No. 05-276

In The

Supreme Court of the United States

EDDIE JACKSON, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Texas

BRIEF FOR AMICUS CURIAE NEIL H. COGAN IN SUPPORT OF APPELLANTS

NEIL H. COGAN
WHITTIER LAW SCHOOL
3333 Harbor Boulevard
Costa Mesa, CA 92626
(714) 444-4141 ext. 111

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

INTEREST OF THE AMICUS

Neil H. Cogan has taught federal and state constitutional law since 1973.[1] He is the editor of *The Complete Bill of Rights* (New York: Oxford University Press, 1997), *Contexts of the Constitution* (New York: Foundation Press, 1997), and *The Complete Reconstruction Amendments* (New Haven: Yale University Press, forthcoming 2007), as well as unpublished course materials on constitutional law. He has maintained an interest in structural issues arising from the decennial census, reapportionment, and districting since 1979, when he was Scholar-in-Residence at the United States Department of Justice and participated in advising the Attorney General regarding the then-pending litigation arising out of the 1980 United States Decennial Census.

Amicus files this brief in support of Appellants and has obtained the consent of all parties to do so.

SUMMARY OF ARGUMENT

From *Davis v. Bandemer*, 478 U.S. 109 (1986), through *Vieth v. Jubelirer*, 541 U.S. 267 (2004), this Court and the lower federal courts have focused on outcomes in adjudicating the constitutional fairness of partisan gerrymandered districts. In *Vieth*, the Court was divided between a plurality convinced that there are no judicially manageable standards available to adjudicate whether outcomes are fair, and five concurring and dissenting

[1] This filing is written solely by the undersigned. Its printing is supported solely by his scholarship support account.

Justices convinced that manageable standards can be developed. The plurality believed that the Court should abandon its role in reviewing partisan gerrymandered districts, while the five Justices believed that the Court should continue review.

Amicus respectfully submits that this Court should not abandon its role. To the contrary, amicus submits that the Court should consider, in addition to outcomes, the process by which the outcomes were rendered. Process of course is an inherently judicial role, which fits neatly within Article I's process-oriented framework. Moreover, recent developments – the availability of instantaneous districting, the prospect of biennial redistricting, the negligible shifts in party turnover, and the heightened intrusion of federal officials and their PAC allocations – impel a turn to process.

Amicus submits that a focus upon a fair and adequate districting process, including such issues as adequate notice, competent access, full participation, open deliberation, and undictated resolution, might encourage the development of judicially manageable substantive standards.

The peculiarities of the process in the instant case make a process-directed remand appropriate. There was inadequate attention in the District Court to the extraordinary role of the Majority Leader and the use of PAC allocations, and to the absence of fundamental indicia of fairness. These matters impinge significantly on the legitimacy of governance.

ARGUMENT

I. LEGISLATIVE DISTRICTING AND REDISTRICTING SHOULD AFFORD AFFECTED GROUPS A FAIR AND ADEQUATE OPPORTUNITY TO PARTICIPATE IN AN UNDICTATED PROCESS

In *Davis v. Bandemer*, 478 U.S. 109 (1986), a plurality of this Court wrote, correctly in the view of amicus, that the federal courts should recognize claims of unfairly partisan gerrymandering. In the nineteen years since *Bandemer*, neither the Court nor the lower courts have clarified the basis for the claim of unfairness or the standard by which the claim will be determined. In *Vieth v. Jubelirer*, 541 U.S. 267 (2004), a plurality of this Court wrote that the federal courts should no longer recognize a claim because of the difficulty of formulating judicially manageable standards; however, five concurring and dissenting Justices, in four opinions, wrote that the federal courts should continue their attempt to develop such standards.

Respectfully, amicus agrees with commentators who have suggested that the Court not diminish its role in protecting the democratic functioning of our institutions. *See, e.g.,* Pildes, *Forward: The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28 (2004). While it is most tempting to accede to Justice Frankfurter's warning, the dangers to legitimacy that unfairly partisan gerrymandering are causing to our democracy counsel otherwise. It is respectfully submitted that there is a breakdown in the functioning of the districting process itself and there are special dangers emanating from the heightened intrusion of incumbents and powerful federal officials in that process. And it is painfully unclear

whether ordinary political forces can overcome entrenched power and money to provide a democratic fix.

With the advance of technology, the ability of Washington officials to become the chief architects of districting and redistricting has become manifest. While it once took months of effort by local workers to draw legislative lines, advances in computer technology now allow partisans in Washington to produce dozens of maps at one sitting. Lines can be drawn from Austin to the Rio Grande and transmitted to the Texas Speaker and Lieutenant Governor more quickly than the time it takes for a Justice to walk from the Court to the Capitol. Short a few votes of carrying their agenda, the Speaker and the Majority Leader in the United States House of Representatives might well redraw legislative lines and transmit them to their partisans in legislatures controlled by their parties. This makes the prospect of biennial redistricting a likely event in many states and localities.

The mischief is exacerbated by the current state of political affairs. Congressional districts have been drawn with such precision that there is little partisan turnover. For example, it is reported that "in the 2004 Congressional elections, only 13 seats in the House changed hands, and four incumbents were defeated in the general election." Adam Nagourney, *The New York Times*, February 7, 2005, Section A, p. 19, col. 1. In their home districts, Representatives are drawn principally to their "base" rather than to all their constituents, *see id.*, and in Washington they have become complicit in political polarization not experienced since the debate over Abolition.

Further, while Representatives have historically been interested and involved in decennial districting and

redistricting, technology permits them and their party leaders to be involved intimately and repeatedly. They can draw lines that will guarantee their party's victory and will guarantee their enemy's defeat. Ominously, the availability of money – not just traditional pork for constituents, but PAC money raised by Washington officials and their aides and distributed to state legislative campaign coffers – is particularly coercive, enabling Washington to dictate state redistricting.

Amicus submits that the effect on the legitimacy of the democratic process is too ominous for the Court to abandon the field. While it is true that there are some reform initiatives that have succeeded, *see* Note, *Toward a Greater State Role in Election Administration*, 118 Harv. L. Rev. 2314 (2005), nonetheless the power of incumbency and money are far too great to be sanguine about a probable grassroots solution. Amicus does not suggest that this Court order solutions outside the legislature, such as by commissions or committees, but he does suggest that this Court should order that districting be governed by a process that is fair, adequate, and undictated.

This is not to disparage the attention of the courts and parties to equal protection and First Amendment issues, but rather it is to suggest that the Court should seriously consider structural issues. Article I in its language recognizes the primary role of the States in forming districts and, particularly by the words "manner of holding elections," emphasizes the role of process. Because technology and money are shifting that traditional state role to Washington and are altering "manner" to results, it is appropriate for this Court to address the structural issues.

Respectfully, amicus submits that it violates the structure of Article I for federal incumbents and powerful federal officials to dictate the districting or redistricting process. See Issacharoff, *Gerrymandering and Political Cartels,* 116 Harv. L. Rev. 594 (2002). Further, amicus submits that it violates the structure of Article I's "manner" delegation for the States to draw political lines through a process that is not "fair and adequate" to the task. Amicus suggests that a fair and adequate process includes reasonable notice when the process will begin; an opportunity to participate (including timely availability and adequate review of plans); access to data, technology, and expertise; open and on-the-record hearings; and unbiased consideration and decision about plans.

These are judicially manageable standards to implement and review. And, once in place and operation, they may lead to judicially manageable standards regarding outcomes. Importantly, their implementation will strengthen the legitimacy of the districting process and the elections within the districts; their implementation will strengthen the national perception of the legitimacy of legislation and governance generally.

II. THIS COURT SHOULD REVERSE AND REMAND FOR A TRIAL ON WHETHER THE REDISTRICTING PROCESS WAS FAIR, ADEQUATE, AND UNDICTATED

If the media reports are correct, the instant case may be an example of a redistricting process that was heavily influenced, if not dictated, by federal officials and their access to money, and that was conducted in a manner that was not fair and adequate. It appears, for example, that legislative redistricting following the judicial districting

was not initially on the 2003 Texas legislative agenda, but that the United States House Majority Leader, Mr. Tom DeLay, did more than simply recommend that redistricting be on the agenda. According to *The Houston Chronicle,* in a February 10, 2003 report:

> U.S. House Majority Leader Tom DeLay's behind-the-scenes pressure on Texas legislators to redraw the state's congressional districts to favor more Republicans is not gaining support in the Capitol.
>
> Lt. Gov. David Dewhurst called congressional redistricting as welcome as a "contagious flu" and did not even bother to appoint a Senate redistricting committee.
>
> House Speaker Tom Craddick last year said he did not want to take up congressional redistricting if the issue was dead in the Senate. But when he appointed committees Jan. 30, he named a redistricting committee at the urging of DeLay, Capitol sources told the Houston Chronicle.

The Houston Chronicle, February 10, 2003, Section A, p. 13.

Two weeks later, *The Houston Chronicle* reported:

> Texas House Redistricting Chairman Joe Crabb has asked state Attorney General Greg Abbott whether lawmakers have a legal obligation to redraw the state's congressional districts.
>
> . . .
>
> Crabb, R-Houston, asked if the Legislature must draw new maps this year since it failed to in the year following the census.

> Does the Legislature have a mandated responsibility to enact a permanent map for the electoral period 2003 through 2010? Crabb asked in his Feb. 11 letter to the attorney general.
>
> . . .
>
> U.S. House Majority Leader Tom DeLay, R-Sugar Land, has been pushing state Republican leaders to draw new congressional districts to give the GOP a majority of the state's U.S. House seats. The Democrats currently hold a 17-15 majority.

The Houston Chronicle, February 22, 2003, Section A, p. 30.

Two months later, on April 20, 2003, *The Dallas Morning News* reported that Mr. DeLay's aides had several redistricting plans "under consideration." Second Edition, News Section, p. 5A. On April 23, 2003, *The Houston Chronicle* reported that a Democratic member of the Texas House Redistricting Committee, Rep. Richard Raymond, declared that Speaker DeLay's aides had drawn up "at least 10 different congressional maps," and that Mr. Raymond had asked Rep. Crabb for access to them. The paper reported, however, that Rep. "Crabb had filed a bill re-establishing the existing lines" and "has said he has no intention of taking any action on congressional redistricting unless Texas Attorney General Greg Abbott tells him he has to." Rep. Crabb denied that he had received any maps from Mr. DeLay or his aides. *The Houston Chronicle*, April 23, 2003, 3 Star Edition, Section A, p. 27. *See Fort Worth Star Telegram*, April 24, 2003, Final Edition, Metro Section, p. 4 ("In published reports, state Rep. Joe Crabb, the head of state House redistricting panel has said he won't proceed with congressional redistricting unless he is compelled to by the attorney general.").

The next day, April 24, 2003, *The Dallas Morning News* reported that Attorney General Greg Abbott cleared the way Wednesday [April 23] for the Legislature to redraw the state's congressional district lines but said lawmakers "cannot be compelled to do so." P. 7A. On April 24, 2003, as well, Mr. DeLay visited Austin for Speakers Reunion Day and met with Texas officials. On April 25, 2003, the *Austin American-Statesman* reported in part:

> While Democrats welcomed an opinion from Texas Attorney General Greg Abbott that the Texas Legislature does not have to draw new congressional districts, the Republican majority leader of the U.S. House said it should be done anyway.
>
> . . .
>
> "I think it's the responsibility of the Legislature," said U.S. House Majority Leader Tom DeLay, R-Sugar Land. "The constitution's very specific as to who is supposed to do redistricting and apportionment – not judges."
>
> On cue, House Redistricting Committee Chairman Joe Crabb, R-Atascocita, said he'll hold a public hearing next week on the topic.
>
> . . .
>
> DeLay said he met with Gov. Rick Perry, Lt. Gov. David Dewhurst and House Speaker Tom Craddick, R-Midland. Dewhurst, who presides over the Senate, said senators would consider bringing a redistricting bill to the floor if the House passes it.
>
> DeLay said Craddick told him that he will move the bill through the House.

> But Craddick said, "It's up to the House, and I don't know how the House really feels about it." Although he supports it, he said, "I'm not pushing it."

Austin American-Statesman, April 25, 2003, Metro/State Section, p. B6.

On May 6, 2003, *The Houston Chronicle* reported that at least two redistricting maps were under consideration, one submitted by Rep. Crabb and one by Rep. King. "King offered the map to the House Redistricting Committee after three days of public testimony on" Rep. Crabb's plan. "King drew the map with the help of Jim Ellis, a political aide to DeLay. A DeLay-established political committee – Texans for a Republican Majority – raised almost $1.5 million to help Republicans win a majority in the Texas House last year." *The Houston Chronicle*, May 6, 2003, Section A, p. 1.

On May 12, 2003, due to their view that redistricting was being controlled by Mr. DeLay, 55 Democratic House members boycotted the legislative session and went into hiding in Ardmore, Oklahoma. In an AP story, *The New York Times* reported that "Democratic lawmakers brought the Texas House to a standstill today by going into hiding and state troopers and the elite Texas Rangers were ordered to track them down . . . It occurred as the chamber was scheduled to debate a Congressional redistricting plan the Democrats opposed." *The New York Times*, May 13, 2003, Section A, p. 24. Carl Hulse, a *Times* reporter, wrote that "Mr. DeLay, majority leader of the United States House of Representatives and former state legislator who loves the rough and tumble of Texas politics has touched off a rumble in his home state with his push for a new districting map that would almost certainly hand Republicans four or

more additional seats in Congress, at the expense of Democrats." *The New York Times*, May 15, 2003, Section A, p. 1.

Efforts to force the House members back to Texas failed. In time, determinations were made that neither the Texas Rangers nor the Texas Department of Public Safety had jurisdiction to force the members back to Texas. *The New York Times*, July 12, 2003, Section A, p. 7 (AP story). A Department of Homeland Security aircraft tracked the legislators at the request of the Department of Public Safety and, according to some accounts, with the assistance of Mr. DeLay's staff. However, a true account of the matter remains unknown, pertinent records at the Department having been ordered destroyed. *The New York Times*, May 22, 2003, Section A, p. 16.

The Democratic House boycott succeeded in blocking consideration of the redistricting plan during the regular 2003 legislative session. However, the governor called three special sessions to secure eventual passage. In the first special session, the Lieutenant Governor rescinded the rule that a two-thirds majority was needed for passage of redistricting legislation. In the second special session, eleven Democratic senators left for Albuquerque to deprive the Senate of the constitutionally-mandated 21-member quorum. *See The New York Times*, July 29, 2003, Section A, p. 18 (AP story). In the third special session, "Mr. DeLay spent most of [a] week in Austin breaking the deadlock between state House and Senate GOP negotiators." *The Dallas Morning News*, October 16, 2003, Texas Section, p. 6A.

In addition to the media reports, amicus respectfully adverts to Exhibit 136 submitted by the Jackson Plaintiffs

in the District Court. The exhibit is a summary of memoranda and messages from Mr. Jim Ellis, an aide to Mr. DeLay. It tellingly illustrates the heavy influence, if not control, exercised by the Majority Leader on the redistricting process and upon its key participants, the Governor, the Lieutenant Governor, and the Speaker of the House. It shows an intent to exclude identified incumbent Democrats from the House and suppress their viewpoints.

The above summary, amicus submits, is sufficient to warrant a judicial inquiry whether the redistricting process was indeed heavily influenced, if not controlled, by Mr. DeLay. Adam Cohen, writing in *The New York Times*, quoted Mr. DeLay as saying, "I'm the majority leader, and I want more seats." *The New York Times*, May 27, 2003, Section A, p. 24.

In addition to the intrusion of Mr. DeLay and his aides, there are other troubling aspects about the redistricting process. There are a significant number of reports that there was not timely notice of, and open and on-the-record hearings on, the plans under serious consideration. Under the expedited briefing schedule, amicus has not had the opportunity to research and gather what appear to have been several operative deficiencies.

In the view of amicus, the reports and exhibit described above warrant an opportunity for Plaintiffs to challenge the process and for the District Court to rule on its fairness. If the Court reverses on grounds other than those advanced by Plaintiffs, which would declare mid-decade redistricting unlawful, then a remand would be appropriate to give Plaintiffs the opportunity to present evidence about Mr. DeLay's role and other defects in the redistricting process.

Amicus reiterates his view that this matter raises important Article I structural concerns that impinge upon the legitimacy, and the perception of legitimacy, of governance. Amicus respectfully submits that the Court should continue its vital role in promoting the fairness of districting.

CONCLUSION

Amicus respectfully submits that this Court should continue its role in reviewing challenges to unfairly partisan gerrymandering; it should hold that the process of Congressional districting and redistricting should not be dictated by incumbents and other federal officials; and should it reverse on grounds other than the unconstitutionality of mid-decade redistricting, it should remand this case to the District Court to determine whether the 2003 Texas redistricting process was heavily influenced, if not dictated, by the United States House Majority Leader and whether the process was otherwise "fair and adequate."

Respectfully submitted,

NEIL H. COGAN
Amicus Curiae
WHITTIER LAW SCHOOL
3333 Harbor Boulevard
Costa Mesa, CA 92626
(714) 444-4141 ext. 111

January 9, 2006