

No. 03A581

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**IN THE SUPREME COURT OF THE UNITED STATES**

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EDDIE JACKSON, *et al.*,

*Applicants-Appellants,*

v.

RICK PERRY, *et al.*,

*Respondents-Appellees.*

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

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**REPLY BRIEF IN SUPPORT OF  
APPLICATION FOR A STAY OR INJUNCTION PENDING APPEAL**

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To the Honorable Antonin Scalia, Associate Justice of the United States and Circuit Justice for the Fifth Circuit:

Applicants Eddie Jackson *et al.* respectfully submit this reply brief showing why Defendants’ arguments opposing a stay or injunction pending appeal are misplaced. Defendants’ analysis of the relevant equities is wholly divorced from reality, while their arguments on the merits largely evade, rather than address, the serious legal problems with the analysis applied by the majority below. The record shows that Plan 1374C’s designers made a conscious decision to opt for a map that maximized partisan bias by substantially undercutting the voting power of African-Americans and Hispanics. They should not be allowed to put such a map into effect – while this Court addresses the merits of Applicants’ challenges to that map – given that there is an available “status quo” map that the Court has already reviewed and determined to be fully lawful two years ago.

**I. The Equities Strongly Favor an Order Preventing Plan 1374C from Going into Effect.**

A. Defendants first attempt to persuade the Court to apply a heightened standard of scrutiny to the pending Application on the theory that it constitutes a request for an injunction and not a stay. But that argument turns on the incorrect claim that the *Balderas* court's injunction requiring Defendants to use Plan 1151C was no longer in effect when the District Court ruled on January 6, 2004. In fact, the *Balderas* injunction was still in place, and this Court can thus "stay" the lifting of that injunction.

Defendants offer a variety of arguments for why no injunction from *Balderas* still existed as of January 6, but none makes sense. The *Balderas* court ordered into effect a new congressional redistricting map in November 2001, without specifying any temporal limitation. Defendants claim there never was an "ongoing *Balderas* injunction," Opp'n at 6, but they cannot explain how, absent an injunction, the State had authority to implement a court-ordered map for the 2002 congressional elections. Elsewhere, they falsely claim that the injunction was limited to the 2002 elections, while going on to assert, with no support whatsoever, that the District Court "indicated that it did not believe its prior *Balderas* decision constrained subsequent legislative action." Opp'n at 7 n.2. *But see* Stay App. Exs. C & E. Finally, we are met with the puzzling assertion that the switch from Plan 1151C to Plan 1374C happened "by operation of Texas law after preclearance." Opp'n at 5. The plain fact is that there was an indefinite *federal* injunction entered in 2001, and the District Court simply finessed that issue in a ruling that unquestionably had the effect of lifting that injunction.

In any event, as we have explained, *see* Stay App. at 13-14 n.37, it makes no sense to apply a heightened "injunction" standard in the unusual procedural posture of this case. The map that Applicants seek to keep in place, Plan 1151C, is the status quo map used in the 2002

primary, runoff, and general elections, as well as in a 2003 special election. Moreover, the District Court consciously postured the case so that it would be feasible to use that map or Plan 1374C once all the evidence was heard. *See* Stay App. Ex. P. Thus, as a practical matter, Applicants are not seeking to alter the status quo and not asking this Court to craft an affirmative injunction. They are suggesting that the Court direct selection of one of the two remedial options the District Court preserved for itself – the one that maintains the *status quo ante*. Defendants do not respond to this point.<sup>1</sup>

Moreover, the State’s argument for a heightened injunction standard rests upon highly selective and often misleading portrayals of this Court’s jurisprudence. Although, in some circumstances, a request for affirmative intervention by this Court into fact-sensitive contexts does require that the “applicants’ right to relief must be indisputably clear,” *Communist Party v. Whitcomb*, 409 U.S. 1235, 1235 (1972), the Court’s decisions fall far short of establishing such a rule for all cases. To the contrary, this Court has granted such affirmative relief by applying the criteria that the State would maintain are only appropriate for a stay. *Lucas v. Townsend*, 486 U.S. 1301, 1304-05 (1988) (Kennedy, J., in chambers); *American Trucking Ass’ns v. Gray*, 483

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<sup>1</sup> Defendants do suggest that Applicants’ vote-dilution and *Shaw* claims are too localized to justify an order requiring use of Plan 1151C. Opp’n at 9-10. But given the late timing, the District Court was clearly correct to posture the case in such a way that the choice was between the new legislative plan – *if* it was found to be fully lawful – or the existing plan used in 2002. Some third option – a new map fixing one or more of the districts at issue in response to a finding of illegality – would have required substantial changes in many surrounding districts at a time when it was no longer practical to make such changes.

Following the District Court’s lead, this Court should also restrict itself to choosing between Plans 1151C and 1374C. Indeed, Defendants themselves made arguments in this case that demonstrate the impracticality of using some third option at this late stage. They successfully argued to the District Court that it was essential that counties be allowed to go forward with redrawing potential precincts to conform with Plan 1374C in December, claiming that it would be far too late to begin this process in January. *See* Stay App. Ex. P at 3-4. A new remedial map would require new precinct lines as well as an entirely new candidate-qualifying process – all with the March 9 primary date looming.

U.S. 1306, 1308-10 (1987) (Blackmun, J., in chambers) (mandating implementation of an escrow fund to hold all monies collected under a state tax whose constitutionality was under review). Moreover, the cases cited by the State as requiring a different standard are readily distinguishable. *Communist Party v. Whitcomb*, for example, involved what then-Justice Rehnquist properly characterized as a request for a “partial summary reversal.” 409 U.S. at 1235. Here, by contrast, the Court is not being asked to make an emergency decision on the merits – only to hold in place for one more election cycle a congressional districting map that is incontrovertibly constitutional. Even if, as the State extravagantly claims, the 2001 map has been “repudiated” by the Texas Legislature, that fact provides no justification for insisting that the Legislature’s action take effect while its constitutionality is fully tested.

Similarly, the State seeks to fashion out of a single statement by Justice Marshall in *Fishman v. Schaffer*, 429 U.S. 1325 (1976) (Marshall, J., in chambers), a rule that “novel” claims cannot give rise to interim injunctive relief. *See id.* at 1330. But again, there is no such rule; the test is whether the claims, whether novel or not, are likely to succeed. And even if such a rule existed, there is no basis for characterizing as “novel” (1) the partisan-gerrymandering issue, which is currently before the Court in *Vieth v. Jubelirer*, No. 02-1580 (argued Dec. 10, 2003), (2) the intent-based arguments concerning District 24, (3) the District 23 Voting Rights Act challenge, which applies black-letter Section 2 law, or (4) the *Shaw* challenge to District 25.<sup>2</sup>

B. Turning to the actual balance of hardships, the Court should not be taken in by Defendants’ effort to skew that balance. The Court’s task here is to compare the harms that

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<sup>2</sup> The Section 2 issues relating to District 24 and the 50 Percent Rule are “novel” only in the sense that we ask the Court to apply a rule of law with wide support in the lower courts that the Court has been willing to “assume” applies in prior cases like *Johnson v. De Grandy*, 512 U.S. 997, 1009 (1994).

would flow from granting the stay and later affirming the judgment below with those that would flow from denying the stay and later reversing the judgment below; in making that comparison, one must consider both the irreparable injuries caused by, and the likelihood of, each type of error. *See American Hosp. Supply Corp. v. Hospital Prods., Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986) (Posner, J.).

The consequences of an erroneous denial of a stay here are severe: Applicants and millions of other Texans would suffer a needless deprivation of their federal constitutional and statutory rights. Coupled with the substantiality of Applicants' claims on the merits, this risk clearly outweighs the competing consequences of leaving Plan 1151C in place but later affirming the judgment below – a course of action that would not deprive any individuals of their constitutional or statutory rights. Defendants attempt to concoct such a risk by noting that Plan 1374C, but not Plan 1151C, was precleared by the Department of Justice. Opp'n at 31. But Plan 1151C did not need preclearance precisely because it was drawn by a panel of federal judges after a two-week trial, and no one has ever suggested that Plan 1151C was in any way “retrogressive.”<sup>3</sup> Indeed, the State of Texas defended the legality of Plan 1151C as an appellee in this Court in *Balderas v. Texas*, 536 U.S. 919 (2002).

The actual consequences of an erroneous grant of a stay are far less significant. Defendants say it would be highly inappropriate to force any delay in the State's implementation of the legislative “policy preferences” reflected in Plan 1374C. Opp'n at 31. In so arguing, of course, they are saying that it is somehow urgent to implement a “110% partisan” map that eliminates every competitive district and devalues the votes of Democrats in order to produce a

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<sup>3</sup> By contrast, although the Department of Justice's 2003 preclearance of Plan 1374C may be insulated from judicial review, *see Morris v. Gressette*, 432 U.S. 491 (1977), it is extraordinarily difficult to reconcile with the undisputed facts brought out at trial.

congressional delegation with a preordained 22-to-10 Republican majority. Implicitly acknowledging the weakness of such a plea for legislative deference, Defendants attempt to suggest that Plan 1151C is itself a partisan gerrymander. Opp’n at 32-33. They know, however, that such a claim is groundless. Plan 1151C was drawn by a federal court, “[s]tarting with a blank map of Texas” and applying neutral principles. Stay App. Ex. C at 5. To the extent it resembled the map used in the 2000 elections, that map itself had been substantially redrawn by another federal court on remand from *Bush v. Vera*, 517 U.S. 952 (1996). Defendants’ own expert testified that Plan 1151C slightly favors the Republicans overall.<sup>4</sup> The fact that 17 Democrats were elected under the map in November 2002 was a result of the decision of thousands of *Republican* voters in 6 districts to split their tickets and support moderate or conservative Democrats for Congress.

As for the more practical point that allowing immediate use of Plan 1374C will irreparably alter the electoral landscape by creating a group of new incumbents who owe their status to what may then turn out to be an illegal map, Defendants attempt to suggest that that harm is felt only by the current incumbents who will lose their seats. But the harms will be inflicted primarily upon the people of Texas, who stand to lose an accumulated 114 years of House seniority, and upon the literally hundreds of thousands of voters who wish to continue to be represented by those Members of Congress.<sup>5</sup> Nor is there any basis for suggesting that the only relevant incumbent here is Congressman Martin Frost. *See* Opp’n at 30. The evidence made clear that Plan 1374C would inevitably spell the defeat of up to six other current

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<sup>4</sup> *See* Jackson Pls. Ex. 140 (Gaddie expert deposition) at 52.

<sup>5</sup> Before trial, Defendants stipulated that Applicant Eddie Jackson and his co-plaintiffs had standing to raise every claim discussed here, including those concerning Districts 23, 24, and 25. *See* Stay App. at 1 n.1.

Democratic Representatives, each of whom has a longstanding relationship with a particular community of voters and each of whom also depends on strong support from minority voters to get re-elected. That injury is relevant both with respect to Applicants’ partisan-gerrymandering claims – as Defendants concede, Opp’n at 9, 29 – and with respect to Applicants’ argument that Plan 1374C systematically destroyed all districts in which minorities exercise “influence” if not outright control.<sup>6</sup>

Finally, Defendants attempt to paint a picture of substantial disruptions caused by an order requiring use of Plan 1151C for the 2004 elections. But they do not and cannot claim that if the District Court had selected Plan 1151C as the map for this year’s elections on January 6, it would have caused *any* disruption. The reason, of course, is that the District Court deliberately restructured the election calendar to assure that the State stood ready to use either Plan 1374C or Plan 1151C. *See* Stay App. Ex. P. Indeed, as of January 6, when the District Court ruled, a full array of congressional candidates (including all 32 incumbents) had already filed to run under Plan 1151C. Defendants’ “public interest” arguments thus all turn on the notion that actions taken since January 6, even as Applicants have sought relief from this Court, have fundamentally changed matters. But there is no substance to this claim. Defendants speculate that “voter registration cards *may well* [have been] printed and mailed.” Opp’n at 34 (emphasis added). But they offer no evidence of that; and even if it has occurred in a handful of Texas’s 254 counties, it is a harm manufactured by those who rushed to take such an action.

As for the candidates who have filed to run under Plan 1374C, those actions in no way preclude a return to use of the candidate filings previously made under Plan 1151C during the

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<sup>6</sup> Stay App. Ex. K (Lichtman expert report) at 70-73.

normal filing period, between December 3 and January 2.<sup>7</sup> And the notion that there has been a substantial amount of campaigning for seats under Plan 1374C since January 6, *see* Opp'n at 35, is simply preposterous. After all, the new filing period for candidates does not even close until 6:00 p.m. Central Time on Friday the 16th, so the array of candidates in the new districts is not yet even set.<sup>8</sup>

## **II. Applicants Are Likely to Succeed on the Merits.**

### **A. Mid-Decade Partisan Gerrymandering**

If nothing else, the State Defendants must be applauded for their candor. Accused of enacting Plan 1374C for *no reason* other than bald partisan maximization, the State Defendants simply confess: “Guilty, as charged.” Indeed, their brief goes out of its way to endorse the District Court’s conclusion that gaining partisan advantage was ““the *single-minded* purpose of the Texas Legislature”” and ““110% of the motivation for the Plan.”” Opp’n at 23-24 (quoting Majority Op. at 24, 28) (emphasis added by the State Defendants).

The State’s willingness to concede that it classified voters – and intentionally discriminated against them – on the basis of their political viewpoint demonstrates how warped redistricting law has become. While redistricters typically recoil from even the mildest accusation of *racial* motivation, they willingly confess if confronted with the starkest accusations

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<sup>7</sup> Any candidate who gave up some other office to run for Congress under Plan 1374C – even before the January 16 close of filing and while this Application was pending – assumed the risk of such an injury. The Application has received heavy media coverage throughout the State. *See, e.g.,* David Pasztor, *One Hurdle Remains for New Map: Supreme Court Review Sought*, Austin Am.-Statesman, Jan. 11, 2004, at A1.

<sup>8</sup> Defendants seem not to understand why Applicants stated that Monday, January 19, is an appropriate target date for establishing which district map will be used. That is the first weekday after the close of filing under Plan 1374C. (And, due to the Martin Luther King, Jr. holiday, January 20 is actually the first business day after the close of filing.) At that point, it should be a relatively simple matter either to use the new filings and the new districts or to use the older filings under Plan 1151C and that plan’s districts.

of *partisan* motivation. As Justice Powell warned nearly two decades ago, and as the court below said was now “painfully clear,” the Federal Judiciary’s unwillingness to constrain even the most blatantly partisan redistricters has “offered a constitutional green light to would-be gerrymanderers.” Majority Op. at 30 (quoting *Davis v. Bandemer*, 478 U.S. 109, 173 (1986) (Powell, J., dissenting in part)) (internal quotation marks omitted).

The Texas Defendants ran that green light with the pedal floored. As explained in our Application, Stay App. at 14-16, if the appellants in *Vieth v. Jubelirer* stated a cognizable claim, then surely Applicants here have proved one. The State’s own expert, Professor Keith Gaddie – whose name, tellingly, appears nowhere in the State’s brief – conceded that Plan 1374C was designed to generate a 22-to-10 Republican majority by creating 10 districts packed with Democratic voters and 22 safely Republican districts.<sup>9</sup> Indeed, all 22 of these Republican seats would likely remain Republican for the rest of the decade even if Democrats regained preeminence with the Texas electorate.<sup>10</sup> This complete eradication of competitive districts – where the voters, rather than the mapmakers, can determine the party of their Representatives – is one of the most disturbing features of the new map.<sup>11</sup>

The State defends this biased and anticompetitive map as the legitimate byproduct of the Texas voters’ newfound, but supposedly immutable, allegiance to the Republican Party. On page 13 of their brief, Defendants downplay the risk of Democrats winning 51% of the total congressional vote statewide yet carrying only 31% of the seats (10 of 32): The Democratic Party, the State asserts, will be unable “at any time in the near future . . . to obtain a statewide

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<sup>9</sup> Stay App. Ex. H (Gaddie expert report) at 3, 19, 24 & 36 Figure 1.

<sup>10</sup> See Stay App. Ex. F (Alford expert report) at 23-28, 34, 38. See generally *id.* at 19-41.

<sup>11</sup> See Stay App. Ex. H (Gaddie expert report) at 19 (finding zero of Plan 1374C’s 32 districts to be “competitive” based on an analysis of the most recent statewide elections).

majority of votes.” Opp’n at 13. But that statement is wrong, given the recent, rapid increases in the naturalization, voter registration, and Democratic loyalty of Texas’s Hispanic residents, who now constitute more than a third of the State’s total population.<sup>12</sup> Moreover, it is beside the point: One can never know for sure which party will earn majority support in some *future* electorate; but a redistricting plan should not foreclose *either* party from capturing a majority of seats if its candidates (and their platforms) are strong enough to earn a majority of votes statewide.

On the very next page of its brief, the State, speaking out of the other side of its mouth, argues that Plan 1374C does not truly shut Democrats out of the State’s political processes because, “through hard work,” they might “gain[] a foothold in Texas’s statewide offices” and thus control, or at least constrain, redistricting after the 2010 census. Opp’n at 14. The State cannot have it both ways. If it is fair game to consider the prospect that Democrats could regain statewide offices, then it is also fair game to consider the fact – undisputed in the record below – that this new Democratic majority would likely remain confined to just 10 of the State’s 32 congressional districts. After all, as this Court held in *Bandemer*, the Constitution mandates “a level of parity between votes and representation sufficient to ensure that significant minority voices are heard *and that majorities are not consigned to minority status.*” 478 U.S. at 126 n.9 (emphasis added). That principle is precisely what Applicants here, like the appellants in *Vieth*, have asked this Court to reaffirm.

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<sup>12</sup> See, e.g., Tr., Dec. 17, 2003, 1:00 p.m., at 99-100 (Prof. Richard Murray); Stay App. Ex. K (Lichtman expert report) at 50-51. Contrary to Defendants’ assertion, Opp’n at 13, the contrast between Tables 1 and 2 in Professor Alford’s expert report shows that the gerrymandering of Plan 1374C is most severe when bias is measured with the most recent voting patterns – not that the State is trending Republican. See Stay App. Ex. F (Alford expert report) at 23-24.

But even if the *Vieth* appeal falls short, Applicants’ appeal should succeed. Plan 1374C should be struck down under a rule that is crisp and eminently administrable: *The Constitution bars congressional redistricting motivated solely by partisanship*. As explained in the Brennan Center’s *amicus* brief supporting this stay application, that rule will almost never apply to normal decennial redistricting, which serves to equalize district populations and thus vindicate the “one person, one vote” principle. But the mid-decade replacement of a perfectly lawful plan has nothing to do with population equality and hence can be motivated solely by partisanship. That does violate the Constitution.<sup>13</sup>

Defendants’ contention that only Congress – not the Court – can rein in the practice of mid-decade redistricting that is “110%” partisan, Opp’n at 24 (quoting Majority Op. at 28), is absurd. The majority below completely ignored four decades of this Court’s jurisprudence when it stated that, “[u]nless and until Congress chooses to act, the states’ power to redistrict remains unlimited by constitutional text.” Majority Op. at 6, *quoted in* Opp’n at 16. In *Wesberry v. Sanders*, 376 U.S. 1, 5-18 (1964), and a long line of subsequent cases,<sup>14</sup> this Court has repeatedly held that the States’ power to establish congressional constituencies is limited not only by the Equal Protection Clause, but also by the text of Article I guaranteeing “the People of the several States” the right to choose their Representatives in Congress through free and fair elections.

When a legislature redraws congressional district lines based not on new decennial census

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<sup>13</sup> Contrary to the State Defendants’ suggestion, *see* Opp’n at 17, Applicants do not contend that the State was powerless to override the *Balderas* court’s November 2001 adoption of Plan 1151C. But the State had to do so *before* the 2002 elections were held under that map. Having defaulted on the opportunity to amend or replace Plan 1151C in late 2001, and having conceded the legality of Plan 1151C (in this Court, on appeal from the *Balderas* court’s judgment), the State had no authority to replace the plan in 2003 for the sole purpose of partisan maximization.

<sup>14</sup> *See, e.g., Karcher v. Daggett*, 462 U.S. 725 (1983) (relying on *Wesberry* to strike down a congressional plan); *White v. Weiser*, 412 U.S. 783 (1973) (same); *Wells v. Rockefeller*, 394 U.S. 542 (1969) (same); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) (same).

results, but rather on new biennial election returns, and thus dictates electoral outcomes, it usurps the power that Article I reserves to the people and it abridges their constitutionally protected right to vote. Just as the Constitution prohibited the passive malapportionment that occurred when state legislatures refused to redraw congressional district lines after each federal decennial census, it also prohibits the active gerrymandering that occurs when they illegitimately manipulate lines more than once a decade for no purpose but partisan greed.<sup>15</sup>

### **B. Minority Vote Dilution in the Dallas-Fort Worth Area**

Defendants are totally unpersuasive in arguing against Section 2 protections for a “coalitional” district like District 24, where African-Americans concededly dominate the Democratic primary and can count on support from Hispanics and from a reliable *minority* of Anglos<sup>16</sup> to elect their candidate of choice in the general election.<sup>17</sup> In such a district, the absence of an African-American majority of the citizen voting-age population does not alter the fact that African-Americans have the power to elect their candidate of choice. Certainly the use of the word “elect” in Section 2 hardly connotes a limitation of protection to districts where a given minority group has a literal majority of the population. To the contrary, as the Court

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<sup>15</sup> See generally Stay App. Ex. F (Alford expert report) at 3-11, 31-33 (canvassing arguments against mid-decade “re-redistricting”).

<sup>16</sup> There is no substance to the suggestion that a crossover rate of 30% by Anglos indicates the absence of Anglo bloc voting under *Gingles*. See Opp’n at 19-20. Indeed, this Court held just the opposite in *Gingles* itself. See *Thornburg v. Gingles*, 478 U.S. 30, 80-82 (1986) (finding legally significant white bloc voting even where the fraction of white voters who “crossed over” and supported minority candidates in general elections was as high as 42%).

<sup>17</sup> Defendants feel free to echo the District Court’s doubts about the cohesiveness of African-American voting in District 24, Opp’n at 19, even though they told that Department of Justice that Texas is characterized by a consistent pattern of racial polarization in voting. See Stay App. Ex. K (Lichtman expert report) at 16-17. In any event, the data they cite do not support their conclusion. They point to two candidates who received overwhelming support from African-Americans but not from other voters; that demonstrates minority political cohesiveness. The third was an unknown judicial candidate who lost every demographic group in every district and thus can hardly be viewed as significant. See *id.* at 18-22.

recognized in *Georgia v. Ashcroft*, 123 S. Ct. 2498 (2003), the Voting Rights Act draws no distinction between majority-black districts where African-Americans have a realistic opportunity to nominate and elect their preferred candidates and “coalitional” districts where African-Americans have similar opportunities notwithstanding the absence of a mathematical majority. *See id.* at 2511-12; *id.* at 2518 (Souter, J., dissenting on other grounds).

To hold otherwise would authorize mapmakers in many jurisdictions to eliminate the only districts that could give minorities an “equal opportunity” to elect candidates of their choice. That hardly makes sense.

Nor would it make sense to adopt a position that *intentional* elimination of such a district can never violate the Constitution. Defendants suggest that the *Gingles* prongs should apply to intent claims under Section 2, but even they cannot contend that such a limitation applies to claims, like Applicants’, based on the Equal Protection Clause. Nor do they offer any other way to distinguish intentional vote-dilution cases like *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), which held that redistricters may not satisfy their political objectives by intentionally fracturing existing or potential minority districts.<sup>18</sup>

Under Defendants’ reading of the Voting Rights Act and the Constitution, race is an “all or nothing” consideration: African-Americans and Hispanics who cannot be corralled into majority-black or majority-Hispanic districts become legally irrelevant, and the State is free to take any and all steps to render them *politically* irrelevant as well. By contrast, Applicants’

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<sup>18</sup> Relying on *Cano v. Davis*, 211 F. Supp. 2d 1208 (C.D. Cal. 2002) (three-judge court), *summarily aff’d*, 537 U.S. 1100 (2003), the State Defendants suggest that *Garza* is no longer good law, in the wake of *Voinovich v. Quilter*, 507 U.S. 146 (1993). Opp’n at 25. But the *Cano* court expressly reaffirmed *Garza*’s central holding that, where “intent exists in a vote dilution case, it may be appropriate to relax the first or even second of the *Gingles* pre-conditions, as well as to consider intent in connection with the ‘totality of the circumstances inquiry.’” 211 F. Supp. 2d at 1249 (citing *Garza*, 918 F.2d at 770-71).

reading of the law allows the stricture of the Voting Rights Act to ratchet down as our politics become increasingly integrated and as leaders of the minority communities build their capacity to “pull, haul, and trade” on an equal footing with their Anglo counterparts. *See Johnson v. De Grandy*, 512 U.S. at 1020. Unlike the State’s approach, Applicants’ interpretation of the Voting Rights Act and the Equal Protection Clause will “encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life.” *Georgia v. Ashcroft*, 123 S. Ct. at 2517 (citing *Shaw v. Reno*, 509 U.S. at 657).

### **C. Minority Vote Dilution in South and West Texas**

Bizarrely, the State asserts that Applicants have not sought a stay on the ground that Plan 1374C’s District 23, in South and West Texas, violates Section 2 of the Voting Rights Act. Opp’n at 25 n.10. That is incorrect. An entire section of the Application, entitled “District 23 Violates Hispanic Citizens’ Voting Rights,” makes precisely that argument. Stay App. at 32-35; *see also* Stay App. Ex. K (Lichtman expert report) at 49-64 (thoroughly analyzing the same issue).

Judge Ward devoted the bulk of his dissenting opinion to explaining why the removal, or “cracking,” of nearly 100,000 Webb County Hispanics from District 23 violates Section 2. *See* Dissent at 3-23. Faced with a dissenting opinion that shredded the majority’s findings as to District 23, Defendants choose not to defend the majority’s tortured analysis, but rather raise three discrete points. None of them holds water.

*First*, the State argues that Applicants’ attack on Plan 1374C’s version of District 23 – the version that replaces nearly 100,000 Webb County Hispanics with “Hill Country” Anglos – was somehow implicitly rejected by this Court’s summary affirmance in *Balderas v. Texas*, 536 U.S.

919 (2002). But of course, the *Balderas* appeal was an unsuccessful attack on Plan 1151C, not Plan 1374C. The latter plan had not even been drawn in 2002, when this Court decided the *Balderas* appeal. Therefore, the Court’s affirmance says nothing about the new version of District 23 that Applicants challenge here.

*Second*, the State argues that Plan 1374C affords Hispanics rough proportionality “on both a regional and statewide basis,” Opp’n at 26 (quoting Majority Op. at 63, 81), although the quotations that it draws from the majority opinion below focus solely on the former point. The District Court’s preference for assessing proportionality on a regional basis makes little sense, because the outcome of the assessment turns entirely on how one defines the relevant “region.” States do not come neatly divided into self-defining “regions,” much less regions whose populations are evenly divisible into equipopulous congressional districts. To some considerable extent, then, the definition of any “region” of a State will be arbitrary. For example, if defendants can define a “region” as the part of the State where they in fact drew Hispanic districts, then no Section 2 claim could ever succeed, as 100% of the districts in this concocted “region” will be Hispanic districts, even though less than 100% of its population is Hispanic. Assessing proportionality on a *statewide* basis, however, destroys the State Defendants’ argument, as the fraction of Plan 1374C’s 32 districts that are Hispanic districts is less than the fraction of Texas’s population that is Hispanic. And that holds true regardless of whether the relevant measure is total population, voting-age population, or citizen voting-age population.<sup>19</sup>

*Third*, the State highlights the fact that Latino voters in Plan 1374C’s District 23 will likely control the outcome of every Democratic primary held there. Opp’n at 27. But this point is downright silly. Ensuring Hispanic voters’ power to choose the Democratic nominee in a

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<sup>19</sup> Stay App. Ex. K (Lichtman expert report) at 17-18.

district that never elects the Democratic nominee<sup>20</sup> does nothing to safeguard their opportunity “to *elect* representatives of their choice.” 42 U.S.C. § 1973(b) (emphasis added).

#### **D. Racial Gerrymandering in South and Central Texas**

Finally, the State offers only two counter-arguments to Applicants’ claim that new District 25 – the monstrosity reaching 300 miles from the overwhelmingly Hispanic city of McAllen, along the Mexican border in South Texas, to the Hispanic neighborhoods of east Austin, in Central Texas’s Travis County – is a racial gerrymander prohibited by the Equal Protection Clause, as interpreted in *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny. Neither of the State’s arguments can withstand scrutiny.

*First*, the State suggests that “plain partisan concerns,” not race, predominated. Opp’n at 27. While that is certainly true of the map as a whole, it is just as certainly *not* true with respect to District 25. And racial-gerrymandering claims under the *Shaw* doctrine are always district-specific. *See, e.g., Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995). At trial, the State’s expert witness on racial gerrymandering conceded “that race predominated over partisan politics in constructing District 25” and that, in stringing together the Hispanic neighborhoods of east Austin with the Hispanic border communities of Hidalgo and Starr Counties, Defendants “were trying to draw a[n

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<sup>20</sup> *See* Majority Op. at 66 (“It is undisputed that Plan 1374C eliminated Congressional District 23 as a district with a Latino majority citizen voting age population for the political purpose of increasing Republican voters in the district and shoring up the reelection chances of the Republican incumbent.”); *id.* at 67 (“Congressional District 23 is unquestionably not a Latino opportunity district under Plan 1374C.”); *id.* at 68 & n.139 (citing the State’s expert report showing that Hispanic candidates of choice have *never* carried the new District 23 in a general election); *see also* Stay App. Ex. H (Gaddie expert report) at 9-10; Stay App. Ex. K (Lichtman expert report) at 52-56.

additional] Hispanic district,” not an additional Democratic district.<sup>21</sup> State Representative Phil King, the bill’s chief sponsor in the Texas House, confirmed that conclusion:

Q. Now, let me ask you about the new District 25 in South Texas. Is there any doubt in your mind that the reason that District was created was to add an additional Hispanic District between the border and Travis County [Austin]?

A. Well, no. That was the purpose. . . .

Q. [Having destroyed the effectiveness of District 23 in South and West Texas,] to avoid retrogression, you needed the Hispanics in Travis County to ‘up’ the numbers; is that right?

A. Well, I think you had to go up there to pick up the Hispanics, yes. . . .

Q. You certainly wouldn’t say, however, would you, that the reason you created a District running all the way from the middle of McAllen [along the Mexican border] up to the middle of Travis County is because you were seeking to create a new open *Democratic*-leaning seat; is that right?

A. No, I wouldn’t say that.<sup>22</sup>

*Second*, the State contends that District 25’s noncompactness was driven not by the search for additional Hispanics but rather by the peculiar “‘geography and population distribution’” of South and Central Texas. Opp’n at 27 (quoting Majority Op. at 95). But if that were true, other districting plans covering the same geography would be afflicted by similar levels of noncompactness. In fact, that is not the case. As the State’s expert conceded at trial, District 25’s “smallest circle” compactness score is worse than that of:

- any of the 32 Texas congressional districts in Plan 1151C, which the State used in the 2002 elections;
- any of the 30 Texas congressional districts in Plan 1000C, which the State used in the 1996, 1998, and 2000 elections;

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<sup>21</sup> Tr., Dec. 19, 2003, 8:00 a.m., at 47 (Todd Giberson).

<sup>22</sup> Tr., Dec. 18, 2003, 1:00 p.m., at 152-54 (Rep. Phil King) (emphasis added).

- any of the 30 Texas congressional districts in Plan C657, which the State used in the 1992 and 1994 elections and which included three districts that this Court struck down as racial gerrymanders in *Bush v. Vera, supra*;
- any of the 31 Texas State Senate districts currently in effect;
- any of the 150 Texas House districts currently in effect; and
- any of the 15 Texas State Board of Education districts currently in effect.<sup>23</sup>

In total, 288 districts in six different plans – all including the same South and Central Texas “geography and population distribution” that Plan 1374C covers – somehow managed to avoid the kind of severely elongated, bizarre shape that marks new District 25. What sets District 25 apart is not the need to cover the allegedly peculiar terrain of South and Central Texas, but rather the Legislature’s admitted desire to pack Hispanic voters. Thus, “the predominant factor motivating the legislature’s decision to place a significant number of voters within or without [this] particular district” was the excessive and unjustified consideration of race. *Miller v. Johnson*, 515 U.S. at 916. Therefore, the District Court erred by upholding District 25 against Applicants’ claim of unconstitutional racial gerrymandering.

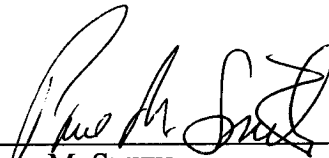
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<sup>23</sup> Tr., Dec. 19, 2003, 8:00 a.m., at 39-40, 44-45 (Todd Giberson).

**CONCLUSION**

For the reasons set forth above and in the Application filed on January 9, 2004, Applicants urge this Court to stay the District Court's January 6, 2004 judgment, so that the 2004 primary, runoff, and general elections for Texas's Representatives in Congress can be conducted under Plan 1151C, the same map that this Court upheld in *Balderas v. Texas*, 536 U.S. 919 (2002), and that the State used in the 2002 elections.

Respectfully submitted,



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