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

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| WALTER SESSION, et al., | § | |
| | § | |
| Plaintiffs, | § | CIVIL ACTION NO. 2:03-CV-354 |
| | § | |
| v. | § | Consolidated |
| | § | |
| RICK PERRY, et al., | § | Judges Higginbotham, Rosenthal, |
| | § | and Ward |
| Defendants. | § | |

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# BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS

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*Amicus Curiae* Brennan Center for Justice at NYU School of Law ("Brennan Center") hereby submits its brief in support of the plaintiffs in these consolidated actions.[1]

## IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

The Brennan Center unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy. Through the Brennan Center's Voting and Representation Project, which is part of its 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 of its implications for the ability of voters in all states to have a meaningful voice in their government, in light of increasingly sophisticated methods of creating partisan gerrymanders, and the specter presented by mid-decade "re-redistrictings" purely to advantage one political party. The Brennan Center submitted briefs on these issues in *Vieth v. Jubelirer*, No. 03-1580 (S. Ct. to be argued Dec. 10, 2003), and *People ex rel. Salazar*, 2003 WL 22833085 (Colo. Dec. 1, 2003).

## PRELIMINARY STATEMENT

Texas, it appears, deserves its reputation for doing everything bigger than the rest of us. Colorado may have been the first state to try partisan re-redistricting since decennial redistricting was required by the one person, one vote cases of the 1960s. But in Colorado, the substantive legal dispute was limited to construing the word "when" in the state's constitution. The Texas scheme is much bolder: it is such a grotesque partisan gerrymander and so abuses minorities' voting rights that it would be illegal even if enacted in the normal way at the beginning of a

[1] The American Civil Liberties Union ("ACLU") joined the Brennan Center's request for leave to appear as *amici*. The press of time and the lack of access to a developed record concerning the Voting Rights Act issues have led the ACLU to reconsider its decision to participate. We are authorized to state that the ACLU's action is not intended to reflect any disagreement with the views expressed in this brief.

decade. The Colorado legislature's manipulation of two districts' boundaries to make them somewhat "safer" for the dominant party seems trifling by comparison.

Unfortunately, in this case bigger and bolder are not better. The ruthlessness and pure partisanship of Plan 1374C mock the fundamental tenets of representative democracy. Various Plaintiffs have pointed out serious flaws in the new map and in the process by which it was adopted. We will focus on one problem that has not been emphasized, so far as we know, by the parties: the absence of any legitimate state interest in adopting the plan. Because Plan 1374C was openly designed to diminish the voting power of certain citizens, it must survive strict scrutiny. But it cannot pass even the rational basis test, for the only interest served by the legislature's action—punishing voters for voting the "wrong" way—is not legitimate.

In addition, this brief responds to the State Defendants' contention that Plan 1374C somehow promotes legislative accountability. The map makes virtually every district in the state "safe" for one party or the other and deliberately robs millions of voters of the chance to decide whether to return their current representatives to Washington in the next Congress. Plan 1374C, and its extraordinary mid-decade enactment, do nothing but violence to the principle of republican government.

Finally, we briefly discuss a question dealt with only implicitly by the parties (to our knowledge). While the parties join issue over the legal standards applicable to partisan gerrymandering claims, there is little discussion of the somewhat confusing state of precedent in this field, where the leading Supreme Court case was a plurality decision and subsequent holdings from the High Court have been summary affirmances without explanation. We attempt to assist the Court to separate what is binding from what is merely persuasive and leave to the parties the task of arguing the substance of the partisan gerrymandering issue.

## ARGUMENT

### I. RE-REDISTRICTING 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 at the ballot box is decidedly not a legitimate reason for treating some worse than others. That, however, is the sole motivation of Plan 1374C: its entire purpose is to make it more difficult for voters who have voted "incorrectly" in the past to elect 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, however, 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. *See Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (characterizing "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively" as "fundamental") (internal quotation marks omitted). Purely partisan re-redistricting serves no compelling state interest. Indeed, we understand that its proponents essentially concede that Plan 1374C serves no interest at all 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.

Ordinary decennial redistricting does serve compelling state interests: it replaces districts that would otherwise violate the "one person, one vote" guarantee. Occasionally, because of a judicial ruling, the process must be repeated; but again, this is because the existing districts are illegal, perhaps even unconstitutional. In ordinary redistricting, the differential treatment of voters according to political preference *may be* offset by the need to create lawful districts. Even then, striking an appropriate balance is difficult, with constitutional interests on both sides of the scales. *See infra* Point II (addressing the *Bandemer* case). But here, there is nothing to weigh in the balance. Plan 1374C serves no state interest at all.

The re-redistricting punishes some voters for the manner in which they have exercised their fundamental rights, most notably those guaranteed by the First Amendment. 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). Elections are a formal, structured marketplace of expression. Voters express their belief in particular political ideas by voting for candidates who have themselves publicly espoused those ideas. 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 that are the culmination and principal object of the First Amendment's textual protections. 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. *See also Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 828-29 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.").

The re-redistricting also attacks the right to vote, deliberately making disfavored citizens' votes less meaningful and their participation in the democratic process less effective by deliberately minimizing the effect of their votes. *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.").

The essence of *Reynolds* and *Bush* is equal treatment of each voter. Although vote dilution is an unavoidable by-product of necessary 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). Intent converts an unfortunate inequity into an actionable injury. *See Washington v. Davis*, 426 U.S. 229 (1976). 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 success of one political party at the polls has no reasonable relationship to a legitimate government end. *See* Report of Prof. Ronald Keith Gaddie (expert witness for State Defendants) dated Nov. 21, 2003, at 24 ("This, in sum, is a map that was designed by the Republican state legislature to advantage Republicans in congressional elections in the state of Texas.").[2] Indeed, even when fundamental rights are not at stake, it is improper for the government to act for the sole purpose of favoring some private interests over others. *See Simi Investment Co. v. Harris County, Tex.*, 236 F.3d 240, 251-54 (5th Cir. 2000). The State's interest, as distinct from the interest of the individuals who currently occupy its legislature and their Washington patrons, is in providing free and fair elections, not in guaranteeing a particular result. That Plan 1374C burdens citizens' fundamental rights in pursuit of this illegitimate goal only exacerbates the constitutional injury.

### 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. Rather, 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

[2] Assuming *arguendo* that a preference for a plan adopted through the legislative process is a legitimate state interest, 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 the *Balderas* court adopted a plan, the legislature did not belatedly create a legislative plan and seek judicial approval. 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 the true legislative objective: pure partisan advantage.

(1995). The Supreme Court has made clear that hamstringing a particular group of candidates is not part of the authority delegated to the states.

The power of a state 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 (emphasis added).

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. In *U.S. Term Limits*, for example, the Court held that a law prohibiting incumbent representatives who had served three terms from appearing on the ballot was not a valid exercise of state authority under the Elections Clause, because it was "undertaken for the twin goals of disadvantaging a particular class of candidates and evading the dictates of the Qualifications Clauses." *Id.* at 835.[3] The Elections Clause did not give the states *carte blanche* to create whatever election procedures they pleased. Even when a state law relates to election procedure—as the banning of term-limited representatives from the ballot clearly did, since the affected representatives could still be elected by write-in votes—it can exceed the states' delegated power over congressional elections. *Cook* struck down the more modest procedural device of stating on the ballot whether

[3] The Qualifications Clause provides: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." U.S. Const. art. I, § 5, cl. 1.

a candidate had supported term limits. Only regulations of election procedures that serve the states' interest in protecting "'the integrity and reliability of the electoral process itself'" are valid under the Elections Clause. *U.S. Term Limits*. at 834 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)).

Sham procedural regulations that purport to set election procedures, but really are intended to dictate election results, violate the Elections Clause. Here, there is not even a sham: the legislative majority concedes that its purpose in re-redistricting the state was to alter the outcome of future congressional elections. The state cannot have the right to change districting schemes solely to ensure the election of the federal representatives preferred by the Texas legislature. Otherwise, the legislature could change a U.S. representative's district on a daily basis, rendering it 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 wished. Nothing would 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—with a small "r."

> 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 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 . . . .”); *People ex rel. Salazar v. Davidson*, __ P.3d __, 2003 WL 22833085, at *21 (Colo. Dec. 1, 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 few 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.

The State Defendants flatter us by quoting our brief from the Colorado re-redistricting case: “This country was founded on the notion that the people must be able to ‘throw the rascals out.’” State Def. Consol. Brief (#79) at 17. But their citation of this precept in *support* of Plan 1374C suggests that the State Defendants do not appreciate the difference between being thrown out by the people and being thrown out by other rascals. The legislature’s purging the incumbents of one party is not the same as the people’s getting rid of unsatisfactory incumbents in general.

We agree with the State Defendants’ expert that “competition is central to the health of a democratic system.” Gaddie Rep’t at 17; *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’s intention, however, was to reduce competition and accountability, not to increase them. Consider Professor Gaddie’s conclusion

that Plan 1374C consistently cuts in half the number of competitive districts as compared to the current plan (by one measure, the new plan has zero marginal districts). *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. The legislature created a map in which virtually every district is "safe" for one party or the other; after the hoped-for 2004 purge, 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 Rep. 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*." (emphasis added).

The legislature achieved its goal by moving enemy legislators from districts where they faced meaningful challenges to ones where they do not stand a chance. Democratic incumbents were systematically separated from their current constituents and paired, either with each other or with Republicans, in heavily Republican districts. *See* Gaddie Rep't at 23-24; Alford Rep't at 30. Again, Rep. Barton's legislative counsel states the facts plainly: "[M]y boss was drawn into a district with both [Democratic Rep.] Frost's and [Democratic Rep.] Turner's homes[;] however, if they would like to commit political suicide, be my guest." The Barton-Frost-Turner district contains 66.4% of Rep. Barton's old district, 21.6% of Frost's (and a disproportionately Republican part of the district at that), and 4.4% of Rep. Turner's; the new district has a 64.1% Republican "statewide index." Alford Rep't at 28. No honest person could say with a straight face that this scheme will increase competition or render any of these three incumbents more

accountable to those he represents in Congress. The Colorado Supreme Court understood what the State Defendants do not:

> The framers knew that to achieve accountability, there must be stability in representation. . . . 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*, 2003 WL 22833085, at *21.

Terminating Rep. Frost's and Rep. Turner's representation of their constituents is not the legislature's job. It is up to the mostly Republican voters in those representatives' current districts to decide if and when to jettison them because of party loyalty. The heads-we-win-tails-you-lose approach—try to beat Democratic incumbents 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*, 2003 WL 2003 WL 22833085, at *5. This point was also appreciated by the citizens—Republican and Democratic—of the West Texas districts that are slated to lose the representatives who understand their local interests. *See West Texas 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.").

## II. *BANDEMER* SUPPORTS PLAINTIFFS' PARTISAN GERRYMANDERING CLAIMS.

Even if Plan 1374C had been adopted during an ordinary decennial redistricting, it would still be unconstitutional. Its partisan bias is so extreme as to exceed even the considerable deference courts rightly owe legislatively adopted redistricting plans. We will not discuss at length the new plan's intrinsic constitutional infirmities. Given several parties' intense focus on the partisan gerrymandering issue and the shortness of time in which this Court must decide the case, we believe it would be more helpful to the Court to touch on subsidiary issues that the parties have left largely undiscussed: the nature of the precedents in this area, and the extent to which existing authorities bind this Court. On the merits, the legal standard propounded by the Jackson Plaintiffs is firmly grounded in the Supreme Court's election-law precedents, including the plurality opinion in *Davis v. Bandemer*, 478 U.S. 109 (1986).[5]

Contrary to the State Defendants' arguments in their dismissal motion, however, the *Bandemer* plurality opinion is not binding precedent. In fact, very little binding precedent constrains courts that consider partisan gerrymandering claims. For example, this Court is not bound by the reasoning of other three-judge district courts that have considered partisan gerrymandering claims since *Bandemer*, even though Supreme Court judgments summarily affirming those decisions are binding. Similarly, the Court is not bound by decisions of the United States Court of Appeals for the Fifth Circuit. The State Defendants' analysis of the *Bandemer* plurality opinion is incorrect on the merits; far from rejecting the partisan gerrymandering claims in this case, the reasoning of that opinion supports those claims. But even

[5] A more complete statement of the Brennan Center's position on the law governing partisan gerrymanders is available in our *amicus* brief in *Vieth* at http://www.brennancenter.org/resources/downloads/sc_briefs/vieth.pdf.

if the current claims were inconsistent with *Bandemer*, the State Defendants would be wrong to contend that the claims must therefore be dismissed without further analysis.

Only Part II of Justice White's opinion in *Bandemer*, in which he concluded that partisan gerrymandering claims are justiciable under the Equal Protection Clause, received the support of a majority of the Supreme Court and is binding precedent. Part III, in which Justice White discussed the proof required to make out a successful claim, was only a plurality opinion. While this Court is bound by the judgment of the Supreme Court rejecting the partisan gerrymandering claim in *Bandemer*, it is not bound by the reasoning that the plurality applied in reaching that result.

In *United States v. Marks*, 430 U.S. 188, 193 (1977), the Supreme Court stated that a plurality opinion could be a controlling decision of the Court when it was the narrowest position taken by any of the Justices concurring in the result. While that standard adequately resolves conventional divisions within the Court, such as the one considered in *Marks*, it is ill-suited to resolving conflicts when it is impossible to line up the decisions concurring in the judgment into a clean collection of narrower opinions nested within broader opinions.

The *Bandemer* plurality did not decide the case on a narrower ground than the concurring opinions. The concurring opinions would have held that the plaintiffs' claims were nonjusticiable. *Bandemer*, 478 U.S. at 143 (Burger, C.J., concurring in the judgment), 144 (O'Connor, J., concurring in the judgment). That argument was flatly rejected in the one part of Justice White's opinion that commanded a majority of the Court. *Bandemer*, 478 U.S. at 118-27. The plurality's standard for determining whether a partisan gerrymandering claim had been sustained cannot be viewed as "narrower" than the concurrences. The concurring Justices did not attempt to enunciate any substantive standard to apply to partisan gerrymandering claims;

indeed, it was precisely because they thought there were *no* "judicially manageable standards" to apply that they would have held such claims to be nonjusticiable. The judgment in *Bandemer* was thus a combination of two logically distinct approaches with no overlap other than the conclusion that the plaintiffs' claims should be dismissed.

In light of this irreconcilable conflict, *Bandemer*'s holding must be understood as very narrow indeed. On the one hand, partisan gerrymandering claims are justiciable; on the other, the particular claim brought by the plaintiffs in *Bandemer* was rejected. Those two propositions are the entirety of the binding precedent created by the *Bandemer* Court. The State Defendants correctly note that lower courts should not attempt to anticipate a future reversal in course by the Supreme Court. *See* State Defendants' Motion to Dismiss and Brief in Support (#60) at 16, *citing Agostini v. Felton*, 521 U.S. 203, 237-38 (1997). The premise of their argument, however—that upholding Plaintiffs' claims in this case would require such a reversal in course—is incorrect, not only because Plaintiffs' claims are consistent with the reasoning of the *Bandemer* plurality, but also because that reasoning is not binding.

As for the decisions of other three-judge district courts since *Bandemer*, the State Defendants were correct not to rely on them in their dismissal motion. While those decisions can be persuasive authority, they do not bind other three-judge district courts, even when summarily affirmed. The summary affirmances themselves are binding, but the Supreme Court has repeatedly cautioned lower courts about the narrowness of such precedent. Summary affirmances affirm only the judgment of the court below, not the rationale, and "no more may be read into the [Supreme Court's] action than was essential to sustain that judgment." *Illinois State Bd. of Elections*, 440 U.S. at 183. Many of the district courts that have purported to apply *Bandemer* have reached conclusions that cannot be reconciled with even the plurality in *Bandemer*, such as

requiring plaintiffs to plead independent violations of their First Amendment rights, entirely distinct from the partisan gerrymander itself, in order to survive a motion to dismiss. *Badham v. Eu*, 694 F. Supp. 664 (N.D. Cal. 1988) (three-judge court). If that were the law, of course, then *Bandemer*'s holding that partisan gerrymanders are justiciable would be meaningless; every unlawful partisan gerrymander would already violate another constitutional provision and be independently actionable on that basis. The summary affirmance of a decision such as *Badham* does not convert the district court's error into binding Supreme Court precedent; it validates only the lower court's judgment in favor of the defendants..

This Court is not bound even by Fifth Circuit precedent. A district court is bound by prior decisions of a particular court of appeals only when its decisions may be reviewed in that court. A contrary rule would be unenforceable, since the only reviewing court—the Supreme Court—is not bound by circuit precedent either. Under some circumstances, issues of federalism or comity justify narrow exceptions from the principle that courts are bound only by courts which have the authority to review their decisions; for instance, because state courts of last resort have the definitive power to interpret state law, federal courts respect their state-law decisions even though no appeal from a federal court judgment may be taken to a state court. Of course, no such circumstance requires a three-judge court to adhere to the decisions of the regional circuit in which it happens to sit, any more than an ordinary district court in one circuit is bound by the decisions of a different circuit. In both instances, circuit court authority has persuasive value only.

## CONCLUSION

For the foregoing reasons, the Brennan Center respectfully requests that the Court find Plan 1374C to be invalid and decline to exercise its discretion to modify the *Balderas* injunction.

Dated: New York, New York
December 3, 2003

Respectfully submitted,

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**Certificate of Service**

I hereby certify that a true and correct copy of the Brief of the Brennan Center for Justice at NYU School of Law as *Amicus Curiae* Supporting Plaintiffs has been delivered to all counsel of record on the 3rd day of December, 2003.

_____/s/_____
J. J. Gass