

No. \_\_\_\_\_

**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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**STATE DEFENDANTS' OPPOSITION TO STAY AND TO EMERGENCY INJUNCTION**

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GREG ABBOTT  
Attorney General of Texas

BARRY R. McBEE  
First Assistant Attorney General

EDWARD D. BURBACH  
Deputy Attorney General for Litigation

DON R. WILLET  
Deputy Attorney General for Legal Counsel

R. TED CRUZ  
Solicitor General  
*Counsel of Record*

DON CRUSE  
Assistant Solicitor General

CASSANDRA ROBERTSON  
Assistant Solicitor General

Office of the Attorney General  
P.O. Box 12548 (MC 059)  
Austin, Texas 78711-2548  
[Tel.] 512/936-1824  
[Fax] 512/474-2697

**ATTORNEYS FOR RESPONDENTS-APPELLEES**

RICK PERRY, DAVID DEWHURST,  
TOM CRADDICK, AND GEOFFREY S. CONNOR

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TO THE HONORABLE ANTONIN SCALIA, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

Respondents-Appellees Texas Governor Rick Perry, Lieutenant Governor David Dewhurst, Speaker of the House Tom Craddick, and Secretary of State Geoffrey S. Connor, in their official capacities, respectfully oppose the applications to enjoin the upcoming Texas congressional elections and to stay the January 6, 2004 order issued by the three-judge court. The Court should deny the emergency relief because the decision of the three-judge court was correct and, in any event, Applicants do not satisfy the prerequisites for emergency relief.

**THE DECISION FROM WHICH APPLICANTS SEEK RELIEF**

The consolidated actions challenged the legality of the congressional districts enacted by the Texas Legislature in October 2003. On January 6, 2004, after nearly three months of pretrial motions, discovery, and a seven-day bench trial, the District Court denied relief on all claims. Judge Patrick E. Higginbotham of the United States Court of Appeals for the Fifth Circuit and Judge Lee

H. Rosenthal of the United States District Court for the Southern District of Texas jointly authored the 99-page opinion for the panel. As the District Court put it, “Plaintiffs have failed to prove that the State statute prescribing the lines for the thirty-two congressional seats in Texas violates the United States Constitution or fails to comply with § 2 of the Voting Rights Act.” Majority Op., at 1. Judge T. John Ward of the United States District Court for the Eastern District of Texas concurred in part and dissented in part. Judge Ward concurred with the decision of the panel that the Plaintiffs had failed to establish a claim under *Davis v. Bandemer*, had failed to prove a violation of the Voting Rights Act for District 24, and had failed to prove an Equal Protection Clause violation.<sup>1</sup> Dissent, at 2-3, 23-24. Judge Ward dissented on the sole ground that he believed the panel had erred in its evaluation of a single district of the map, District 23, under the Section 2 of the Voting Rights Act. Dissent, at 3.

#### SUMMARY OF ARGUMENT

Applicants argue that the Court should “stay” the decision below. A “stay,” however, would have no effect. The District Court merely denied Applicants’ claims; it took no action to order Plan 1374C into effect. Instead, Plan 1374C became the operative congressional map for Texas after it had been precleared by the Department of Justice. Thus, any meaningful relief for Applicants would involve the truly extraordinary step of an interim, mandatory injunction. And after preclearance has already been obtained under Section 5 of the Voting Rights Act, the distinction between a “stay” and an injunction is far from semantic. Here, issuing an interim injunction would in effect reverse the decision of the Department of Justice, turn back the clock to before preclearance, and order relief that was wholly unavailable to Applicants below.

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1. Judge Ward expressed no opinion on the question of the constitutionality of District 25. Dissent, at 23.

Moreover, Applicants' request does not satisfy the Court's requirements for emergency relief, either on the merits or on the equities. Foremost, Applicants' claims are far from "indisputably clear," as is required for the extraordinary relief of an interim injunction. *Communist Party of Indiana v. Whitcomb*, 409 U.S. 1235, 1235 (1972) (Rehnquist, J., in chambers). Nor have Applicants demonstrated the requisite likelihood that this Court will eventually reverse the well-reasoned judgment of the District Court. Applicants suggest four claims on which they hope eventually to prevail. Several of their claims are clearly barred by the Court's precedent, some are so novel they have never been recognized by any court, and none have merit based on the record.

The equitable factors also weigh against the emergency relief sought by Applicants. Aside from the partisan-gerrymandering claim, only three districts are challenged: changes made to old District 23 and old District 24 (under Plan 1151C), and the lines drawn in the new District 25 (under Plan 1374C). For each of these three districts, Applicants advance no cognizable irreparable harm. Applicants suggest that the loss of incumbency advantage would constitute irreparable harm. But none of the Members of Congress who are parties to this appeal represent those challenged districts. *See* Notice of Appeal (Jan. 7, 2004) (Appl. App. A). And the "irreparable" nature of the harm, Applicants argue, is that the incumbent, once beaten in an election, would be unable to win again even if the district lines are restored later. Appl. Br., at 41. That claimed anti-democratic advantage in an election is hardly sufficient to justify extraordinary relief.

The balance of equities also strongly favors leaving Plan 1374C in effect because doing so avoids a certainty of harm to the public interest. If emergency relief is granted, that order would necessarily run counter to the very legislative policy preferences that this Court has commanded federal courts to respect in the context of redistricting. By contrast, there is virtually no possibility that, on any of Applicants' claims, the ultimate remedy would have been to set aside Plan 1374C in

its entirety in favor of the court-drawn Plan 1151C, which has already been repudiated by the Texas Legislature. Even if the District Court had found some violation—which, on consideration of the full record, it did not—the appropriate remedy would have been limited to adjusting Plan 1374C to the extent necessary to address the specific violation while still respecting the legislative policy preferences embodied in the remainder of the map. Thus, issuing emergency relief would unavoidably frustrate the will of the citizens of Texas as expressed through their elected Legislature, while refusing such relief creates, at most, only a speculative risk of harm.

Switching back to Plan 1151C through an interim injunction would also unsettle the upcoming elections. Despite Applicants' statement to this Court that nothing "significant" would happen under the new map until January 19, 2004, *see* Appl. Br., at 12—a date that seems to have been somewhat arbitrarily chosen—filings under the new districting plan are already underway and, by Texas law, will be completed before that date. *See* Order Ensuring Orderly Preparations for March 2004 General Primary Elections, *Session v. Perry*, C.A. No. 2:03-CV-354 (E.D. Tex. Nov. 12, 2003) (three-judge court) (Appl. App. P); *accord* Tex. H.B. 1, 78th Leg., 3d C.S. (2003) (noting that an application for a place on the ballot must be filed "not later than 6 p.m. on January 16, 2004."). Since the District Court's January 6, 2004 decision, candidates have begun filing and announcing their candidacies under the new district map. So, too, some candidates have withdrawn from other positions so that they can run under the new map. And candidates across the State have begun aggressively campaigning in their new districts, raising public expectations that the new district lines will be used. The emergency relief requested by Applicants would therefore do more harm than good, and it would disserve the public interest.

## ARGUMENT

### **I. APPLICANTS' REQUEST FOR A STAY OR MANDATORY INJUNCTIVE RELIEF IS IMPROPER ON THIS RECORD.**

The Application for a Stay or Injunction Pending Appeal mischaracterizes the procedural posture of this litigation and the appropriate standard that should govern Applicants' request for emergency relief. Although Applicants had originally pressed claims under Section 5 of the Voting Rights Act, those claims were mooted by the preclearance of Plan 1374C by the Department of Justice on December 19, 2003. After that preclearance, the District Court treated the statute enacting Plan 1374C as the operative law of Texas; it was Applicants' burden to challenge that statute. In its final judgment, the District Court's order below merely denied Applicants their requested relief. Accordingly, Applicants' request for a stay would accomplish nothing because the judgment did not alter the status quo. To receive emergency relief, Applicants must prove to this Court that they meet the extraordinary standards for a mandatory injunction pending appeal. This they cannot do.

#### **A. The Only Meaningful Relief Available to Applicants Is Through a Mandatory Injunction, Which Requires a Level of Proof That They Cannot Meet.**

Applicants equivocate as to whether the relief they seek is properly characterized as a stay or as an injunction. *See* Appl. Br., at 1 n.3, 13 n.37. But the District Court did not order Plan 1374C into effect; that happened by operation of Texas law after preclearance of the map by the Department of Justice. The District Court merely denied the challenges to the plan brought by Applicants and others. Majority Op., at 99 (“For the foregoing reasons, we deny all relief requested by Plaintiffs.”). Thus, staying the District Court order would have no effect whatsoever on the upcoming elections. Such a stay would have no effect where the district court merely refused to order relief. *See Barthuli v. Board of Trustees of Jefferson Elementary Sch. Dist.*, 434 U.S. 1337, 1339 (1977) (Rehnquist, J.,

in chambers) (where court below merely denied relief, a stay “would affect no present rights” and “would amount to nothing more than ‘a mere declaration in the air’”) (citation omitted).

Applicants wrongly suggest that there is some preexisting, ongoing injunction that would force the use of Plan 1151C in the 2004 congressional elections absent the District Court’s order. *See* Appl. Br., at 13 (characterizing the order below as “effectively dissolving the November 2001 injunction”), 13 n.37 (“the decision below had the effect of lifting the 2001 injunction requiring the use of the court-drawn Plan 1151C”). But there is no ongoing *Balderas* injunction. Nothing in the 2001 *Balderas* court’s order purported to bind the future hands of the State legislature; it instead adopted its plan for the 2002 congressional elections as “the *remedial* congressional redistricting plan for the State of Texas.” Final Judgment, *Balderas v. Texas*, C.A. No. 6:01-CV-158 (E.D. Tex. Nov. 14, 2001) (Appl. App. E). The use of the term “remedial” underscored what was already apparent: the Court’s power to draw districts was institutionally limited, and the proper forum in which to seek a plan that goes beyond the constitutional minimum is the Legislature, not the Court. *See Balderas v. Texas*, C.A. No. 6:01-CV-158, slip op. at 13-15 (E.D. Tex. Nov. 14, 2001) (per curiam) (Appl. App. C). Indeed, far from enjoining the State from enacting a new redistricting plan, the *Balderas* Court expressly invited those not happy with the map it had drawn to seek relief in the Texas Legislature. *Id.* at 9, 13-14. Because the very District Court in which the *Balderas* action was

consolidated held that its 2001 order does not bind the hands of the State,<sup>2</sup> it is remarkable that Applicants so casually suggest to this Court that it does.

Thus, because Plan 1374C is now the operative law of Texas under which candidates are filing and campaigning, Applicants can affect the upcoming election only by obtaining mandatory injunctive relief from this Court. Applicants assert—without authority—that such injunctive relief is available on the same terms as a stay. *See* Appl. Br., 13 n.37. But the Court has spoken precisely to the contrary, setting a particularly high bar on the likelihood-of-success prong for such injunction requests: “it is settled that [such an] injunctive power ‘should be used sparingly and only in the most critical and exigent circumstances.’” *Graddick v. Newman*, 453 U.S. 928, 937 (1981) (Powell, J., in chambers)(citation omitted). Moreover, the Court has explained that “[i]n order that it be available, the applicants’ right to relief must be *indisputably clear*.” *Communist Party of Indiana*, 409 U.S., at 1235 (emphasis added); *see also Graddick*, 453 U.S., at 937 (same).

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2. Applicants advanced these same arguments to the District Court and were rebuffed. On October 12, 2003, Applicants filed papers purporting to “enforce” the order from the 2001 *Balderas* litigation that had imposed a remedial map for use in 2002, despite the fact that the *Balderas* order contained no language limiting the authority of the Texas Legislature to adopt a new map. *See* Mayfield Plaintiffs’ Motion to Prohibit Modification or Termination of Injunction, *Balderas v. Texas*, C.A. No. 6:01-CV-158 (E.D. Tex. Oct. 14, 2003). They argued that the 2001 order had an ongoing injunctive effect that would preclude the use of Plan 1374C unless the State proved that a modification of the “injunction” was justified. *Id.* That motion was filed before the original *Balderas* three-judge panel (which included two of the three members of the current three-judge panel), and that proceeding was consolidated with the 2003 *Jackson* and *Session* lawsuits at issue here.

The District Court, considering all of the consolidated actions, indicated that it did not believe its prior *Balderas* decision constrained subsequent legislative action, and Applicants therefore filed complaints re framing their arguments as direct attacks on Plan 1374C. *See* Amended Complaint of the Jackson Plaintiffs, the Mayfield Plaintiffs, the Manley Plaintiffs And Their Co-Plaintiffs, *Session v. Perry*, C.A. No. 2:03-CV-354 (E.D. Tex. Nov. 7, 2003). That is how the trial was conducted, and, as Judge Higginbotham noted at the closing arguments, once it was precleared Plan 1374C became the “current plan.” Tr. 12/23/03, at 41:23-41:25. So, too, the District Court made clear that the only effect of the *Balderas* map was to adopt “Plan 1151C to govern the State’s 2002 elections.” Majority Op., at 3; *see also id.*, at 20 (rejecting a collateral-estoppel argument based on the *Balderas* ruling: “The issues are different here. . . . We also must examine a never-before-considered legislative districting plan, Plan 1374C, and decide whether it passes muster under the Constitution and the Voting Rights Act.”). And in the request for a stay made to the District Court, Applicants acknowledge that there is no preexisting injunction by requesting that the District Court now “direct that the 2004 primary, runoff, and general elections [be] conducted under Plan 1151C.” *See* Jackson Plaintiffs’ and Democratic Congressional Intervenors’ Emergency Motion to Stay the Judgment Pending Appeal, *Session v. Perry*, C.A. No. 2:03-CV-354, at 9-10 (E.D. Tex. Jan. 7, 2004) (three-judge court).

Applying that principle, Justices have refused to grant such injunctive relief when the applicants—as do Applicants here—pressed a claim urging a “novel” theory rather than relying on existing law. In *Fishman v. Schaffer*, Justice Marshall denied an injunction in an elections context because the particular question presented was “too novel and uncertain to warrant a single Justice’s acting unilaterally to strip the State of its chosen method of protecting its interests . . . .” 429 U.S. 1325, 1329-1330 (1976) (Marshall, J., in chambers). Justice Marshall distinguished *McCarthy v. Briscoe* because there the underlying claim raised “no novel issue of constitutional law.” *Fishman*, 429 U.S., at 1328 (quoting *McCarthy v. Briscoe*, 429 U.S. 1317, 1320 (1976) (Powell, J., in chambers)). Indeed, in *McCarthy*, not only was the constitutional question already settled under Supreme Court precedent, but even the district court had agreed that the status quo was infirm, differing only on the feasibility of a remedy. 429 U.S., at 1321-22. Here, by contrast, the District Court soundly rejected all of Applicants’ claims.<sup>3</sup>

Under the controlling standard for likelihood-of-success for an interim injunction—whether the claims are “indisputably clear” and whether they ask the Court to reach a “novel” conclusion—Applicants fail their required proof. *First*, on the partisan-gerrymandering claim, Applicants do not argue to this Court that they have a claim under current law but instead ask the

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3. Applicants cite two cases that they call “elections context” cases in which injunctions have been granted. *See* Appl. Br., at 13 n.37 (citing *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers); *Clark v. Roemer*, 498 U.S. 953, 953 (1990), *order modified*, 498 U.S. 954 (1990)). But both are Section 5 cases, in which injunctive relief serves a different purpose that is not implicated here, where preclearance is not in dispute. In such cases, the injunction ensured that preclearance could take place before implementation of the districts, preserving the power of the Department of Justice or the United States District Court for the District of Columbia to consider the matter in the first instance. In *Lucas*, the Department of Justice had refused to preclear the map before the election date. 486 U.S. at 1304-05. And in *Clark*, this Court’s injunction was crafted to reach those judicial races—and only those judicial races—for which such preclearance had not been granted. *Clark*, 498 U.S., at 953 (original order); *see also Clark v. Roemer*, 498 U.S., 954, 955 (1990) (modifying original order to specifically exclude those races in which there was agreement that preclearance had been granted). Here, by contrast, the Department of Justice has precleared Plan 1374C without objection.

Court to make new law. *Second*, on the District 24 arguments, Applicants urge the Court to adopt a new standard governing the first factor under *Gingles*. *Third*, on the District 23 arguments, Applicants urge the Court to reach a result contrary to the finding of the *Balderas* district court in 2001—affirmed by this Court—that Section 2 of the Voting Rights Act did not require the drawing of an additional district in the relevant region of the State. And *fourth*, on the racial gerrymandering claim, Applicants’ claim is not well-founded because they do not address the geographic and demographic realities of the relevant region of Texas, in which the features they criticize (long districts and sparsely populated counties) are simply the constraints within which any redistricting map for Texas must be drawn. Thus, Applicants lack the extraordinary degree of likelihood of success necessary to support an interim mandatory injunction. *See* Point II, *infra*. So, too, the equitable factors of irreparable harm and balancing of the equities that apply to any emergency relief from this Court strongly weigh against granting any emergency relief. *See* Point III, *infra*.

**B. The Mandatory Injunction Requested Would Exceed the Full Relief To Which Applicants Might Have Been Entitled Even Had They Prevailed On Their Voting Rights or Constitutional Discrimination Claims Below.**

Applicants’ injunction request should be denied for the additional reason that it exceeds even the *final* relief to which they might have been entitled below, had they prevailed on their claims. Applicants seek to force the State to use Plan 1151C—the court-drawn plan from 2001—with no modification whatsoever to take into account the legislative policy preferences embodied in the enacted and precleared Plan 1374C. *See, e.g.*, Appl. Br., at 44. But—setting aside the Applicants’ partisan-gerrymandering theory that has never been adopted by any court—none of Applicants’ claims would have warranted such relief.

Indeed, had the District Court awarded them the relief they now seek, it would have committed reversible error. Courts may not impose their own plan—and Plan 1151C is nothing more than an earlier, court-drawn interim plan—that unnecessarily deviates from the expressed policy preferences of the state legislature. *Upham v. Seamon*, 456 U.S. 37, 40-41 (1982) (per curiam); *White v. Weiser*, 412 U.S. 783, 795 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 160-61 (1971). For Texas, Plan 1374C embodies exactly those legislative preferences that the District Court would have been commanded to respect.

Nor is there any merit to the dissent’s suggestion that the more deferential route would have been to ignore the Legislature completely. The dissent argues that its proposed changes to a single district (District 23) would have had “ripple effects” that would have counseled against the District Court trying to remedy the map itself. Dissent, at 23. But, even assuming a Section 2 violation, the record is silent on why a single district out of a 32-district map would be impossible to fix. The rationale presented by the dissent is that it would be truer to legislative intent to reject Plan 1374C in its entirety in favor of Plan 1151C. Dissent, at 23. But given that Plan 1151C has itself been roundly rejected by the Texas Legislature, it is difficult to see how reimposing it could be seen as being in any way deferential. It would instead elevate judicial preferences over legislative preferences, precisely what the Court has consistently condemned in the redistricting context.

**C. Through a Mandatory Injunction Turning Back the Clock, Applicants Are Seeking an Indirect Reversal of the Department of Justice’s Decision to Preclear Plan 1374C.**

The injunction sought by Applicants also improperly attempts to return not to the status quo before the District Court’s decision, but instead to an earlier time—before the Department of Justice precleared Plan 1374C. On December 19, 2003, the Department of Justice precleared Plan 1374C,

removing the only statutory barrier to its implementation. At that point, as the District Court recognized, Plan 1374C became the operative congressional map for Texas and the baseline for any required changes. Yet, throughout this litigation, Applicants (and other plaintiffs) have raised claims that properly sound, if anywhere, under Section 5 of the Voting Rights Act. *See, e.g.*, Majority Op., at 49 (“[W]e are persuaded that alterations to [District 24] raised questions primarily of § 5, which have been answered by the Department of Justice.”). But there is no provision for decisions by the Department of Justice under Section 5 to be judicially second-guessed. 42 U.S.C. §1973c; *see also Seastrunk v. Burns*, 772 F.2d 143, 151 (CA5 1985) (“[W]here the Justice Department has offered no objections following a preclearance submission under section 5 of the Voting Rights Act, a federal court is not free to substitute its reapportionment preferences for those of the state.”) (citing *Upham v. Seamon*, 456 U.S., at 40-41). Yet by seeking the all-or-nothing strategy of asking this Court to undo Plan 1374C entirely, Applicants, in effect, ask this Court to do just that.

**II. BECAUSE THERE IS NO SUBSTANTIAL LIKELIHOOD THAT THIS COURT WILL EVENTUALLY REVERSE THE JUDGMENT BELOW, NO INTERIM RELIEF IS WARRANTED.**

For the Court to grant emergency injunctive relief, Applicants must demonstrate that their right to relief on the merits of the underlying claims is “indisputably clear.” *Communist Party of Indiana*, 409 U.S., at 1235; *see also Graddick*, 453 U.S., at 937. This they cannot do. Indeed, for several claims Applicants acknowledge that they are asking the Court to extend the law or to make wholly new law. *See* Appl. Br., at 19 (“The Court should respond to this new form of abuse . . . .”); *id.*, at 21 (arguing that Section 2 law should also evolve after *Georgia v. Ashcroft*); *id.*, at 26 (“Given the uncertainty in the lower courts, this Court should take this opportunity to determine . . . .”); *id.*, at 29 (Supreme Court’s test “does not make sense” in this situation). To the extent that the questions

are novel, that very novelty defeats Applicants' request for interim injunctive relief. *See Fishman*, 429 U.S., at 1329-30 (denying relief because "question is too novel and uncertain to warrant" it). So, too, the District Court's familiarity with the record counsels deference in this context to its findings in a complicated redistricting case. *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers) (denying a stay in a reapportionment case, and noting that "[a] lower court judgment, entered by a tribunal that was closer to the facts than the single Justice, is entitled to a presumption of validity"). Consideration of the merits of each claim in turn demonstrates why, far from being appropriate for such an extraordinary remedy as interim injunctive relief, Applicants' theories will most likely ultimately result in a summary affirmance.

**A. Applicants Do Not Contend That They Have a Partisan Gerrymandering Claim Under Current Law, and Their Argument To Extend the Law Is Hopelessly Misguided.**

**1. Applicants Have No Partisan-Gerrymandering Claim Under Current Law.**

There is no basis for an interim injunction premised on Applicants' partisan-gerrymandering claims because they have no claim under current law. Indeed, Applicants do not explain to this Court how *Davis v. Bandemer*, 478 U.S. 109 (1986), or its progeny, provides them any relief. The District Court heard Applicants' evidence on that point and rightly concluded that they had no such claim. Majority Op., at 30. There is no doubt that its judgment was correct.

To show the "discriminatory effect" required under *Bandemer*, Applicants must prove both (1) "an actual or projected history of disproportionate results," and (2) "that 'the electoral system is arranged in such a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole.'" *Terrazas v. Slagle*, 821 F. Supp. 1162, 1172 (W.D. Tex. 1993)

(per curiam) (citing *Bandemer*, 478 U.S., at 132); *see also O’Lear v. Miller*, 222 F. Supp. 2d 850, 855 (E.D. Mich.) (same), *aff’d*, 537 U.S. 997 (2002). Applicants did not prove either required aspect of the “effects” test.

Applicants presented no real-world evidence on the first aspect of *Bandemer*’s “effects” prong, which requires an actual election history or “projected history” of disproportionate results. Instead, Applicants offered experts who constructed hypothetical, “50-50” elections using simple arithmetic models. *See, e.g.*, Report of John R. Alford on Texas Congressional Redistricting, at 25 (Appl. App. F). Those so-called models are not projections at all; they simply measure relative partisan concentrations across districts at the moment the analysis is done. None of Applicants’ proof suggests—nor could it credibly suggest given the voluminous trial record to the contrary—that the Democratic Party would at any time in the near future be likely to obtain a statewide majority of votes. To the contrary, Dr. Alford’s report (submitted by Applicants) demonstrates that the Republican Party in Texas has been strengthening its electoral majority in Texas over the time period that he studied. *Compare id.*, Table 1, at 34 *with id.*, Table 2, at 35. There is accordingly no reason to think that the results of Plan 1374C are likely to be out of line with the statewide voting trends in Texas. Without evidence that the congressional map will result in actual disproportionality, there is no cognizable harm to justify judicial intervention in the normal processes of state politics.<sup>4</sup> *Cf. White v. Alabama*, 867 F. Supp. 1571, 1577 (M.D. Ala. 1994) (“[One candidate’s] lack of success is not enough to suggest that future Republican appointees will be unable to achieve statewide

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4. This failure is magnified in the procedural posture of this application for a stay or an interim injunction pending appeal. Applicants have nowhere shown that Democratic candidates are likely to receive a majority of votes from Texas voters in the 2004 elections, and accordingly there is no call whatsoever for emergency relief for the upcoming elections.

election. In light of increasing Republican success in the political process as a whole, the intervenor’s claim is premature.”).

Second, Applicants presented no proof on the second aspect of *Bandemer*’s “effects” prong, whether they will be unable to regain their former political standing through the normal political process. See, e.g., *O’Lear*, 222 F. Supp. 2d, at 859; *Pope v. Blue*, 809 F. Supp. 392, 397 (W.D. N.C.), *aff’d*, 506 U.S. 801 (1992); *Badham v. Eu*, 694 F. Supp. 664, 671 (N.D. Cal. 1988), *aff’d*, 488 U.S. 1024 (1989). The District Court expressly found that Applicants failed this test, adding that “[i]n Texas, redistricting advantages can be overcome through the political process. The exchange of political advantage between the Democrats in 1990 and the Republicans in 2000 demonstrates this reality.” Majority Op., at 13. The District Court’s conclusion accords with that of the district court that heard a partisan-gerrymandering challenge brought by Republicans against the 1991 congressional map—the legislative map that drove the policy preferences ultimately embodied in Plan 1151C. *Terrazas*, 821 F. Supp., at 1175. The *Terrazas* district court held that the structure of Texas state government allowed for the out-of-power party to work its way into a position of influence through hard work at the local level or by gaining a foothold in Texas’s statewide offices. *Id.*, at 1174-75. The subsequent decade proved the court correct; in the intervening decade, the out-of-power party (then, the Republicans) achieved success at the ballot box and was able to ultimately garner enough support to pass a new redistricting map. Applicants point to no barriers to the ability of Democrats to do the same thing over the long haul, provided they receive the support of Texas voters.<sup>5</sup>

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5. Applicants’ “entrench[ment]” argument, Appl. Br., at 18—that once a party gets power it can continue to gerrymander in order to stay in power despite popular will for change—has no application to congressional districts because congresspersons do not draw their own lines. They sit in a national assembly; they do not sit as a delegation to

## 2. Applicants' Novel Theory of Political Gerrymandering Will Not Ultimately Prevail and Does Not Justify Any Interim Relief.

Unable to meet this Court's controlling precedents, Applicants instead ask this Court to base relief on precisely the kind of "novel" theory that Justices of this Court have held to be inadequate to support interim relief. *Fishman*, 429 U.S., at 1329-1330; *accord Dexter v. Schrunk*, 400 U.S. 1207, 1207 (1970) (Douglas, J., in chambers) (refusing to issue an interim restraining order because a related case was pending before the Court but had not been decided). In this Court, Applicants have adopted a somewhat different theory on partisan gerrymandering than they pressed below, contending here that partisan gerrymandering should be *indirectly* limited by restricting the overall frequency of redistricting.<sup>6</sup> Appl. Br., at 16, 19.

Primarily, this "partisan gerrymandering" theory mirrors the mid-decade redistricting argument that Applicants advanced below, which was unanimously rejected by the District Court. Majority Op., at 4-21; Dissent, at 1 ("I join the court's opinion that the law does not preclude the State's Legislature from enacting a mid-decade redistricting plan following a court-ordered remedial plan such as the one enacted by the court in *Balderas v. State of Texas*."). The Constitution clearly delegates congressional districting to state legislatures in the first instance. *See* U.S. CONST. art. I,

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enact laws for Texas. And it is demonstrably *not* true that having a majority of the congressional delegation translates into control over the redistricting process. To the contrary, Democrats held 17 of Texas's 32 congressional seats in 2003, yet the Republicans controlled the redistricting process because they held all the bodies of state government.

6. In the District Court, Applicants argued for a modification of the *Bandemer* test to address their partisan concerns and moved separately for a ruling that there was a complete prohibition on mid-decade redistricting. *See* Jackson Pl. Post-Trial Br., at 65-71 (for partisan gerrymandering, arguing only about "intent" and "effects"); Jackson Pl. Trial Br., at 35 (explaining that Applicants propose to change the *Bandemer* test in order to "heighten" the intent prong and to "sharpen the effects" prong); *see also* Jackson Pl. Mot. for Summ. Judg., at 22 (arguing that only legal infirmities in the existing map can justify mid-decade redistricting: "Absent an intervening census, there can be no need to adjust the number of districts . . . depriv[ing] them of any right to a mid-decade adjustment."); *id.*, at 21 (arguing that without new census data, new district lines are impermissible).

§4, cl. 1; *see also Smiley v. Holm*, 285 U.S. 355, 366-67 (1932) (evaluating redistricting power through Article I, § 4); *State of Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565, 569 (1916) (same). Furthermore, the Court has repeatedly held that “the Constitution leaves with the States *primary responsibility* for apportionment of their federal congressional . . . districts.” *Grove v. Emison*, 507 U.S. 25, 34 (1993) (emphasis added); *see also White v. Weiser*, 412 U.S. 783, 795 (1973) (“[S]tate legislatures have ‘primary jurisdiction’ over legislative reapportionment.”); *Branch v. Smith*, 538 U.S. 254, \_\_\_, 123 S.Ct. 1429, 1435 (2003) (“[Redistricting] is primarily the duty and responsibility of the State through its legislature.”).

That same constitutional provision gives Congress the power to place limits on what the States can do in terms of redistricting. Majority Op., at 6. As the District Court noted, “This reservation to Congress, however, is not a direct limitation on the scope of the states’ authority; rather, it allows Congress to override state election decisions or to enact regulations of its own. Unless and until Congress chooses to act, the states’ power to redistrict remains unlimited by constitutional text.” Majority Op., at 6. Congress has passed no such regulation. And numerous decisions by this Court indicate that States may redistrict following a court action—the same situation that faced the Texas Legislature after the *Balderas* case. Majority Op., at 8-9 & 8 n.14 (citing cases).

Applicants’ proposed rule in this Court—to the extent it can be discerned—appears to be that partisan gerrymandering at the decennium may be acceptable, but that redrawing lines mid-decade

may violate some constitutional principle. Appl. Br., at 16, 19. They invite this Court to “respond to this new form of abuse.”<sup>7</sup> Appl. Br., at 19.

But in the factual circumstance presented by this case—where the preexisting plan was a court-drawn plan—Applicants’ proposed rule prohibiting subsequent legislative action is contrary to decades of precedent acknowledging that because federal courts have only a remedial role to play in redistricting, *Upham*, 456 U.S., at 43, state legislatures are free to draw new district lines even after a court has drawn such a remedial plan. *See id.*, at 44; *White v. Weiser*, 412 U.S. 783, 789 (1973); *Johnson v. Miller*, 922 F. Supp. 1556, 1569 (S.D. Ga. 1995) (“We do no harm with this plan, which cures the unconstitutionality of the former and can serve in ‘caretaker’ status until the legislature convenes to change it. *That may occur following the millennium census, or before.*”) (emphasis added), *aff’d sub nom., Abrams v. Johnson*, 521 U.S. 74 (1997); *Vera v. Bush*, 980 F. Supp. 251, 252-53 (S.D. Tex. 1997) (noting that Texas Legislature was free to enact its own congressional redistricting plan to replace district court’s plan); *Vera v. Bush*, 933 F. Supp. 1341, 1346 (S.D. Tex. 1996) (same); *Bush v. Martin*, 251 F. Supp. 484, 516 (S.D. Tex. 1966) (rejecting argument that the Legislature could not enact a *second* map in the same decade even after it had been approved by the court).

Moreover, if the only “legitimate” reason for a State to undertake redistricting is to correct some illegality in the prior map, then little remains of the constitutional principle that “a state legislature is the institution that is by far the best situated” to undertake redistricting and that it brings

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7. Applicants also suggest that courts might attempt to quantify the percentage that a particular redistricting plan was motivated by “partisanship.” Appl. Br., at 16. The categories of “partisan” and “political” cannot be disentangled within decisions made by politicians elected in partisan elections, nor can politics be removed from redistricting so long as elected legislatures are entrusted with the task.

to the task “political authoritativeness” that courts lack. *Connor v. Finch*, 431 U.S. 407, 414-15 (1977). The claim advanced by Applicants is not only novel, but it would also require a fundamental change in the understanding of the role of state legislatures in redistricting. To remove politics from the equation, the Court would have to take politicians out. There is no constitutional basis to do so.

**B. The District Court’s Treatment of Congressional District 24 Does Not Warrant Interim Relief Because It Will Likely Be Affirmed By This Court.**

Applicants argue that District 24 is protected under Section 2 of the Voting Rights Act as an African-American opportunity district. The baselessness of this claim is underscored by the demographic facts: in District 24, African-American citizens make up only 21.4% of the voting-age population. Majority Op., at 43. That places African Americans as the third largest of the three major ethnic groups in the district—hardly a position of control. That District 24 has elected a Democrat has been due to ties of partisanship, not the kind of racial bloc voting that the Voting Rights Act was enacted to address.

**1. The District Court correctly concluded that Applicants failed to meet the *Gingles* prerequisites for District 24.**

The District Court was unanimous in concluding that Section 2 does not require District 24 to be drawn. Majority Op., at 44-48. Under *Gingles*, Applicants must prove the three preconditions to bringing a Section 2 claim: (1) that the minority group “is sufficiently large and geographically compact to constitute a majority in a single-member district”; (2) that the minority group “is politically cohesive”; and (3) that “the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.” *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986); *Grove v. Emison*, 507 U.S. 25 (1993).

First, African Americans constitute only 21.4% of the population in District 24, Majority Op., at 43, and therefore are not “sufficiently large and geographically compact to constitute a majority in a single-member district.” *Gingles*, 478 U.S., at 50.

Second, the District Court correctly concluded that Applicants had failed to prove voter cohesion. Majority Op., at 47. The Jackson Plaintiffs’ principal statistical expert, Allan Lichtman, focused on three primary races to determine African-American cohesion in District 24: the 2002 Senate race with Black candidate Ron Kirk, the 2002 Court of Criminal Appeals race with Black candidate Julius Whittier, and the 1998 Attorney General race with Black candidate Morris Overstreet. *See* Lichtman Report, Tables 2 & 6 (Appl. App. K). According to Dr. Lichtman, in the first race Mr. Kirk received 99% of the Black vote, in the second race Mr. Whittier received 40% of the Black vote, and in the third race Mr. Overstreet received 66% of the Black vote in Dallas County and 76% of the Black vote in Tarrant County. *Id.* Thus, in the three races examined by Dr. Lichtman, one (Kirk) shows very strong African-American cohesion, one (Whittier) shows no cohesion whatsoever, and one (Overstreet) shows significant but not overwhelming cohesion. The District Court examined these data and correctly determined that “whether Blacks vote cohesively in the primary is far from certain.” Majority Op., at 47.<sup>8</sup>

Finally, the District Court found that Plaintiffs’ own expert had demonstrated the lack of white bloc voting, noting that when voter turnout is considered, Dr. Lichtman had conceded that “in the general election Black turnout will fall to the range of 31, 32 or perhaps 33%, while Anglo

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8. In addition, Applicants at times relied upon the combined African-American and Hispanic population in District 24 to support their §2 claim. But, as all of the experts agreed, and as the District Court concluded, “[t]hat there is no cohesion between Black and Latino voters in the primary contests is beyond serious dispute.” Majority Op. At 46-47.

turnout will jump into the 60's, approximately a two to one margin.” Majority Op., at 47. The deciding votes in the elections are thus cast by Anglos, not by African-Americans. Dr. Lichtman found an Anglo crossover rate of 30.75%, and the Court observed that “such a crossover rate has been found to establish the absence of Anglo bloc voting under *Gingles*’s third precondition as a matter of law.” Majority Op., at 47.

**2. Plaintiffs’ claim that “coalition districts” need not meet the *Gingles* requirements is both misguided and too novel to support a stay.**

Applicants attempt to circumvent *Gingles* by alleging that a Black-preferred candidate can be elected through a bi-racial coalition of African-American and Anglo voters, as is the case in many districts where African Americans are a minority of the total voters. But that does not mean that African-American voters have the ability “to elect” the candidate of their choice, since their ability to elect their preferred candidate is dependent on a coalition with Anglo voters. In such circumstances, the minority group simply does not have “the potential to elect a representative of its own choice in some single-member [districts].” *Grove*, 507 U.S., at 40 (emphasis added). *Gingles* itself makes this clear: “[I]f . . . the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, these minority voters cannot maintain that they would have been able *to elect* representatives of their choice in the absence of [the challenged plan].” 478 U.S., at 51 n.17 (emphasis added). If the potential “to elect” under Section 2 included the potential to elect in combination with other groups, *Gingles* would not have said that a group constituting a substantial minority of a district is unable to “elect” their preferred representative.

Contrary to Applicants' assertion, this limit on Section 2 claims is required both by *Gingles* and by the text of Section 2. Under the statute, plaintiffs must show that the challenged districting plan results in minorities suffering a disadvantage, relative to nonminorities, "on account of race or color." 42 U.S.C. §1973(a). Thus, "a violation of" Section 2 is established only if "the political processes leading to nomination or election . . . are not equally open to participation by [minorities]." *Gingles*, 478 U.S., at 36. Relatedly, the Act is violated only if minorities "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* Depriving minorities of the ability to form a winning coalition does not result in vote dilution "on account of race" and does not mean that minorities have "less opportunity than other members of the electorate . . . to elect representatives of their choice." 42 U.S.C. §1973(b). Bi-racial coalitions are not defined by "race" and are not protected by the Voting Rights Act; racial and ethnic groups are. African Americans are not provided with "less opportunity than other members of the electorate" if they are unable to form a winning coalition because no racial group (or group defined by any other characteristic) has a right to form a winning coalition. To the contrary, they would be in precisely the same position as any other group constituting a minority of the population: their ability to elect their preferred candidate will be frustrated unless they are able to persuade the majority of the relative merits of their candidate. Granting minorities a right to rearrange districts so that their political coalition will usually win would by no means further equal opportunity. *See Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994) ("[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground" to elect their preferred representatives.).

In addition, the *Gingles* majority-in-a-district requirement reflects the only understanding of “to elect” that is consistent with the rest of the language of Section 2. An electoral device is illegal only if it deprives a “class of citizens protected by subsection (a)”—*i.e.*, a racial or language minority group—of the ability to elect. 42 U.S.C. §1973(b). That being so, the only appropriate focus for determining whether a “class” has the power to elect is a focus on that class of citizens. It makes no sense to look at that class, *plus* an additional group of citizens from different racial or ethnic groups that happen to share the political preferences of the minority voters. *See Nixon v. Kent County*, 76 F.3d 1381, 1392 (CA6 1996) (biracial coalition that loses elections is “indistinguishable from political minorities as opposed to racial minorities”).

Indeed, the political realities of “influence” districts are well illustrated by the testimony of Representative Ron Wilson, a Black Democrat and 28-year veteran of the Texas Legislature:

“[T]o me, when you talk about influence District or impact Districts, I call them begging and pleading Districts or step ‘n fetch it Districts. Those are -- that term, I think, was originated by the segregationists when they tried to stop us from going to single member Districts. They said, oh, no, you have great influence as -- as your votes are in a county-wide race. Because you make up 15 to 20 percent of the county, you can influence all these folks. I mean, that was their argument against going to single member Districts, and now the same thing has cropped up now in this debate.” Tr. 12/18/03 PM at 69:9-69:19.

At base, Applicants’ theory concerning “influence” districts, that no district can be altered where the candidate favored by a majority of African-American or Hispanic voters is currently prevailing—irrespective of the levels of minority population or cohesion—would operate (and is intended to operate) simply to protect all Democratic incumbents from ever facing a modification of their districts. That partisan end was not the intent of the Voting Rights Act.

Finally, there is one additional reason that the Court should reject Applicants' effort to conflate the issue of whether African Americans constitute a potential numerical majority with the entirely distinct question of whether a bi-racial coalition of African Americans and "crossover" Anglos can elect a Black-preferred candidate: any such interpretation would render the first *Gingles* precondition an entirely superfluous subpart of the third *Gingles* precondition. In Applicants' view of the first *Gingles* prong, if minorities bloc vote under the second *Gingles* prong, and Anglos vote sufficiently as a bloc under the third *Gingles* prong to defeat the minority-preferred candidate, Plaintiffs have established vote dilution sufficient to require increasing minority population to the point at which the minorities' preferred candidate could be elected in combination with Anglo crossover voting. Thus, the only required vote-dilution showing is that minority-preferred candidates lose because a sufficient portion of the Anglo majority votes against them. This, of course, is precisely the same showing that Plaintiffs would need to make under the third *Gingles* prong if the first *Gingles* precondition were entirely eliminated.

**C. Applicants' "Intentional" Discrimination Claims Are Directly Contrary to This Court's Redistricting Precedents And, In Any Event, Are Unsupported by the Record.**

Applicants argue that the State engaged in intentional race discrimination by eliminating former District 24. The District Court, however, was unanimous in rejecting that argument. *See* Majority Op., at 21-22; Dissent, at 23. And in so doing, the District Court judged the credibility of witnesses and found that the State possessed no racial motive in drawing district lines. Majority Op., at 24 ("There is little question but that the *single-minded* purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage.") (emphasis added). The District Court reiterated this conclusion in examining specific features challenged by Applicants. *Id.* at 27. The

Court described lengthy testimony from Texas legislators describing the political influences that shaped district lines and stated that “[w]e find these unchallenged explanations to be credible.” Majority Op., at 27. The District Court further noted that even Senator Ratliff—who did not support the redistricting effort—agreed that “political gain for the Republicans was 110% of the motivation for the Plan, that it was ‘the entire motivation.’” Majority Op., at 28.

Even if the District Court had not concluded that the State utterly lacked discriminatory intent, however, allegations of bad intent could not excuse Plaintiffs’ failure to satisfy the *Gingles* preconditions. This Court has explained that Section 2 “focuses exclusively on the consequences of apportionment. Only if the apportionment scheme has the effect of denying a protected class the equal opportunity to elect its candidate of choice does it violate § 2; where such an effect has not been demonstrated, § 2 simply does not speak to the matter.” *Voinovich v. Quilter*, 507 U.S. 146, 155 (1993). The statute “speaks only of results and makes no distinction between the intentional and unintentional causes thereof.” *Turner v. Arkansas*, 784 F. Supp. 553, 569 (E.D. Ark. 1991), *aff’d*, 504 U.S. 952 (1992).

The *Gingles* standards are necessary preconditions to the existence of Section 2 effects. An invidious purpose by a legislature, even if true, cannot somehow make it possible for an apportionment scheme to deny something—*i.e.*, an opportunity to elect candidates of choice—that has no potential to exist. Allowing plaintiffs to bypass the *Gingles* requirements by alleging purposeful discrimination would render the *Gingles* preconditions superfluous. Indeed, this would run directly contrary to Congress’s reason for removing intent from the Section 2 calculus, which was that an inquiry into intent “asks the wrong question.” S. Rep. No. 417, at 36, reprinted in 1982 U.S.C.C.A.N. 177, 214.

Applicants cite the pre-*Voinovich* case of *Garza v. County of Los Angeles*, 918 F.2d 763 (CA9 1990), but, as Judge Reinhardt observed, “*Garza* . . . does not provide the clear direction that the plaintiffs assert [that] it does.” *Cano v. Davis*, 211 F. Supp. 2d 1208, 1249 (C.D. Cal. 2002), *aff’d*, 537 U.S. 1100 (2003). At most, *Garza* held only that the effects requirement for constitutional claims differs from the effects requirement for Section 2 claims, “because the constitutional claims are not burdened by the language of Section 2.”<sup>9</sup> *Turner*, 784 F. Supp., at 571 n.16.

This Court has held that a showing of intent—not mere awareness—is a prerequisite to the establishment of an Equal Protection claim. *See Washington v. Davis*, 426 U.S. 229 (1976); *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (“‘Discriminatory purpose,’ however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”) (citation omitted).

**D. The District Court Correctly Concluded That Plaintiffs Failed to Prove a Section 2 Claim With Regard to District 23.**

The District Court’s rejection of Applicants’ Section 2 claim in regard to District 23 was correct.<sup>10</sup> The court noted at the outset that the question of whether Section 2 requires an additional Hispanic district in South and West Texas had been determined in prior litigation and affirmed by this Court. Majority Op., at 59 (“The *Balderas* panel found that Plaintiffs had failed to prove that

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9. Indeed, subsequent cases—including one affirmed by the Ninth Circuit—hold that *Garza* applies to constitutional but not statutory claims. *See id.*; *DeBaca v. County of San Diego*, 794 F. Supp. 990, 993-94 (S.D. Cal. 1992), *aff’d*, 5 F.3d 535 (CA9 1993).

10. The question of whether District 23 violated the Voting Rights Act is the single question on which the Dissent noted that it would reach a different conclusion than the panel. Dissent, at 3. Yet, Applicants did not ask the District Court for a stay on this ground, instead only asserting equal-protection grounds in regard to District 23.

§ 2 required the creation of an additional Latino citizen voting age majority congressional district in South and West Texas. Plaintiffs appealed that finding; the Supreme Court summarily affirmed. The additional census data Plaintiffs present does not alter the validity of that finding.”).

Moreover, the District Court also addressed the question of whether any new Section 2 district would need to be drawn in place of District 23 under the totality of the circumstances:

“Even if this court were to assume that the finding in *Balderas* rejecting the claim that an additional Hispanic citizen voting age population majority district should be drawn in South and West Texas was entitled to no weight, and even if this court were to overlook the *Gingles* problems reflected in the proffered demonstration plan, the GI Forum Plaintiffs have failed to make the necessary showing under § 2. . . . [A]ny examination of the totality of the circumstances beyond *Gingles* must include proportionality.” Majority Op., at 60-61.

The District Court concluded that Plan 1374C was roughly proportional on both a regional and statewide basis. Majority Op., at 63 (“[S]ix out of the seven districts in South and West Texas are Latino citizen voting age majority districts. Given the fact that Latinos comprise 58% of the citizen voting age population in South and West Texas, proportionality is satisfied as to that area.”); *id.*, at 81 (“The totality of facts and circumstances, including those pointing to proportionality, as well as past and predicted election outcomes and evidence as to the likely functioning of the newly-configured districts, does not show a violation of § 2 in South and West Texas under Plan 1374C.”).

The District Court’s conclusion on these points is correct. Although Plaintiffs have alleged that Hispanics could numerically comprise the citizen majority of seven districts, they have not established that Plan 1374C denies or abridges the right to vote “on account of race or color” by causing Hispanics to “have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice.” 42 U.S.C. §1973(b). A violation of

the Voting Rights Act is established only if “the political processes leading to nomination or election . . . are not equally open to participation by [minorities].” 42 U.S.C. §1973(b) (emphasis added). The District Court correctly determined that Latinos do not have less opportunity to participate in the political process in Texas, especially given the Court’s conclusion that, while Latino voters may not ultimately control the general election in District 23, “Latino voters will likely control every primary outcome.” Majority Op., at 80.

**E. The District Court Correctly Concluded That Plaintiffs Failed to Prove A Racial Gerrymandering Claim With Regard to District 25.**

Applicants alleged that District 25 is an unconstitutional racial gerrymander, and their burden was to prove that the district had no rational explanation other than as an effort to separate voters based on race and that matters of race predominated over matters of politics and other traditional redistricting factors. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). The District Court—after examining expert reports, hearing live testimony, and evaluating the credibility of witnesses—properly concluded that Plaintiffs failed to meet that burden. In sum: (1) Applicants did not show that race predominated over the plain partisan concerns driving redistricting, *see Hunt v. Cromartie*, 526 U.S. 541, 547 (1999) (*Cromartie I*); (2) they did not show that the resulting district shape is so bizarre as to raise any inference of racial discrimination, *Shaw v. Hunt*, 517 U.S. 899, 905-06 (1996) (*Shaw II*); and (3) they did not prove that there was no non-racial explanation for the district lines in Plan 1374C, *see Easley v. Cromartie*, 532 U.S. 234, 257 (2001) (*Cromartie II*). Consequently, the District Court correctly concluded that “the districting decisions involved in Plan 1374C are best explained by Texas’s geography and population distribution and its Legislature’s predominantly political intent.” Majority Op., at 95.

The District Court is correct that District 25 is best explained through a combination of geography and politics. Rather than address those fundamental issues, Applicants have chosen instead to mischaracterize the District Court’s decision. For example, Applicants cite the majority opinion for the proposition that sparsely populated counties “serv[e] as little more than a ‘land bridge.’” Appl. Br., at 35-36 (citing Majority Op., at 77, 85). The District Court concluded no such thing. Instead, with no mention of a “land bridge,” the Court concluded that “Texas has vast geographical areas with widely dispersed population; except for areas around major cities, the State is a challenge for any redistricter who cherishes compactness as a value.” Majority Op., at 85.

Furthermore, while Applicants claim that “the court below derided [three districts] as ‘bacon strip’ districts,” Appl. Br., at 35, the Court in fact never derided district shapes at all. On the contrary, the Court concluded that the district shapes were primarily driven by the State’s geography and that “[n]either the districts’ shape nor their shape in relation to ethnic demographics and population densities provides circumstantial evidence of forbidden racial gerrymandering.” Majority Op., at 86. Indeed, the District Court explained the shape of districts such as District 25—which resembles in shape a number of districts in Plan 1151C—as being driven by the unique geography of that region of Texas. Majority Op., at 85. The region of the State containing District 25 is wedged between the United States-Mexico border to the south and west, and the contours of the Texas Gulf Coast to the east. Finally, while Applicants challenge the smallest-circle measures of District 25, they ignore the District Court’s finding that, within South and West Texas, the smallest-circle measure “examined in relation to the geography and population, reflect[s] the sheer size and population distribution of the area, rather than a calculated stretch to find voters of a particular ethnic makeup.” Majority Op., at 86.

Applicants do not present this Court with proof that any particular line-drawing decisions in these challenged districts were made predominantly on the basis of race. To the contrary, the District Court concluded that map drawer Bob Davis and Representative Phil King, two of the State's witnesses who testified at the trial, "provided credible testimony that the numerous decisions embodied in the location of *each district line* combined the broad political goal of increasing Republican seats with the local political decisions that are the *most traditional of districting criteria*." Majority Op., at 91 (emphasis added).

**III. THE EQUITIES FAVOR ALLOWING THE 2004 CONGRESSIONAL ELECTIONS TO PROCEED UNDER THE MAP APPROVED BY THE DISTRICT COURT.**

**A. Applicants Have Not Shown Irreparable Harm.**

Before Applicants can be entitled to emergency relief from this Court, they must demonstrate that they themselves will suffer irreparable harm. *See Graddick v. Newman*, 453 U.S. 928, 933-34 (1981). The Applicants who are congressional incumbents have shown no cognizable harm that would be irreparable. Only three of the Applicants are incumbent congresspersons: Chris Bell, Gene Green, and Nick Lampson. *See* Notice of Appeal (Jan. 7, 2004) (Appl. App. A). None of those incumbents represent any of the districts that are subject to specific challenge in this application: old District 23, old District 24, or new District 25. Thus, setting aside the partisan gerrymandering claim, no Applicant can claim cognizable personal harm from the loss of his or her own incumbency advantage.

Nor have Applicants demonstrated irreparable harm to voters who reside in those challenged districts. Only voters in District 24 would conceivably be able to assert such an interest in protecting their own incumbent; the other two challenged districts either have no incumbent at all (new District

25) or have an incumbent that Applicants have no interest in reelecting (District 23, represented by Republican Henry Bonilla). Appl. Br., at 34, 36. And the “incumbency advantage” that residents of District 24 might seek to protect for their congressperson, Martin Frost, is inadequate to support any interim equitable relief, for three reasons.

*First*, Applicants’ irreparable-harm argument contradicts their Voting Rights Act claim. Applicants argue that the harm to them will be “irreparable” because, once voted out of office, the former incumbent would not be able to win a fair election in 2006 even if the Court were to eventually impose the exact map that they ask this Court to impose on an interim basis now. Appl. Br., at 41. But it cannot be true both that (1) District 24 is somehow a performing opportunity district in which African-Americans are reliably able to elect their candidate of choice, *see* Appl. Br., at 19, and (2) Martin Frost would be unable to win an election in District 24 in 2006 once he loses an election in another district configuration in 2004, *see* Appl. Br., at 41. Either the old District 24 can elect the minority candidate of choice or it cannot.

*Second*, emergency relief to protect an “incumbency advantage” disserves the public interest and is itself inequitable. The advantages inherent in incumbency can be a force that distorts popular will—for example, under Plan 1151C in Texas in 2002, every single incumbent running for reelection won (28 out of 28), cementing a 17-15 Democratic majority in the congressional delegation despite that party’s clearly losing in every measure of statewide party support. *See* Secretary of State website, <http://www.sos.state.tx.us/elections/historical/> (last visited Jan. 13, 2004).

*Third*, as to voters in Representative Frost’s district, whether these Applicants will suffer any harm at all is very much in doubt. Representative Frost has declared his intention to seek reelection,

and he has announced that he intends to spend \$3 million to do so.<sup>11</sup> Even under Plan 1374C, Representative Frost does not fear that he will lose the election. There is no call for this Court to issue emergency relief merely to ensure that he wins.

**B. Enjoining Plan 1374C Would Inflict Certain Harm on the Texas Legislature and the Voters Who Elected It, While Any Harm to Applicants Is Pure Speculation.**

Considering the relative risks of harm to each side, the balance of equities strongly favors allowing the 2004 elections to proceed under Plan 1374C. There is virtually no chance that, on any of these claims, the ultimate remedy would have been to toss aside Plan 1374C in favor of the court-drawn Plan 1151C, which had been repudiated by the Texas Legislature's enactment of Plan 1374C. By contrast, it is certain that a stay or injunction against Plan 1374C would sacrifice those legislatively made policy preferences, replacing them with the court-drawn policy preferences embodied in Plan 1151C. Accordingly, leaving Plan 1374C in effect avoids certain harm, while enjoining it rewards the Applicants with relief they could not have achieved below.

Nor is there any merit to Applicants' contention that the "safer" course is to use the now-superseded Plan 1151C. As between the two maps, only Plan 1374C reflects the policy preferences of the Texas Legislature; indeed, the enactment of Plan 1374C expressly repudiated the policy choices inherent in the prior plan. Of the two maps, only the legislative Plan 1374C has been approved by the Department of Justice after scrutiny for compliance with Section 5 of the Voting Rights Act concerning retrogression. By contrast, Plan 1151C, as a court-drawn plan remedying population changes, was never even submitted to the Department of Justice. And of the two maps,

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11. Mark Wagner & Richard E. Cohen, *Turner Hints at Retirement, Frost Vows to Fight in Texas*, CONGRESS DAILY, Jan. 7, 2004, available at 2004 WL 61703597.

only Plan 1374C has been subjected to testing by the fire of the adversarial trial process, with numerous witnesses, exhibits, and expert witnesses focusing precisely on Plan 1374C's exact configuration. By contrast, Plan 1151C did not even exist at the close of the Texas redistricting trial in 2001; it was drawn by the court in an effort to minimize change from the prior map. Majority Op., at 20; *Balderas* order, at 4-9. Thus, other than the very limited issues considered on appeal, Plan 1151C was never subjected to adversarial scrutiny.

Far from being the less-tested map, Plan 1374C has been approved by a state legislative body, a federal agency, and a federal three-judge court. Applicants' argument that the safer course is to use instead Plan 1151C is unpersuasive when the judicial "remedial" plan was never so thoroughly validated.

And, at the very least, the partisan history embedded in the lines of Plan 1151C means that Applicants can hardly claim that it is the lesser of partisan evils. When drawn in 2001, Plan 1151C in large part preserved the district lines drawn by the Texas Legislature in 1991, a map that "is cited by political scientists as the shrewdest of the 1990s." *See* Majority Op., at 43 (citing MICHAEL BARONE, *THE ALMANAC OF AMERICAN POLITICS* 2004, at 1448 ("The plan carefully constructs Democratic districts with incredibly convoluted lines and packs heavily Republican suburban districts into just a few districts.")). Because the District Court was constrained in 2001 from making its own policy judgments, that earlier partisan gerrymander largely remained effective—so much so that Democrats continued to win a majority of the congressional seats in 2002 despite gaining only approximately 45% of the vote in most statewide races. *See* Secretary of State website, <http://www.sos.state.tx.us/elections/historical/> (last visited Jan. 13, 2004). Thus, to the extent this Court is forced to choose between maps based on partisanship, its choice is between Plan 1374C,

which reflects the current will of the elected representatives in the state Legislature, or Plan 1151C, which still reflects the dead-hand wishes of the political party that has lost power in Texas and has been rebuffed by Texas voters in the last several election cycles. Fundamental democratic and constitutional values favor using Plan 1374C.

Nor should Applicants' assertion that the "delay" leading to the short time before the March 2004 congressional primaries be held against the State of Texas. The Texas Legislature was twice thwarted in its attempts earlier 2003 to pass redistricting bills by legislators leaving the state to bust a quorum, shutting down the Texas Legislature entirely. Majority Op., at 4; *see also* Appl. Br., at 8. One of the Members of the Texas House who left the State in May 2003 to delay the inevitable adoption of a new redistricting map is one of the Applicants here, Rep. Richard Raymond, *see* Tr. 12/15/03 PM 75:23-76:12—indeed, he is the only Applicant from the challenged District 23. The subsequent five months of elapsed time, stretching to a third special session, is due to such delay tactics by, among others, the Applicants here.

**C. Enjoining Plan 1374C Would Also Harm the Public and Other Non-Parties Through Increased Voter Confusion and Disruptions to Ongoing Election Preparations, Including Candidates Already Filing and Campaigning Under the New Map.**

On November 7, 2003, certain Applicants—including the only Applicants from Districts 23, 24, or 25—submitted to the District Court a proposed order for interim relief in advance of trial. Submission of the Mayfield, Manley and Jackson Plaintiffs, the Texas Democratic Congressional Intervenors and the Texas Democratic Party of a Proposed Order Governing the Election Process Pending a Decision of This Court in *Session v. Perry*, Civil Action No. 2:03-CV-354 (E.D. Tex. Nov. 12, 2003) (three-judge court). That submission asked the District Court to order that voter

registration cards not be mailed before January 11, 2004 and to order the latest filing date under either map be January 16, 2004. *Id.* On November 12, 2003, the District Court ordered relief substantially like that requested by Applicants, ordering both those deadlines into place. *See Order Ensuring Orderly Preparations for March 2004 General Primary Elections, Sessions v. Perry, C.A. no. 2:03-CV-354 (E.D. Tex. Nov. 12, 2003) (three-judge court) (Appl. App. P).*

Given their own proposed and adopted schedule, it is surprising that Applicants suggest to this Court that “no significant steps in the electoral process leading to the March 2004 primaries can take place until January 19 at the earliest.” Appl. Br., at 12. By that time, voter registration cards may well be printed and mailed, and candidates will have had to choose definitively whether to run and in which districts. Indeed, it is difficult to conceive of anything “significant” related to the elections that may *not* have taken place by January 19, except for completing the campaigns.

Thus, an injunction from this Court reinstating the prior congressional district map would harm both the public and non-parties who are candidates. The public would be harmed by confusion arising from multiple voter-registration cards and further confusion about district lines. The Court has relied on similar disruption to deny interim injunctive relief in the electoral context. *See Graves v. Barnes*, 405 U.S. 1201, 1204 (1972) (Powell, J., in chambers) (holding that a stay should not be granted in a legislative reapportionment case, in part because “the order of the [district] court was narrowly drawn to effectuate its decision with a minimum of interference with the State’s legislative processes, and with a minimum of administrative confusion in the short run”); *see also Fishman v. Schaffer*, 429 U.S. 1325, 1330 (1976) (Marshall, J., in chambers) (noting disruption where ballots had already been printed and some distributed).

Moreover, those prospective candidates who have substantially relied upon the District Court's January 6, 2004 order would be harmed. Candidates are already filing and announcing their candidacies under the new district map.<sup>12</sup> Others have resigned from judicial offices or withdrawn from other state-level races so that they can enter their chosen congressional races under the new map.<sup>13</sup> And of course, all candidates have been aggressively campaigning in their new districts, raising public awareness and expectations that the new district lines will be used.<sup>14</sup>

These harms to the public at large and the popular will as expressed through Texas's duly elected Legislature, as well as to numerous third parties, are an inevitable result of the relief sought by Applicants. The balance of harms therefore tilts strongly against such an interim injunction.

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12. *E.g.*, Jack Douglas Jr., *Republican Favorite Files for Frost's Seat in New District 24*, FORT WORTH STAR-TELEGRAM, Jan 14, 2004 (noting that State Sen. Kenny Marchant has filed in District 24, "veteran U.S. Rep. Charles Stenholm, D-Abilene, announced he will seek re-election in the newly drawn 19th congressional district," and state Rep. Arlene Wohlgemuth has filed in District 17).

13. Michael King, *Naked City: More Redistricting Fallout*, AUSTIN CHRONICLE, Jan. 9, 2004 (noting that Wohlgemuth "put all her political eggs in that basket by deciding not to refile for her House seat"); Mariano Castillo, *McAllen Judge to Run for Congress*, SAN ANTONIO EXPRESS NEWS, Jan. 9, 2004 (noting that Leticia Hinojosa has resigned from a state judgeship in order to run for Congress in District 25).

14. *E.g.*, Douglas, *supra*; *see also* KXAN 36 News, *Election Officials Trying To Get Everyone Informed*, Jan. 13, 2004 at <http://www.kxan.com/Global/story.asp?S=1599597&nav=0s3dKAwo> (noting that "notification is being sent to all Travis County voters beginning this week" regarding district changes).

## CONCLUSION

For the foregoing reasons, Respondents-Appellees respectfully request that this Court deny the relief requested by Applicants-Appellants.

Respectfully submitted,

GREG ABBOTT  
Attorney General of Texas

BARRY R. McBEE  
First Assistant Attorney General

EDWARD D. BURBACH  
Deputy Attorney General for Litigation

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R. TED CRUZ  
Solicitor General  
*Counsel of Record*

DON R. WILLETT  
Deputy Attorney General for Legal Counsel

DON CRUSE  
Assistant Solicitor General

CASSANDRA ROBERTSON  
Assistant Solicitor General

**OFFICE OF THE ATTORNEY GENERAL**  
P.O. Box 12548 (MC 059)  
Austin, Texas 78711-2548  
[Tel.] 512/936-1700  
[Fax] 512/474-2697

**ATTORNEYS FOR RESPONDENTS-APPELLEES**

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of State Defendants' Opposition to Stay and to Emergency Injunction has been sent via e-mail and via UPS Next Day Service on January 14, 2004, to counsel of record.

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R. Ted Cruz