

No. 03A-581

IN THE
Supreme Court of the United States

EDDIE JACKSON, *et al.*,

Applicants-Appellants,

v.

RICK PERRY, *et al.*,

Respondents-Appellees.

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

**MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF
THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL
OF LAW AS *AMICUS CURIAE* SUPPORTING APPLICANTS**

J. J. GASS

Counsel of Record

DEBORAH GOLDBERG

ADAM H. MORSE

BRENNAN CENTER FOR JUSTICE

AT NYU SCHOOL OF LAW

161 Avenue of the Americas

12th Floor

New York, NY 10013

(212) 998-6730

Counsel for Amicus Curiae

**MOTION FOR LEAVE TO FILE
AMICUS BRIEF IN SUPPORT OF APPLICANTS**

To the Honorable Antonin Scalia, Associate Justice of the United States and Circuit Justice for the Fifth Circuit:

The Brennan Center for Justice at NYU School of Law (“Brennan Center”) respectfully requests leave to file, as *amicus curiae*, the attached brief in support of the Applicants’ request for a stay. The reasons for granting our motion include:

- Counsel for all parties have consented to the filing;¹
- The District Court apparently found the Brennan Center’s *amicus* brief helpful, as a member of the panel majority raised the brief’s main contention at oral argument and the majority’s opinion at least arguably reflected the panel’s favorable consideration of that argument²;
- The Brennan Center has filed briefs as *amicus curiae* on related issues in *Vieth v. Jubelirer*, No. 02–1580 (U.S. argued Dec. 10, 2003), and *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003) (the Colorado “re-redistricting” case) and is recognized for its expertise in election law; and
- The attached brief presents matters that the parties have not addressed and that may be helpful in adju-

¹ Counsel for all parties have advised us via e-mail or orally of their consent to the filing of the attached brief. Because the Clerk’s Office advised us that a motion for leave to file the brief would be required even if the parties consented to the filing, we have not lodged the written consents as would be done were the brief filed pursuant to Supreme Court Rule 37.2(a).

² See pages 15–17 of the attached brief for a discussion of the panel majority’s apparent support for the argument Judge Higginbotham had referred to favorably in open court.

dicating Applicants' stay request, including considerations stemming from the interests of the broader public and matters pertaining to the original meaning of the Elections Clause.

The Brennan Center unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy. Our mission is to develop and implement an innovative, nonpartisan agenda of scholarship, public education, and legal action that promotes equality and human dignity, while safeguarding fundamental freedoms.

Through the Voting and Representation Project, which is part of our Democracy Program, the Brennan Center seeks to protect the right to equal electoral access and full political participation. The Brennan Center takes an interest in this case because it implicates voters' ability to have a meaningful voice in their government in light of increasingly sophisticated gerrymandering techniques, and because it presents the specter of an escalating war of mid-decade "re-districtings" that will further undermine the responsiveness of representatives to those whom they purport to represent.

For the foregoing reasons, the Brennan Center respectfully requests leave to file the attached *amicus* brief in support of the application for a stay.

Respectfully submitted,

J. J. GASS
Counsel of Record
Deborah Goldberg
Adam H. Morse
Brennan Center for Justice
at NYU School of Law
161 Avenue of the
Americas, 12th Floor
New York NY 10013
(212) 998-6730

January 14, 2004

TABLE OF CONTENTS

TABLE OF AUTHORITIES *ii*

INTERESTS OF THE *AMICUS CURIAE*..... 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. Re-redistricting Solely for Partisan Advantage
Is Unconstitutional 3

 A. Plan 1374C Violates the Equal Protection
 Clause by Discriminating Against
 Disfavored Voters Without Serving Any
 Legitimate State Interest..... 3

 B. Plan 1374C Exceeds Texas’s Authority to
 Regulate the “Times, Places, and Manner”
 of Congressional Elections 7

 C. Plan 1374C Violates Texas’s Commitment
 to a Republican Form of Government..... 9

II. A Stay Is Appropriate Because of *Vieth*’s
Pendency and the Unprecedented Nature
of this Re-redistricting 13

CONCLUSION..... 20

TABLE OF AUTHORITIES

Cases

<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983).....	4
<i>Baker v. Carr</i> , 369 U.S. 186 (1962).....	2
<i>Boos v. Barry</i> , 485 U.S. 312 (1988).....	4
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992).....	4
<i>Bush v. Gore</i> , 531 U.S. 98 (2000).....	5
<i>Cook v. Gralike</i> , 531 U.S. 510 (2001).....	7
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976).....	5
<i>Gray v. Sanders</i> , 372 U.S. 368 (1963).....	5
<i>Ill. State Bd. of Elections v. Socialist Workers Party</i> , 440 U.S. 173 (1979).....	4
<i>Lyng v. Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Amer.</i> , 485 U.S. 360 (1988).....	4
<i>O’Hare Truck Serv., Inc. v. City of Northlake</i> , 518 U.S. 712 (1996).....	5

<i>People ex rel. Salazar v. Davidson</i> , 79 P.3d 1221. (2003).....	10, 12
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982).....	4
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964).....	5
<i>Rosenberger v. Rector & Visitors of the Univ. of Virginia</i> , 515 U.S. 819 (1995).....	5
<i>Tarrant County v. Ashmore</i> , 635 S.W.2d 417 (Tex. 1982).....	9
<i>U.S. Term Limits, Inc. v. Thornton</i> , 514 U.S. 779 (1995).....	7, 8, 11, 18
<i>Wesberry v. Sanders</i> , 376 U.S. 1 (1964).....	7, 8
<i>Williams v. Rhodes</i> , 393 U.S. 23 (1968).....	11
<i>Constitutional Provisions</i>	
Tex. Const. art. I, § 2	9
U.S. Const. art. I, § 2, cl. 1.....	8
U.S. Const. art. IV, § 4.....	9
U.S. Const. amend. XVII.....	8

Other Authorities

Juliet Eilperin, *Deciding Where to Draw the Lines*,
Washington Post, Aug. 20, 2003, at A-6 9

The Federalist No. 52 (James Madison)
(Terence Ball ed., 2003)..... 8

Todd J. Gillman, *House Democrat’s Exit Likely a
First, Not a Last*, Dallas Morning News,
Jan. 11, 2004, at 8A 18

Ken Herman & Gary Susswein, *Barrientos Won’t
Run But Doesn’t Back Doggett*, Austin
American-Statesman, Jan. 9, 2004, at A1 18, 19

Statement of Hon. Kenneth M. Mead, Inspector
General, U.S. Dep’t of Tranp., *Federal Aviation
Administration Efforts to Locate Aircraft N711RD*
(July 15, 2003), available at
http://www.oig.dot.gov/show_pdf.php?id=1127 6

Office of Inspector General, U.S. Dep’t of Homeland
Security, *Report of Investigation IN03-OIG-0662-S*,
available at [http://www.dhs.gov/interweb/assetlibrary/
DHS_OIG_Investigation_Texas.pdf](http://www.dhs.gov/interweb/assetlibrary/DHS_OIG_Investigation_Texas.pdf)..... 6

Office of the Inspector General, U.S. Dep’t of Justice,
*An Investigation of the Department of Justice’s
Actions in Connection with the Search for Absent
Texas Legislators*, (Aug. 12, 2003), available at
<http://www.usdoj.gov/oig/special/03-08a/final.pdf> 6

Daniel D. Polsby & Robert D. Popper, *The Third
Criterion: Compactness as a Procedural Safeguard
Against Partisan Gerrymandering*, 9 Yale L. &
Pol’y Rev. 301 (1991)..... 5

Marie Price, <i>Remap Fight May Start Again</i> , Tulsa World, Dec. 24, 2003, at A1	19
Clay Robison, <i>Undecided Texas Lawmakers Feel Pressure over New Redistricting Map</i> , Houston Chronicle, July 13, 2003.....	13
Lynn Sweet, <i>Jones Puts Remap on Drawing Board</i> , Chicago Sun-Times, Nov. 20, 2003, at 43	19
<i>West Texas Opposition</i> , Austin American-Statesman, Oct. 15, 2003, at A12	12

BRIEF IN SUPPORT OF APPLICANTS

Amicus Curiae the Brennan Center for Justice at NYU School of Law (“Brennan Center”) hereby submits its brief in support of the applicants.¹

INTERESTS OF THE *AMICUS CURIAE*

The Brennan Center unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy. Our mission is to develop and implement an innovative, nonpartisan agenda of scholarship, public education, and legal action that promotes equality and human dignity, while safeguarding fundamental freedoms. Through the Voting and Representation Project, which is part of our Democracy Program, the Brennan Center seeks to protect the right to equal electoral access and full political participation. The Brennan Center takes an interest in this case because it implicates voters’ ability to have a meaningful voice in their government in light of increasingly sophisticated gerrymandering techniques, and because it presents the specter of an escalating war of mid-decade “re-redistrictings” that will further undermine the responsiveness of representatives to those whom they purport to represent. The Brennan Center submitted briefs on related issues in *Vieth v. Jubelirer*, No. 02–1580 (U.S. argued Dec. 10, 2003), and *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003).

SUMMARY OF ARGUMENT

The mostly Republican voters in six Texas districts decided two years ago to retain Democratic Congressmen who had ably represented them in Washington. Republican Party leaders decided to subvert the wayward voters’ will by de-

¹ No party’s counsel authored any part of this brief. No person or entity other than the *amicus* contributed monetarily to preparing or submitting the brief.

priving them of their chosen representatives, and to undermine Democratic voters throughout the state by reducing the effectiveness of their votes to an absolute minimum. It is this unlawful result—the abuse of state power solely to discriminate against a disfavored partisan viewpoint—that the Court can prevent by granting a stay.

The District Court’s finding that “political gain for the Republicans was 110% of the motivation for the Plan” distinguishes this case from partisan gerrymandering cases like *Davis v. Bandemer*, 478 U.S. 109 (1986), and this Term’s *Vieth* case. See Majority Op. at 28. Ordinary post-census redistricting, however partisan it may be, serves the nonpartisan state interest of replacing districts that would otherwise violate the “one person, one vote” guarantee. The mixture of motives that attends decennial redistricting—partisanship, incumbent protection, eliminating malapportionment, and so on—may seem to complicate the formulation of “judicially manageable standards” for determining whether the resulting map is so badly skewed towards one faction as to violate the Constitution. See *Baker v. Carr*, 369 U.S. 186, 226 (1962). This case, accepting the District Court’s findings (and the State Defendants’ own contentions), does not involve mixed motives. It requires only a narrow, judicially manageable rule: state action that is admittedly and openly taken *solely* for partisan advantage is illegal.

Even if this were a garden-variety partisan gerrymandering case, however, there would be good reason to grant a stay. All three members of the District Court panel acknowledged that this Court’s upcoming decision in *Vieth* will likely change their analysis of Plan 1374C. Indeed, so certain was the District Court that the current standards are toothless, and so unwilling was it to anticipate the new standards that *Vieth* may establish, that neither the majority nor the dissent bothered even to state what the current law is, let alone to apply it to the facts of this case. See Majority Op. at 30; Dissent at 2.

Thus, even if this case were treated as simply another partisan gerrymandering case, it would likely be remanded for reconsideration in light of *Vieth*.

The damage to Texas citizens' power to choose their representatives will not easily be reversed should Plan 1374C be implemented this year. Even if the old map is reinstated in 2006, Texans will go through four consecutive congressional elections without ever being in the same districts from one election to the next. The District Court's decision has already induced one representative to retire from the House, and a "regional and ethnic battle" has begun in one of the "bacon strip" districts—a district that includes some of the only neighborhoods in Texas where racial bloc voting had previously vanished. Should this Court reverse or vacate the District Court's judgment, it will be impossible to restore the *status quo ante*.

And Texas is only the beginning. Already, Democrats in Illinois and Oklahoma have introduced retaliatory redistricting legislation, and Republicans in Ohio are considering an "improvement" to the map the Republican legislature and governor adopted only two years ago. A stay would be a finger in the dike. Without it, we will be inundated.

ARGUMENT

I.

Re-redistricting Solely for Partisan Advantage Is Unconstitutional.

A. Plan 1374C Violates the Equal Protection Clause by Discriminating Against Disfavored Voters Without Serving Any Legitimate State Interest.

The Equal Protection Clause guarantees that the government will not treat people differently without a legitimate

reason. *See Lyng v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Amer.*, 485 U.S. 360, 370 (1988). In a democracy, the fact that citizens have expressed differing political preferences is decidedly not a legitimate reason for treating some worse than others. That, however, is the sole motivation of Plan 1374C: to prevent those who have voted “incorrectly” in the past from electing candidates of their choice in the future. Because that objective is not a legitimate basis for state action, Plan 1374C would fail even rational basis scrutiny.

Laws that differentially burden the exercise of fundamental rights, moreover, must pass a more stringent test: they must serve a compelling state interest. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 216–17 & n.15 (1982). Plan 1374C penalizes citizens’ exercise of their rights of political association and expression, as well as the right to vote. Those rights are undeniably fundamental. Voting and running for office are quintessential exercises of free speech and free association. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780 (1983) (recognizing right to run for office as act of political association between candidate and supporters); *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992) (noting that voting regulations burden First Amendment rights but holding that standard of review varies with circumstances). It would be self-defeating to expend substantial judicial resources defending a neutral marketplace of ideas on sidewalks and in parks, *see, e.g., Boos v. Barry*, 485 U.S. 312, 318 (1988), only to allow the government to rig the outcome of elections. This Court has also noted that “the right of qualified voters, regardless of their political persuasion, to cast their votes effectively” is “fundamental.” *See Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (internal quotation marks omitted). Plan 1374C’s proponents repeatedly admitted that their action served no interest *other than* preventing voters of a disfavored “political persuasion” from “cast[ing] their votes effectively.”

The desire to help one faction and harm another is not even a legitimate state interest, let alone a compelling one. The fact that Plan 1374C chooses its victims on the basis of the content of their past expression, burdening the rights of voters in neighborhoods whose residents have tended to vote for a disfavored political party, only exacerbates the problem: viewpoint-based restrictions on speech are also highly suspect. See *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 828–29 (1995). If the Constitution forbids denying governmental employment because of an individual’s political affiliation or belief, see *Elrod v. Burns*, 427 U.S. 347 (1976), and forbids conditioning government contracts on support for political incumbents, see *O’Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996), it cannot countenance burdening the right to vote on the same forbidden bases.

Diluting the voting power of a disfavored class is among the most fundamental breaches of democratic doctrine. See *Gray v. Sanders*, 372 U.S. 368, 379–80 (1963) (“The concept of ‘we the people’ under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.”); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”); *Bush v. Gore*, 531 U.S. 98, 104–05 (2000) (referring to “the equal weight accorded to each vote and the equal dignity owed to each voter” and holding that states cannot “value one person’s vote over that of another”). Although disproportionate harm to some voters’ interests may be a nearly unavoidable by-product of decennial redistricting, “[i]t is one thing for a phenomenon to exist by necessity, and quite another for someone to distribute or redistribute it selectively.” Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & Pol’y Rev.

301, 313 (1991). Here, there is no “necessity.” Texas already has a legal, functioning set of districts. The *only* reason to adopt Plan 1374C was to dilute targeted citizens’ voting power, a plainly improper basis for state action.

Ensuring the electoral success of one political party has no reasonable relationship to a legitimate government end.² The state’s interest, as distinct from the interest of the individuals who currently occupy its legislature, is in providing free and fair elections, not in guaranteeing a particular result.

² Assuming *arguendo* that the state has a legitimate interest in preferring a legislatively adopted map to one drawn by a court, Plan 1374C was not designed with that interest in mind. First, the legislature failed to adopt a plan in 2001, even though it knew to a certainty that its inaction would force the state to use a court-drawn plan. Second, even after a court reluctantly adopted a plan in November 2001, the governor and legislature did not try to adopt a replacement for the 2002 elections. Last, the way Plan 1374C was adopted gives the lie to any claimed respect for the legislative process. It is clear that nothing—not senate rules and traditions, not compunction over the use of national security agencies to harass state legislators, not the overwhelming opposition of citizens at public hearings—was going to stop the architects of Plan 1374C from pursuing their true objective: pure partisan advantage. See Office of the Inspector General, U.S. Dep’t of Justice, *An Investigation of the Department of Justice’s Actions in Connection with the Search for Absent Texas Legislators*, at 4–6 (Aug. 12, 2003), available at <http://www.usdoj.gov/oig/special/03-08a/final.pdf>; Statement of Hon. Kenneth M. Mead, Inspector General, U.S. Dep’t of Tranp., *Federal Aviation Administration Efforts to Locate Aircraft N711RD* (July 15, 2003), available at http://www.oig.dot.gov/show_pdf.php?id=1127; Office of Inspector General, U.S. Dep’t of Homeland Security, *Report of Investigation IN03-OIG-0662-S*, at 1, available at http://www.dhs.gov/interweb/assetlibrary/DHS_OIG_Investigation_Texas.pdf.

B. Plan 1374C Exceeds Texas’s Authority to Regulate the “Times, Places, and Manner” of Congressional Elections.

States have no inherent authority over federal elections. Their power to hold elections for federal offices arises from the federal Constitution. *See Cook v. Gralike*, 531 U.S. 510, 522 (2001). A state cannot exercise any powers with respect to federal elections beyond those delegated by the Constitution. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995). This Court has made clear that hamstringing a particular group of candidates is not part of the authority delegated to the states.

States’ power to draw congressional district lines stems from the Elections Clause of Article I, Section 4 of the Constitution, which permits states to regulate the “Times, Places, and Manner” of congressional elections. *See Wesberry v. Sanders*, 376 U.S. 1, 7–9 (1964). The Framers feared that a faction dominating a state’s government would abuse its power to help that same faction dominate the House of Representatives. Hence, they severely circumscribed the states’ power under the Elections Clause. “[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.” *U.S. Term Limits*, 514 U.S. at 833–34.

Even ostensibly procedural laws can exceed the power delegated to the states if those laws have the purpose and effect of influencing the outcome of congressional elections. A state has no delegated authority to exclude from the ballot incumbent representatives who have served three terms in the House, even if the affected representatives can still be elected by write-in votes. *Id.* at 835. *Cook* struck down the more modest procedural device of stating on the ballot whether a

candidate had supported term limits. Only procedural regulations that protect “the integrity and reliability of the electoral process itself” are valid under the Elections Clause. *Id.* at 834 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)). Ordinary redistricting preserves electoral integrity by eliminating malapportionment. Re-redistricting to slant the process toward a favored faction does not.

Sham procedural regulations that purport to set election procedures, but really dictate election results, violate the Elections Clause. Here, there is not even a sham: Texas concedes that the re-redistricting was designed to alter the outcome of future congressional elections. Permitting a partisan legislative majority—rather than the people—to select House representatives would fly in the face of the Framers’ design. That conclusion is underscored by the Constitution’s command that Members of the House be “chosen . . . by the People of the several States.” U.S. Const. art. I, § 2, cl. 1; *see also Wesberry*, 376 U.S. at 8 (referring to “the principle of a House of Representatives elected ‘by the People,’ a principle tenaciously fought for and established at the Constitutional Convention”); *The Federalist* No. 52, at 256 (James Madison) (Terence Ball ed., 2003) (“[I]t is particularly essential that the [House] should have an immediate dependence on, and an intimate sympathy with the people.”). *Cf.* U.S. Const. amend. XVII (requiring direct popular election of Senators).

If the Texas legislature could enact Plan 1374C for no reason other than to install the congressional delegation it preferred, what would stop a state legislature from changing a U.S. representative’s district at its whim, rendering the district more or less favorable to that representative based on his or her votes in Congress, his or her responsiveness to local party leaders, or any other factor the legislative majority

wishes?³ Nothing could be more at odds with the limited role in administering House elections that the Framers intended the state legislatures to exercise.

C. Plan 1374C Violates Texas's Commitment to a Republican Form of Government.

Like the Guarantee Clause of the federal Constitution, *see* U.S. Const. art. IV, § 4, the Texas Constitution commits the state to republicanism.

All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient.

Tex. Const. art. I, § 2. Accountability of representatives to the people is the touchstone of republican government. *See Tarrant County v. Ashmore*, 635 S.W.2d 417, 421 (Tex. 1982) (“[A] fundamental principle associated with our republican form of government is that every public officeholder

³ Lest it seem farfetched to suggest that if allowed to do so, legislatures would fiddle with district lines repeatedly during a decade, consider Representative Sherrod Brown, an Ohio Democrat. After the 2000 census, Brown was considered a potential opponent of Republican Governor Bob Taft, and the Republican-controlled legislature adopted a redistricting plan that kept Brown's seat safe so as to encourage him to remain in Congress. Now that Taft has been reelected and Brown is no longer a threat to unseat him, Republican legislators are reportedly considering a new map that would threaten Brown's reelection. *See* Juliet Eilperin, *Deciding Where to Draw the Lines*, Washington Post, Aug. 20, 2003, at A6.

remains in his position at the sufferance and for the benefit of the public, subject to removal from office by edict of the ballot box”); *accord People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1242 (Colo. 2003) (“A ‘fundamental axiom of republican governments’ . . . is that there must be ‘a dependence on, and a responsibility to, the people, on the part of the representative, which shall constantly exert an influence upon his acts and opinions, and produce a sympathy between him and his constituents.’”) (quoting Joseph Story, *Story’s Commentaries on the Constitution* § 300 (1833)).

The legislative majority is impatient with voters in a half-dozen Republican-leaning districts who chose to retain Democratic incumbents. But the decision whether, and when, to sever those districts’ ties with their long-serving representatives properly belongs to the people. Plan 1374C, which takes that decision away from those representatives’ constituents and gives it to the legislature, is anti-republican. As Justice Kennedy explained:

Not the least of the incongruities in the position advanced by Arkansas is the proposition, necessary to its case, that it can burden the rights of resident voters in federal elections by reason of the manner in which they earlier had exercised it. If the majority of the voters had been successful in selecting a candidate, they would be penalized from exercising that same right in the future. . . . This observation serves to illustrate the extent of the State’s attempted interference with the federal right to vote (and the derivative right to serve if elected by majority vote) in a congressional election, rights that do not derive from the state power in the first instance but that belong to the voter in his or her capacity as a citizen of the United States.

U.S. Term Limits, 514 U.S. at 844 (Kennedy, J., concurring).

We agree with the State's expert that "competition is central to the health of a democratic system." Gaddie Rep't at 17 (Ex. H to the Application); *see also Williams v. Rhodes*, 393 U.S. 23, 32 (1968) ("Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms."). The legislature intended, however, to reduce competition and accountability, not to increase them. Consider Professor Gaddie's conclusion that, no matter which of several alternative measures of competitiveness he applied, Plan 1374C consistently had half as many competitive districts as the current plan (by one measure, the new plan has no competitive districts at all). *See* Gaddie Rep't at 19. The Jackson Plaintiffs' expert finds that the projected outcome of elections under Plan 1374C is nearly unvarying, even if voters' party preferences change significantly. *See* Alford Rep't at 24–27 (Ex. F to the Application). The legislature created a map in which virtually every district is "safe" for one party or the other; after the hoped-for 2004 purge of Democratic incumbents, no incumbent, Democrat or Republican, will be vulnerable to a challenge from the other party. The profoundly anti-republican motive for installing this unchangeable Texas delegation was to ensure a Republican majority in the House, irrespective of voters' desires. The widely publicized e-mail by Representative Barton's legislative counsel summed up the plan's effect succinctly: "This has a real national impact that should assure that Republicans keep the House *no matter the national mood*." (Ex. R to the Application) (emphasis added).

The Colorado Supreme Court understood that this kind of mid-decade tinkering undercuts the cardinal principles of republicanism:

The framers knew that to achieve accountability, there must be stability in representa-

tion. . . . If the districts were to change at the whim of the state legislature, members of Congress could frequently find their current constituents voting in a different district in subsequent elections. In that situation, a congressperson would be torn between effectively representing the current constituents and currying the favor of future constituents.

Salazar, 79 P.3d at 1242. Terminating Democrats' representation of their constituents is not the legislature's job. It is up to the mostly Republican voters who elected those representatives to decide if and when to jettison them because of party loyalty. The heads-we-win-tails-you-lose approach—try to beat opponents at the ballot box and then, if that fails, punish uncooperative voters by taking away their chosen representatives—is the antithesis of the republican government guaranteed by the federal and Texas constitutions.⁴

⁴ Again, the Colorado Supreme Court appreciated the harm done to the people's interests by severing the links between them and their representatives:

The frequency of redistricting affects the stability of Colorado's congressional districts, and hence, the effectiveness of our state's representation in the United States Congress. When the boundaries of a district are stable, the district's representative or any hopeful contenders can build relationships with the constituents in that district. Furthermore, the constituents within a district can form communities of interest with one another, and these groups can lobby the representative regarding their interests. These relationships improve representation and ultimately, the effectiveness of the district's voice in Congress.

Salazar, 79 P.3d at 1228. This point was also appreciated by the citizens—Republican and Democratic—of the districts that are slated to lose the representatives who understand their local interests. *See West Texas* (cont'd)

II.

A Stay Is Appropriate Because of *Vieth*'s Pendency and the Unprecedented Nature of this Re-redistricting.

For the foregoing reasons, the Applicants should prevail on plenary review of their partisan gerrymandering claims (even without considering the strength of their Voting Rights Act and *Shaw* claims). And, for reasons set out in the Application, the balance of hardships and public interest favor granting a stay. There are five other matters, however, that the Court should consider in exercising its discretion.

1. The impending decision in *Vieth* cannot be ignored. As the Court is only too aware, the lower courts' treatment of *Bandemer* has made a paper tiger of that case. The District Court observed: "It is now painfully clear that Justice Powell's concern that the decision offered a "constitutional green light" to would-be gerrymanderers' has been realized." Majority Op. at 30 (quoting *Bandemer*, 478 U.S. at 173 (Powell, J., concurring in part and dissenting in part)). The District Court viewed *Bandemer*'s standards as so toothless that it did not bother even to state what they were or to apply them to the facts at hand. The majority simply announced: "We have no hesitation in concluding that, under current law, this court cannot strike down Plan1374C on the basis that it is an illegal partisan gerrymander." *Id.*

(cont'd)

Opposition, Austin American-Statesman, Oct. 15, 2003, at A12 (collecting editorial comment from West Texas newspapers); Clay Robison, *Undecided Texas Lawmakers Feel Pressure over New Redistricting Map*, Houston Chronicle, July 13, 2003 ("[T]he veteran statehouse Republican [Bob Hunter of Abilene] found plenty of time to listen to constituents. They were everywhere, and to a person—Republicans, Democrats and independents alike—they didn't want their West Texas congressional district redrawn.").

But “current law” may be about to change. Should the Court, in *Vieth*, give teeth to the *Bandemer* doctrine, the judgment below would have to be vacated and the case remanded for reconsideration, if not summarily reversed. Any meaningful test for partisan gerrymandering would condemn the new map, which undisputed testimony shows was designed to guarantee more than two-thirds of the seats to the now-dominant party, even if it fails to get a plurality of the votes. Because the District Court thought *Bandemer* so meaningless as not to require even a cursory application of law to facts, almost any conceivable decision in *Vieth* (other than a holding that partisan gerrymandering is nonjusticiable) would require a remand. In the meantime, if there is no stay, primary elections will have been held with the new map, and it will be too late for the District Court to unscramble the omelet should it turn out that the Texas gerrymander is unconstitutional in light of this Court’s decision.

Both the majority and the dissenting judge below declined to anticipate *Vieth*, but both opinions also recognized that *Vieth* would likely alter the analysis of this case. The majority opined:

When the Supreme Court resolves *Vieth*, it may choose to retreat from its decision that the question is justiciable, or it may offer more guidance on the nature of the required effect. . . . We have learned firsthand what will result if the Court chooses to do neither. Throughout this case we have borne witness to the powerful, conflicting forces nurtured by *Bandemer*’s holding that the judiciary is to address ‘excessive’ partisan line-drawing, while leaving the issue virtually unenforceable.

Id. at 30–31.⁵ Judge Ward concurred:

The present case fails under the standards announced in *Davis v. Bandemer* and its progeny—even though those standards may or may not ultimately control the disposition of this case, given its timing and that of the arguments in *Vieth v. Jubelirer*.

Dissent at 2. With all three judges recognizing that their analysis of the case could be different after *Vieth*, the likelihood of a remand must be considered. Under the circumstances, it makes much more sense to stay the judgment and ensure that the Texas districts will change, at most, once during this decade than to risk the possibility of four consecutive elections (in 2000, 2002, 2004, and 2006) without any continuity in district lines from one to the next should the Court deny a stay and later reverse or vacate the judgment.

2. The majority opinion also points to the second consideration favoring a stay. Though the entire panel felt constrained by *Bandemer*'s progeny not to strike down the new map, the majority suggested that if a more meaningful standard is to be developed for partisan gerrymandering cases, this case might be a paradigm.

⁵ There seems to be little support for the majority's hope that the political process might solve the partisan gerrymandering problem if the courts abandoned the field. Nearly two centuries of pre-*Bandemer* history provides little reason for optimism. This case itself demonstrates politicians' response to the lower courts' lifting of any practical constraints *Bandemer* might have imposed. As for the District Court's suggestion that Congress prohibit mid-decade redistricting, the fact that the House Majority Leader was the moving force behind Plan 1374C suggests that such a prohibition will not be adopted any time soon.

Our point is that if the judiciary must rein in partisan gerrymanders, limitations that focus upon the time and circumstance of partisan line-drawing and less upon the ‘some but not too much’ genre of strictures offer the best of an ugly array of choices. Drawing upon the Voting Rights Act jurisprudence to give *Bandemer* teeth may be the worst of choices.

Majority Op. at 32. We respectfully disagree that the likely effects of the district lines should be deemphasized in partisan gerrymandering cases; our *amicus* brief in *Vieth* sets forth our analysis of why gerrymanders with consistent antimajoritarian effects are unconstitutional. But the panel majority was correct to note that this case presents a much narrower, “cleaner” circumstance for judicial intervention.

Even if one believes (as we do not) that ordinary post-census redistricting is not amenable to manageable judicial standards, this was no ordinary redistricting. The fact that the proponents of the legislation admitted, and the lower court found, that there was no motivation for this action other than partisan advantage sets this case apart.⁶ The “time and circumstance” of Plan 1374C’s adoption, to borrow the majority’s phrase, are virtually unprecedented since *Baker* and *Wesberry* first required regular decennial redistricting. (The Colorado Supreme Court struck down the only similar re-redistricting.) This Court need not revisit *Bandemer*, nor anticipate *Vieth*, to find Plan 1374C unconstitutional. A

⁶ We do not disagree with Applicants’ argument that the legislature intentionally acted on the basis of race. We simply note that legislators testified, and the District Court found, that partisanship was the state’s sole objective. To the extent that race was a factor, the legislature’s reliance on a suspect classification can hardly ameliorate the constitutional injury done by its otherwise single-minded pursuit of partisan advantage.

narrow, bright-line rule is enough to decide this case: partisan advantage, standing alone, cannot justify any state action, let alone viewpoint-based burdens on disfavored citizens' voting rights.⁷

A leading proponent of the new map testified that partisan advantage was 110% of the reason for adopting it. Deciding whether 98%, or 90%, or 80% would be "too much" is unnecessary; standards can be formulated another day for normal, decennial redistrictings driven partly by the need to cure malapportionment. In other words, even if the Appellants in *Vieth* should lose, Appellants here should prevail. This case is a discrete and (it is to be hoped) unique instance of naked, avowed, pure partisanship as the admitted reason for depriving disfavored voters of the power to select their representatives.

3. Applicants correctly point out that denying a stay risks the irretrievable violation of millions of individuals' constitutional rights this year, while granting a stay risks only a delay in implementing the new map while the valid existing map is used in 2004. *See* Application at 40–41.

The latter risk should not be ignored; it is a serious matter for a federal court to delay state legislative action. As we have pointed out, however, the power exercised by the Texas legislature is not inherent in the state's sovereignty. The power to draw district lines for Congress derives from the nation's sovereignty and is delegated to the states to facilitate the people's election of their federal representatives. Applicants have made a strong case that the legislature abused its delegated authority and violated citizens' federal rights.

⁷ It was this bright-line rule that, we are advised, Judge Higginbotham brought up at oral argument below.

When a state exercises its plenary police power, federal courts are appropriately reluctant to suspend the state's act *pendente lite*. Here, considerations of federalism cut the other way. "There can be no doubt, if we are to respect the republican origins of the Nation and preserve its federal character, that there exists a federal right of citizenship, a relationship between the people of the Nation and their National Government, with which the States may not interfere." *U.S. Term Limits*, 514 U.S. at 845 (Kennedy, J., concurring).

4. Members of Congress have intervened in this case, but it is the people of Texas who would suffer the truly irreparable harm if the state uses an illegal map this year. It is already apparent that many of the split-ticket voters targeted by Plan 1374C will not be able to reestablish relationships with their chosen representatives. Before the ink was dry on the District Court's opinion, the Ranking Member of the House Select Committee on Homeland Security announced his retirement from the House of Representatives. Todd J. Gillman, *House Democrat's Exit Likely a First, Not a Last*, Dallas Morning News, Jan. 11, 2004, at 8A.

More disturbing, events are already bearing out testimony that Hispanic voters at opposite ends of the "bacon strip" districts do not have much in common other than ethnicity. The City of Austin and Travis County, intervenors in this case, have pointed out the nearly unique multi-ethnic coalition among Hispanic, African-American, and Anglo voters in Austin who have until now been in a single district. Only days after that district was splintered and bits of it were paired with counties along the Rio Grande 300 miles to the south, the Democratic primary in one new district "shape[d] up as a regional and ethnic battle." Ken Herman & Gary Susswein, *Barrientos Won't Run But Doesn't Back Doggett*, Austin American-Statesman, Jan. 9, 2004, at A1. "Hidalgo County Democratic Chairman Bobby Guerra said people in the southern sector of the district want a local Hispanic, not

an Austin Anglo, representing them in the U.S. House.” *Id.* Even if the old map is reinstated in 2006, it may be too late to reverse the damage to the multi-ethnic community Plan 1374C rends asunder.

5. Finally, a stay would at least temporarily close the lid to Pandora’s Box. Partisanship is hardly limited to the Republican Party, of course. Since the Colorado and Texas re-redistrictings were first mooted, Democrats in other states have threatened to do unto Republicans as Republicans have done unto them. Democrats have been willing to stay their hands so long as the Colorado and Texas maps have not taken effect. Should the Court allow the 2004 election to proceed under Plan 1374C, however, the gloves may come off. States under Democratic control may be the next in line for cynical mid-decade rejiggering of district lines as Democrats copy the Republicans’ innovation. Indeed, Democrats have already introduced bills to that effect in Illinois and Oklahoma. *See* Lynn Sweet, *Jones Puts Remap on Drawing Board*, Chicago Sun-Times, Nov. 20, 2003, at 43 (quoting a Democrat’s characterization of a new re-redistricting bill as “The Tom DeLay Retribution Act”); Marie Price, *Remap Fight May Start Again*, Tulsa World, Dec. 24, 2003, at A1 (“perhaps Oklahoma needs to follow Congressman DeLay’s lead”) (quoting Democratic President Pro Tempore of the Oklahoma Senate).

Given the possibility—even the likelihood—that this Court will reverse the decision below, a stay would nip this unhealthy development in the bud before things get out of hand. Without a stay, there may be a free-for-all before the Court has an opportunity to rule, and it could be very difficult to undo the damage.

CONCLUSION

For the foregoing reasons, the Brennan Center respectfully requests that the District Court's judgment of January 6, 2004 be stayed, thereby requiring the State of Texas to prepare for and conduct congressional elections using Plan 1151C, pending resolution of these appeals.

Respectfully submitted,

J. J. GASS
Counsel of Record
Deborah Goldberg
Adam H. Morse
Brennan Center for Justice
at NYU School of Law
161 Avenue of the
Americas, 12th Floor
New York NY 10013
(212) 998-6730

January 14, 2004