

The University Professors' argument misses the structural significance of the balance struck in Article I, §4. Some of the most well known of the checks and balances between the branches of government could be described as little used. Although the veto is often threatened, its use is statistically infrequent. The same can be said for the implicit check that judicial review of the constitutionality of statutes serves on the legislative branch; although it is rare for the Supreme Court to strike down a statute, the knowledge that statutes may be so reviewed serves a significant limiting function. And the impeachment power serves as a check on official misconduct, even though it has been invoked only on the rarest of occasions. These powers—like the power of a state legislature to redraw federal-court-drawn congressional districts—have effects that are felt throughout the process even when the power itself is not formally invoked.

The real-world check on the frequency of redrawing congressional districts—like the reason for the infrequency of the exercise of the veto or judicial review—is the scarcity of political attention and the sheer divisiveness of the process for state legislators. There is no reason to think that state legislators will choose to engage in the process with great frequency. To the contrary, before *Reynolds v. Sims* mandated equal population at the state-legislative level, many states had resisted redistricting *for decades* in order not to disturb the status quo. 377 U.S. 533, 569-70, 583-84 (1964); *see also id.* at 588-89 & nn.1-2 (Harlan, J., dissenting) (listing States and the pervasiveness of systems that built representation on factors other than equal population). It is no surprise that voluntary redistricting is infrequent—to undertake it involves an enormous amount of political capital and legislative attention. It is only in the most unusual cases—such as Texas's vastly disproportionate congressional delegation in 2002 and the twelve-year absence of legislative action—where a legislature is likely to determine it to be worthwhile.

Because of the substantial real-world impediments to redistricting, Plaintiffs' specter of widespread "biennial" redistricting is simply not credible.

**c. The historical evidence offered by Plaintiff Henderson merely underscores that neither the Constitution nor federal law bars "mid-decade" redistricting.**

Plaintiff Henderson marshals impressive historical research to recount the long history of public debate over the wisdom of mid-decade redistricting. But that research does not reveal any evidence that mid-decade redistricting is, or ever was, prohibited. If anything, the vibrant political debate about the advisability of mid-decade redistricting clarifies that the question of whether to engage in mid-decade redistricting remains open, and left under the Constitution to the political branches of the state and federal governments.

**The attempts to amend the Constitution to bar mid-decade redistricting.** Plaintiff Henderson cites several examples of when Congress debated proposed amendments that sought to ban mid-decade redistricting, arguing that these debates somehow show that such redistricting must already be unconstitutional. *See* Henderson Br. at 23-24. The flaw in that reasoning is apparent. If the Constitution already barred mid-decade redistricting, proposing such amendments would have been pointless. The fact that the early Congresses engaged in so frequent a debate on this subject merely shows that the question was one seen as remaining with the political branches, not already answered by the Constitution.

**The legislative history of the 1842 and 1967 statutes.** Plaintiff Henderson also cites two examples of when Congress did *not* pass statutes that might have banned mid-decade redistricting. In one instance in 1842, a legislator decried the practice in floor debate. *See* Henderson Br. at 24 (citing Cong. Globe, 27th Cong., 2d Sess. App. at 493 (1842)). In another instance in 1967, the relevant language was deleted from the bill before it was enacted. *See*

Henderson Br. at 25-27. Those examples again illustrate that the operative statutory language did not contain such limitation.

**The state constitutions that have taken up the question.** Plaintiff Henderson also cites the examples of several other States that have chosen to regulate the frequency of their own congressional redistricting decisions. *See* Henderson Br. at 21-22 (citing 13 States that have some relevant provision of state law). This, too, merely confirms that the decision was one entrusted to state control. *See* Part IV(A)(1)(a), *supra*.

In sum, the historical data make clear (1) that the political branches have full authority to prohibit “mid-decade” redistricting, and (2) they have not yet done so.

**d. Plaintiffs’ unsuccessful arguments against “mid-decade” redistricting are not strengthened by somehow amalgamating them with allegations of partisan gerrymandering.**

In order to somehow fall within the *Vieth* remand, Plaintiff Henderson suggests that his historical research about mid-decade redistricting helps to answer Justice Kennedy’s concerns about the lack of standards for substantive fairness in districting. *See* Henderson Br. at 41. But Henderson’s research is of the wrong kind, and covers the wrong subjects, to give guidance as to the substantive fairness of where district lines are drawn. Justice Kennedy’s concurrence expressed interest in records of how legislative bodies themselves had considered questions of fairness—materials that might aid a court in crafting a standard that reflected how legislatures have typically viewed this question. *See Vieth*, 124 S.Ct. at 1794 (Kennedy, J., concurring in the judgment). Justice Kennedy was concerned with how to tell whether the lines drawn in a particular map are substantively fair, not with disputes about the timing of that process. *Id.* at 1793 (requiring a consensus “substantive definition of fairness in districting” before political-gerrymandering claims can be justiciable). Plaintiff Henderson, by contrast, takes issue only with the timing of the map, not with the substance of its district lines.

Thus, Plaintiff Henderson’s theory gets the Court no closer to a *substantive* test for determining what makes one districting plan more “fair” than another. He does not provide a viable model of what would make one district configuration more substantively “fair” than another. Indeed, his argument is entirely independent of where the lines fall. If the timetables had been reversed—if Plan 1374C had been adopted in 2001 and Plan 1151C adopted in 2003—Plaintiff Henderson’s argument would suggest that Plan 1374C should be used. It thus says nothing about the substantive fairness of either map.

Shoehorning these mid-decade claims into a post-*Vieth* remand does not comply with the demands of *Vieth*, and it confuses restrictions on the *process* of redistricting—which is determined by the constitutional structure—with questions about the *substantive result* of redistricting—which is the focus of *Vieth*. As this Court made clear, questions about process are better left to the branches that the Constitution assigned the task of redistricting: state legislatures in the first instance, subject to the regulation of Congress. *Session*, 298 F.Supp.2d at 468 (“[T]hese arguments . . . are directed to the wrong forum.”).

2. **Travis County and LULAC Plaintiffs and the University Professors Amici: The equal-population arguments urged by plaintiffs are contrary to law.**

The second variant of Plaintiffs’ “mid-decade” redistricting argument derives from the Supreme Court’s “one-person, one-vote” jurisprudence. Travis County, the University Professor *amici*, and—for the first time on remand—a brief filed by LULAC and the Valdez-Cox

Plaintiffs<sup>24</sup> all advance variations on the argument that Plan 1374C violates the constitutional principle of one-person, one-vote.<sup>25</sup> These claims fail as a matter of law.

Plaintiffs' claims fail because they are an undisguised attempt at a backdoor judicial prohibition on "mid-decade" redistricting, and this Court has already correctly concluded that "mid-decade" redistricting is legal and permissible. *See* Part IV(A)(1), *supra*. Plaintiffs' claims also fail because the Supreme Court has made clear that decennial Census data are presumptively valid for redistricting, absent a substantial showing to the contrary. Plaintiffs' proffered burden shifting also has no basis in law. Finally, Plaintiffs' claims fail because Plaintiffs have not met the burden placed on them under Supreme Court precedent to demonstrate an equal-population violation.

But the Court need not—and should not—even reach these arguments, because all of them are beyond the scope of the remand. To the extent Plaintiffs argue that "one-person, one vote" prohibits "mid-decade" redistricting, that argument has nothing to do with *Vieth* or political gerrymandering. To the extent Plaintiffs argue instead that that "one-person, one vote" prohibits "mid-decade" redistricting *only where there are background allegations of partisan gerrymandering*, that claim is a derivative claim of mid-decade redistricting, itself a derivative claim from partisan gerrymandering; as such, it is too attenuated from *Vieth* to fall within the remand. And, to the extent that Plaintiffs assert free-standing equal-population claims, those are utterly unrelated to *Vieth*, and hence outside the remand.

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<sup>24</sup> It is unclear what basis LULAC and Valdez-Cox might have to so radically change their claims on remand. Their pleadings do not reflect equal-population claims, and they have offered no evidence supporting them.

<sup>25</sup> The Jackson Plaintiffs and Democratic Congressional Intervenors have also adopted these arguments by cross-reference. Jackson Br. at 26 n.9.

- a. **The Court should reject Plaintiffs’ attempts at a backdoor prohibition on “mid-decade” redistricting for the same reasons that the Court rejected their direct challenges to “mid-decade” redistricting.**

Travis County and the University Professors would use “equal population” as a backdoor method to establish a bar on mid-decade redistricting. They reason that, because the Census data are now two years older, any plan drawn using that data necessarily violates the Constitution. With no realistic alternative to those Census data, the Plaintiffs conclude, there can be no mid-decade redistricting. Indeed, the Professor *amici* are quite candid about this ultimate goal: by its design, their proffered “equal population” test erects two insurmountable obstacles—first, it requires the State to show an up-to-date data set that the Professors say does not exist, Univ. Profs. Br. at 4, and second, it requires a compelling state interest that the Professors say “is doubtful” could ever be met, *id.* at 16. Thus, their test collapses to a blanket prohibition on “mid-decade” redistricting.

For the reasons set out in Part IV(A), *supra*, the States’ authority to redistrict “mid-decade” derives directly from the Constitution (absent congressional prohibition), from the federal structure, and from repeated Supreme Court decisions emphasizing the primacy of state legislatures in drawing plans. None of the Supreme Court’s “one-person, one-vote” cases have any reference to prohibiting “mid-decade” redistricting, and Plaintiffs can point to no authority for extending the one body of precedent to overrule the other. The Court should not indulge that unsupported linkage.

- b. **The Court should reject Plaintiffs’ claims because the Supreme Court has made clear that decennial Census data are presumptively valid for redistricting, absent a substantial showing to the contrary.**

It is undisputed that Plan 1374C is perfectly equipopulous under the block-level Census 2000 data provided by the federal government for the purpose of redistricting. The thirty-two

districts have a maximum variance of one person per district, which is unavoidable because the total number of Texans counted in the Census was not evenly divisible by thirty-two. The State Defendants are unaware of any case in which an equal-population claim has been made against congressional districts when the districts were perfectly equipopulous under current Census data.

There is likewise no dispute about the Census data. All sides agree that the data are remarkably geographically precise, that the data are based on a headcount rather than extrapolation or guesswork, and that the data are measured at a certain point in time (the “Census date” of April 1, 2000). Accordingly, the Supreme Court has established a strong and well-founded presumption in favor of using the Census enumeration data for redistricting:

When the decennial Census numbers are released, States must redistrict to account for any changes or shifts in population. But *before the new census*, States operate under the legal fiction that even 10 years later, *the plans are constitutionally apportioned*.

*Georgia v. Ashcroft*, 123 S.Ct. at 2515 n.2 (emphasis added). Indeed, in that 2003 decision, the Court used *thirteen-year-old* Census data from 1990 to evaluate a Voting Rights Act challenge, specifically rejecting the dissent’s argument that such data was “irrelevant.” *Id.*

Even recognizing that decennial Census data “measure[] population at only a single instant in time [and] [d]istrict populations are constantly changing, often at different rates in either direction, up or down,” *Gaffney v. Cummings*, 412 U.S. 735, 746 (1973), the Supreme Court has repeatedly held that States may rely on the decennial data until replacement data are proven up. This is because “the Census data provide the only reliable—albeit less than perfect—indication of the districts’ ‘real’ relative population levels . . . [, and] because the Census count represents the ‘best population data available,’ it is the only basis for good-faith attempts to achieve population equality.” *Karcher v. Daggett*, 462 U.S. 725, 738 (1983); *see also Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 344 (1999).

The University Professors and Travis County Plaintiffs acknowledge that the Census data is the best available. As the University Professor *amici* put it, “[a]fter all, there is effectively no alternative.” *See* Univ. Profs. Br. at 4.<sup>26</sup> And, as the Travis County Plaintiffs note, “the hurdle of developing a rigorous and careful new current population basis may be insurmountably high in a factual sense.” Travis County Br. at 12.

Neither even attempts to offer any such replacement data and, accordingly, Plaintiffs fail to meet the heavy burden required to displace the presumption in favor of using block-level Census data.

**c. Plan 1374C must be upheld because Plaintiffs have failed to meet the required threshold showing of an “avoidable” population deviation.**

Plaintiffs make no effort to meet their burden under binding Supreme Court precedent, which squarely places the initial burden on them to prove that there is a population deviation that could have been avoided. Under Supreme Court guidance, when congressional redistricting plans are challenged on an equal-population basis, the plaintiffs “must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme *must be upheld*.” *Karcher*, 462 U.S. at 730-31 (emphasis added). Under *Karcher*, Plaintiffs must prove (1) actual “differences” in population equality among the districts that (2) “could have been avoided” by drawing different district lines.<sup>27</sup> Plaintiffs have failed to discharge that burden.

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<sup>26</sup> Indeed, because there are no better data available in this case than the Census 2000 data, if the Court were to find those data unreliable, the Court would then be faced with drawing its own map based on the very same data set that it had ruled to be unconstitutional. This intractable dilemma—where the test could yield a violation but no remedy—is avoided by *Karcher*’s requirement that the plaintiff *first* offer a map with a lower deviation. Under *Karcher*, a court would always have available a meaningful remedy.

<sup>27</sup> Travis County is mistaken about the legal test for what must be “avoidable.” Travis County argues about whether the initial decision to redraw Plan 1151C was “avoidable.” *See* Travis County Br. at 11. But that is the wrong question. The Supreme Court’s equal-population test does not examine the initial

- i. **There is no foundation for Plaintiffs’ arguments about “burden shifting” that ask the Court to convert the equal-population rule into a rule about timing and structure.**

Rather than attempt to meet their burden, Plaintiffs instead ask the Court to create a novel “burden-shifting” rule that would eliminate their need for proof at all. Such a result would directly contradict the Court’s holding in *Karcher*, which placed the burden firmly on the party challenging the equipopulosity of a plan. 462 U.S. at 730-31. And Plaintiffs cite no legal authority supporting their request that this Court so dramatically depart from precedent.

The lack of relevant authority is particularly striking in the operative parts of Travis County’s brief and the University Professors’ brief. When Travis County argues for burden shifting, they assert, *ipse dixit*, that the Court should entirely disregard the “legal fiction” of Census validity because there was no need for mid-decade redistricting. See Travis County Br. at 8. They provide no reason to depart from the constitutional text giving such authority to state legislatures or of the countless cases expressly confirming a state legislature’s prerogative to redraw a court-drawn map. See Part IV(A)(1), *supra*.

By the same token, when the University Professors argue for a “presumption” of unconstitutionality and a “compelling state interest” test, they offer page after page without citing legal authority. See Univ. Profs. Br. at 5-8 (setting out their proposed test); *id.* at 11-14 (citing only one substantive case, and that for a proposition about standing). The authority cited in their brief is for ancillary points because there is no foundation for their arguments about the equal-population rule itself.

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decision to undertake to draw a map. Rather, it looks to whether a particular, demonstrated *population deviation* was, in the case of a particular district, “avoidable.” See *Karcher*, 462 U.S. at 730-31 (discussing “a good-faith effort to draw districts of equal population”) (emphasis added). For that question—the legally relevant one—the Plaintiffs have offered no evidence, because they have not shown a deviation based on the specific lines drawn in Plan 1374C or an alternative map that would have avoided that deviation.

That the University Professors and Travis County have not offered legal authority is no slight on their research skills. Rather, it reflects that the rules they propose are both novel and contrary to law. Their arguments—by demanding a presumption of unconstitutionality—ask this Court to overrule binding Supreme Court precedent establishing that the burden of proof in an equal-population claim falls on the plaintiff and the requirement that the plaintiff offer a means of achieving a lower population inequality.

Plaintiffs' rule disallowing use of Census data after the decennium would also, in practice, disrupt the relative role of state legislatures and federal courts in redistricting.<sup>28</sup> Plaintiffs suggest that burden shifting would not constitute an absolute legal bar on a legislature drawing districts after a court-ordered plan has been used. *See* Travis County Br. at 11-12. That suggestion strains credulity. *Wesberry v. Sanders* requires essentially perfect equality between congressional districts. 376 U.S. 1, 7-8 (1964). In practice, that high degree of mathematical precision would be all but impossible using any data other than the decennial block-level data.

Plaintiffs' rule would turn on its head the clear guidance that state legislatures have been delegated primary jurisdiction over redistricting as a constitutional matter. *See* *Grove*, 507 U.S. at 34; *Upham*, 456 U.S. at 41-42; *Connor*, 431 U.S. at 414-15; *see also* *Wise*, 437 U.S. at 540 (“[I]t becomes the ‘unwelcome obligation’ . . . of the federal court to devise and impose a reapportionment plan *pending later legislative action.*”) (emphasis added). Their burden-shifting regime is created out of whole cloth, and without basis in law.

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<sup>28</sup> Their rule could also interfere with actions under the Voting Rights Act. After all, a statute cannot trump the Constitution. If the University Professors are right (and state legislatures are barred from mid-decade redistricting on equal-population grounds), then state legislatures might not be able to implement changes to comply with the Voting Rights Act or other merely statutory commands. Nor would a federal court be able to order such changes if those statutory preferences would contravene the Constitution.

**ii. The University Professors' timing-based argument has no factual or legal merit.**

The University Professors also argue that Plan 1374C is less equal in population than Plan 1151C, not because of any features of the map, but rather because it was adopted later in time. From that premise, they argue that all later-adopted maps should be presumed unconstitutional because they present a “risk of . . . increased population inequalities.” Univ. Profs. Br. at 15. Reasoning from that assumed increased “risk,” they conclude that the State should bear the burden of proof. But the University Professors’ argument fails as a factual matter because there is no reason to believe that a later-adopted map is, merely for that reason, less equipopulous.

According to the University Professors, if Map A is adopted in the first year of a decade and Map B is adopted in the third year of a decade, it is necessarily true that Map A is more equipopulous than is Map B. On that thread depends their entire argument; from that premise they weave a complicated tapestry of presumptions, shifting burdens, and other legal devices. But because that premise is fatally flawed—indeed, it is utterly groundless—their entire argument unravels.

The University Professors’ temporal hypothesis is fundamentally flawed for one simple, and undisputed, reason: *both Plan 1151C and Plan 1374C were based on the identical 2000 Census data.* Therefore, there is no logical basis for inferring that one plan or the other is more or less equipopulous. Both plans perfectly divide every resident of Texas into exactly equal districts, relying on the exact same data.

The University Professors appear to suggest that a court could state with confidence that Map A is currently more equal than Map B because it was adopted two years prior—even if based on identical population data. But their test is insufficient to state anything substantive

about the relative *population equality* of two maps. Instead, it just speaks to the timing of two maps.<sup>29</sup>

Indeed, the remedies sought by Plaintiffs for this supposed “equal population” violation reveal that they are entirely unconcerned with equal population. Plaintiffs urge the Court to “reinstate” Plan 1151C—a map based on the exact same population data as Plan 1374C. *See* Travis County Br. at 14; LULAC Br. at 9; *see also* Univ. Profs. Br. at 18. It would be nothing short of bizarre for the Court to hold that 2000 Census data are too stale and inaccurate to be used in Plan 1374C for the 2004 congressional election but that the identical data are nonetheless accurate enough to be used in Plan 1151C in 2006. Such a “remedy,” would have no effect on equal population; rather it would have just one predictable effect—which is precisely why it is urged by Plaintiffs and *amici*—of rendering it easier for Democrats to get elected to Congress in Texas, notwithstanding the votes of a majority of Texans for Members of Congress from the opposite party.

**iii. The equal-population rule is about demography and geography, not abstract legislative intent.**

The University Professors suggest that the mere intent by the Legislature to redraw congressional districts mid-decade could somehow offend the equal-population rule, even if there is in fact no better set of data to use and even if the legislators made no effort to exploit any possible population variances that may have arisen since the last Census. By their logic, the

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<sup>29</sup> A simple thought experiment shows why. Imagine the tables were turned, that Map A, the map passed in 2001, was Plan 1374C. And imagine that Map B, the map passed in 2003, was Plan 1151C. According to the University Professors’ logic, a court would be asked to conclude that Plan 1151C “is *prima facie* unconstitutional because it is based on inaccurate population enumerations,” *id.* at 12, that a compelling state interest would be needed to draw such a map because of the “risk of the increased population inequality” attendant to Plan 1151C, *id.* at 15, and that “it is doubtful that any state interest could justify the risk of increased population inequality caused by the replacement or change of [Plan 1374C],” *id.* at 16. Thus, the University Professors’ test does not say anything substantive about the whether the district configuration of one map is more equal in population than the district configuration of another map. Rather, it is merely a structural argument clad in the language of “equal population.”

constitutional right is not about actual equality of population, but rather is a right to have the legislature use “good faith” toward population equality. *See Univ. Profs. Br.* at 8.

This deliberate shift in focus is evident when they say that Plan 1151C was closer to equal in population in 2001 (when it was enacted) than Plan 1374C was in 2003 (when it was enacted). *See Univ. Profs. Br.* at 6. But by changing the point of reference from 2001 to 2003, the University Professors proffer a false comparison. They rely on the mundane point that Plan 1151C (and 1374C) was more likely to be perfectly equipopulous in 2001 than it was (or any other plan was) at any later date. Their comparison says nothing about whether Plan 1151C was in actuality more or less equal than 1374C in 2001, or 2003, 2006, or any moment thereafter. The 2000 Census data is not getting any younger, but that criticism could be leveled against every plan using those data, including 1151C.

**iv. In any event, the record does not establish any improper use of population data.**

Because the Supreme Court requires a showing of *actual* inequality as the starting point for an equal-population claim, *Karcher*, 462 U.S. at 730-31, the Court should never reach the secondary question of good faith. But, in any event, this record is completely devoid of evidence of avoidable population deviations resulting from lack of good faith.

The University Professors offer hypothetical horror stories that, perhaps, some state legislature could theoretically consider post-censal population changes to accomplish improper ends. *See Univ. Profs. Br.* at 5. Yet, nowhere do they argue that the Texas Legislature in fact did that, nor would the record support such an assertion.<sup>30</sup> And if this hypothetical ever did

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<sup>30</sup> Nor is there any merit to the sole example proffered by Travis County. The record does not show that legislators took into account any post-Census population changes that had already occurred. *Cf. Travis County Br.* at 10 (asserting that legislators “relied on [new population numbers] in making their political line drawing decisions”). The testimony referenced by Plaintiffs, on its face, concerned future growth

come to pass, current Supreme Court doctrine under *Karcher* offers ample protection. With such evidence of deliberate malfeasance and mispopulated districts, a plaintiff would be able to establish that the particular population inequality was “avoidable” by offering a more equal map, which would open the door to a full examination of the legislature’s good faith.<sup>31</sup>

**v. . *Cox v. Larios* does not support Plaintiffs’ claims.**

The Supreme Court’s summary affirmance in *Cox v. Larios*, 124 S.Ct. 2806 (2004), provides no comfort to Plaintiffs. While Plaintiffs assert that *Larios* lacks “meaningful distinction[]” from this case, *see* Travis County Br. at 5, they omit two outcome-determinative distinctions. In *Larios*, the map was not perfectly equipopulous based on decennial Census data, and thus the plaintiffs were able to demonstrate an actual population deviation. *Larios v. Cox*, 300 F.Supp.2d 1320, 1354 (N.D. Ga. 2004) (three-judge court), *aff’d*, 124 S.Ct. 2806 (2004). And in *Larios*, the plaintiffs offered an alternative map drawn with the same data that would have minimized the population deviated. *Id.* at 1354.

Here, Plaintiffs have done neither: Plan 1374C is perfectly equipopulous and the Plaintiffs have not offered a better map. And without those necessary prerequisites, the *Larios* district court would not have been able even to reach the allegations that partisanship undermined good faith. As the *Larios* court observed, absent the threshold showing of an avoidable population deviation, “the apportionment scheme must be upheld.” *Id.* at 1353 (quoting *Karcher*, 462 U.S. at 730-31).

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trends, not any attempt to benefit from past changes. *Id.* (discussing how counties would grow in the future). Nor does that testimony relate to any congressional district touching Travis County.

<sup>31</sup> The salient question would be whether the particular *population* deviations in the map are explainable by “good faith” attempts to achieve equality, not some more general concept that would condemn mid-decade redistricting in particular or political ends in general. *See Karcher*, 462 U.S. at 734 n.6 (acknowledging that its measure of “achieving population equality[] is far less ambitious than what would be required to address gerrymandering on a constitutional level”).

The post-affirmance proceedings in *Larios* further undermine the Plaintiffs' assertion that 2000 decennial Census numbers are inadequate for use mid-decade. On remand in *Larios*, the court's special master who undertook in 2004 to draw equipopulous legislative districts relied on the very same 2000 block-level decennial Census data decried by Plaintiffs here. See Affidavit of Nathaniel Persily, at ¶12 *Larios v. Cox*, Appendix to Report and Recommendation of the Special Master, No. 1:03-CV-693-CAP (March 15, 2004) (available at <http://electionlawblog.org/archives/000900.html>) (last visited Jan. 13, 2005) ("After consulting with the Special Master, Mr. Egan and I endeavored to prepare single-member district plans for the Georgia House and Senate in which no district deviated from the ideal population size, according to 2000 Census figures, by more than one percent.") (emphasis added).<sup>32</sup> Here, the Plaintiffs argue that the violation in this case is using the 2000 Census data; yet, in *Larios*, close adherence to the same Census data was the remedy.

**vi. There is no merit to LULAC's suggestion that projections and estimates are sufficiently precise to use for these purposes.**

LULAC suggests that it could prove up a new data set using Census estimates and projections. See LULAC Br. at 5-6. When plaintiffs seek to dislodge the presumptively accurate Census data, they must meet a heavy burden. As the Fifth Circuit has held, plaintiffs must demonstrate that their proposed method of calculating populations is "thoroughly documented, ha[s] a high degree of accuracy, and [is] clear, cogent, and convincing." *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 853-54 (5th Cir. 1999). The Plaintiffs presented no such

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<sup>32</sup> Although the University Professors suggest that Texas is a special case, see Univ. Profs. Br. at 5-6 ("of particular importance in a State like Texas"), the population growth in Georgia is mathematically indistinguishable. According to the Census Bureau's estimates, between the Census date and July 1, 2004 the population of Georgia has grown by an estimated 7.85%. See United States Census Bureau, Annual Population Estimates, available at [www.Census.gov/popest/states/NST-ann-est.html](http://www.Census.gov/popest/states/NST-ann-est.html) (last visited Jan. 13, 2005). Meanwhile, according to that same source, during the same period the population of Texas has grown by an estimated 7.86%. *Id.*

evidence of accuracy or reliability. Nor did they offer a map demonstrating how to use projections and estimates for such a purpose—especially given that the projections are made at the county and city, rather than the block-level Census data used for congressional lines.

Unlike *Valdespino*—in which the party seeking to use non-Census data presented an expert who testified about particular housing units that closed down and the demographic features of those residents, a technique the district court noted to be particularly suited to the small-scale geography in question, 168 F.3d at 850, 854—Plaintiffs offer nothing more than large-scale estimates and projections. While the *Valdespino* court had before it straightforward evidence of particular population movements and the methodology supporting it, *id.* at 854, Plaintiffs offer this Court nothing more than projections and estimates made at the level of counties and cities—woefully inadequate to the task of drawing congressional districts, which must be substantially more equal in population than the districts at issue in *Valdespino*.

Trying to construct congressional districts out of county- and city-level data would be like trying to rearrange the pieces from one big statewide jigsaw puzzle into 32 smaller—but perfectly equally sized—district-sized arrangements. It simply could not be done; the projected and estimated data is not cut into the right size pieces to make those districts equal. One reason is that larger counties—such as Travis County, Harris County, and Dallas County—are bigger than any single congressional district. These projections say nothing about *which parts* of Dallas County, *which parts* of Harris County, and *which parts* of Travis County had experienced precisely what levels of relative population change. And even for smaller counties, it is extremely unlikely that they could be assembled to make even a few districts that happened to precisely match the “ideal” district size computed by dividing the State’s population by 32.

These large pieces of county- and city-level data—unlike the much more finely cut block-level Census data—simply are not suited to that purpose.

These problems are exemplified by Plaintiff Travis County’s defense of its own standing, in which it tries to assert that some of its congressional districts may be overpopulated when recalculated using these county-level estimates.<sup>33</sup> *See* Travis County Br. at 13-14. Because the County only has county-level data, it must resort to simply listing some population changes at the county level and making the (unsupported) assertion that “it is reasonable to conclude that, comparatively speaking, the districts are overpopulated.”<sup>34</sup> *Id.* at 14. Using this larger-scale data, Travis County cannot even speak with confidence about whether its own particular districts would be overpopulated or underpopulated. *See* Travis County Br. at 14 (acknowledging that “no single voter can definitively establish underrepresentation” because of a lack of data).

The University Professors and the Travis County Plaintiffs agree that such projections and estimates are inadequate for use in congressional districting. The University Professors say, when discussing the very report relied on by LULAC, that “[t]his report, and similar ones estimating or projecting population changes, cannot provide data with sufficient certainty or specificity to permit the data to be used for drawing elective districts.” Univ. Profs. Br. at 6. And Travis County notes that “the hurdle of developing a rigorous and careful new current population basis may be insurmountably high in a factual sense,” Travis County Br. at 12, and despite the existence of the state demographer’s report, “the relevant populations for one person, one vote purposes . . . are not discernable,” *id.* at 13.

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<sup>33</sup> There is serious reason to doubt that the city and the county have standing to assert these population-based claims because congresspersons represent people, not cities or counties. *See* U.S. CONST. art. I, §2 (“by the People”). Indeed, that is the whole rationale behind the Article I equal-population principle. *See Wesberry*, 376 U.S. at 7-8.

<sup>34</sup> There is no way to tell from the data given by Travis County. The particular county statistics given show growth rates of around 5.1%, 5.6%, 5.8% and 11.7% between the Census date and 2003—a mixed bag, with some counties higher and some lower than the overall statewide growth rate.

Because the defects in these post-censal estimates are inherent—in particular, the too-large geographic resolution that makes them inappropriate for congressional districts—there is no need for further evidence. Nor do LULAC or the Valdez-Cox Plaintiffs have any reason to complain; they failed even to suggest these theories until after the final judgment and have yet to offer a viable map showing what they contend would be a lower population deviation so as to meet the threshold to bring an equal-population claim.

**vii. The Count Question Resolution (CQR) data mentioned by Travis County would provide no basis for redistricting.**

Travis County has abandoned its earlier claim that supposed “corrected” Census data should have been used by the Texas Legislature when drawing Plan 1374C. *Cf.* Travis County Post-Tr. Br. at 6-8 (Dec. 20, 2003). Now, it is clear that Travis County does not argue that the Texas Legislature could or should have used that corrected data as a basis for drawing district lines. *See* Travis County Br. at 6-7 n.2 (“The city and county do not rely on this corrected Census analysis to establish their case . . . .”). They are right to have abandoned this claim, because “corrected” data in the form of Count Question Resolution (CQR) results is insufficient for use in drawing a statewide congressional map that is perfectly equipopulous.

Before this remand, Travis County had argued that the State should have based Plan 1374C on the Count Question Resolution (CQR) Program results that were released in the weeks prior to the enactment of Plan 1374C on October 12, 2003. *See* United States Census Bureau, CQR Release for Texas, *available at* <http://www.Census.gov/prod/cen2000/notes/cqr-tx.pdf> (last visited Jan. 13, 2005). However, this CQR data was not meant to be used for redistricting, nor was it a complete enough data set to be used for that purpose. Instead, this data was to make very slight corrections in Census results for use in *other* programs based on Census data.

The CQR program was a method by which local governments could request that Census results be corrected to account for errors in the way that geographies were aggregated. For example, if a particular housing cluster was wrongly put in a city rather than an unincorporated area by the Census Bureau, that city could request that the CQR results make that correction. Thus, the Census Bureau did not re-release or re-aggregate all of the statewide data, but instead merely released a short list of corrections that had been requested and approved. *See* CQR Release for Texas, *supra*; *see also* The Census 2000 Count Question Resolution Program, 66 Fed. Reg. 35588-03, 2001 WL 753536 (July 6, 2001) (describing the program).

With that in mind, the Census Bureau expressly qualified the release of CQR data with an official statement that “[t]he CQR program is not a mechanism or process to challenge the March 6, 2001, decision of the Secretary of Commerce to release unadjusted numbers from Census 2000 for redistricting purposes . . . .” 66 Fed. Reg. 35588-03, 2001 WL 753536 (July 6, 2001) (“The Census Bureau will not change the . . . redistricting counts to reflect corrections resulting from the CQR process.”). The Texas CQR data do not cover the entire State,<sup>35</sup> and even for the covered regions, it contains data only at the geographic level of cities and counties. *See* CQR Release for Texas, *supra*. Plaintiffs did not show how to translate data at that level of granularity into perfectly equipopulous congressional districts, nor did they propose a congressional map based on such data. The CQR data was simply not meant to be used as basis for redistricting.

**d. None of this has anything to do with *Vieth* or political gerrymandering.**

None of the foregoing discussion concerns *Vieth* or political gerrymandering. For good reason: Plaintiffs’ equal-population claims have nothing to do with *Vieth*. Indeed, the

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<sup>35</sup> For example, the CQR data do not indicate any change in the population for any of the component cities or counties within Congressional District 10, the district relevant to the only individual Plaintiff who took this equal-population claim on appeal to the Supreme Court.

University Professors, in some nineteen pages of briefing, cite *Vieth* only twice, both times in the context of making general assertions that their brief is somehow “responsive to” and “meets . . . the concerns” of the *Vieth* remand.<sup>36</sup> See Univ. Profs. Br. at 14, 11. Travis County cites *Vieth* only once, simply to note that this case is on remand following that decision. Travis County Br. at 1. And LULAC/Valdez-Cox, in discussing their equal population claim, cite *Vieth* not at all. See LULAC Br. at 3-6.<sup>37</sup> On their face, Plaintiffs’ equal-population claims fall outside the scope of the Court’s remand “for further consideration in light of *Vieth*.”

**B. G.I. Forum, Congresswomen, and Texas-NAACP: The Race-Based Claims Are Beyond the Scope of This Remand and, in Any Event, Present No Reason for the Court to Reconsider Its Decision.**

Because *Vieth* did not address racial-gerrymandering claims, the race-based claims made in several Plaintiffs’ opening briefs are not properly before this Court on remand. But even if the Court were to choose to address these claims, each should be rejected once again. This Court properly rejected G.I. Forum’s race-based challenges in South and West Texas because they do not show that a seventh district can be drawn that both complies with *Thornburg v. Gingles*, 478 U.S. 30 (1986), and will function as a Latino opportunity district. And, this Court correctly found, Plan 1374C satisfies proportionality under *Johnson v. De Grandy*, 512 U.S. 997 (1994). See Part IV(B)(1), *infra*. The claims made by the Congresswomen fail because, as this Court previously noted, their congressional districts continue to function as African-American opportunity districts under Plan 1374C. See Part IV(B)(2), *infra*. And Texas-NAACP’s claim that Texas does not have enough opportunity and influence districts was properly rejected by this Court, as it is unsupported in both law and fact. See Part IV(B)(3), *infra*.

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<sup>36</sup> In support of these assertions, the Professor *amici* neither quote nor analyze as much as a single word from any of the opinions in *Vieth*.

<sup>37</sup> The LULAC and Valdez-Cox Plaintiffs do cite *Vieth* several times in the portion of their brief asserting a separate First Amendment claim based on Justice Kennedy’s *Vieth* concurrence, but that discussion is distinctly captioned and discrete from their equal population claim. See LULAC Br. at 1-2, 6, 8.

**1. This Court correctly rejected G.I. Forum’s race-based claims seeking an additional Latino-opportunity district in South and West Texas.**

G.I. Forum contends in its opening brief that Latino voting rights were impaired by the redrawn Congressional District 23 and that Latino voting strength was therefore diluted in South and West Texas.<sup>38</sup> These claims were properly rejected by this Court, and there is no basis to revisit that ruling.

G.I. Forum asserts that *Vieth* “instructs . . . that the burdens imposed on Latino voters by Texas redistricters violate the Constitution and invalidate the plan,” G.I. Forum Br. at 3, suggesting that the *Vieth* opinions offer a “sufficient discussion of the prohibition of racial considerations in redistricting to provide further guidance to this court,” *id.* at 4. *Vieth*, however, addressed no Voting Rights claims whatsoever. Rather, the G.I. Forum Plaintiffs rely on various Justices’ characterizations of the evils of racial gerrymandering and discussions of racial standards in comparison to the proposed standards for judging political gerrymandering. Nothing in *Vieth* changed or purported to change the legal standards applicable to race-based claims. Rather, it sought (unsuccessfully) to identify a standard for measuring the fairness of *political* gerrymanders, the only question relevant to this remand. And on that question, G.I. Forum remains silent, offering no test for political gerrymandering. For that reason, G.I. Forum’s claims do not warrant reconsideration on remand.

Nor is there any substantive reason to do so. This Court’s decision to deny G.I. Forum’s claims was manifestly correct. G.I. Forum contends that the Texas Legislature’s decision to redraw CD 23 was “infused with race—not just an awareness of race, but the intent to thwart the will of a cohesive block of minority voters.” G.I. Forum Br. at 5. Yet Plaintiffs offer no

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<sup>38</sup> In *Session*, this Court referred to the area of Texas addressed by G.I. Forum as South and West Texas, *see, e.g., Session*, 298 F.Supp.2d 451, 486, or South and Central Texas, *see id.* at 522 (Ward, J., concurring in part and dissenting in part). G.I. Forum names the same congressional districts South Texas. G.I. Forum Br. at 3. Regardless of its label, the same general area is at issue in these claims.

evidence that CD 23 was drawn as a result of race-based considerations. Mere allegations that the State used “impermissible racial classifications,” without evidence to refute the State’s non-race-based justifications for CD 23, do not make out a claim for racial gerrymandering.

Instead, this Court recognized it was the State’s “politically motivated decision to make Congressional District 23 more Republican,” rather than any animus towards Latinos in the area, that produced the new district boundaries. *Session*, 298 F.Supp.2d at 490. This Court further acknowledged that the specific changes to the boundaries of CD 23 were designed to achieve “the dual goal of increasing Republican seats in general and protecting [Congressman Henry] Bonilla’s incumbency in particular,” and that, contrary to Plaintiffs’ assertions, these political objectives could not be readily achieved while keeping Webb County intact. *Id.* at 497. Plaintiffs offer nothing new on remand to refute the State’s “undisputed evidence that the Legislature changed the lines of Congressional District 23 to meet the political purpose of making the district more Republican and protecting the incumbent.” *Id.* at 508.

G.I. Forum further asserts that Plan 1374C has resulted in the dilution of Latino voting strength because there are “only six opportunity districts among the seven districts located in the southern portion of the state.” G.I. Forum Br. at 11. However, Plan 1151C also had six southern districts in which the Latino population made up a majority of the citizen voting age population. *Session*, 298 F.Supp.2d at 491. No reduction in the number of Latino opportunity districts has occurred. As this Court observed, “Plaintiffs . . . have presented no convincing basis to reject the *Balderas* holding that §2 [of the Voting Rights Act] did not require an additional district in South and West Texas.” *Id.*

Indeed, there is serious doubt as to whether a seventh Latino opportunity district could be drawn in South Texas. This Court properly concluded that Plaintiffs failed to show that seven

Latino majority districts could be drawn “meeting the threshold *Gingles* requirements,” *id.* at 496, because Plaintiffs’ plan “proposes districts that are more unusually shaped than either Plan 1151C or Plan 1374C,” *id.* at 491, 491 n.125. Nor did Plaintiffs show that all seven districts—even if they could be drawn in compliance with *Gingles*—would “function effectively as Latino opportunity districts,” *id.* at 491, because one of the seven districts would have a Hispanic citizen voting age population of 50.3%, and five of the seven districts would have a Hispanic citizen voting age population below 60%, whereas Plan 1374C had only three of the six opportunity districts with Hispanic citizen voting age populations below 60%, *id.* at 494-95.

And, even if such a district *could* theoretically be fashioned—and this Court held that it could not be, *id.* at 491, 494-95—Plaintiffs still offer no persuasive argument or evidence why a seventh district is *required*. As a part of its examination of the totality of the circumstances, this Court followed the dictate of *De Grandy* and considered whether the minority group had already achieved substantial proportionality of representation. *Session*, 298 F.Supp.2d at 477-78. The Court did not treat proportionality as necessarily dispositive, but instead as “only one factor to be used in assessing the totality of circumstances to determine if unlawful vote dilution has created an ‘unequal political and electoral opportunity’ for a protected class.” *Id.* at 493 n.127 (citing *De Grandy*, 512 U.S., at 1022). Based on the entire record—including proportionality—the Court found that the totality of the circumstances did “not show a violation of § 2 in South and West Texas under Plan 1374C.” *Id.* at 504.

Plaintiffs’ only justification for a seventh Latino opportunity district is the suggestion that *De Grandy* proportionality is not met in South Texas under Plan 1374C. G.I. Forum Br. at 11-12. This assertion defies the record, however, as this Court found in *Session*. 298 F.Supp.2d at 494 (“[S]ix out of the seven districts in South and West Texas are Latino citizen voting age

majority districts. Given the fact that Latinos comprise 58% of the citizen voting age population in South and West Texas, proportionality is satisfied.”). Indeed, if an additional Latino-opportunity district were created in South and West Texas, it would give 58 percent of the relevant population control of 100 percent of the congressional districts—precisely the sort of “maximization” of potential majority-minority districts that was explicitly rejected in *De Grandy* as an improper use of Section 2. 512 U.S. at 1022.

Thus, G.I. Forum offers no persuasive reason for the Court to revisit its holding with respect to Plaintiffs’ race-based claims. The Court correctly rejected them, and that finding should control.

**2. The Congresswomen’s claims of vote dilution in CD 18 and CD 30 were properly rejected and need not be considered on remand.**

The Congresswomen challenge Plan 1374C as an impermissible dilution of African-American voting strength in Congressional Districts 18 and 30 because, they allege, some areas of high Democratic turnout have been replaced by areas of low Democratic turnout. Congresswomen Br. at 9-11. These claims are unsupported in the facts and were previously rejected by this Court. Because these claims are unrelated to *Vieth*, they should not be addressed on remand. But, if they were, they should again be dismissed.

As this Court found in *Session*, “Plaintiffs’ own population and voting data” support the conclusion that CD 18 and CD 30 remain African-American opportunity districts under Plan 1374C. 298 F.Supp.2d at 514. In CD 18, the African-American citizen voting age population is decreased only slightly under Plan 1374C, from 49.8% to 48.3%. *Id.* Such a minor shift does not render CD 18 invalid. This Court’s analysis of the difference between the voting patterns of those citizens in areas removed from CD 18 with those citizens in areas added to CD 18 indicates that only a minimal shift in voter turnout occurred. *Id.* As this Court correctly concluded,

“[t]hese changes are too slight to support the claim that the strength or status of Congressional District 18 as an effective African-American opportunity district, that has and will reliably elect the African-American candidate of choice, is diluted.” *Id.*

In CD 30, the African-American citizen voting age population was *increased* under Plan 1374C, from 48.6% to 50.6%. *Id.* at 515. And the Court’s analysis of voting patterns likewise “verifie[d] the continuing strength of Congressional District 30 as an effective African-American opportunity district.” *Id.* At a minimum, there is no basis to conclude that either district was diluted. Indeed, in addition to retaining African-American opportunity districts in CD 18 and 30, Plan 1374C creates an additional African-American opportunity district, CD 9.

The Court’s conclusions were confirmed by the 2004 election results, in which both Congresswomen won landslide reelections. In the contested congressional elections in November 2004, Congresswoman Johnson received 93.03% of the vote in CD 30 and Congresswoman Lee received 88.90% of the vote in CD 18. *See* Race Summary Report 2004 General Elections, *available at* <http://elections.sos.state.tx.us/elchist.exe>. And the Plaintiffs’ complaint that “low-turnout” voters were being added to their districts appears to have been ill-founded. In 2004, Congresswoman Lee received 136,018 votes—her highest vote total ever—and nearly 37,000 more votes than she received in 2002.<sup>39</sup> And Congresswoman Johnson received unprecedented support in 2004 as well, with 144,513 votes—an increase of more than 55,000 votes from 2002—which by far constituted her largest total in her past seven elections.<sup>40</sup>

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<sup>39</sup> Congresswoman Sheila Jackson Lee received 99,161 votes in 2002. She received 131,857 votes in 2000; 82,091 votes in 1998; 106,111 votes in 1996; and 84,790 votes in 1994, the year she was first elected to Congress. Office of the Secretary of State 1992-2004 Election History, *available at* <http://elections.sos.state.tx.us/elchist.exe>.

<sup>40</sup> Congresswoman Johnson received 88,980 votes in 2002; 109,163 votes in 2000; 57,603 votes in 1998; 61,723 votes in 1996; 73,166 votes in 1994; and 107,831 votes in 1992, her first election to Congress. *See* Office of the Secretary of State 1992-2004 Election History, *available at* <http://elections.sos.state.tx.us/elchist.exe>.

Likewise, Congresswoman Johnson's vote percentage of 93.03% of the vote in 2004 was her highest ever. Office of the Secretary of State 1992-2004 Election History, *available at* <http://elections.sos.state.tx.us/elchist.exe>. The 2004 election results suggest no reason to question the continued vitality of CD 18 and CD 30 as African-American opportunity districts.

Finally, the Congresswomen suggest that racial considerations caused these districting decisions. Congresswomen Br. at 29. Yet even the Plaintiffs admit that the new districts were drawn "in order to effectuate a known and expressed intent (elect more Republicans)." *Id.* at 32. There simply is no evidence offered to show that the Legislature had any rationale for enacting Plan 1374C based on race. *See, e.g.*, LULAC Br. at 3-4 ("As this Court thoroughly documented, 'there is little question but that the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage.'") (citing *Session*, 298 F.Supp.2d at 470); Jackson Br. at 25 ("The new map's only purpose and effect was to increase the Republican share of the Texas congressional delegation."). As this Court observed, "States are not required to ignore race; indeed, the Supreme Court has acknowledged that states will always be aware of race when they draw district lines." *Session*, 298 F.Supp.2d at 505 (citing *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). States are only prevented from allowing race or ethnicity to "predominate over traditional race-neutral districting principles." *Id.* Plaintiffs bear a "significant" burden in "proving that race was the predominant factor in the Legislature's districting decisions." *Session*, 298 F.Supp.2d at 506 (citing *Miller*, 515 U.S. at 916, 928); *see also Easley v. Cromartie*, 532 U.S. 234, 241 (2001); *Bush v. Vera*, 517 U.S. 952, 958-59 (1996). And the Congresswomen have not met the "significant burden" required to show that the Texas Legislature used race or ethnicity—rather than the many race-neutral considerations offered by the State Defendants—in drawing their districts.

The Congresswomen's claims of minority vote dilution are not supported by the population data with respect to either district. Nor is it necessary to relitigate these claims on a remand in light of *Vieth*, because they do not address any substantive test for permissibility of partisan gerrymandering. Therefore, the Congresswomen's claims do not warrant being reopened on remand.

**3. The Texas-NAACP's claims are unsupported.**

Texas-NAACP suggests that the burden a redistricting plan has on the representational rights of African-Americans can be determined by analyzing both majority-minority districts and minority-influence districts. Texas-NAACP Br. at 3. Texas-NAACP's proposed test for racial gerrymandering suggests that a reduction in the combined total of majority-minority districts and minority-influence districts would impermissibly burden African-American representational rights. *Id.* This proposed test does not find support in the law, nor does Texas-NAACP's analysis of the redistricting plans match political reality. Like the other race-based claims presented in Plaintiffs' opening briefs, Texas-NAACP's race-based claims are unrelated to *Vieth*, and do not warrant reconsideration on remand.

Plaintiffs previously suggested that *Georgia v. Ashcroft*, 539 U.S. 461 (2003), which observes that a district may provide effective representation to minorities despite the absence of a mathematical majority, requires minority "influence" districts to be protected under §2 of the Voting Rights Act. *Session*, 298 F.Supp.2d at 480. As this Court noted in rejecting Plaintiffs' claim, "if §2 protection is afforded to [a district where no minority group constitutes a majority of the population] despite the absence of the *Gingles* factors, the Voting Rights Act begins to protect political affiliation and not race." *Id.* at 483 n.114. This Court therefore correctly concluded, "[i]f there is no obligation to create an influence district, there is no obligation to

retain one.” *Id.* Texas-NAACP’s suggestion that minority “influence” districts cannot be altered has no basis in the Voting Rights Act.

Not only does Texas-NAACP’s proposed standard fail, but its specific interpretation of Plans 1151C and 1374C does not withstand scrutiny. Texas-NAACP acknowledges that Plan 1374C includes three African-American opportunity districts (CD 9, 18, 30), but it suggests that this is a *decrease* from what it alleges had been four African-American opportunity districts (CD 18, 24, 25, 30) in Plan 1151C. Texas-NAACP Br. at 5. As this Court properly concluded, careful analysis of these four districts reveals that two districts, CD 24 and CD 25, did not function as African-American opportunity districts under Plan 1151C. In CD 25, Anglo Chris Bell defeated Carroll Robinson, who was the African-American candidate of choice, in the 2002 Democratic primary. *Session*, 298 F.Supp.2d at 483. And in CD 24 Martin Frost was never challenged in the Democratic primary by an African-American candidate. *Id.* at 484. Indeed, as the Court noted, Congresswoman Johnson testified that in the 1991 redistricting plan, which is viewed largely as having been created by Congressman Frost, CD 24 was deliberately drawn to elect an Anglo Democrat. *Id.* at 482.

Because these issues are unrelated to *Vieth*, and because the Court decided them correctly at final judgment, there is no reason to revisit them now on remand.

**PRAYER**

The State Defendants respectfully request that the Court reinstate its judgment denying all relief to the Plaintiffs.

Respectfully submitted,

BY:

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**CERTIFICATE OF SERVICE**

I hereby certify that an electronic form of this brief was provided to counsel in this case in accordance with Local Rule CV-5 of the United States District Court for the Eastern District of Texas.

*Andy Taylor* *By permission*  
*AT*  
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