Nos. 05-204, 05-254, 05-276, 05-439

IN THE SUPREME COURT OF THE UNITED STATES

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,
Appellants,
v.
RICK PERRY, *et al.*,
Appellees

TRAVIS COUNTY, *et al.*,
Appellants,
v.
RICK PERRY, *et al.*,
Appellees.

EDDIE JACKSON, *et al.*,
Appellants,
v.
RICK PERRY, *et al.*,
Appellees.

GI FORUM OF TEXAS, *et al.*,
Appellants,
v.
RICK PERRY, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Texas

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BRIEF OF BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AS *AMICUS CURIAE* SUPPORTING APPELLANTS

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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*, 541 U.S. 267 (2004), and *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003), as well as a brief supporting an application for a stay the first time the current cases were appealed to this Court.[1]

SUMMARY OF ARGUMENT

Simply put, this case arises out of perhaps the most notorious, even scandalous, partisan gerrymanders of the past half century. This redistricting had no purpose other than partisan gerrymandering. No one even pretends to assert that it had any other purpose. It was pushed through the state legislature on entirely partisan grounds just two years after the last, constitutionally required reapportionment. This mid-decade

[1] No party's counsel authored any part of this brief. No person or entity other than *amicus* and counsel contributed monetarily to preparing or submitting the brief. Letters from all parties' counsel consenting to the filing of this brief have been lodged herewith.

re-redistricting fails constitutional muster. If it does not fail, it is hard to imagine what would.

It fails even after the decision in *Vieth.* If the *Vieth* plurality and dissenters agreed on nothing else, they agreed on what the case was about. The author of the plurality opinion noted that eight of the nine Justices agreed that politics is a constitutional redistricting criterion "so long as it does not go too far." *Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting). The *Vieth* dissenters did not disagree; after all, two of them had opined that while *some* intent to gain political advantage was inevitable, "the issue is one of how much is too much." *Vieth*, 541 U.S. at 344 (Souter, J., dissenting).

How far is too far? How much is too much? Whatever the range of possible answers is, it is plain that 110% must be too much. That is the weight that one of the re-redistricting's architects assigned to political gain for Republicans when asked about the legislature's motives. *Session v. Perry*, 298 F. Supp. 2d 451, 473 (E.D. Tex.) (noting that "political gain for Republicans was 110% of the motivation for the Plan"), *vacated in five separate orders*, 125 Sup. Ct. 351-52 (2004). The state has contended, and the District Court found, that the re-redistricting was undertaken purely for political advantage. This Court need not decide whether 51%, or 75%, or 90% is too much; when the impermissible purpose of harming voters with disfavored viewpoints is not leavened with any legitimate state purpose, the state has violated the Constitution.

In many respects, this case is not a typical redistricting case of the sort considered by this Court several times in recent decades. It arises out of singular – and distinctly distressing – circumstances. 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 mal-apportionment, 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's own contentions), involves no such mixed motives. It requires only a narrow, judicially manageable rule: state action that is admittedly and openly taken *solely* for partisan advantage is illegal.

In short, 110% is too much.

ARGUMENT

I.
The Constitution Establishes a Representative Democracy Incompatible with State Action Designed to Disadvantage Citizens with Disfavored Political Opinions.

Representative democracy, protected by federalism and the separation of powers as well as by the Bill of Rights and later amendments, is the essence of the Constitution. Our foundational text, particularly as amended, enshrines two principles: the right of the people to participate as equals in the project of self-governance; and the necessity for representatives to be accountable to their electors. The Texas re-redistricting clashes with both of these principles.

A. Constitutional Structure.

The Court has attended to the Constitution's structure, as well as the text of specific clauses, in adjudicating the division of power both among the branches, s*ee, e.g.*, *INS v. Chadha*, 462 U.S. 919, 946 (1983) ("The very structure of

the Articles delegating and separating powers under Arts. I, II, and III exemplifies the concept of separation of powers . . . ."); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982) (plurality opinion) ("[T]he literal command of Art. III, assigning the judicial power of the United States to courts insulated from Legislative or Executive interference, must be interpreted in light of the . . . structural imperatives of the Constitution as a whole."), and between the federal and state governments, s*ee, e.g.*, *Alden v. Maine*, 527 U.S. 706, 728 (1999) ("[S]overeign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself."); *Fed. Maritime Comm'n v. S. Car. State Ports Auth.*, 535 U.S. 743, 754 (2002) (applying "the sovereign immunity embedded in our constitutional structure").

The most fundamental division of power in our democracy—between the government as a whole and the people from whom it derives all legitimate authority—similarly suffuses the Constitution. *See Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) ("[V]oting is of the most fundamental significance under our constitutional structure."). The Framers included in the text numerous structural elements to give effect to the popular will. *See, e.g.*, U.S. Const. art. IV, § 4 (guaranteeing states a republican form of government); art. I, § 2, cl. 1 (requiring periodic election of House members by "the people"); art. I, § 2, cl. 3 (providing for decennial enumeration and establishing minimum population of House districts); art. 1, § 2, cl. 4 (requiring House vacancies to be filled by elections, not appointments).

Not only the original Framers, but those who have followed, have focused their attention on preserving democratic self-governance. Of the 17 amendments adopted after the Bill of Rights, 12 deal with the democratic process or the government's accountability to the people. The Fourteenth

Amendment establishes national citizenship, requires states to provide equal protection of the laws (including voting districts of equal population), and conditions states' representation in Congress on their granting suffrage to newly freed slaves. The Fifteenth, Seventeenth, Nineteenth, Twenty-Third, Twenty-Fourth, and Twenty-Sixth Amendments implement equal universal suffrage by banning voting discrimination on the basis of race, sex, wealth, or youth; provide for direct popular election of Senators; and permit residents of the District of Columbia to participate in presidential elections. The Twelfth, Twentieth, Twenty-Second, and Twenty-Fifth Amendments provide for separate elections of the President and Vice-President, limit a lame-duck President's term, impose a two-term limit on the Presidency, and provide for orderly succession in time of Presidential disability. The Twenty-Seventh Amendment enforces accountability by forbidding Members of Congress from enjoying self-enacted pay raises without first standing for re-election.

Thus, the Constitution views every American citizen as a member of a self-governing community of political equals. In pursuit of that vision, it guarantees to each citizen the right to participate in democracy through voting, running for office, and fair representation. It also guarantees that the government will remain accountable to the people. It is this normative vision of representative democracy that underlies *Baker* and *Kramer v. Union Free School District*, 395 U.S. 621 (1969). It is this vision that is desecrated when a state openly, admittedly, and intentionally deprives citizens who have expressed disfavored viewpoints from participating as political equals in our representative democracy.

One would think that the principle of state neutrality among citizens of different political persuasions ought to be uncontroversial.

> If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles,' we would surely conclude the Constitution had been violated.

Vieth, 541 U.S. at 312 (Kennedy, J., concurring in the judgment). The question should therefore be, not whether the Constitution permits a state to do what the Texas legislature set out to do, for surely it does not. The question is whether by acting in accordance with Justice Kennedy's hypothesized enactment but without adopting the enactment itself, a state can get away with its constitutional violation because courts cannot define a judicially enforceable rule giving effect to the Constitution's command. For, as Justice Kennedy went on to point out, pursuing the same outcome by different means does not render the impermissible permissible. At most, it makes the violation irremediable:

> If that is so, we should admit the possibility remains that a legislature might attempt to reach the same result without that express directive.

Id.[2] While four Justices concluded in *Vieth* that no judicially manageable standard could be crafted in the context of regular decennial redistricting (a conclusion with which we respectfully disagree), that problem does not affect this case, for reasons discussed in Point III below. Whatever the difficulties in other contexts, this particular assault on our constitutional structure can be averted by the judiciary.

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[2] Justice Kennedy's description might be applied to the Democratic gerrymander of Georgia, which was struck down because the party in power did not quite manage to act "still in accord with one-person, one-vote principles." *See Cox*, 542 U.S. 947.

B. Guarantee Clause.

The national commitment to representative democracy is not embodied only in the Constitution's structure, but in its text, perhaps most starkly in the national government's guarantee to every individual state of 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. The Guarantee Clause, which is directly relevant to elections for representatives in *state* governments, does not apply directly to Texas's districts for the *federal* House of Representatives. It serves, however, as yet another brick in the constitution's republican edifice. It underscores what should already be apparent: the Texas redistricting is at odds with the Constitution's very core.

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 . . . ."); *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)).

Permitting a partisan state 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 v. Sanders*, 376 U.S. 1, 8 (1964) (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).[3]

If viewpoint discrimination is the Texas mid-decade redistricting's cardinal sin, its subversion of government accountability is not far behind. This can be seen most clearly in the context of the largely Republican West Texas districts whose voters stubbornly re-elected Democratic incumbents while mostly voting for Republicans in other races. It is no secret that one of the legislature's main goals in redrawing the lines was to put those Democratic incumbents into different districts from most of their existing constituents.

[3] This choice was entirely conscious; for the first century-and-a-quarter of the nation's existence, the U.S. Senate was in fact chosen by the various state legislatures. U.S. Const. Art. I, § 3, cl. 1. This practice was so prone to partisan abuse and corruption that the Constitution was amended to provide direct election. U.S. Const. amend XVII.

It is understandable that a Republican legislative majority would be impatient with voters in a half-dozen Republican-leaning districts who choose to retain Democratic incumbents. But the decision whether, and when, to end those representatives' ties with their constituents properly belongs to the people. The extraordinary re-redistricting took that decision away from them and gave it to the legislature, a profoundly anti-republican usurpation of power.

The power grab was not surprisingly, and not inaccurately, characterized in the media as anti-Democrat. But among its most prominent victims are the Republicans of West Texas, whom party leaders punished for their wayward votes by denying them the right to elect representatives of their choice. Another state unsuccessfully tried something similar (though less invidious in that its rule was not viewpoint-based) when it adopted congressional term limits.

> 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.

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 844 (1995) (Kennedy, J., concurring).

The Colorado Supreme Court understood that the kind of mid-decade tinkering undertaken by Texas and also attempted in Colorado undermines republicanism, even putting partisan motivations to one side:

> 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, 79 P.3d at 1242. 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]

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[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 were separated from the representatives who understood 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, (cont'd)

C. Elections Clause.

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*, 514 U.S. at 805. This Court has made clear that hamstringing a particular group of candidates is not part of the authority delegated to the states.

When a state exercises its plenary police power, federal courts are appropriately reluctant to intercede. 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." *Id.* at 845 (Kennedy, J., concurring).

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*, 376 U.S. at 7–9. Limits on the legitimate use of time, place, or manner regulations are, of course, not unknown to constitutional jurisprudence. In the analogous First Amendment context, the Court has repeatedly ruled that viewpoint-based regulations of speech cannot be defended as mere time, place, or manner regulations. *E.g.*, *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972); *Carey v. Brown*, 447 U.S. 455 (1980).

(cont'd)
Democrats and independents alike—they didn't want their West Texas congressional district redrawn.").

As Chief Justice Rehnquist and Justice O'Connor noted in their concurrence in *Cook*, 531 U.S. at 531–32, the Election Clause mirrors the First Amendment in forbidding content-based, let alone viewpoint-based, time, place, or manner regulations. *Cf. Tashjian v. Republican Party*, 479 U.S. 208 (1986) (upholding power to set content-neutral procedures for Congressional elections). Or, to use the majority's formulation, electoral mechanisms designed to "place their targets at a political disadvantage" are outside states' Elections Clause authority. *Cook*, 531 U.S. at 525.

The Texas re-redistricting intentionally grants decisive power to citizens who have expressed favored political views. Simultaneously, it makes it as hard as possible for citizens with disfavored views to elect like-minded candidates. A state cannot possibly defend as a time, place or manner regulation an electoral system openly adopted for that viewpoint-based purpose. *See id.* at 523 ("[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.") (internal quotation marks omitted). 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 undertaken for the sole purpose of altering the outcome of future congressional elections.

Nor, if the re-redistricting is allowed to stand, would there seem to be a limiting principle to states' power to interfere with congressional elections. If the Texas legislature can redistrict for no reason other than to install the congressional delegation it prefers, what will 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 responsive-

ness to local party leaders, or any other factor the legislative majority wishes? What could stop a legislature from adjusting the lines two or three or four times a decade? Nothing could be more at odds with the limited role in administering House elections that the Framers intended the state legislatures to exercise. *See U.S. Term Limits*, 514 U.S. at 808 (noting that the Elections Clause was meant to limit state legislatures' influence over the House).

Both the *Vieth* plurality and the District Court in this case suggested one possible limit to congressional redistricting abuses by states: Congress itself. The Elections Clause permits Congress to override almost all of the procedures adopted by the states for electing House members, though of course it does not *require* Congress to do anything. As the *Vieth* plurality pointed out, Congress knows what the states have been up to.

> Recent history, however, attests to Congress's awareness of the sort of districting practices appellants protest, and of its power under Article I, § 4 to control them. Since 1980, no fewer than five bills have been introduced to regulate gerrymandering in congressional districting.

Vieth, 541 U.S. at 276–77 (plurality opinion) (citations omitted). The events underlying this case dramatically confirm "Congress's awareness of abusive districting practices": the re-redistricting was openly orchestrated by the Majority Leader of the (federal) House of Representatives. And his counterpart, the Minority Leader, has discussed with officials in Democrat-controlled states the possibility of copying the Republicans' innovation. *See* Chris Cillizza, *Democrats Eye Remap Payback; Leaders Target Illinois, N.M.*, Roll Call, Feb. 22, 2005. The District Court majority in its first opinion in this case expressed the hope that Congress might step in and forbid mid-decade redistricting altogether to avoid she-

nanigans like those seen in Texas. That hope seems, to put it mildly, somewhat optimistic.

There may well have been no fewer than five bills introduced in the past quarter-century (none since 1990) to regulate gerrymandering in congressional districting, as the *Vieth* plurality noted. None of those bills passed either house of Congress. Given the natural penchant of both major political parties to take maximum advantage of any legislative majority they may enjoy in the federal or state legislatures, there is no reason to expect future anti-gerrymandering bills to fare any better (all five bills cited by the *Vieth* plurality were introduced into a Democratic-majority House and failed to progress). *Vieth* and this case both happen to involve Republican gerrymanders. Of course, Democrats are not averse to similar abuses, as this Court knows from *Cox*.

Following the 2000 census, for example, Maryland's Democratic governor drafted state and federal redistricting plans that were assailed in part as gerrymanders, both on party grounds and for the way in which they punished individual legislators whom the governor considered political enemies. The state redistricting plan was struck down for violating the state constitutional requirement to give "due regard" to the boundaries of political subdivisions. *In re Legislative Districting of the State*, 805 A.2d 292 (Md. 2002). The House of Representatives plan, which was designed to (and did) cause the defeat of Republican Representative Connie Morella, helped to convert the state's delegation from 4–4 to 6–2 in favor of the Democrats but was upheld by the Fourth Circuit. *See Duckworth v. State Admin. Bd. of Election Laws*, 332 F.3d 769 (4th Cir. 2002); Sarah Koenig, *Congressional Districts Fought in Federal Suit*, Baltimore Sun, June 19, 2002, at 1B ("Even many Democrats have been hard-pressed to defend the congressional map's lines, which in places look as if they were drawn by a child experimenting with an Etch-A-Sketch.").

Around the same time, Georgia Democrats adopted the gerrymandered state legislative districts struck down in *Cox*. The party also managed to gain two seats in the state's congressional delegation in an election in which voters statewide rejected Democratic incumbents in races for Governor and U.S. Senator. Democrats eliminated Republican Congressman Bob Barr, a manager of President Clinton's impeachment trial, by putting him in the same district as another Republican incumbent, in spite of the state's having received two additional seats in the House.

Republicans had Georgia on their minds when they gerrymandered Pennsylvania and provoked the *Vieth* litigation. "Democrats rewrote the book when they did Georgia, and we would be stupid not to reciprocate," said Virginia Rep. Thomas M. Davis III, Chairman of the National Republican Congressional Committee. Thomas B. Edsall, *Democrats Hold Edge Over GOP in Redistricting; Gains Still Possible for Republicans*, Washington Post, Dec. 14, 2001, at A55.

Rep. Davis's blunt talk—"we would be stupid not to reciprocate"—is typical. Just as Republicans responded to Democrats' "rewr[iting] the book" in Georgia, Democrats have not only threatened to copy Republicans' Texas playbook in states they control, but have also begun planning to redistrict states that they hope to take control of after the 2006 midterm election. *See* Josh Kurtz, *Remap Revenge in New York?*, Roll Call, March 1, 2005.

> Regardless of the tactics Democrats may eventually choose, what is clear is that redistricting is no longer simply a once-a-decade process but rather part of the ongoing struggle by both parties to make gains in the House.

Chris Cillizza, *Democrats Eye Remap Payback*, *supra*.

In this environment, it would be naive to expect either party to use its control of Congress to stop abuses like the Texas re-redistricting. For much of our history, anti-democratic entrenchment was permitted because redistricting was an irregular and infrequent process in many states. Since this Court's one-person, one-vote decisions required regular post-census redistricting, redistricting has been a "once-a-decade process." Unless the Court acts again now, constant partisan tinkering will become the new norm, with some of the same deleterious consequences as the pre-*Baker* regime. The result would be a far greater likelihood that an ever-widening number of voters of both parties in many states would be denied the chance to affect the outcome of legislative races. Without this Court's intervention, what began as a particularly shameless power-grab in one legislature will metastasize into the national norm.

D. Equal Protection Clause

Burdening the rights of voters who express certain viewpoints, or who have certain political affiliations, violates the Equal Protection Clause as well as the Elections Clause. In *Baker* and its progeny, the Court prohibited apportionments that systematically underweighted the votes of citizens in particular districts. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964) ("[D]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race."). In *Kramer* and *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), the Court barred allocating the franchise on differential grounds. This equal protection jurisprudence culminated in *Bush v. Gore*, 531 U.S. 98 (2000), which stopped a recount because of a lack of uniform standards for counting votes. The principle throughout has been the right of every voter to equal treatment.

In non-electoral contexts as well as electoral contexts, 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, was the Texas legislature's sole reason for taking up redistricting when the state already had a legal set of congressional districts. As the state itself has conceded, and as the District Court found, the process would not have been undertaken at all but for partisan advantage, which is a polite way of describing the deliberate prevention of 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, the re-redistricting would fail even rational basis scrutiny. Ensuring the electoral success of one political party has no reasonable relationship to a legitimate governmental end. 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.

Ordinary decennial redistricting, however partisan it may be, serves the nonpartisan state interest of replacing districts that would otherwise violate the "one person, one vote" guarantee. A complex mixture of motives is inevitably at play in this mandatory process, which may make it hard to assign a single dominant cause to the resulting map, or even to the placement of any particular voter in a particular district. This case is different. It is indisputable that the re-redistricting would not have happened at all—there would have been *no* new map of any kind—but for the opportunity it presented for partisan advantage.

Rational-basis review is not particularly stringent, but it does serve an important purpose. "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer v. Evans*, 517 U.S. 620, 633 (1996). Yet that was precisely the state's purpose here: the burdens suffered by those who had previously voted for Democrats were not incidental but were the *raison d'être* of the entire enterprise.

As *Romer* repeated and several of the *Vieth* opinions recognized, it is a longstanding and fundamental principle that state action must be actuated by some neutral, legitimate state interest. Even if partisan considerations are inevitably part of the lawmaking process, as they undoubtedly are in redistricting, they must be accompanied by some other interest that belongs to the state, rather than to officeholders and their parties. *See Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment) ("A determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective."); *id.* at 333 (Stevens, J., dissenting) ("[T]he Equal Protection Clause implements a duty to govern impartially that requires, at the very least, that every decision by the sovereign serve some nonpartisan public purpose."); *id.* at 355, 360 (Breyer, J., dissenting) ("[P]ure politics often helps to secure constitutionally important democratic objectives. But sometimes it does not. Sometimes purely political 'gerrymandering' will fail to advance any plausible democratic objective while simultaneously threatening serious democratic harm. . . . The use of purely political boundary-drawing factors, even where harmful to the members of one party, will often nonetheless find justification in other desirable democratic ends, such as

maintaining relatively stable legislatures in which a minority party retains significant representation."). The fact that so few enactments fall under rational basis review reflects not so much the weakness of the test but the acceptance by politicians of the fundamental principle that laws must be affected with a public interest.

But this is not a rational basis case in any event. Laws that differentially burden the exercise of fundamental rights 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). Texas has penalized citizens' exercise of their rights of political association and expression, as well as the right to vote. Those rights are undeniably fundamental, as we discuss at greater length in the next section of this brief concerning the First Amendment. This Court has 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*, 440 U.S. at 184 (internal quotation marks omitted). The re-redistricting's proponents repeatedly testified 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 the legislature chose 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 highly suspect. *See Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 828–29 (1995). Diluting the voting power of a disfavored class is, moreover, 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. at 104–05 (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 re-redistricting violates the Equal Protection Clause in part because of its attack on fundamental rights that are also protected by the First Amendment. But the equal protection claim is not simply a First Amendment claim dressed in different clothes. What Texas has done is contrary to the very nature of equal protection:

> A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.

Romer, 517 U.S. at 633.

II.
The Re-redistricting Violated the First Amendment.

Like the Constitution itself, the First Amendment has an architecture that reflects an inherent, structural, and intentional commitment to representative democracy. The six clauses of the First Amendment form a set of concentric circles with the democratic citizen at the center. The text opens with Establishment Clause protection of private conscience, moves to Free Exercise protection of public displays of conscience, continues with Free Speech protection of individual expression, extends to institutional expression of ideas by guaranteeing a Free Press, goes on to Free Assembly protection of collective action, and culminates in protecting

formal interaction with the government through Petitions for Redress of Grievances. The sequence is not random. The textual rhythm of Madison's First Amendment reprises the life cycle of a democratic idea, moving from the interior recesses of the human spirit to individual expression, public discussion, collective action, and finally direct interaction with government. Madison's vision remains one of our most valuable guides to the kind of democracy the Constitution guarantees.

Electoral politics thus implicate the First Amendment's core purpose. Much of this Court's First Amendment jurisprudence has been devoted to the proposition that government must remain neutral regarding its citizens' ideological expression and association. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Mosley*, 408 U.S. at 95. The political acts of 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 regulation of voting burdens First Amendment rights but holding that standard of review varies with circumstances).

The neutrality principle has particular force when it comes to elections. Elections are a formal, structured marketplace. Each candidate seeks to persuade voters that his or her ideas (and the ideas of the party to which the candidate belongs) should be enacted into law. Unless government remains neutral in administering the contest, the electoral competition cannot operate fairly. It would be self-defeating to expend substantial judicial resources defending a neutral marketplace of ideas on sidewalks and in parks, only to allow the government to rig the outcome of elections that are the

culmination and 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.

After canvassing some of these same precedents, Justice Kennedy concluded in *Vieth*:

> First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights.

Vieth, 541 U.S. at 314 (Kennedy, J., concurring). Texas does not deny the purpose of the re-redistricting. The question, then, is whether there are judicially manageable standards for gauging the re-redistricting's effect. *See id.* at 315 ("Of course, all this depends first on courts' having available a manageable standard by which to measure the effect of the apportionment and so to conclude that the State did impose a burden or restriction on the rights of a party's voters."). It is to that question that we now turn.

III.
There Are Judicially Manageable Standards for Evaluating the Effect of the Re-redistricting.

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.[5]

Unlike in *Vieth*, there is no question here of "predominant" causes. The entire process of re-redistricting was undertaken for one reason and one reason only: partisan advantage. Burdening the rights of disfavored voters, and the derivative rights of their chosen representatives, was the whole purpose, motivation, and intention for the legislature even to convene. Even if the process itself, once begun, was molded in part by considerations like the equipopulation requirement, the District Court need not have tried to discern what was the "predominant" force in the process. It needed only determine, as it already has, the sole purpose for the process's having occurred at all.

The re-redistricting was a river with a Republican sea as its only objective. The one-person, one-vote principle, incumbent protection, Voting Rights Act compliance, and the like may have formed the river's banks and shaped the precise path it took, but they affected the final destination not one whit. As the legislature and its allies in Austin and Washington vividly demonstrated, the only barriers the river would respect were those the law imposed and courts were willing to enforce. 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

[5] We do not disagree with the argument of some plaintiffs and Appellants 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.

the re-redistricting's architects of the from pursuing their objective of 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.

These considerations do not directly have to do with assessing the re-redistricting's effects. But they are critical to understanding how those effects should be measured. In a mandatory decennial redistricting involving a complex mixture of motivations, one may find it difficult to judge how much partisan effect is "too much." Even conceding for the sake of argument that there are no judicially manageable standards for making that judgment, however, no such judgment is required in this case. Although vote dilution is inevitable under any districting scheme, and some voters will consistently be outvoted, "[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 effect into an actionable injury. *See Washington v. Davis*, 426 U.S. 229 (1976).

It is undeniable, under any standard of measurement, that the re-redistricting accomplished the (impermissible) intention of its authors. The targeted West Texas Democrats were

purged from the House, and the Texas delegation achieved the partisan makeup that had been predicted by both supporters and opponents of the re-redistricting. A state may not burden its citizens' rights at all without a legitimate purpose. When the state acts purely for an illegitimate purpose, any effect on protected rights is "too much." The rights of hundreds of thousands, if not millions, of voters have been impaired in precisely the fashion intended; under the circumstances, it cannot credibly be contended that the Court lacks an adequate metric for determining whether there has been an impermissible effect. One need not know exactly how many people will end up in the hospital to be certain that it is wrong to put arsenic in the soup.

In an ordinary redistricting, a specific group of voters may suffer a relative inability to elect candidates of choice, but it is a complex task to draw a clear causal link between the impairment of those particular individuals' rights and legislative partisanship. They might have been "packed" or "cracked" because they were Democrats, but they may also find themselves in their current districts because the incumbent in the neighboring county needed a safe district or because the line-drawers had to ensure non-retrogression under Section 5 of the Voting Rights Act.

There is no difficulty, however, in identifying the *conditio sine qua non* for the inability of West Texas Republicans to re-elect their chosen representatives in 2004, nor for the impairment of the rights of voters elsewhere in the state. No district line would have moved an inch to protect an incumbent. No line would have moved to adhere to a city or county boundary. No line would have moved to meet the Voting Rights Act's requirements. *Nothing* would have happened to any Texas voter had the legislature and its cronies not set the process in motion for the sole purpose of discriminating against voters with disfavored viewpoints.

This case is more like *Cook v. Gralike* than it is like *Vieth*. In *Cook*, the Court struck down a law requiring the ballot to identify incumbent members of the House who were defying a state-imposed limit on the number of terms they ought to serve. The Court could have speculated about how many votes would actually be affected by the ballot notice. It could have guessed how often, if ever, an incumbent would have been defeated because of the forbidden words on the ballot. But the Court did not have to do either of those things. The state had no legitimate reason, and no authority under the Elections Clause, to put those words on the ballot in the first place. Therefore, there was no need to measure the words' effect with any precision: any effect was "too much." Just so here. Texas has acted beyond the scope of the authority granted to it by the federal Constitution, and for good measure it has also transgressed individual rights protected under the First Amendment and the Equal Protection Clause. As in *Cook*, the state's actions serve no permissible purpose. As in *Cook*, therefore, the judiciary is competent and indeed required to overturn those actions.

CONCLUSION

The District Court's judgment should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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