

No. _____

IN THE
Supreme Court of the United States

EDDIE JACKSON, *et al.*,
Appellants,

v.

RICK PERRY, *et al.*,
Appellees.

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

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the Equal Protection Clause and the First Amendment prohibit States from redrawing lawful districting plans in the middle of the decade, for the sole purpose of maximizing partisan advantage.

2. Whether Section 2 of the Voting Rights Act permits a State to destroy a district effectively controlled by African-American voters, merely because it is impossible to draw a district in which African-Americans constitute an absolute mathematical majority of the population.

3. Whether, under *Bush v. Vera*, 517 U.S. 952 (1996), a bizarre-looking congressional district, which was intentionally drawn as a majority-Latino district by connecting two far-flung pockets of dense urban population with a 300-mile-long rural “land bridge,” may escape invalidation as a *racial* gerrymander because drawing a compact majority-Latino district would have required the mapmakers to compromise their *political* goal of maximizing Republican seats elsewhere in the State.

PARTIES TO THE PROCEEDING

Plaintiff-appellants filing this Jurisdictional Statement are the “Jackson Plaintiffs” (Eddie Jackson, Barbara Marshall, Gertrude “Traci” Fisher, Hargie Faye Jacob-Savoy, Ealy Boyd, J.B. Mayfield, Roy Stanley, Phyllis Cottle, Molly Woods, Brian Manley, Tommy Adkisson, Samuel T. Biscoe, David James Butts, Ronald Knowlton Davis, Dorothy Dean, Wilhelmina R. Delco, Samuel Garcia, Lester Gibson, Eunice June Mitchell Givens, Margaret J. Gomez, Mack Ray Hernandez, Art Murillo, Richard Raymond, Ernesto Silva, Louis Simms, Clint Smith, Connie Sonnen, Alfred Thomas Stanley, Maria Lucina Ramirez Torres, Elisa Vasquez, Fernando Villareal, Willia Wooten, Ana Yañez-Correa, and Mike Zuniga, Jr.); and the “Democratic Congressional Intervenors” (Chris Bell, Gene Green, Nick Lampson, Lester Bellow, Homer Guillory, John Bland, and Reverend Willie Davis).

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

Defendant-appellees are Rick Perry, Governor of Texas; David Dewhurst, Lieutenant Governor of Texas; Tom Craddick, Speaker of the Texas House of Representatives;

Roger Williams, Secretary of State of Texas; Tina Benkiser, Chairman of the Republican Party of Texas; and the State of Texas. Defendant-appellant is Charles Soechting, Chairman of the Texas Democratic Party. All individual defendants were sued in their official capacities.

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This case returns to the Court after the prior ruling of the three-judge District Court, which had upheld Texas's 2003 congressional redistricting plan, was vacated and remanded for further consideration in light of *Vieth v. Jubelirer*, 541 U.S. 267 (2004). See *Jackson v. Perry*, 125 S. Ct. 351 (2004). On remand, after additional briefing and argument, the District Court reaffirmed its prior ruling, finding no basis in *Vieth* for invalidating the 2003 plan as a partisan gerrymander, even though the District Court continued to recognize that the plan was enacted for purely partisan reasons at a time when a fully lawful plan was already in place. That ruling requires review by this Court to clarify that legislators cannot redistrict when their *only* reason for acting is to maximize partisan advantage. In addition, the very substantial questions presented relating to Section 2 of the Voting Rights Act and the *Shaw v. Reno* racial-gerrymandering doctrine — which were included in the first appeal but never addressed because the case was remanded in light of *Vieth* — merit plenary consideration as well.

OPINIONS BELOW

The three-judge District Court's majority and concurring opinions are reprinted at pages 1a to 55a of the Appendix to this Jurisdictional Statement ("J.S. App."). The District Court's final judgment is reprinted at J.S. App. 56a.

JURISDICTION

The District Court denied appellants' claims for injunctive relief on June 9, 2005. J.S. App. 40a. Pursuant to 28 U.S.C. § 2101(b), appellants timely filed a notice of appeal on July 5, 2005. *Id.* at 227a-229a. This Court's jurisdiction is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution provides: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

The First Amendment to the Constitution in part prohibits laws “abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

STATEMENT OF THE CASE

The State of Texas enacted a new congressional districting plan in 2003 solely to maximize partisan advantage, at a time when there was no legal necessity whatsoever for changing the district lines. The State had a redistricting plan in place that had been drawn in 2001 by a unanimous three-judge District Court and upheld in an appeal to this Court in which the State itself had argued that the court-drawn plan was lawful. *See Balderas v. Texas*, 536 U.S. 919 (2002). Under that earlier plan, which was court-drawn because the Texas Legislature had defaulted on its constitutional duty to enact a plan in 2001, the Republicans gained two additional congressional seats in the 2002 election and stood to gain more in six districts that generally voted Republican but had narrowly reelected incumbent Democratic congressmen in 2002. The 2001 map had been found to be fair and balanced by the District Court that drew it and later was labeled by the State’s own expert witness as somewhat biased in favor of the Republicans. The only reason for its replacement in 2003 was a desire to *guarantee* that a supermajority of districts would elect Republicans immediately and for the rest of the decade.

This was accomplished in four steps. *First*, the Legislature carved up the districts of the six Democratic

incumbents representing generally Republican-leaning constituents. *Second*, the Legislature obliterated District 24, a district effectively controlled by African-Americans, by encircling the minority neighborhoods in southeastern Fort Worth and linking them via a stringy corridor to a suburban district that runs north to the Oklahoma border. *Third*, the mapmakers redrew District 23, a majority-Latino border district previously won narrowly by a Republican, to assure its future control by Anglo suburbanites in the San Antonio area. *Fourth*, seeking to avoid Voting Rights Act liability for the new version of District 23, the Legislature inserted an absurd new majority-Latino District 25 connecting the Latino portions of Austin with a chunk of McAllen, 300 miles away.

I. The Process Leading to the 2003 Plan

After the 2000 federal decennial census, Texas became entitled to 32 seats in Congress. The task of replacing the 30 old malapportioned districts from the 1990s with 32 new equipopulous ones fell initially to the Texas Legislature. But in Texas in 2001, political power was split, with Republicans controlling the State Senate and the Governor's mansion and Democrats controlling the State House. The Legislature made no serious effort to reach agreement on a new congressional map in its 2001 regular session, and Texas Governor Rick Perry declined to call a special session. The Legislature's default ultimately left a three-judge district court in *Balderas v. Texas* "with the 'unwelcome obligation of performing in its stead.'" J.S. App. 202a (citation omitted). On November 14, 2001, the *Balderas* court, based on findings that the 30 existing congressional districts in Texas were unconstitutional and based upon the continuing "failure of the State to produce a congressional redistricting plan," unanimously imposed on the State of Texas a new 32-district congressional map known as "Plan 1151C." *Id.* at 202a; *see also id.* at 218a (color map of 2001 plan).

In reaching its decision, the *Balderas* court stated that it had followed the process for drawing districts outlined by Rice University political-science professor John R. Alford, who served as the State's expert witness in the 2001 *Balderas* litigation. *Id.* at 205a-206a. Professor Alford's suggested process was grounded in "principles of district line-drawing that stand politically neutral." *Id.* at 205a. Moreover, the court "checked [its] plan against the test of general partisan outcome, comparing the number of districts leaning in favor of each party based on prior election results against the percentage breakdown statewide of votes cast for each party in congressional races." *Id.* at 208a. The court found that its plan was "likely to produce a congressional delegation roughly proportional to the party voting breakdown across the state," *id.* at 209a, and the court-drawn plan fairly "reflected the growing strength of the Republican Party in Texas, with 20 of the 32 seats offering a Republican advantage," *id.* at 85a. Indeed, the State's own expert later testified that the 2001 plan was somewhat biased to favor the *Republicans*. Jackson Pls.' Ex. 141, at 18-21 (report of Prof. Ronald Keith Gaddie).

Neither the State of Texas nor any other defendant appealed the District Court's decision. The only appeal was taken by a group of Latino voters known as the "Balderas Plaintiffs." The State of Texas filed a motion asking this Court to affirm the District Court's judgment. This Court summarily affirmed on June 17, 2002. *Balderas v. Texas*, 536 U.S. 919 (2002). The court-drawn Plan 1151C therefore governed the 2002 congressional election in Texas.

That election generated a congressional delegation with 15 Republicans and 17 Democrats.¹ The two new congressional districts that Texas gained from reapportionment elected Republicans, while the other 30 districts reelected 28 incumbents and elected one freshman from each party (each of whom replaced a retiring member of the same party).

Seven of the incumbents – six Democrats and one Republican – prevailed even as their districts were voting for senatorial, gubernatorial, and other statewide candidates of the *opposite* party. In other words, seven Members of Congress won because they attracted split-ticket voters. Without that support, each would have lost to a challenger from the district's dominant political party. These seven Congressmen (most of whom represented relatively rural districts) had the closest contests of any incumbents in the State. Three of them won with less than 52% of the total vote. Aside from the seven districts where split-ticket voters played a key role, 14 of the new districts voted consistently Republican and 11 voted consistently Democratic. But because six of the seven incumbents who won the relatively competitive seats were Democrats, Texas's congressional delegation had more Democrats and fewer Republicans than the statewide balance of power alone would have suggested.

At the same time that Republicans were picking up two new congressional seats, they also made gains in Texas House races, winning unified control of the state government for the first time in decades. In 2003, the newly elected 78th Legislature convened and took the unprecedented step of voluntarily considering congressional redistricting in the

¹ When District 4's Congressman Ralph Hall switched parties in January 2004, Texas's House delegation became evenly divided, with 16 Republicans and 16 Democrats.

middle of a decade. As a critical deadline approached for passing legislation in the regular session, a group of Democratic state representatives left the State and broke quorum for a week, effectively killing redistricting for that session.²

Governor Perry called the Texas Legislature into special session to take up congressional redistricting. Representative Phil King, the legislation's chief sponsor, initially asked the Redistricting Committee to pass a map dismantling District 24 (in the Dallas-Fort Worth area) as a minority district.³ The next day, he reversed course and supported a plan that left intact all 11 majority-minority districts.⁴ He said he did so to improve the chances of winning preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.⁵

The Senate Jurisprudence Committee also took up congressional redistricting in the first special session. But the Senate failed to pass a map in that session when 11 state senators (more than a third of the 31-member chamber) stated that they were opposed to taking up congressional-redistricting legislation. It has been a long-standing tradition of the Texas Senate to require that a measure receive support from a two-thirds supermajority before the full Senate will consider it.⁶ See Jurisdictional Statement, *Barrientos v. Texas*, 541 U.S. 984 (U.S. filed Nov. 21, 2003) (No. 03-756).

When Lieutenant Governor David Dewhurst then announced that he would abandon the two-thirds rule in any future special session on congressional redistricting, 11 Texas senators left the State to deprive the Senate of a

² Tr., Dec. 15, 2003, 1:00 p.m., at 76-77 (Rep. Richard Raymond).

³ Tr., Dec. 18, 2003, 1:00 p.m., at 149 (Rep. Phil King).

⁴ *Id.* at 149-51 (Rep. Phil King).

⁵ *Id.* at 148-50 (Rep. Phil King).

⁶ Tr., Dec. 15, 2003, 8:30 a.m., at 7-8 (Sen. Bill Ratliff).

quorum.⁷ But when one of them returned to the State a month later, Governor Perry called a third special session.

In that session, each house passed a map that preserved all 11 minority districts.⁸ But the conferees — after extensive meetings in Austin with Congressman (and House Majority Leader) Tom DeLay — instead produced a map that dismantled as minority districts both District 24 in the Dallas-Fort Worth area and District 23 in South Texas, while adding a new majority-Latino district running from McAllen (on the Mexican border) 300 miles north to Austin.⁹ The House and Senate passed this new map, known as “Plan 1374C,” on October 10 and 12, 2003. *See* J.S. App. 219a (color map of 2003 plan). Every Latino and African-American state senator and all but two of the minority state representatives voted against the 2003 plan.¹⁰

The new map shifted more than eight million Texans into new districts and split more counties into more pieces than did the court-drawn 2001 plan.¹¹ And the 32 districts in the new map were, on average, much less compact, under either of the Legislature’s two standard measures.¹²

The 2003 plan was designed to protect all 15 Republican Members of Congress and to defeat at least 7 of the 17 Democratic Members.¹³ Among those targeted for defeat were the six Democrats who had won in November 2002 on the strength of ticket-splitting voters. Each of them was

⁷ Tr., Dec. 17, 2003, 1:00 p.m., at 119 (Sen. Royce West).

⁸ Tr., Dec. 15, 2003, 1:00 p.m., at 83 (Rep. Richard Raymond).

⁹ Tr., Dec. 18, 2003, 1:00 p.m., at 148-49, 157 (Rep. Phil King).

¹⁰ Tr., Dec. 15, 2003, 1:00 p.m., at 85 (Rep. Richard Raymond).

¹¹ Jackson Pls. Ex. 141 (Gaddie expert report) at 5-6; Jackson Pls. Ex. 89.

¹² Jackson Pls. Ex. 141 (Gaddie expert report) at 6-7.

¹³ Jackson Pls. Ex. 44 (Alford expert report) at 30.

“paired” with another incumbent, placed in a substantially more Republican district, or given hundreds of thousands of new, unfamiliar (and heavily Republican) constituents who would be less likely to split their tickets based on personal allegiance.

The seventh Democrat targeted for defeat was Congressman Martin Frost, an Anglo Democrat who represented District 24 in the Dallas-Fort Worth area. Under the court-drawn 2001 plan, District 24 was a majority-minority district whose total population was roughly 23% black, 38% Latino, 35% Anglo (*i.e.*, non-Latino white), and 4% Asian or “Other.” In general elections, the district was reliably Democratic. And in the Democratic primary elections, where the ultimate winners are nominated, blacks routinely constitute at least 64% of the electorate, because the district’s Anglo and Latino voters are much more likely to participate in the Republican primary, to be noncitizens (and therefore nonvoters), or simply to stay home.¹⁴ Thus, African-American voters consistently could nominate and elect their preferred candidates within the 2001 plan’s District 24.¹⁵ But the new 2003 plan dismantled District 24 — which the State’s own expert testified “perform[s] for African-Americans”¹⁶ — and splintered its minority population (more than 400,000 persons) into five pieces, each of which was then submerged in an overwhelmingly Anglo Republican district.

The one Republican incumbent who had won narrowly in November 2002 by attracting ticket splitters — District 23’s Congressman Henry Bonilla — was made substantially safer,

¹⁴ Tr., Dec. 11, 2003, 1:00 p.m., at 73-75 (Prof. Allan J. Lichtman); Jackson Pls. Ex. 140 (Gaddie expert deposition) at 32-33.

¹⁵ Jackson Pls. Ex. 1 (Lichtman expert report) at 23-26.

¹⁶ Jackson Pls. Ex. 140 (Gaddie expert deposition) at 33.

as nearly 100,000 Latinos from the Laredo area — who are roughly 87% Democratic — were removed and replaced with heavily Anglo and Republican voters.¹⁷ As a result, the district is now concededly controlled by Anglo voters, but 359,000 Latinos remain stranded there, with no hope of electing their preferred candidate.¹⁸

In an attempt to “offset” that loss of electoral opportunity for Latinos, the Legislature drew a new, bizarrely shaped majority-Latino district stretching from the Rio Grande Valley, along the border with Mexico, all the way to the Latino neighborhoods of Austin in Central Texas. This new District 25 is more than 300 miles long and in places less than 10 miles wide. *See* J.S. App. 220a (District 25 silhouette). The two ends of the district are densely populated and contain more than 89% of its Latino population, as the six intervening rural counties serve primarily to “bridge” the two population centers. *See id.* at 221a (color map showing population densities in and around new District 25).

At trial in 2003, experts on both sides predicted that the new map would produce at least 21 solid Republican districts (out of 32). That prediction was realized when the map was implemented in 2004. As Professor Alford declared: “The consensus expectation for the new district map for Texas was that it would shift the state rapidly to a 22R-10D party split composed of noncompetitive district strongholds for each party. The only surprise in the actual 2004 election results is how far things moved in that direction in a single election year. Already the split is 21R-11D, and the party vote shares, even in open seats, are strikingly noncompetitive. The trend could easily complete itself in 2006, with a 22R-10D result,

¹⁷ Jackson Pls. Ex. 44 (Alford expert report) at 15.

¹⁸ Jackson Pls. Ex. 1 (Lichtman expert report) at 52-53.

and extend throughout the rest of the decade with even less competition than what was evident in 2004.” J.S. App. 226a (expert declaration of Prof. Alford).

II. The Procedural History of this Case

Appellants — Texas voters of various races and ethnicities who reside in 17 congressional districts — challenged the 2003 plan as an unconstitutional partisan gerrymander (under the Equal Protection Clause, the First Amendment, and Article I of the Federal Constitution) and as a violation of both Section 2 of the Voting Rights Act and the racial-gerrymandering doctrine of *Shaw v. Reno*, 509 U.S. 630 (1993). After expedited discovery, the District Court held a full trial on the merits and upheld the 2003 map. This Court denied a stay, *Jackson v. Perry*, 540 U.S. 1147 (2004), but later vacated the ruling below and remanded the case for reconsideration in light of *Vieth*. See *Jackson v. Perry*, 125 S. Ct. 351 (2004). After further briefing and argument, the three-judge District Court again upheld the 2003 plan.

Prior to the remand, the State of Texas had admitted, and the three-judge court below had found as fact, that the *sole* motivation for changing the court-drawn map mid-decade was partisan gain. See, e.g., J.S. App. 85a (“There is little question but that the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage.”); *id.* at 88a (“Plaintiffs’ expert testimony supports our conclusion that *politics*, not race, *drove Plan 1374C*.”) (emphasis added); *id.* at 88a-89a (“[T]he newly dominant Republicans . . . decided to redraw the state’s congressional districts solely for the purpose of seizing between five and seven seats from Democratic incumbents.”) (citation omitted); *id.* at 89a (“Former Lieutenant Governor Bill Ratliff, one of the most highly regarded members of the Senate and commonly referred to as the conscience of the Senate, testified that political gain for

the Republicans was 110% of the motivation for the Plan, that it was ‘the entire motivation.’”); *id.* at 85a (“With Republicans in control of the State Legislature, they set out to increase their representation in the congressional delegation to 22.”); *id.* at 89a (concluding “that this plan was a political product from start to finish”). Indeed, one of the chief architects of the 2003 plan openly boasted at trial that Congressman DeLay and the Republican leadership had set out to “get as many seats as we could.” Tr., Dec. 18, 2003, 1:00 p.m., at 142 (trial testimony of State Rep. Phil King).

In its most recent decision reexamining the partisan-gerrymandering issues on remand from this Court, the three-judge court below did not rescind its earlier findings that partisan maximization was the sole motive behind the 2003 congressional redistricting plan. Instead, the District Court concluded that a redistricting map serving purely partisan ends is a constitutionally permissible exercise of governmental power. *See* J.S. App. at 15a-17a. It reasoned that this Court so held in *Vieth*, pointing out that the plaintiffs’ complaint there had alleged that the redistricting map was driven solely by partisan motives. *See id.* at 15a-16a. The District Court also reasoned that a purely partisan map may be permitted if its purpose is to redress a perceived partisan imbalance in the existing map. *See id.* at 18a-20a. And it further held that the existing map here — the 2001 court-drawn plan — contained vestiges of the 1990s plan drawn by Democrats to favor their interests. *See id.* at 20a-22a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The Court should note probable jurisdiction and ultimately recognize that a redistricting law violates the Equal Protection Clause and the First Amendment when it is enacted solely to skew future election results in favor of one political party and against another, at a time when a perfectly

lawful map is already in place and there is no other legitimate justification for changing the district lines. Under well-established constitutional principles, a mere desire to lessen the power of one group of citizens because of their disfavored political beliefs cannot constitute a legitimate basis for exercising governmental power. While political motives will always be present during redistricting and will affect how lines are drawn, that reality is tolerated if there are other legitimate governmental interests being served. But if redistricting occurs in mid-decade (*i.e.*, when a lawful map is in place and has already been used in at least one election), the goals being served can be, as in this case, purely partisan. Such a law is not a legitimate exercise of governmental power.

Recognizing a bar to *purely* partisan redistricting would have a limited but very important practical impact. The rule would not affect redistricting laws passed right after the decennial census, because maps passed under those circumstances necessarily serve legitimate purposes such as equalizing population among districts. But the rule would significantly limit States' ability to redraw district lines in mid-decade, absent some intervening event (like a court ruling) creating a nonpartisan justification. The trend toward almost continuous mid-decade redistricting, which the District Court rightly criticized as harmful to our electoral system, *see* J.S. App. 61a, is a symptom of the excessively partisan approach to redistricting now in vogue. Just at the congressional level, this decade has already witnessed the "re-redistricting" of congressional lines in Texas, in Colorado, and (while this case was on remand) in Georgia. When legislators choose to take such actions, they should be required to demonstrate some legitimate governmental purpose. Simply redistributing power from disfavored to favored political parties is not legitimate.

The redistricting law at issue here is no more justified than a hypothetical law mandating that votes for candidates of one political party be counted twice. Neither law serves a legitimate public purpose. Moreover, line-drawers lacking such a public purpose in mid-decade are not entitled to rely on the fiction that the decennial census figures remain accurate for ten years, because that fiction is borne of necessity — and a purely partisan redrawing of lines is not necessary in any sense. *See Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003).¹⁹

The Court also should review the Voting Rights Act and *Shaw v. Reno* racial-gerrymandering claims that were included in the prior appeal but went unaddressed when the Court remanded the case under *Vieth*. As to the former, the circuits are split on whether a plaintiff suing to preserve an effective minority district under Section 2 of the Voting Rights Act must show that a *majority*-black or *majority*-Latino district could be drawn. And such a mechanical, flat rule cannot be squared with this Court's recent decision in *Georgia v. Ashcroft*, 539 U.S. at 479-91. As for the *Shaw* claim, the problem is that the District Court, in refusing to grant relief, relied on precisely the same argument that this Court *rejected* in *Bush v. Vera*, 517 U.S. 952 (1996) — *i.e.*, the argument that a bizarrely shaped minority district was really drawn in that manner because of a desire to preserve partisan control over another nearby district.

¹⁹ In addition to the arguments set forth in this Jurisdictional Statement, appellants also adopt and incorporate by reference the one-person, one-vote arguments that Travis County, the City of Austin, and the *amici* University Professors made below — and that Judge Ward largely accepted, *see* J.S. App. 45a-55a.

I. PARTISAN ADVANTAGE CAN NEVER BE THE SOLE INTEREST SERVED BY A GOVERNMENTAL ACTION.

Appellants do not ask the Court to apply intermediate or strict scrutiny under the Fourteenth Amendment — although there certainly are strong arguments for applying such heightened scrutiny to a law designed solely to favor some private interests and disfavor others, in the exercise of the fundamental right to vote, based on whether their political views align with those of the majority of legislators. The Court’s cases establish unambiguously that even under the more lenient rational-basis standard of review, governmental power may not be exercised solely to augment the influence of those with a favored political agenda at the expense of those who disagree with them. “The concept of equal justice under law requires the State to govern impartially. . . . The sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective.” *Lehr v. Robertson*, 463 U.S. 248, 265 (1983) (citing *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979); *Reed v. Reed*, 404 U.S. 71, 76 (1971)). And under the First Amendment, governmental preference for those with a particular political viewpoint does not supply a legitimate public purpose that can support a law under rational-basis scrutiny. A law serving only that purpose amounts to the abuse of governmental power, not a legitimate and rational exercise of such power.

The Court several times has addressed laws designed to harm particular groups of people simply because they are unpopular, and it has not hesitated to invalidate these laws under the rational-basis test. As the Court held in *Romer v. Evans*, 517 U.S. 620 (1996), a law “inexplicable by anything but animus toward the class it affects . . . lacks a rational relationship to legitimate state interests.” *Id.* at 632. That is because a “bare . . . desire to harm a politically unpopular

group cannot constitute a *legitimate* governmental interest.” *Id.* at 634 (quoting *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)) (emphasis in the original); see *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446-50 (1985) (law motivated by animus toward mentally disabled); *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring in the judgment) (“When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.”).

Justice Kennedy summarized this constitutional principle in his concurrence in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), discussing rational-basis review under the Fifth Amendment’s Public Use Clause, which he analogized to rational-basis review under the Equal Protection Clause:

The determination that a rational-basis standard of review is appropriate does not . . . alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden

A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as *a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.*

Id. at 2669 (citing *City of Cleburne*, 473 U.S. at 446-47, 450; *Moreno*, 413 U.S. at 533-36) (emphasis added). It is hard to imagine a clearer example of such a constitutional problem than this case, where the State conceded, and the District Court found, that a thoroughgoing revision of congressional

districts was passed in mid-decade not for any good and legitimate *public* purpose, but *solely* to give one group of citizens greater political power at the expense of another.

Then there are the cases in which the Court has held that governmental actions designed to punish or promote a particular *political* group or point of view are particularly questionable in light of First Amendment principles. That is the central meaning of the political-patronage line of cases beginning with *Elrod v. Burns*, 427 U.S. 347 (1976), and culminating with *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996). In *O'Hare*, for example, the Court recognized that the City could terminate its relationship with a contractor at will, but held that it could *not* do so to punish a contractor's political affiliation:

Respondents' theory, in essence, is that no justification is needed for their actions, since government officials are entitled, in the exercise of their political authority, to sever relations with an outside contractor for any reason including punishment for political opposition. Government officials may indeed terminate at-will relationships, unmodified by any legal constraints, without cause; but it does not follow that this discretion can be exercised to impose conditions on expressing, or not expressing, specific political views

518 U.S. at 725-26.

The *O'Hare* Court then invoked the familiar *Mt. Healthy* test for assessing government employees' claims that they were dismissed in retaliation for exercising their First Amendment rights. *See id.* at 725 (citing *Mt. Healthy City Sch. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). Under that test, if the employee shows that impermissible retaliatory motives were a motivating factor, the burden shifts to the government to show that it would have taken the same action "even in the absence of the protected conduct."

Mt. Healthy, 429 U.S. at 287. Such a test allows hostility to an employee’s political speech to be *a* motivating factor — just as politics can be considered by legislators in redistricting. But the test bars governmental actions that would not have occurred absent the desire to punish unpopular speech. *Mt. Healthy* thus constitutes another example of this Court’s recognition that governmental action based solely on a desire to promote or punish a particular political perspective is not constitutionally legitimate.

II. THE OPINIONS OF A MAJORITY OF JUSTICES IN VIETH SUPPORT THE PROPOSITION THAT A REDISTRICTING PLAN BECOMES UNCONSTITUTIONAL WHEN THE SOLE MOTIVATION WAS TO ADVANTAGE ONE POLITICAL PARTY AT THE EXPENSE OF ANOTHER.

The various opinions in *Vieth*, taken together, support the application to redistricting of the bedrock principle that the government has to have some *legitimate* basis for acting — not merely a desire to augment the power of citizens it agrees with at the expense of those it disagrees with. To begin with, all nine Justices in *Vieth* recognized that the abuse of redistricting to further partisan interests is constitutionally illegitimate. *See Vieth*, 541 U.S. at 292 (plurality opinion) (conceding that “severe partisan gerrymanders violate the Constitution”); *id.* at 293 (“[A]n *excessive* injection of politics [in redistricting] is *unlawful*.” (emphasis in the original)); *id.* at 316 (Kennedy, J., concurring in the judgment) (agreeing with the plurality that partisan gerrymandering is incompatible with “democratic principles” and thus constitutionally impermissible) (quoting the plurality, *id.* at 292); *id.* at 323-25 (Stevens, J., dissenting); *id.* at 343-44 (Souter, J., joined by Ginsburg, J., dissenting); *id.* at 355 (Breyer, J., dissenting). Moreover, five Justices presented views particularly supportive of the claim presented here.

First, Justice Kennedy in his concurrence in the judgment, while not articulating a specific governing test, was clear that the goal was a test targeting district maps driven *solely* by a partisan agenda. He stated that a “determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner *or in a way unrelated to any legitimate legislative objective.*” 541 U.S. at 307 (emphasis added). Then, defending his conclusion that such claims remain justiciable, he quoted a passage from *Baker v. Carr*, 369 U.S. 186 (1962), emphasizing the traditional function of the Fourteenth Amendment as a bar to legislation serving no legitimate and rational state interest:

“Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.”

541 U.S. at 310 (quoting *Baker*, 369 U.S. at 226 (emphasis in the original)); *see also id.* at 313-14 (“The Fourteenth Amendment standard governs [partisan-gerrymandering claims]; and there is no doubt of that.”).

Justice Kennedy then went on to say that the goal was to enunciate a “subsidiary standard” that would identify those redistricting maps that went so far in the single-minded pursuit of partisan advantage that they established political classifications “unrelated to the aims of apportionment.” *Id.* at 312-14. As he put it, “[i]f a State passed an enactment that

declared ‘All future apportionment shall be drawn so as most to burden Party X’s rights to fair and effective representation, though still in accord with one-person, one-vote principles,’ we would surely conclude the Constitution had been violated.” *Id.* at 312. It follows, he said, that the Court should seek a standard that determines when, in parallel fashion, “an apportionment’s *de facto* incorporation of partisan classifications burdens rights of fair and effective representation (and so establishes the classification is *unrelated to the aims of apportionment* and thus is used in an impermissible fashion).” *Id.* (emphasis added). In light of the principles he enunciated, it is not surprising that Justice Kennedy did not find a constitutional violation in *Vieth*, as the map at issue there was passed at the beginning of the decade to cure population disparities evidenced by the latest census and thus could not be said to serve *purely* partisan purposes.

Second, Justice Stevens in dissent expressly agreed that a redistricting law enacted solely for partisan reasons, and thus not serving any legitimate governmental policy, is unconstitutional. *See id.* at 317-42. Justice Stevens began his opinion by stating:

Today’s plurality opinion . . . would give license, for the first time, to partisan gerrymanders that are *devoid of any rational justification*. In my view, when partisanship is the legislature’s *sole motivation* — when any pretense of neutrality is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage — the governing body cannot be said to have acted impartially.

Id. at 318 (emphasis added). He later added:

State action that discriminates against a political minority *for the sole and unadorned purpose of maximizing the power of the majority* plainly violates the

decisionmaker's duty to remain impartial. . . . Thus, the critical issue in both racial and political gerrymandering cases is the same: *whether a single nonneutral criterion controlled the districting process* to such an extent that the Constitution was offended.

Id. at 326 (citation omitted; emphasis added).

In Justice Stevens's view, the appropriate way to assess these issues is generally on a district-specific basis — at least where, as in *Vieth*, some new map was needed at the beginning of the decade to satisfy other legal constraints. *See id.* at 327-29. Building on the racial-gerrymandering line of cases, he would ask whether the contours of a challenged district can be explained on the basis of any traditional, rational, nonpartisan criteria. *See id.* at 335. If not — “if no neutral criterion can be identified to justify the lines drawn, and if the only possible explanation for a district's bizarre shape is a naked desire to increase partisan strength” — it follows that “no rational basis exists to save the district from an equal protection challenge.” *Id.* at 339.

Justice Souter, joined by Justice Ginsburg, agreed with Justice Stevens that the focus should generally be on individual districts. *See id.* at 346; *see also id.* at 350 n.4, 353 (treating a statewide challenge as a conglomeration of district-specific claims). He thus would require a plaintiff with appropriate standing to show, first, that a district “paid little or no heed to those traditional districting principles whose disregard can be shown straightforwardly: contiguity, compactness, respect for political subdivisions, and conformity with geographic features like rivers and mountains.” *Id.* at 347-48. Then, the plaintiff would have to show that the district's irregularity correlates with achieving the “packing” and “cracking” goals of a gerrymander — *i.e.*, that specific protuberances serve to capture members of one party, or that specific fissures serve to exclude members of

the other party, or that municipalities were generally divided along partisan lines. *Id.* at 349. Finally, the plaintiff would have to present a hypothetical district fixing the problems, and he would have to prove invidious intent (which would generally be easy). *Id.* at 349-51. The burden would then shift to the defendants “to justify their decision by reference to objectives *other than naked partisan advantage.*” *Id.* at 351 (emphasis added). In sum, here again, the focus would be on identifying line-drawing decisions explainable *only* in partisan terms.

Justice Breyer’s opinion started by stating that the “use of purely political considerations in drawing district boundaries” can be permissible — but only when it “helps to secure constitutionally important democratic objectives” like political stability. *Id.* at 355. By contrast, he would invalidate “purely political ‘gerrymandering’ [that fails] to advance any plausible democratic objective while simultaneously threatening serious democratic harm.” *Id.* He identified one non-exclusive example of the latter — what he called “entrenchment” of a minority party in power. *Id.* at 360-62. Justice Breyer then focused on when judicial intervention is warranted to protect the rights of a majority group suffering from minority entrenchment. *See id.* at 362-67. In general, he would wait until one or more actual elections show the entrenchment effect. *See id.* at 365-66. But he then articulated when entrenchment could properly be anticipated and remedied by a court in advance:

[S]uppose that the legislature clearly departs from ordinary districting norms, but the entrenchment harm, while seriously threatened, has not yet occurred. *E.g.*, (a) the legislature has redrawn district boundaries more than once within the traditional 10-year census-related period . . . ; (b) the boundary-drawing criteria depart radically from previous traditional boundary-drawing criteria; (c) strong, objective, unrefuted statistical

evidence demonstrates that a party with a minority of the popular vote within the State in all likelihood will obtain a majority of the seats in the relevant representative delegation; and (d) the jettisoning of traditional districting criteria *cannot be justified or explained other than by reference to an effort to obtain partisan political advantage*. To my mind, such circumstances could also support a claim, because the presence of midcycle redistricting, for any reason, raises a fair inference that partisan machinations played a major role in the map-drawing process.

Id. at 366-67 (emphasis added). Thus, while Justice Breyer would include some statistical evidence of statewide effects in the calculus and seemed particularly concerned about situations where a future majority party could be thwarted from taking power, he too would give great weight to facts and circumstances — especially including mid-decade redistricting — showing that the legislature pursued partisan advantage with no other rational and legitimate purpose.

III. THE DISTRICT COURT'S REASONS FOR UPHOLDING THE 2003 PLAN CANNOT WITHSTAND SCRUTINY.

As noted above, the three-judge District Court did not back away from its prior finding that Texas's 2003 redistricting plan was solely the product of purely partisan intent. Rather, the court articulated two reasons for refusing to invalidate the map on that ground. *First*, relying on allegations in the *Vieth* plaintiffs' complaint, the court read *Vieth* as rejecting an argument that purely partisan motives suffice to invalidate a plan. J.S. App. 15a-17a. *Second*, the court held that the Texas Legislature can be seen as having acted to eliminate pro-Democratic bias in the map the court itself drew in 2001. *Id.* at 18a-22a. Neither argument serves

to justify a state action undertaken to further purely partisan interests.

A. *Vieth* Did Not Reject a Sole-Purpose Test.

It was spurious for the court below to conclude that this Court in *Vieth* addressed and rejected the argument that proof of a purely partisan motivation would suffice to invalidate a given district or districting plan. Relying on the fact that the complaint filed in *Vieth* alleged that some of the district lines in Pennsylvania were the product of pure partisanship, the District Court reasoned that the plurality and Justice Kennedy implicitly held that such allegations, even if proved, would not be enough. J.S. App. 16a. But that did not occur.

By the time the case reached the Supreme Court, the *Vieth* plaintiffs' argument was that the Court should invalidate maps drawn with a "predominantly" partisan intent and substantial statewide biasing effects. *See* 541 U.S. at 284-90 (plurality opinion). That was the argument that the plurality "consider[ed] . . . at length," *id.* at 284, and rejected. Justice Kennedy then rejected the same argument for the reasons stated by the plurality. *See id.* at 308-09 (Kennedy, J., concurring in the judgment). There is not a word in either opinion suggesting that it would be lawful for a State to decide to redraw a districting plan, or decide how to draw a particular district, for purely partisan reasons without being able to articulate any other state interest being served.

To be sure, as the District Court noted, Justice Stevens's dissent emphasized the language in the *Vieth* complaint alleging that the challenged plan was motivated solely by partisan goals. *Id.* at 318-19 (Stevens, J., dissenting). He treated those words as allegations about a particularly egregious district inhabited by one of the named plaintiffs. *Id.* But neither the plurality nor Justice Kennedy took seriously, or even addressed, this "sole purpose" language because the plaintiffs were by then arguing a "predominant

intent” test — as one would expect of plaintiffs attempting to establish a standard that could invalidate an entire statewide map drawn at the beginning of the decade. As other provisions in the *Vieth* complaint acknowledged, that same map also reflected the need to reduce the number of districts in the State by two and to equalize population using the new census data. *See* Am. Compl., *Vieth v. Jubelirer* ¶ 16 (filed Jan. 11, 2002). A sole-purpose test was thus incompatible with winning a statewide challenge to that map.

But that is where *Vieth* differs so dramatically from this case. Here, the 2003 plan replaced a 2001 plan that *already* had the right number of districts of the right size. There was no constitutional obligation to act at all. So it made sense in this situation for the District Court to find as fact that the very existence of the 2003 plan arose *solely* because the majority in the Legislature wanted to maximize the number of Republican Representatives in Congress. Put differently, the sole-purpose test imposes a potentially meaningful check on decisions to replace existing lawful maps in mid-decade. Indeed, recognizing a requirement that a remap serve some legitimate, nonpartisan governmental purpose would lead to a strong presumption against the validity of a map drawn in mid-decade to replace an existing lawful map, even though, by contrast, it would bar few, if any, maps drawn right after a new decennial census.

B. The 2003 Plan Cannot Be Upheld on the Theory that It Was Aimed at Eliminating Pro-Democratic Bias in the Court-Drawn 2001 Plan.

The district court also erroneously concluded that Texas’s 2003 plan was not irrational and illegitimate because it served to undo the residual effects of what the court saw as gerrymandering by the Democrats in 1991 — effects that the court said had found their way into the map the court itself

drew in 2001. This justification fails as a matter of fact as well as law.

Factually, this justification turns on a serious distortion of the way the 2001 court said it went about drawing that year's map. In its most recent ruling, the District Court suggested that it had made only modest changes in the 1991 plan that the court saw as favoring the Democrats. But in reality, as the *Balderas* three-judge court explained in 2001, its map-drawing methodology was not based in any way on the existing districts from the 1990s but instead started with "a blank map of Texas" and applied neutral factors such as compactness, contiguity, and respect for political subdivisions like cities and counties. J.S. App. 206a; *see id.* at 207a ("We eschewed an effort to treat old lines as an independent locator, an effort that, in any event, would be frustrated by the population changes in the last decade."). In so doing, the court followed the "neutral approach" urged by the *State's* expert, who obviously was not seeking to preserve any preexisting pro-Democratic bias that may have existed in the earlier map. *Id.* The 2001 court then verified the partisan fairness of its neutrally drawn map by (1) checking whether senior members of Congress from either party were threatened, and (2) checking the "plan against the test of general partisan outcome, comparing the number of districts leaning in favor of each party based on prior election results against the percentage breakdown statewide of votes cast for each party in congressional races." *Id.* at 208a. The court found that the map was "likely to produce a congressional delegation roughly proportional to the party voting breakdown across the state." *Id.* at 209a.

Two years later, a modified three-judge panel (which included two of the three original judges) confirmed after a full trial that the 2001 plan "reflected the growing strength of the Republican Party in Texas, with 20 of 32 seats offering a Republican advantage." *Id.* at 85a. In so concluding, the

court had the benefit of the State's own expert, who testified that the 2001 plan had a small pro-Republican bias. Jackson Pls.' Ex. 141, at 18-21. The court was undaunted by the fact that "the voters in 2002 split their tickets" and "[s]ix incumbent Anglo Democrats were elected by narrow margins in Republican-leaning districts." J.S. App. 85a. The court implicitly recognized that incumbency can affect the results produced by a given map in the short term, but cannot alter the underlying fairness or unfairness of the districts as drawn.

In 2005, however, the 2002 election results and incumbency effects suddenly became a justification for redrawing the map to remove what the same court, based on no new evidence whatsoever, now labeled as residual pro-Democratic bias in the court-drawn 2001 map. Especially given the court's failure to take account of the process for drawing the map in 2001 — a process beginning with a blank slate — the notion that the Legislature had legitimate concerns about eliminating the residual effects of the 1990s map is clearly erroneous.

Even if there were a factual basis for this defense of the 2003 plan, the justification would still fail as a matter of law. Allowing a State to defend a mid-decade redistricting on the theory that it was aimed only at restoring partisan balance would still amount to endorsing state action aimed solely at altering the partisan outcome of future elections. Repackaging that goal as restoring balance does not create a legitimate state interest justifying new districts. Here, for example, the State's argument is, in effect, that it had a legitimate basis for (1) objecting when voters in some Republican-leaning districts stubbornly chose to stick with familiar Democratic incumbents, and (2) redrawing the lines to assure that voters would not make such objectionable choices again. Nakedly partisan goals do not become a legitimate basis for governmental action through incantation of the concept of "restoring balance."

**IV. PARTICULAR FEATURES OF THE 2003 PLAN
DRAMATIZE THE LEGISLATURE'S PURELY
PARTISAN MOTIVE WHILE ALSO VIOLATING
SECTION 2 OF THE VOTING RIGHTS ACT AND
THE SHAW DOCTRINE.**

When this Court vacated the District Court's prior ruling and remanded the case for further consideration in light of *Vieth*, it did not have occasion to address appellants' challenges to specific parts of the 2003 plan based on Section 2 of the Voting Rights Act and the racial-gerrymandering doctrine of *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny. Appellants therefore ask the Court to address those claims, which serve to illustrate the lengths to which the Texas Legislature was willing to go to maximize Republican control of congressional districts.

A. The Section 2 Claim

The essence of the Section 2 claim is that the Texas Legislature improperly carved up former District 24, in the Dallas-Fort Worth area. This was a majority-minority district effectively controlled by African-American voters, who constituted an overwhelming majority of voters in the Democratic primary in a district that consistently supported Democrats, of all races, in the general election. With this district obliterated, African-Americans are left with only three districts statewide in which they exercise electoral control, a total substantially less than their proportional share of the State's citizen voting-age population.

The District Court rejected appellants' Section 2 challenge to the dismantling of this district based primarily on the Fifth Circuit's rule that the Voting Rights Act applies only where it is possible to draw an additional district in which the relevant protected group has an absolute mathematical majority of the citizen voting-age population. *See* J.S. App. 96a & n.76, 107a-108a & n.112 (citing

Valdespino v. Alamo Heights Ind. Sch. Dist., 168 F.3d 848, 852-53 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000)). Because this “50% Rule” could not be satisfied here, the court held that Texas was free to eliminate a district in which experience showed that African-Americans could nominate and elect their preferred candidates. *See id.* at 106a-113a.

This approach conflicts directly with the rule applied in the First Circuit and other courts across the Nation. *See, e.g., Metts v. Murphy*, 363 F.3d 8, 11 (1st Cir. 2004) (en banc) (*per curiam*) (holding that a successful Section 2 claim could be brought where the plaintiff group “was a numerical minority but had predictable cross-over support from other groups”).²⁰

²⁰ *See also Metts v. Murphy*, 347 F.3d 346, 2003 U.S. App. LEXIS 21987, at *13-*34 (1st Cir. 2003) (withdrawn following grant of rehearing en banc) (providing further details in the same case); *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1322 (S.D. Fla. 2002) (three-judge court) (criticizing “the approach of focusing mechanically on the percentage of minority population (or voting age population or registered voters) in a particular district, without assessing the actual voting strength of the minority in combination with other voters”); *Puerto Rican Legal Defense & Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 681, 694 (E.D.N.Y. 1992) (three-judge court) (rejecting any bright-line rule for minority percentages under Section 2 of the Voting Rights Act); *West v. Clinton*, 786 F. Supp. 803, 807 (W.D. Ark. 1992) (three-judge court) (same); *Armour v. Ohio*, 775 F. Supp. 1044, 1059-60 (N.D. Ohio 1991) (three-judge court) (same); *Jordan v. Winter*, 604 F. Supp. 807, 814-15 (N.D. Miss.) (three-judge court) (recognizing that Section 2 protects a 41.99% black district), *summarily aff’d sub nom. Mississippi Republican Exec. Comm. v. Brooks*, 469 U.S. 1002 (1984); *cf. Page v. Bartels*, 144 F. Supp. 2d 346, 355-66 (D.N.J. 2001) (three-judge court) (finding no Section 2 violation where minority voters comprising less than half the district population, together with limited cross-over votes, could usually elect minority candidates of choice); *McNeil v. Legislative Apportionment Comm’n of N.J.*, 828 A.2d 840, 853 (N.J. 2003) (“[N]othing suggests that Congress intended to limit Section 2 claims to ones involving districts where minorities were a

The strict “50% Rule” also makes little sense after this Court’s ruling in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). There, interpreting Section 5 of the Voting Rights Act, the Court recognized that protected groups can and do elect their preferred representatives and exercise meaningful electoral power in districts where they lack an absolute mathematical majority. *See id.* at 479-91. All nine Justices called for a more nuanced assessment of districting plans — including recognition of “coalitional” districts where minority voters can elect their preferred candidates by forming coalitions with predictably supportive non-minority voters — rather than focusing solely on majority-black and majority-Latino districts. *See id.*; *see also id.* at 492 (Souter, J., dissenting) (agreeing with the majority’s treatment of “coalitional districts”). Yet the District Court here stuck with a wooden rule that States’ obligations under Section 2 extend only to the creation of majority-black and majority-Latino districts. By imposing a formalistic barrier to minority voters seeking to build cross-racial coalitions, the District Court’s “50% Rule” can only serve to thwart the Voting Rights Act’s goals and retard the racial integration of American politics. *See* Jurisdictional Statement at 10, 16-25, *Jackson v. Perry*, 125 S. Ct. 351 (2004) (No. 03-1391) [hereinafter “*First Jackson J.S.*”] (providing greater detail about appellants’ Section 2 claim).

B. The *Shaw* Claim

Appellants’ *Shaw v. Reno* racial-gerrymandering claim relates to new District 25, which ties together the most Latino parts of Austin with the border city of McAllen via a narrow, largely unpopulated land bridge. More than 89% of the district’s Latinos reside at either end of the district. *See* J.S.

majority of voters.” (citation omitted)), *cert. denied*, 540 U.S. 1107 (2004).

App. 223a (color map showing population densities in and around new District 25). In places, this 300-mile-long district is less than 10 miles wide. *See id.* at 222a (district silhouette).

The District Court rejected appellants' *Shaw* claim on the ground that District 25 was drawn this way for a "political" reason: Nearby District 23 had been altered to eliminate any chance of Latino control in order to assure the reelection of an endangered Republican incumbent. *Id.* at 157a. It followed that, to avoid Voting Rights Act liability, it was necessary to create an additional effective Latino district elsewhere, and the only way to do that was to combine densely populated pockets of Latino population separated by 300 miles of largely empty territory. *Id.* at 161a-165a.

The problem with this defense is that it is precisely the same as the one this Court rejected in *Bush v. Vera*, 517 U.S. 952 (1996). The *Bush v. Vera* Court expressly held that race-based line-drawing cannot be justified by a desire to protect a nearby incumbent. *See id.* at 967-73 (plurality opinion). There, the irregular shape of a challenged African-American district in North Texas had been defended as necessary not to capture African-American voters *per se*, but to do so consistent with the interests of adjacent Anglo Democratic incumbents. *See id.* This Court flatly rejected that justification as inconsistent with fundamental Fourteenth Amendment principles. *See id.* It should do so here, for precisely the same reasons. *See First Jackson J.S.* at 10, 25-30 (providing greater detail about appellants' *Shaw* claim).

CONCLUSION

The Court should note probable jurisdiction.

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