No. 03-9644

In the Supreme Court of the United States

FRENCHIE HENDERSON,
Appellant,

v.

RICK PERRY, GOVERNOR OF TEXAS, *ET AL.*,
Appellees.

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

MOTION TO AFFIRM

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Question Presented

Whether the Elections Clause of the United States Constitution or a federal statute adopted thereunder prohibits a state legislature from replacing a court-drawn congressional districting plan with a legislatively drawn plan.

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

MOTION TO AFFIRM

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

STATEMENT OF THE CASE

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

gerrymander of the 1990s. J.S. App., at 43a (citing MICHAEL BARONE, THE ALMANAC OF AMERICAN POLITICS 2004, at 1448).[1]

Over the next twelve years, that plan was judicially modified twice,[2] including in 2001 when two new congressional seats were added after the 2000 census. App., at 1a. But, throughout those modifications, the basic contours of the plan remained the same,[3] preserving the districts of incumbent Democratic Members of Congress despite the growing Republican leanings of the Texas electorate.[4]

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1. Appellant's jurisdictional statement will be cited as "J.S.," and his appendix items will be cited as "J.S. App." The State's appendix is cited as "App."

2. In 1996, three of Texas's then-thirty congressional districts were redrawn as part of the *Bush v. Vera* litigation. *See* 933 F.Supp. 1341 (S.D. Tex. 1996), *remanded from Bush v. Vera*, 517 U.S. 952 (1996), *aff'g*, *Vera v. Bush*, 861 F.Supp. 1304 (S.D. Tex. 1994) (finding these three districts unconstitutional but staying the effect of its decision pending appeal); *see also Vera v. Bush*, 980 F.Supp. 251 (S.D. Tex. 1997) (leaving the court-drawn districts in place). The second judicial modification was in 2001. App., at 1a.

3. In 2001, the federal court plan added two seats while causing the least disruption to the existing plan, J.S. App., at 170; *see also id.*, at 171 ("It was plain that . . . no incumbent was paired with another incumbent or significantly harmed by the plan."). As a result, all 28 incumbents who ran for reelection won back their seats.

4. By 2002, Texas voters had elected Republicans to 27 out of 27 statewide elected offices and to majorities in both Houses of the State Legislature. *See* http://www.sos.state.tx.us/elections/historical/; *see also* J.S. App., at 4a. The Republican candidate for governor in 2002 prevailed with 58 percent of the vote, *id.*, and the Republican candidate for governor in 1998 garnered 69 percent of the statewide vote, *id.* Nevertheless, despite these statewide voting trends, in 2002 Democrats still maintained a majority in congressional delegation, which was split 17 to 15. *Id.*

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

Following extensive discovery, two weeks of trial, and dozens of witnesses, the three-judge federal court affirmed the legality of the plan in all respects. The court engaged in a careful weighing of the evidence, assessed the credibility of the witnesses, sifted through the facts concerning each contested congressional district, and issued a detailed and thorough 99-page opinion affirming the legality of Plan 1374C.

Appellant's Statement of the Case presents a selective account that is contrary to the three-judge court's factual findings and legal conclusions.[5] Appellees refer the Court to the three-judge court's

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5. For example, any suggestion by Appellant that the remedy imposed in Texas's 2001 redistricting litigation was intended to foreclose further legislative action is inaccurate. *See* J.S., at 3-4. The 2001 remedy was a court-drawn plan (Plan 1151C) that rectified a lack of equipopulosity due, in part, to Texas's two newly awarded congressional seats. *Balderas v. Texas*, No. 6:01CV158 (E.D. Tex. Nov. 14, 2001) (three-judge court) (App., at 1a), *aff'd*, 536 U.S. 919 (2002). The court expressly invited those not happy with the remedial map it had drawn to seek relief in the Texas Legislature. App., at 8a, 11a-12a. Specifically, although several groups had urged the creation of additional majority-minority districts, the Court concluded that "[t]hese districts are not required by law." App., at 8a. Thus, these permissive districts "could be created by the State . . . . Whether to do so is, however, a quintessentially legislative decision, implicating important policy concerns." App., at 8a. Accordingly, the Court concluded that "the matter of creating such a permissive district is one for the legislature," App., at 11a, and the

careful factual findings and evaluation of Appellant's contentions. *See* J.S. App., at 1a-21a.

ARGUMENT

The judgment below has yielded five separate appeals to this Court.[6] Four of the jurisdictional statements challenge what they term "mid-decade" redistricting. Although the Texas Legislature had not passed a congressional redistricting plan for twelve years, the appellants repeatedly frame their challenge as one to state legislatures' revisiting redistricting multiple times in a single decade.

In the face of explicit constitutional language and Supreme Court precedent making clear that it is the prerogative and primary responsibility of state legislatures to redistrict, the appellants ask the courts to engraft an additional limitation onto the Constitution.

Each set of appellants has a different theory as to why they believe "mid-decade" redistricting should be judicially prohibited: the Jackson Appellants urge a fusion with the Court's political gerrymandering cases; the Travis County Appellants suggest modifying the "one-person, one-vote" standards to require updating the census count more often than once a decade; Appellants Congresswomen Lee and Johnson rely on the Census Clause of the U.S. Constitution, and Henderson, Appellant in the instant proceeding, relies on a federal statute, 2 U.S.C §2c.

"arguments so ably presented" on behalf of such districts "are directed to the wrong forum." App., at 12a. In 2003, the Legislature accepted the court's invitation and, in Plan 1374C, created the two additional minority opportunity districts that plaintiffs had sought in *Balderas*.

6. In addition to this appeal, see also *Jackson v. Perry*, (No. 03-1391); *American GI Forum v. Perry*, (No. 03-1396); *Jackson Lee v. Perry*, (No. 03-1399); *Travis County v. Perry*, (No. 03-1400).

Although creative, none of these theories is persuasive. Each will be addressed in the relevant Motion to Affirm.[7]

THE QUESTIONS PRESENTED ARE INSUBSTANTIAL

On the issue of "mid-decade" redistricting, these appeals present no split of authority whatsoever. Nor do they implicate the broad policy specter repeatedly invoked—that of state legislatures returning seriatim, year after year, to redistrict throughout the decade. The facts of this case do not present the Court with an opportunity to address that question. Rather, this case concerns a factbound application of settled law to the unremarkable circumstances of a legislature adopting a redistricting plan following a judicial remedial plan that expressly invited the Legislature to do so. Given that the Texas Legislature had not adopted a congressional redistricting plan for twelve years prior, the issue of "mid-decade" redistricting simply is not presented.

The three-judge court unanimously rejected all of the challenges to so-called "mid-decade" redistricting. The majority opinion painstakingly refuted the appellants' individual arguments, J.S. App., at 4a-21a, and Judge Ward's limited dissent explicitly "join[ed] the court's decision that the Elections Clause does not prohibit mid-decade redistricting," *id.*, at 1b.

With respect to the specific legal theory raised by Appellant Henderson, no court has ever adopted it. It cannot be squared with the text of the Constitution, with the Court's redistricting precedents, or with the primary role delegated to state legislatures under the Elections Clause. There is no cause for the Court to resolve an appeal offering so insubstantial a legal basis.

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7. Because of these similarities, Part I of this Motion to Affirm necessarily covers the same ground as the respective Part I in the Motions to Affirm filed in those other appeals.

I. There Is No Prohibition on "Mid-Decade" Redistricting.

A. The Constitution Gives State Legislatures the Primary Responsibility for Redistricting.

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

> "The Times, Places and Manner of holding Elections for Senators and Representatives, *shall be prescribed in each State by the Legislature thereof*; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, §4, cl. 1 (emphasis added).

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

Moreover, under Texas law, "[t]he Legislature is the department constitutionally responsible for apportioning the State into federal congressional legislative districts." *Perry v. Del Rio*, 67 S.W.3d 85, 91 (Tex. 2001); *see also* Tex. Const. art. III, §1 ("The Legislative power of this State shall be vested in a Senate and House of

Representatives, which together shall be styled 'The Legislature of the State of Texas.'").

B. Congress Has Not Exercised Any Power to Regulate the Frequency with Which State Legislatures May Redistrict.

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

Congress has on occasion used its power under Article I, §4 to enact "such regulations." *See* U.S. CONST. art. I, §4, cl. 1. For example, Congress has provided a uniform day for congressional elections. *See* 2 U.S.C. §7. Congress has provided that votes for congressional candidates must be by written or printed ballots. *See* 2 U.S.C. §9. And, in regard to congressional districting, Congress has provided that Members of the House must be elected from single-member districts rather than the previously accepted practices of at-large statewide seats or multi-member districts. *See* 2 U.S.C. §2c ("[T]here shall be established by law a number of districts equal to the number of Representatives.").

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

its congressional districts. And, absent congressional prohibition, state legislatures retain broad authority over the decision to redistrict.

C. Federal Courts Have Repeatedly Recognized the Limited Nature of Court-Drawn Plans and the Primacy of State Legislative Plans in the Constitutional Scheme.

Given this broad grant of constitutional authority, when federal courts are forced to step into redistricting they do so in a limited way that recognizes the "primary jurisdiction" of the state legislatures in this field. *See Upham v. Seamon*, 456 U.S. 37, 41-42 (1982) (per curiam). Federal courts treat it as an "unwelcome obligation [to] perform[]in the legislature's stead," because, in the words of the Court, "a state legislature is the institution that is by far the best situated" to undertake redistricting. *Connor v. Finch*, 431 U.S. 407, 414-15 (1977). A federal court, meanwhile, "lack[s] the political authoritativeness that the legislature can bring to the task." *Id*., at 415. "Federal courts, unlike state legislatures, are not in a position to reconcile competing state policies on the electorate's behalf, nor to engage in political policy-making decisions. . . . [Courts] do not possess the latitude afforded a state legislature to advance political agendas." *Colleton County Council v. McConnell*, 201 F.Supp.2d 618, 628 (D.S.C. 2002); *see also Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests.").

Accordingly, federal court-ordered redistricting plans are focused on remedying violations of the Constitution or of the Voting Rights Act. As the three-judge court noted in adopting the 2001 Texas congressional map: "The Congress has by its enactment of voting rights laws constrained the political process and given the courts a role—to the extent of those constraints. We have no

warrant to impose our vision of 'proper' restraints upon the political process beyond the constraints imposed by the Constitution or the Voting Rights Act." App., at 12a; *see also* App., at 1a, 4a, 11a-12a (noting limited nature of the federal court role); *accord Upham*, 456 U.S., at 43 (holding that unless the plan violated the Constitution or the Voting Rights Act, "the District Court was not free . . . to disregard the political program of the Texas State Legislature").

As the Court has noted concerning the Voting Rights Act,

> "Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the 'unwelcome obligation' of the federal court to devise and impose a reapportionment plan *pending later legislative action*." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (emphasis added) (quoting *Connor v. Finch*, 431 U.S. 407, 415 (1977)).

These basic principles—that state legislatures have "primary jurisdiction" over redistricting, are the institution appropriate for the political nature of the task, and can best weigh competing state policies that go beyond minimum compliance with the law—lead to an inexorable result: the mere fact of a court-ordered plan does not foreclose a subsequent, legislative congressional redistricting plan, even within the same decade. *See Johnson v. Miller*, 922 F.Supp. 1556, 1569 (S.D. Ga. 1995) ("We do no harm with this plan, which cures the unconstitutionality of the former and can serve in 'caretaker' status until the legislature convenes to change it. *That may occur following the millennium census, or before*." (emphasis added)), *aff'd sub nom. Abrams v. Johnson*, 521 U.S. 74 (1997).

The presence of a prior court-ordered remedial plan does nothing to alter the Legislature's authority to adopt a subsequent redistricting plan. Indeed, one need no look no further than Texas's

own history of congressional redistricting to find repeated examples of courts deferring to the primary responsibility of the State Legislature to draw its own congressional districts, even immediately after a court-ordered remedial plan. *See* J.S. App., at 8a n.14 (collecting cases).[8]

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8. For example, in *Bush v. Martin*, 251 F.Supp. 484, 516 (S.D. Tex. 1966), the district court upheld a redistricting plan as minimally constitutional and expressly refuted the argument that the Legislature could not later alter it, even before the next decennial census: "That we do not find [the plan] deficient enough to set it aside and install one of our own is a long way from holding that it is free from shortcomings or that such shortcomings may somehow get frozen into the legislative thinking (or our own) as adequate criteria for the future." In *White v. Weiser*, 412 U.S. 783 (1973), the district court had indicated that its remedial plan was without prejudice to consideration and adoption of any new plan by the Legislature before the next census. *Id*., at 789. And even that limited order was too broad, and stayed by this Court, because the remedial plan had unnecessarily deviated from the policy choices made by the Texas Legislature. *Id*., at 795-97. Likewise, in *Upham*, the Court reversed a district court remedial plan as not "closely approximat[ing] the state-proposed plan." 456 U.S., at 42. In determining whether to allow the now-disapproved district-court plan to be used in the imminent elections, the Court expressly noted that it was "only an interim plan *and is subject to replacement by the legislature in 1983*." *Id*., at 44 (emphasis added).

In *Vera v. Bush*, 933 F.Supp. 1341 (S.D. Tex. 1996), the court ordered a remedial plan to rectify three unconstitutional districts. *Id*., at 1346, 1353. In response to an argument that the court should allow the 1996 elections to proceed under the old map, the court replied that the Legislature would be free to implement its own map when it met again: "[Texas Lieutenant Governor] Bullock and [House Speaker] Laney contend that the Texas Legislature is ready and willing to redistrict during its 1997 regular session. Of course, in any event, they will have

Consistent with this long line of cases, the three-judge court that drew a map for Texas in 2001 did not purport to divest the Texas Legislature of its authority to redistrict in the future. Indeed, the Legislature accepted the court's express invitation to undertake this "quintessentially legislative" task and create two new minority-opportunity districts in Texas through Plan 1374C. *See* App., at 11a-12a; *see also* note 5, *supra*. There is no support for Appellants' argument that the use of a court-ordered plan in the 2002 election cycle somehow precluded Plan 1374C.

II. THE CONSTITUTIONS OF OTHER STATES PROVIDE NO BASIS FOR IMPUTING INTO THE FEDERAL CONSTITUTION A JUDICIAL ASSESSMENT OF "NEED" AND "LEGITIMACY" OF THE REDISTRICTING DECISIONS OF STATE LEGISLATURES.

The three-judge court analyzed Appellant's constitutional argument about the Elections Clause in detail, concluding that "the Elections Clause itself—the provision in the Constitution that grants states the authority to redistrict—does not limit States to redistricting once per decade, particularly where, as here, the State's action follows a court-imposed map." J.S. App., at 9a; *see also* J.S. App., at 4a-9a.

Appellant suggests—with no citation to authority—that this explicit constitutional grant of redistricting power to state legislatures is somehow subject to an unspoken requirement that it be exercised only when there is a "*legitimate* governmental objective" or where there has been a "politically neutral change in

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that opportunity . . . ." *Id*., at 1346; *see also id*., at 1353. And in *Vera v. Bush*, 980 F.Supp. 251 (S.D. Tex. 1997), after the Texas Legislature failed to enact its own plan in 1997, the district court left its own interim plan in place for the 1998 election cycle. *Id*., at 254. The court, however, explicitly recognized that the Legislature was free to enact its own congressional redistricting plan as a replacement when it next met. *Id*., at 252-53.

circumstances." J.S., at 7 (emphasis in original). But no such words of limitation appear. *See* U.S. CONST. art. I, §4. The provision does not itself directly constrain the exercise of the delegated power. Rather, the role of regulating that power is expressly placed in congressional hands, *id*., and Congress has chosen not to act.

Because neither the United States Constitution nor the Texas Constitution contain the kind of restriction he proposes,[9] Appellant suggests looking to the constitutions of other States not involved in this litigation. *See* J.S., at 9-10. But all that comparison shows is how those state constitutions differ from the federal Constitution. Appellant invokes state court decisions interpreting the constitutions of the States of Kansas, New York, Indiana, West Virginia, Illinois, Pennsylvania, South Dakota, Ohio, Oklahoma, Alabama, and Connecticut. *See* J.S., at 9-10. All of those decisions are interpreting state constitutional texts—different from the federal Constitution—concerning restrictions on redrawing *state* legislative lines.

Of all the decisions Appellant cites, only two concern congressional districts. And those two, from California and Colorado, both involve state constitutional provisions that—unlike the Texas Constitution—expressly applied to congressional districts.[10]

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9. The Texas Constitution contains no restrictions on congressional redistricting. *See* TEX. CONST. art. III, §28. The Texas Attorney General has issued an official opinion concluding that Texas law does not prevent the Texas Legislature from redrawing congressional districts to replace a court-drawn plan. TEX. ATT'Y GEN. OP. GA-0063 (April 23, 2003).

10. *See People v. Salazar*, 79 P.3d 1221, 1236, 1237-38 (Colo. 2003) (construing Colorado constitutional provision about "congressional districts"), *cert. denied*, 124 S.Ct. 2228 (2004); *Legislature v. Deukmejian*, 669 P.2d 17, 25 (Cal. 1983) (considering constitutional

Notably absent from Appellant's list is any decision interpreting the United States Constitution or the Texas Constitution.

Appellant points to no state-court decision adopting Appellant's theory that "under their respective State Constitutions . . . the power of a legislature to enact political boundaries is limited, and *commensurate with the need* for such regulation." J.S., at 9 (emphasis in original). The cases instead turn on particular textual provisions of each State's constitution, not a broad judicial assumption of authority to test the legitimacy and need for each legislative action.

The language and structure of the Elections Clause likewise does not provide for a judicial role second-guessing the "need" for legislative action. Such judgments are left to the state legislatures, and to Congress.

III. CONGRESS HAS NOT REGULATED WHETHER STATE LEGISLATURES CAN REPLACE A COURT-DRAWN PLAN WITH A LEGISLATIVELY ENACTED PLAN.

Appellant's statutory argument is predicated on two laws that by their terms have nothing to do with when state legislatures may redraw congressional districts.

The first cited statute is 2 U.S.C. §2c. J.S., at 20-22. It deals instead with the number of districts that must be drawn:

> "**Number of Congressional Districts; number of Representatives from each District.** In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of section 2a(a) of this title, *there shall be established by law a*

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provision that applies to "Senatorial, Assembly, [and] *Congressional*" seats (emphasis added))

> *number of districts equal to the number of Representatives to which such State is so entitled*, and Representatives shall be elected only from districts so established, no district to elect more than one Representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress." 2 U.S.C. §2c (emphases added).

The heart of this provision is that "there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled." *Id.*; *see also Branch v. Smith*, 538 U.S. 254, 273 (2003) ("[I]n enacting 2 U.S.C. §2c, Congress mandated that States are to provide for the election of their Representatives from single-member districts, and that this mandate applies equally to courts remedying a state legislature's failure to redistrict constitutionally. . . ."). There is no dispute that Plan 1374C complies with the text of 2 U.S.C. §2c because it provides for single-member districts.

The second cited statute requires that House elections be held on a specified calendar date. J.S., at 12-14; 2 U.S.C. §7. There is similarly no dispute that Texas's congressional election calendar satisfies that federal statute.

Neither statute speaks to when congressional districts must be drawn. Nevertheless, Appellant contends that,

> "once the valid Congressional map in *Balderas v. Texas* . . . was ordered . . . by the three-judge District Court . . . under Title 2, U.S.C. Section 2c . . . , *no future Congressional redistricting statute revising the boundaries of Texas Congressional districts could constitutionally be enacted by the Texas Legislature* until after the next

> decennial enumeration or census . . . ." J.S., at 6-7 (emphasis added).

For this proposition, Appellant cites no authority whatsoever.[11]

Appellant's suggested "cannon [sic] of construction," J.S., at 10-14, prohibiting legislative authority to redistrict absent compelling need has no basis in the constitutional text or in this Court's precedents. *See* Part I, *supra*. Appellant's policy reasons supporting such a prohibition, J.S., at 13-17, 20-22, are addressed to the wrong forum. Congress has ample authority to prohibit "mid-decade" redistricting, U.S. CONST. art. I, §4, and could do so were it convinced of Appellant's emphatic policy concerns.

The remainder of Appellant's argument focuses on Texas's "traditional . . . districting principles." J.S., at 18-19. The presentation of this argument in the Jurisdictional Statement renders its contours difficult to follow. In his briefing below, Appellant explained this argument to mean that Texas bore the burden to show "a [s]tate custom, practice or policy" allowing mid-decade redistricting "in order for this Court to conclude that the *Balderas* court implicitly relied upon it, and when relying on it, intended to rule that the Texas Legislature should thereafter retain authority to revise congressional districts before the next federal decennial census." *See* Cherokee County Summary Judgment Br., at 9-10.[12]

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11. It is unsurprising that Appellant could marshal no authority for his proffered categorical prohibition on state legislatures' revisiting redistricting following a court-ordered plan, given that countless prior decisions of this Court and lower federal courts have held precisely to the contrary. *See* Part I.C, *supra*.

12. In the court below, Appellant was one of three plaintiffs styled the "Cherokee County Plaintiffs."

His argument is both wrong and irrelevant. It is irrelevant because past state "policies and preferences" limit only a *court's* authority when drawing a map, not the Legislature's. Courts must follow state policy and preferences because a court steps into the shoes of the Legislature and acts "in [its] stead." *Connor*, 431 U.S., at 414-15. Hence, hewing to prior state practices ensures that courts do not impermissibly enact their own policy predilections. *See*, *e.g.*, App., at 12a. ("The Congress has by its enactment of voting rights laws constrained the political process and given the courts a role—to the extent of those constraints. We have no warrant to impose our vision of 'proper' restraints upon the political process beyond the constraints imposed by the Constitution or the Voting Rights Act."); *see also Upham*, 456 U.S., at 43 (holding that unless the plan violated the Constitution or the Voting Rights Act, "the District Court was not free . . . to disregard the political program of the Texas State Legislature").

Unlike a court, the Legislature is not bound by prior state policy or practice. So long as it does not violate the Constitution or the Voting Rights Act, the Legislature is fully empowered to alter state district lines in any way it chooses, to change the state policy. Because of "the political authoritativeness that the legislature can bring to the task," *Connor*, 431 U.S., at 415, definitionally, a plan that the Legislature enacts *is* the state policy and preference.

Appellant's related argument that "traditional redistricting principles" were implicitly made into law "at the time the *Balderas* judgment was entered," Cherokee County Summary Judgment Br., at 21, is merely an attempt to bootstrap past policy to the *Balderas* opinion in order to constrain the Legislature in perpetuity. But, the *Balderas* judgment purported to do no such thing, nor could it have done so.

Even if past state policies and preferences were relevant, Appellant's recitation of those policies is incorrect. Before the

three-judge court, Appellant admitted, "[n]o Texas Constitution has ever explicitly prescribed either the standards or procedures for drawing congressional districts." Cherokee County Summary Judgment Br., at 9. Given the broad grant of authority to the Legislature in Article I, Section 4 of the U.S. Constitution—and the absence of any act of Congress prohibiting mid-decade redistricting—Appellant's concession was dispositive.

Beyond that, Appellant relied upon a provision of the Texas Constitution (a) governing *state* elections, (b) which he admitted has been repealed. That does not suffice to form any binding Texas policy or practice.

As Appellant conceded below, the only Texas constitutional provision on redistricting concerns districting for the *State* Legislature. *See* TEX. CONST. art. III, §28. And even that provision does not explicitly bar mid-decade redistricting, *id*., as Appellant admitted: This section "was amended in 1948 . . . and, as amended, no longer explicitly contains the requirement that once a valid redistricting statute has been enacted, it must remain in force 'until the next decennial census.'" Cherokee County Summary Judgment Br., at 12. Whether a *prior* version of the State Constitution did or did not prohibit mid-decade redistricting for *state* elections—as Appellant argued at some length below, Cherokee County Summary Judgment Br., at 12-14—simply has no bearing on whether there is any current prohibition on mid-decade congressional redistricting.

As the three-judge court observed in rejecting his argument,

> "Plaintiffs ask us to . . . restore a [Texas constitutional] provision removed over 100 years ago, apply it beyond its plain text to congressional redistricting, and strike down in the name of state law the first redistricting plan passed by the State Legislature since 1991." J.S. App., at 19a, n.48.

Thus, Appellant's argument about the past "policies and preferences" of Texas concerns a question of state law that the three-judge court resolved against him. *Id*. ("Plaintiffs have shown this court nothing in the Texas Constitution that would limit mid-decade redistricting."); *see also* TEX. ATT'Y GEN. OP. GA-0063 (April 23, 2003).

An unrelated, and now-repealed, provision of the Texas Constitution provides insufficient basis to infer an additional limitation on the Texas Legislature not found in the text of the United States Constitution.

CONCLUSION

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

Respectfully submitted,

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July 2004

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

SIMON BALDERAS, ET AL	§	
	§	CIVIL ACTION
vs.	§	NO. 6:01CV158
	§	
STATE OF TEXAS, ET AL.	§	

This Filing Applies to: All Actions

Before HIGGINBOTHAM, Circuit Judge, HANNAH and WARD, District Judges.

PER CURIAM:

This phase of the redistricting case involves the Texas congressional districts following the 2000 census. After a period of deferral to the State of Texas as mandated in *Growe v. Emison*[1] and the failure of the State to produce a congressional redistricting plan, we are left with the "unwelcome obligation of performing in the legislature's stead."[2] We will describe the course of this litigation

1. 507 U.S. 25 (1993).
2. *Connor v. Finch*, 431 U.S. 407, 415 (1977).

and explain the process by which we drew the congressional redistricting plan which we order.[3]

I

Voters and various officeholders filed multiple lawsuits in state and federal court challenging the districting of Texas' congressional seats and both houses of the state legislature based on the 2000 census.[4] The federal cases were consolidated into the earliest-filed federal action, *Balderas v. Texas*, No. 6:01-CV-158, before this three-judge court.[5] Pursuant to the Supreme Court's direction in *Growe*, on July 23, 2001 we deferred proceedings in federal court until October 1, 2001. We directed that the trial of any challenge to any state-adopted plan for congressional districts, or of any dispute over an appropriate plan to be adopted if the State adopted no plan, would begin on October 15, 2001. Any trials of the disputes over the districts for the state Senate and House would follow in that order. The record in each trial would rest on the trials which preceded it as well as its own. We prescribed the usual pre-trial tasks. All this was to reduce, if not avoid, any delay in the

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3. The Congressional Districts imposed by this court's Final Judgment shall bear the number 1151C, which is the next number available for public plans within the Texas Legislative Council's RedAppl 2001 computer program.

4. *Balderas v. Texas*, Civil No. 6:01-CV-158 (E.D. Tex.); *Mayfield v. Texas*, Civil No. 6:01-CV-218 (E.D. Tex.); *Manley v. Texas*, Civil No. 6:01-CV-231 (E.D. Tex.); *Del Rio v. Perry*, No. GN-003665 (353rd Dist. Ct., Travis County, Tex.); *Cotera v. Perry*, No. GN-101660 (353rd Dist. Ct., Travis County, Tex.); *Connolly v. Perry*, No. GN-102250 (98th Dist. Ct., Travis County, Tex.); *Associated Republicans of Texas v. Cuellar*, No. 2001-26894 (281st. Dist. Ct., Harris County, Tex.); *Rivas v. Cuellar*, No. 2001-33760 (152nd Dist. Ct., Harris County, Tex.).

5. Other three-judge courts had dismissed prior suits filed prematurely.

electoral process and to follow the specific command of the Supreme Court in *Growe*.

On September 12, 2001, the Texas Supreme Court determined that the Travis County trial court had dominant jurisdiction among the state cases to hear the various plaintiffs' redistricting claims and held that a state trial court in Travis County must decide the districting dispute. The Travis County court commenced trial on September 17, 2001. It heard testimony and arguments from all the parties, concluding trial on September 28, 2001.

On October 1, 2001, at the request of the state trial judge, we extended the deadline for the filing of any congressional redistricting plan to October 3, 2001. On October 3, the state trial court issued a plan, known as 1065C. No provision was made in our October 1 order for the filing of any new plan, although the state trial judge advised that he might modify the plan on or before October 10, 2001. The schedule we had provided did not contemplate major changes in the state court plan filed on October 3. On October 10, 2001, the state court nonetheless issued a new plan, known as 1089C. We immediately delayed the start of any federal trial for one week to October 22 at the request of the parties who pointed to the need for additional time given the substantial differences between the two plans of the state court. On October 19, 2001, however, the Texas Supreme Court vacated the trial court's October 10, 2001 judgment based on a violation of the parties' state constitutional rights and remanded the case to the state trial court.[6] The Texas Supreme Court also concluded that 1065C, the first plan of the state trial court, was not the baseline plan for this court to use, because 1065C was never adopted as a final judgment by the state trial court. The Texas Supreme Court acknowledged that the end result of the state processes left the

6. *Perry v. Del Rio*, No. 01-0988, 2001 WL 1285081, at *9 (Tex. Oct. 19, 2001).

federal courts with no choice but to proceed without the benefit of a state plan.[7]

As forecasted by the Texas Supreme Court, we proceeded to trial in Austin, Texas on October 22, 2001, without a state baseline plan in place. This court heard testimony and took evidence on congressional redistricting plans between October 22 and November 1, concluding with final argument on November 2. The parties filed post-trial briefs on November 7, 2001. After reviewing the evidence and the parties' submissions, we now turn to our decision implementing a plan for the redistricting of the Texas congressional districts based on the 2000 census.

II

Federal courts have a limited role in crafting a congressional redistricting plan where the State has failed to implement a plan. The limits are not to be found in the traces of the unconstitutional plan being replaced. "Although a court must defer to legislative judgments on reapportionment as much as possible, it is forbidden to do so when the legislative plan would not meet the special standards of population equality and racial fairness that are applicable to court-ordered plans."[8] Rather, the court must draw a redistricting plan according to "neutral districting factors," including, *inter alia*, compactness, contiguity, and respecting county and municipal boundaries.[9] The 1991 plan as modified in 1996 is conceded by all parties to be unconstitutional, made so by changes in population disclosed by the decennial census, if not also for other reasons. In our effort to steer the required neutral course through this political sea, we have been assisted by the many distinguished political scientists who have testified in this case.

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7. *Id.*

8. *Upham v. Seaman*, 456 U.S. 37, 39 (1982) (per curiam).

9. *See Abrams v. Johnson*, 521 U.S. 74, 88, 98 (1997); *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

Dr. John Alford, Rice University professor of political science, detailed in his trial testimony a process drawing upon principles of district line-drawing that stand politically neutral. We found that process, substantially parallel to our preliminary thinking and that of other courts, to be the most appropriate for our judicial task.

Our decisional process accepted the reality that, as with so many decisional processes, the sequence of decisions is critical. Starting with a blank map of Texas, we first drew in the existing Voting-Rights-Act-protected majority-minority districts. We were persuaded that the next step had to be to locate Districts 31 and 32, the two new Congressional seats allotted to Texas following the 2000 census. As observed by Dr. Alford, the most natural and neutral locator is to place them where the population growth that produced the new additional districts has occurred.[10] It is self-evident that this locator is, across cases, neutral down to the immediate area, if not in the ultimate, precise fit on the ground. Here the new districts' precise landing was virtually dictated by step 1. When we sent the two new districts to the areas of greatest population growth, Dallas County and Harris County, the districts necessarily landed in the northern half of these counties, and, in the case of District 31, continuing over to Williamson County. Their landing was directed by the location of the protected majority-minority districts in southern Dallas and Harris Counties, which could not be disrupted. Use of this neutral guide was further supported by the circumstance that the Texas legislature has

10. We are not the first court to see the wisdom of this choice. *See*, *e.g.*, *Johnson v. Miller*, 922 F.Supp. 1556, 1563 (S.D. Ga. 1995) (discussing the decision to place Georgia's additional congressional district in high population growth area near Atlanta), *aff'd sub nom.*, *Abrams v. Johnson*, 521 U.S. 74 (1997).

previously located new districts in the areas of greatest population growth.[11]

With a large part of the Texas map thus drawn, we looked to general historic locations of districts in the state, such as the districts in the Panhandle and the northeast corner of the state, the north central districts of the Red River area,[12] through the metropolitan districts and the central plains. We then drew in the remaining districts throughout the state, emphasizing compactness, while observing the contiguity requirement.[13] We struggled to follow local political boundaries that historically have defined communities--county and city lines.[14] In the vernacular, "splits" of counties and cities in our drawing had to be a product of our neutral standards and the demands of population equality. We eschewed an effort to treat old lines as an independent locator, an effort that,

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11. *See Bush v. Vera*, 517 U.S. 952, 1003 (1996) (Stevens, J., dissenting) ("Because Texas' growth was concentrated in south Texas and the cities of Dallas and Houston, the state legislature concluded that the new congressional districts should be carved out of existing districts in those areas.").

12. *Cf. Johnson*, 922 F.Supp. at 1565 (discussing Georgia's tradition of having four "corner districts" in its congressional plans).

13. *See Good v. Austin*, 800 F.Supp. 557, 563 (E.D. Mich. & W.D. Mich. 1992) ("In addition to serving as a check on gerrymandering compactness 'facilitates political organization, electoral campaigning, and constituent representation.'" (quoting *Karcher v. Daggett*, 462 U.S. 725, 756 (1983) (Stevens, J., concurring))).

14. *See Karcher*, 462 U.S., at 758 (Stevens, J., concurring) ("Subdivision boundaries tend to remain stable over time. Residents of political units such as townships, cities, and counties often develop a community of interest, particularly when the subdivision plays an important role in the provision of governmental services. In addition, legislative districts that do not cross subdivision boundaries are administratively convenient and less likely to confuse the voters." (footnote omitted)).

in any event, would be frustrated by the population changes in the last decade. Nonetheless, the districts fell to their long-held areas, a natural result of the process we have described, much the same as the map drawn at our request by the State using Dr. Alford's neutral approach.

As we have explained, in our efforts to avoid splitting counties and cities, and in particular "double splits," or simultaneously moving populations in and out of a county between two districts, we also strove for compactness and contiguity. Doing so did much to end most of the below-the-surface "ripples" of the 1991 plan and the myriad of submissions before us. For example, the patently irrational shapes of Districts 5 and 6 under the 1991 plan, widely-cited as the most extreme but successful gerrymandering in the country, are no more.

As a check against the outcome of our neutral principles, we asked if the resulting plan was avoidably detrimental to Members of Congress of either party holding unique, major leadership posts. We looked at three Democrats and three Republicans, consensus members of this limited group, each with substantial leadership positions in the Congress. It was plain that these Members were not harmed in their reelection prospects by this plan and that, indeed, no incumbent was paired with another incumbent or significantly harmed by the plan. We thus considered no change in our map in response to this inquiry. Doubtlessly some may see any such weighting as an incumbency factor since congressional leadership so directly correlates with seniority. This view is not without force. Nonetheless, three circumstances must also be considered. First, this correlation is no longer so complete. Second, it does not here offer purchase to one political party over another. And, finally, it reflects a traditional state interest in the power of its congressional delegation distinct from partisan affiliation.

Finally, we checked our plan against the test of general partisan outcome, comparing the number of districts leaning in favor of each party based on prior election results against the percentage breakdown statewide of votes cast for each party in congressional races. This is a traditional last check upon the rationality of any congressional redistricting plan,[15] widely relied-upon by political scientists to test plans, if only in a approximating manner. We found that the plan is likely to produce a congressional delegation roughly proportional to the party voting breakdown across the state. It must be understood that any plan necessarily begins with a Democratic bias due to the preservation of protected majority-minority districts, all of which contain a high percentage of Democratic voters.

III

Various parties urged us to create both African-American and Latino minority districts. These districts are not required by law, as discussed in more detail below, but could be created by the State so long as race was not a predominant reason for doing so. Whether to do so is, however, a quintessentially legislative decision, implicating important policy concerns.[16] We did not avoid creating such a district. At the same time, we did not depart from our neutral factors to draw any district not required by law. To do so would render our effort to keep our thumb off the political scale an illusion.[17]

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15. *See*, *e.g.*, *Good*, 800 F.Supp. at 566-67 (using partisan fairness to assess plan drawn according to neutral principles).

16. *See Wyche v. Madison Parish Police Jury*, 635 F.2d 1151, 1160 (5th Cir. Unit A Feb. 1981).

17. *Cf. Abrams*, 521 U.S., at 88.

IV

Finally, to state directly what is implicit in all that we have said: political gerrymandering, a purely partisan exercise, is inappropriate for a federal court drawing a congressional redistricting map.[18] Even at the hands of a legislative body, political gerrymandering is much a bloodfeud, in which revenge is exacted by the majority against its rival. We have left it to the political arena, as we must and wisely should. We do so because our role is limited and not because we see gerrymandering as other than what it is: an abuse of power that, at its core, evinces a fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good.

V

The parties presented competing plans for redistricting the Congressional seats. We have passed by the approach by which these plans were created in favor of the approach we have described, which we found to be mandated by our position as a federal court engaging in our "delicate task with limited legislative guidance."[19]

Several parties raise Voting Rights Act arguments in support of their preferred plans. In drawing our plan, we have endeavored to

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18. *See Hunt v. Cromartie*, 526 U.S. 541, 551 (1999); *see generally Davis v. Bandemer*, 478 U.S. 109, 117 n.6 (1986) (plurality opinion of White, J.); *cf. Wyche v. Madison Parish Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985) ("Many factors, such as the protection of incumbents, that are appropriate in the legislative development of an apportionment plan have no place in a plan formulated by the courts.").

19. *Abrams*, 521 U.S., at 101.

ensure that the plan complies with the goals of sections 2[20] and 5[21] of the Voting Rights Act.[22]

Our plan works no retrogression. We have maintained intact the existing districts, and, to the extent the boundaries have changed, as we "zeroed out" the plan, the minority populations have been either enhanced or not diminished in any meaningful way (*i.e.*, by mere fractions of percentages). Thus, although the minority populations in Districts 15, 16, and 30 represent a slightly smaller, but still overwhelming, percentage of the total populations of those districts as compared with the baseline 1991 plan as modified in 1996, we find that these changes do not result in "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[23]

The Balderas plaintiffs argue that the congressional plan must contain seven Latino registration majority districts, within nine Latino voting age majority districts, to avoid a section 2 violation. The Martinez intervenors specifically argue for a Latino opportunity district in Dallas County to maintain compliance with section 2. Many parties, including the Texas Coalition of Black Democrats, argue for an African-American opportunity district, generally labeled District 25, in Fort Bend and Harris Counties.

The Latino and African-American plaintiffs thus present competing positions, reflecting a political reality that they are competitors in the political process.[24] This competition finds

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20. 42 U.S.C. § 1973.

21. 42 U.S.C. § 1973c.

22. *See Abrams*, 521 U.S., at 90, 96.

23. *Beer v. United States*, 425 U.S. 130, 141 (1976); *see also Abrams*, 521 U.S., at 95; *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997).

24. Several political scientists alluded to this political reality in their testimony.

expression in an absence of cohesive voting between Latinos and African-Americans at the point in which it is meaningfully measured, the Democratic primaries.

We find that the plaintiffs have failed to prove that vote dilution will occur in violation of section 2 of the Voting Rights Act in the absence of seven Latino citizenship majority congressional districts or an African-American opportunity district, proposed District 25, in Fort Bend and Harris Counties. The evidence did not persuade us that either Latino or African-American voting age populations are sufficiently numerous to form voting age population majorities in effective districts.[25] The plaintiffs have also not proved that Latinos and African-Americans vote cohesively as required by *Thornburg v. Gingles*[26] so as to constitute a majority in a single-member district.[27]

Looking first to the proposed African-American opportunity district, the Texas Coalition of Black Democrats has conceded that the evidence showed that African-Americans would not be an absolute majority of citizen voting age population in the proposed District 25. Again, the plaintiffs were unable to prove cohesive voting between Latinos and African-Americans sufficient to compel the drawing of a district in Fort Bend and Harris Counties.[28] The overwhelming evidence found to be persuasive was to the contrary.

The matter of creating such a permissive district is one for the legislature.[29] As we have explained, such an effort would require

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25. *See Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 852-53 (5th Cir. 1999).

26. 478 U.S. 30, 50-51 (1986).

27. *See Valdespino*, 168 F.3d at 852-53.

28. *See Growe*, 507 U.S., at 41.

29. *See Johnson*, 922 F.Supp. at 1567 ("Since political considerations pervade the redistricting task, the Court feels that any permanent footprint left on Georgia's political landscape . . . should be

that we abandon our quest for neutrality in favor of a raw political choice. We offer no opinion as to the wisdom of an appropriate body doing so. Such arranging of voting presents a large and complex decision with profound social and political consequences. The Congress has by its enactment of voting rights laws constrained the political process and given the courts a role--to the extent of those constraints. We have no warrant to impose our vision of "proper" restraints upon the political process beyond the constraints imposed by the Constitution or the Voting Rights Act. The Supreme Court put it succinctly in *Growe*, stating that, where there has been no showing establishing the "three *Gingles* prerequisites," then under section 2 of the voting Rights Act "there neither has been a wrong nor can be a remedy."[30] A month later, the Court stated even more directly that, "[o]f course, the federal courts may not order creation of majority-minority districts unless necessary to remedy a violation of federal law."[31]

In sum, these arguments so ably presented by Morris Overstreet, African-American attorney and former state official and candidate for elective office, and others are directed to the wrong forum, however much we may personally admire the arguments. It bears mention that our plan has hardly left a bleak terrain. In District 25 of our plan, the combined African-American and Latino voting age population increased to a 52.3 majority. In the practical world, this percentage will dominate the Democratic primary in a district that has consistently elected a Democratic congressman. This is, then, in a real sense, a minority district produced by our process that enhances the elective prospects of a minority, albeit not wholly the district sought.

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left to those elected to make such decisions.").

30. 507 U.S., at 41.

31. *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993).

As for the proposed Latino opportunity districts, the evidence shows that the Latino population is not sufficiently compact or numerous to support another, effective majority Latino citizenship district in Texas, in Dallas County or in South Texas.[32] We find that, under the totality of the circumstances, the failure to create seven such districts will not prevent full and equal Latino participation in the political process. It bears mention that our insistence upon compactness has increased the Latino force in District 24, a result supported by Congresswoman Eddie Bernice Johnson in her testimony at trial.

The Valdez-Cox plaintiffs also urge that Webb and Hidalgo Counties be left whole. We heard powerful arguments from the witness stand and counsel in opposition to a splitting of Hidalgo County in South Texas, and our neutral standards stood against such a county split. That standard was ultimately overriden as to Hidalgo County by the mandate of population equality under the principle of one-man, one-vote, and the existence of surrounding protected majority-minority districts. It is an ugly fact that the law's insistence on absolute population equality in court-drawn plans has to perverse effect of splitting counties and cities, when a tolerance of greater deviation would not demand such undesirable divisions. The split here of Hidalgo County is a fit example.[33] Webb County was not caught in this squeeze and remains wholly intact in District 23.

VI

There being no reason for delay, we direct entry of final judgment in this case pursuant to Federal Rule of Civil Procedure 54(b).

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32. *See Growe*, 507 U.S., at 39-40; *Gingles*, 478 U.S., at 50-51; *NAACP v. Fordice*, 252 F.3d 361, 365-67 (5th Cir. 2001).

33. We endeavored to and did respect the municipal boundaries of McAllen, a major population center of Hidalgo County.

So **ordered** and **signed** this 14th day of November, 2001.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

/s/ John Hannah, Jr.
JOHN HANNAH, JR.
UNITED STATES DISTRICT JUDGE

/s/ T. John Ward
T. JOHN WARD
UNITED STATES DISTRICT JUDGE