiff will therefore endeavor to assist this Court in that regard. It is also clear however, that while no majority of the Court was able to agree on a “judicially manageable” standard to determine “how much is too much” partisan motivation under the Constitution; a five Member majority of the Court, comprising Justice Kennedy and the four dissenting Members of the Court, agreed with the Plaintiff’s argument herein that use of legislative power delegated by Article I, Section 4 of the U.S. Constitution (hereafter the “Elections Clause”) must be supported by *at least some* politically neutral, “legitimate regulatory purpose”. *See Vieth v. Jubelirer*, supra, 124 S.Ct. at 1793 (Kennedy, J., concurring in judgment)(the Elections Clause does not empower legislatures to regulate “in a way unrelated to any legitimate legislative objective”); *id.*, 124 S.Ct. at 1811 (Stevens, J.,

² *See Henderson v. Perry*, No. 03-9644, juris. stat., at “i” (filed March 31, 2004)(italics added).

dissenting)(requiring a “rational basis” for use of Elections Clause power that “must satisfy a standard of legitimacy and neutrality”); *id.*, 124 S.Ct. at 1819-1820 (Souter, joined by Ginsburg, JJ., dissenting)(imposing burden on defendants “to justify their decision by reference to objectives other than naked partisan advantage”, by proof that “*legitimate objectives* [are] better served by the lines drawn than by plaintiff’s hypothetical”)(italics added); and *id.*, 124 S.Ct. at 1829 (Breyer, J., dissenting)(congressional redistricting is “extreme enough to set off constitutional alarm” when “no justification other than party advantage can be found”).

The Plaintiff, as he has throughout this litigation,³ again presents two principle arguments for invalidation of Plan 1374C that are separately premised on the Elections Clause, and Title II, U.S.C. Section 2c (“Section 2c”). First, under the Elections Clause, Plaintiff contends that once valid districts are established after a federal apportionment, no residual constitutional power remains vested in a State legislature to authorize alteration of congressional districts *in the absence of a neutral, legitimate regulatory purpose*. In support of this contention, Plaintiff’s would draw the Court’s attention to:

- 1) The literal terms of the Elections Clause, the “plain meaning” of those terms, and the necessary construction of the Elections Clause in light of an accepted rule of statutory construction that has specifically been applied to resolve the question presented;
- 2) A comparison of the Elections Clause with contemporaneous State constitutional provisions in effect at the time the Elections Clause was adopted, on which the Framers purported to model the Constitution;

³ See Plaintiffs’ Original Complaint, 10 (filed 10/12/03); Cherokee County Plaintiffs’ Motion for Summary Judgment, 17-20 (Doc.59); and, Cherokee County Plaintiffs’ Response in Opposition to Defendants’ Motion to Dismiss, 5 (Doc. 64).

- 3) Evidence of the usage of the Elections Clause power by the several States legislatures during the first decade of the Republic;
- 4) A contemporary “broadside”, published in 1808, that reflects the understanding of one (*albeit* exceptionally astute) layperson as to the temporal scope of legislative power under the Elections Clause;
- 5) An insightful legal opinion and analysis written by renowned jurist Chancellor James Kent, delivered by Kent while Chief Justice of the New York Council of Revision in 1809, that addresses multiple intra-census electoral redistricting, and construes a redistricting provision similar to the Elections Clause; and
- 6) Numerous judicial opinions rendered by the Courts of last resort in several States that have addressed the scope of legislative duties under, and the temporal limitations on, legislative redistricting power.

The foregoing sources are in complete accord with modern constitutional pronouncements by the Supreme Court concerning the Elections Clause. Under the Elections Clause, alteration of valid congressional districts by a State legislature, like revision of legislative districts, must be undertaken pursuant to a “reasonably conceived plan for periodic readjustment of legislative representation”. Reynolds v. Sims, 377 U.S. 533, 583 (1964). The intent of the Framers, as articulated by the Supreme Court, was that *population* would govern any prescription or alteration of congressional election districts. Wesberry v. Sanders, 376 U.S. 1, 8-9 (1964)(“those who framed the Constitution meant that, no matter what the mechanics of an election, whether statewide or by districts, it was population which was to be the basis of the House of Representatives.”). Settled law

likewise establishes that the “basic aim” of the Framers under the Elections Clause, as well as Congress when enacting single member districting regulations to govern elections to the United States House of Representatives, was to ensure “fair and effective representation for all citizens.” Vieth v. Jubelirer, supra, 124 S.Ct. at 1793 (Kennedy, J., concurring in judgment)(italics added), *quoting* Reynolds v. Sims, supra, 377 U.S. at 565-566; Vieth v. Jubelirer, supra, 124 S.Ct. at 1800 (Stevens, J., dissenting)(same); *id.*, 124 S.Ct. at 1815 (Souter, joined by Ginsburg, JJ., dissenting)(same).

While the foregoing guidelines generally shape the outer contours of the power delegated to State legislatures by the Elections Clause, other equally important but more specific countervailing factors must be considered when defining the power delegated. The Supreme Court, for example, has held that “[l]imitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system” Reynolds v. Sims, supra, 377 U.S. at 583. A fair expression of this “need for stability and continuity”, against which any exercise of Elections Clause power must be balanced, appropriately includes recognition that representational harm to some voters necessarily results from any substantial alteration of congressional districts; and that “[i]ntelligent voters, regardless of party affiliation” reasonably “resent...political manipulation of the electorate for no public purpose”. Vieth v. Jubelirer, supra, 124 S.Ct. at 1802 n. 6 (Stevens, J., dissenting), *quoting* Davis v. Bandemer, 478 U.S. 109, 177 (1986)(Powell, J., concurring in part and dissenting in part).With these factors in mind, Plaintiff contends that absent a demonstration of exigent or extraordinary circumstances, any “reasonably conceived plan” adopted by a State legislature to alter valid congressional districts implemented by a federal court in a final judgment, must be

supported by a legitimate and neutral regulatory purpose that takes into account, and is justified by, shifts or growth in population unaccounted for since congressional districts have last been established.

Second, Plaintiff contends that under Section 2c, as demonstrated by both the literal terms and legislative history of that statute, Congress intended that once valid districts are “established” after a federal apportionment (whether by a Court or State legislature), a State legislature *would not* retain “residual” power to alter congressional districts in the absence of a neutral and legitimate regulatory purpose.

Consistently with the foregoing argument under Section 2c, Plaintiff further contends that Section 2c constitutes a valid and intentional delegation of Elections Clause power by Congress, to the Courts—State and Federal, that authorizes Courts to implement single member districting regulations, in any case or controversy, “in Congress’ stead”. Legislative history discloses that when enacting Section 2c, Congress was compelled to delegate its Elections Clause power to the judiciary as a last resort to overcome a 120 year-long institutional inability to arrive at a politically acceptable means to enforce, against the State legislatures, the single member district requirement first enacted by Congress in the Apportionment Act of 1842. Far from “advancing a specie of preemption”, as characterized by the District Court, Session v. Perry, 298 F.Supp.2d 451, 464 (E.D.Tex.2004); Plaintiff’s claim under Section 2c is premised on the theory that the State of Texas retained no constitutional power that could be “preempted”. Under the Supremacy Clause and the maxim *qui facit per alium facit per se*, once the District Court properly implemented valid congressional districts *pursuant to authority delegated to it by Congress* under Section 2c, the State of Texas’ new districting regulations could not

constitutionally supercede the valid regulations implemented by the District Court (as agent of Congress), *at least* not without a neutral regulatory purpose. The historical record from the First Congress establishes the Elections Clause did not delegate or “reserve” to State legislatures any power to supercede valid regulations implemented pursuant to power reserved to Congress. As there was no power to be “preempted”, the State of Texas is not entitled to any deference under a constitutionally based “States’ rights” theory or under more general principles of “comity”.

Finally, in anticipation of responsive arguments likely to be made by the State of Texas, Plaintiff has drawn the Court’s attention to the reasons why, with regard to the purposes that the State would characterize as “legitimate”, the State’s defensive claims are without merit.⁴

ARGUMENT

I. The Elections Clause Power.

A) The Literal Text of the Elections Clause Supports the Conclusion that the Power to Devise Congressional Districts is Commensurate with the Need for Regulation.

The literal text of the Elections Clause supports the conclusion that the Framers intended State legislatures to have a temporarily limited opportunity to prescribe regulations for congressional elections during the period of time after each decennial enumeration and prior to the next congressional election. Examination of the Elections

⁴ The Plaintiff’s argument herein must necessarily disagree with a substantial number of the conclusions reached by this Honorable Court in its earlier published opinion in Session v. Perry, 289 F.Supp.2d 451 (E.D.Tex.2004). In presenting his argument herein, of course, the Plaintiff intends no disrespect to this Court, and sincerely hopes the Court will fairly consider his contentions anew in light of the Supreme Court’s directive.

Clause discloses it is only Congress, and not the State Legislatures, that “may at any time” make or alter regulations governing the manner of holding congressional elections. As explained by Alexander Hamilton, the primary reason why the Elections Clause reserved to Congress the power to “make” regulations under the Elections Clause was that the Framers feared the State legislatures might fail to timely act during “[the] period of making” regulations after each enumeration.⁵ The Framers were also familiar with the maxim *expressio unius exclusio alterius*, see U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 793 n. 9 (1995); 2 Story, Commentaries on the Constitution of the United States, 102-103 (1833). If the Framers had intended for State Legislatures, in addition to Congress, to be delegated power under the Elections Clause to “make or alter” regulations for congressional elections “at any time”, and to generally be delegated regulatory authority beyond the contemplated “period of making” regulations, it seems passing odd they would have expressed that intention in the terms stated by the Elections Clause. The District Court found Plaintiff’s more limited textual interpretation of the Elections Clause “just too convenient and tailored”. Session v. Perry, 289 F.Supp.2d 451, 459 (E.D.Tex.2004).

⁵ As stated by Hamilton: “If the State legislatures were to be invested with an exclusive power of regulating these elections, every *period of making them* would be a delicate crisis in the national situation, which might issue in a dissolution of the Union”. The Federalist, No. 59 (italics added). See also Paschal, The House of Representatives: “Grand Depository of the Democratic Principle”?, 17 Law & Contemp Probs 276, 279 (Spring 1952)(hereafter “Paschal”)(noting this justification for the Congressional reservation “was repeated in practically every ratifying convention”).

B) The District Court Disregarded a Fundamental Canon of Construction to Reach its Decision.

Turning to “statements of principled, well-accepted rules of fairness that should govern districting, or ... helpful formulations of the legislator's duty in drawing district lines”, Vieth v. Jubelirer, supra, 124 S.Ct. at 1794 (Kennedy, J. concurring in judgment); the District Court’s decision likewise discounted a canon of construction that, over the last hundred plus years, has been developed among the State Courts of last resort that have considered whether multiple intra-decennial electoral redistricting is permissible. This canon of construction, which has been found applicable to both statutory and constitutional provisions, provides that it is only in the “absence of restrictive or mandatory provisions...as to the time when and how often the legislature may make a representative apportionment, [that] the legislature may, in its discretion, make apportionments as often as it wills.” Annot., Territorial Units; Districts and Precincts; Apportionment, 18 Am. Jur., Elections, § 14, at page 190 (1958). Conversely, “when there are provisions inserted by the people as to the time when a power shall be exercised, there is at least a strong presumption that they design it should be exercised at that time, and in the designated mode only.” People v. Hutchinson, 50 N.E. 599, 601 (Ill. 1898), citing T. Cooley, Constitutional Limitations, 94 (6th ed. 1890). As further explained in the State legislative redistricting context by the Supreme Court of Illinois in People v. Hutchinson, supra, at 601, under the identified canon of construction:

“If legislative power is given in general terms, and is not regulated, it may be exercised in any manner chosen by the Legislature; but where the constitution [or a regulation] fixes the time and mode of exercising a particular power it contains a necessary implication against anything contrary to it, and by setting a particular time for its exercise it also sets a boundary to the legislative power.”

Application of the foregoing canon of construction to federal “regulatory” law that governs congressional redistricting, discloses both “time” and “manner” directives that confine congressional redistricting to a period of time immediately after the federal decennial census and apportionment. The constitutional power to “regulate” the manner of holding elections for the United States House of Representatives may be exercised by the States “only within the exclusive delegation of power under the Elections Clause.” Cook v. Gralike, 531 U.S. 510, 523 (2001). Thus, as a matter of Federal constitutional law, after each decennial census the Legislatures of the several States are required to provide, if necessary, new regulations for the manner of electing their respective congressional Representatives, based on the enumeration of the population and the congressional apportionment of the number of Representatives to which each State is entitled. Under the constitutional mandate of “one person, one vote”, Gray v. Sanders, 372 U.S. 368, 381 (1963); Wesberry v. Sanders, 376 U.S. 1 (1964); a congressional apportionment that increases the number of Representatives to which a State is entitled under U.S. Const. art. I, Section 2, cl. 3, necessarily triggers a federal constitutional obligation, imposed on each State entitled to an increased number of Representatives, to provide new Congressional districts, in accordance with Title II, U.S.C. Section 2c, *before the next biennial Congressional election*.

The foregoing constitutional obligation to draw new congressional districts in States entitled to an increased number of Representatives based on the 2000 federal census, such as Texas, would necessarily have accrued not later than March, 2001, coinciding with the federal release of the block-by-block census figures. At the other end of the temporal spectrum, Title II, U.S.C. Section 7, provides that congressional elections

must take place on “[t]he Tuesday next after the 1st Monday in November, in every even numbered year”. Consequently, the federal constitutional and statutory obligations to design new congressional districts after apportionment based on the 2000 census required new congressional districts to be drawn and implemented, and the power delegated to the States by the Elections Clause to be exercised, at the latest, during the approximate 19 month period between March, 2001, and the next biennial congressional election held on Tuesday, November 5, 2002. Because federal law (constitutional, statutory and decisional) that regulates the power delegated to State legislatures under the Elections Clause both “fixes the time and mode of exercising [that] particular power[,] it contains a necessary implication against anything contrary to it, and by setting a particular time for its exercise it also sets a boundary to the legislative power.” People v. Hutchinson, *supra*, 50 N.E. at 601.

C) Frequency of Congressional Redistricting: Historical Context.

The District Court concluded that because the Elections Clause does not *constitutionally require* promulgation of congressional districts, it “presumably...never entered the Framers’ minds” that the Elections Clause would in any manner limit the frequency of congressional redistricting by the States after each federal decennial census. Session v. Perry, 298 F.Supp.2d at 460. The Plaintiff would respectfully state that the District Court’s analysis, in this regard, is fundamentally flawed in at least four critical respects. First, the District Court’s “presumption” (about what “never entered the Framers’ minds”) is predicated solely on its passing observation that there is no explicit districting requirement in the Elections Clause. To this extent, the District Court’s analysis conflicts with Wesberry v. Sanders, *supra*, 376 U.S. at 7 (construing Article I,

Section 2 “in its historical context”); for if the absence of any explicit districting requirement in the Elections Clause, without resort to “historical context”, were determinative of the question presented by Plaintiff, then it would likewise be true that no constitutional prohibition against nonequipopulous congressional districts could exist, as the literal terms of Article I do not textually require elections by districts, much less by equipopulous districts. Second, the District Court’s “presumption” (about what “never entered the Framers’s minds”) is flawed not only by its exclusion of substantial contemporaneous evidence that the Framers assumed congressional districts (and not only “general ticket” regulations) would be established by the States; but also by its failure to recognize the existence of colonial era regulations that did, in fact, contain temporal restrictions on the frequency of electoral redistricting at the time the Elections Clause was framed. Third, the District Court’s decision wholly fails to take into account the behavior of the State legislatures during the first decade after the first federal enumeration and apportionment, which discloses that no State engaged in multiple intra-decennial congressional redistricting in the absence of a neutral regulatory purpose, *i.e.*, without justification of an intervening census conducted under State law demonstrating the need to adjust representation. Fourth, and finally, the District Court’s conclusion directly conflicts with contemporaneous evidence disclosing that, at least as early as the second federal census and apportionment, the general electorate (and at least one governing body) understood multiple intra-census redistricting, in the absence of a legitimate regulatory purpose, to be constitutionally prohibited.

The record of debate at the Federal Constitutional Convention of 1787, as well as the debates at the several State ratification conventions, signals an awareness on the part

of the Framers that the manner of electing representatives to the National Legislature would in most States be by districts.⁶ The fact that some States after ratification of the Elections Clause chose initially to adopt the “general ticket” system to regulate congressional elections, Session v. Perry, 298 F.Supp.2d at 460; says nothing about whether the Framers expected the Elections Clause to limit the frequency of redistricting when States chose to enact, as they had previously, districting regulations for holding their elections.

When drafting the Federal Constitution, the Framers sought “[t]o use simple and precise language, and general propositions, *according to the example of the (several) constitutions of the several states.*”⁷ At the time of the Federal Convention in 1787, at least nine of the thirteen original colonies had already enacted their own State constitutions.⁸ All nine of these had provided for election to State legislative offices by territorial subdivisions of their respective States, *i.e.*, by towns, counties, parishes or districts.⁹ Three of these nine colonies had constitutions that provided for the return of a

⁶ *E.g.*, 3 The Records of the Federal Convention of 1787, 106, 110 (Farrand ed. 1911)(hereafter “Farrand”)(C.Pickney, pamphlet of May 28, 1787)(“The districts, into which the Union are to be divided, will be apportioned, as to give each its due weight.”); 1 Farrand, 48-49 (George Mason, May 31, 1787)(House of Representatives should be elected “from different districts” to reflect the “views arising from difference of produce, of habits, &c. &c.”); 1 Farrand, 132-133 (Elbridge Gerry, June 6, 1787)(“[t]he people should nominate persons in certain districts”); 1 Farrand, 134 (George Mason, June 6, 1787)(“there [is] a better chance for proper elections by the people, if divided into larger districts, than by the State Legislatures.”); 1 Farrand, 179-180 (James Wilson, June 9, 1787)(“Representatives of different districts ought clearly to hold the same proportion to each other, as their respective constituents hold to each other.”); and, 1 Farrand, 300 (Alexander Hamilton, June 18, 1787)(proposing that House of Representatives be elected “by the people in districts.”).

⁷ Committee of the Detail, 2 Farrand at 137 (italics added).

⁸ These colonies were Pennsylvania (1776), 5 Thorpe, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws, 3081 (1909)(hereafter “Thorpe”); New Jersey (1776), 5 Thorpe, 2594; Massachusetts (1780), 3 Thorpe, 1888; Maryland (1776), 3 Thorpe, 1686; South Carolina (1778), 6 Thorpe, 3248; New Hampshire (1784), 4 Thorpe, 2453; New York (1777), 5 Thorpe, 2623; North Carolina (1776), 5 Thorpe, 2787; and Georgia (1777), 2 Thorpe, 777.

⁹ Pa.Const., Section 17 (1776)(district and counties), 5 Thorpe, 3086; N.J.Const., Art. III (1776)(counties), 5 Thorpe, 2595; Mass.Const., Part II, ch. I, sec. II, Art. II (1780)(towns and districts), 3 Thorpe, 1895; Md.Const., Art. III(1776)(counties), 3 Thorpe, 1691; S.C.Const., Art. XII and XIII (1778)(parishes and districts), 6 Thorpe, 3250-51; N.H.Const., Part II (1784)(districts), 4 Thorpe, 2459; N.Y.Const., Art. IV, V,

census or enumeration to govern representation.¹⁰ Article 17 of the Pennsylvania Constitution of 1776 required an enumeration of “taxable inhabitants” of that commonwealth; provided for districts consisting of “the City of Philadelphia and each county of the commonwealth”; and ordained proportional “representation to each...which representation shall continue for the next seven years afterwards at the end of which, a new return of the taxable inhabitants shall be made, and a representation agreeable thereto appointed by the said Assembly, and so on septennially forever.”¹¹ The South Carolina Constitution of 1778 provided that “at the expiration of seven years after the passing of this constitution, and at the end of every fourteen years thereafter, the representation of the whole State shall be proportioned in the most equal and just manner according to the particular and comparative strength and taxable property of the different parts of the same, regard being always had to the number of white inhabitants and such taxable property.”¹² Article XII of the New York Constitution of 1777 provided that a census be taken “once every seven years”, and that the State Legislature “adjust the proportion”, “as near as may be”, whenever “on such census” it appeared the districts were “not justly apportioned”.¹³ While the colonial constitutions of Massachusetts and New Hampshire, in contrast, did authorize alteration of legislative districts “from time to time”; the constitutional authority for an adjustment of representation in these colonies was contingent upon a change in the “the proportion of the public taxes paid by the said

and VIII (1777)(counties and districts), 5 Thorpe 2629-30; N.C.Const., Art. III (1776)(counties and towns), 5 Thorpe, 2790; and Ga.Const., Art. IV (1777)(counties), 2 Thorpe, 778.

¹⁰ Pa.Const., Section 17 (1776), 5 Thorpe, 3086; S.C.Const., Art. XV (1778), 6 Thorpe, 3252; and N.Y.Const., Art. V and XII (1777), 5 Thorpe, 2630-31.

¹¹ 5 Thorpe, 3086.

¹² S.C.Const. of 1778, Article XV, 6 Thorpe, 3252.

¹³ 5 Thorpe, 2631.

districts”,¹⁴ with the calculation and payment of taxes received from each district presumably occurring more than once every enumeration of the entire populous.

The behavior of the original 13 States immediately after the first federal enumeration and apportionment reinforces the notion that the Elections Clause was understood to authorize congressional redistricting *only once* after each federal apportionment unless justified by a legitimate regulatory purpose (i.e., to respond to a *demonstrated* shift or growth in population). Excluding Delaware and Rhode Island, which under the Constitutional apportionment were entitled to only one Representative each,¹⁵ seven of the remaining eleven original States elected their Representatives to the First Congress by districts.¹⁶ Between the first federal apportionment act of April 14, 1792,¹⁷ and the second apportionment act of January 14, 1802,¹⁸ only three States, New York, Pennsylvania, Massachusetts, enacted multiple congressional redistricting statutes; and a neutral regulatory purpose or justification existed in each case.

Intervening septennial censuses were conducted under State law in both New York and Pennsylvania after their initial redistricting based on the first federal decennial census, and before their subsequent intra-decennial revisions of congressional districts. New York enacted its first congressional districting law, after the first federal apportionment, on December 18, 1792.¹⁹ A statewide septennial census under New York

¹⁴ Mass.Const. of 1780, Chapter I, Section II, Article I, 3 Thorpe, 1895; N.H. Const. of 1784, 4 Thorpe, 2459.

¹⁵ U.S.Const., Article I, Sec. 2.

¹⁶ Martis, The Historical Atlas of United States Congressional Districts, 8 (1982)(hereafter “Martis”). States electing Representatives to the First Congress by congressional districts were Georgia, Maryland, Massachusetts, New York, North Carolina, South Carolina, and Virginia, while the States of Connecticut, New Hampshire, New Jersey and Pennsylvania elected their Representatives by “general ticket”. Ibid.

¹⁷ 1 Stat. 253, ch. 23 (1792).

¹⁸ 2 Stat. 128, ch. 1 (1802).

¹⁹ Martis, supra, 247.

law was thereafter conducted in 1795,²⁰ and a second congressional districting statute was then enacted, before the next federal apportionment, on March 28, 1797.²¹ In 1792, Pennsylvania enacted its first congressional districting law after the first federal apportionment.²² Pennsylvania thereafter, in compliance with State law,²³ conducted two statewide septennial censuses (of “taxable inhabitants”) in 1793 and 1800,²⁴ and subsequently enacted successive congressional districting statutes after each of these censuses, on April 22, 1794, and March 12, 1800, respectively.²⁵ Finally, as previously noted *ante* at pages 14-15, the Massachusetts state constitution during this period authorized alteration of electoral districts “from time to time” contingent upon changes in the “the proportion of the public taxes paid by the said districts”. While alteration of congressional districts as the result of an intra-decennial calculation (or payment) of taxes could not presently provide a constitutionally valid purpose to redistrict, *cf.*, Harper v. Virginia Board of Elections, 383 U.S. 663, 668 (1966)(nullifying regulations conditioning right to vote on payment of taxes); it assuredly provided, at the time, a more neutral justification for multiple intra-decennial redistricting than does the redistricting in the present case, which is unrelated to increases (or decreases) in either wealth, property value *or* population.

Two events in the early years of the Republic support the conclusion that the Framers believed *the only legitimate purpose* for electoral redistricting was to achieve

²⁰ 5 Thorpe, 2629 n. 5; Dubester, State Censuses: An Annotated Bibliography of Censuses of Population Taken after the Year 1790 by the States and Territories of the United States, 45 (Library of Congress 1969).

²¹ Martis, *supra*, 247.

²² Martis, *supra*, 263.

²³ Pa.Const., Sec. 17 (1776), 5 Thorpe 3086.

²⁴ Dructor, Guide to Genealogical Sources at the Pennsylvania State Archives, 98 (1981)(Library of Congress Control No. 99234418); “Pennsylvania Septennial Census Returns (1779-1863)”, available at the Pennsylvania State Archives, Records Group 7 (“RG-7”).

²⁵ Martis, *supra*, 263.

“fair and effective representation for all citizens” Reynolds v. Sims, 377 U.S. 533, 565-568 (1964). The first incident of multiple congressional redistricting between federal decennial enumerations *not* supported by any legitimate regulatory purpose (that is, not related to any purpose to accommodate for population shifts or growth), occurred in the State of New York in 1804. This redistricting was swiftly followed by yet another alteration of congressional districts in that State in 1808.²⁶ Far from receiving universal acceptance as merely a lawful exercise of power under the Elections Clause however, these intra-decennial congressional redistricting enactments went neither unnoticed nor unchallenged by the electorate.

In a broadside entitled “To the Electors of Members of Congress” (signed under the pseudonym “SENEX”),²⁷ one adversely affected voter objected that “[a]ccording to the constitution, when a new census and apportionment of representatives are made by Congress, the state legislatures should respectively *prescribe* the *manner* of their choice; and this manner, until altered by Congress, ought to remain the same till a new apportionment of representatives shall be made.” Ibid. (italics in original). While the anonymous author of this broadside, “SENEX”, noted that more frequent congressional redistricting might arguably be justified “as the states from time to time [might] enumerate their own inhabitants, and as thereby they m[ight] discover changes and inequalities in the districts, [and should] not [be] restrained from correcting the same by altering the districts”, ibid.; in SENEX’s view, no such alteration of valid congressional

²⁶ See Elmer C. Griffith, The Rise and Development of the Gerrymander, 56-59 (1907)(hereafter “Griffith”). This historical authority was favorably cited by Justice Scalia in his plurality opinion in Vieth v. Jubelirer, supra, 541 U.S. at ___, 124 S.Ct. at 1774.

²⁷ Although published in the April 27, 1808, edition of the New-York Herald, this broadside, which is briefly discussed in Griffith, supra, 57-58, is dated April 25, 1808. It is available on microfilm at the Library of Congress, Call No. “Microfilm Newspaper 3295”.

districts, as “ha[d] led to these frequent violations of the constitution” in New York in 1804 and 1808, could constitutionally be justified solely by illegitimate “motives...[wherein] the object has been to preserve power in the hands of those who at present possess and abuse it.” Ibid.

The assertion made by SENEX----that multiple redistricting between enumerations violates the constitutionally protected rights of voters, was not a view that was limited, during the earliest years of the Nation, to the general populace. Less than a year after the foregoing protest by SENEX, the New York Council of Revision, in a decision reported by renowned Chief Justice (and later Chancellor) James Kent,²⁸ construed Article IV of the New York Constitution, as amended in 1801, to prohibit multiple alteration of state senate districts after each census.

In 1807, the State of New York had conducted a census pursuant to Article V of the Constitution of 1777, which, like Pennsylvania, provided that a census be taken every seven years.²⁹ On April 1, 1808, the New York legislature enacted new legislative districts utilizing that census of 1807. In March of 1809, however, the New York legislature attempted to enact new State senate districts a *second* time after the census of 1807. On March 14, 1809, as noted, the New York Council of Revision intervened to prohibit alteration of the earlier districts established by the Legislature in 1808, finding that Article IV did not authorize enactment of legislative districts more than once after each census.³⁰ In his written opinion for the Council of Revision, Chancellor Kent explained in relevant part that:

²⁸ Kent’s treatise, Commentaries on American Law (1826), has been favorably cited no less than 37 times by Members of the Supreme Court when resolving constitutional questions involving original intent.

²⁹ See 5 Thorpe, 2629-2630 n.5.

³⁰ Alfred B. Street, The Council of Revision of New York, 352-354 (1859)(hereafter “Street”).

“The bill is to be considered either as a new apportionment of the Senators, or as a new revision of the districts, and in either view it appears to the Council to be inconsistent with the spirit of the Constitution and the public good....By the fourth article of the amendments to the Constitution [ratified in 1801] it is provided that upon the return of every census the Legislature shall apportion the Senators and members of the Assembly; and the Legislature did accordingly, on the first day of April last, by the act entitled ‘An act apportioning the representation in the Legislature according to the rule prescribed by the Constitution,’ make such apportionment in pursuance of the census in 1807. The apportionment having thus been made, the provision in the Constitution is complied with, and it ceases to operate until the taking of another census....[I]t is extremely important, both as it respects the security of the Constitution and the just rights of the electors which are concerned in these apportionments, that when an apportionment is once made it should be steadily adhered to until the return of another census. There is no rule for making another apportionment by the census of 1807, and that [census] becomes an uncertain guide for a second apportionment, because the population of the districts has varied in the meantime and that variation increases every year. If a second apportionment may be made now, it may equally be made in any future session and even in the year preceding the taking of another census, and thus all accuracy in the rule of the apportionment would be lost and the constitutional objects of the census defeated.”³¹

Although the foregoing decision was later derided as an *ultra vires* act at the New York Constitutional Convention of 1821 (by an aggrieved partisan, Anti-Federalist former New York Governor, and then Vice President, Daniel D. Tompkins);³² the delegates at that convention, without a single dissenting voice, made explicit what had theretofore been generally understood as intended by the New York Constitution. On the Report of the Committee on Legislative Departments chaired by Rufus King,³³ the New

³¹ Street, supra, at 352-354.

³² See Nathaniel H. Carter & William L. Stone, Reports of the Proceedings and Debates of the [New York] Convention of 1821, 79-80 (1821)(hereafter “New York Debates of 1821”).

³³ Rufus King served as a delegate from Massachusetts to the Federal Constitutional Convention of 1787, 3 Farrand at 557; and as a delegate to the Massachusetts ratification convention. At the Massachusetts convention, King was a prominent figure in debate concerning the Elections Clause. 2 The Debates of the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787, 50 (Jan. 21, 1788)(Elliott ed. 1937)(hereafter “Elliot’s Debates”). At the Federal Constitutional Convention, King was elected to the five-member Committee that addressed, among other things, the method of Representation in the National Legislature, 1 Farrand at 542. After relocating to the State of New York later in 1788, King was elected to the First Congress as U.S. Senator from New York; and, as indicated, was a delegate to the New York Constitutional Convention of 1821.

York Constitution was amended to more clearly express, in accord with the prior decision of the Council of Revision, “that a just apportionment...may be made by the legislature at the first session after the return of every census, *which apportionment shall remain unaltered until the return of another census.*”³⁴

More than merely “the best of an ugly array of choices”, Session v. Perry, supra, 298 F.Supp.2d at 475; Chancellor Kent’s “principled discussion” of redistricting power, as quoted above, recognized “the need for stability and continuity” in the electoral system, Reynolds v. Sims, supra, 377 U.S. at 583; and cogently observed that under constitutional principles, any legislative justification for redistricting must be legitimately related to the “basic aim” of equal representation based on equal population. While neither Chancellor Kent’s reasoning, nor the argument advanced by Plaintiff here, relies on any amorphous (and “judicially unmanageable”) right to “fairness”,³⁵ the now “well-accepted rule” stated by the Chancellor does have the collateral effect of reinforcing “the policy, so carefully guarded in the constitution, of preventing a change of representative districts intermediate two enumerations, for partisan purposes.” People ex. rel. Henderson v. Westchester Board of Supervisors, 41 N.E. 563, 568 (N.Y. 1895).

D) Legislative Authority to Revise Electoral Districts Has Widely Been Recognized as Only Commensurate with the Need to Provide Valid Districts.

The District Court’s legal assumption that “the power given the states [by the Elections Clause] is broad enough to encompass mid-decade redistricting”, Session v. Perry, supra, 298 F.Supp.2d at 463, is also clearly at odds with the reasoning of the vast

³⁴ N.Y.Const, Sec. 6 (1821); 5 Thorpe, supra, at 2641 (italics added); New York Debates of 1821, at 142, 581-582.

³⁵ Vieth v. Jubelirer, supra, 124 S.Ct. at 1784 (plurality opinion per Scalia, J.) (“‘Fairness’ does not seem to us a judicially manageable standard.”)

majority of State Courts of last resort which, undoubtedly influenced by the reasoning of Chancellor Kent quoted above, have decided under their respective State Constitutions that the power of a legislature to enact political district boundaries is limited, and *commensurate with the need* for such regulation. Thus, these States have held that, while legislatures remain under a “continuing duty” to act after they have failed to timely enact new legislative districts, “*once a valid apportionment law is enacted no future act may be passed by the Legislature until after the next regular apportionment period by the constitution.*”³⁶ Applying this analysis, for example, the Supreme Court of California has ruled its State constitution limits *congressional* redistricting to a period “immediately after each decennial census and not again thereafter until the next census”.³⁷ More

³⁶ Harris v. Shanahan, 387 P.2d 771, 779-80 (Kan. 1963)(Kan.Const.Article X, Section 2)(italics added), *citing* 18 Am. Jur., Elections, § 14, p. 190 (1958); Lanning v. Carpenter, 20 N.Y. 447, 451 (N.Y.1859)(N.Y.Const. of 1846, Article III, Section 5)(“the apportionment and districts so to be made shall remain unaltered until another enumeration shall be taken”); Denny v. Balsler, 42 N.E. 929, 931-33 (Ind. 1896)(Ind.Const. of 1881, Article IV, Sections 4 and 5)(after enumeration, “the apportionment of members of the legislature shall be made at the next ensuing session of the general assembly, and only then”); Harmison v. Ballot Commissioners, 31 S.E. 394, 395 (W.Va. 1898)(W.Va.Const. of 1872, Article VI, Sections 7 and 10)(“We plainly see that both sections contemplate one apportionment and arrangement of districts after each census, not a changing one every session of the legislature.”); People v. Hutchinson, 50 N.E. 599, 601-602 (Ill. 1898)(Ill.Const. of 1870, Article IV, Section 6)(“provisions giving specific directions to make the apportionment at a particular time...manifest an intention to impose a negative upon the exercise of the power at any other time.”); Noecker v. Woods, 102 A. 507, 508-510 (Pa. 1917)(Pa.Const. of 1874, Section 14)(providing for apportionment of judicial districts “at the next succeeding session after each decennial census and not oftener”, construed to require that “districts of the state cannot be changed by the Legislature, session after session, but only at intervals of ten years”); Opinion of the Judges, 246 N.W. 295, 296 (S.D. 1933)(S.D.Const.Article 3, Section 5)(providing that Legislature shall enact legislative districts at “its first regular session” after each federal decennial census “but at no other time”); Herbert v. Bricker, 41 N.E. 2d 377, 383 (Ohio 1942)(Ohio Const. Of 1851, Article XI, Section 10)(referring to text of constitutional provision that states “no change shall ever be made...except as above provided”, and construing provision to mean “districts continue unchanged from decennium to decennium except insofar as the Constitution itself prescribes a change.”); Jones v. Freeman, 146 P.2d 564 (Okla. 1944)(Okla.Const.Article 5, Sections 9(a), 10(b), and 10(c))(“Once a valid law is enacted no further act may be passed by the Legislature until after the next federal decennial census.”); Opinion of the Judges, 47 So.2d 714 (Ala.1950)(Ala.Const. Sections 198 and 200)(“only one apportionment is contemplated during the ten-year period that a given census enumeration is in effect”); Cahill v. Leopold, 103 A.2d 818, 827(Conn. 1954)(Conn.Const.Amend. II of 1828, and Amend. XXXI of 1901)(both amendments providing that “districts shall not be altered...except at any session of the General Assembly next after the completion of a census of the United States”).

³⁷ Legislature v. Deukmejian, 669 P.2d 17, 22 (Cal. 1983)(Cal.Const. of 1879, Article IV, Section 6).

recently, the Colorado Supreme Court has followed suit.³⁸ Typical of these cases is People v. Hutchinson, 50 N.E. 599, 603 (Ill. 1898), wherein the Supreme Court of Illinois rejected precisely the argument made by the State of Texas (and accepted by the District Court in the present case), with the following observation:

“It is further argued that a fair construction of the provision in question is that it was to secure to the people a reapportionment at least once in 10 years, rather than to fix the time for the exercise of the power or to operate as an exclusion of apportionments at other times. The same argument was insisted upon in Denny v. State, supra [42 N.E. 929, 931-33 (Ind. 1896)], but did not prevail, and it was held that the apportionment could only be made after the taking of an enumeration, and that, when a valid apportionment was once made, it must stand until after the making of the next apportionment.”

II. Congressional Regulation by Title II, U.S.C. Section 2c.

A) The Text and Legislative History of Section 2c.

The State of Texas, before the United States Supreme Court, also contended herein that “Congress has not Regulated whether State Legislatures Can Replace a Court-Drawn Plan with a Legislatively Enacted Plan”, State’s Motion to Affirm, at 13; and implied, as the District Court asserted, that Plaintiff has “ignore[d] the text of Section 2c”. Session v. Perry, 298 F.Supp.2d at 464. With all due respect, Plaintiff contends it is the State of Texas, and not this Plaintiff (at least), that has neglected the express terms of Section 2c. Both the plain meaning of Section 2c, and the legislative history of Section 2c reflect congressional intent that redistricting be performed only once after each decennial enumeration and apportionment, *at least* in the absence of a neutral regulatory purpose.

The text of present Section 2c mandates that after each federal census and apportionment, single member congressional districts “shall be established by law” and that “Representatives shall be elected *only from districts so established*”. Id., (italics

³⁸ Salazar v. Davidson, 79 P.3d 1221 (Colo.2003).

added). The plain meaning of Section 2c thus expresses the intent that congressional districts, once “established”, may not be altered by a State legislature until after the next federal census and apportionment. Moreover, while absolutely no legislative history exists to support a contention that Section 2c permits multiple intra-decennial congressional redistricting (unrelated to population deviation), substantial evidence supports the contrary conclusion that Section 2c prohibits State legislative revision of congressional districts after valid districts have been “established”. Articulation of this legislative history, regrettably, requires some degree of elaboration by Plaintiff and the Court’s indulgence.

The origin of Section 2c can be traced to a period shortly after ratification of the Federal Constitution wherein a series of constitutional amendments were unsuccessfully proposed that sought to both: 1) require single member congressional districts; and 2) prohibit further congressional redistricting within a decennial period once valid districts were established. On February 19, 1802, the State of Vermont proposed a constitutional amendment that required single member congressional districts, and further provided, regardless of intra-decennial shifts in population, that “[su]ch district[s], when so divided, shall remain unalterable until a new census of the United States shall be obtained.”³⁹ Similar amendments were thereafter proposed but failed to obtain the necessary 2/3 vote in the 12th, 14th, 15th, 17th, and 18th Congresses.⁴⁰ While these efforts to require single

³⁹ 11 Annals of Cong., 190 (1802). All references to the “Annals of Congress” herein uses the pagination found in the first edition published by Gales and Seaton in 1834, as it has been digitally reproduced online, under the auspices of the Library of Congress, at: <http://memory.loc.gov/ammem/amlaw/lwac.html>. The Plaintiff is informed by staff at the Library of Congress that more than one “first edition” of early volumes of the Annals of Congress were published by Gales and Seaton in 1834, each with differing pagination.

⁴⁰ In the 12th Congress an amendment was proposed to require equipopulous and “contiguous” single member congressional districts “immediately” and “successively afterwards, whenever by a census and apportionment of representatives...to which any State may be entitled, shall be changed; ...and on no other occasion.” 25 Annals of Cong., 57-58 (1813); Senate Journal, January 20, 1813, 12th Cong., 2d Sess., 235-

member congressional districts by constitutional amendment proved unsuccessful, they were in due course replaced by efforts to achieve the same objectives through *statutory* regulation, a course of action first suggested by Senator Rufus King.⁴¹

In 1842, an amendment to the congressional apportionment bill created (by statute) the first single member district requirement for congressional elections.⁴² In support of this requirement, it was stated by Representative Davis of Kentucky that:

“There are other reasons why Congress should now take this matter in hand, and pass this amendment....There are instances where, after the State has been arranged into districts for years, a single district has been altered, to transfer it to the opposing party of the one which then had the Representation of it. Repeatedly, and long after the apportionment bill has been passed by Congress, and the States have enacted the necessary legislation to give it effect, States have repealed the district, and introduced the general-ticket system, upon no other ground than calculations of party power. We ought to establish [by this bill] the district system in every State, requiring as nearly as practicable that the districts should contain the number of people constituting the ratio, to be in convenient form of contiguous territory, and *to remain immutable until the next apportionment of representation.*”⁴³

Contemporary legislative history discloses that present Section 2c was inspired by the Apportionment Act of 1842, and that when enacting Section 2c in 1967, Congress intended that once valid congressional districts were “established” (either by a State

236 (1813). The same temporal restriction on congressional redistricting was proposed in the 14th Congress by the State of North Carolina, and supported by a separate resolution of the State Legislature of Virginia. 29 Annals of Cong., 158, 1403-1404 (1816). Such an amendment was again proposed by North Carolina in the 15th Congress, supported by resolutions of the State Legislatures of New York, New Jersey, New Hampshire, and Connecticut. Senate Journal, November 25, 1818, 15th Cong., 2d Sess., 28-31 (1818); *id.*, at 55-57 (December 17, 1818); 33 Annals of Cong., 137, 140 (1819)(“these districts are to be altered but once in tens years”). In the 17th Congress, a North Carolina substitute to a constitutional amendment proposed by Senator Taylor of Virginia required equipopulous and contiguous congressional districts, and provided that “such districts shall not be altered until a subsequent census shall have been taken, and an apportionment under it shall have been made.” 40 Annals of Cong., 176-177 (1823). In the 18th Congress, Representative George McDuffie of South Carolina, acting as Chair of a Select Committee, “made a detailed report” recommending adoption of a constitutional amendment providing that congressional districts “when laid off, shall not be altered until after another census shall be taken.” 41 Annals of Cong., 850-851, 866 (1823).

⁴¹ 29 Annals of Cong., 215-216 (1816)(Congress “can now make the same regulation by law...Let the question of the mode of election of Senators and Representatives rest where it is; if Congress choose to interpose, let them.”).

⁴² 5 Stat. 491, ch. 47, Section 2 (June 25, 1842).

⁴³ Cong.Globe, 27th Cong., 2d Sess. App. at 493 (1842)(italics added).

legislature or by a Court---State or Federal), such districts would, in the absence of some neutral regulatory purpose, “*remain immutable until the next apportionment of representation*” (as stated above by Representative Davis).

In the 90th Congress on January 17, 1967, Representative Emanuel Celler, Chairman of the House Judiciary Committee, introduced H.R. No. 2508, which was “a bill identical, in all relevant respects” to a bill passed by the House of Representatives in the preceding Congress, H.R. 5505, 89th Cong., 1st Sess. (1965).⁴⁴ In the House Judiciary Committee of the 90th Congress, Section 1 of H.R. 2508 (like its predecessor in the 89th Congress, H.R. 5505) contained a provision that prohibited “more than one redistricting during any decennial.”⁴⁵ While Section 1 of H.R. 2508 was designed to operate as “permanent” legislation (applicable to “the Ninety-Third Congress or in any subsequent Congress”), Section 2 was intended to provide temporary or “interim” regulations pending the 19th federal census in 1970. One “interim” provision in Section 2 provided that “in the event a court of competent jurisdiction has ordered the redistricting of any State and such order has been applied in an election, the districts established by such court order or orders shall remain in full force and effect until the State shall establish valid districts in accordance with the provisions of this Act....”⁴⁶ In this connection, the applicable “permanent” provisions in Section 1 “of this Act”, under which such revised “interim” districts were to be “established”, provided that “if a State redistricts more than two years after a decennial census, the population requirements specified in this

⁴⁴ *Branch v. Smith*, 538 U.S. 254, 287 n. 3 (2003)(Stevens, J., joined by Souter and Breyer, JJ, concurring).

⁴⁵ Compare H.R. Rep. No. 89-140, at 3-4 (1965); with H.R. Rep. No. 90-191, at 1, 4, and 6 (1967)(“There shall not be more than one redistricting between decennial censuses unless a particular State constitution requires otherwise.”).

⁴⁶ H.R. Rep.No. 90-191, at 2 (April 13, 1967).

paragraph must be met under a statewide Federal special census...and said census must be less than two years old at the time of the next election following said redistricting.”⁴⁷

After being adopted by the House, Section 1 of H.R. 2508 was amended on the Senate floor in a manner originally proposed by Senator Kennedy (of Massachusetts) in his minority report in the Senate Judiciary Committee.⁴⁸ As adopted by the full Senate, and as supported by minority Republican Senator Howard Baker,⁴⁹ Section 1 permitted States to “reestablish” districts “more than once in each ten-year period”, but retained the House requirement that any redistricting occurring “more than two years after a decennial census” be “based on special statewide censuses taken within two years before the election to which the redistricting is to apply.”⁵⁰

The Senate insisted on the Kennedy amendment to H.R. 2508, and requested a conference,⁵¹ which was agreed to by the House.⁵² At their first Conference Committee hearing the Senate and House conferees “adopt[ed] Section 1 as passed by the House”,⁵³ but a disagreement over the “interim” provisions of Section 2 resulted in a Conference Committee Report unacceptable to the House.⁵⁴ After recommitment of the bill to the Conference Committee, the conferees were then unable to report agreement on even the “permanent” regulations provided in Section 1 of H.R. 2508 (to which they had

⁴⁷ *Id.*, at 1.

⁴⁸ See S.Rep. No. 90-291 (minority report), at 25-26 (June 1, 1967); 113 Cong.Rec. 14, 779-80 (amendment proposed); *id.*, at 15,243 (amendment adopted).

⁴⁹ 113 Cong.Rec. 14,791 (statement of Sen. Kennedy, concurred in by Sen. Baker).

⁵⁰ See S.Rep. No. 90-291 (minority report), at 25-26 (June 1, 1967); 113 Cong.Rec. 14, 779-80 (amendment proposed).

⁵¹ 113 Cong.Rec. 15, 244 (June 8, 1967).

⁵² 113 Cong.Rec. 15, 817 (June 14, 1967).

⁵³ H.R.Conf.Rep. No. 90-435, at 4 (June 27, 1967).

⁵⁴ 113 Cong.Rec. 17, 738 (June 28, 1967).

previously agreed).⁵⁵ However, even Senator Ervin, one of the least enthusiastic “supporters” of the bill, acknowledged that under the final Conference Committee Report that emerged, H.R.Conf.Rep.No. 90-795 (Oct. 19, 1967), which contained no “permanent” regulations whatsoever, a State would be permitted to engage in intra-decennial redistricting *provided* that “it had reliable figures that would show that it was malapportioned.”⁵⁶ At this juncture (as described by Justice Stevens in Branch v. Smith, 538 U.S. 254, 290 n. 5 (2003)(concurring opinion)) Senator Bayh then “attach[ed] that part of the bill” over “which there was no dispute, or a minimal amount of dispute”, to a private immigration bill, H.R. 2275.

Senator Bayh’s amendment to H.R. 2275, which purported to include those parts of H.R. 2508 over which there was no controversy, included the precise terms of present Section 2c; and, notwithstanding the adoption of a substitute amendment by Senator Baker, the terms of present Section 2c initially proposed by Senator Bayh were ultimately enacted as law. Immediately prior to the final vote on this measure in the Senate, and after adoption of the Baker substitute amendment, Senator Bayh argued in favor of H.R. 2275, as amended, on the specific ground that while “[r]edistricting is important...we do not want to get into the position where it becomes a political pawn, *where first one and then the other party can change the boundaries.*”⁵⁷

While subsequent congressional debate on mid-decade *census* legislation in the 94th Congress reflects a pronounced congressional hostility to multiple intra-decennial

⁵⁵ H.R.Conf.Rep.No. 90-795 (Oct. 19, 1967). The contradictory signals sent by this particular Conference Committee can be attributed to the Senate’s unusual selection of five Senate conferees that had voted *against* the amendment proposed by Senator Kennedy and adopted by the full Senate. 113 Cong. Rec. 31, 703 (Statement of Senator Clark, referring to Senators Eastland, Ervin, McClellan, Hruska, and Dirksen).

⁵⁶ 113 Cong. Rec. 31, 710 (Nov. 8, 1967).

⁵⁷ 113 Cong.Rec. 34,367 (Nov. 30, 1967)(italics added).

redistricting for *any* purpose, Department of Commerce v. United States, 525 U.S. 316, 361 n.3 (1999)(Stevens, J., dissenting); in light of the foregoing legislative history of Section 2c, it is apparent that Title II, U.S.C Section 2c, independent of the Elections Clause, expresses the intent that congressional districts once “established” may not be altered by a State legislature, *at least* not in the absence of a legitimate regulatory purpose, until after the next succeeding federal census and apportionment.

B) The District Court in Balderas Exercised Elections Clause Power Delegated by Congress.

Resolution of whether the State of Texas retained “unlimited” constitutional authority to revise its congressional districts intra-decennially “at will” also depends on the source of the power exercised by the District Court in Balderas v. Texas, *supra*, when it initially “established” congressional districts. The Plaintiff contends that when the Balderas court devised and implemented single member congressional districts in 2001, it was necessarily acting under authority conferred by Section 2c, and was therefore acting pursuant to power delegated by Congress, and not pursuant to the Court’s “inherent equitable power”. If, as the Plaintiff contends, the Balderas court’s authority to devise districts in 2001 was derived from a delegation of power by Congress, the Supremacy Clause foreclosed any assumption of authority by the State of Texas to alter the extant congressional districts in place. In this connection, Plaintiff contends the legislative history of congressional efforts to enforce the equipopulous single member district requirement against State legislatures, since the first enactment of that requirement in 1842, confirms that when enacting Section 2c, Congress intended to delegate its own power under the Elections Clause (in conformity with the “intelligible principle” test), to

the courts---State and Federal, to “make or alter” regulations and enforce the federal statutory command in Section 2c.

When enacting the Apportionment Act of 1842,⁵⁸ Congress contemplated that intransigence or delay by State legislatures to timely comply with its single member district requirement would justify congressional action to deny a seat to any Representative elected at-large. *See* Cong.Globe, 27th Cong., 2nd Sess.App., 750 (1842)(Statement of Sen. Graham: “If, therefore, notwithstanding this law, a State should return members according to general ticket, the House of Representatives, as judge of the elections of its members, would be under the necessity of pronouncing the election a nullity”, relying on U. S. Const., Art. I, Section 5). The need for an effective means of enforcement was particularly acute after the federal apportionment of 1842, in that, unlike all prior apportionment acts that had numerically *increased* the total number of Representatives in the House (to ensure that no State delegation was numerically decreased by the federal apportionment based on population shifts or growth), the Apportionment Act of 1842 deliberately *decreased* the overall number of Representatives in the House. As a result of this decrease in the total number of Representatives in the House, the lack of a provision to enforce the single member district requirement in 1842 would thus have lead by default to congressional elections at-large in all nonconforming States having a pre-existing number of districts exceeding the decreased number of Representatives to which these States were entitled under the new federal apportionment.

⁵⁸ 5 Stat. 491, ch. 47, Section 2 (June 25, 1842).

The means of enforcement contemplated by Congress under the Apportionment Act of 1842 proved wholly ineffective. As one scholar has noted, “although the requirement for election by districts was on the statute books for nearly ninety years, Congress never denied seats to representatives elected at large.” Paschal, The House of Representatives: “Grand Depository of the Democratic Principle”?, 17 *Law & Contemp Probs.*, 285 (Spring 1952). Undaunted, in the Apportionment Act of 1862 Congress reenacted the single member district requirement (after a lapse in the Apportionment Act of 1850), and again expressed an intention that intransigence or delay by State legislatures to *timely* comply with the single member districting requirement *before the next succeeding congressional election* would justify congressional action to deny a seat to any Representative elected at-large.⁵⁹ Further demonstrating its resilience in the face of futility, during the 42nd Congress that enacted the Apportionment Act of 1872, Congress rejected a proposal by the Senate that sought to relax the temporal limitations imposed on State legislatures, and which would have stricken the words “Forty-Third Congress” from the Apportionment Act of 1872.⁶⁰ As explained by one *proponent* of this unsuccessful Senate amendment, the result of striking out the words “Forty-Third Congress” from the Apportionment Act of 1872 would have enabled “every State in which the adverse party can obtain a majority in the Legislature in the next year, or the next year, or any succeeding year, [to] have the power” to “grapple in the State for partisan advantage” by

⁵⁹ *Cong. Globe*, 37th Cong., 2nd Sess., 3117 (1862)(Sen. Trumbell, stating it “would be for the House of Representatives to determine” whether Representatives “sent to the next Congress” after election “by the general ticket system... would be entitled to their seats or not.”).

⁶⁰ *Cong. Globe*, 42nd Cong., 2nd Sess. 3763 (1872)(amendment proposed by Sen. Morton); *id.*, at 3765 (amendment adopted by Senate); *id.*, at 3988 (“The committee of conference... recommends that the Senate recede from its amendment”); and, *id.*, at 3988, 3943, 4010 (H.R. No. 1343 adopted by House and Senate, and enrolled, without Senate amendment).

redistricting the State.⁶¹ The congressional rejection of this proposed Senate amendment provides evidence that, at least as long ago as 1872, Congress did not intend to permit the sort of partisan shenanigans that has occurred in the present case.

In 1882 Congress considered the then novel enforcement option of delegating its Elections Clause power to other “constituted agencies” to compel dilatory or intransigent States to *timely* comply with the single member districting requirement before the next succeeding congressional election. In February of 1882, Representatives Thompson and Springer (in separate amendments) proposed to delegate the constitutional power to draw congressional districts to the Governors or “Executives” of non-complying States, but to no avail.⁶² Although these isolated proposals to solve the enforcement problem failed, they provided the example for future attempts to resolve the problem of congressional enforcement of the single member district requirement, and laid the groundwork for present Section 2c.

During the extended 16 year crusade for equipopulous single member congressional districts immediately preceding enactment of Section 2c in 1967 (heroically lead by Representative Celler),⁶³ Congress considered statutory proposals to delegate congressional redistricting power under the Elections Clause to the Director of

⁶¹ Cong. Globe, 42nd Cong., 2nd Sess. 3763 (1872)(Statement of Sen. Pomeroy).

⁶² 13 Cong.Rec. 1224, 1228, 1236 (1882). As later noted by Representative Crumpacker in the 62nd Congress, such a delegation of power to a Governor would not be viable, as the redistricting power delegated to Governors could become an exclusive power of a Governor’s office merely by exercise of the Governor’s veto power, and thereby effectively deprive State legislatures of meaningful participation in the redistricting process. 47 Cong.Rec. 674 (April 27, 1911)(rhetorically asking whether, under such circumstances, a State legislature would still meaningfully have “the right to say how her districts shall be made?”).

⁶³ See Celler, Congressional Apportionment—Past, Present, and Future, 17 Law & Contemp Probs. 268, 274-275 (Spring 1952).

the Federal Bureau of the Census,⁶⁴ and to delegate to the Clerk of the U.S. House of Representatives authority to judge the qualifications and deny credentials to congressional candidates not elected in compliance with federal statutory law.⁶⁵ Separation of powers concerns with respect to the former proposal, expressed in opposition to the concept of delegating congressional redistricting power under the Elections Clause to the Director of the U.S. Census Bureau, were persuasively met by a published opinion of the American Law Division of the Library of Congress issued in response to a congressional inquiry on the subject.⁶⁶ In its opinion on the constitutional delegation of power question, the American Law Division concluded (presaging the “intelligible principle” test later articulated by this Court in Mistretta v. United States, 488 U.S. 361, 372-374 (1989)), that a congressional delegation of authority to redistrict in the form proposed by these bills was constitutionally permissible, in light of directory language within the bills (similar to language contained in present Section 2c), which it found sufficiently “clear and intelligible” to guide performance of the redistricting task assigned.⁶⁷

⁶⁴ H.R. 8075, H.R. 8498, and H.R. 8616, 87th Cong., 1st Sess. (1961), *reprinted in* Increasing the Membership of the House of Representatives and Redistricting Congressional Districts: Hearings Before the Subcomm. No. 3 of the House Comm. on the Judiciary, 87th Cong., 18-20 (1961)(SuDoc No. Y 4.J89/1:87/9)(hereafter “87th Cong.Hearings”). In a public hearing in the 86th Congress this enforcement solution was attributed to Professor Kenneth C. Sears of the University of Chicago Law School. *See Standards for Congressional Districts (Apportionment): Hearings Before the Subcomm. No. 2 of the House Comm. on the Judiciary*, 86th Cong., 36-37 (1959)(SuDoc No. Y 4.J89/1:C76/20)(hereafter “86th Cong.Hearings”), *citing* Sears, Methods of Reapportionment, 2 (1952).

⁶⁵ H.R. 575, 86th Cong., 1st Sess. (1959), *reprinted in* 86th Cong.Hearings, *supra*, at 2.

⁶⁶ *Reprinted in* 87th Cong.Hearings, *supra*, 68-72 (August 3, 1961). Although the three bills that proposed delegation of redistricting power to the Director of the Census contained provisions that expressly authorized State legislatures to enact congressional districting statutes to supercede any district regulations formulated by the Director, *see* H.R. 8075, H.R. 8498, and H.R. 8616, 87th Cong., 1st Sess. (1961), *supra*, those provisions were not addressed by this American Law Division opinion. As explained by Plaintiff, however, *ante* at pages 25-28, subsequent legislative history of Section 2c discloses congressional intent to prohibit “more than one redistricting during any decennial” in the absence of a neutral regulatory purpose based on demonstrated population deviations.

⁶⁷ 87th Cong.Hearings, *supra*, 71-72.

Ultimately, after Representative Celler had “considered every possible approach and ha[d] abandoned all but the one set forth in [his] bill”,⁶⁸ Congress endorsed the concept of delegating its own redistricting power under the Elections Clause to the judiciary, as first proposed by Representative Celler in H.R.73, 86th Cong., 1st Sess. (1959),⁶⁹ and as eventually enacted in Section 2c. In the end, as explained by Senator Baker during adoption of Section 2c, when Congress enacted present Section 2c, Congress intended to delegate a “*derivative* right of the judiciary, Federal and State, to intervene”, and to vest in the judiciary, in any case or controversy, a derivative power under the Elections Clause, upon default of a State legislature, to draw and implement single member districts for congressional elections.⁷⁰

C) The Plaintiff’s Theory under Section 2c does not Advance a “Specie of Preemption”, and the State of Texas is not Entitled to Deference under any “States’ Rights” Theory or General Principles of “Comity”.

The position taken by the State of Texas is that once a State legislature’s inability to enact congressional districts has abated, and *no matter how long* that may occur after the return of the federal census, apportionment, and elections, State legislatures retain “unlimited” power under the Elections Clause to enact congressional districts at will. In the State’s view, the Elections Clause vests the legislatures of the several States with a “broad constitutional right” (of a “State’s rights” variety) that never expires, notwithstanding the implementation of valid congressional districts pursuant to power reserved to Congress and the occurrence of an intervening biennial congressional

⁶⁸ 86th Cong.Hearings, supra, 18.

⁶⁹ Reprinted in 86th Cong.Hearings, supra, 2

⁷⁰ 113 Cong.Rec. 31, 719 (1967)(Statement of Sen. Baker on adoption of Section 2c)(italics added).

election. Without the slightest historical evidence to support its calculation of the Framers' intent, the State of Texas must rely on the District Court's generalized conclusion that "the Elections Clause delegates power to the States in broad terms", Session v. Perry, 298 F.Supp.2d at 459; and the District Court's conclusion that any other view would fail to "preserv[e] the relative roles of Congress and the states under the Elections Clause". Id., Session v. Perry, 298 F.Supp.2d at 465.

The State of Texas is wrong on all counts. The First Congress of the United States considered and *rejected* a proposed constitutional amendment that would have "broadened" the Elections Clause power of State legislatures to include *precisely the power to supercede federal regulations claimed by the State of Texas* in the present case. For this reason, and contrary to the District Court's conclusion which is premised on the assumption that State legislatures retain such "broad", "unlimited", and *superceding* power under the Elections Clause; the Plaintiff's theory under Section 2c cannot be fairly characterized as a "specie of preemption", as described by the District Court. *See* Session v. Perry, 298 F.Supp.2d at 464. There was no State power under the Elections Clause to be "preempted" after valid districts were established by the District Court pursuant to Section 2c, and the State of Texas was therefore not entitled to any deference under either a constitutionally based "States' rights" theory or "comity".

The Elections Clause was drafted by the Framers with the intent that Congress, and not the State legislatures, would have ultimate authority "at any time" to "make or alter" regulations for congressional elections.⁷¹ In the Massachusetts ratifying convention on January 16, 1788, an amendment to the Elections Clause was proposed that would have permitted congressional regulation of federal elections *only* in the event a State

⁷¹ 5 Elliot's Debates, 401-402.

legislature “refuse[d] or neglect[ed] so to do”.⁷² While Massachusetts adopted this amendment, more relevant for present purposes is that the Maryland convention proposed an even more restrictive amendment, which was ultimately “negatived by a majority”, that would have amended the Elections Clause to provide:

“That Congress shall have no power to alter or change the time, place or manner of holding elections for senator or representatives, unless a state shall neglect to make regulations, or refuse to execute its regulations, or shall be prevented by invasion or rebellion; in which case *only*, Congress may interfere *until the cause is removed*.”⁷³

The succeeding ratification conventions of South Carolina, New Hampshire, and Virginia, all adopted constitutional amendment propositions similar to the Massachusetts “neglect or refuse” provision, but none included the more restrictive temporal limitation on the duration of congressional authority to “interfere” that had previously been rejected by Maryland.⁷⁴ At the New York convention, however, Samuel Jones, “apprehend[ing] that the [Elections] clause might be so construed as to deprive the States of an essential right, which, in the true design of the constitution, was to be reserved to them”, proposed a constitutional amendment similar to the one rejected by the Maryland convention.⁷⁵ The Jones amendment, which was adopted by New York, provided:

“That the Congress shall not make or alter any regulation, in any state, respecting the times, places, and manner, of holding elections for senators or representatives, unless the legislature of such state shall neglect or refuse to make laws or regulations for the purpose, or from any circumstance be incapable from making same, and then *only until the legislature of such state shall make provision in the premises*; provided, that Congress may prescribe the time for the election of representatives.”⁷⁶

⁷² 2 Elliot’s Debates, 23; 1 Elliot’s Debates, 322.

⁷³ 2 Elliot’s Debates, 552 (italics added).

⁷⁴ 1 Elliot’s Debates, 325 (South Carolina); *id.*, at 326 (New Hampshire); and, *id.*, at 327; 3 Elliot’s Debates, 661 (Virginia).

⁷⁵ 2 Elliot’s Debates, 325-326.

⁷⁶ 1 Elliot’s Debates, 329-330 (July 26, 1788)(italics added).

The Pennsylvania convention ratified the Federal Constitution on December 12, 1787, without proposing any constitutional amendments.⁷⁷ However, on September 2, 1788, following ratification of the Federal Constitution by the State of New York, a rump delegation including six former members of the Pennsylvania ratifying convention met at Harrisburg and likewise proposed a constitutional amendment which provided:

“That Congress shall not have the power to make or alter regulations concerning the time, place, and manner of electing senators or representatives, except in case of neglect or refusal by the state to make regulations for the purpose; *and then only for such time as such neglect or refusal shall continue.*”⁷⁸

At the First Congress on July 21, 1789, the constitutional amendments proposed by the States noted above (along with the Bill of Rights proposed by James Madison) were referred to a select committee.⁷⁹ However, none of the proposed constitutional amendments that sought to alter the Elections Clause, including the one proposed by New York, were approved by the Special Committee or included in that Committee’s Report. On August 18, 1789, objecting to this omission, Elbridge Gerry moved “[t]hat such of the amendments to the constitution proposed by the several states, as are not in substance comprised in the report of the select committee appointed to consider amendments, be referred to a Committee of the whole House.”⁸⁰ After “desultory conversation” on Gerry’s motion, “the motion was lost” by a vote of 16 to 34.⁸¹ Representative Thomas

⁷⁷ 1 *Elliot’s Debates*, 319-320.

⁷⁸ 2 *Elliot’s Debates*, 542, 545 (italics added). The former delegates of the Pennsylvania ratifying convention that attended this later meeting at Harrisburg were Benjamin Elliot of Huntington County; Robert Whitehall of Cumberland County; John Bishop of Berks County; John Smiley of Fayette County; Adam Orth of Daughin County; and apparently Richard Baird (a/k/a/ “Bard”) of Franklin County. *Id.*, 415-416, 542-543.

⁷⁹ 1 *Annals of Cong.*, 685-691. The appointed members of this Select Committee were Representatives Vinson, Madison, Baldwin, Sherman, Burke, Gilman, Clymer, Benson, Goodrue, Boudinot, and Gale. *Id.*, at 691.

⁸⁰ *Id.*, at 786.

⁸¹ *Id.*, at 788.

Tudor Tucker of South Carolina then moved a “proposition of amendment” (substantively identical to the disapproved proposal made by the South Carolina delegates at the Federal Convention)⁸² providing that the reservation of power to Congress in the Elections Clause be stricken and that such amendment be referred to the Committee of the Whole.⁸³ This proposition, too, was defeated in the Select Committee.⁸⁴ Before the Committee of the Whole, Representative Aedanus Burke of South Carolina, much to the chagrin of James Madison,⁸⁵ moved once again to amend the Elections Clause to prohibit congressional regulation of federal elections unless a State should “refuse or neglect, or be unable, by invasion or rebellion, to make such election.”⁸⁶ After further debate, during which the amendment rejected by Maryland and adopted by the rump Pennsylvania delegation were alluded to (by Representative Smith), Representative Burke’s motion failed by a vote of 23 to 28.⁸⁷

Although the specific constitutional amendment proposed by New York (providing that congressional regulations remain in effect “*only until the legislature of such state shall make provision in the premises*”) never formally reached the floor of the House of Representatives for consideration; the fact that such an amendment was proposed, and that the Select Committee of the First Congress voted not to report it for further consideration, provides, at a minimum, “inferentially meaningful” evidence of the

⁸² 5 Elliot’s Debates, 401-402.

⁸³ 1 Annals of Cong., 790.

⁸⁴ Id., at 792.

⁸⁵ 1 Annals of Cong., 798 (“I cannot agree to delay the amendments now agreed upon, by entering into the consideration of propositions not likely to obtain the consent of either two-thirds of this House or three-fourths of the State Legislatures.”).

⁸⁶ Id., at 797. One historian reports that Madison had carefully examined all the amendments proposed by the ratification conventions of Massachusetts, South Carolina, New Hampshire, Virginia, New York and North Carolina, and by the minorities in Pennsylvania and Maryland. *See Brant, James Madison, Father of the Constitution*, 264 (1950).

⁸⁷ 1 Annals of Cong., 799-802. During this debate, Representative Sherman pointedly “observed that the [Federal] Convention were [sic] very unanimous in passing this [Elections] clause”. Id., at 800.

Framers intent. *Cf.*, Mistretta v. United States, 488 U.S. 361, 398 (1989)(“we find it at least inferentially meaningful that at the Constitutional Convention...[prohibitions] were proposed, but did not reach the floor of the Convention for a vote.”). Under applicable precedents of this Court, the decision of the First Congress to reject the amendment to the Elections Clause proposed by New York, being a “Decision of 1789”, “provides contemporaneous and weighty evidence of the Constitution’s meaning”, Bowsher v. Synar, 478 U.S. 714, 723 (1986), and forecloses the assumption of any constitutional power, or entitlement to any deference, claimed by the State of Texas in the present case.

The State of Texas’ claim under a “States’ rights” theory to some sort of “constitutional right” to engage in congressional redistricting after valid districts have been implemented under federal authority derived from power reserved to Congress, is directly at odds with the foregoing evidence of the Framers’ intent. In the present case, it is undisputed the 77th Texas legislature “neglected” to enact new congressional districts after the federal census and apportionment for the year 2000,⁸⁸ and that the 77th Texas legislature did not act in a timely fashion before “the time was past for which [Representatives] were to have been chosen.”⁸⁹ Under the maxim *qui facit per alium facit per se*,⁹⁰ the District Court when implementing congressional districts in Balderas v. Texas,⁹¹ was not merely fashioning a judicial remedy for the violation of constitutionally protected representational rights pursuant to its “inherent equitable power”; it was functioning as an agent of Congress, pursuant to a *congressional delegation of authority*

⁸⁸ During debate on Burke’s proposed amendment, Representative Smith of South Carolina conceded that the failure of “the two branches” of a State legislature to “agree” on new congressional regulations after each enumeration would constitute “neglec[t] without any design”. 1 Annals of Cong., 800.

⁸⁹ 3 Elliot’s Debates, 10 (Wilson Nicholas at Virginia Convention).

⁹⁰ 13 Cong.Rec., 1228 (1882)(“Whatever this Congress does by its constituted agent it does by itself.”).

⁹¹ No. 6:01CV158, O. T. 2001, No. 01-1196 (App. to Juris. Stat.)(E.D.Tex., Nov. 14, 2001).

provided by federal statute and expressly permitted by the Elections Clause. *See Branch v. Smith*, supra, 538 U.S. at 280 (2003)(plurality opinion per Scalia, J., joined by Rehnquist, C.J., Kennedy and Ginsburg, JJ.) (“the District Court appropriately followed the ‘Regulations’ Congress prescribed in § 2c — ‘Regulations’ that Article I, § 4, cl. 1, of the Constitution expressly permits Congress to make.”). Under these circumstances, the Supremacy Clause prohibited further action by the State of Texas, with respect to congressional redistricting, until after the next succeeding federal census and apportionment, as the Elections Clause does not delegate or “reserve” residual power to a State Legislature “at any time” to “make or alter” federal regulations properly implemented under federal law by a Federal Court in a final judgment. This construction of the Elections Clause, and the effect it gives to Section 2c, assuredly does not represent the “creat[ion] out of whole cloth, a detailed scheme for states to exercise their constitutional authority.” *Session v. Perry*, 298 F.Supp.2d at 460.

Far from “preserv[ing] the relative roles of Congress and the states under the Elections Clause”, *Session v. Perry*, 298 F.Supp.2d at 465; the District Court’s decision essentially amends the Elections Clause of the United States Constitution in a manner that unconstitutionally “broadens” the power delegated to the State legislatures. Valid federal elections regulations do not yield, and cannot be made to simply evaporate, whenever a State legislature belatedly decides to enter an appearance.

III. The State of Texas’ Multiple Intra-decennial Congressional Redistricting is Not Supported by any Legitimate Regulatory Purpose.

The State of Texas does not, and cannot under the undisputed facts in the record, attempt to justify its action to replace the valid Court ordered redistricting plan on the basis of any shifts or growth in population since the 2000 federal decennial census. As

the State stipulated prior to trial, and as it has conceded before the Supreme Court in a companion case to the present one, the 78th Texas legislature, like the District Court before it, “relied exclusively” on the 2000 federal census figures when revising Texas’ congressional districts a second time in 2003.⁹² Instead, by various arguments, the State of Texas attempts to avoid the force of Plaintiff’s contention that congressional redistricting by a State legislature must be supported by at least one legitimate regulatory purpose. Initially, the State denied that federal courts possess judicial power to consider and decide whether congressional districting statutes enacted by State legislatures must be supported by any legitimate or rational State objective.⁹³ The State then proceeded to claim that four separate objectives, which it claimed were the *real* motivating factors behind its decision to redistrict, provided a legitimate regulatory purpose for its redistricting effort. As separately discussed below, this Court, like all other federal courts, *does* possess judicial power (and a constitutional obligation) to review the State of Texas’ unconstitutional manipulation of Plaintiff’s fundamental representational rights, and none of the objectives to which the State would assign “legitimate” regulatory status can fairly be characterized as legitimate.

A) The Court has Judicial Power.

Echoing the minority position taken by Justice Frankfurter in Colegrove v. Green, 528 U.S. 549, 554 (1949)(“the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States... [a]n aspect of government from which the judiciary...has been excluded by the clear intention of the Constitution”); the State of Texas appears to contend that “the language and structure of the Elections

⁹² Joint Final Pretrial Order, 19, Stipulation E-85; Travis County v. Perry, 451 U.S. ___, No. 03-1400 (2004), State’s Motion to Affirm, 15 (“both Plan 1151C and 1374C used the identical 2000 census data”).

⁹³ See Henderson v. Perry, No. 03-9644, State’s Motion to Affirm, 11-13.

Clause...does not provide for a judicial role” that allows this Court to consider and decide whether congressional districting statutes enacted by State legislatures must be supported by some legitimate or rational State objective. According to the State of Texas, “such judgments” are left exclusively “to the state legislatures, and to Congress.”⁹⁴ Should a response to this argument be necessary, the Plaintiff would rely on a later decision by the Supreme Court, Wesberry v. Sanders, supra, wherein it was held “that nothing in the language of that article [the Elections Clause] gives support to a construction that would immunize state congressional apportionment laws which debase a citizen’s right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction.” Id., 376 U.S. at 6.

With regard to the availability of “judicially manageable standards”, the question presented by Plaintiff, as should now be evident, does not suffer from any lack of “helpful discussions on the principles of fair districting discussed in the annals of parliamentary or legislative bodies...[or] statements of principled, well-accepted rules of fairness that should govern districting, or ... helpful formulations of the legislator’s duty in drawing district lines.” Vieth v. Jubelirer, supra, 124 S.Ct. at 1794 (Kennedy, J. concurring in judgment). The question presented by Plaintiff is “justiciable” and clearly within the judicial power of this Court to decide.

B) The Objective to Adjust Congressional Districts to Reflect Alleged Statewide Voting Trends is Not a Legitimate Regulatory Purpose.

At trial the State of Texas’ avowed purpose for engaging in multiple intra-decennial congressional redistricting, as candidly expressed *ad nauseum* by virtually all witnesses testifying in the State’s behalf at trial, was to “reflect the voting trends” of *the*

⁹⁴ State’s Motion to Affirm, at 13.

Republican majority of Texas voters statewide, and essentially “to defeat as many incumbent Democratic congressman as possible”. As the District Court found on the basis of that testimony, “[t]here is little question but that the single-minded purpose of the Texas Legislature when enacting Plan 1374C was to gain partisan advantage”, Session v. Perry, 298 F.Supp.2d at 470; and that when revising the existing congressional districts, the State acted “solely for the purpose of seizing between five and seven seats from Democratic incumbents.” Id., 298 F.Supp.2d at 472. These purposes, far from evincing any legitimate regulatory objective, manifest to the contrary a conscious desire by the State of Texas to deliberately undermine the legitimate, politically neutral objectives that the Framers and Congress intended to be secured through the Elections Clause, and Section 2c, respectively.

First, it is the People of the United States, and not the majority political party in a State or State legislature, that were intended to be represented in the National Legislature. As noted in Wesberry v. Sanders, *supra*, 376 U.S. at 11-13; the most volatile disagreement among the delegates at the Federal Constitutional Convention of 1787 concerned the composition of the National Legislature. After extended debate, the so-called “Great Compromise” was ultimately reached between the lesser and more populous States on this subject. The concept of this “Great Compromise”, as noted in Wesberry v. Sanders, *supra*, 376 U.S. at 13 n.29, and as more fully recorded by James Madison when summarizing the comments of William Samuel Johnson of Connecticut, was that:

“[I]n some respects the States are to be considered in their political capacities, and in others as districts of individual citizens, the ideas embraced on different sides, instead of being opposed to each other, ought to be combined; that in *one* branch the *people*, ought to be represented; in the *other*, the *States*.⁹⁵

The “Great Compromise” was subsequently incorporated in Article I, Section 2, Clause 1, which provides for a House of Representatives “composed of Members chosen every second Year *by the People* of the several States” (italics added); and under Article I, Section 3, Clause 1, which provides that the Senate of the United States shall be “composed of two Senators from each State, chosen *by the Legislature* thereof” (italics added). As explained by Madison, “[t]he policy of referring the appointment of the House of Representatives to the People and not the Legislatures of the States, supposes that the result will be influenced by the mode”.⁹⁶ Thus, while the Framers intended that, under *ordinary* circumstances, the manner of holding elections for Members of the House of Representatives would be “prescribed in each State by the Legislature thereof”, no power was intended to be conferred upon the State legislatures that would authorize them “to mould their regulations as to favor the candidates they wished to succeed”.⁹⁷ Had such a constitutional power been delegated to State legislatures by the Elections Clause, the intent of the Great Compromise would have been undone, such that “by the intrigues of a ruling faction in a state, the members of the House of Representatives should not really represent the people of the state.”⁹⁸

Like the other constitutional provisions designed to ensure fair representation in the National Legislature, the Framers did not understand the Elections Clause to delegate any power to the State legislatures to enact regulations that “would have rendered too

⁹⁵ 1 Farrand, 461-462.

⁹⁶ 2 Farrand, at 240.

⁹⁷ Ibid.

⁹⁸ 4 Elliot's Debates, 303.

dependent on the State governments that branch of the federal government which ought to be dependent on the people alone.” U.S. Term Limits, Inc. v. Thornton, supra, 514 U.S. at 809, *quoting* The Federalist, No. 52 (Madison, Feb. 8, 1788), at 326. As Justice Story once observed, “the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution did not delegate to them”; in other words, “[n]o state can say, that it has reserved, what it never possessed.” Cook v. Gralike, 531 U.S. 510, 519 (2001), *quoting* 1 Story, Commentaries on the Constitution of the United States, *101-102, Sections 625-626 (3d ed. 1858); U.S. Term Limits, Inc. v. Thornton, supra, 514 U.S. at 802 (same). There can be no constitutionally “legitimate” purpose, unrelated to any constitutionally legitimate power, which can permissibly be employed consciously by a State legislature to diminish the fundamental representational rights of the People.

The legitimacy of the State of Texas’ use of regulatory power solely for partisan purposes is likewise foreclosed at the federal statutory level under Section 2c for the same reason it is foreclosed at the constitutional level under the Elections Clause. The legislative history of Section 2c and its statutory predecessors emphatically demonstrates specific congressional intent to eliminate partisan abuse of regulatory power by the “ruling faction” in a State legislature. Speaking on the Senate floor in support of the amendment to the Apportionment Act of 1842 that created the first single member district requirement, Senator Jabez Williams Huntington captured the intent of Congress thusly:

“In this form, and only this form, will the just and equal rights of *minorities in the States* be preserved. It needs no argument to prove the importance of minorities to the preservation of public liberty, and the administration of Government. They have rights, too, which ought to be protected. The people ought to be fully represented, and they cannot and will not be so represented, except the election be by districts. If the general ticket system be adopted, that political party which is in a minority, however near it may approximate to an equality in numbers, will virtually be disenfranchised, and the State be represented by men of the same party, and elected not by the whole people, but, as the case may be, by a bare majority of them. Thus the minority will be unrepresented, and free and equal representation of the people be prevented.”⁹⁹

As the Supreme Court itself later observed, the evil that Congress sought to condemn by enactment of single member congressional districting requirements, such as the requirement presently contained in Section 2c, was any system of electing the members to the House of Representatives by regulations that give “an undue preponderance of power to the political party which ha[s] a majority of votes in the State.” Ex Parte Yarbrough, 110 U.S. 651, 660-661 (1884). An esteemed legal treatise likewise agreed this was the primary purpose for the single member district requirement. See Colegrove v. Green, supra, 328 U.S. at 553 (1946)(opinion per Frankfurter, J.), quoting “the language of Chancellor Kent” in “Kent, Commentaries, (12th ed. 1873) [*]230-231 n. (c)”, a posthumously revised edition of that title edited by Justice Holmes.

C) The State’s Claimed Objective to Rectify a De Facto Gerrymander is Unsupported by the Record.

The State of Texas next contends it’s legitimate purpose for displacing the Court-ordered redistricting plan was to “undo” a “preexisting Democratic gerrymander” which, the State contends, was perpetuated by the Balderas court’s decision.¹⁰⁰ In other words, as asserted by the State in the trial court, one of the State’s “legitimate” purposes for

⁹⁹ Cong.Globe, 27th Cong., 2d Sess. App. at 493 (1842)(italics in original).

¹⁰⁰ State’s Motion to Affirm, 3.

enacting new congressional districts under Plan 1374C was to “dismantl[e] the vestiges of the 1991 legislatively enacted plan.”¹⁰¹ Whatever might be the *legal* legitimacy of the State’s asserted tit-for-tat objective, examination of the District Court’s written opinion in Balderas forecloses the possibility of any reasonable, good faith assertion by the State that its purpose when displacing the Court ordered plan was to “dismantle” any “vestiges” of a prior legislatively enacted congressional redistricting plan. The District Court in Balderas plainly states in its opinion that when drawing the congressional districts in Plan 1151C it “start[ed] with a blank map of Texas”; that the limits of its discretion were “not to be found in the traces of the unconstitutional plan being replaced” (that is, “the 1991 plan as modified in 1996”), *id.*, slip op., at 4-5; and that it “eschewed an effort to treat old lines as an independent locator” when creating Plan 1151C. *Id.*, slip op., at 7.¹⁰² Moreover, the State’s assertion that it somehow was aggrieved by the Balderas court’s “Democratic partisan gerrymander” is further belied by the fact that Tom Delay, the Republican Majority Leader of the U.S. House of Representatives, chose not to appeal from the Balderas court’s judgment, and waived his right to respond to an appeal filed by other plaintiffs in that case.¹⁰³ The State of Texas, including Republican Governor Rick Perry (a Defendant herein), proactively requested the Supreme Court *to affirm* the judgment in Balderas,¹⁰⁴ a request that Court summarily granted. Balderas v. Texas, 536 U.S. 919 (2002).

¹⁰¹ Joint Final Pretrial Order, *supra*, 12.

¹⁰² The Balderas Courts’ reference to the “modification” of “the 1991 plan” in 1996 clearly refers to modifications resulting from the decision of the three-judge District Court in Vera v. Bush, 933 F.Supp. 1341 (S.D.Tex.1996).

¹⁰³ See Balderas v. Texas, No. 01-1196, (Supreme Court Docket)(waiver by “Tom Delay” filed March 5, 2002).

¹⁰⁴ *Id.*, (Motion “to Affirm” filed by “Texas, et al.” on March 21, 2002).

D) The Objective to Revise Valid Congressional District Boundaries to Satisfy the Personal Preferences of Individual Incumbents is Not a Legitimate Regulatory Purpose.

The Plaintiff anticipates the State of Texas will also contend, as it did before the Supreme Court in a companion case to the present one,¹⁰⁵ that its legitimate purpose to displace the existing, valid congressional districts, was to accommodate the personal preferences expressed by certain individual State legislators or favored incumbent members of Congress. Apart from the fact that this asserted purpose, if accepted, would have merely been incidental to an objective that “from start to finish” was motivated “entirely” or “110%” by partisan greed, Session v. Perry, 298 F.Supp.2d at 473; in that “all that happened thereafter flowed from this objective”, id., 298 F.Supp.2d at 471; this (at best) subsidiary objective of the State, whether viewed in isolation or not, does not constitute a legitimate regulatory purpose. First, if as Justice Stevens has persuasively suggested, neither “purely personal” nor “purely partisan” objectives (disjunctively) constitute legitimate regulatory objectives, Vieth v. Jubelirer, supra, 124 S.Ct. at 1811(Stevens, J., dissenting)(“an acceptable rationale can be neither purely personal nor purely partisan”); then surely the dual “purely personal” *and* “purely partisan” objectives (conjunctively) cannot combine to provide a legitimate regulatory purpose. Second, *in a democracy* the voters pick their Representatives, not the other way around. The objective to satisfy purely personal desires of an individual elected official, and for no other reason, in no way advances a political system wherein the people elect their Representatives. Rather, satisfaction of such a purely personal objective perversely advances *only* a purely *undemocratic* system, wherein the intended “final result seems not one in which the

¹⁰⁵ Jackson v. Perry, 451 U.S. ___, No. 03-1391 (2004), State’s Motion to Affirm, 4.

people select their representatives, but in which the representatives have selected the people.” Vera v. Richards, 861 F.Supp. 1304, 1334 (S.D.Tex.1994); *cf.*, Vieth v. Jubelirer, *supra*, 124 S.Ct. at 1808 (Stevens, J., dissenting), *quoting* Session v. Perry, 298 F.Supp.2d at 516 (Ward, J., concurring in part and dissenting in part)(“extreme partisan gerrymandering leads to a system in which the representatives choose their constituents, rather than vice-versa.”). This hardly constitutes a legitimate regulatory purpose, and is certainly not one that would justify multiple intra-decennial congressional redistricting.

E) The Objective of Revising Valid Congressional District Boundaries to Establish a “Safe” District for a Particular Candidate Favored by the Ruling Faction, under a “Incumbency Protection” Theory, is Not a Legitimate Regulatory Purpose.

In Bush v. Vera, 517 U.S. 952, 959 (1996), the State of Texas informed the Supreme Court that “incumbency protection” is a traditional districting principle in Texas. However, to the extent the State of Texas views recognition of the traditional districting principle of “incumbency protection” as a license to engage in partisan political gerrymandering, the State fundamentally misapprehends the permissible scope of that principle. While some District Courts have expansively defined “legitimate incumbency protection” to include manipulation of district boundaries to place favored incumbents in “safe” districts for purely partisan political purposes, *see e.g.*, Martinez v. Bush, 234 F.Supp. 1275, 1346 n. 95 (S.D.Fla.2002); the Supreme Court has more narrowly defined “legitimate” incumbency protection as action undertaken to avoid the “pairing” of two or more incumbents together within one congressional district, so as to avoid the loss of existing seniority in a State’s congressional delegation. In this more limited sense, incumbency protection is permissible and legitimate only to the extent it is justified by the purpose of “avoiding contests between incumbent Representatives,”

Karcher v. Daggett, 462 U.S. 725, 740 (1983); Bush v. Vera, supra, 517 U.S. at 964; and when used to “reflec[t] a traditional state interest in the power of [a State’s] congressional delegation distinct from partisan affiliation.” Balderas v. Texas, supra, slip op. at 8.

The form of incumbency protection asserted by the State of Texas “is much different in degree [and purpose] from the generalized, and legitimate, goal of incumbent and seniority protection previously recognized by the Supreme Court.” Vera v. Richards, supra, 861 F.Supp. at 1334. As previously noted, the State’s objective when redistricting Texas in the present case was not to preserve any State interest in the seniority or relative power of its congressional delegation, and it was by no stretch of the imagination “distinct” from considerations of partisan affiliation. The State’s sole objective when redistricting was to use whatever means necessary to “seiz[e] between five and seven seats from Democratic *incumbents*”, Session v. Perry, 298 F.Supp.2d at 472 (italics added); and in the course of that crusade, the State proceeded to transform the districts of favored Republican incumbents, theretofore subject to the risk of defeat by ticket-splitting voters, into unassailably “safe” Republican districts.

CONCLUSION

Simply stated, the State of Texas asks this Court to elevate a purely partisan purpose to the status of a *bona fide* legitimate regulatory objective under the Elections Clause when, as here, such a purpose is conceded to be wholly unaccompanied by (and wholly unrelated to) any aim to establish “fair and effective representation for *all* citizens.” Vieth v. Jubelirer, supra, 124 S.Ct. at 1793 (Kennedy, J., concurring in judgment)(italics added), *quoting* Reynolds v. Sims, supra, 377 U.S. at 565-568. This the Court must not do. At the very least, the State of Texas’ multiple intra-decennial

congressional redistricting, which the State “does not even pretend to be justified by neutral principles”, Cox v. Larios, 541 U.S. ___, 124 S.Ct. 2806, 2809 (2004)(Stevens, J., concurring), constitutes an “arbitrary and capricious” abuse of power under the Elections Clause. Vieth v. Jubelirer, supra, 124 S.Ct. at 1795 (Kennedy, J., concurring in judgment); *see also id.*, 124 S.Ct. at 1796 (when used in a manner “unrelated to the aims of apportionment”, Elections Clause power is “used in an impermissible fashion”); and, *id.*, 124 S.Ct. at 1793 (the Elections Clause does not authorize regulation “in a way unrelated to any legitimate legislative objective”). Far from meriting the reward of undeserved partisan power in the United States Congress, the State of Texas’ deliberate, egregious, and unjustifiable violation of Plaintiff’s fundamental representational rights----rights intended by the Framers to be guaranteed Plaintiff and others like him by the Constitution of the United States, warrants “stern condemnation” by this Honorable Court. Cox v. Larios, supra, 124 S.Ct. at 2809 (Stevens, J., concurring).

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was served by U.S. mail to the counsel for all the opposing parties, Rick Perry, Tom Craddick, David Dewhurst, and Geoffrey S. Connor, at the address below:

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