

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION**

WALTER SESSION, ET AL.	§	
vs.	§	CIVIL ACTION NO. 2:03-CV-354
RICK PERRY, ET AL.	§	Consolidated

**INITIAL BRIEF OF THE JACKSON PLAINTIFFS AND  
THE DEMOCRATIC CONGRESSIONAL INTERVENORS ON REMAND**

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The Jackson Plaintiffs and the Democratic Congressional Intervenor<sup>1</sup> submit this brief addressing how the Court should go about reconsidering its prior merits ruling in this case in light of *Vieth v. Jubelirer*, 541 U.S. 267, 124 S. Ct. 1769 (2004). As we explain below, a majority of the Supreme Court Justices have now held that partisan-gerrymandering claims remain justiciable, all members of the Court have now agreed that severe partisan gerrymanders violate the Equal Protection Clause, and all nine Justices also have agreed that the plurality opinion in *Davis v. Bandemer*, 478 U.S. 109, 127-43 (1986) — which was the controlling authority when this Court last considered Plaintiffs’ claims — is no longer good law. Given the latter changes in the legal landscape, this Court should hold that Texas’s 2003 congressional redistricting plan (the “2003 Plan” or “Plan 1374C”) exemplifies those very extreme plans that can be invalidated as illegal partisan gerrymanders under standards that are both constitutionally defensible and judicially administrable.

## INTRODUCTION

When this Court last addressed the issue of partisan gerrymandering in its opinion eleven months ago, it was bound to follow *Bandemer*. It rejected Plaintiffs’ partisan-gerrymandering claims because it read *Bandemer*’s plurality opinion — as had all other courts — as imposing a standard that was nearly impossible to meet. *See Session v. Perry*, 298 F. Supp. 2d 451, 474 (E.D. Tex. 2004) (three-judge court) (stating that *Bandemer* established “requirements that are difficult to meet in the courtroom, particularly as they have been interpreted by the lower courts,” and thus left “the issue virtually unenforceable”). In so doing, this Court urged the Supreme Court in *Vieth* either to hold that partisan-gerrymandering claims are nonjusticiable or

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<sup>1</sup> The term “Jackson Plaintiffs” includes all plaintiffs included in the Amended Complaint filed on November 7, 2003, on behalf of the existing Jackson, Mayfield, and Manley plaintiffs and some additional plaintiffs included there for the first time. The “Democratic Congressional Intervenor” were plaintiff-intervenor in this Court’s *Balderas* litigation in 2001.

to enunciate a new standard imposing meaningful and understandable limits on partisan redistricting. *Id.* This Court also expressed skepticism about the value of importing a vote-dilution methodology of the kind used under the Voting Rights Act into the partisan-gerrymandering context. *Id.* at 475 (“Drawing upon the Voting Rights Act jurisprudence to give *Bandemer* some teeth may be the worst of choices.”). It suggested that a better rule might limit partisan gerrymandering structurally — by barring legislators from redrawing a legal map in the middle of the decade, after the districts have already been used in one or more elections. *Id.*; *see also id.* (“[A] rule that the game is played only once per decade could matter a great deal in the real world of politics.”).

Ultimately, four Justices supported the first of this Court’s two options: In an opinion by Justice Scalia, they argued that partisan-gerrymandering claims present nonjusticiable political questions. In so doing, they did not disagree with the remaining Justices that excessive partisanship in drawing district lines does violate the Constitution. *See Vieth*, 124 S. Ct. at 1785 (plurality opinion) (“[A]n *excessive* injection of politics [in districting] is *unlawful*.”); *id.* (“We do not disagree with [the] judgment” that “severe partisan gerrymanders [are incompatible] with democratic principles.”); *id.* (“severe partisan gerrymanders violate the Constitution”). But the four Justices who formed the plurality despaired of finding a workable standard.

The other five Justices, speaking in a concurrence and three dissents, held that partisan-gerrymandering claims remain justiciable. Yet they failed to agree on a single new standard. The three dissenting opinions — authored by Justice Stevens, Justice Souter (joined by Justice Ginsburg), and Justice Breyer — proposed three related but not identical approaches. And Justice Kennedy, who cast the controlling vote by concurring in the judgment affirming the dismissal of the case, stated that he could not yet articulate a workable standard but that it was

too soon to abandon the effort to find one. He added a useful discussion about how that goal might be achieved.

Despite their diversity, the opinions upholding justiciability in *Vieth* have several things in common. *First*, they recognize the need for judicial oversight to restrain practices that are (as all nine Justices now agree) unconstitutional. *Second*, they agree with this Court’s advice *not* to rely primarily on traditional vote-dilution analysis, borrowed from Voting Rights Act jurisprudence, or to emphasize statewide statistical analyses of the relationship between a political party’s vote share and its seat share. *Third*, these same five Justices are moving toward a more clear-cut standard that would impose an outer limit on severe partisan gerrymandering. That standard — a variant of the familiar rational-basis test — would focus on whether key features of the plan betray the mapmakers’ departure from neutral, legitimate, and traditional districting criteria to such an extent that the lines can *only* be explained as driven by an agenda of maximizing partisan advantage.

That standard, as several Justices in *Vieth* acknowledged, would only rarely be violated. It would not trigger liability in the run-of-the-mill case where map-drawers, right after the decennial census, seek some political advantage even as they simultaneously work to respect a variety of neutral districting criteria, state traditions, and legal requirements (most notably, the one-person, one-vote rule). But the standard would have a more stringent effect in limiting *mid-decade* “re-redistrictings” — especially those undertaken, as here, to replace a lawful and fair map for obviously (indeed, concededly) partisan reasons — because in those circumstances the defendants will find it difficult to articulate any plausible nonpartisan reasons for making *any* changes in the lines. Simply put, the Constitution bars replacement of a fair and legal districting plan *solely* to maximize partisan advantage.

The Supreme Court’s order vacating this Court’s January 2004 judgment and remanding for further consideration in light of *Vieth* has one clear import: The Supreme Court wants this Court to consider anew Plaintiffs’ partisan-gerrymandering claims without regard to the failed test enunciated in *Bandemer* but taking into account the lessons that can be learned from the fragmented opinions in *Vieth*. We would urge the Court to distill from the *Vieth* opinions the principle that a decision to revise a districting map, along with particular features of the map, become unconstitutional when the evidence makes clear that they were driven solely by a partisan agenda. That principle makes sense constitutionally, is workable, and is well grounded in *Vieth*. And its impact would be quite similar to the kind of structural timing limitation suggested by this Court because it would tend to prevent unnecessary mid-decade line changes. Certainly, our proposed rule would mandate invalidation of the egregious redistricting scheme at issue here — given the concessions and findings in the record establishing that Texas redrew its districts in 2003 *solely* to maximize the Republican share of the State’s congressional delegation.

Before turning to an analysis of *Vieth*, we pause to note that the 2003 Plan proved quite successful in accomplishing the line-drawers’ partisan goals. As this Court has observed, the 2001 court-drawn map already “reflected the growing strength of the Republican Party in Texas, with 20 of the 32 seats offering a Republican advantage.” *Session v. Perry*, 298 F. Supp. 2d at 471. But in 2002 a number of moderate or conservative Democratic Representatives with years of House seniority won narrowly in Republican-leaning districts, *id.*, so the Texas congressional delegation stood at 17 Democrats and 15 Republicans. In 2003, “[w]ith Republicans in control of the State Legislature, they set out to increase their representation in the congressional delegation to 22.” *Id.* Experts from both sides testified that the new plan would function as a 22-to-10 map, largely irrespective of how statewide voting patterns might vary.

In November 2004, as Rice University political-science professor John Alford explains in his attached declaration, that is how the map worked out, with one narrow exception that only “proves the rule.” *See* Decl. of John A. Alford ¶¶ 1-7 (Dec. 3, 2004). The Republicans gained six of the seven additional seats they targeted, after one Democratic incumbent chose not to run, another switched parties, and four others were defeated at the polls. *Id.* ¶¶ 2-4. The only exception to the pattern was Representative Chet Edwards, who won with 51% of the vote against what turned out to be a relatively weak challenger in District 17. *Id.* ¶ 4. Elsewhere in the State, the November 2004 congressional elections were drained of serious competition, as 21 Republicans won by margins ranging from 10 percentage points to 100 points, and 10 Democrats won by margins ranging from 17 points to 88 points. *Id.* ¶¶ 3-6.<sup>2</sup> So the delegation now stands at 21-to-11 Republican, with a chance that it will move to 22-to-10 next time and very little chance it will move in the other direction *even if the Democrats make substantial gains in overall votes for Congress throughout the State.* *Id.* ¶¶ 2-7.

## ARGUMENT

### **I. The Primary Teaching of *Vieth* Is that a Redistricting Plan Is Unconstitutional If It Fails to Serve Any Rational and Legitimate Purpose.**

A careful reading of the concurrence and dissents of the five Justices who rejected nonjusticiability in *Vieth* reveals much more commonality than might at first appear. In particular, the Justices focused a great deal of attention on the possibility that a particular redistricting plan — or some portion thereof — might fairly be described as serving no rational and legitimate purpose. Put differently, the Justices seemed to be converging on a recognition

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<sup>2</sup> *See also* Texas Secretary of State, Race Summary Report, Unofficial Election Tabulation, 2004 General Election, at 1-11 (Nov. 17, 2004) (showing general-election returns for 31 congressional districts, excluding only District 14, where Republican incumbent Congressman Ron Paul ran unopposed), *available at* <http://www.sos.state.tx.us/elections/forms/enrrpts/2004gen.pdf> (accessed Dec. 6, 2004).

that district lines are unconstitutional when the decisions about whether and how to redraw them can be explained *only* by reference to partisanship.

**A. Justice Kennedy**

While he did not articulate a governing test, Justice Kennedy was clear that the goal was a test targeting district maps driven *solely* by partisan goals. In his concurrence in the judgment, he stated that a “determination that a gerrymander violates the law rests on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner *or in a way unrelated to any legitimate legislative objective.*” *Vieth*, 124 S. Ct. at 1793 (emphasis added). Then, defending his conclusion that such claims remain justiciable, he quoted a passage from *Baker v. Carr*, 369 U.S. 186 (1962), emphasizing the traditional function of the Fourteenth Amendment as a bar to legislation serving no legitimate and rational state interest:

“Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.”

124 S. Ct. at 1795 (quoting *Baker*, 369 U.S. at 226 (emphasis in the original)); *see id.* at 1798; *see also id.* at 1797 (“The Fourteenth Amendment standard governs [partisan-gerrymandering claims]; and there is no doubt of that.”).

Justice Kennedy then went on to say that the goal was to enunciate a “subsidiary standard” that would identify those redistricting maps that went so far in the single-minded pursuit of partisan advantage that they established political classifications “unrelated to the aims of apportionment.” *Id.* at 1796-97. As he put it, “[i]f 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.” *Id.* at 1796. It follows, he said, that the Court should seek a standard that determines when, in parallel fashion, “an apportionment’s *de facto* incorporation of partisan classifications burdens rights of fair and effective representation (and so establishes the classification is *unrelated to the aims of apportionment* and thus is used in an impermissible fashion).” *Id.* (emphasis added).

The *Vieth* case involved a challenge to a congressional redistricting map drawn right after the 2000 decennial census — a plan in which the map-drawers pursued an obvious partisan agenda but also sought to comply with a variety of legal mandates and state traditions. These included the Voting Rights Act; the new congressional apportionment under which Pennsylvania lost two seats in the House; the strict one-person, one-vote rule; and the State’s tradition of minimizing split precincts. In that context, the *Vieth* appellants fell short, in Justice Kennedy’s view, because they failed to come up with an argument establishing that the defendants had gone beyond merely “adopt[ing] political classifications” and had in fact adopted “classifications . . . unrelated to the aims of apportionment.” *Id.* at 1796-97. In sum, Justice Kennedy made clear his belief that some consideration of politics in redistricting is permissible. *See id.* at 1793, 1797 (citing *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973), the case that upheld a balanced “bipartisan gerrymander”). But he does not believe the Constitution countenances redistricting where partisanship is the overwhelming or exclusive consideration. He thus sought a way to identify maps that may comply with one-person, one-vote but are otherwise driven by a *single-minded* pursuit of partisan advantage — comparable to the hypothetical law requiring that lines be drawn “so as most to burden Party X’s rights.” Such a map, using his phraseology, would be



invalid because it could not be explained as serving any of the legitimate and nonpartisan “aims of apportionment.”

Justice Kennedy also suggested that applying First Amendment principles and case law might help courts assess whether a map has gone too far in the service of partisanship and thus has burdened what he called the “representational rights” of a disfavored party’s voters “for reasons of ideology, beliefs, or political association.” *Id.* at 1797-98. As he explained, partisan-gerrymandering allegations “involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views.” *Id.* at 1797.

There is no indication that Justice Kennedy intended to call for two separate categories of legal challenge. *See id.* (expressing “no doubt” that the Fourteenth Amendment’s equal-protection standard governs partisan-gerrymandering claims). Instead, he thought First Amendment principles might help identify those irregularities in map design that raise particular constitutional concerns. One good example, we submit, is a district that reflects an obvious and artificial effort to take a community with a distinctive culture and political perspective and submerge it in a sea of unsympathetic opponents where the community has no hope of true representation and thus no real “voice.” Some such “submergence” is inevitable in any district map. But where the district lines depart dramatically from principles of compactness to link a disfavored community with a far-flung but larger favored community, First Amendment concerns seem particularly salient. *See infra* pages 23-24 (discussing several such districts in the 2003 Plan). In this sense, the First Amendment perspective suggested by Justice Kennedy is

consonant with the emphasis on purposeful departures from compactness that is central to each of the dissents.<sup>3</sup>

## **B. The Four Dissenters**

Identifying maps, or portions of maps, driven exclusively by partisanship may be difficult, at least in the usual case where the legislature enacts a plan at the beginning of a decade when redistricting is mandatory and multiple legal and policy considerations typically play a significant role. But the three dissents, each in its own way, sought to explain how such an identification could be made. And in each case, they focused on the same constitutional issue — whether it could be said that the map was really based solely on partisan considerations.

Thus, Justice Stevens began his opinion by saying:

Today’s plurality opinion . . . would give license, for the first time, to partisan gerrymanders that are *devoid of any rational justification*. In my view, when partisanship is the legislature’s *sole motivation* — when any pretense of neutrality is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage — the governing body cannot be said to have acted impartially.

*Id.* at 1799 (dissenting opinion) (emphasis added). He later added:

State action that discriminates against a political minority *for the sole and unadorned purpose of maximizing the power of the majority* plainly violates the decisionmaker’s duty to remain impartial. . . . Thus, the critical issue in both racial and political gerrymandering cases is the same: *whether a single non-neutral criterion controlled the districting process* to such an extent that the Constitution was offended.

*Id.* at 1804 (citation omitted; emphasis added).

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<sup>3</sup> The Jackson Plaintiffs’ Amended Complaint, filed prior to the trial in 2003, includes a First Amendment claim. *See* Jackson Pls.’ First Am. Compl., Count IV (“The 2003 Plan is an intentional partisan gerrymander that thwarts majority rule and is an affront to basic democratic values in violation of the Equal Protection Clause of the Fourteenth Amendment . . . , Article I, Sections 2 and 4, . . . , and the First Amendment . . .”).

In Justice Stevens’s view, the appropriate way to assess these issues is on a district-specific basis. Building on the racial-gerrymandering line of cases, he would ask whether the contours of a challenged district can be explained on the basis of any traditional, rational, nonpartisan criteria. If not — “if no neutral criterion can be identified to justify the lines drawn, and if the only possible explanation for a district’s bizarre shape is a naked desire to increase partisan strength” — it follows that “no rational basis exists to save the district from an equal protection challenge.” *Id.* at 1812. He then agreed with Justice Kennedy that compliance with the one-person, one-vote rule was necessary but not sufficient, since it could be accomplished without truly constraining extreme partisanship. *Id.* at 1812 n.33 (“I would require that a district be justified with reference to both the one-person, one-vote rule and some other neutral criterion.”).

Justice Souter, joined by Justice Ginsburg, did not diverge greatly from Justice Stevens. He, too, thought “we would have better luck at devising a workable *prima facie* case if we concentrated as much as possible on suspect characteristics of individual districts instead of state-wide patterns.” *Id.* at 1817; *see also id.* at 1817, 1819 n.4, 1820-21 (treating a statewide challenge as a conglomeration of multiple individual-district claims). He thus would require that a plaintiff with appropriate standing show, first, that a district “paid little or no heed to those traditional districting principles whose disregard can be shown straightforwardly: contiguity, compactness, respect for political subdivisions, and conformity with geographic features like rivers and mountains.” *Id.* Then, the plaintiff would have to show that the irregularity of the district correlates with achieving the “packing” and “cracking” goals of a gerrymander — *i.e.*, that specific protuberances serve to capture members of one party, or that specific fissures serve to exclude members of the other party, or that municipalities were generally divided along

partisan lines. *Id.* at 1818. Finally, the plaintiff would have to present a hypothetical district fixing the problems, and he would have to prove invidious intent (which would generally be easy). *Id.* at 1818-19. The burden would then shift to the defendants “to justify their decision by reference to objectives *other than naked partisan advantage*.” *Id.* at 1819 (emphasis added). In sum, here again, the focus would be on identifying line-drawing decisions explainable *only* in partisan terms.

Justice Breyer’s approach is a bit more complex, but it generally fits this pattern as well. He started in *Vieth* by saying that the “use of purely political considerations in drawing district boundaries” can be permissible — but only when it “helps to secure constitutionally important democratic objectives” like political stability. *Id.* at 1822. By contrast, he would invalidate “purely political ‘gerrymandering’ [that fails] to advance any plausible democratic objective while simultaneously threatening serious democratic harm.” *Id.* He identified one non-exclusive example of the latter — what he called “entrenchment” of a minority party in power. *Id.* at 1825. Justice Breyer then focused on when judicial intervention to protect the rights of a majority group suffering from entrenchment is warranted. *See id.* at 1826-29. In general, he would wait until one or more actual elections show the entrenchment effect. *See id.* at 1828. But he then articulated when entrenchment could properly be anticipated and remedied by a court in advance:

[S]uppose that the legislature clearly departs from ordinary districting norms, but the entrenchment harm, while seriously threatened, has not yet occurred. *E.g.*, (a) the legislature has redrawn district boundaries more than once within the traditional 10-year census-related period . . . ; (b) the boundary-drawing criteria depart radically from previous traditional boundary-drawing criteria; (c) strong, objective, unrefuted statistical evidence demonstrates that a party with a minority of the popular vote within the State in all likelihood will obtain a majority of the seats in the relevant representative delegation; and (d) the

jettisoning of traditional districting criteria cannot be justified or explained other than by reference to an effort to obtain partisan political advantage. To my mind, such circumstances could also support a claim, because the presence of midcycle redistricting, for any reason, raises a fair inference that partisan machinations played a major role in the map-drawing process. . . .

The presence of these, or similar, circumstances — where the risk of entrenchment is demonstrated; *where partisan considerations render the traditional district-drawing compromises irrelevant, where no justification other than party advantage can be found* — seem to me extreme enough to set off a constitutional alarm.

*Id.* at 1828-29 (emphasis added). Thus, while Justice Breyer would include some statistical evidence of statewide effects in the calculus and seems particularly concerned about situations where a future majority party could be thwarted from taking power, he too would give great weight to facts and circumstances supporting a conclusion that the legislature pursued partisan advantage with no other rational and legitimate purpose.

All the dissenters minimized the significance of their differences. Justice Breyer, for example, noted that “[m]embers of a majority might well seek to reconcile such differences. But dissenters might instead believe that the more thorough, specific reasoning that accompanies separate statements will stimulate further discussion.” 124 S. Ct. at 1829; *see also id.* at 1816 n.1 (Souter, J., dissenting) (joining Justice Breyer on this point); *id.* at 1813 (Stevens, J., dissenting) (expressing a willingness to “endorse either of the approaches advocated today by Justice Souter and Justice Breyer”). Justice Stevens went further, highlighting the dissenters’ common ground not only with each other, but also with Justice Kennedy: “That we presently have somewhat differing views,” he explained, “should not obscure the fact that the areas of agreement set forth in the separate opinions are of far greater significance.” *Id.* at 1799.

### C. *Vieth's* Supreme Court Progeny

Since these opinions were handed down in April, the Justices have cited *Vieth* twice. *See Cox v. Larios*, 542 U.S. \_\_\_, 124 S. Ct. 2806, 2808-09 & n.\* (2004) (summarily affirming *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (three-judge court)) (Stevens, J., joined by Breyer, J., concurring); *Jackson v. Perry*, 543 U.S. \_\_\_, 125 S. Ct. 351 (mem.) (2004) (summarily vacating this Court's judgment in *Session v. Perry* and remanding the case for further consideration in light of *Vieth*).

Although both of these subsequent cases were summary adjudications and therefore of somewhat limited precedential weight,<sup>4</sup> they do tend to confirm Justice Stevens's observation about the breadth of agreement among a majority of Justices. (Unlike the noting of probable jurisdiction, which is governed by the same "Rule of Four" that applies to granting certiorari, a summary affirmance or summary vacatur requires the support of at least five Justices.<sup>5</sup>)

In *Cox v. Larios*, the Court summarily affirmed the judgment of a three-judge district court that Georgia's Senate and House redistricting plans violated the Equal Protection Clause. 124 S. Ct. at 2806 (Stevens, J., concurring). The *Larios* plaintiffs had challenged the plans both as unconstitutional partisan gerrymanders and as violative of the one-person, one-vote doctrine that applies to state-legislative districts (a doctrine that is less strict than its congressional-districting counterpart). *See id.* at 2808. The district court "rejected [the former] claim because

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<sup>4</sup> The summary affirmance of an appeal "is a decision by the Supreme Court having precedential value, not a mere refusal to review that allows the lower court's decision to stand." Robert L. Stern et al., *Supreme Court Practice* 332 (8th ed. 2002). But summary dispositions carry less precedential weight in the Supreme Court than in the lower courts. *See id.* at 279-85; *see also, e.g., Bush v. Vera*, 517 U.S. 952, 996 (1996) (Kennedy, J., concurring) ("I note that our summary affirmance in [a redistricting case] stands for no proposition other than that the districts reviewed there were [or were not] constitutional. We do not endorse the reasoning of the district court when we order summary affirmance of the judgment.") (citations omitted).

<sup>5</sup> *See Stern et al., supra* note 4, at 332-36.

it considered itself bound by the plurality opinion in *Davis v. Bandemer*” — and plaintiff-appellees did not challenge that holding on cross-appeal. *Id.* (citations omitted). But the district court ruled in their favor on the one-person, one-vote claim even though the total population deviation in each plan was less than 10%. *Id.* at 2809-10 (Scalia, J., dissenting). That ruling was unusual because prior Supreme Court decisions had established the principle that deviations of less than 10% are “insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.” *Id.* at 2809 (citations and internal quotation marks omitted).

The linchpin of the district court’s decision to invalidate the plans was its finding that Georgia’s legislature had intentionally favored Democrats ““by systematically underpopulating [by four to five percent] the districts held by incumbent Democrats, by overpopulating those of Republicans [also by four to five percent], and by deliberately pairing numerous Republican incumbents against one another.”” 124 S. Ct. at 2806 (Stevens, J., concurring) (quoting 300 F. Supp. 2d at 1329); *see id.* at 2806-07 (further describing how the Georgia legislature had maximized Democrats’ partisan advantage while keeping total population deviations barely under 10%). Justice Stevens noted that “the population deviations did not result from any attempt to create districts that were compact or contiguous, or to keep counties whole, or to preserve the cores of prior districts.” *Id.* at 2807 (citing 300 F. Supp. 2d at 1331-34). Indeed, Georgia’s ““boundary-drawing criteria depart[ed] radically from previous or traditional criteria,”” and these departures could not be justified or explained ““other than by reference to an effort to obtain partisan political advantage.”” *Id.* at 2808 n.\* (quoting *Vieth*, 124 S. Ct. at 1828 (Breyer, J., dissenting)). Justice Stevens expressly rejected Georgia’s invitation to create “a safe harbor for population deviations of less than ten percent, within which districting decisions could be

made *for any reason whatever*.” *Id.* at 2808 (emphasis added). And, after noting the *Vieth* Court’s failure to set a sufficiently “clear” limitation on improper districting practices, *id.*, Justice Stevens closed his opinion by once again condemning any partisan gerrymander that “does not even pretend to be justified by neutral principles.” *Id.* at 2809.

Justice Breyer expressly joined Justice Stevens’s opinion. *Id.* at 2806. But because the Court affirmed summarily, *id.*, we do not know how every Justice voted. We know that Justices Stevens and Breyer voted to affirm, *id.*, and that Justice Scalia (who wrote separately) dissented, *id.* at 2809-10. What is telling, however, is that at least *three* other Justices must have joined Justices Stevens and Breyer in voting to affirm the invalidation of Georgia’s partisan gerrymander under the Equal Protection Clause.

Likewise, at least five Justices must have voted to summarily vacate this Court’s judgment in *Session v. Perry*. Again, we do not know which five (or more) Justices voted for that disposition. But we do know that the Jackson Plaintiffs’ and Democratic Congressional Intervenor’s Jurisdictional Statement squarely presented two questions directly relevant to the Supreme Court’s remand order calling for reconsideration in light of *Vieth*: first, “[w]hether the 2003 Texas congressional redistricting plan is an unconstitutional partisan gerrymander”; and second, “[w]hether the Constitution prohibits States from redrawing lawful congressional redistricting plans in the middle of a decade for the sole purpose of partisan maximization.” Jurisdictional Statement at i, *Jackson v. Perry*, 125 S. Ct. 351 (2004) (No. 03-1391).

#### **D. The Proposed Standard**

To summarize, taken together, the opinions of the five Justices who upheld the justiciability of partisan-gerrymandering claims in *Vieth* provide strong support for a standard requiring the plaintiffs to show the following:



1. That the map-drawing decisions made in at least some districts cannot be explained as springing from efforts to obey legal mandates or to follow traditional nonpartisan districting principles like compactness, contiguity, respect for political subdivisions and natural barriers, or other neutral state traditions;
2. That the departures from traditional districting principles can be explained as driven by an agenda of achieving partisan advantage because they serve to maximize the impact of votes cast for the favored party's candidates or minimize the impact of votes cast for the disfavored party's candidates; and
3. That the departures from traditional districting principles in the service of a partisan agenda were intentional.

In weighing such evidence, a court might also entertain evidence of statewide bias of the kind Plaintiffs offered at trial in this case, but that would not be the primary focus of the inquiry. In essence, the test would say to map-drawers that they can work for partisan advantage if they want to, but they must always be able to defend and explain their line-drawing decisions as resulting (at least in significant part) from the pursuit of traditional nonpartisan districting principles.

**II. As Applied Here, the Proposed Standard Would Require Invalidation of Texas's 2003 Plan, Because the Very Decision to Draw that Map Mid-Decade, as Well as Many Features of the Map, Can Only Be Seen as Driven by the Agenda of Maximizing the Republicans' Share of the Texas Congressional Delegation.**

As already suggested, the proposed standard would impose relatively lax constraints on redistricting right after the decennial census, when many different legal mandates and redistricting goals are likely to be in play. When new census data are released, congressional districts are always malapportioned, and thus there is always a need to redraw them to comply with the Constitution's strict one-person, one-vote rule. So legislative motives will be mixed. In

that setting, a map could be found unconstitutional as a partisan gerrymander only if some district or districts were sufficiently grotesque as to defy any nonpartisan explanation and if the map's most extreme features were explainable as helping to "pack" or "crack" voters with a disfavored political affiliation or perspective. That would help address the problem of partisan gerrymandering without attempting to eradicate consideration of politics altogether.

In the troubling context of mid-decade "re-redistricting," by contrast, the proposed test takes on substantially more muscle — which is itself a strong argument in its favor. Where, as here, a legislature (and especially a legislature whose two chambers are both controlled by the governor's party) chooses to change a perfectly lawful map in "mid-decade" (*i.e.*, after it has already been used in at least one election cycle), there are two additional reasons for constitutional concern. *First*, of course, such circumstances justify at least a rebuttable presumption that the legislature's central motivation was partisan.<sup>6</sup> *Second*, turning to the question of whether the map or some of its features can be justified as serving some nonpartisan goal, mounting a defense becomes much more difficult. After all, at the beginning of the decade, the one-person, one-vote doctrine normally demands a thoroughgoing revision of the prior decade's map simply to equalize district populations. As a result, there is little need to justify, in neutral terms, changes made to the prior map. By contrast, in mid-decade, when there is already in place a lawful map based on the most recent census data, the decision to change the map must itself be justified. Before the court even gets to the particular features of the new map that might be constitutionally problematic, defendants would be required to articulate some nonpartisan state interest justifying their decision to make *any* changes *at all*. It does no good for defendants,

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<sup>6</sup> Such a presumption might be overcome by a showing that the prior map was unfairly drawn by partisans of the opposite stripe. But where, as here, the prior map was drawn by a neutral decision-maker (*e.g.*, a split legislature, a bipartisan commission, or a court), the presumption should control.

in such a setting, to point out that districts in the new map are appropriately compact or conform to other legitimate districting criteria. If there already was a lawful and fair map in existence, there needs to be some further rational and legitimate justification for changing it.

Indeed, redrawing a map in the middle of a decade solely for partisan gain is the ultimate affront to traditional neutral districting principles. After all, in real-world redistricting, no principle is more firmly ensconced than the notion that districts may be redrawn *only* when population shifts, reflected in the federal decennial census, *require* them to be redrawn. But if congressional districts can be tweaked every two years, when there is no population-based justification, endangered incumbents from the favored party can be shielded from changing public opinion, while popular incumbents from the rival party can be targeted for defeat. And if district lines can be redrawn based not on new decennial census results, but rather on new biennial election returns, then any political party that wins momentary control of the legislature and governorship will be permitted to entrench its power through an initial gerrymander, and then to “fine tune” the gerrymander every two years. Partisan cartographers will stay one step ahead of the voters and thus insulate their political allies from all but the strongest electoral tides. The Constitution surely does not permit such a distorted and fundamentally antidemocratic process.

Therefore, *whenever a state government controlled by one political party replaces a legal redistricting plan in the middle of a decade, that “re-redistricting” should be held presumptively unconstitutional.* Only a compelling explanation should overcome the heavy presumption that the state legislature’s reasons for replacing a lawful plan are purely partisan. This specific rule, unlike the rules that Justice Kennedy rejected in *Vieth*, is crisp and eminently administrable.

Of course, where the new map also contains grotesque districts revealing extreme pursuit of partisan goals, that can be considered as well. But that is not necessary. To the contrary, this Court should support the standard proposed here precisely because its greatest impact will be to limit mid-decade “re-redistricting.” Indeed, this Court has already expressed its preference for partisan-gerrymandering “limitations that focus [more] upon the time and circumstance of partisan line-drawing and less upon the ‘some but not too much’ genre of strictures.” *Session v. Perry*, 298 F. Supp. 2d at 475. Under the specific “time and circumstance” test that Plaintiffs propose here, *see supra* page 18, Texas’s 2003 Plan would be flatly unconstitutional.

**A. The Decision to Redraw the 2001 Map Was Driven by a Single-Minded Intent to Maximize Partisan Advantage.**

In the present case, Defendants already have admitted, and the Court has already found as fact, that the *sole* motivation for changing the existing map mid-decade was partisan gain. *See, e.g., Session v. Perry*, 298 F. Supp. 2d 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.”); *id.* at 472 (“Plaintiffs’ expert testimony supports our conclusion that *politics*, not race, *drove Plan 1374C.*”) (emphasis added); *id.* (the *amicus* brief that the Texas Democrats filed in *Vieth* “told the Supreme Court that ‘the newly dominant Republicans . . . decided to redraw the state’s congressional districts solely for the purpose of seizing between five and seven seats from Democratic incumbents.’ It was clear from the evidence that this assertion is true.”); *id.* at 472-73 (“Former Lieutenant Governor Bill Ratliff, one of the most highly regarded members of the Senate and commonly referred to as the conscience of the Senate, testified that political gain for the Republicans was 110% of the motivation for the Plan, that it was ‘the entire motivation.’”); *id.* at 473 (concluding “that this plan was a political product from start to finish”); *id.* at 471 (“With Republicans in control of the State Legislature, they set out to increase their

representation in the congressional delegation to 22.”); Tr., Dec. 18, 2003, 1:00 p.m., at 142 (testimony of State Rep. Phil King) (confirming that the Republican leadership set out to “get as many seats as we could”).

It follows that there is no need for further fact-finding to establish that Defendants acted with purely partisan motivation and that the act of passing the 2003 Plan was driven, *in toto*, by an agenda of partisan maximization. Under the proposed test distilled from the five Justices’ opinions in *Vieth*, nothing more is required. To paraphrase Justice Kennedy, it is as if the Legislature delegated the task of drawing a new map to an administrative agency, giving that agency just two directives: Comply with one-person, one-vote, but otherwise draw the lines to help the Republicans wherever possible and “so as most to burden [the Democratic Party’s] rights to fair and effective representation.” 124 S. Ct. at 1796 (concurring in the judgment). Such a law, and the resulting product of the administrative process, would be unconstitutional for precisely the reasons that the 2003 Plan was unconstitutional from its inception and remains unconstitutional in its totality.

Moreover, under such circumstances, the remedy is equally clear: Rather than giving the Legislature yet another bite at the redistricting apple and then scrutinizing the newly redrawn lines to see if they adequately remedy particular problems, the Court can and should simply void the 2003 Plan as the product of a single-minded partisan agenda that cannot, under our constitutional system, support any legislative action. Voiding the 2003 gerrymander would effectively reinstate this Court’s 2001 Plan and allow the 2006 congressional elections to proceed under the same districts that Texas used in 2002.

Consistent with their arguments in this Court and in the Supreme Court, Defendants will likely raise two supposed justifications for the 2003 Plan: first, that the prior map drawn and

adopted unanimously by this Court in 2001 was itself unfairly biased to favor Democrats; and second, that the Constitution permits, indeed encourages, the replacement of any districting plan that has been ordered into effect by a federal court, because congressional redistricting should whenever possible be done by state legislatures. Neither argument supplies a legitimate, nonpartisan justification for replacing the 2001 Plan with the 2003 gerrymander.

Defendants' argument about the 2001 Plan's alleged bias contends that Texas has been a majority-Republican State for about a decade, yet the 2001 Plan generated a majority-Democratic congressional delegation in the November 2002 elections. As an initial matter, this sort of argument — focusing on the relationship between a party's statewide vote share and its statewide seat share — seems out of synch with the five Justices whose opinions are controlling under *Vieth*. See *supra* pages 3, 5-16. Furthermore, the picture Defendants paint of the 2002 elections held under the 2001 Plan is entirely misleading. As this Court has specifically found, the 2001 Plan fairly “reflected the growing strength of the Republican Party in Texas, with 20 of the 32 seats offering a Republican advantage.” 298 F. Supp. 2d at 471. Indeed, the Defendants' own expert testified that the 2001 Plan was somewhat biased to favor the *Republicans*. Jackson Pls.' Ex. 141, at 18-21 (report of Prof. Ronald Keith Gaddie).

In the November 2002 elections, that map generated a congressional delegation with 15 Republicans and 17 Democrats for reasons having nothing to do with biased districting. The two new congressional districts that Texas gained from reapportionment elected Republicans, while the other 30 districts reelected 28 incumbents and elected one freshman from each party (each of whom replaced a retiring member of the same party). Seven of the incumbents — six Democrats and one Republican — prevailed even as their districts were voting for senatorial, gubernatorial, and other statewide candidates of the *opposite* party. See Jackson Pls.' Ex. 75. In other words,

seven Members of Congress won because they attracted split-ticket voters. Without that support, each would have lost to a challenger from the district's dominant political party. These seven Congressmen (most of whom represented relatively rural districts) had the closest contests of any incumbents in the State. Three of them won with less than 52% of the total vote. Aside from the seven districts where split-ticket voters played a key role, 14 of the new districts voted consistently Republican and 11 voted consistently Democratic. But because six of the seven incumbents who won the relatively competitive seats were Democrats, Texas's congressional delegation had more Democrats and fewer Republicans than the statewide balance of power alone would have suggested. In short, the 2001 Plan not only was lawful (as the State, having defended it against the Balderas plaintiffs' Supreme Court appeal in 2002, must concede); it was fair. Defendants' desire to dictate electoral outcomes and oust senior Democratic incumbents at any cost can hardly be called "nonpartisan."

Defendants' second allegedly nonpartisan justification for the 2003 gerrymander — focusing on the 2001 Plan's provenance as a court-drawn map — likewise falls flat. Defendants argue that they were simply trying to replace a court-drawn plan with a legislatively enacted one. But the court-drawn plan existed only because the Defendants and other state legislators had refused to meet their constitutional obligation to redraw the map in 2001, a refusal that occurred because only a map that was fair to both Republicans and Democrats could have passed both chambers in the politically balanced 2001 Texas Legislature.<sup>7</sup> Defendants can hardly be exonerated of single-minded partisanship because they chose to do nothing until the Legislature

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<sup>7</sup> If Defendants were dissatisfied with the court-drawn 2001 Plan, they were free to amend or replace it *before* elections were held under that map in 2002. But they chose not to do so.

had come under the control of one party, two years after they had a constitutional duty to redraw the lines.<sup>8</sup>

**B. Even Ignoring the Overall Timing and Circumstances, the 2003 Plan Contains Districts that Violate the Proposed Test.**

Although it should not matter in a mid-decade case like this one, particular details of the 2003 Plan can also be isolated, examined, and found wanting constitutionally. In instance after instance, the map-drawers made decisions that (1) bear no relation to any consistently applied set of legitimate and traditional redistricting principles, and (2) clearly serve the partisan agenda because they have the effect of submerging a strongly Democratic community into a district where that community will be politically powerless, even where doing so required linking two far-flung areas.

A good example is District 26 in the 2003 Plan. Even if that district had not been defended *expressly* at trial as one designed to dump reliably Democratic southeast Fort Worth voters in with a much larger cadre of reliably Republican voters living in suburban and exurban Denton County and in rural Cooke County (on the Oklahoma border), *see Session v. Perry*, 298 F. Supp. 2d at 472, that goal would have been obvious and would have been constitutionally problematic by virtue of the irrational nature of the district itself — especially as compared to the old District 24 in which southeast Fort Worth formerly resided. It is certainly difficult to imagine any other justification for a district that consists of Denton County, a northern appendage shooting up to Oklahoma, and a southern appendage penetrating deeply into Tarrant

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<sup>8</sup> Furthermore, upholding a mid-decade gerrymander simply because the map it replaced was court-drawn would create perverse incentives for ascendant partisans to “park” the redistricting process in the courts until they can gain unilateral control over the legislature and the governorship.



County to capture southeast Fort Worth’s African-American community. The only conceivable inference would be that the map-drawers wanted to stifle the voice of that community.

Another example is District 2, which as described at trial, takes Beaumont and the rest of Jefferson County — a distinctive, Democratic-leaning, and heavily unionized area with a large number of minority voters — and links it via a land bridge through relatively sparsely populated areas of Liberty County to a narrow and irregular slice of Harris County that meanders around and through the northwest side of Houston. *See* Tr., Dec. 16, 2003, 1:00 p.m., at 104-06 (testimony of State Rep. Joseph Deshotel). The new district is dominated by affluent Republican-leaning voters in Harris County. *See id.* at 91-92. It replaces old District 9, a compact and cohesive district combining Jefferson, Chambers, and Galveston Counties along the Gulf Coast. *See id.* at 86-87. No traditional or legitimate districting principle could justify such a change. The only conceivable purpose being served is to deny Beaumont (and Galveston) voters the ability to elect to Congress a representative of their interests. *See id.* at 90-91, 113-15.

While Districts 26 and 2 ignore traditional districting principles to “crack” or “submerge” Democratic communities, District 25 ignores those same principles to “pack” Democratic voters and thus make other districts safely Republican. District 25 stretches from Austin to McAllen, with a chain of sparsely populated counties in between, because the Legislature decided to shore up Congressman Henry Bonilla in District 23 by extending his district north “to take in largely Republican and Anglo areas in the north-central part of the State.” *Session v. Perry*, 298 F. Supp. 2d at 488. Once that occurred, the only way to create a new, offsetting majority-Hispanic district elsewhere was to stretch District 25 until it was more than 300 miles long and in places less than 10 miles wide. *See id.* at 511 (describing these line-drawing decisions as “primarily driven by the political goal of increasing Republican strength in Congressional District 23”); *id.*

at 512 (“the emails, statements, and other communications from those involved in the process reveal that politics predominated”). The resulting new District 25 is Democratic, but it consists primarily of two very distant population centers (in Austin and in the Rio Grande Valley).

These are just a few examples of the kinds of extreme measures the Texas Legislature took in 2003 to cement into place a 22-to-10 advantage in congressional districts for the rest of the decade. If the 2003 Plan had been enacted right after the 2000 census, these characteristics alone might be enough to require changes under the proposed standard we have distilled from *Vieth*. But the Court need not reach that question because, as noted, given the peculiar timing of this redistricting, the 2003 Plan *as a whole* is the product of single-minded partisanship. Its passage served no legitimate and neutral state interest because there is no argument that it is better than the prior map based on some consistently applied set of neutral criteria. (Indeed, in the course of shifting more than eight million Texans into new districts, the 2003 Plan split more counties into more pieces, and generated significantly worse district compactness scores, than did the 2001 Plan. *See* Jackson Pls.’ Ex. 141 at 5-7; Jackson Pls.’ Ex. 89.) The new map’s only purpose and effect was to increase the Republican share of the Texas congressional delegation.

In his *Vieth* concurrence, Justice Kennedy concluded with words that could hardly be more apt here:

The ordered working of our Republic, and of the democratic process, depends on a sense of decorum and restraint in all branches of government, and in the citizenry itself. Here, one has the sense that legislative restraint was abandoned. That should not be thought to serve the interests of our political order. Nor should it be thought to serve our interest in demonstrating to the world how democracy works. Whether spoken with concern or pride, it is unfortunate that our legislators have reached the point of declaring that, when it comes to apportionment, “We are in the business of rigging elections.”

124 S. Ct. at 1798 (quoting a state senator) (citation and internal quotation marks omitted).

## CONCLUSION

Accordingly, the Jackson Plaintiffs and the Democratic Congressional Intervenor respectfully ask this Court to invalidate in its entirety 2003 Texas House Bill No. 3, 78th Leg., 3d C.S. (Oct. 12, 2003), and the mid-decade congressional redistricting Plan 1374C that it established, as a severe political gerrymander that violates the Equal Protection Clause, the First Amendment, and Sections 2 and 4 of Article I of the United States Constitution.<sup>9</sup> By so ruling, the Court would effectively reinstate the congressional redistricting Plan 1151C, which it drew and unanimously adopted in 2001, in a decision that was subsequently supported by the State of

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<sup>9</sup> Given the Supreme Court's remand order, this brief has focused on Plaintiffs' partisan-gerrymandering claims, including their challenge to Texas's mid-decade congressional "re-redistricting." But the Jackson Plaintiffs and the Democratic Congressional Intervenor also hereby renew all their prior challenges to the 2003 Plan, including their minority vote-dilution claims under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and their racial-gerrymandering claims under the Equal Protection Clause. *See* Post-Trial Br. of the Jackson Pls. and the Democratic Cong'l Intervenor at 1-20, 34-64 (filed Dec. 22, 2003). In addition, the Jackson Plaintiffs and the Democratic Congressional Intervenor adopt and incorporate by reference the arguments made by the City of Austin and Travis County advancing an additional basis for invalidating the 2003 Plan.

The relationship among Plaintiffs' claims is clear: In a State where minorities constitute 38% of the adult citizen population and vote overwhelmingly for Democratic candidates, the Texas Legislature sought to confine Democrats to just 31% of the seats (10 out of 32). The goal of locking up 22 safe Republican seats and the goal of providing equal electoral opportunities for Texas's minority citizens were incompatible. By knuckling under to partisan pressures from Washington, the Texas Legislature overreached, diluted minority voting strength, engaged in excessively race-based line-drawing, and thereby violated both the Voting Rights Act and the Equal Protection Clause, as well as the First Amendment and Article I, Sections 2 and 4.

Texas and affirmed by the Supreme Court in *Balderas v. Texas*, 536 U.S. 919 (2002).

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that this 6<sup>th</sup> day of December 2004, I served a copy of the foregoing Initial Brief of the Jackson Plaintiffs and the Democratic Congressional Intervenor on Remand, and the attached Declaration of John A. Alford, on all counsel of record by e-mail and United States mail, first-class, postage prepaid to:

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