UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

FRENCHIE HENDERSON,
Plaintiff

V. No. 2:03-CV-00354

RICK PERRY, *et. al*

Defendants

This Filing Applies to: All Consolidated Actions

PLAINTIFF HENDERSON'S REPLY TO STATE

DEFENDANTS' BRIEF ON REMAND

John S. Ament III
Texas Bar No. 01145000
P.O. Box 751
Jacksonville, Texas 75766-0751
903/586-3561
Of Counsel for Plaintiffs

Richard Gladden
Texas Bar No. 07991330
1602 East McKinney
Denton, Texas 76209
940/323-9307
Fax: 940/323-1697
Counsel-in-Charge for Plaintiffs

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Comes now Frenchie Henderson, Plaintiff in the above captioned and numbered cause and, pursuant to the Federal Rules of Civil Procedure, and in accordance with the Order of this Honorable Court issued October 18, 2004, files this his Reply to the State Defendants' Brief on Remand from the United States Supreme Court, and in this connection would respectfully show unto the Court as follows:

I. The Unusual Scrutiny Given by the Supreme Court to Plaintiff's Jurisdictional Statement Disabuses Any Suggestion that the Order Directing Reconsideration Constituted a "Routine Procedural Step".

In its Brief on Remand, and in a prepared public statement to the news media through its Attorney General, the State of Texas has suggested the Supreme Court's remand order is "a routine procedural step", which warrants only a "routine" and literally

dismissive "procedural step" by this Court.[1] The events leading up to the Supreme Court's action in the present case clearly demonstrates otherwise. The Supreme Court's decision in Vieth v. Jubelirer, 541 U.S. 267, 124 S.Ct. 1769 (2004), was rendered on April 28, 2004. The Supreme Court's docket sheet in the present case, Henderson v. Perry, No. 03-9644, reveals that one month later, on May 28, 2004, and *prior* to its *first* scheduled conference to consider Plaintiff Henderson's jurisdictional statement on June 3, 2004, the Supreme Court ordered the State of Texas to file a response. Thereafter, on return from it's Summer recess and after disposing all other intervening requests for review, the Supreme Court considered whether to grant Plaintiff's jurisdictional statement *on no less than three separate occasions*, at its "weekly" conferences convened on September 27, October 8, and October 15, 2004. It was at this last conference, on October 15, 2004, that at least five Members of the Supreme Court voted to vacate this Court's judgment, and to direct that Plaintiff's challenge to the State's partisan gerrymander be reconsidered. Given this procedural history, along with the Supreme Court's limited resources, it is abundantly clear the Supreme Court did not "routinely" expend its scarce judicial resources to vacate and remand Plaintiff's case for further consideration, only to have this Court perfunctorily reinstate its prior dismissal of Plaintiff's claims with the equivalent of a citation to Vieth.

[1] *See* News Releases: Statement from Texas Attorney General Abbott Regarding Redistricting (October 18, 2004), available online at: http://www.oag.state.tx.us/oagnews/release ; State Def.'s Brief on Remand, 8-9 ("the Court should dismiss Plaintiffs' political gerrymandering claims without further proceedings').

II. The State of Texas' Meritless Attempts to Evade this Court's Reconsideration of Plaintiff Henderson's Claims Must Be Rejected.

Rather than confront Plaintiff Henderson's claim that multiple intra-decennial congressional redistricting is unconstitutional in the absence of any "legitimate regulatory purpose", the State of Texas instead attempts:

1) to recast Plaintiff Henderson's claims as something other than a challenge to the State's asserted constitutional and statutory authority to engage in unmitigated "partisan gerrymandering"; and

2) to confine this Court's reconsideration on remand to an examination of a legal theory raised by the Jackson plaintiffs, which the State contends the Supreme Court rejected in Vieth, and which the State contends Plaintiff Henderson "followed". *See* State Def.'s Brief on Remand, 11 n. 7.

The reason for the State's avoidance of Plaintiff Henderson's claims is obvious: having rested its defense against other claims wholly on the ground that its motives were "purely partisan" (and not racially discriminatory), the State of Texas now finds itself unable to demonstrate any "legitimate regulatory purpose" whatsoever to legally justify its actions. For several reasons, this Court should reject the foregoing arguments by the State.

First, Plaintiff Henderson throughout this litigation *has* challenged the constitutional and statutory legality of the State's "partisan gerrymander". It is true, and Plaintiff Henderson does concede, that in framing his contentions he consciously elected to avoid the "how much is too much" partisanship problem encountered in Vieth, and to

instead focus more directly on the unique unconstitutionality of multiple intra-census congressional redistricting under the Elections Clause.[2] This Court in its prior decision, however, clearly understood the analytical distinction, but recognized no less the legal relationship, between limitations on "partisan gerrymandering" that "focus upon the time and circumstance of partisan line-drawing and [those that rely] upon the 'some but not too much' genre of strictures", Session v. Perry, 298 F.Supp.2d 451, 475 (E.D.Tex.2004).[3] Given the common target of these two approaches (to limit "partisan gerrymandering"), the Court should reject the State's attempt to confine this Court's reconsideration to only "Part III-B" of the Court's prior decision, State Def.'s Brief on Remand, 8. That course of proceeding, as proposed by the State of Texas, would essentially require this Court to selectively excise that portion of "Part III-B" wherein the Court, by reference to earlier parts of its opinion addressing Plaintiff Henderson's claims, recognized the theories of limitation on "partisan gerrymandering" that Plaintiff Henderson presented.

Moreover, the State's attempt to impose an artificial limitation on the scope of the Court's reconsideration to "outcome based" limitations on "partisan gerrymandering", *see* n. 3 of this Brief, below, would be contrary to the understanding of learned experts

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[2] *See* Cherokee County Plaintiffs' Response in Opp. To State's Motion to Dismiss, 5 (November 17, 2003) (Doc. 64) ("there is an analytical difference between an Equal Protection claim that alleges the State has used *power that it does possess* in a unconstitutionally discriminatory way, and an Elections Clause claim that alleges the State *does not have constitutional power* to undertake certain actions in the absence of a legitimate governmental purpose.")(italics in original).

[3] In a similar vein, one legal commentator in addressing this Court's prior decision in Session v. Perry, has categorized the temporal limitation on "partisan gerrymandering" invoked by Plaintiff Henderson as a "process based regulation", and the theory of limitation proposed by the plaintiffs in Vieth, as "outcome based". *See* Cox, Partisan Fairness and Redistricting Politics, 79 N.Y.U.L. Rev. 751, 756 (June 2004). As defined by this commentator, "process based regulations" that seek to prevent or limit "partisan gerrymandering" (including the "compactness", "contiguity" and "one person, one vote" requirements) require adherence "to certain procedural or form based" strictures when redistricting is undertaken. In contrast, "outcome based regulations" attempt "to directly test districting outcomes against some metric of fairness". Ibid.

familiar with the Supreme Court's decision in Vieth. Professor Samuel Issachmaroff, for example, whose expertise this Court recognized in Session v. Perry, 298 F.Supp.2d at 474 n. 72, recently expressed his opinion, in response to news of the Supreme Court's remand order in the present case, that in light of Vieth and the more recent result in Cox v. Larios, 541 U.S. __, 124 S.Ct. 2806 (2004), there is now "a burden on the [S]tate [of Texas] to show a legitimate reason for redrawing the districts a second time after the 2000 census."[4] As directly quoted, Professor Issachmaroff further states that such a "legitimate" purpose has "got to be something more than 'we've got the votes; we're going to do our adversaries in'".[5]

Second, neither the Supreme Court's dismissal of the plaintiffs' claims in Vieth, nor the asserted similarity of those claims to the claims advanced by the Jackson Plaintiffs herein, control the disposition of Plaintiff Henderson's claims. While in some sense there may be little difference between an inquiry into whether a legislative act of redistricting is supported by any neutral and "legitimate regulatory purpose" (which Plaintiff Henderson has raised), as opposed to whether such an act is "solely" motivated by partisan greed (which the Jackson Plaintiffs raise); there is now, and always has been, a meaningful distinction between Plaintiff Henderson's claims and those raised by the Jackson Plaintiffs (and the plaintiffs in Vieth). Plaintiff Henderson submits that because the Supreme Court in Vieth was not presented directly with the legal theories presented by Plaintiff Henderson; and because Plaintiff Henderson's claims are sufficiently related to, but analytically distinct from, the "partisan gerrymandering" claims raised by the

[4] Robbins, *Parties Dispute What Court Meant in Order for Redistricting Review*, Texas Lawyer, at 17 (October 25, 2004).
[5] Ibid.

Jackson Plaintiffs (and the plaintiffs in Vieth);[6] this Court should accept its responsibility and, in accordance with the Supreme Court order on remand, reconsider and decide the merits of Plaintiff Henderson's claims.

III. The Undisputed Factual Differences Between *Vieth*, and the Present Case, Render the State of Texas' Redistricting Plan More Clearly Unconstitutional than the Redistricting Plan in *Vieth*.

There is also a critical distinction between *the facts* in the present case and those encountered by the Supreme Court in Vieth that strongly suggests the true reason for the Supreme Court's decision to remand Plaintiff's case for reconsideration. Unlike the present case, as the State of Texas itself has noted, the redistricting plan challenged in Vieth involved a plan that was enacted "to rectify the population imbalance between districts", State Def.'s Brief on Remand, 4. Thus, unlike the present case, the Pennsylvania Assembly's redistricting *was* supported *in part* by a politically neutral and "legitimate regulatory purpose".

As Plaintiff has already noted in his Brief on Remand, at 2; a five Member majority of the Court in Vieth, comprising Justice Kennedy and the four dissenting Members, agreed with Plaintiff Henderson's argument herein that use of legislative power delegated by the Elections Clause must be supported by *at least some* politically

[6] The plaintiffs in Vieth did, albeit "fleetingly", invoke an argument under the Elections Clause. Id., 124 S.Ct. at 1792 (plurality opinion per Scalia, J.). The jurisdictional statement "noted" by the Supreme Court in Vieth included the question of whether the Pennsylvania Assembly had "exceed[ed] its delegated power under Article I of the Constitution". Id., No. 02-1580, at "i".

neutral, "legitimate regulatory purpose".[7] This factual distinction between Vieth and the present case rises to even greater significance given that the difficulty in Vieth essentially involved the inability of the Court to define what, if any, legitimate regulatory purpose, *in addition to* compliance with the "one-person, one-vote rule", should be required to defeat a claimed abuse of Elections Clause power. Id., 124 S.Ct. 1812 n. 33 (Stevens, J., dissenting)("The one-person, one-vote rule obviously constitutes a neutral districting criteria…. I would require that a district be justified with reference *to both* the one-person, one-vote rule and some other neutral criteria.")(italics added). The factual distinction noted thus renders Plan 1374C far *more* constitutionally pernicious, and not less deserving of constitutional invalidation (as the State contends), when compared with the redistricting plan presented in Vieth.

IV. Plaintiff Henderson's Claims are "Ripe" for Consideration, and Present a Worthy Vehicle for "Judicial Intervention".

The State of Texas also contends Plaintiff Henderson's claims are neither "ripe" for consideration, nor the proper vehicle for "judicial intervention". Both of these arguments are without merit.

Ironically, although the State puts forward a contention that Plaintiff Henderson's claims are not "ripe", or are "singularly unsuited to challenge the limits set by the Court in Vieth", *see* State Def.'s Brief on Remand, 25; elsewhere in its Brief the State quotes a

[7] *See* Vieth v. Jubelirer, supra, 124 S.Ct. at 1793 (Kennedy, J., concurring in judgment)(the Elections Clause does not empower legislatures to regulate "in a way unrelated to any legitimate legislative objective"); id., 124 S.Ct. at 1811 (Stevens, J., dissenting)(requiring a "rational basis" for use of Elections Clause power that "must satisfy a standard of legitimacy and neutrality"); id., 124 S.Ct. at 1819-1820 (Souter, joined by Ginsburg, JJ., dissenting)(imposing burden on defendants "to justify their decision by reference to objectives other than naked partisan advantage", by proof that "*legitimate objectives* [are] better served by the lines drawn than by plaintiff's hypothetical")(italics added); and id., 124 S.Ct. at 1829 (Breyer, J., dissenting)(congressional redistricting is "extreme enough to set off constitutional alarm" when "no justification other than party advantage can be found").

passage from a legal article that construes Justice Kennedy's concurring opinion in Vieth as "an invitation to litigants to work at the state constitutional level to develop a nationwide consensus about how such claims should be handled." State Def.'s Brief on Remand, 11 n. 6, *quoting* Gardner, A Post-Vieth Strategy for Litigating Partisan Gerrymandering Claims, 3 Election L. J. 643, 643-644 (2004). The State quite understandably neglects to mention that, as repeatedly explained by Plaintiff Henderson throughout this litigation, the State courts of last resort have *long ago* reached a consensus to prohibit "a change of representative districts intermediate two enumerations, for partisan purposes." People ex. rel. Henderson v. Westchester Board of Supervisors, 41 N.E. 563, 568 (N.Y. 1895). *See* Cherokee County Plaintiffs' Motion for Summary Judgment, 10-11 (Doc. 59)(listing cases); and Brief of Plaintiff Henderson on Remand from the United States Supreme Court, 20-22 (Doc. 196). The Supreme Court of Colorado in Salazar v. Davidson, 79 P.2d 1221 (2003), after extensive research on this very subject, recently reported that it "found no decision by any state's highest court that has interpreted its constitution to allow redistricting more than once per decade." Id., 79 P.2d at 1240-1241.

The State's additional argument against "judicial intervention" is unavoidably linked to its argument that no "judicially manageable standard" exists to limit partisan gerrymandering. State Def.'s Brief on Remand, 25-26. Insofar as this argument is directed at Plaintiff Henderson's claims, and not solely directed at those raised by the Jackson Plaintiffs, it too must be rejected.

In the second of two legal articles cited by the State in its Brief on Remand, the author refers to an "easily administrable test for partisan gerrymandering claims" championed by Professor Mitchell Berman. This "easily administrable (and presumably "judicially manageable") test", as quoted in the article the State has cited, recommends that "[t]he court should declare that mid-decade redistricting is unconstitutional…unless narrowly tailored to achieve a compelling governmental interest."[8] There is no reason to believe the limitation on redistricting advocated by Plaintiff Henderson herein, which would merely require *some* "legitimate regulatory purpose" (and not a more onerous "compelling governmental interest"), would be less "judicially manageable".

V. Plaintiff Henderson's Claims are Consistent with Justice Scalia's Plurality Opinion in *Vieth*, and the Original Intent of the Framers.

Finally, had the State of Texas found the fortitude to actually address the merits of Plaintiff Henderson's claims, it would have been compelled to admit that the challenges raised by Plaintiff Henderson do not even conflict with Justice Scalia's four Member plurality opinion in Vieth. The legislative action undertaken by the State of Texas does not represent the sort of "practice" that can fairly be said to "bea[r] the endorsement of a long tradition of open, widespread, and *unchallenged* use that dates back to the beginning of the Republic". Vieth v. Jubelirer, supra, 124 S.Ct. at 1803 n. 11 (Stevens, J. dissenting)(italics added). To the contrary, the conduct engaged in by the State of Texas, as previously noted by Plaintiff, was publicly condemned as unconstitutional at its inception in 1808;[9] and one of the first, and indisputably among the

[8] Hasen, Looking for Standards (In All the Wrong Places): Partisan Gerrymandering Claims After Vieth, 3 Election L.J. 626,639 (2004), *quoting* Berman, *Putting Fairness on the Map*, L.A. Times (May 28, 2004), at B15.

[9] *See* Brief of Plaintiff Henderson on Remand from the United States Supreme Court, 17-18.

foremost, native legal minds in the new Republic, Chancellor James Kent, articulated clear legal principles against multiple intra-decennial redistricting "unrelated" to an intervening enumeration. Even then, in 1809, Kent observed, among other things, that were such intra-decennial redistricting permitted at will, "all accuracy in the rule of the apportionment would be lost and the constitutional objects of the census defeated."[10] Justice Scalia, having extensively cited a book in Vieth wherein these historical challenges to multiple intra-decennial redistricting are partially recounted, id., 124 S.Ct. at 1774-1775 (plurality opinion per Scalia, J.), *citing* Elmer C. Griffith, The Rise and Development of the Gerrymander (1907)(*see* id., at pages 56-59); surely is aware of these challenges "that dat[e] back to the beginning of the Republic". Were one to suppose further review of this case by the Supreme Court, there is little doubt that Justice Scalia, for one, would be influenced by them.

On the subject of original intent, it is beyond historical dispute that both the Constitutional decision to permit the several States to share congressional power to regulate congressional elections, and the Constitutional decision to require the taking of an enumeration of the population each decennial, was to ensure that "no matter what the mechanics of an election, whether statewide or by districts, it was population which was to be the basis of the House of Representatives." Wesberry v. Sanders, 376 U.S. 1, 8-9 (1964). In answer to the question of why congressional districts were not explicitly prescribed and permanently delineated in the Constitution, Rufus King explained at the Massachusetts ratifying convention that:

[10] *See* Brief of Plaintiff Henderson on Remand from the United States Supreme Court, at 19.

> "If it was practicable, he said, it would be necessary to have a district the fixed place; but this is liable to exceptions; as a district that may now be settled, may in time be scarcely inhabited; and the back country, now scarcely inhabited, may be fully settled. Suppose this state thrown into eight districts, and a member apportioned to each; if the numbers increase, the representatives and districts will be increased. The matter, therefore, must be left subject to the regulation of the state legislature, or the general government."[11]

The rule that governs "alterations in representation" of *the People* (not the States) in the United States House of Representatives, as necessitated "by changes in the relative circumstances of the states",[12] was intended by the Framers to be based, in every circumstance, *at least in part*, on an enumeration of changes or shifts in population within as well as without a State. That Constitutional rule is not, and never has been, informed solely by the changing whims or preferences of a partisan majority within a State or State legislature. The radical departure from this Constitutional principle by the State of Texas, in the words of Chancellor Kent, undeniably operates to "defeat the constitutional objects of the census"; and in the absence of some other legitimate regulatory purpose, the State Defendants' actions have deprived, and will continue to deprive, this Plaintiff of his Constitutionally protected representational rights.

CONCLUSION

Suffice it to say, nowhere in any recorded historical document concerning the Constitution of the United States, insofar as Plaintiff's exhaustive research has disclosed, is there any mention (or even a suggestion) of the several State legislatures being delegated constitutional authority to enact, "at will", congressional electoral regulations

[11] 2 The Debates of the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787, 50 (Jan. 21, 1788)(Elliott ed. 1937)(hereafter "Elliot's Debates").
[12] 5 Elliot's Debates, at 303-304.

unjustified by, and wholly unrelated to, any legitimate regulatory purpose whatsoever. As amply demonstrated by the chaotic experiences of all involved in (and affected by) this latest Texas redistricting saga, the methods employed by the State Defendants hardly resemble any "reasonably conceived plan for periodic readjustment of legislative representation". Reynolds v. Sims, 377 U.S. 533, 583 (1964).

The Plaintiff respectfully submits this Court's prior decision to find the *sui generis* "unlimited power" claimed by the State Defendants, is both ill conceived, and without Constitutional pedigree or federal statutory authorization. On reconsideration of Plaintiff Henderson's claims the Court must find Plan 1374C invalid.

Respectfully submitted,

Digitally signed by Richard Gladden
DN: CN = Richard Gladden, C = US
Reason: I agree to the terms defined by the placement of my signature on this document
Date: 2004.12.12 09:18:51 -06'00'

John S. Ament III
Texas Bar No. 01145000
P.O. Box 751
Jacksonville, Texas 75766-0751
903/586-3561
Of Counsel for Plaintiff

Richard Gladden
Texas Bar No. 07991330
1602 East McKinney
Denton, Texas 76209
940/323-9307
Fax: 940/323-1697
Counsel-in-Charge for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been served both electronically, and by U.S. mail to the counsel for all the opposing parties, Rick Perry, Tom Craddick, David Dewhurst, and Geoffrey S. Connor, at the addresses below:

Hon. Greg Abbott
Attorney General of Texas
P.O. Box 12548 (MC-059)
Austin, Texas 78711

&

Andy Taylor
405 Main Street, Suite 200
Houston, Texas 77002
Attorney-in-Charge for
State Defendants

I further certify that on this date all other parties required to be served have been served, both electronically, and by regular U.S. mail, through their respective Attorneys-in-Charge in this court, as listed below:

Otis W. Carroll
Attorney-in-Charge for
The "Jackson Plaintiffs"
6101 South Broadway, Ste. 500
Tyler, Texas 75703

Nina Perales
Attorney-in-Charge for
The G.I. Forum Plaintiffs
140 East Houston St., Ste. 300
San Antonio, Texas 78205

J. Gerald Hebert
Attorney-in-Charge for
Demo.Cong. Intervenors
5019 Waple Lane
Alexandria, VA 22304

Rolando Rios
Attorney-in-Charge for
The LULAC Plaintiffs
115 East Travis, Ste. 1645
San Antonio, Texas 78205

Anthony Griffin
Attorney-in-Charge for
Cong.Intervenors
Jackson & Lee
1115 Moody
Galveston, Texas 77550

Javier P. Guajardo, Jr.
Attorney-in-Charge for
Valdez-Cox Intervenors
1502 West Ave., #A
Austin, Texas 78701

Morris L. Overstreet
Attorney-in-Charge for
Coalition for Black Democrats
P.O. Box 8100
Houston, Texas 77288

Gary Bledsoe
Attorney-in-Charge for
Texas-NAACP
316 West 12th Street, Ste. 307
Austin, Texas 78701

Renea Hicks
Attorney-in-Charge for
Travis Co./City of Austin
800 Norwood Tower
Austin, Texas 78701

Robert M. Long
Attorney-in-Charge for
Texas Demo. Party
103 East 5th Street, Ste. 200
Austin, Texas 77002

Frank T. Ivy
Attorney-in-Charge for
Amicus Ellen Richards
Building 3, Suite 200
4601 Spicewood Springs Road
Austin, TX 78759

R. Steve Bickerstaff
Attorney-in-Charge for
Amicus Univ.Professors.
727 East 26th St.
Austin, Texas 78705

SIGNED this 12th day of December, 2004.

Digitally signed by Richard Gladden
DN: CN = Richard Gladden, C = US
Reason: I agree to the terms defined by the placement of my signature on this document
Date: 2004.12.12 09:19:47 -06'00'

Richard Gladden