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, TEXAS, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

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

BRIEF OF *AMICUS CURIAE* SENATOR ROBERT C. JUBELIRER IN SUPPORT OF APPELLEES

JOHN P. KRILL, JR.
(*Counsel of Record*)
LINDA J. SHOREY
ANTHONY R. HOLTZMAN
KIRKPATRICK & LOCKHART NICHOLSON GRAHAM LLP
17 North Second Street
Harrisburg, Pennsylvania 17101
(717) 231-4505
Counsel for Amicus Curiae

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EDDIE JACKSON, *et al.*,

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INTEREST OF *AMICUS CURIAE*

Robert C. Jubelirer, in his capacity as President *pro tempore* of the Senate of the Commonwealth of Pennsylvania, submits this brief as *amicus curiae*.* He was a party in *Vieth v. Jubelirer,* 541 U.S. 267 (2004). Senator Jubelirer has also participated as *amicus* in an earlier redistricting case, *Branch v. Smith,* 538 U.S. 254 (2003) and in a case involving whether a federal statute created a private right of action against a state, *Alexander v. Sandoval*, 532 U.S. 275 (2001). He is a constitutional officer of Pennsylvania's legislative branch of government, which has responsibilities for both congressional redistricting and its own redistricting.

SUMMARY OF ARGUMENT

Congressional redistricting is inherently political, having partisan effects no matter how it is approached. There are no neutral judicial standards for ascertaining how much partisan effect in redistricting is too much, nor are there neutral standards for a court to use in drawing its own redistricting map. A legislature can reasonably determine that a districting plan has become so incompatible with changes in the political preferences of the electorate that an intra-decennial redistricting is warranted. The courts should defer to the most recent political judgment of the legislature in order to avoid making

* No counsel for a party authored this brief in whole or in part, and no person or entity other than the office of the *amicus* made a monetary contribution to the preparation of this brief. Letters of consent from counsel for the parties are on file with the Clerk.

political judgments of their own. Partisan redistricting per se does not impair the rights of any individual voter or any cognizable group. There are no constitutional restrictions on intra-decennial redistricting.

ARGUMENT

I. THIS CASE IS NO DIFFERENT THAN *VIETH V. JUBELIRER* IN THAT JUDICIALLY MANAGEABLE STANDARDS ARE LACKING FOR ADDRESSING THE INHERENT PARTISAN IMPACT OF REDISTRICTING

In *Vieth v. Jubelirer*, 541 U.S. 267 (2004), a majority of the Court took the view that judicially manageable standards for addressing partisan impact in redistricting plans had not been discovered. Moreover, every member of the Court recognized that partisan impacts are inherent in the fundamentally political process of configuring districts for legislative representation. *Id.* The Court has always been chary of invading the province of the political branches in this task. *See White v. Weiser*, 412 U.S. 783, 795-96 (1973) ("Districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task.").

Appellants argue that this matter is different than any previous redistricting case, that standards are at hand and that, for the first time, the Court should strike down a state law on the grounds that it embodies an unconstitutional quotient of partisan gerrymandering.

In advancing this contention, the Appellant Democrats' Brief[1] confuses three distinct concepts that relate to the legislative enactment of the Texas plan: the effect of the law, the purpose of the law and the motives of some or all of the lawmakers. *See* Democrats' Brief, p.17. Arguing that gaining partisan advantage was the sole motive for the plan, the Democrats contend that this case "does not ask a Court to determine how much bias is too much" because "a redistricting plan undertaken solely to achieve partisan advantage, and serving no other purpose, necessarily violates the Constitution." *Id.* Unscrambling the concepts conflated in this statement shows the error of the contention.

Legislative Purpose

A valid purpose of the Texas law can be determined by using principles of statutory construction commonly employed in equal-protection cases. In examining a statute that does not adversely affect a fundamental right or make a classification based upon a suspect criterion, the courts look for a legislative purpose that constitutes a rational basis for the statute. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 195-96 (1983). If any possible rational basis can be inferred for the statute, the courts will uphold it. *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 809 (1969) ("Legislatures are presumed to have acted constitutionally . . . and their statutory classifications will

[1] References to the "Democrats' Brief" or "the Democrats" are to the Brief for Appellants, the "Democratic Congressional Intervenors" and the "Jackson Plaintiffs" in No. 05-276 and to those parties respectively.

be set aside only if no grounds can be conceived to justify them.").

Applied here, it is apparent that one possible purpose of the Texas plan was "to *undo* a perceived *dis*advantage imposed previously," i.e., by the 1991 Democratic gerrymander that was perpetuated by the District Court's 2001 plan. *See* Memorandum Opinion of District Court, incorporated at J.A. 11 (Tab 266), at 14 and 22 (emphasis in original). Viewing the incongruity between the 2002 Republican sweep of statewide offices and the Democrat retention of a majority of congressional seats,[2] the Texas legislature could reasonably have perceived a need for legislation to reconfigure the communities of political interest in congressional districts to make them more reflective of present-day Texas.[3] Since grouping people for

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[2] *See* Barone and Cohen, *The Almanac of Am. Politics*, 2004 and 2006 editions (Nat'l Journal Group, Wash., D.C.) The *Almanac* is a useful compilation of statistics as well as a font of political gossip. It is cited here only for the former. Texas Republicans now hold all 29 statewide elective offices and have majorities in both houses of the legislature. Yet, in 2002, under the District Court's redistricting plan, Democrats won 17 out of 32 congressional seats.

[3] The District Court should not be blamed for producing a plan that was out of sync with the inclinations of Texas voters. Its mission was to produce a one-person-one-vote plan that caused minimal violence to past legislative judgments about representation. The District Court simply couldn't replicate the legislative process. The District Court necessarily received its input in public. It could have no private discussions with constituents, local officials or members of Congress to find out what they really wanted. The candid preferences and, perhaps more importantly, dislikes and local rivalries, of constituents are apt to elude a court, which will hear only the sanitized views of those witnesses who choose to speak in a public forum. Legislators, though, may actively seek out constituent comment rather than wait for counsel to present a witness list. Expert witnesses have inordinate influence on courts, whereas legislators rely on their intimate knowledge of constituencies despite what the experts say. Most importantly,

(Continued on following page)

political representation is the essence of having districts, the Texas legislature's possible perception of a need to regroup to reflect changes in the politics of its citizens would be a rational basis for the statute.

Even casting the legislative purpose in terms of a purely partisan objective does not lead to a different conclusion. This Court has *relied* on partisan gerrymandering as a basis to uphold a redistricting plan. *See Easley v. Cromartie,* 532 U.S. 234 (2001) (partisan gerrymander is a valid purpose, defeating claim of racial gerrymander).[4] The Court there equated "the creation of a safe Democratic seat" with "a constitutional political objective." *Id.* at 239. Accordingly, far from violating the Constitution, even a partisan gerrymander that "serves no other purpose" has a valid purpose.

A legislative purpose to enact a partisan gerrymander is essentially no different than a purpose to protect incumbents. Incumbent protection is often achieved through a "bipartisan gerrymander." A redistricting plan that protects incumbents has essentially the same effect (or the same non-effect, as argued below) on the rights of individual voters in a district as a partisan gerrymander. Yet, the

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legislators may initiate policy changes, discarding even their own precedent.

[4] The Democrats' Brief does not cite *Easley.* The result they seek here cannot be reconciled with *Easley.* The Court described the effect of the redistricting plan in that case as follows: "A legislature trying to secure a safe Democratic seat is interested in Democratic voting behavior. Hence, a legislature may, by placing reliable Democratic precincts within a district without regard to race, end up with a district containing more heavily African-American precincts, but the reasons would be political rather than racial." *Easley*, 532 U.S. at 245. The Court in *Easley* upheld precisely the partisan effect contested here.

Court has recognized "incumbent protection" as a valid objective of redistricting. *Bush v. Vera*, 517 U.S. 952, 964 (1996) (with respect to redistricting, "we have recognized incumbency protection . . . as a legitimate state goal") (citations omitted); *see also Karcher v. Daggett*, 462 U.S. 725, 740 (1983).

Legislators' Motives

The motives of some or all of the legislators who voted for a law are distinct from the law's purpose. Motives are not a valid area of inquiry in statutory analysis. *See Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) ("The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, 3 L.Ed. 162, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned."); *see also McCreary County, Kentucky v. ACLU*, 125 S.Ct. 2722, 2734 (2005) (legislative purpose must "emerge[] from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts"). Legislative history of a law excludes evidence of the personal motives of the individuals who comprise the state entity that made the pronouncement. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 508 (1975) ("Our cases make clear that in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it."). Any other rule would allow courts to pick and choose from statements or conduct of individual members of a legislative body, in order to ascribe a motive to all members. To avoid this skewing of motives by individuals, a court would have to induce each member of the body to waive Speech or Debate immunity (when a federal law is at issue) or its common law equivalent (for state legislators) and to

appear in court to testify about motive.[5] The court would in effect have to take a roll-call vote to determine the majority motive, if any, for the law. Besides being infeasible, such a courtroom poll might not even resemble the reality at the time of enactment. Therefore, the Court has wisely excluded legislators' motives from the test for legislative purpose. *A fortiori* a court should not impute the motives of non-members who lobbied for a law to the legislature itself.[6] However, even if the motives of some legislators in this case are conflated with the purpose of the law, the purpose remains a valid one. *See Easley*.

Legislation's Effect

The partisan bias in the plan is part of the *effect* of the statute. Partisan bias in a districting plan has been variously defined. To some, it is the degree to which the votes for a party's candidate in a district vary from the statewide voting strength of the party, measured by selecting various statewide races. *See, e.g.,* J.A. at 34-36 (report of Professor Alford). To others, it is the difference in how parties would fare in winning seats, if hypothetically given the same percentage of votes. Brief of *Amici* King *et al.* at 3. There may be other views, but, in any event, partisan bias is a concept distinct from legislative purpose or legislators' motives.

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[5] *Bogan v. Scott-Harris*, 523 U.S. 44 (1998) (unanimously reaffirming the existence of common law legislative immunity and clarifying its applicability to local legislators).

[6] For purposes of Texas's congressional redistricting, even Rep. Tom DeLay was not a legislator. He was as free as any citizen to petition the legislature of his state for action.

Having distinguished the effect from the purpose and/or motives for the law, the Court's task, if anything, is to weigh the law's effect, not to try to quantify its purpose or the motives of the legislators who, as a body, enacted it. The Court is therefore faced in this case with the same questions as in *Vieth v. Jubelirer*: How much partisan effect is too much? How is it to be measured? The answers are the same as in *Vieth*: there are no neutral, objective standards that a court can apply.

II. THERE ARE NO JUDICIALLY MANAGEABLE STANDARDS FOR ASSESSING PARTISAN GERRYMANDERING

Various tests have been proposed for judicial resolution of political gerrymandering claims. All these tests have inherent partisan impacts. As the *Vieth* plurality explained, not one is either neutral or judicially manageable. *See Vieth*, plurality opinion at III.A. *Amicus curiae* respectfully offers the following additional analysis of potential tests.

In *Vieth*, Justice Stevens suggested that courts should test for impermissible partisan gerrymandering using the same standard that is employed in racial gerrymandering cases. *Vieth*, 541 U.S. at 339. That is, that courts should apply strict scrutiny if a state legislature has engaged in congressional redistricting with a predominant partisan purpose, "forsaking all neutral principles." *Id.*

The first problem with this test is that it would apply strict scrutiny to purpose rather than, as in other cases, to

effect.[7] When thus refocused, the test is somewhat tautological because to qualify for the test is to fail the test. A statute the predominant purpose of which is invalid would instantaneously fail the test, because the state necessarily could not articulate a compelling state interest, which is found in the legislative purpose. A second problem is in the labeling of the purpose. A valid purpose of redistricting is to restructure communities of political interest to better reflect changing politics. Yet, because in any such case the result will have partisan impact, a court could label the purpose as predominantly partisan. In construing a statute, though, a court has a duty to recognize any plausible valid purpose. *McDonald*, 394 U.S. at 809 ("Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent."); *McGowan v. State of Maryland*, 366 U.S. 420, 425-26 (1961). Characterizing the purpose of a statute in the worst possible terms is not the function of the courts. Characterizing the purpose in the best possible terms is the duty of a court, which must uphold the statute if at all possible. A third problem with the test is that it hypothesizes the existence of "neutral principles." There are none. For example, protecting incumbents is considered a valid principle for districting. Yet, incumbent protection has

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[7] Strict scrutiny looks at statutory effect on a fundamental right, then looks at the purpose to see whether the statute is narrowly tailored to advance a compelling state interest. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). Strict scrutiny is not itself a standard. It merely shifts the burdens. Strict scrutiny is unwarranted in partisan redistricting claims. *See Vieth*, plurality opinion. There is another key distinction between racial and partisan gerrymandering claims. The former focus on the district level, where evidence of them is largely found. The latter relate to overall state plans. *See* J.A. at 34 (report of Professor Alford).

partisan impacts and is really just a species of partisan gerrymander. Respecting municipal boundaries has likewise been considered a neutral principle, yet 19th century city and county lines have been ignored by the spread of residential and commercial development since World War II. Urban municipal boundaries, moreover, can be used to "pack" Democrats and minorities into districts to achieve partisan goals. Highway and public sewer corridors are arguably more relevant to defining communities of political interest, but attempting to use them also produces partisan effects, as well as "ugly" districts.[8] Ultimately, it must be acknowledged that the very concept of districting has implicit partisan aspects.

Justice Souter remarked in *Vieth* that courts should reach the conclusion that impermissible partisan gerrymandering has occurred when a plaintiff demonstrates: (1) that he is a member of a "cohesive political group"; (2) "that the [congressional] district of his residence . . . paid little or no heed" to traditional redistricting principles; (3) that there were "specific correlations between the district's deviations from traditional [re]districting principles and the distribution of the population of his group"; (4) that a hypothetical congressional district, which includes the plaintiff's residence, could remedy the packing or cracking of the plaintiff's group and deviates less from traditional redistricting principles; and (5) that "the defendants acted intentionally to manipulate the shape of the district [in question] in order to pack or crack his group." *Vieth*, 541 U.S. at 347-50. This test was addressed by the *Vieth* plurality. *Id.* at 296.

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[8] Because patterns of population growth have not conformed to anyone's idea of neatness or beauty, the courts should not use aesthetic criteria for evaluating the shapes of districts.

In addition, *amicus curiae* respectfully submits that members of "cohesive political groups" are impossible to identify on a state-wide, partisan basis. Unlike members of racial groups, whose identity is unchangeable, the political identity of a voter is changeable from election to election and candidate to candidate. Voter registration does not identify "cohesive political groups," because voters often cross party lines in the same election to vote for candidates of different parties. In Pennsylvania, for example, where Democrats have had about half a million more registered voters than Republicans, voters split tickets in 2000 and 2004, electing candidates of both parties in statewide races.[9] In 2000 and again in 2004, Pennsylvania voters picked a Democrat for president and a Republican for senator. One cannot call these shifting majorities a "cohesive political group." Even single-issue voters cross party lines: Pennsylvania has pro-choice Republicans as well as pro-life Democrats and vice-versa. Moreover, voters enjoy the protection of the secret ballot, so that even party workers may secretly split their tickets. Although Texas looks quite Republican at present, one cannot assume that Texas voters behave any differently. The right combination of issues and candidates could produce abrupt change.

Moreover, "traditional districting principles" should not become a constitutional standard when no basis for such exaltation exists. They may seem attractive, because courts are familiar with them, but such a freezing of past practices into constitutional doctrine would deprive legislatures of their distinctive function: the ability to

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[9] *See Almanac,* 2004 and 2006 editions.

envision the future and change the way things are done. The Court should not promote old practices that themselves have partisan effects, but that the Court is willing to condone.

Justice Breyer said that impermissible partisan gerrymandering involves "the *unjustified* use of political factors to entrench a minority in power." *Id.* at 360. In explaining his standard, Justice Breyer commented:

> By entrenchment I mean a situation in which a party that enjoys only minority support among the populace has nonetheless contrived to take, and hold, legislative power. By *unjustified* I mean that the minority's hold on power is purely the result of partisan manipulation and not other factors. These "other" factors that could lead to "justified" (albeit temporary) minority entrenchment include sheer happenstance, the existence of more than two major parties, the unique constitutional requirements of certain representational bodies such as the Senate, or reliance on traditional (geographic, communities of interest, etc.) districting criteria.

Id. The *Vieth* plurality addressed this standard. *Id.* at 299. *Amicus curiae* respectfully submits, in addition, that defining when a party "holding power" is one "that enjoys only minority support" requires multiple exercises of subjective political judgment. To be "holding power," how many offices must a party hold and for how many election cycles? How does one determine whether a party enjoys only minority support? Does one look only to the most recent elections or does one give weight to the choices of voters of the past? A party whose support is waxing will want a court to weigh its present support. A party whose support is waning will contend that it is still a majority

party and want to include less recent elections in the scales.[10] Moreover, the court would have to adjust for significant factors that affected each election, such as the effects of incumbency, campaign spending, the relative quality of competing candidates, hot issues and even variances in weather across the state on election day. Whatever answers a court gives to these questions will have partisan impacts on the court's final assessment.

Amici King, *et al.* contend that there is a judicially manageable standard that is based on their concept of partisan symmetry. They advocate having the courts use computer programs to "examine all relevant election-related data" to calculate the difference in seats that two parties would win at a given vote level. Brief of *Amici* King, *et al.* at 9. However, as they acknowledge, there are different approaches and "inputs may vary." *Id.* at 10. Some of the variables include the presence of incumbents, whether races are contested, party registration, prior party control of the district, "candidate quality" and demographics. *Id.* Scandals and campaign spending, together with "relative campaign effectiveness and the like" are also issues.[11] How one weighs these factors is a subjective exercise. How strong is an incumbent? How poorly did a candidate handle debates? Can you reduce these subjective factors to numerical values? Ultimately, this approach requires a court to pick which expert it

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[10] If one does not dilute the present preferences of Texas voters by weighing the votes of the past, it would appear that the Democratic Party in Texas enjoys only minority support.

[11] Gelman and King, *A Unified Method of Evaluating Electoral Systems and Redistricting Plans,* Am. Journal of Political Sci., Vol. 38, No. 2, May 1994, at 544.

prefers. The expert's choices then become the court's choices. This approach would simply try to mask the political judgments that a court would be making, using experts and black boxes.

III. THE PARTISAN IMPACTS OF REDISTRICTING DO NOT AFFECT INDIVIDUAL RIGHTS

None of the appellants have shown that any of their rights have been impaired by the partisan impacts of redistricting. The Texas plan conforms to the one-person-one-vote requirement. Each voter has the right to cast a secret ballot. Each voter even has the right to write in a candidate on the ballot, if the candidates listed are not acceptable.[12] Like voters everywhere, voters in Texas can, and do, split their tickets.[13] Nobody has a right to have the candidate of their choice win. No candidate has a right to win election to public office.

Any candidate elected to Congress will generally tend to represent the overall interests of the constituency of the district.[14] This is why a Democrat elected in a conservative

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[12] TEX. ELEC. CODE ANN. § 146.001.

[13] *See* JACOBSON, THE POLITICS OF CONG. ELECTIONS (Addison-Wesley Educ. 5th ed. 2001) at 108 (noting a growing proportion of voters in congressional races "who vote contrary to their expressed party affiliation").

[14] Under the "median voter" theory, elected officials gravitate towards the position of the voter at the hypothetical equilibrium point of politics in the district. *See* Congleton, *The Median Voter Model*, Ctr. for Study of Pub. Choice, George Mason Univ. (2002) (visited on Jan. 29, 2006 *at* http://www.rdc1.net/forthcoming/medianvt.pdf). For a more complex model that incorporates both constituent interests and institutional concerns, *see, e.g.*, Lopez, *The Legislator as Political Entrepreneur: Investment in Political Capital*, The Review of Austrian Econ. (2002), 15:23, 211-228.

district migrates at least somewhat to the right of the party and a Republican in a liberal district moves at least somewhat to the left of the party. Regardless of party, the member tries to bring value to the district in constituent services, economic development and public projects.

The Court has been presented with the spectre of computers determining outcomes of elections, by the grouping of voters. However, no individual voter is an automaton in a computer-manipulated matrix. Each voter makes choices, candidate by candidate and office by office. Computers are simply sifting data to describe what real live people are doing at the ballot boxes. The computers are not directing their actions. This undeniable truth exposes the sham of concern about the impact of gerrymandering on individual voters.

A good candidate who has the feel of a district can defeat a bad candidate despite the best computerized cartography. In Pennsylvania, for example, an incumbent Republican was defeated in 2002, despite running in a heavily "Republican" district.[15]

The power of incumbency is nevertheless a major factor in holding down the turnover in congressional seats.[16] Voters get to know, and often to like, incumbents

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[15] *See Almanac*, 2006, p. 1465. The Democrat who won the 17th District in 2002 was reelected in 2004 by a bigger margin.

[16] While retention of incumbents is high, many factors other than gerrymandering contribute to it: "The list of possible causes for the growth of the incumbency advantage is quite long [and] includes the rise of candidate-centered politics, the increased use of the perquisites of office (such as porkbarreling, the franking privilege, credit claiming and casework), and rising campaign costs that inhibit effective challengers." Persily, *In Defense of Foxes Guarding Henhouses: The Case for*

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and usually choose to retain them. That they do so with high frequency does not mean that they are "controlled" or deprived of the right to choose. They are free to choose incumbency over other options.

The partisan effects of congressional redistricting, therefore, do not affect the rights of individual voters. Why then has redistricting engendered so much litigation?

The answer is that the fight, battled state by state, is really about the organizational control of the House of Representatives. This control matters to the parties and the members of the House. It determines the Speakership and committee chairs and affects many perquisites of office. But, it is not a judicially cognizable interest of the individual voter. The individual plaintiffs are, in actuality, merely proxies for the real combatants, the political parties.

In suits over alleged partisan gerrymandering, plaintiffs invoke the formula that they are "unable to elect the candidate of their choice." As demonstrated, when it comes to partisan redistricting, this is an empty, conclusory allegation and not one that shows the substance of any real harm.

IV. UPHOLDING THE TEXAS PLAN IS THE ONLY OUTCOME THAT EMBODIES JUDICIAL DEFERENCE TO LEGISLATIVE POLICY

To find for a partisan gerrymandering claim a court would be forced to make forbidden policy determinations

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Judicial Acquiescence to Incumbent-Protecting Gerrymanders, 116 HARV. L. REV. 649, 666 (2002).

"about how this Nation is to be governed." *Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring). In contrast, in one-person, one-vote cases, the courts accept and incorporate the basic legislative choices previously made.

This distinction between the two types of cases becomes clear in contemplating relief. Every one-person, one-vote case to date has been resolved either by a legislature enacting a new districting plan or, if the legislature is deadlocked, by a court drawing a new map. In the latter instance, when the court draws a map to achieve population equality, the court must deviate as little as possible from the previously enacted map, thus preserving the policy choices inherent in the map. *See White*, 412 U.S. at 795-97. But, if the courts task themselves with exorcising partisanship from mapmaking, they would not be able to use previous legislative enactments as the historical base for map-drawing because those plans are themselves infected with politics. Even if the judiciary tried to retain some "good" political choices by the legislature while discarding other "bad" partisan choices inherent in a previous enactment, the judiciary would still be making political choices and would find both its decisions and its decision-makers being critiqued for partisan bias.

The Court faces this problem here. It has three basic options in this case. First, if the Court affirms, elections will be held again under the Texas statute's map. Second, if the Court reverses, finding the statute unconstitutional, elections will occur under the plan adopted by the District Court in 2001, which substantially perpetuated the Democrat gerrymander of the '90s. This plan would be used until superseded. Third, the Court could conceivably find fault with both plans and order the District Court to allow

the Texas legislature an opportunity to create a new plan, using whatever criteria the Court adopts. If the legislature failed to do so, the District Court would have to draw a map, using the Court's criteria. All these choices have partisan, political effects, but only one is a proper course for the judiciary.

The current map embodies the most recent policy decisions of the legislature about how communities of political interest should be represented. Although the map, like any plan, has partisan impact, by upholding it the Court would be deferring to legislative policy on political issues. *Id.*

The second option, involving a reversion to the District Court's map, also embodies political choices of the legislature, in so far as it is based on the earlier statute. In that respect, it is no different than the present map. But the District Court's map reflects the legislative policy of more than a decade ago. When a later legislature passes a statute that is inconsistent with an earlier, unrepealed statute, the courts do not choose which they prefer. The courts give effect to the later enactment, deferring to the most recent policy of the legislative branch, rather than making a policy choice themselves. *See Posadas v. Nat'l City Bank of New York*, 296 U.S. 497, 503 (1936). Implicit in this deference is a recognition that new legislatures are elected so that they can adapt policy to fit changing times and evolving constituencies. So, too, in redistricting, the courts should always defer to the legislative determination that was made closest to the present time. Otherwise, the courts would be expressing a preference for past policy, yet applying it to present circumstances.

The third choice, perhaps unlikely but possible, would represent a political decision by the Court to discard all prior legislative policy choices and to start over with a blank paper and new tools. This, however, would require the Court not just to reject legislative guidance, but also to make subjective choices about how to measure partisan bias and how much bias is an acceptable amount. To be fair, the standards would have to apply consistently, both to legislative and judicial mapmaking. The Court could not in good conscience use one standard to overturn the current statute, yet fail to apply it to the District Court's plan or to the drafting of a new plan. For example, the Court should not use conformity to traditional municipal boundaries as a standard of review for a legislative map, then waive the standard for a court to draw a map (because the standard tends to compact minorities and Democrats into cities). In any event, because there are no neutral standards either for measuring bias or for avoiding it in mapmaking, the third option would put the judiciary on the political spot.

The Court's decision in this case will obviously have partisan political impact regardless of which option it chooses. However, only the first option, affirmance, allows the judiciary to avoid making policy choices about current politics and communities of political interest by deferring to the political branch of state government.

V. INTRA-DECENNIAL REDISTRICTING IS WITHIN THE DISCRETION OF THE LEGISLATURE

Article I, Section 4 of the United States Constitution provides that the "time, places and manner of holding Elections for Senators and Representatives shall be

prescribed in each State by the Legislature thereof; but Congress may at any time by Law make or alter such regulations[.]" U.S. CONST. art. I, § 4 (emphasis added). "[T]hese comprehensive words embrace authority to provide a complete code for congressional elections." *Smiley v. Holm*, 285 U.S. 355, 366 (1932); *United States v. Classic*, 313 U.S. 299, 311 (1941) ("states are given, and in fact exercise a wide discretion in the formulation of a system for the choice by the people of representatives in Congress").[17] *See also Wesberry v. Sanders*, 376 U.S. 1, 33 (1964) (Harlan, J., dissenting) ("the Convention understood the state legislatures to have plenary power over the conduct of elections for Representatives, including the power to district well or badly, subject only to the supervisory power of Congress").[18]

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[17] Appellee Henderson argues that various limits in early state constitutions should be imputed to exist in the federal Constitution as some form of limitation on the power of the states. Brief of Henderson at 8 *et seq.* The opposite inference is correct. If the Framers knew about such limits yet did not put them into the text of the Constitution, they must have chosen not to restrict the power granted to the state legislatures.

[18] The Framers knew that the authority they were giving to the states included the power to "gerrymander." They gave Congress the power to override any state regulation that Congress deemed contrary to the nation's interests. Ironically the power given to the states was not controversial, but Congress's proposed supervisory power was contested in the Convention. When Pinckney and Rutledge moved to strike the grant of power to Congress, Madison defended it:

> The necessity of a Genl. Govt. supposes that the State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices. . . . It was impossible to foresee all the abuses that might be made of the discretionary power. . . . Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as *to favor the*

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Over time, Congress has repeatedly exercised its supervisory power. In 1842, Congress enacted a statute requiring all House representatives to be elected from single-member, contiguous districts. *See* Act of June 25, 1842, 5 Stat. 491. In 1872, Congress enacted a statute requiring vacant House seats to be filled by way of special elections held every second year on the first Tuesday in November. Act of Feb. 2, 1872, 17 Stat. 28. In 1882, Congress enacted a statute requiring congressional districts to contain "as nearly as practicable an equal number of inhabitants." Act of Feb. 25, 1882, 22 Stat. 5. In 1901, Congress enacted a statute requiring that congressional districts be compact as well as contiguous. Act of Jan. 16, 1901, 31 Stat. 733. Then, in 1929, Congress allowed all the aforementioned requirements but one to lapse. *See* Act of June 18, 1929, 46 Stat. 21; *Wood v. Broom*, 287 U.S. 1, 7 (1932). Today, the only constraint that Congress has placed on congressional redistricting in the states is the requirement that Representatives be elected from single-member districts, although election on a statewide basis is permitted under certain uncommon circumstances. *See* 2 U.S.C. §§ 2c, 2a(c); *see also Branch v. Smith*, 538 U.S. 254 (2003).

Although Congress has exercised its supervisory power before, it has never used that power to address intra-decennial redistricting. Because the legislatures have comprehensive power in the absence of congressional

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> *candidates they wished to succeed*. . . . What danger could there be in giving a controuling power to the Natl. Legislature?

II RECORDS OF THE FED. CONVENTION OF 1787 at 240 (M. Farrand ed. 1911) (1937 Revised ed.) (emphasis added). Madison's remarks show that the Framers knew that art. I, § 4 empowers the states to do precisely what has since become known as gerrymandering.

limitation, it follows that intra-decennial redistricting is within their discretion.

History shows that the generation that ratified the Constitution believed that state legislatures had the power to engage in intra-decennial congressional redistricting. Throughout the decade immediately following ratification of the Constitution, state legislatures regularly altered the way in which members of Congress were elected.

Pennsylvania's General Assembly adopted different plans for congressional elections in 1788, 1790, 1792 and 1794. *Compare* 13 Pa. Stat. at Large (1682-1801) at 140-45 (Oct. 4, 1788) (providing for the at-large election of eight representatives) *with* 14 Pa. Stat. at Large (1682-1801) at 20-23 (Mar. 16, 1790) (providing for eight congressional districts and one representative per district) *with* 14 Pa. Stat. at Large (1682-1801) at 271-74 (Mar. 16, 1791) (providing for the at-large election of thirteen representatives) *with* 15 Pa. Stat. at Large (1682-1801) at 171-74 (Apr. 22, 1794) (providing for twelve congressional districts and thirteen representatives). *Id.*[19]

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[19] The first federal elections in Pennsylvania "were in large measure the continuation of a struggle between two well-defined political parties." I DOCUMENTARY HISTORY OF THE FIRST FED. ELECTIONS 1788-1790 (Univ. of Wisc. Press 1976) at 229. The Pennsylvania Assembly seems to have chosen methods of election for Congress based on considerations of partisan advantage. In 1788, for example, most Federalists were in Philadelphia and district elections would have given them fewer seats than an at-large election. "By obliging the whole state to vote in one ticket, it is expected the Federalists will prevail by a majority of two to one in the choice of Representatives for the lower house of Congress." *Id.* at 302 (quoting Benjamin Rush). For the 1788 congressional elections, some states used at-large elections while others used districts. *Id., passim.*

During the same period, the New Jersey legislature flip-flopped on its congressional election policies. *Compare* N.J. Act of May 29, 1792 (providing for the at-large election of five representatives) *with* N.J. Act of Mar. 1, 1798 (providing for five congressional districts and one representative per district) *with* N.J. Act of Nov. 7, 1800 (providing for the at-large election of five representatives).[20] Massachusetts switched from having four multi-member districts in 1792 to having single-member districts in 1794. *Compare* Mass. Resolves, June 30, 1792, p. 25 *with* Mass. Act of June 26, 1794.

That state legislatures freely altered the way in which members of Congress were chosen from one election to the next and that the alterations were never challenged on constitutional grounds are facts that show intra-decennial changes were consistent with the legal and popular understanding of the newly-ratified Constitution.

Furthermore, intra-decennial congressional redistricting does not undermine the one-person, one-vote doctrine embodied by the Equal Protection Clause of the Fourteenth Amendment. The Appellants, here, argue that when state legislatures engage in intra-decennial congressional redistricting, lawmakers pursuing a partisan agenda are able to use their knowledge of post-census population shifts to produce congressional districts that appear (in light of the most recent decennial census data) to have populations equal to those in other congressional

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[20] New Jersey's switch back to at-large election for 1800 must have had partisan impact. *Amicus* does not know at this time which party sought advantage in New Jersey through such changes, but in 1800 there was a partisan realignment, with the Federalists losing and Jeffersonian Republicans taking control of the House.

districts but that in reality are packed with voters from the disfavored political party. However, their fears of such tactics, although unwarranted, should extend as well to the very first possible redistricting after a census. This is because decennial census data are *always* inaccurate, even at the moment they are released. The federal government takes approximately 1.3 years to complete a census and to release the attendant data, *see* U.S. CENSUS BUREAU, FREQUENTLY ASKED QUESTIONS (Oct. 12, 2004), *available at* http://www.census.gov/dmd/www/genfaq.htm. Census data are afflicted by a minimum 13% margin of inaccuracy at the moment they are released. Assuming an additional, natural inaccuracy margin of 5% (a modest assumption, considering the large number of citizens who either refuse to participate in a typical census or participate multiple times),[21] decennial census data may be up to 18% inaccurate when released.

Nevertheless, the census represents the only attempt at an actual population count that the nation has.[22] It is

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[21] Undercount rates for the 2000 census may have been: 0.67% for non-Hispanic whites, 0.96% for Asians, 2.17% for blacks, 2.85% for Hispanics, and 4.74% for Native Americans and Alaskans. *See* PRESIDENTIAL MEMBERS, U.S. CENSUS MONITORING BD., FINAL REPORT TO CONG. 7 (2001). The undercount rate for blacks was more than 3% higher than the national undercount average in every decennial census between 1940 and 1990. Hogan and Robinson, *What the Census Bureau's Coverage Evaluation Programs Tell Us About Differential Undercount* § 1 (unpublished manuscript, presented at the Research Conference on Undercounted Ethnic Populations, May 5-7, 1993), *available at* http://www.census.gov/population/www/documentation/1993/conference.html.

[22] The Census Act requires an actual count of population to be used for apportionment. Section 195 of the Census Act, 13 U.S.C. § 195; *Dep't of Commerce v. United States House of Representatives*, 525 U.S. 316, 340 (1999) ("there is only one plausible reading of the amended § 195 [of

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not the Court's function to put a shelf-life date on it. Moreover, there has never been an instance of a court depriving an elected legislature of its right to exercise a continuing review and amendment of the laws under which we are governed.[23] A "one shot" rule would be both unprecedented and contrary to the fundamental nature of the legislative process in a democracy.

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the Census Act]: It prohibits the use of sampling in calculating the population for purposes of apportionment").

[23] Fears have also been expressed that intra-decennial redistricting will be used more frequently to improve margins of control in an increasingly polarized and partisan House. These fears are misplaced for two reasons.

Any experienced state legislator knows that redistricting consumes vast amounts of time and energy. Even when the same party is in the majority, the two chambers of the legislature can have difficulty reaching agreement, as the record in Texas shows. Therefore, states would not lightly undertake intra-decennial redistricting. It is not apparent that Texas has started a broad revival of the practices of the 1790s.

Furthermore, the House of Representatives is not polarized due to redistricting. The un-gerrymander-able Senate is at least (and perhaps more) polarized on a partisan basis. For example, in both the Clinton and Bush administrations, the Senate has been controlled by a partisan opposition that refused to bring many judicial nominations to a vote. *See* REHNQUIST, 1997-2002 YEAR-END REPORTS ON THE FEDERAL JUDICIARY.

CONCLUSION

Amicus curiae Senator Robert C. Jubelirer respectfully requests that this Court affirm the district court's judgment for the reasons stated above.

Respectfully submitted,

JOHN P. KRILL, JR.
(*Counsel of Record*)
LINDA J. SHOREY
ANTHONY R. HOLTZMAN