

**In the United States District Court
for the Eastern District of Texas
Marshall Division**

WALTER SESSION, *et al.*
Plaintiffs,

v.

RICK PERRY, *et al.*
Defendants.

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§

No. 2:03-CV-354
Consolidated

**STATE DEFENDANTS'
OPENING BRIEF ON REMAND**

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**STATE DEFENDANTS'
OPENING BRIEF ON REMAND**

TO THE HONORABLE EASTERN DISTRICT OF TEXAS:

The remand order mandates that this Court consider the case further in light of *Vieth v. Jubelirer*, 124 S.Ct. 1769 (2004). *Vieth* bears on only one issue in this case: political gerrymandering. And on that, *Vieth* expressly rejects the theories of political gerrymandering advanced by Plaintiffs at the *Session v. Perry* trial—a majority of the Supreme Court held that those theories, at a minimum, do not state a constitutional claim. Thus, applying the controlling *Vieth* decision, this Court should hold that Plaintiffs have not only failed to prove their claim, but that their theories fail even to state a claim. Accordingly, the State of Texas, Governor Rick Perry, Lieutenant Governor David Dewhurst, Texas House Speaker Tom Craddick, and Texas Secretary of State Geoffrey S. Connor (the State Defendants) ask this Court to dismiss the political-gerrymandering claims and again render judgment in favor of the State Defendants.

STATEMENT OF THE CASE

Procedural Posture on Remand

On January 6, 2004, this Court issued a comprehensive decision in this litigation, followed shortly thereafter by a final judgment. *Session v. Perry*, 298 F.Supp.2d 451 (E.D. Tex. 2004) (three-judge court). That judgment rejected all claims that had been leveled against Plan 1374C (the Texas congressional map that had been passed by the Legislature), including Plaintiffs' theory that it was an illegal political gerrymander under *Davis v. Bandemer*, 478 U.S. 109 (1986). *See Session*, 298 F.Supp.2d at 474-75.

Before trial, the State had moved to dismiss those political-gerrymandering claims. *See State Defendants' Motion to Dismiss and Brief in Support* (Nov. 13, 2003). The Court nonetheless allowed those claims to proceed to trial for purposes of creating a more complete appellate record, as the Supreme Court was then revisiting its political-gerrymandering jurisprudence in *Vieth v. Jubelirer*. *See Session*, 298 F.Supp.2d at 474. This case and *Vieth* were linked by more than scheduling:¹ counsel for the *Vieth* appellants was also counsel for certain Plaintiffs here, at least one of the experts (Alan Lichtman) was common to plaintiffs in both cases, both sets of plaintiffs advanced two-part tests that sought to refine *Bandemer* by couching intent as "predominant intent," and both proposed the identical methodology to assess partisan effect.

The Court's final judgment denied relief on all of Plaintiffs' claims. *Session*, 298 F.Supp.2d at 515. After final judgment, and after Plaintiffs had filed their jurisdictional

1. The lead counsel for the Jackson Plaintiffs argued *Vieth* on December 10, 2004, and returned to commence the *Session v. Perry* trial on December 11, 2004. Unsurprisingly, the legal theories remained the same from one day to the next.

statements in the Supreme Court, the Supreme Court issued its decision in *Vieth*, supplanting *Bandemer* as the controlling statement of political-gerrymandering law. *Vieth v. Jubelirer*, 124 S.Ct. 1769 (2004). Subsequently, the Supreme Court remanded this case with a narrow and specific mandate: “for further consideration in light of *Vieth*.”

The *Vieth* Decision

Because the Supreme Court has specifically directed that this Court apply *Vieth v. Jubelirer*, that case deserves careful attention.

By the time it reached the Supreme Court, the *Vieth* litigation had become focused on the plaintiffs’ challenge to the partisan nature of the Pennsylvania General Assembly’s congressional redistricting efforts. The *Vieth* plaintiffs described that redistricting process as having been motivated by partisan maximization at the expense of every other traditional redistricting principle:

Following the 2000 census, Pennsylvania lost two congressional seats to reapportionment, and its General Assembly had to enact a new districting plan. The goal of that plan—frankly admitted by Pennsylvania legislative leaders and the national Republican officeholders who had significant input into the process—was to *maximize the number of Republicans* elected to Congress throughout the decade, while *eliminating as many Democratic incumbents as possible*. To that end, the General Assembly *sacrificed every redistricting principle traditionally applied* in Pennsylvania, slicing through municipalities, counties, and communities and creating bizarrely shaped districts The new districting scheme also guaranteed that several Democratic incumbents would lose by ‘pairing’ them in the same districts; by contrast, the scheme provided safe seats for each Republican incumbent and created two open seats custom designed to send particular Republican state senators to Washington.

Appellants’ Br. at 1-2, *Vieth v. Jubelirer* (No. 02-1580) (emphasis added).²

2. The *Vieth* briefs are collected as Adobe PDF files on the FindLaw website. See

The *Vieth* plaintiffs brought their suit in a three-judge court in the Middle District of Pennsylvania. The *Vieth* plaintiffs alleged that the Pennsylvania congressional plan was an unconstitutional political gerrymander. *Vieth v. Pennsylvania*, 188 F.Supp.2d 532 (M.D. Pa. 2002) (three-judge court); *see also Vieth v. Jubelirer*, 124 S.Ct. 1769, 1774 (2004). The three-judge court dismissed the political-gerrymandering claims; it did, however, strike down the Pennsylvania plan for violation of the equal-population rule because the districts had a variance in terms of their official census populations that could have been avoided. *Vieth v. Pennsylvania*, 195 F.Supp.2d 672 (M.D. Pa. 2002) (three-judge court).

After the Pennsylvania General Assembly enacted a new plan to rectify the population imbalance between districts, the plaintiffs reasserted their original political-gerrymandering challenge. The three-judge court noted the partisan underpinnings of the plan, observing that it “represents a good faith effort to achieve zero deviation, but like its predecessor . . . jettisons *every other* neutral non-discriminatory redistricting criteria that the Supreme Court has endorsed in one person-one vote cases.” *Vieth v. Pennsylvania*, 241 F.Supp.2d 478, 484 n.3 (M.D. Pa. 2003) (three-judge court) (emphasis added).

Yet, despite the starkness of the plaintiffs’ allegations, the court dismissed the political-gerrymandering claims. It held that, because the *Vieth* plaintiffs had failed to “allege facts indicating that they have been shut out of the political process,” they did not state a claim—even assuming all of the allegations in their complaint to be true. *Id.* at

http://conlaw.usatoday.findlaw.com/supreme_court/docket/2003/december.html#02-1580 (last visited Dec. 5, 2004).

484-85. The Supreme Court noted probable jurisdiction, heard oral argument, and affirmed. *Vieth*, 124 S.Ct. at 1774, 1792.

In affirming the three-judge court's dismissal, a majority of the Supreme Court held that the allegations made by the *Vieth* plaintiffs did not state a claim and thus were properly dismissed. Indeed, four Justices would have gone further and held that all political-gerrymandering claims are nonjusticiable because no judicially discernible and manageable standards for adjudicating such claims can be found. *Vieth*, 124 S.Ct. at 1778 (plurality opinion). A fifth Justice agreed that none of the gerrymandering theories that had yet been offered to the Court could form the basis of a viable claim. *Id.* at 1794 (Kennedy, J., concurring in the judgment). Thus, a majority of the Court held that the political-gerrymandering theories before it did not state a claim, and the district court had accordingly been correct to dismiss the claims.

Four Justices in *Vieth* dissented because they would have allowed the plaintiffs an opportunity to replead their claims. Yet, none of the *Vieth* dissenters indicated that they agreed with the standard offered by the *Vieth* appellants. Instead, the dissenters offered competing and mutually incompatible proposals for how to evaluate political-gerrymandering claims. Justices Stevens and Souter each proposed tests that would restrict plaintiffs to district-specific political-gerrymandering claims, *see id.* at 1812 (Stevens, J., dissenting); *id.* at 1817 (Souter, J., dissenting), while Justice Breyer suggested a standard that would condemn, on a statewide claim, the use of the redistricting process to "entrench a minority in power," *id.* at 1825 (Breyer, J., dissenting). All of those theories—in addition to every other theory that was before the

Court—were expressly rejected by a majority of the Court. *See id.* at 1778 (plurality opinion); *id.* at 1794 (Kennedy, J., concurring in the judgment).

SUMMARY OF THE ARGUMENT

A decision by this Court to dismiss Plaintiffs' political-gerrymandering claims should follow *a fortiori* from the Supreme Court's holding in *Vieth v. Jubelirer*. A majority of the Supreme Court held that the political-gerrymandering theories offered in that case—indeed, the full range of political-gerrymandering theories that have yet been devised—failed to state a viable claim. Applying that holding to this case should be straightforward.

Indeed, these facts should be easier than *Vieth*. In *Vieth*, it was alleged that an entrenched political minority was thwarting majority rule. By contrast, the Texas plan is a pro-majoritarian plan that—for the first time in a decade—empowers a statewide Republican majority to elect a majority Republican congressional delegation. If the *anti*-majoritarian allegations of *Vieth* do not state a political-gerrymandering claim, it is difficult to understand how a redistricting plan that makes Texas's congressional delegation more like Texas's voting patterns could possibly be objectionable on a theory of partisan fairness. Thus, even if the Supreme Court had left open the possibility that some of the now-existing political-gerrymandering theories might be viable, Texas's plan would pass any such test. But the Supreme Court did not leave that question open. By holding in *Vieth* that current legal and statistical methods of proving political-gerrymandering are inadequate to the task, it closed the door to Plaintiffs' claims.

ARGUMENT

I. THE REMAND ORDER MANDATES THAT THE COURT CONSIDER *VIETH*'S EFFECT ON THIS CASE, NOT THAT IT CONSIDER NOVEL THEORIES OF POLITICAL GERRYMANDERING THAT HAVE NOT BEEN RAISED.

This Court's task on remand need not—indeed should not—be overly complicated. Only one issue should be revisited, and the Court need only ensure that its decision on that issue is not inconsistent with the Supreme Court's holding in *Vieth*. See, e.g., *United States v. Johnson*, 246 F.3d 749, 752 (5th Cir. 2001) (per curiam) (on remand for further consideration in light of *Jones v. United States*, 529 U.S. 848 (2000), “[w]e have reconsidered in light of *Jones*. We conclude that nothing in the Court's *Jones* opinion, or in its holding there, is inconsistent with or suggests error in our prior action”); *In re Asbestos Litigation*, 134 F.3d 668, 669 (5th Cir. 1998) (“The Supreme Court vacated our judgment and remanded the case for reconsideration in light of *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 [] (1997). After oral argument and reconsideration, we can find nothing in the *Amchem* opinion that changes our prior decision.”).

This is not the first time that a three-judge district court in this Circuit has faced such a remand from the Supreme Court. In *Sheldon v. Reynolds*, 422 U.S. 1050 (1975), the Supreme Court vacated and remanded the decision of a three-judge court in the Northern District of Texas for further consideration in light of the intervening decision in *O'Connor v. Donaldson*, 422 U.S. 563 (1975). The three-judge court's earlier decision had addressed both due process and equal protection challenges to Texas's commitment standards. See *Reynolds v. Sheldon*, 404 F.Supp. 1004, 1006 (N.D. Tex. 1975). But,

acknowledging the Supreme Court's narrow mandate, on remand the district court refused to entertain that full spectrum of claims. Instead, it held that since *O'Connor* "dealt only with . . . due process . . . no equal protection arguments are considered on remand." *Id.* at 1007.

That same restraint should guide this Court, and the focus should remain on what the Supreme Court has directed. Because *Vieth* addressed only political gerrymandering, the only live question should be how *Vieth* affects this Court's analysis of the Plaintiffs' claim that Plan 1374C is an unconstitutional political gerrymander. That analysis is found in Part III.B of this Court's decision in *Session*, 298 F.Supp.2d at 474-75; this Court's consideration on remand should be similarly confined.³ See *Kotler v. American Tobacco Co.*, 981 F.2d 7, 13 (1st Cir. 1992).

II. IN LIGHT OF VIETH, THIS COURT SHOULD DISMISS PLAINTIFFS' POLITICAL-GERRYMANDERING CLAIMS.

In *Vieth*, the Supreme Court upheld the dismissal of political-gerrymandering claims at the motion-to-dismiss stage.⁴ 124 S.Ct. at 1774, 1792 (plurality opinion); see also *Vieth v. Pennsylvania*, 241 F.Supp.2d 478, 484-85 (M.D. Pa. 2003). The same result

3. Although a district court on remand has "the naked power to reexamine an issue that lies beyond the circumference of the Supreme Court's specific order," that power "is to be exercised sparingly and only when its invocation is necessary to avoid extreme injustice." *Kotler*, 981 F.2d at 13 (applying a stricter rule to civil cases) (citing *Aladdin's Castle v. City of Mesquite*, 713 F.2d 137, 138-39 (5th Cir. 1983)).

4. The Court's original reluctance to dismiss these claims was rooted in judicial efficiency, allowing a record to develop because the governing law was expected to change in *Vieth*. Now that *Vieth* has been decided, that concern no longer pertains. Indeed, the Supreme Court's mandate directs this Court to apply *Vieth*, which affirms a district court's dismissal of such claims at the pleading stage for failure to state a claim.

should follow here, and the Court should dismiss Plaintiffs' political-gerrymandering claims without further proceedings.

A. A Majority of the *Vieth* Court Held That the Theories and Methodologies Before It Were Legally Insufficient To State a Claim.

The *Vieth* decision forecloses Plaintiffs' claims. A majority of the Court held that the *Vieth* appellants' theories—and those of the various *amici* and those proposed by the dissenting Justices—were inadequate to state a claim. The four-Justice plurality would have held that all political-gerrymandering claims are nonjusticiable. *Vieth*, 124 S.Ct. at 1778 (plurality opinion). Justice Kennedy concurred in the judgment, agreeing that none of the gerrymandering theories that had yet been offered to the Court could form the basis of a viable claim. *Id.* at 1793-94, 1799 (Kennedy, J., concurring in the judgment).

The four-Justice plurality and Justice Kennedy's concurrence did not disagree about the futility of the claims before the Court. Justice Kennedy agreed with the plurality's rejection of the potential political-gerrymandering tests that had been proposed to, or suggested by, Members of the Court. He rejected the plaintiffs' proposed principle that "a majority of voters . . . should be able to elect a majority of the . . . congressional delegation," and affirmed the plurality's rejection of "the other standards that have been considered to date." *Id.* at 1793-94 (Kennedy, J., concurring in the judgment). He also rejected the *Bandemer* standard and those standards offered by the dissenting Justices. *See Vieth*, 124 S.Ct. at 1794 (Kennedy, J., concurring in the judgment) (the plurality opinion "demonstrat[es] that the standards proposed in [*Bandemer*], by the parties before

us, and by our dissenting colleagues are either unmanageable or inconsistent with precedent, or both”).

Thus, Justice Kennedy agreed that the *Vieth* plaintiffs’ complaint was properly disposed of at the pleading stage, *id.* at 1793 (Kennedy, J., concurring in the judgment)—that there was no need to provide an opportunity for the plaintiffs to replead because there was no viable claim available for them to plead. As Justice Kennedy observed, “[b]ecause there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights.” *Id.* at 1793 (Kennedy, J., concurring in the judgment). Without such standards, court intervention is inappropriate.⁵ *Id.* (Kennedy, J., concurring in the judgment).

The divergence between Justice Kennedy and the plurality is one of temperament, not reasoning. While the plurality would hold that political-gerrymandering claims are inherently nonjusticiable, Justice Kennedy prefers to “err on the side of caution” by allowing for the possibility of federal court intervention at some future time should a

5. The plurality reads Justice Kennedy as saying that, for now, such claims are nonjusticiable:

Reduced to its essence, Justice KENNEDY’s opinion boils down to this: ‘As presently advised, I know of no discernible and manageable standard that can render this claim justiciable. I am unhappy about that, and hope that I will be able to change my opinion in the future.’ What are the lower courts to make of this pronouncement? We suggest that they must treat it as a reluctant fifth vote against justiciability at district and statewide levels – a vote that may change in some future case but that holds, for the time being, that this matter is nonjusticiable.

Id. at 1792 (plurality opinion).

consensus eventually emerge on “suitable standards with which to measure the burden a gerrymander imposes on representational right.” *Id.* at 1796 (Kennedy, J., concurring in the judgment). That time is not now; the ink is barely dry on *Vieth*, and no such consensus can be said to have emerged.⁶

B. Plaintiffs’ Theories Are Foreclosed Because They Mirror Those Theories and Methods Rejected in *Vieth*.

There is a remarkable convergence between the theories advanced to the Supreme Court in *Vieth* and those advanced by Plaintiffs in the *Session* trial. The Jackson Plaintiffs⁷ offered a two-part test that they pitched as both a refinement of *Bandemer* and an application of “the arguably stricter standards” provided by Article I of the Constitution: (1) “predominant intent to achieve unfair partisan advantage” and (2) “the effect of so skewing electoral outcomes that Democrats would have no chance of winning a majority of seats . . . even if they repeatedly won a narrow majority of the votes statewide.” See Jackson Pl. Tr. Br. 34 (citing *Bandemer v. Davis*, 478 U.S. 109 (1986)). This identical test was offered to the Supreme Court in *Vieth*. Indeed, the Jackson

6. The academic literature agrees. As one commentator has summarized the situation, “[f]or the foreseeable future, Justice Kennedy’s vote appears to bar political gerrymandering claims. But it allows for the courts to reconsider the question periodically as circumstances and, perhaps, attitudes change.” Richard L. Hasen, *Looking for Standards (In All the Wrong Places): Partisan Gerrymandering Claims After Vieth*, 3 ELECTION L. J. 626, 640 (2004). Another analyst has concluded that Justice Kennedy’s concurring opinion “stands as an invitation to litigants to work at the state constitutional level to develop a nationwide consensus about how such claims should be handled. Once such a standard emerges from the pack . . . litigants may then return to federal court well poised to argue for federal adoption of the consensus state-level standard.” James A. Gardner, *A Post-Vieth Strategy for Litigating Partisan Gerrymandering Claims*, 3 ELECTION L. J. 643 (2004).

7. The Jackson Plaintiffs were, for all practical purposes, the lead plaintiffs for claims of political gerrymandering. Indeed, the only plaintiffs’ expert witness on political gerrymandering was offered by the Jackson Plaintiffs, and the other Plaintiffs followed those arguments.

Plaintiffs described this “two-part test” as “*match[ing]* the one being proposed to the Supreme Court in *Vieth v. Jubelirer*.” *Id.* (emphasis added).

1. As in *Vieth*, the claims here allege a “solely” partisan purpose undertaken for “maximum partisan advantage.”

The Plaintiffs have argued for a “predominant intent” standard by which a court would evaluate whether partisan motives were excessive. *See* Jackson Pl. Tr. Br. 34. In that regard, Plaintiffs have contended that the “predominant intent” was “partisan advantage” and that the Legislature “sacrificed other neutral and legitimate criteria to that overriding [political] goal.” *See* Jackson Pl. Post-Tr. Br. 65 & 67.

That argument mirrors the allegations in *Vieth*, which were eventually rejected by the Supreme Court as insufficient. In *Vieth*, one plaintiff “allege[d] that the new districting plan was created ‘solely’ to effectuate the interests of Republicans, and that the General Assembly relied ‘exclusively’ on a principle of ‘maximum partisan advantage’ when drawing the plan.” *Vieth*, 124 S.Ct. at 1799-1800 (Stevens, J., dissenting). And given the procedural posture of *Vieth*—which was reviewing the grant of a motion to dismiss—those allegations were presumed to have been true. *See Leatherman v. Tarrant County Narcotics Intelligence Unit*, 507 U.S. 163, 164 (1993) (“We review here a decision granting a motion to dismiss, and therefore must accept as true all the factual allegations in the complaint.”).

A majority of the Court rejected the contention that such allegations could state a claim. *See Vieth*, 124 S.Ct. at 1785-86 (plurality opinion); *id.* at 1794 (Kennedy, J., concurring in the judgment). Instead, the Supreme Court acknowledged that political

concerns were an inevitable part of any legislative process, especially one with the real-world political consequences of redistricting. *Id.* at 1781 (plurality opinion). The *Vieth* Court made plain that intent was not enough—even an allegation of intent preceded by modifiers like “sole,” “only,” or “predominant.” *See id.* at 1781 (plurality opinion) (“Vague as the ‘predominant motivation’ test might be when used to evaluate single districts, it all but evaporates when applied statewide.”); *id.* at 1793 (Kennedy, J., concurring in the judgment); *see also Bandemer*, 478 U.S. at 128 (“As long as redistricting is done by a legislature,” partisan intent is “not . . . very difficult to prove.”).

Plaintiffs in this case assume that political purposes are illegitimate purposes. But the Supreme Court has rejected that assumption, and Plaintiffs’ framework provides no guidance as to how to assess “the excess of an ordinary and lawful motive” of political gain. *Vieth*, 124 S.Ct. at 1781 (plurality opinion).

Politics is an inherent part of redistricting—it would be “quixotic” to believe otherwise. *Id.* at 1780 (plurality opinion) (quoting Appellants’ Br. at 3, *Vieth v. Jubelirer* (No. 02-1580)). “The Constitution clearly contemplates districting by political entities, *see* Article I, §4, and unsurprisingly that turns out to be root-and-branch a matter of politics.” *Id.* at 1781 (plurality opinion); *see Miller v. Johnson*, 515 U.S. 900, 914 (1995) (“[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition”); *Shaw v. Reno*, 509 U.S. 630, 662 (1993) (White, J., dissenting) (“[D]istricting inevitably is the expression of interest group politics”); *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) (“The reality is that districting inevitably has and is intended to have substantial political consequences.”). *Accord* Jackson Pl.

Post-Trial Br. 24 (“To be sure, partisan considerations and political viewpoint will play a part in any redistricting process run by political institutions such as state legislatures.”).

Thus, Plaintiffs’ claims must be dismissed for failing to offer a meaningful framework by which to evaluate partisan intent. In *Vieth*, even where partisanship was alleged to be the “sole” motivation, *see Vieth*, 124 S.Ct. at 1799 (Stevens, J., dissenting), a majority of the Court held that such an allegation would not form the basis of a viable claim. *Id.* at 1778, 1780-81 (plurality opinion); *id.* at 1794, 1799 (Kennedy, J., concurring in the judgment). That result should control here, where Plaintiffs offer no more than a collection of similar intensifiers in front of the word “partisan.”

2. As in *Vieth*, the claims here are built on allegations that the map does not result in a sufficiently proportional result.

The Plaintiffs have built their argument for partisan effects on what they call its “distributional bias”—which is an expert witness’s guess as to “how the map performs in a 50-50 election statewide.” Jackson Pl. Post-Tr. Br. 68-69. In essence, Plaintiffs claim that—in some hypothetical future election—the proportion of seats won at a district-by-district level for Texas’s congressional delegation might be out of line with the proportion of votes cast statewide for members of that political party.

In *Vieth*, the Supreme Court categorically rejected the proportionality-based statewide partisanship arguments offered by Plaintiffs. *See Vieth*, 124 S.Ct. at 1782 (plurality opinion) (“[T]he Constitution contains no such principle.”); *id.* at 1793 (Kennedy, J., concurring in the judgment) (“The fairness principle appellants propose is that a majority of voters in the Commonwealth should be able to elect a majority of the

Commonwealth's congressional delegation. There is no authority for this precept."); *id.* at 1799 (Stevens, J., dissenting) ("Plaintiff-appellants urge us to craft new rules that in effect would authorize judicial review of statewide election results to protect the democratic process from a transient majority's abuse of its power to define voting districts. I agree with the Court's refusal to undertake that ambitious project."); *id.* at 1817 (Souter, J., dissenting) (rejecting statewide claims as judicially unworkable until experience is gained with district-level claims).

The only Justice who entertained the *Vieth* plaintiffs' statewide theory was Justice Breyer, who limited his concern to a situation where an actual political majority was being thwarted by a political minority. *See id.* at 1825 (Breyer, J., dissenting). That concern is not present here. *See* Part III.B, *infra*. The other three dissenting Justices wrote that, while they believed political-gerrymandering claims to be justiciable, they would confine them to district-specific claims rather than statewide models of proportional representation such as offered by Plaintiffs here. *See Vieth*, 124 S.Ct. at 1805, 1812 (Stevens, J., dissenting); *id.* at 1817 (Souter, J., dissenting).

In this more typical case, in which a political minority is simply complaining that it should have a bigger share of the pie, Plaintiffs' complaints are misplaced:

[The] single-member-district system helps to assure certain democratic objectives better than many "more representative" (*i.e.*, proportional) electoral systems. Of course, single-member districts mean that only parties with candidates who finish "first past the post" will elect legislators. That fact means in turn that a party with a bare majority of votes or even a plurality of votes will often obtain a large legislative majority, perhaps freezing out smaller parties. But single-member districts thereby diminish the need for coalition governments. And that fact makes it easier for voters to identify which party is responsible for government decisionmaking (and

which rascals to throw out), while simultaneously providing greater legislative stability.

Id. at 1823 (Breyer, J., dissenting).

The Supreme Court has roundly rejected the kind of statewide proportionality urged by Plaintiffs as providing a basis for political-gerrymandering claims. Adhering to *Vieth*, this Court should dismiss Plaintiffs' political-gerrymandering claims as lacking any meaningful metric to measure when a constitutional violation has occurred.

3. Even the methodology used by Plaintiffs' experts mimics the methodology advanced by the *Vieth* plaintiffs.

Plaintiffs built their case on expert testimony about the “bias” in Texas’s congressional redistricting map. In particular, Plaintiffs rely on the method of “normalizing” the vote shares of each candidate in a prior statewide election to 50% and counting the districts each would have carried.” Jackson Pl. Tr. Br. 39. The method involves picking a baseline statewide election and then using that as a way to “normalize” the congressional district-by-district returns, in essence to take a guess as to how those districts would perform in a hypothetical election in which the State’s voters split perfectly 50-50 on a statewide basis. *See* Alford Report 21-22. This guess depends on the mathematical “normalizing” assumption that each shift in the statewide political mood will be perfectly evenly distributed across each of the 32 congressional districts—that if the Republican ticket loses 3% of its vote share in District 10, that it will also lose exactly 3% of its vote share in District 9, and in each of the other 30 districts. Relying on

that assumption, this method allows a guess as to the composition of a congressional delegation in a hypothetical 50-50 election, all other things being equal.⁸

Plaintiffs' expert, Professor John Alford, conducted this analysis using "all 64 general statewide elections conducted since 1992" as 64 different baseline elections from which to "normalize" the results. Jackson Pl. Tr. Br. 39. Among those, he found that in 59% of these scenarios, Republicans would have an edge toward winning 22 of the 32 congressional seats, and in 19% of the scenarios they would have an edge toward winning 21 of the 32 congressional seats. *Id.*

After *Vieth*, this method is legally insufficient to form the basis of a political-gerrymandering claim. Indeed, this methodology is precisely what the Supreme Court rejected. It is worth examining in detail exactly what the *Vieth* appellants offered to the Supreme Court as their proposed method of assessing whether there was an unconstitutional partisan effect:

Step One. The first step in assessing whether an alleged gerrymander systematically packs and cracks one party's voters is to identify the body of relevant elections. In a challenge to a congressional map, the focus ordinarily should be on the entire set of *statewide* general elections (for offices such as President, U.S. Senator, Governor, and so forth) that appeared on the ballot with congressional elections in the last decade. Those are the data used by consultants who design gerrymanders and by political scientists who evaluate them—including the experts for both Appellants and Appellees. See JA 32-45, 218-19. A statewide election is particularly revealing because the same Republican candidate and the same Democratic candidate square off in every precinct in the State. . . .

8. Excluded from Plaintiffs' model, of course, are other factors that bear on election outcomes—incumbency advantages, the personal qualities of the candidate, whether the candidate's positions deviate from the national party's positions, personal scandal, and decisions by political parties as to how to allocate their resources—any of which might lead to a different result for any particular district.

Step Two. The second step in checking for systematic packing and cracking is to compute, for each statewide election from the last decade, how the candidates performed in each district under the challenged map. For any given district in any given plan, one can easily calculate accurate vote totals by simply adding up the votes each statewide candidate received in the precincts that fall within the district. *See* JA 273-76. . . .

Step Three. The third step is to “normalize” each statewide election to simulate a 50-50 contest and then to add up the number of seats that each candidate would have won. A 50-50 election (where the two candidates are effectively “tied” statewide) is the litmus test for determining whether a party’s majority share of the seats flows from disparate packing and cracking of the rival party’s voters, as opposed to the legitimate “seats bonus” that winner-take-all, district-based systems typically generate. . . . When the two parties are effectively “tied” statewide, a redistricting plan intentionally crafted to consistently reward one party with far more seats than the other offends our Constitution’s “general majoritarian ethic.” *Bandemer*, 478 U.S. at 126 n.9.

In Pennsylvania’s 2000 Treasurer’s contest, on average (across the 19 congressional districts), the Republican Hafer got 50.78% of the major-party vote and her Democratic opponent, Knoll, got 49.22%. So to simulate a 50-50 contest, one can “normalize” the results by adding 0.78% to Knoll’s percentage and subtracting 0.78% from Hafer’s percentage in each district. That simulates what would have happened in a “tied” election. Here, the Republican candidate (Hafer) would have carried 12 of the 19 congressional districts under the challenged map, while the Democrat (Knoll) would have carried only 7 districts. That disparity reflects the extraordinary degree to which the voters who could have formed a Democratic majority for Knoll were “packed” into 7 districts and “cracked” among the remaining 12.

Step Four. The next step is to apply Steps Two and Three to all the other statewide elections identified in Step One, to check for a *systematic pattern* of packing and cracking. . . . [F]or Pennsylvania’s 18 relevant elections, each of which was “normalized” to simulate a statewide “tie,” Appellants’ expert, Professor Lichtman, found a stark pattern: With half the votes, Republican candidates would have carried between 11 and 14 districts in every contest, with no exceptions, while Democratic candidates would have carried only 5 to 8 districts. *See* Appellants’ Br. at 46-47 & n.34. Appellees cannot point to a *single* recent statewide contest contradicting this pattern of disparate packing and cracking.

Step Five. The fifth and final step is to appraise the “totality of circumstances” that might bear on the issue of partisan gerrymandering. Here, the inquiry turns to other factors—such as the treatment of each party’s incumbents—that can aggravate or mitigate the anti-majoritarian effects of disparate packing and cracking. See Appellants’ Br. at 36-37, 40-41, 47-48.

Appellants’ Reply Br. at 9-12, *Vieth v. Jubelirer* (No. 02-1580). That is precisely the method that Plaintiffs have asked this Court to employ. Indeed, if the names of candidates and some numbers were changed, that description from *Vieth* could well have been lifted from the *Session v. Perry* case.⁹

The Supreme Court held that this methodology was not sufficient to form the basis of a political-gerrymandering claim. See *Vieth*, 124 S.Ct. at 1784 (plurality opinion); *id.* at 1794 (Kennedy, J., concurring in the judgment). Indeed, the *Vieth* Court refused even to allow the plaintiffs to amend to try to refine their claim. Applying the holding of *Vieth* to the case before the Court leads to a straightforward result—the political-gerrymandering claims advanced by Plaintiffs must be dismissed.

* * * * *

Last fall, the Jackson Plaintiffs told this Court that the Texas case was so intertwined with *Vieth* that, “[i]f the Supreme Court reverses the judgment below in *Vieth*, it is all but certain that Plan 1374C would then have to be invalidated.” Jackson Pl. Post-Tr. Br. 73. Unsurprisingly, the inverse is true as well: The Supreme Court’s

9. There is some indication that, in fact, the *Vieth* appellants’ proposed methodology may have been directly borrowed from the *Session* case. The brief in *Vieth* that articulated that theory (Appellants’ Reply Brief) was dated November 23, 2003—ten days *after* the same counsel had offered the same theories to this Court in the Jackson Plaintiffs’ motion for summary judgment and the Alford expert report, both of which discuss that methodology.

outright rejection of the same standard in *Vieth* mandates that the claims here also be dismissed.

III. ALTHOUGH FIVE JUSTICES REJECTED THE TESTS DISCUSSED IN *VIETH*, THE TEXAS PLAN WOULD HAVE MET THE MAJORITARIAN TEST URGED BY THE *VIETH* APPELLANTS AND DISCUSSED BY JUSTICE BREYER.

Because a majority of the *Vieth* Court held that the tests before it did not state a claim, *see* Part II, *supra*, there is no need to consider how the facts of the Texas redistricting would fare under those tests. But if the Court were to take such a step, the Texas plan would be constitutional. It passes the test offered by the *Vieth* appellants, as well as the modified version of that test discussed by Justice Breyer.

A. The Texas Plan Would Pass the *Vieth* Appellants' "Majoritarian" Test.

The appellants in *Vieth* proposed a political-gerrymandering test that "would invalidate the districting only when it prevents a majority of the electorate from electing a majority of representatives." *Vieth*, 124 S.Ct. at 1782 (plurality opinion). Appellants named this principle the "majoritarian standard." *See* Appellants' Br. at 34, *Vieth v. Jubelirer* (No. 02-1580). The Court recognized this as little more than an argument for proportional representation in finer dress. *See Vieth*, 124 S.Ct. at 1782 (plurality opinion). Both the plurality and Justice Kennedy rejected this standard as judicially unmanageable. *See id.* at 1782 (plurality opinion); *id.* at 1794 (Kennedy, J., concurring in the judgment).

This case is, if anything, substantially easier than *Vieth*. In *Vieth*, the challenged plan was alleged to be frustrating the will of the majority of Pennsylvania voters. And it was alleged to be severe: "Democrats consistently constitute a majority of Pennsylvania

voters in congressional elections [and yet] the predictable result of [the plan] is that Republicans will win roughly twice as many seats as the Democrats in Pennsylvania's congressional delegation." Jurisdictional Statement, at 16-17, *Vieth v. Jubelirer* (No. 02-1580).¹⁰

By contrast, in Texas, there is no allegation of a thwarted majority. The electorate is solidly Republican, having elected Republicans to majorities in "both houses of the Texas Legislature as well as control over all prominent Executive Branch positions." *Session*, 298 F.Supp.2d at 458. Republicans routinely garner in excess of 55% of the statewide vote, and, in 1998, the Republican candidate for governor prevailed by nearly forty points. See <http://www.sos.state.tx.us/elections/historical/>. Rather than thwarting majority rule—as the plan in *Vieth* was alleged to have done—Plan 1374C more closely aligns the congressional delegation with the will of the majority. Indeed, if any plan would have been objectionable for frustrating the will of the voters, it would have been the predecessor Plan 1151C, which the 2003 redistricting replaced.

Appellants' claim of partisan effect was predicated on their expert's prediction that Republicans would win 22 of the 32 congressional seats under the new plan and, in turn, that Republicans would likely retain a majority of seats "*even if they repeatedly won a narrow majority of the votes statewide.*" Jackson Pl. Post-Tr. Br. 64 (emphasis added). Appellants' argument was thus built on a hypothetical: "even if" Democrats were to

10. The *Vieth* plaintiffs offered historical evidence bolstering their claim of an anti-majoritarian effect: "In the five most recent statewide races combined, Democrats had averaged 50.1% of the major-party vote, and in the most recent congressional elections (in November 2000) they had garnered 50.6% of the major-party votes cast across the State." Appellants' Br. at 43, *Vieth v. Jubelirer* (No. 02-1580).

make substantial statewide gains to become the majority party. Appellants did not allege or prove that there was any basis in fact for such an assumption. Because there is no indication that Democrats are a thwarted majority of the State's voters, there is no anti-majoritarian effect.

B. The Texas Plan Would Also Pass Justice Breyer's "Entrenchment" Standard Because No Majority Is Being Thwarted.

For much the same reason, the Texas plan would satisfy the test offered in Justice Breyer's dissent.¹¹ Justice Breyer offered a version of the appellants' theory that would condemn "the unjustified use of political factors to entrench a minority in power." *Vieth*, 124 S.Ct. at 1825 (Breyer, J., dissenting). Justice Breyer would define "entrenchment" as "a situation in which a party that enjoys only minority support among the populace has nonetheless contrived to take, and hold, legislative power." *Id.* Thus, Justice Breyer would look for whether there was manipulation of the system by and on behalf of the minority party to entrench it despite majority will to the contrary. *Id.* at 1829 (Breyer, J., dissenting). In Texas, that would require a redistricting map that favored the State's minority party—the Democratic Party—despite a statewide majority to the contrary. That situation describes the old map, Plan 1151C, not the new map.

Justice Breyer's test is aimed at plans that are anti-majoritarian in a way that the Texas congressional map is not. In Texas, the composition of the congressional delegation is aligned with the composition of the State's electorate—both have a solid

11. Justice Breyer's proposed test received only one vote; it is not the controlling standard. This brief discusses his dissent only to emphasize that the Texas plan is nothing at all like "entrenchment."

Republican majority. See <http://www.sos.state.tx.us/elections/historical/> (archiving election returns for both statewide and congressional offices). To that extent, Plan 1374C can be fairly described, in Justice Breyer's terminology, as "a method for transforming the will of the majority into effective government." See *Vieth*, 124 S.Ct. at 1822-23 (Breyer, J., dissenting).

If anything, the 2004 election results confirm how Plan 1374C reflects the majoritarian wishes of the Texas electorate. According to the election returns collected by the Texas Secretary of State, in the 2004 presidential election, 61.1 percent of Texas voters voted for the Republican candidate for President, and 38.2 percent voted for the Democratic candidate. See <http://www.sos.state.tx.us/elections/historical/>. And looking specifically at the votes cast in the 2004 congressional races, Texans cast 57.7 percent of their votes for Republican candidates for Congress, 39 percent of their votes for Democratic candidates, and the remaining 3.3 percent for candidates from other parties. See <http://www.sos.state.tx.us/elections/historical/>. Thus, in 2004, the party receiving the clear majority of votes also received the majority of congressional seats.¹²

By contrast, in 2002 the party receiving the majority of votes did not receive a majority of the congressional seats. In 2002, Texans cast 53.3 percent of their votes for Republican candidates for Congress, 43.9 percent of their votes for Democratic candidates, and the remaining 2.8 percent for candidates from other parties. See

12. Although proportionality is by no means constitutionally required, See Part II.B.2, *supra*, the percentages of votes cast in the 2004 elections are roughly proportional to the resulting congressional delegation, in which Texans elected 21 Republican Members of Congress and 11 Democratic Members, a ratio of 65.6 percent to 34.4 percent.

<http://www.sos.state.tx.us/elections/historical/>. Nevertheless, under Plan 1151C, those votes elected 17 Democratic Members of Congress and 15 Republican Members, a 53.1 percent to 46.9 percent split—contrary to the expressed will of the majority of Texas voters. Thus, it was Plan 1151C, not Plan 1374C, that might possibly have run afoul of Justice Breyer’s proposed test.

Moreover, Justice Breyer would require a degree of certainty about there being a thwarted majority before any judicial intervention could be proper. His test suggests that, without evidence that entrenchment has already occurred to thwart the majority, a plaintiff would need “strong, objective, unrefuted statistical evidence demonstrat[ing] 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.” *Id.* at 1828 (Breyer, J., dissenting). Here, there is no such proof, no such allegation, and the record demonstrates the opposite. In Texas, the majority of voters have translated their votes into a majority of the congressional delegation. That is not a constitutional violation; it is the democratic process.

IV. THIS IS NOT THE CASE THROUGH WHICH TO SEARCH OUT AND DEVISE A VIABLE POLITICAL-GERRYMANDERING THEORY.

Plaintiffs will no doubt focus their attention, and hopes, on certain language from Justice Kennedy’s concurrence in *Vieth*. But Justice Kennedy’s opinion offers no solace for Plaintiffs’ theories. Indeed, Justice Kennedy explicitly agreed that the *Vieth* plaintiffs’ complaint “must be dismissed,” 124 S.Ct. at 1793 (Kennedy, J., concurring in the judgment), and that all of the standards proposed [1] in *Davis v. Bandemer*, [2] “by

the parties before us,” and [3] “by our dissenting colleagues” are “either unmanageable or inconsistent with precedent, or both.” *Id.* at 1794. Nevertheless, Justice Kennedy declined to “foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.” *Id.* at 1793.

It is unclear whether any test will ever meet the strictures of Justice Kennedy’s concurrence—a fact he himself acknowledges. *Id.* at 1794 (observing that the arguments for nonjusticiability “may prevail in the long run”). This case, in particular, is singularly unsuited to challenge the limits set by the Court in *Vieth*, for four distinct reasons:

First, the Supreme Court’s remand did not suggest that this Court should undertake the Sisyphean task of attempting to discern standards that have eluded judicial discovery for some 18 years and that, Plaintiffs would contend, escaped the Supreme Court’s notice just six months prior. Rather than direct this Court to extend *Vieth*, the Supreme Court directed this Court to apply it. *See* Part I, *supra*.

Second, the holding of *Vieth* itself—which dismissed the political-gerrymandering complaint for failure to state a claim—controls this case. Plaintiffs’ theories, proffered by the same lawyers, supported by overlapping experts, and using the same methodology, were expressly rejected by a majority of the Court in *Vieth*, and they should likewise be rejected here. *See* Part II.B, *supra*.

Third, even if there are hypothetical circumstances that might yield a manageable standard some time in the future, those standards would be most likely to emerge where a legislature’s conduct is alleged to be *more* egregious than Pennsylvania’s in *Vieth*, not

less so. In *Vieth*, the plan was alleged to have frustrated the will of the majority of Pennsylvania voters by electing a majority of representatives from the *opposite* party. Here, by contrast, Plan 1374C furthers the will of the majority of voters by electing a majority of representatives from the *same* party. See Part III, *supra*. After *Vieth*, a pro-majoritarian map is a particularly poor place to look for a theoretical political-gerrymandering violation.

And fourth, Plaintiffs' claims are simply too contingent to form the basis for judicial intervention in the political process. Plaintiffs' claims are predicated only upon hypothetical predictions of what might happen if a series of future contingencies come to pass, contingencies which they have in no manner proven are imminent or even likely. Plaintiffs have presented no evidence that there is currently a Democratic majority of voters in Texas or that one is likely any time soon, nor have they proven that such a hypothesized majority would in fact be frustrated at the polls. Even under *Bandemer*, courts looked primarily to *actual election results*, not mere hypothetical predictions. See *generally* State Defendants' Tr. Br. 17-36. Thus, if there is to be some future case where a viable standard is discovered, it should be one based on demonstrated electoral outcomes, not unproven future contingencies.

Justice Kennedy did not invite such speculation. His own description of such a future claim was built on a requirement that they be reliable, that they be "established"—not hypothesized—violations: "I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an *established* violation of the

Constitution in some redistricting cases.” 124 S.Ct. at 1793 (Kennedy, J., concurring in the judgment) (emphasis added). That degree of certainty, Plaintiffs cannot provide.

V. THERE IS NO NEED TO REOPEN THE RECORD TO FULFILL THE REMAND’S MANDATE, BUT, IF PLAINTIFFS ARE PERMITTED TO INTRODUCE NEW THEORIES OR EVIDENCE, THE STATE SHOULD BE AFFORDED THE SAME OPPORTUNITY.

There is no need for this Court to take any additional evidence to reach the conclusion that *Vieth* mandates judgment in favor of the State Defendants. No evidence is needed to conclude that Plaintiffs’ claims were rejected by a majority in *Vieth*. See Part II, *supra*. Nor is any new evidence needed to confirm that Plan 1374C does not have an anti-majoritarian effect because it is aligned with the partisan preferences of the State as a whole. See Part III, *supra*. If, however, the Court does choose to reopen the record to consider new arguments or evidence—which it should not, given the limited scope of this remand, see Part I, *supra*, and given the inappropriateness of this case as a vehicle to challenge the boundaries of *Vieth*, see Part IV, *supra*—then the State Defendants should be afforded an opportunity to respond and the same opportunity as Plaintiffs to supplement the record.

CONCLUSION AND PRAYER

The State Defendants respectfully request that the Court dismiss the political-gerrymandering claims as foreclosed by *Vieth* and to reinstate its judgment denying all relief to the Plaintiffs.

Respectfully submitted,

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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.

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