

**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

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

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The Jackson Plaintiffs and Democratic Congressional Intervenors submit this brief replying to the initial brief filed by Defendants Rick Perry *et al.* (“the State”). As we show, the State errs in suggesting that the correct response to *Vieth v. Jubelirer* would be for this Court to dismiss the partisan-gerrymandering claims and re-enter judgment for the State. First, as to justiciability, if a majority of the Supreme Court thought it appropriate to hold this case nonjusticiable, they had no reason to vacate the judgment and remand the case. The fact that they did so indicates they thought the case was justiciable and wanted this Court to consider whether an applicable standard could be devised consistent with the four opinions upholding justiciability in *Vieth*.

Second, as to the merits, the fact that the partisan-gerrymandering statistical analyses and the legal arguments we made last year about how one might satisfy *Davis v. Bandemer* were similar to those offered by the *Vieth* plaintiffs does not mean that this case is non-meritorious. Now that the *Bandemer* plurality opinion has been overruled, the question is what new standard this Court can derive from *Vieth* and how that standard applies to the *facts* already proved here. As explained in our initial brief, there is such a standard – whether the map as a whole, or some portion thereof, was the product of a single-minded partisan agenda rather than serving (at least in part) some rational and legitimate government purpose. Defendants anticipate that argument but fail to show that the proposed sole-purpose standard is inconsistent with *Vieth*. The Court should adopt that standard and apply it here in the one factual context where it is most likely to lead to invalidation of a map – where a legislature has chosen to replace an existing, perfectly lawful and fair districting plan in mid-decade, for no reason other than to promote the power of people with one partisan point of view at the expense of persons who disagree with them.

Indeed, the Court should recognize a strong presumption that unnecessary mid-decade line changes fail this test.

Third, the State's effort to defend the 2003 Plan as a legitimate and laudatory effort to promote the rights of the majority of Texas voters is out of touch with reality. As the Court's findings made clear, the 2001 Plan was *not* biased against the Republicans, because it already had a large *majority* of districts controlled by Republican voters – some of whom nevertheless chose in 2002 to return their long-time Democratic representatives to Washington. Taking that decision away from those voters by scrambling the districts and pairing incumbents can hardly be defended as vindicating the rights of anyone. In fact, as the Court also found, the single-minded goal being pursued by the Legislature in replacing the 2001 Plan was not to promote democratic values but just the opposite: The Legislature set out to bias the electoral system in favor of one party to the maximum extent possible and to cement that bias in place by making the electoral outcomes in virtually every district a foregone conclusion.

Finally, Travis County and the City of Austin, together with the *amici* University Professors, have pointed to another significant concern the Court should take into account. Map drawers pursuing a partisan agenda years after the census are very likely to use their knowledge of post-census population shifts to produce districts that appear to be equipopulous but in fact pack voters from the disfavored party into larger-than-average districts, thus further diluting their votes. This danger of manipulation should be considered as well as the Court decides whether to recognize a presumption against the validity of mid-decade remaps not undertaken in response to any form of legal compulsion.

I. The Court Should Not Adopt the *Vieth* Plurality's Nonjusticiability Position.

The State seems to think that the United States Supreme Court went to the trouble of vacating this Court's judgment and remanding the matter for further briefing and a new decision

all for nothing. Defendants ask this Court to conclude that the difference between the anti-justiciability plurality in *Vieth* and Justice Kennedy's controlling concurrence was one of "temperament," not substance. State Br. at 10. They thus urge this Court not to even think about elaborating post-*Bandemer* standards for cabinining partisanship in redistricting.

But their arguments in this regard are utterly illogical. To begin with, if Justice Kennedy thought it was too soon even to think about applying limits on partisan gerrymandering in this case, the rational course of action would have been to join with what must have been four votes to affirm summarily. It certainly would not have made sense, instead, to return the matter to this Court with the sole instruction to reconsider the judgment in light of *Vieth*. That course of action makes sense only if the majority of Justices wanted this Court to do just what we have suggested – reconsider and evaluate this case using a new standard.

Moreover, the State's argument is illogical in another sense as well. It seems to be based on the notion that Justice Kennedy anticipated a long wait for the emergence of a judicial consensus on the right standard. State Br. at 10-11; *see id.* at 11 ("That time is not now; the ink is barely dry on *Vieth*, and no such consensus can be said to have emerged."). That may be, but it hardly explains why this Court should not begin the dialogue. A consensus could hardly emerge if every court confronted with a partisan-gerrymandering claim followed the State's lead and said, "I won't even think about the question unless a consensus has somehow appeared elsewhere first." It is possible that Justice Kennedy believes the Supreme Court should defer further consideration of the issue for a while, but there can be little doubt that he wanted and expected this Court and other lower courts to undertake further efforts at devising a way that the basic principles of the First and Fourteenth Amendments can be meaningfully applied in this context.

Finally, Defendants argue that this case is not a good place to start because “Plaintiffs’ claims are simply too contingent to form the basis for judicial intervention in the political process.” State Br. at 26. That might be a critique applicable to the statewide, statistically based arguments presented after trial, but it has no application to the standard we propose now. As the State notes, Justice Kennedy did 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.”” State Br. at 26-27 (quoting 124 S. Ct. at 1793 (Kennedy, J., concurring in the judgment)) (emphasis added by Defendants). Here, the violation we claim is fully established by the evidence marshaled at trial, reflected in repeated findings by this Court that Plan 1374C is an enactment that served *no* purpose other than favoring one group of partisans to the disadvantage of another. For the reasons stated in our initial brief and elaborated on below, such a law violates both the First and Fourteenth Amendments. Government in our constitutional scheme has no authorization to use the force of law in pursuit of a purely partisan agenda.

II. The “Sole Partisan Purpose” Test Is Perfectly Consistent with *Vieth*.

Defendants go on to say that every argument Plaintiffs have made or could make to establish the unconstitutionality of the 2003 Plan is foreclosed by *Vieth*. But that is wishful thinking on their part. It is certainly fair to say that most of the Justices in *Vieth* did not agree with an approach that used statewide statistical techniques to predict whether the disfavored party had a chance of winning half the seats if it received half the votes. But such a vote-dilution analysis drawn from Voting Rights Act caselaw is not the only way to address the issue. To the contrary, as Defendants themselves anticipate, Br. at 12-14, it is possible to ask a much simpler question: whether a given district or an entire redistricting plan was the product of purely partisan legislative goals. It may be a rare case where a court can make such a finding, but the

rule still makes sense. As the Supreme Court has held in numerous other contexts, a law aimed solely at favoring one group and disfavoring another based on their respective political beliefs or activities is not within the constitutional power of government. It lacks a rational and legitimate governmental purpose. *See infra* pages 7-10.

Defendants argue that *Vieth* stands for the proposition that even proof of a purely partisan motivation would not suffice to invalidate a given district or district map. Br. at 12-14. Relying on the fact that the complaint filed in *Vieth* alleged that some of the district lines in Pennsylvania were the product of pure partisanship, they argue that the plurality and Justice Kennedy implicitly held that such allegations, even if proved, would not be enough. *Id.* But that is pure fiction.

By the time the case reached the Supreme Court, the *Vieth* plaintiffs' argument was that the Court should invalidate maps drawn with a "predominant" partisan intent and substantial statewide biasing effects. *See Vieth*, 124 S. Ct. at 1780-84 (plurality). That was the argument that the plurality "consider[ed] . . . at length," *id.* at 1780, and rejected. Justice Kennedy then rejected the same argument for the reasons stated in Justice Scalia's plurality opinion. *See id.* at 1793-94. There is not a word in either opinion suggesting that it would be lawful for a State to decide to redraw a districting plan, or decide how to draw a particular district, for purely partisan reasons without being able to articulate any other state interest being served.

To be sure, as Defendants point out, Justice Stevens in his dissent emphasized the language in the *Vieth* complaint alleging that the challenged plan was motivated solely by partisan goals. *Id.* at 1799-800. He transposed those words into allegations about a particularly egregious district inhabited by one of the named plaintiffs. *Id.* But neither the plurality nor Justice Kennedy took seriously, or even addressed, this "sole purpose" language because the

plaintiffs were by then arguing a “predominant intent” test – as one would expect of plaintiffs attempting to establish a standard that could invalidate an entire statewide map drawn at the beginning of the decade. As other provisions in the *Vieth* complaint acknowledged, that same map also reflected the need to reduce the number of districts in the State by two and to equalize population using the new census data. *See* Amended Complaint in *Vieth v. Jubelirer*, ¶ 16 (filed January 11, 2002).¹ A sole-purpose test was thus incompatible with winning a statewide challenge to that map.

But that is where *Vieth* differs so dramatically from this case. Here, the 2003 Plan replaced a 2001 plan that *already* had the right number of districts of the right size. There was no constitutional obligation to act at all. So it is plausible in this situation to say that the very existence of the 2003 Plan arose *solely* because the majority in the Legislature wanted to maximize the number of Republican representatives in Congress. Put differently, the sole-purpose test imposes a potentially meaningful check on decisions to replace existing lawful and fair maps in mid-decade – a check much more significant than the test’s modest impact as a basis for challenging maps drawn right after the census. Indeed, recognizing a requirement that a remap serve some legitimate, non-partisan governmental purpose would lead to a strong presumption against the validity of a map drawn in mid-decade to replace an existing lawful map.

For all of these reasons, it is completely spurious to suggest that that majority of Justices considered and rejected a sole-purpose standard. The issue simply was not before them.

¹ As noted in our initial brief, at page 14, that will always be the case with a congressional districting plan drawn right after the decennial census. In such a map, the proposed “sole purpose” test could be deployed against a given *district* drawn so egregiously as to reveal purely partisan motivation. But the test would not be likely to invalidate an entire map.

Defendants go on to suggest that a sole-purpose test would not make sense because the Court has repeatedly recognized that “[p]olitics is an inherent part of redistricting.” Br. at 13 (citing cases). But the key word in that sentence – the one that makes it accurate – is “part.” The Supreme Court has never held that a redistricting bill or any other law is constitutional if it is the product of a purely partisan agenda – *i.e.*, if the sole interest being served is subordinating one group of citizens and elevating another based on their political beliefs or voting choices.

To the contrary, in *Vieth* itself, all of the Justices recognized that the Constitution is violated when partisan considerations weigh too heavily in the redistricting process. *See* Jackson Pls. Initial Remand Br. at 3-4. That necessarily means that partisanship itself is not a legitimate governmental interest that can justify a new redistricting map. It also means that the Constitution must be violated when a state passes any law that serves no legitimate and neutral governmental interest, doing so *solely* in pursuit of a partisan agenda.

Justice Kennedy in particular has gone on record in other contexts as saying that such a law would be unconstitutional. First, he wrote the majority opinion in the most recent of the Court’s *Elrod v. Burns* line of cases barring dismissal of public employees (or, in that case, contractors) based on their political affiliations. *See O’Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996). In that opinion, he directly noted that the defendant city could, of course, “terminate[] its affiliation with a service provider for reasons unrelated to political association.” *Id.* at 725. He then rejected the argument that purely political motives could justify such an action:

Respondents’ theory, in essence, is that no justification is needed for their actions, since government officials are entitled, in the exercise of their political authority, to sever relations with an outside contractor for any reason including punishment for political opposition. Government officials may indeed terminate at-will relationships, unmodified by any legal constraints, without

cause; it does not follow that this discretion can be exercised to impose conditions on expressing, or not expressing, specific political views

Id. at 725-26 (citing *Perry v. Sinderman*, 408 U.S. 593, 597 (1972)). Put differently, even entirely discretionary governmental actions become unconstitutional when they are undertaken purely to punish political opponents. This statement merits particular attention here, given Justice Kennedy’s invocation of the *Elrod v. Burns* line of cases in *Vieth*. *See* 124 S. Ct. at 1797 (citing *Elrod*).

The Court’s opinion in *O’Hare Trucking* also invoked the familiar *Mt. Healthy* test for assessing dismissals of government employees claimed to have occurred in retaliation for their exercise of First Amendment rights. *See* 518 U.S. at 725 (citing *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). Under that test, if the employee shows that impermissible retaliatory motives were a motivating factor, the burden shifts to the defendant to show that it would have reached the same decision “even in the absence of the protected conduct.” 429 U.S. at 287. Such a test allows hostility to the employees’ speech to be a motivating factor – just as politics can be considered in redistricting – but bars personnel actions that would not have occurred absent such an illegitimate state interest. Here, of course, Plaintiffs have argued – and this Court has found – that the very existence of Plan 1374C resulted *entirely* from a desire to maximize the political power of one favored group at the expense of a disfavored group. Absent that goal, the mid-decade redistricting would never have been considered, let alone enacted.² *Mt. Healthy* suggests that such a law is constitutionally illegitimate.

² The State’s efforts to argue against the sole-purpose test, *see* Br. at 12-14, are no doubt driven by its inability to deal with this Court’s findings of fact that “110%” of the motivation behind Plan 1374C was to further the Republicans’ partisan agenda. *Session*, 298 F. Supp. 2d at 472-73.

Yet another example is Justice Kennedy’s opinion for the Court in *Romer v. Evans*, 517 U.S. 620 (1996), which invalidated under the Equal Protection Clause a state constitutional amendment barring all legislative, executive, or judicial action at any level of government designed to protect the rights of gay people. The Court applied rational-basis scrutiny and held that a law “inexplicable by anything but animus toward the class it affects . . . lacks a rational relationship to legitimate state interests.” *Id.* at 632. It explained that a “bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.” *Id.* at 634 (quoting *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (emphasis in the original)); see *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446-47 (1985) (same); see also *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring in the judgment) (“When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.”). Given this Court’s factual findings, the *Romer* principle clearly would require invalidation of Plan 1374C -- unless for some reason redistricting bills are subject to a different set of rules under which a bare desire to harm a politically unpopular group (and help a politically popular one) *can* constitute a legitimate governmental interest.

In sum, Defendants have not shown any reason why a sole-purpose test would be constitutionally unjustified or unworkable. At trial, they chose to be remarkably frank about the sole motivation animating the legislative reworking of the State’s congressional districts. They did so because they had little other choice given the factual circumstances and because they relied on the near-insuperable standards of *Davis v. Bandemer* to immunize their partisan capture of the machinery of government from constitutional remedy. But now that *Bandemer*’s plurality opinion has been overruled, there is no reason to apply anything other than the usual

constitutional standards here, recognizing that the primary effect of those standards would be to limit severely the ability of States under one-party control to replace lawful maps in mid-decade. Indeed, under our proposed standard, legislators will know that if they fail to compromise to pass a map when constitutionally required at the start of the decade, they are very likely to lack a justification for supplanting in later years the remedy they are forcing a court to impose.³

III. Defendants’ “Majoritarian” Defense Is Misplaced.

Anticipating the argument that this case is much more severe than *Vieth*, Defendants conclude by making the opposite claim. They say that Plan 1374C was “majoritarian,” reasoning that the 2001 Plan left a majority-Democratic (17-to-15) delegation in place in a majority-Republican State. Br. at 20-26. That argument is wrong for the reasons already noted in our initial brief and in this Court’s January 2004 opinion. *See Session*, 298 F. Supp. 2d at 471. Plan 1151C, drawn in 2001 by this Court, contained a substantial majority of districts (20 out of 32) controlled by voters who generally favor Republican candidates.

Thus, the reason the delegation remained Democratic after the 2002 election was not that the map was biased in favor of Democratic voters, but rather that *Republican* voters in a series of rural districts chose to continue supporting long-time moderate and conservative incumbent Democrats like Charlie Stenholm, Ralph Hall, Chet Edwards, Jim Turner, Nick Lampson, and

³ The Court should reject any argument to the effect that the Legislature was justified in seeking to replace a court-drawn plan with a plan drawn by elected officials. Such an argument ignores the reality of what happened in this case. In 2001, the Texas Legislature had a constitutional duty to redraw the Texas congressional districts, creating two new districts and equalizing population. It made no serious effort to comply with that duty. The reason was partisanship: there were not enough legislators willing to make the political compromises required to pass a bill when each party controlled one house in the Legislature. That was true in part because the Republicans knew they had a strong chance of winning unified control in 2002. So this Court was forced to provide a constitutional remedy -- the 2001 Plan. That sequence of events should not be viewed as providing some alternative, non-partisan justification for passing the 2003 map. To do so would reward the Legislature for constitutional violation that was engineered in order to make it easier to pass a partisan gerrymander later in the decade.

Max Sandlin. The Defendants then decided to take that decision away from those voters by pairing incumbents and by scrambling the districts so that they would be dominated by new voters (mainly in the Dallas-Fort Worth and Houston suburbs). It is hard to see how that action can be defended as nonpartisan and “majoritarian.” In reality, targeted voters were deprived of choices that they wished to continue making (or at least have the opportunity to make) and nearly all voters were placed in districts where the partisan outcome had been decided by the line-drawers long before the polls even opened. That is hardly a pro-democratic (small “d”) program.

In the past, Defendants have argued that the incumbencies preventing Republican control of the congressional delegation under the 2001 Plan were relics of prior Democratic gerrymanders and that those effects should be eradicated. But here again, reality intrudes. Most of the six Members of Congress listed in the previous paragraph were initially elected in parts of the State that had not elected a Republican House member since Reconstruction.⁴ They did not become incumbent Democrats through manipulation of district lines. They then remained in office in 2002 because their Republican-leaning constituents had *chosen* not to follow their fellow voters in other districts who had replaced a large number of Democratic incumbents with Republicans. Certainly this Court’s 2001 Plan was not forcing them to do anything of the sort.

Given these realities, the majoritarian defense does not provide a valid alternative state interest underlying Plan 1374C. It amounts to another way of saying that the map drawers decided they wanted to maximize the number of seats held by Republicans in any way possible.

Defendants may also argue that in drawing Plan 1374C they had to take into account a whole variety of legal constraints including Sections 2 and 5 of the Voting Rights Act, equal-population requirements, and the *Shaw v. Reno* racial-gerrymandering doctrine. But that

⁴ For example, when Charlie Stenholm was first elected in 1978, the only Republican Members of Congress in Texas were from the Dallas and Houston suburbs.

argument is a nonstarter because it does not provide an alternative nonpartisan justification for the decision to replace an existing map that *already* satisfied those constraints – indeed had been upheld by the Supreme Court. Here again, one sees the distinctive impact that a sole-purpose test would have in constraining unnecessary *mid-decade* redistricting. Under our proposed standard, compliance with a variety of legal mandates would usually justify a map drawn right after the decennial census. But such compliance cannot provide a justification for replacing another map in mid-decade that was already in compliance with those same constitutional and statutory requirements.

IV. Equal Population Concerns Reinforce the Conclusion that There Should Be a Near-Insurmountable Constitutional Bar Preventing Unnecessary Mid-decade Redistricting.

Travis County and the City of Austin, along with the amici University Professors, have pointed to another, related concern raised by mid-decade redistrictings: because they occur years after the decennial census, line drawers armed with knowledge of post-census population shifts may be able to draw a map that maintains the appearance of equally populated districts (using the old census data) while they in fact are exploiting population divergences in the service of their partisan agenda.

This could occur, for example, if the line-drawers know that particular areas have seen unusually rapid growth in the number of residents who are Hispanic or come from other groups that tend to vote Democratic. That kind of population change can, over ten years, tend to transform Republican-leaning districts into competitive ones. But if the lines are redrawn mid-decade, the map drawers can make the problem go away by ensuring that these high-growth areas are taken out of Republican-held districts and included within the few highly-packed Democratic districts left in the map. When that occurs, the Democratic districts will have higher

numbers of people in them than other districts, but the use of old census data will make them appear equipopulous.

This danger should serve to reinforce the arguments for recognizing a very strong presumption against the constitutionality of unnecessary mid-decade redistricting. Not only are such plans very likely to be undertaken solely for partisan reasons, but they allow manipulation of population differentials that are obscured through the pretense that the old census data remain accurate.

CONCLUSION

The Court should hold Plan 1374C unconstitutional on the ground that the sole state interest served by replacing the prior map in mid-decade was promotion of partisan advantage.

Respectfully submitted,

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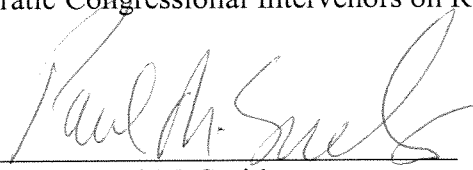
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January 14, 2005

CERTIFICATE OF SERVICE

I hereby certify that this 14th day of January 2005, I served a copy of the foregoing Reply Brief of the Jackson Plaintiffs and the Democratic Congressional Intervenors on Remand on all counsel of record by e-mail.



Paul M. Smith