SUPREME COURT OF THE UNITED STATES

Nos. 05–204, 05–254, 05–276 and 05–439

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL., APPELLANTS
05–204 *v.*
RICK PERRY, GOVERNOR OF TEXAS, ET AL.

TRAVIS COUNTY, TEXAS, ET AL., APPELLANTS
05–254 *v.*
RICK PERRY, GOVERNOR OF TEXAS, ET AL.

EDDIE JACKSON, ET AL., APPELLANTS
05–276 *v.*
RICK PERRY, GOVERNOR OF TEXAS, ET AL.

GI FORUM OF TEXAS, ET AL., APPELLANTS
05–439 *v.*
RICK PERRY, GOVERNOR OF TEXAS, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

[June 28, 2006]

JUSTICE STEVENS, with whom JUSTICE BREYER joins as to Parts I and II, concurring in part and dissenting in part.

This is a suit in which it is perfectly clear that judicially manageable standards enable us to decide the merits of a statewide challenge to a political gerrymander. Applying such standards, I shall explain why the wholly unnecessary replacement of the neutral plan fashioned by the three-judge court in *Balderas* v. *Texas,* Civ. Action No. 6:01CV158 (ED Tex., Nov. 14, 2001) (Plan 1151C or *Bal-*

deras Plan) with Plan 1374C, which creates districts with less compact shapes, violates the Voting Rights Act, and fragments communities of interest—all for purely partisan purposes—violated the State's constitutional duty to govern impartially. Prior misconduct by the Texas Legislature neither excuses nor justifies that violation. Accordingly, while I join the Court's decision to invalidate District 23, I would hold that Plan 1374C is entirely invalid and direct the District Court to reinstate Plan 1151C. Moreover, as I shall explain, even if the remainder of the plan were valid, the cracking of *Balderas* District 24 would still be unconstitutional.

I

The maintenance of existing district boundaries is advantageous to both voters and candidates. Changes, of course, must be made after every census to equalize the population of each district or to accommodate changes in the size of a State's congressional delegation. Similarly, changes must be made in response to a finding that a districting plan violates §2 or §5 of the Voting Rights Act, 42 U. S. C. §§1973, 1973c. But the interests in orderly campaigning and voting, as well as in maintaining communication between representatives and their constituents, underscore the importance of requiring that any decision to redraw district boundaries—like any other state action that affects the electoral process—must, at the very least, serve some legitimate governmental purpose. See, *e.g.*, *Burdick* v. *Takushi*, 504 U. S. 428, 434, 440 (1992); *id.*, at 448–450 (KENNEDY, J., joined by Blackmun and STEVENS, JJ., dissenting). A purely partisan desire "to minimize or cancel out the voting strength of racial or political elements of the voting population," *Fortson* v. *Dorsey*, 379 U. S. 433, 439 (1965), is not such a purpose. Because a desire to minimize the strength of Texas Democrats was the sole motivation for the adoption of Plan

1374C, see *Session* v. *Perry*, 298 F. Supp. 2d 451, 470, 472 (ED Tex. 2004) *(per curiam)*, the plan cannot withstand constitutional scrutiny.

The districting map that Plan 1374C replaced, Plan 1151C, was not only manifestly fair and neutral, it may legitimately be described as a milestone in Texas' political history because it put an end to a long history of Democratic misuse of power in that State. For decades after the Civil War, the political party associated with the former Commander in Chief of the Union Army attracted the support of former slaves and a handful of "carpetbaggers," but had no significant political influence in Texas. The Democrats maintained their political power by excluding black voters from participating in primary elections, see, *e.g.*, *Smith* v. *Allwright*, 321 U. S. 649, 656–661 (1944), by the artful management of multimember electoral schemes, see, *e.g.*, *White* v. *Regester*, 412 U. S. 755, 765–770 (1973), and, most recently, by outrageously partisan gerrymandering, see *ante*, at 3–4 (opinion of KENNEDY, J.); *Bush* v. *Vera*, 517 U. S. 952, 987–990 (1996) (appendices in plurality opinion), *id.*, at 1005–1007, 1042–1045 (STEVENS, J., dissenting). Unfortunately, some of these tactics are not unique to Texas Democrats; the apportionment scheme they devised in the 1990's is only one example of the excessively gerrymandered districting plans that parties with control of their States' governing bodies have implemented in recent years. See, *e.g.*, *Cox* v. *Larios*, 542 U. S. 947, 947–950 (2004) (STEVENS, J., joined by BREYER, J., concurring) (Democratic gerrymander in Georgia); *Vieth* v. *Jubelirer*, 541 U. S. 267, 272 (2004) (plurality opinion); *id.*, at 342 (STEVENS, J., dissenting) (Republican gerrymander in Pennsylvania); *Karcher* v. *Daggett*, 462 U. S. 725, 744 (1983) (Democratic gerrymander in New Jersey); *Badham* v. *Eu*, 694 F. Supp. 664, 666 (ND Cal. 1988), summarily aff'd, 488 U. S. 1024 (1989) (Democratic gerrymander in California).

Despite the Texas Democratic Party's sordid history of manipulating the electoral process to perpetuate its stranglehold on political power, the Texas Republican Party managed to become the State's majority party by 2002. If, after finally achieving political strength in Texas, the Republicans had adopted a new plan in order to remove the excessively partisan Democratic gerrymander of the 1990's, the decision to do so would unquestionably have been supported by a neutral justification. But that is not what happened. Instead, as the following discussion of the relevant events that transpired in Texas following the release of the 2000 census data demonstrates, Texas Republicans abandoned a neutral apportionment map for the sole purpose of manipulating district boundaries to maximize their electoral advantage and thus create their own impermissible stranglehold on political power.

By 2001, Texas Republicans had overcome many of the aforementioned tactics designed to freeze the Democrats' status as the State's dominant party, and Republicans controlled the governorship and the State Senate. Democrats, however, continued to constitute a majority of the State House of Representatives. In March of that year, the results of the 2000 decennial census revealed that, as a result of its population growth, Texas was entitled to two additional seats in the United States House of Representatives, bringing the size of the Texas congressional delegation to 32. Texas, therefore, was required to draw 32 equipopulous districts to account for its additional representation and to comply with the one-person, one-vote mandate of Article I, §2, see, *e.g.*, *Karcher*, 462 U. S. 725. Under Texas law, the Texas Legislature was required to draw these new districts. See *Session*, 298 F. Supp. 2d, at 457–458.

The Texas Legislature, divided between a Republican Senate and a Democratic House, did not reach agreement on a new congressional map in the regular legislative

session, and Governor Rick Perry declined to call a special session. Litigation in the Texas state courts also failed to result in a plan, as the Texas Supreme Court vacated the map created by a state trial judge. See *Perry* v. *Del Rio*, 67 S. W. 3d 85 (2001). This left a three-judge Federal District Court in the Eastern District of Texas with "'the unwelcome obligation of performing in the legislature's stead.'" *Balderas* v. *Texas*, Civ. Action No. 6:01CV158 (Nov. 14, 2001) *(per curiam)*, App. E to Juris. Statement in No. 05–276, p. 202a (hereinafter App. to Juris Statement) (quoting *Connor* v. *Finch*, 431 U. S. 407, 415 (1977)).

After protracted proceedings which included the testimony of an impartial expert as well as representatives of interested groups supporting different plans, the court prepared its own plan. "Conscious that the primary responsibility for drawing congressional districts is given to political branches of government, and hesitant to 'und[o] the work of one political party for the benefit of another,' the three-judge *Balderas* court sought to apply 'only "neutral" redistricting standards' when drawing Plan 1151C." *Ante*, at 4 (opinion of KENNEDY, J.) (quoting *Henderson* v. *Perry*, 399 F. Supp. 2d 756, 768 (ED Tex. 2005)). As the court explained, it started with a blank map of Texas, drew in the existing districts protected by the Voting Rights Act, located the new Districts 31 and 32 where the population growth that produced them had occurred, and then applied the neutral criteria of "compactness, contiguity, and respecting county and municipal boundaries." App. to Juris. Statement 205a. See *id.*, at 206a–209a. The District Court purposely "eschewed an effort to treat old lines as an independent locator," and concluded that its plan had done 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." *Id.*, at 207a–208a.

At the conclusion of this process, the court believed that it had fashioned a map that was "likely to produce a congressional delegation roughly proportional to the party voting breakdown across the state." *Id.*, at 209a. Indeed, reflecting the growing strength of the Republican Party, the District Court's plan, Plan 1151C, offered that party an advantage in 20 of the 32 congressional seats. See *Session*, 298 F. Supp. 2d, at 471 (describing Plan 1151C). The State's expert in this litigation testified that the *Balderas* Plan was not biased in favor of Democrats and that it was "[m]aybe slightly" biased in favor of Republicans. App. 224 (deposition of Ronald Keith Gaddie, Ph.D.). Although groups of Latino voters challenged Plan 1151C on appeal, neither major political party did so, and the State of Texas filed a motion asking this Court to affirm the District Court's judgment, which we did, see *Balderas* v. *Texas*, 536 U. S. 919 (2002).

In the 2002 congressional elections, however, Republicans were not able to capitalize on the advantage that the *Balderas* plan had provided them. A number of Democratic incumbents were able to attract the votes of ticket-splitters (individuals who voted for candidates from one party in statewide elections and for a candidate from a different party in congressional elections), and thus won elections in some districts that favored Republicans. As a result, Republicans carried only 15 of the districts drawn by the *Balderas* court.[1]

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[1]It was apparently these electoral results that later caused the District Court to state that "the practical effect" of Plan 1151C "was to leave the 1991 Democratic Party gerrymander largely in place as a 'legal' plan." *Henderson* v. *Perry*, 399 F. Supp. 2d 756, 768 (ED Tex. 2005); see *id.*, at 768, n. 52. But the existence of ticket-splitting voters hardly demonstrates that Plan 1151C was biased in favor of Democrats. Instead, as noted above, even the State's expert in this litigation concluded that Plan 1151C was, if anything, biased in favor of Republi-

While the Republicans did not do as well as they had hoped in elections for the United States House of Representatives, they made gains in the Texas House of Representatives and won a majority of seats in that body. This gave Texas Republicans control over both bodies of the state legislature, as well as the Governor's mansion, for the first time since Reconstruction.

With full control of the State's legislative and executive branches, the Republicans "decided to redraw the state's congressional districts solely for the purpose of seizing between five and seven seats from Democratic incumbents." *Session*, 298 F. Supp. 2d, at 472 (citation and internal quotation marks omitted). According to former Lieutenant Governor Bill Ratliff, a highly regarded Republican member of the State Senate, "political gain for the Republicans was 110% of the motivation for the Plan, . . . it was 'the entire motivation.'" *Id.*, at 473 (quoting trial transcript). Or, as the District Court stated in the first of its two decisions in this litigation, "[t]here is little question but that the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage." *Id.*, at 470. See also *ante*, at 5 (quoting District Court's conclusion). Indeed, as the State itself argued before the District Court: "The overwhelming evidence demonstrated that partisan gain was the motivating force behind the decision to redistrict in 2003." State Defendants' Post-Trial Brief in No. 2:03–CV–354 (ED Tex.), p. 51 (hereinafter State Post-Trial Brief).

This desire for political gain led to a series of dramatic confrontations between Republicans and Democrats, and

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cans. Nor do the circumstances surrounding the replacement of Plan 1151C suggest that the legislature was motivated by a misimpression that Plan 1151C was unfair to Republicans, and accordingly should be replaced with a more equitable map. Rather, as discussed in detail below, it is clear that the sole motivation for enacting a new districting map was to maximize Republican advantage.

ultimately resulted in the adoption of a plan that violated the Voting Rights Act. The legislature did not pass a new map in the regular 2003 session, in part because Democratic House members absented themselves and thus denied the body a quorum. Governor Perry then called a special session to take up congressional redistricting—the same step he had declined to take in 2001 after the release of the decennial census figures, when Republicans lacked a majority in the House. During the first special session, the House approved a new congressional map, but the Senate's longstanding tradition requiring two-thirds of that body to support a measure before the full Senate will consider it allowed Democrats to block the plan.

Lieutenant Governor Dewhurst then announced that he would suspend operation of the two-thirds rule in any future special session considering congressional redistricting. Nonetheless, in a second special session, Senate Democrats again prevented the passage of a new districting map by leaving the State and depriving the Senate of a quorum. When a lone Senate Democrat returned to Texas, Governor Perry called a third special session to consider congressional redistricting.

During that third special session, the State Senate and the State House passed maps that would have apparently avoided any violation of the Voting Rights Act, because they would have, *inter alia*, essentially preserved *Balderas* District 23, a majority-Latino district in southwest Texas, and *Balderas* District 24, a majority-minority district in the Dallas-Fort Worth area, where black voters constituted a significant majority of voters in the Democratic primary and usually elected their candidate of choice in the general election. Representative Phil King, the redistricting legislation's chief sponsor in the Texas House, had previously proposed fragmenting District 24, but, after lawyers reviewed the map, King expressed concern that redrawing District 24 might violate the Voting Rights Act,

and he drafted a new map that left District 24 largely unchanged.

Nonetheless, the conferees seeking to reconcile the House and Senate plans produced a map that, as part of its goal of maximizing Republican political advantage, significantly altered both Districts 23 and 24 as they had existed in the *Balderas* Plan. *Balderas* District 23 was extended north to take in roughly 100,000 new people who were predominately Anglo and Republican, and was also moved west, thus splitting Webb County and the City of Laredo, and pushing roughly 100,000 people who were predominately Latino and Democratic into an adjacent district. *Session*, 298 F. Supp. 2d, at 488–489. Black voters who previously resided in *Balderas* District 24 were fragmented into five new districts, each of which is predominately Anglo and Republican. See App. 104–106. Representative King testified at trial that District 24 was cracked even though cracking the district was not "'the path of least resistance'" in terms of avoiding Voting Rights Act liability, because leaving *Balderas* District 24 intact would not "accomplish our political objectives." State Post-Trial Brief 51–52 (quoting transcript). This map was ultimately enacted into law as Plan 1374C.

The overall effect of Plan 1374C was to shift more than *eight million* Texans into new districts, and to split more counties into more pieces than the *Balderas* Plan. Moreover, the 32 districts in Plan 1374C are, on average, much less compact under either of two standard measures than their counterparts had been under the *Balderas* Plan. See App. 177–178 (expert report of Professor Gaddie).[2]

Numerous parties filed suit in federal court challenging

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[2] These two standard measures of compactness are the perimeter-to-area score, which compares the relative length of the perimeter of a district to its area, and the smallest circle score, which compares the ratio of space in the district to the space in the smallest circle that could encompass the district. App. 178.

Plan 1374C on the grounds that it violated §2 of the Voting Rights Act and that it constituted an unconstitutional partisan gerrymander. A three-judge panel—two of whom also were members of the *Balderas* court—rejected these challenges, over Judge Ward's partial dissent on the §2 claims. See *Session*, 298 F. Supp. 2d 451. Responding to plaintiffs' appeals, we remanded for reconsideration in light of *Vieth*, 541 U. S. 267. See 543 U. S. 941 (2004).

In a characteristically thoughtful opinion written by Judge Higginbotham, the District Court again rejected all challenges to the constitutionality of Plan 1374C. See *Henderson*, 399 F. Supp. 2d 756. It correctly found that the Constitution does not prohibit a state legislature from redrawing congressional districts in the middle of a census cycle, see *id.*, at 766, and it also correctly recognized that this Court has not yet endorsed clear standards for judging the validity of partisan gerrymanders, see *id.*, at 760–762. Because the District Court's original decision, and its reconsideration of the case in the light of the several opinions in *Vieth* v. *Jubelirer*, are successive chapters in the saga that began with *Balderas*, it is appropriate to quote this final comment from that opinion before addressing the principal question that is now presented. The *Balderas* court concluded:

> "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. 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." App. to Juris. Statement 209a–210a (footnote omitted).

II

The unique question of law that is raised in this appeal is one that the Court has not previously addressed. That narrow question is whether it was unconstitutional for Texas to replace a lawful districting plan "in the middle of a decade, for the sole purpose of maximizing partisan advantage." Juris. Statement in No. 05–276, p. i. This question is both different from, and simpler than, the principal question presented in *Vieth* v. *Jubelirer,* in which the "'lack of judicially discoverable and manageable standards'" prevented the plurality from deciding the merits of a statewide challenge to a political gerrymander. 541 U. S., at 277–278.

As the State points out, "in every political-gerrymandering claim the Court has considered, the focus has been on the *map* itself, not on the decision to create the map in the first place." Brief for State Appellees 33. In defense of the map itself, rather than the basic decision whether to draw the map in the first place, the State notes that Plan 1374C's district borders frequently follow county lines and other neutral criteria. At what the State describes as the relevant "level of granularity," the State correctly points out that appellants have not even attempted to argue that every district line was motivated solely for partisan gain. *Ibid.* See also *ante,* at 11 (opinion of KENNEDY, J.) (noting that "partisan aims did not guide every line" in Plan 1374C). Indeed, the multitude of "granular" decisions that are made during redistricting was part of why the *Vieth* plurality concluded, in the context of a statewide challenge to a redistricting plan promulgated in response to a legal obligation to redistrict, that there are no manageable standards to govern

whether the predominant motivation underlying the entire redistricting map was partisan. See 541 U. S., at 285. But see *id.*, at 355 (BREYER, J., dissenting) (arguing that there are judicially manageable standards to assess statewide districting challenges even when a plan is enacted in response to a legal obligation to redistrict).

Unlike *Vieth,* the narrow question presented by the statewide challenge in this litigation is whether the State's decision to draw the map in the first place, when it was under no legal obligation to do so, was permissible. It is undeniable that identifying the motive for making that basic decision is a readily manageable judicial task. See *Gomillion* v. *Lightfoot,* 364 U. S. 339, 341 (1960) (noting that plaintiffs' allegations, if true, would establish by circumstantial evidence "tantamount for all practical purposes to a mathematical demonstration," that redistricting legislation had been enacted "solely" to segregate voters along racial lines); cf. *Personnel Administrator of Mass.* v. *Feeney,* 442 U. S. 256, 276–280 (1979) (analyzing whether the purpose of a law was to discriminate against women). Indeed, although the Constitution places no *per se* ban on midcycle redistricting, a legislature's decision to redistrict in the middle of the census cycle, when the legislature is under no legal obligation to do so, makes the judicial task of identifying the legislature's motive simpler than it would otherwise be. As JUSTICE BREYER has pointed out, "the presence of midcycle redistricting, for any reason, raises a fair inference that partisan machinations played a major role in the map-drawing process." *Vieth,* 541 U. S., at 367 (dissenting opinion).

The conclusion that courts can easily identify the motive for redistricting when the legislature is under no legal obligation to act is reinforced by the record in this very case. The District Court unambiguously identified the sole purpose behind the decision to promulgate Plan 1374C: a desire to maximize partisan advantage. See

Session, 298 F. Supp. 2d, at 472 ("It was clear from the evidence" that Republicans "'decided to redraw the state's congressional districts solely for the purpose of seizing between five and seven seats from Democratic incumbents'" (quoting *amicus* brief filed in *Vieth* v. *Jubelirer*); 298 F. Supp., at 470 ("There is little question but that the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage"). It does not matter whether the District Court's description of that purpose qualifies as a specific finding of fact because it is perfectly clear that there is more than ample evidence in the record to support such a finding. This evidence includes: (1) testimony from state legislators; (2) the procedural irregularities described above that accompanied the adoption of Plan 1374C, including the targeted abolition of the longstanding two-thirds rule, designed to protect the rights of the minority party, in the Texas Senate; (3) Plan 1374C's significant departures from the neutral districting criteria of compactness and respect for county lines; (4) the plan's excessive deviations from prior districts, which interfere with the development of strong relationships between Members of Congress and their constituents; and (5) the plan's failure to comply with the Voting Rights Act. Indeed, the State itself conceded that "[t]he overwhelming evidence demonstrated that partisan gain was the motivating force behind the decision to redistrict in 2003." State Post-Trial Brief 51. In my judgment, there is not even a colorable basis for contending that the relevant intent—in this case a purely partisan intent[3]—cannot be

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[3]The State suggests that in the process of drawing districts the architects of Plan 1374C frequently followed county lines, made an effort to keep certain entire communities within a given district and otherwise followed certain neutral principles. But these facts are not relevant to the narrow question presented by these cases: Neutral motivations in the implementation of particular features of the redistricting do not qualify the solely partisan motivation behind the basic decision to adopt

identified on the basis of admissible evidence in the record.[4]

Of course, the conclusions that courts are fully capable of analyzing the intent behind a decision to redistrict, and that desire for partisan gain was the sole factor motivating the decision to redistrict at issue here, do not resolve the question whether proof of a single-minded partisan intent is sufficient to establish a constitutional violation.

On the merits of that question, the State seems to assume that our decision in *Upham* v. *Seamon,* 456 U. S. 37 (1982) *(per curiam),* has already established the legislature's right to replace a court-ordered plan with a plan drawn for purely partisan purposes. JUSTICE KENNEDY ultimately indulges in a similar assumption, relying on *Upham* for the proposition that "our decisions have assumed that state legislatures are free to replace court-mandated remedial plans by enacting redistricting plans of their own." *Ante,* at 9. JUSTICE KENNEDY recognizes that "[j]udicial respect for legislative plans, however, cannot justify legislative reliance on improper criteria for districting determinations." *Ibid.* But JUSTICE KENNEDY then incorrectly concludes that the singular intent to

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an entirely unnecessary plan in the first place.

[4]As noted above, rather than identifying any arguably neutral reasons for adopting Plan 1374C, the record establishes a purely partisan single-minded motivation with unmistakable clarity. Therefore, there is no need at this point to discuss standards that would guide judges in enforcing a rule allowing legislatures to be motivated in part by partisan considerations, but which would impose an "obligation not to apply *too much* partisanship in districting." *Vieth* v. *Jubelirer,* 541 U. S. 267, 286 (2004) (plurality opinion). Deciding that 100% is "too much" is not only a manageable decision, but, as explained below, it is also an obviously correct one. Nonetheless, it is worth emphasizing that courts do, in fact, possess the tools to employ standards that permit legislatures to consider partisanship in the redistricting process, but which do not allow legislatures to use partisanship as the predominant motivation for their actions. See Part IV, *infra.*

maximize partisan advantage is not, in itself, such an improper criterion. *Ante,* at 11.

This reliance on *Upham* overlooks critical distinctions between the redistricting plan the District Court drew in *Upham* and the redistricting plan the District Court drew in *Balderas*. The judicial plan in *Upham* was created to provide an interim response to an objection by the Attorney General that two contiguous districts in a plan originally drafted by the Texas Legislature violated §5 of the Voting Rights Act. We concluded that, in fashioning its interim remedy, the District Court had erroneously "substituted its own reapportionment preferences for those of the state legislature." 456 U. S., at 40. We held that when judicial relief was necessary because a state legislature had failed "'to reapportion according to federal constitutional [or statutory] requisites in a timely fashion after having had an adequate opportunity to do so,'" the federal court should, as much as possible "'follow the policies and preferences of the State,'" in creating a new map. *Id.*, at 41 (quoting *White* v. *Weiser,* 412 U. S. 783, 794–795 (1973)). We did not suggest that federal courts should honor partisan concerns, but rather identified the relevant state policies as those "'expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution.'" *Upham,* 456 U. S., at 41 (quoting *White,* 412 U. S., at 794–795). Because the District Court in *Upham* had exceeded its authority in drawing a new districting map, we made clear that the legislature was authorized to remedy the §5 violation with a map of its own choosing. See 456 U. S., at 44. *Upham*, then, stands only for the proposition that a state legislature is authorized to redraw a court-drawn congressional districting map when a district court has exceeded its remedial authority. *Upham* does not stand for the proposition that,

after a State embraces a valid, neutral court-drawn plan by asking this Court to affirm the opinion creating that plan, the State may then redistrict for the sole purpose of disadvantaging a minority political party.

Indeed, to conclude otherwise would reflect a fundamental misunderstanding of the reason why we have held that state legislatures, rather than federal courts, should have the primary task of creating apportionment plans that comport with federal law. We have so held because "a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies" with the requirements of federal law, *Finch,* 431 U. S., at 414–415, not because we wish to supply a dominant party with an opportunity to disadvantage its political opponents. Indeed, a straightforward application of settled constitutional law leads to the inescapable conclusion that the State may not decide to redistrict if its sole motivation is "to minimize or cancel out the voting strength of racial *or political* elements of the voting population," *Fortson,* 379 U. S., at 439 (emphasis added).

The requirements of the Federal Constitution that limit the State's power to rely exclusively on partisan preferences in drawing district lines are the Fourteenth Amendment's prohibition against invidious discrimination, and the First Amendment's protection of citizens from official retaliation based on their political affiliation. The equal protection component of the Fourteenth Amendment requires actions taken by the sovereign to be supported by some legitimate interest, and further establishes that a bare desire to harm a politically disfavored group is not a legitimate interest. See, *e.g.*, *Cleburne* v. *Cleburne Living Center, Inc.,* 473 U. S. 432, 447 (1985). Similarly, the freedom of political belief and association guaranteed by the First Amendment prevents the State, absent a compelling interest, from "penalizing citizens because of their participation in the electoral process, . . .

their association with a political party, or their expression of political views." *Vieth*, 541 U. S., at 314 (KENNEDY, J., concurring in judgment) (citing *Elrod* v. *Burns*, 427 U. S. 347 (1976) (plurality opinion)). These protections embodied in the First and Fourteenth Amendments reflect the fundamental duty of the sovereign to govern impartially. *E.g.*, *Lehr* v. *Robertson*, 463 U. S. 248, 265 (1983); *New York City Transit Authority* v. *Beazer*, 440 U. S. 568 (1979).

The legislature's decision to redistrict at issue in this litigation was entirely inconsistent with these principles. By taking an action for the sole purpose of advantaging Republicans and disadvantaging Democrats, the State of Texas violated its constitutional obligation to govern impartially. "If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles,' we would surely conclude the Constitution had been violated." *Vieth*, 541 U. S., at 312 (KENNEDY, J., concurring in judgment).

III

Relying solely on *Vieth*, JUSTICE KENNEDY maintains that even if legislation is enacted based solely on a desire to harm a politically unpopular minority, this fact is insufficient to establish unconstitutional partisan gerrymandering absent proof that the legislation did in fact burden "the complainants' representative rights." *Ante*, at 11. This conclusion—which clearly goes to the merits, rather than the manageability, of a partisan gerrymandering claim—is not only inconsistent with the constitutional requirement that state action must be supported by a legitimate interest, but also provides an insufficient response to appellants' claim on the merits.

JUSTICE KENNEDY argues that adopting "the modified

sole-intent test" could "encourage partisan excess at the outset of the decade, when a legislature redistricts pursuant to its decennial constitutional duty and is then immune from the charge of sole-motivation." *Ante,* at 12–13. But this would be a problem of the Court's own making. As the decision in *Cox* v. *Larios,* 542 U. S. 947, demonstrates, there are, in fact, readily manageable judicial standards that would allow injured parties to challenge excessive (and unconstitutional) partisan gerrymandering undertaken in response to the release of the decennial census data.[5] See also *Vieth,* 541 U. S., at 328–339 (STEVENS, J., dissenting); *id.,* at 347–353 (SOUTER, J., joined by GINSBURG, J., dissenting); *id.,* at 365–367 (BREYER, J., dissenting). JUSTICE KENNEDY's concern about a heightened incentive to engage in such excessive partisan gerrymandering would be avoided if the Court were willing to enforce those standards.

In any event, JUSTICE KENNEDY's additional requirement that there be proof that the gerrymander did in fact burden the complainants' representative rights is clearly satisfied by the record in this litigation. Indeed, the

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[5] See *Larios* v. *Cox,* 300 F. Supp. 2d 1320, 1342–1353 (ND Ga. 2004) *(per curiam).* In *Cox,* the three-judge District Court undertook a searching review of the entire record in concluding that the population deviations in the state legislative districts created for the Georgia House and Senate after the release of the 2000 census data were not driven by any traditional redistricting criteria, such as compactness or preserving county lines, but were instead driven by the impermissible factors of regional favoritism and the discriminatory protection of Democratic incumbents. If there were no judicially manageable standards to assess whether a State's adoption of a redistricting map was based on valid governmental objectives, we would not have summarily affirmed the decision in *Cox* over the dissent of only one Justice. See 542 U. S. 947; *id.,* at 951 (SCALIA, J., dissenting). In addition, as Part III of the Court's opinion and this Part of my opinion demonstrate, assessing whether a redistricting map has a discriminatory impact on the opportunities for voters and candidates of a particular party to influence the political process is a manageable judicial task.

Court's accurate exposition of the reasons why the changes to District 23 diluted the voting rights of Latinos who remain in that district simultaneously explains why those changes also disadvantaged Democratic voters and thus demonstrates that the effects of a political gerrymander can be evaluated pursuant to judicially manageable standards.

In my judgment the record amply supports the conclusion that Plan 1374C not only burdens the minority party in District 23, but also imposes a severe statewide burden on the ability of Democratic voters and politicians to influence the political process.[6]

In arguing that Plan 1374C does not impose an unconstitutional burden on Democratic voters and candidates, the State takes the position that the plan has resulted in an equitable distribution of political power between the State's two principal political parties. The State emphasizes that in the 2004 elections—held pursuant to Plan 1374C—Republicans won 21 of 32, or 66%, of the congressional seats. That same year, Republicans carried 58% of the vote in statewide elections. Admittedly, these numbers do suggest that the State's congressional delegation was "roughly proportional" to the parties' share of the statewide vote, Brief for State Appellees 44, particularly in light of the fact that our electoral system tends to produce a "seat bonus" in which a party that wins a majority of the vote generally wins an even larger majority of the seats, see Brief for Alan Heslop et al. as *Amici Curiae* (describing the seat bonus phenomenon). Cf. *ante*, at 12 (opinion of KENNEDY, J.) (arguing that, compared to the redistricting plan challenged in *Vieth*, "Plan 1374C can be seen as

[6]Although the burdened group at issue in this litigation consists of Democratic voters and candidates, the partisan gerrymandering analysis throughout this opinion would be equally applicable to any "politically coherent group whose members engaged in bloc voting." *Vieth*, 541 U. S., at 347 (SOUTER, J., joined by GINSBURG, J., dissenting).

making the party balance more congruent to statewide party power").

That Plan 1374C produced a "roughly proportional" congressional delegation in 2004 does not, however, answer the question whether the plan has a discriminatory effect against Democrats. As appellants point out, whether a districting map is biased against a political party depends upon the bias in the map itself—in other words, it depends upon the opportunities that the map offers each party, regardless of how candidates perform in a given year. And, as the State's expert found in this litigation, Plan 1374C clearly has a discriminatory effect in terms of the opportunities it offers the two principal political parties in Texas. Indeed, that discriminatory effect is severe.

According to Professor Gaddie, the State's expert, Plan 1374C gives Republicans an advantage in 22 of 32 congressional seats. The plaintiffs' expert, Professor Alford, who had been cited favorably by the *Balderas* Court as having applied a "neutral approach" to redistricting in that litigation, App. to Juris. Statement 207a, agreed. He added that, in his view, the only surprise from the 2004 elections was "how far things moved" toward achieving a 22-to-10 pro-Republican split "in a single election year," *id.*, at 226a (declaration of John R. Alford, Ph.D.).[7] But this 22-to-10 advantage does not depend on Republicans winning the 58% share of the statewide vote that they

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[7] In the 2004 congressional elections, Republicans won 21 of the 22 seats that had been designed to favor Republicans in Plan 1374C. One Democratic incumbent, Representative Chet Edwards, narrowly defeated (with 51% of the vote) his nonincumbent Republican challenger in a Republican-leaning district; Edwards outspent his challenger, who lacked strong ties to the principal communities in the district. Republicans are likely to spend more money and find a stronger challenger in 2006, which will create a "very significant chance" of a Republican defeating Edwards. App. to Juris. Statement 224a, 226a.

received in 2004. Instead, according to Professor Gaddie, Republicans would be likely to carry 22 of 32 congressional seats if they won only 52% of the statewide vote. App. 216, 229. Put differently, Plan 1374C ensures that, even if the Democratic Party succeeds in convincing 10% of the people who voted for Republicans in the last statewide elections to vote for Democratic congressional candidates,[8] which would constitute a major electoral shift, there is unlikely to be *any* change in the number of congressional seats that Democrats win. Moreover, Republicans would still have an overwhelming advantage if Democrats achieved full electoral parity. According to Professor Gaddie's analysis, Republicans would be likely to carry 20 of the 32 congressional seats even if they only won 50% (or, for that matter, 49%) of the statewide vote. *Id.*, at 216, 229–230. This demonstrates that Plan 1374C is inconsistent with the symmetry standard, a measure social scientists use to assess partisan bias, which is undoubtedly "a reliable standard" for measuring a "burden . . . on the complainants' representative rights," *ante*, at 11 (opinion of KENNEDY, J.).

The symmetry standard "requires that the electoral system treat similarly-situated parties equally, so that each receives the same fraction of legislative seats for a particular vote percentage as the other party would receive if it had received the same percentage." Brief for Gary King et al. as *Amici Curiae* 4–5. This standard is widely accepted by scholars as providing a measure of partisan fairness in electoral systems. See, *e.g.*, Tufte, The Relationship Between Seats and Votes in Two-Party Systems, 67 Am. Pol. Sci. Rev. 540, 542–543 (1973); Gel-

[8] If 10% of Republican voters decided to vote for Democratic candidates, and if there were no other changes in voter turnout or preferences, the Republicans' share of the statewide vote would be reduced from 58% to 52%.

man & King, Enhancing Democracy Through Legislative Redistricting, 88 Am. Pol. Sci. Rev. 541, 545 (1994); Thompson, Election Time: Normative Implications of Temporal Properties of the Electoral Process in the United States, 98 Am. Pol. Sci. Rev. 51, 53, and n. 7 (2004); Engstrom & Kernell, Manufactured Responsiveness: The Impact of State Electoral Laws on Unified Party Control of the Presidency and House of Representatives, 1840–1940, 49 Am. J. Pol. Sci. 531, 541 (2005). Like other models that experts use in analyzing vote dilution claims, compliance with the symmetry standard is measured by extrapolating from a sample of known data, see, *e.g.*, *Thornburg* v. *Gingles,* 478 U. S. 30, 53 and n. 20 (1986) (discussing extreme case analysis and bivariate ecological regression analysis). In this litigation, the symmetry standard was not simply proposed by an *amicus* to this Court, it was also used by the expert for plaintiffs and the expert for the State in assessing the degree of partisan bias in Plans 1151C and 1374C. See App. 34–42 (report of Professor Alford); *id.*, at 189–193, 216 (report of Professor Gaddie).

Because, as noted above, Republicans would have an advantage in a significant majority of seats even if the statewide vote were equally distributed between Republicans and Democrats, Plan 1374C constitutes a significant departure from the symmetry standard. By contrast, based on Professor Gaddie's evaluation, the *Balderas* Plan, though slightly biased in favor of Republicans, provided markedly more equitable opportunities to Republicans and Democrats. For example, consistent with the symmetry standard, under Plan 1151C the parties were likely to each take 16 congressional seats if they won 50% of the statewide vote. See App. 216.

Plan 1374C then, clearly has a discriminatory impact on the opportunities that Democratic citizens have to elect candidates of their choice. Moreover, this discriminatory effect cannot be dismissed as *de minimis*. According to the

State's expert, if each party receives half the statewide vote, under Plan 1374C the Republicans would carry 62.5% (20) of the congressional seats, whereas the Democrats would win 37.5% (12) of those seats. In other words, at the vote distribution point where a politically neutral map would result in zero differential in the percentage of seats captured by each party, Plan 1374C is structured to create a 25% differential. When a redistricting map imposes such a significant disadvantage on a politically salient group of voters, the State should shoulder the burden of defending the map. Cf. *Brown* v. *Thomson,* 462 U. S. 835, 842–843 (1983) (holding that the implementation of a redistricting plan for state legislative districts with population deviations over 10% creates a prima facie case of discrimination under the Equal Protection Clause, thus shifting the burden to the State to defend the plan); *Larios* v. *Cox,* 300 F. Supp. 2d 1320, 1339–1340 (ND Ga.) *(per curiam),* summarily aff'd, 542 U. S. 947 (2004) (same, but further pointing out that the "'ten percent rule'" is not a safe harbor, and concluding that, under the circumstances of the case before it, a state legislative districting plan was unconstitutional even though population deviations were under 10%). At the very least, once plaintiffs have established that the legislature's sole purpose in adopting a plan was partisan—as plaintiffs have established in this action, see Part II, *supra*—such a severe discriminatory effect should be sufficient to meet any additional burden they have to demonstrate that the redistricting map accomplishes its discriminatory purpose.[9]

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[9]JUSTICE KENNEDY faults proponents of the symmetry standard for not "providing a standard for deciding how much partisan bias is too much," *ante*, at 13. But it is this Court, not proponents of the symmetry standard, that has the judicial obligation to answer the question of how much unfairness is too much. It would, of course, be an eminently manageable standard for the Court to conclude that deviations of over

The bias in Plan 1374C is most striking with regard to its effect on the ability of Democratic voters to elect candidates of their choice, but its discriminatory effect does not end there. Plan 1374C also lessens the influence Democratic voters are likely to be able to exert over Republican lawmakers, thus further minimizing Democrats' capacity to play a meaningful role in the political process.

Even though it "defies political reality to suppose that members of a losing party have as much political influence over . . . government as do members of the victorious party," *Davis* v. *Bandemer,* 478 U. S. 109, 170 (1986) (Powell, J., concurring in part and dissenting in part), the Court has recognized that "the power to influence the political process is not limited to winning elections," *id.*, at 132 (plurality opinion); see also *Georgia* v. *Ashcroft,* 539 U. S. 461, 482 (2003). In assessing whether members of a group whose candidate is defeated at the polls can nonetheless influence the elected representative, it is "important to consider 'the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account.'" *Id.,* at 482 (quoting *Gingles,* 478 U. S., at 100 (O'Connor, J., concurring in judgment)). One justification for majority rule is that elected officials *will* generally "take the minority's interests into account," in part because the majority recognizes

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10% from symmetry create a prima facie case of an unconstitutional gerrymander, just as population deviations among districts of more than 10% create such a prima facie case. Or, the Court could conclude that a significant departure from symmetry is one relevant factor in analyzing whether, under the totality of the circumstances, a districting plan is an unconstitutional partisan gerrymander. See n. 11, *infra.* At any rate, proponents of the symmetry standard have provided a helpful (though certainly not talismanic) tool in this type of litigation. While I appreciate JUSTICE KENNEDY's leaving the door open to the use of the standard in future cases, see *ante,* at 13, I believe it is the role of this Court, not social scientists, to determine how much partisan dominance is too much.

that preferences shift and today's minority could be tomorrow's majority. See, *e.g.*, L. Guinier, Tyranny of the Majority 77 (1994); J. Ely, Democracy and Distrust 84 (1980); cf. Letter from James Madison to Thomas Jefferson, (Oct. 24, 1787), reprinted in Republic of Letters 502 (J. Smith ed. 1995) (arguing that "[t]he great desideratum in Government is . . . to modify the sovereignty as that it may be sufficiently neutral between different parts of the Society" and thus prevent a fixed majority from oppressing the minority). Indeed, this Court has concluded that our system of representative democracy is premised on the assumption that elected officials will seek to represent their constituency as a whole, rather than any dominant faction within that constituency. See *Shaw* v. *Reno,* 509 U. S. 630, 648 (1993).

Plan 1374C undermines this crucial assumption that congressional representatives from the majority party (in this case Republicans) will seek to represent their entire constituency. "When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Ibid.* *Shaw*'s analysis of representational harms in the racial gerrymandering context applies with at least as much force in the partisan gerrymandering context because, in addition to the possibility that a representative may believe her job is only to represent the interests of a dominant constituency, a representative may feel more beholden to the cartographers who drew her district than to the constituents who live there. See *Vieth,* 541 U. S., at 329–331 (STEVENS, J., dissenting). In short, Plan 1374C reduces the likelihood that Republican representatives elected from gerrymandered districts will act as vigorous advocates for the needs and interests of Democrats who reside within their districts.

In addition, Plan 1374C further weakens the incentives for members of the majority party to take the interests of the minority party into account, because it locks in a Republican congressional majority of 20–22 seats, so long as Republicans achieve at least 49% of the vote. The result of this lock-in is that, according to the State's expert, between 19 and 22 of these Republican seats are safe seats, meaning seats where one party has at least a 10% advantage over the other. See App. 227–228 (expert report of Professor Gaddie). Members of Congress elected from such safe districts need not worry much about the possibility of shifting majorities, so they have little reason to be responsive to political minorities within their district.[10]

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[10] Safe seats may harm the democratic process in other ways as well. According to one recent article co-authored by a former Chairman of the Federal Election Commission, electoral competition "plainly has a positive effect on the interest and participation of voters in the electoral process." Potter & Viray, Election Reform: Barriers to Participation, 36 U. Mich. J. L. Reform 547, 575 (2003) (hereinafter Potter & Viray); see also L. Guinier, Tyranny of the Majority 85 (1994). The impact of noncompetitive elections in depressing voter turnout is especially troubling in light of the fact that voter participation in the United States lags behind, often well behind, participation rates in other democratic nations. Potter & Viray 575–576, and n. 200. In addition, the creation of safe seats tends to polarize decisionmaking bodies. See, *e.g.*, *Clingman* v. *Beaver*, 544 U. S. 581, 620 (2005) (STEVENS, J., joined by GINSBURG, J., dissenting) (noting that safe districts can "increase the bitter partisanship that has already poisoned some of those [legislative] bodies that once provided inspiring examples of courteous adversary debate and deliberation"); Cox, Partisan Gerrymandering and Disaggregated Redistricting, 2004 S. Ct. Rev. 409, 430 (arguing that "safe seats produce more polarized representatives because, by definition, the median voter in a district that is closely divided between the two major parties is more centrist than the median voter in a district dominated by one party"); Raviv, Unsafe Harbors: One Person, One Vote and Partisan Redistricting, 7 U. Pa. J. Const. L. 1001, 1068 (2005) (arguing that safe districts encourage polarization in decisionmaking bodies because representatives from those districts have to cater only to voters

In sum, I think it is clear that Plan 1374C has a severe burden on the capacity of Texas Democrats to influence the political process. Far from representing an example of "one of the most significant acts a State can perform to ensure citizen participation in republican self-governance," *ante*, at 9 (opinion of KENNEDY, J.), the plan guarantees that the Republican-dominated membership of the Texas congressional delegation will remain constant notwithstanding significant pro-Democratic shifts in public opinion. Moreover, the harms Plan 1374C imposes on Democrats are not "hypothetical" or "counterfactual," *id.*, at 13, simply because, in the 2004 elections, Republicans won a share of seats roughly proportional to their statewide voting strength. By creating 19–22 safe Republican seats, Plan 1374C has already harmed Democrats because, as explained above, it significantly undermines the likelihood that Republican lawmakers from those districts will be responsive to the interests of their Democratic constituents. In addition, Democrats will surely have a more difficult time recruiting strong candidates, and mobilizing voters and resources, in these safe Republican districts. Thus, appellants have satisfied any requisite obligation to demonstrate that they have been harmed by the adoption of Plan 1374C.

Furthermore, as discussed in Part II, *supra*, the sole intent motivating the Texas Legislature's decision to replace Plan 1151C with Plan 1374C was to benefit Republicans and burden Democrats. Accordingly, in terms of both its intent and effect, Plan 1374C violates the sovereign's duty to govern impartially.

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from one party). See generally Issacharoff & Karlan, Where to Draw the Line? 153 U. Pa. L. Rev. 541, 574 (providing data about the large percentage of safe seats in recent congressional and state legislative elections, and concluding that "[n]oncompetitive elections threaten both the legitimacy and the vitality of democratic governance").

> "When a State adopts rules governing its election machinery or defining electoral boundaries, those rules must serve the interests of the entire community. If they serve no purpose other than to favor one segment—whether racial, ethnic, religious, or political—that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community, they violate the constitutional guarantee of equal protection." *Karcher*, 462 U. S., at 748 (STEVENS, J., concurring) (citation omitted).

Accordingly, even accepting the Court's view that a gerrymander is tolerable unless it in fact burdens the minority's representative rights, I would hold that Plan 1374C is unconstitutional.[11]

IV

Even if I thought that Plan 1374C were not unconstitutional in its entirety, I would hold that the cracking of District 24—which, under the *Balderas* Plan, was a majority-minority district that consistently elected Democratic Congressman Martin Frost—was unconstitutional. Read-

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[11] In this litigation expert testimony provided the principal evidence about the effects of the plan that satisfy the test JUSTICE KENNEDY would impose. In my judgment, however, most statewide challenges to an alleged gerrymander should be evaluated primarily by examining these objective factors: (1) the number of people who have been moved from one district to another, (2) the number of districts that are less compact than their predecessors, (3) the degree to which the new plan departs from other neutral districting criteria, including respect for communities of interest and compliance with the Voting Rights Act, (4) the number of districts that have been cracked in a manner that weakens an opposition party incumbent, (5) the number of districts that include two incumbents from the opposite party, (6) whether the adoption of the plan gave the opposition party, and other groups, a fair opportunity to have input in the redistricting process, (7) the number of seats that are likely to be safe seats for the dominant party, and (8) the size of the departure in the new plan from the symmetry standard.

ily manageable standards enable us to analyze both the purpose and the effect of the "granular" decisions that produced the replacements for District 24. Applying these standards, which I set forth below, I believe it is clear that the manipulation of this district for purely partisan gain violated the First and Fourteenth Amendments.

The same constitutional principles discussed above concerning the sovereign's duty to govern impartially inform the proper analysis for claims that a particular district is an unconstitutional partisan gerrymander. We have on several occasions recognized that a multimember district is subject to challenge under the Fourteenth Amendment if it operates "'to minimize or cancel out the voting strength of racial *or political* elements of the voting population.'" *E.g.*, *Gaffney* v. *Cummings*, 412 U. S. 735, 751 (1973) (emphasis added); *Burns* v. *Richardson*, 384 U. S. 73, 88 (1966). There is no constitutionally relevant distinction between the harms inflicted by single-member district gerrymanders that minimize or cancel out the voting strength of a political element of the population and the same harms inflicted by multimember districts. In both situations, the State has interfered with the voter's constitutional right to "engage in association for the advancement of beliefs and ideas," *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 460 (1958).

I recognize that legislatures will always be aware of politics and that we must tolerate some consideration of political goals in the redistricting process. See *Cousins* v. *City Council of Chicago*, 466 F. 2d 830, 847 (CA7 1972) (Stevens, J., dissenting). However, I think it is equally clear that, when a plaintiff can prove that a legislature's predominant motive in drawing a particular district was to disadvantage a politically salient group, and that the decision has the intended effect, the plaintiff's constitutional rights have been violated. See *id.*, at 859–860. Indeed, in *Vieth*, five Members of this Court explicitly

recognized that extreme partisan gerrymandering violates the Constitution. See 541 U. S., at 307, 312–316 (KENNEDY, J., concurring in judgment); *id.*, at 317–318 (STEVENS, J., dissenting); *id.*, at 343, 347–352 (SOUTER, J., joined by GINSBURG, J., dissenting); *id.*, at 356–357, 366–367 (BREYER, J., dissenting). The other four Justices in *Vieth* stated that they did not disagree with that conclusion. See *id.*, at 292 (plurality opinion). The *Vieth* plurality nonetheless determined that there were no judicially manageable standards to assess partisan gerrymandering claims. *Id.*, at 305–306. However, the following test, which shares some features of the burden-shifting standard for assessing unconstitutional partisan gerrymandering proposed by JUSTICE SOUTER's opinion in *Vieth*, see *id.*, at 348–351, would provide a remedy for at least the most blatant unconstitutional partisan gerrymanders and would also be eminently manageable.

First, to have standing to challenge a district as an unconstitutional partisan gerrymander, a plaintiff would have to prove that he is either a candidate or a voter who resided in a district that was changed by a new districting plan. See *id.*, at 327–328 (STEVENS, J., dissenting) (discussing *United States* v. *Hays*, 515 U. S. 737 (1995)). See also 541 U. S., at 347–348 (SOUTER, J., joined by GINSBURG, J., dissenting) (citing *Hays*). A plaintiff with standing would then be required to prove both improper purpose and effect.

With respect to the "purpose" portion of the inquiry, I would apply the standard fashioned by the Court in its racial gerrymandering cases. Under the Court's racial gerrymandering jurisprudence, judges must analyze whether plaintiffs have proved that race was the predominant factor motivating a districting decision such that other, race-neutral districting principles were subordinated to racial considerations. If so, strict scrutiny applies, see, *e.g.*, *Vera*, 517 U. S., at 958–959 (plurality opinion), and the State must justify its districting decision by

establishing that it was narrowly tailored to serve a compelling state interest, such as compliance with §2 of the Voting Rights Act, see *King* v. *Illinois Bd. of Elections*, 979 F. Supp. 619 (ND Ill. 1997), aff'd, 522 U. S. 1087 (1998); *Vera*, 517 U. S., at 994 (O'Connor, J., concurring).[12] However, strict scrutiny does not apply merely because race was one motivating factor behind the drawing of a majority-minority district. *Id.*, at 958–959 (plurality opinion); see also *Easley* v. *Cromartie*, 532 U. S. 234, 241 (2001). Applying these standards to the political gerrymandering context, I would hold that, if a plaintiff carried her burden of demonstrating that redistricters subordinated neutral districting principles to political considerations and that their predominant motive was to maximize one party's power, she would satisfy the intent prong of the constitutional inquiry.[13] Cf. *Vieth*, 541 U. S., at 349–350 (SOUTER, J., joined by GINSBURG, J., dissenting) (discussing the importance of a district's departures from traditional districting principles in determining whether the district is an unconstitutional gerrymander).

With respect to the effects inquiry, a plaintiff would be required to demonstrate the following three facts: (1) her candidate of choice won election under the old plan; (2) her

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[12]JUSTICE BREYER has authorized me to state that he agrees with JUSTICE SCALIA that compliance with §5 of the Voting Rights Act is also a compelling state interest. See *post*, at 9. I too agree with JUSTICE SCALIA on this point.

[13]If, on the other hand, the State could demonstrate, for example, that the new district was part of a statewide scheme designed to apportion power fairly among politically salient groups, or to enhance the political power of an underrepresented community of interest (such as residents of an economically distressed region), the State would avoid liability even if the results of such statewide districting had predictably partisan effects. See generally *Vieth*, 541 U. S., at 351–352 (SOUTER, J., joined by GINSBURG, J., dissenting) (discussing legitimate interests that a State could posit as a defense to a prima facie case of partisan gerrymandering).

residence is now in a district that is a safe seat for the opposite party; and (3) her new district is less compact than the old district. The first two prongs of this effects inquiry would be designed to measure whether or not the plaintiff has been harmed, whereas the third prong would be relevant because the shape of the gerrymander has always provided crucial evidence of its character, see *Karcher*, 462 U. S., at 754–758, 762–763 (STEVENS, J., concurring); see also *Vieth*, 541 U. S., at 348 (SOUTER, J., joined by GINSBURG, J., dissenting) (noting that compactness is a traditional districting principle, which "can be measured quantitatively"). Moreover, a safe harbor for more compact districts would allow a newly elected majority to eliminate a prior partisan gerrymander without fear of liability or even the need to devote resources to litigating whether or not the legislature had acted with an impermissible intent.

If a plaintiff with standing could meet the intent and effects prong of the test outlined above, that plaintiff would clearly have demonstrated a violation of her constitutional rights. Moreover, I do not think there can be any colorable claim that this test would not be judicially manageable.

Applying this test to the facts of this case, I think plaintiffs in new Districts 6, 24, 26, and 32—four of the districts in Plan 1374C that replaced parts of *Balderas* District 24—can demonstrate that their constitutional rights were violated by the cracking of *Balderas* District 24. First, I assume that there are plaintiffs who reside in Districts 6, 24, 26, and 32, and whose homes were previously located in *Balderas* District 24.[14] Accordingly, I assume that there

[14] This assumption is justified based on counsel's undisputed representations at oral argument. See Tr. Oral Arg. 35. However, if there were any genuine dispute about whether there are plaintiffs whose residences were previously located in *Balderas* District 24, but which are now incorporated into Districts 6, 24, 26, and 32, a remand would

are plaintiffs who have standing to challenge the creation of these districts.

Second, plaintiffs could easily satisfy their burden of proving predominant partisan purpose. Indeed, in this litigation, the State has acknowledged that its predominant motivation for cracking District 24 was to achieve partisan gain. See State Post-Trial Brief 51–52 (noting that, in spite of concerns that the cracking of District 24 could lead to Voting Rights Act liability, "[t]he Legislature . . . chose to pursue a political goal of unseating Congressman Frost instead of following a course that might have lowered risks [of such liability]").

The District Court agreed with the State's analysis on this issue. In the District Court, plaintiffs claimed that the creation of District 26 violated the Equal Protection Clause because the decision to create District 26 was motivated by unconstitutional racial discrimination against black voters. The District Court rejected this argument, concluding that the State's decision to crack *Balderas* District 24 was driven not by racial prejudice, but rather by the political desire to maximize Republican advantage and to "remove Congressman Frost," which required that Frost "lose a large portion of his Democratic constituency, many of whom lived in a predominately Black area of Tarrant County." *Session*, 298 F. Supp. 2d, at 471.

That an impermissible, predominantly partisan, purpose motivated the cracking of former District 24 is further demonstrated by the fact that, in my judgment, this cracking caused Plan 1374C to violate §5 of the Voting Rights Act, 42 U. S. C. §1973c. The State's willingness to adopt a plan that violated its legal obligations under the Voting Rights Act, combined with the other indicia of partisan intent in this litigation, is compelling evidence

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be appropriate to allow the District Court to address this issue.

that politics was not simply one factor in the cracking of District 24, but rather that it was an impermissible, predominant factor.

Section 5 of the Voting Rights Act "was intended 'to insure that that [the gains thus far achieved in minority political participation] shall not be destroyed through new [discriminatory] procedures and techniques.'" *Beer* v. *United States*, 425 U. S. 130, 140–141 (1976) (quoting S. Rep. No. 94–295, p. 19 (1975) (alteration in *Beer*)). To effectuate this goal, §5 prevents covered jurisdictions, such as Texas, from making changes to their voting procedures "that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Georgia*, 539 U. S., at 477 (internal quotation marks and citations omitted). In other words, during the redistricting process, covered jurisdictions may not "leave minority voters with less chance to be effective in electing preferred candidates than they were" under the prior districting plan. See *id.*, at 494 (SOUTER, J., dissenting). By cracking *Balderas* District 24, and by not offsetting the loss in black voters' ability to elect preferred candidates elsewhere, Plan 1374C resulted in impermissible retrogression.

Under the *Balderas* Plan, black Americans constituted a majority of Democratic primary voters in District 24. According to the unanimous report authored by staff attorneys in the Voting Section of the Department of Justice, black voters in District 24 generally voted cohesively, and thus had the ability to elect their candidate of choice in the Democratic primary. Section 5 Recommendation Memorandum 33 (Dec. 12, 2003), available at http://www.washingtonpost.com/wp-srv/nation/documents/texasDOJmemo.pdf (all Internet materials as visited June 21, 2006, and available in Clerk of Court's case file). Moreover, the black community's candidates of choice could consistently attract sufficient crossover voting from

nonblacks to win the general election, even though blacks did not constitute a majority of voters in the general election. *Id.*, at 33–34. Representative Frost, who is white, was clearly the candidate of choice of the black community in District 24, based on election returns, testimony of community leaders, and "scorecards" he received from groups dedicated to advancing the interests of African-Americans. See *id.*, at 35.

As noted above, in Plan 1374C, "the minority community in [*Balderas* District] 24 [was] splintered and submerged into majority Anglo districts in the Dallas-Fort Worth area." *Id.*, at 67. By dismantling one district where blacks had the ability to elect candidates of their choice,[15] and by not offsetting this loss of a district with another district where black voters had a similar opportunity, Plan 1374C was retrogressive, in violation of §5 of the Voting Rights Act. See *id.*, at 31, 67–69.

Notwithstanding the unanimous opinion of the staff attorneys in the Voting Section of the Justice Department that Plan 1374C was retrogressive and that the Attorney General should have interposed an objection, the Attorney General elected to preclear the map, thus allowing it to

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[15] In the decision below, the District Court concluded that black voters did not in fact "control" electoral outcomes in District 24. See *Session* v. *Perry*, 298 F. Supp. 2d 451, 498 (2004). Even assuming, as JUSTICE KENNEDY concludes, see *ante*, at 34, that the District Court did not commit reversible error in its analysis of this issue, the lack of "control" might be relevant in analyzing plaintiffs' vote dilution claim under §2, but it is not relevant in evaluating whether Plan 1374C is retrogressive under §5. It is indisputable that, at the very least, *Balderas* District 24 was a strong influence district for black voters, that is, a district where voters of color can "play a substantial, if not decisive, role in the electoral process." *Georgia* v. *Ashcroft*, 539 U. S. 461, 482 (2003). Accordingly, by dismantling *Balderas* District 24, and by failing to create a strong influence district elsewhere, Plan 1374C was retrogressive. See 539 U. S., at 482 (explaining that, in deciding whether a plan is retrogressive, "a court must examine whether a new plan adds or subtracts 'influence districts'").

take effect. We have held that, under the statutory scheme, voters may not directly challenge the Attorney General's decision to preclear a redistricting plan, see *Morris* v. *Gressette,* 432 U. S. 491 (1977), which means that the Attorney General's vigilant enforcement of the Act is critical, and which also means that plaintiffs could not bring a §5 challenge as part of this litigation.[16] However, judges are frequently called upon to consider whether a redistricting plan violates §5, because a covered jurisdiction has the option of seeking to achieve preclearance by either submitting its plan to the Attorney General or filing a declaratory judgment action in the District Court for the District of Columbia, whose judgment is subject to review by this Court, see, *e.g., Georgia,* 539 U. S. 461. Accordingly, we have the tools to analyze whether a redistricting plan is retrogressive.

Even though the §5 issue is not directly before this Court, for the reasons stated above, I believe that the cracking of District 24 caused Plan 1374C to be retrogressive. And the fact that the legislature promulgated a retrogressive plan is relevant, because it provides additional evidence that the legislature acted with a predominantly partisan purpose. Complying with §5 is a neutral districting principle, and the legislature's promulgation of a retrogressive redistricting plan buttresses my conclusion that the "legislature subordinated traditional [politically-]neutral districting principles . . . to [political] considerations." *Miller*

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[16]As JUSTICE KENNEDY explains, see *ante,* at 33–36, plaintiffs did, however, challenge District 24 under §2. I am in substantial agreement with JUSTICE SOUTER's discussion of this issue. See *post,* at 3–8. Specifically, I agree with JUSTICE SOUTER that the "50% rule," which finds no support in the text, history, or purposes of §2, is not a proper part of the statutory vote dilution inquiry. For the reasons stated in my analysis of the "unique question of law . . . raised in this appeal," *supra* at 11, and in this part of my opinion, however, it is so clear that the cracking of District 24 created an unconstitutional gerrymander that I find it unnecessary to address the statutory issue separately.

v. *Johnson*, 515 U. S. 900, 916 (1995). This evidence is particularly compelling in light of the State's acknowledgment that "[t]he Legislature . . . chose to pursue a political goal of unseating Congressman Frost instead of following a course that might have lowered risks in the preclearance process." State Post-Trial Brief 52 (citing, *inter alia*, trial testimony of state legislators).

In sum, the record in this litigation makes clear that the predominant motive underlying the fragmentation of *Balderas* District 24 was to maximize Republicans' electoral opportunities and ensure that Congressman Frost was defeated.

Turning now to the effects test I have proposed, plaintiffs in new Districts 6, 24, 36, and 32 could easily meet the three parts of that test because: (1) under the *Balderas* plan, they lived in District 24 and their candidate of choice (Frost) was the winning candidate; (2) under Plan 1374C, they have been placed in districts that are safe seats for the Republican party, see App. 106 (showing that the Democratic share of the two-party vote in statewide elections from 1996 to 2002 was 40% or less in Districts 6, 24, 26, and 32); and (3) their new districts are less compact than *Balderas* District 24, see App. 319–320 (compactness scores for districts under the *Balderas* Plan and Plan 1374C).[17]

JUSTICE KENNEDY rejects my proposed effects test, as applied in this case, because, in his view *Balderas* District 24 lacks "any special claim to fairness," *ante*, at 36. But my analysis in no way depends on the proposition that *Balderas* District 24 was fair. The district *was* more

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[17] Because new District 12, another district that covers portions of former District 24, is more compact than *Balderas* District 24, voters in new District 12 who previously resided in *Balderas* District 24 would not be able to bring a successful partisan gerrymandering claim under my proposed test, even though new District 12 is also a safe Republican district. See App. 106, 319–320.

compact than four of the districts that replaced it, and, as explained above, compactness serves important values in the districting process. This is why, in my view, a State that creates more compact districts should enjoy a safe harbor from partisan gerrymandering claims. However, the mere fact that a prior district was unfair should surely not provide a safe harbor for the creation of an even more unfair district. Conversely, a State may of course create less compact districts without violating the Constitution so long as its purpose is not to disadvantage a politically disfavored group. See *supra*, at 31–32 and n. 13. The reason I focus on *Balderas* District 24 is not because the district was fair, but because the prior district provides a clear benchmark in analyzing whether plaintiffs have been harmed.

In sum, applying the judicially manageable test set forth in this Part of my opinion reveals that the cracking of *Balderas* District 24 created several unconstitutional partisan gerrymanders. Even if I believed that Plan 1374C were not invalid in its entirety, I would reverse the judgment below with regard to Districts 6, 24, 26, and 32.

* * *

For the foregoing reasons, although I concur with the majority's decision to invalidate District 23 under §2 of the Voting Rights Act, I respectfully dissent from the Court's decision to affirm the judgment below with respect to plaintiffs' partisan gerrymandering claim. I would reverse with respect to the plan as a whole, and also, more specifically, with respect to Districts 6, 24, 26, and 32.

SUPREME COURT OF THE UNITED STATES

Nos. 05–204, 05–254, 05–276 and 05–439

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL., APPELLANTS
05–204 *v.*
RICK PERRY, GOVERNOR OF TEXAS, ET AL.

TRAVIS COUNTY, TEXAS, ET AL., APPELLANTS
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RICK PERRY, GOVERNOR OF TEXAS, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

[June 28, 2006]

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, concurring in part and dissenting in part.

I join Part II–D of the principal opinion, rejecting the one-person, one-vote challenge to Plan 1374C based simply on its mid-decade timing, and I also join Part II–A, in which the Court preserves the principle that partisan gerrymandering can be recognized as a violation of equal protection, see *Vieth* v. *Jubelirer,* 541 U. S. 267, 306 (2004) (KENNEDY, J., concurring in judgment); *id.*, at 317 (STEVENS, J., dissenting); *id.*, at 346 (SOUTER, J., dissent-

ing); *id.*, at 355 (BREYER, J., dissenting). I see nothing to be gained by working through these cases on the standard I would have applied in *Vieth*, *supra*, at 346–355 (dissenting opinion), because here as in *Vieth* we have no majority for any single criterion of impermissible gerrymander (and none for a conclusion that Plan 1374C is unconstitutional across the board). I therefore treat the broad issue of gerrymander much as the subject of an improvident grant of certiorari, and add only two thoughts for the future: that I do not share JUSTICE KENNEDY's seemingly flat rejection of any test of gerrymander turning on the process followed in redistricting, see *ante*, at 10–14, nor do I rule out the utility of a criterion of symmetry as a test, see, *e.g.*, King & Browning, Democratic Representation and Partisan Bias in Congressional Elections, 81 Am. Pol. Sci. Rev. 1251 (1987). Interest in exploring this notion is evident, see *ante*, at 13 (principal opinion); *ante*, at 20–23 (STEVENS, J., concurring in part and dissenting in part); *post*, at 2 (BREYER, J., concurring in part and dissenting in part). Perhaps further attention could be devoted to the administrability of such a criterion at all levels of redistricting and its review.

I join Part III of the principal opinion, in which the Court holds that Plan 1374C's District 23 violates §2 of the Voting Rights Act of 1965, 42 U. S. C. §1973, in diluting minority voting strength. But I respectfully dissent from Part IV, in which a plurality upholds the District Court's rejection of the claim that Plan 1374C violated §2 in cracking the black population in the prior District 24 and submerging its fragments in new Districts 6, 12, 24, 26, and 32. On the contrary, I would vacate the judgment and remand for further consideration.

The District Court made a threshold determination resting reasonably on precedent of this Court and on a clear rule laid down by the Fifth Circuit, see *Valdespino* v. *Alamo Heights Independent School Dist.*, 168 F. 3d 848, 852–853 (1999), cert. denied, 528 U. S. 1114 (2000): the

first condition for making out a §2 violation, as set out in *Thornburg* v. *Gingles*, 478 U. S. 30 (1986), requires "the minority group . . . to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district," *id.*, at 50, (here, the old District 24) before a dilution claim can be recognized under §2.[1] Although both the plurality today and our own prior cases have sidestepped the question whether a statutory dilution claim can prevail without the possibility of a district percentage of minority voters above 50%, see *ante*, at 37; *Johnson* v. *De Grandy*, 512 U. S. 997, 1008–1009 (1994); *Voinovich* v. *Quilter*, 507 U. S. 146, 154 (1993); *Growe* v. *Emison*, 507 U. S. 25, 41, n. 5 (1993); *Gingles*, *supra*, at 46, n. 12, the day has come to answer it.

Chief among the reasons that the time has come is the holding in *Georgia* v. *Ashcroft*, 539 U. S. 461 (2003), that replacement of a majority-minority district by a coalition district with minority voters making up fewer than half can survive the prohibition of retrogression under §5 of the Voting Rights Act, 42 U. S. C. §1973c, enforced through the preclearance requirement, *Georgia*, 539 U. S., at 482–483. At least under §5, a coalition district can take on the significance previously accorded to one with a majority-minority voting population. Thus, despite the independence of §§2 and 5, *id.*, at 477–479, there is reason to think that the integrity of the minority voting population in a coalition district should be protected much as a majority-minority bloc would be. While protection should begin through the preclearance process,[2] in jurisdictions where

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[1] In a subsequent case, however, we did not state the first *Gingles* condition in terms of an absolute majority. See *Johnson* v. *De Grandy*, 512 U. S. 997, 1008 (1994) ("[T]he first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice").

[2] Like JUSTICE STEVENS, I agree with JUSTICE SCALIA that compliance

that is required, if that process fails a minority voter has no remedy under §5, because the State and the Attorney General (or the District Court for the District of Columbia) are the only participants in preclearance, see 42 U. S. C. §1973c. And, of course, vast areas of the country are not covered by §5. Unless a minority voter is to be left with no recourse whatsoever, then, relief under §2 must be possible, as by definition it would not be if a numerical majority of minority voters in a reconstituted or putative district is a necessary condition. I would therefore hold that a minority of 50% or less of the voting population might suffice at the *Gingles* gatekeeping stage. To have a clear-edged rule, I would hold it sufficient satisfaction of the first gatekeeping condition to show that minority voters in a reconstituted or putative district constitute a majority of those voting in the primary of the dominant party, that is, the party tending to win in the general election.[3]

This rule makes sense in light of the explanation we gave in *Gingles* for the first condition for entertaining a claim for breach of the §2 guarantee of racially equal opportunity "to elect representatives of . . . choice," 42 U. S. C. §1973: "The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large . . . is this: Unless minority voters possess the potential to elect representatives in the ab-

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with §5 is a compelling state interest. See *ante*, at 31, n. 12 (STEVENS, J., concurring in part and dissenting in part); *post*, at 9 (SCALIA, J., concurring in judgment in part and dissenting in part).

[3] I recognize that a minority group might satisfy the §2 "ability to elect" requirement in other ways, and I do not mean to rule out other circumstances in which a coalition district might be required by §2. A minority group slightly less than 50% of the electorate in nonpartisan elections for a local school board might, for example, show that it can elect its preferred candidates owing to consistent crossover support from members of other groups. Cf. *Valdespino* v. *Alamo Heights Independent School Dist.*, 168 F. 3d 848, 850–851 (CA5 1999), cert. denied, 528 U. S. 1114 (2000).

sence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." 478 U. S., at 50, n. 17 (emphasis deleted); see also *id.*, at 90, n. 1 (O'Connor, J., concurring in judgment) ("[I]f a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice"). Hence, we emphasized that an analysis under §2 of the political process should be "'functional.'" *Id.*, at 48, n. 15 (majority opinion); see also *Voinovich*, *supra*, at 158 ("[T]he *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim"). So it is not surprising that we have looked to political-primary data in considering the second and third *Gingles* conditions, to see whether there is racial bloc voting. See, *e.g.*, *Abrams* v. *Johnson*, 521 U. S. 74, 91–92 (1997); *Gingles*, *supra*, at 52–54, 59–60.

The pertinence of minority voters' role in a primary is obvious: a dominant party's primary can determine the representative ultimately elected, as we recognized years ago in evaluating the constitutional importance of primary elections. See *United States* v. *Classic*, 313 U. S. 299, 318–319 (1941) ("Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article I, §2. . . . Here, . . . the right to choose a representative is in fact controlled by the primary because, as is alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representative"); *id.*, at 320 ("[A] primary election which involves a

necessary step in the choice of candidates for election as representatives in Congress, and which in the circumstances of this case controls that choice, is an election within the meaning of the constitutional provision"); *Smith* v. *Allwright*, 321 U. S. 649, 660 (1944) (noting "[t]he fusing by the *Classic* case of the primary and general elections into a single instrumentality for choice of officers"); *id.*, at 661–662 ("It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution. . . . Under our Constitution the great privilege of the ballot may not be denied a man by the State because of his color").[4] These conclusions of our predecessors fit with recent scholarship showing that electoral success by minorities is adequately predictable by taking account of primaries as well as elections, among other things. See Grofman, Handley, & Lublin, Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence, 79 N. C. L. Rev. 1383 (2000–2001).[5]

I would accordingly not reject this §2 claim at step one of *Gingles*, nor on this record would I dismiss it by jumping to the ultimate §2 issue to be decided on a totality of

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[4] Cf. *California Democratic Party* v. *Jones*, 530 U. S. 567, 575 (2000) ("In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views").

[5] One must be careful about what such electoral success ostensibly shows; if the primary choices are constrained, say, by party rules, the minority voters' choice in the primary may not be truly their candidate of choice, see McLoughlin, Note, *Gingles* In Limbo: Coalitional Districts, Party Primaries and Manageable Vote Dilution Claims, 80 N. Y. U. L. Rev. 312 (2005).

the circumstances, see *De Grandy*, 512 U. S., at 1009–1022, and determine that the black plaintiffs cannot show that submerging them in the five new districts violated their right to equal opportunity to participate in the political process and elect candidates of their choice. The plurality, on the contrary, is willing to accept the conclusion that the minority voters lost nothing cognizable under §2 because they could not show the degree of control that guaranteed a candidate of their choice in the old District 24. See *ante*, at 37–40. The plurality accepts this conclusion by placing great weight on the fact that Martin Frost, the perennially successful congressional candidate in District 24, was white. See, *e.g.*, *ante*, at 38–39 (no clear error in District Court's findings that "no Black candidate has ever filed in a Democratic primary against Frost," *Session* v. *Perry*, 298 F. Supp. 2d 451, 484 (ED Tex 2004) *(per curiam)*), and "[w]e have no measure of what Anglo turnout would be in a Democratic primary if Frost were opposed by a Black candidate," *ibid.*); *ante*, at 38–39 (no clear error in District Court's reliance on testimony of Congresswoman Eddie Bernice Johnson that "District 24 was drawn for an Anglo Democrat (Martin Frost, in particular) in 1991").

There are at least two responses. First, "[u]nder §2, it is the status of the candidate as the chosen representative of a particular group, not the race of the candidate, that is important." *Gingles*, *supra*, at 68 (emphasis deleted). Second, Frost was convincingly shown to have been the "chosen representative" of black voters in old District 24. In the absence of a black-white primary contest, the unchallenged evidence is that black voters dominated a primary that consistently nominated the same and ultimately successful candidate; it takes more than speculation to rebut the demonstration that Frost was the candi-

date of choice of the black voters.[6] There is no indication that party rules or any other device rigged the primary ballot so as to bar any aspirants the minority voters would have preferred, see n. 5, *supra*, and the uncontroverted and overwhelming evidence is that Frost was strongly supported by minority voters after more than two decades of sedulously considering minority interests, App. 107 (Frost's rating of 94% on his voting record from the National Association for the Advancement of Colored People exceeded the scores of all other members of the Texas congressional delegation, including black and Hispanic members of both major parties); *id.*, at 218–219 (testimony by State's political-science expert that Frost is the African-Americans' candidate of choice); *id.*, at 239 (testimony by Ron Kirk, an African-American former mayor of Dallas and U. S. Senate candidate, that Frost "has gained a very strong base of support among African-American . . . voters because of his strong voting records [in numerous areas]" and has "an incredible following and amount of respect among the African-American community"); *id.*, at 240–241 (Kirk's testimony that Frost has never had a contested primary because he is beloved by the African-American community, and that a black candidate, possibly including himself, could not better Frost in a primary because of his strong rapport with the black community); *id.*, at 242–243 (testimony by county precinct administrator that Frost has been the favored candidate of the African-American community and there have been no primary challenges to him because he "serves [African-American] interests").[7]

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[6] Judge Ward properly noted that the fact that Frost has gone unchallenged may "reflect favorably on his record" of responding to the concerns of minorities in the district. See *Session* v. *Perry*, 298 F. Supp. 2d 451, 530 (ED Tex. 2004) (opinion concurring in part and dissenting in part).

[7] In any event, although a history or prophecy of success in electing candidates of choice is a powerful touchstone of §2 liability when

It is not that I would or could decide at this point whether the elimination of the prior district and composition of the new one violates §2. The other *Gingles* gatekeeping rules have to be considered, with particular attention to the third, majority bloc voting, see 478 U. S., at 51, since a claim to a coalition district is involved.[8] And after that would come the ultimate analysis of the totality of circumstances. See *De Grandy*, *supra*, at 1009–1022.

I would go no further here than to hold that the enquiry should not be truncated by or conducted in light of the Fifth Circuit's 50% rule,[9] or by the candidate-of-choice analysis just rejected. I would return the §2 claim on old District 24 to the District Court, which has already labored so mightily on this case. All the members of the three-judge court would be free to look again untethered by the 50% barrier, and Judge Ward, in particular, would

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minority populations are cracked or packed, electoral success is not the only manifestation of equal opportunity to participate in the political process, see *De Grandy*, 512 U. S., at 1014, n. 11. The diminution of that opportunity by taking minority voters who previously dominated the dominant party's primary and submerging them in a new district is not readily discounted by speculating on the effects of a black-white primary contest in the old district.

[8]The way this third condition is understood when a claim of a putative coalition district is made will have implications for the identification of candidate of choice under the first *Gingles* condition. Suffice it to say here that the criteria may not be the same when dealing with coalition districts as in cases of districts with majority-minority populations. All aspects of our established analysis for majority-minority districts in *Gingles* and its progeny may have to be rethought in analyzing ostensible coalition districts.

[9]Notably, under the Texas Legislature's Plan 1374C, there are three undisputed districts where African-Americans tend to elect their candidates of choice. African-Americans compose at most a citizen voting age majority (50.6%) in one of the three, District 30, see *Session*, *supra*, at 515; even there, the State's expert pegged the percentage at 48.6%, App. 185–186. In any event, the others, Districts 9 and 18, are coalition districts, with African-American citizen voting age populations of 46.9% and 48.6% respectively. *Id.*, at 184–185.

have the opportunity to develop his reasons unconstrained by the Circuit's 50% rule, which he rightly took to limit his consideration of the claim, see *Session*, 298 F. Supp. 2d, at 528–531 (opinion concurring in part and dissenting in part).

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

[June 28, 2006]

JUSTICE BREYER, concurring in part and dissenting in part.

I join Parts II–A and III of the Court's opinion. I also join Parts I and II of JUSTICE STEVENS' opinion concurring in part and dissenting in part.

For one thing, the timing of the redistricting (between census periods), the radical departure from traditional boundary-drawing criteria, and the other evidence to which JUSTICE STEVENS refers in Parts I and II of his opinion make clear that a "desire to maximize partisan

advantage" was the "sole purpose behind the decision to promulgate Plan 1374C." *Ante*, at 12. Compare, *e.g.*, App. 176–178; *ante*, at 7–9, 13 (STEVENS, J., concurring in part and dissenting in part), with *Vieth* v. *Jubelirer*, 541 U. S. 267, 366–367 (2004) (BREYER, J., dissenting).

For another thing, the evidence to which JUSTICE STEVENS refers in Part III of his opinion demonstrates that the plan's effort "to maximize partisan advantage," *ante*, at 13 (STEVENS, J., concurring in part and dissenting in part), encompasses an effort not only to exaggerate the favored party's electoral majority but also to produce a majority of congressional representatives even if the favored party receives only a *minority* of popular votes. Compare *id.*, at 20–22 (STEVENS, J., concurring in part and dissenting in part), App. 55 (plaintiffs' expert); *id.*, at 216 (State's expert), with *Vieth*, *supra*, at 360.

Finally, because the plan entrenches the Republican Party, the State cannot successfully defend it as an effort simply to *neutralize* the Democratic Party's previous political gerrymander. Nor has the State tried to justify the plan on nonpartisan grounds, either as an effort to achieve legislative stability by avoiding legislative exaggeration of small shifts in party preferences, see *Vieth*, *supra*, at 359, or in any other way.

In sum, "the risk of entrenchment is demonstrated," "partisan considerations [have] render[ed] the traditional district-drawing compromises irrelevant," and "no justification other than party advantage can be found." 541 U. S., at 367. The record reveals a plan that overwhelmingly relies upon the unjustified use of purely partisan line-drawing considerations and which will likely have seriously harmful electoral consequences. *Ibid.* For these reasons, I believe the plan in its entirety violates the Equal Protection Clause.