1984 WL 565924 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Susan J. DAVIS, et al., Appellants,
v.
Irwin C. BANDEMER, et al., Appellees.

No. 84-1244.
October Term, 1984.
June, 1984.

On Appeal from the United States District Court for the Southern District of Indiana

Brief of Appellees

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*i QUESTION

Whether the court below correctly ruled that the Indiana law apportioning the state for purposes of electing its bicameral state legislature violates the equal protection clause of the fourteenth amendment where that law: (1) was designed to and does preclude voters of one political party from electing a majority of the legislature irrespective of that party's performance at the polls; (2) mixes single-member and multimember districts for the purpose of concentrating the vote of the minority party in some areas and diluting it in others; (3) is replete with highly irregular configurations, lacks compactness, ignores traditional political subdivisions and reflects no concern for communities of interest; (4) was adopted through a legislative process which wholly excluded one of the major political parties and the public; and (5) is without rational basis or neutral criteria.

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The opinion of the three-judge federal district court is reported at 603 F. Supp. 1479 (1984). With that exception, although appellees ("plaintiffs") do not agree with all aspects of appellants' ("defendants") statement of this Court's jurisdiction and the identities of the parties, they regard the discrepancies as immaterial and therefore accept defendants' version for these purposes.

STATEMENT OF THE CASE

A. Indiana's Legislature

The state legislature or "General Assembly" in Indiana consists of a 100-member House of Representatives and a 50-member Senate. Representatives are elected to ***2** two-year terms. Senators are elected to four-year terms. Senators' terms are staggered so that only twenty-five Senate seats are subject to election in any general election (A-5).[1] The General Assembly is not a full-time legislature (A-5). In odd-numbered years (following a general election), the General Assembly meets in a "regular session" consisting of no more than 61 session days and concluding by April 30 (A-6). In even-numbered years the General Assembly meets for up to 30 session days concluding by March 15. The Governor may call the General Assembly into special session (A-6). Indiana has no mechanism for referendum or initiative. Adoption of any such procedure would require constitutional amendment that in turn requires adoption by both houses of the General Assembly in two consecutive legislatures. IND. CONST. art. 16, § 1.

Legislative process in each house is controlled by the political party holding a majority of seats in that house. The ability of a party to find expression for its views in legislative action is drastically affected by its status as majority or minority in the legislature. The majority party in the House of Representatives elects the speaker, who in turn exercises absolute control over the committee to which bills are assigned and whether a bill will ever reach the floor (A-6). In Indiana, a speaker wishing to prevent a piece of legislation from becoming law may simply refuse to "hand it down" as a matter of unfettered discretion (A-6). This unreviewable veto power gives the speaker the power to bargain for affirmative votes on any issue. Similarly, the majority party ***3** elects the floor leaders in both houses who control the flow of legislation, the assignment of members to committees, and the appointment of committee chairs (A-6).

B. Indiana's Politics

Indiana is a "swing state"; neither overwhelmingly Democratic or Republican (A-11). The best measure of a party's "baseline" or normalized strength in any given area are the races for "anonymous" statewide offices. [2] In Indiana the clerk or reporter of the state appellate courts was on the statewide ballot each year through 1982. As a practical matter, elections for these offices (and state auditor and treasurer) are simply reflections of party vote because these races present no policy issue or controversy. Indeed, very few voters even know the names of the candidates.

In recent years in which neither party scored landslide victories in Indiana or nationally (1976 and 1982), the Republican candidates for the clerk or reporter received 51.0% and 50.8% of the statewide vote for the two major parties (Pl. Ex. 30; JA-37). [3] In the best Democratic years (1974 and 1958), the Republican totals declined to 44.3% and 44.6%, and in the best Republican years (1980 and 1972), the Republican totals were 56.1% and 57.4% (Pl. Ex. 30; JA-37). Although there is a small third-party vote for statewide offices, there is no significant third-party vote for legislative seats (Def. Exs. W and X; Nov. R. 126 and 127). Because the Senate is elected for staggered terms (one-half stands every two years), victories in consecutive elections are necessary ***4** for a party to gain control of the General Assembly and change the districting for future elections. A party that can insulate itself from swings of 6% to 7% from the norm can effectively perpetuate its control of the legislature. In the particular circumstances before the Court, if the incumbent Republican majority can retain a majority of the seats despite a 56% vote for the opposition, it withstands the Democratic high water mark. The record includes basic Indiana election results since 1954 (Pl. Ex. 30; JA-37). It reveals no two consecutive elections in which the same party attained 55% of the statewide vote.

Indiana has a strong tradition of adherence to party lines. It has not seen widespread crossover voting. As a result, individual candidates deviate from party line votes less than in some states (Nov. R. 244). Indeed, in some counties the voting machines are set to require a vote for all candidates of a party to open the machine. To vote only for president, the voter must throw the party lever then push up each of the dozens of other individual levers.

C. Apportionment in Indiana Before 1981

Article 4, Section 5 of the Constitution of the State of Indiana requires that at the first session of the General Assembly after each census, the number of senators and representatives is to be fixed by law and apportioned among the several counties (A-5). From at least 1879 through 1971 Indiana's apportionment laws allocated House and Senate seats among its 92 counties (or groups of counties). [4] If a county was entitled to more than one seat, all seats were elected at large from the county. Smaller counties were grouped and elected one seat from the group. Because Marion County (Indianapolis) alone since 1965 represented a 15 House seat swing for one ***5** party or the other, the result of this system was that the party that carried Marion County became the majority party. The pattern of apportionment by counties changed in 1971 when, in response to the district court's decision in *Whitcomb v. Chavis,* the General Assembly adopted a reapportionment

plan for the House employing only single-member districts. *Whitcomb v. Chavis,* 403 U.S. 124, 128 n.1 (1971). No election occurred under that plan, however, because a second plan employing a mix of single and multimember districts was adopted by the General Assembly in 1972 after this Court's reversal of the district court's decision. 1972 Ind. Code, § 2-1-1.2-3.

D. The 1981 Reapportionment

The first General Assembly after the 1980 census convened on November 18, 1980. As a result of the 1980 national Republican landslide, the Republicans enjoyed a substantial majority in both houses of the General Assembly. The reapportionment process began in February when "vehicle" bills were introduced in the two houses by members of the Republican leadership (A-7). The bills were without substantive content and contained no description of any legislative district (A-7; Pl. Exs. 55 and 56; Oct. R. 117, 118 and 119).

Each of these bills was passed in its respective chamber and then sent to the other chamber where each was amended by making wholly insignificant changes (A-7). The sole purpose for this contrived legislative process was to cause the two bills, still devoid of content but no longer identical to the versions passed in the first house, to be referred to a conference committee (A-7). All four of the members of the conference committee were Republicans. [5]

***6** Only after the empty bills had been assigned to the all majority conference committee did the process of giving the bills substance begin. This work was done by a few members of the Republican leadership and their staff in an office rented for them by the Republican State Committee (A-8). The major tool used in this process was a computer system provided by a Detroit, Michigan, computer firm, Market Opinion Research ("MOR") (A-7) and a data base for use in that system that included the political complexion of each voting unit in the State based upon recent election returns (A-26; Sutherlin Dep. 17; Schneider Dep. Exs. 104-107; Oct. R. 29-30). MOR's services were obtained, not by the state legislature, but by the Republican State Committee at a cost of $250,000 (A-8).

The members of the legislative minority and the public were totally excluded from the map-drawing process (A-8). They did not have access to the computer equipment, programs or data; nor were they given the opportunity to view any preliminary maps. The State Legislative Services Agency, a bipartisan agency available to legislators to assist them in drafting legislation, had a computer capable of performing the same operations, but did not have the political data base used by MOR. According to the majority leader in the Senate, the Legislative Services Agency was not used for the specific reason that "partisan activity was strictly prohibited on the part of the (Agency's) employees" (Bosma Dep. 163; R. 29-30). Similarly, at no time during the two and one-half month period it was reapportioning the State did the majority leadership afford the citizens of Indiana any meaningful opportunity to comment on any proposed maps (A-8). Finally, in the last week of the legislative session, the conference committee unveiled for the first time the majority's plan for new legislative districts (A-8). The disclosure of the contents of the heretofore empty bills was the first time anyone other than the ***7** Republican legislators or party officials had an opportunity to view these enormously complex plans. The minority had only 40 hours between the time the bills were released and the time they were adopted to review the districting of more than 4,000 precincts (A-9).

On the final day of the 1981 regular session, after limited floor debate, the Senate and House adopted the conference report, voting along party lines (A-9). During the 1982 legislative session, technical revisions were made in the bills in order to correct a number of errors; these included the omission of some precincts from any districts and one district whose boundary did not close (A-9).

E. The Resulting Maps

1. Districts of Various Sizes. The apportionment plan adopted in 1981 ("the Plan") created 77 House districts: 7 triple-member districts, 9 double-member districts and 61 single-member districts. In Marion County, which had 15 seats under the prior plan, parts of two surrounding counties were added in order to create a population base sufficient to support 15 seats. These 15 seats were distributed among five triple-member districts, each highly irregular in shape. [6]

The political makeup of the five districts into which Marion County and the added surrounding areas were divided produced a 12 to 3 majority for the Republicans (Def. Ex. X; Nov. R. 126, 127). This was accomplished by concentrating the Democratic core vote in one triple-member district and slicing off enough of the surrounding ***8** Democratic vote into each of the four surrounding areas to create four inevitably Republican triple-member districts (A-15 and 30). If Marion County were divided into single-member districts on any reasonably compact and contiguous scheme, the likely result would be the addition of two or three seats that would be favorable to the Democrats. [7]

In contrast to the Plan's concentration of Democratic voters in central Indianapolis, in Fort Wayne the Plan employed 3-member districts to divide the Democratic vote essentially down the middle. By patching areas from several surrounding counties onto Allen County, which includes the city of Fort Wayne, the Plan created two triple-member districts, each overwhelmingly Republican. This was done notwithstanding the fact that the city of Fort Wayne (population 172,196 (Pl. Ex. 23; Oct. R. 44 and 48)) has a Democratic mayor and would itself be entitled to over three seats in the Indiana House.

The triple-member districts were not employed consistently in metropolitan areas, however. In Lake County, the second most populous county in Indiana, there are no triple-member districts. [8] Rather, a combination of double and single-member districts resulted. And in the state's fourth and fifth most populous counties, Vander ***9** burgh [9] (which includes the city of Evansville) and St. Joseph (which includes the city of South Bend), again combinations of double and single-member districts appeared (Pl. Ex. 1; Pl. Ex. 50; JA-54). In all three cases the districts included areas outside these counties notwithstanding the fact that in both Vanderburgh and St. Joseph, either the county itself (Vanderburgh) or well-recognized units within the county (the city of South Bend and Portage Township in St. Joseph County), had populations that were integral multiples of a numerically perfect district. Double-member districts (House districts 9, 10 and 31) appear outside the major metropolitan areas (Pl. Ex. 1). And some of the larger cities (Muncie, Anderson, Terre Haute) have only single-member districts (Pl. Ex. 49; JA-53).

2. County Lines and Other Independently Meaningful Lines. The Senate plan, though employing all single-member districts, paid no regard whatever to the State constitutional mandate that "no county for Senatorial apportionment, shall ever be divided." [10] It was long ago established that if this constitutional mandate must be bent to yield to population equality, it should be ignored only to the extent necessary to preserve proportionate representation. *Denney v. State,* 144 Ind. 503, 42 N.E. 929 (1896). The Senate districts created by the Plan divided Indiana's 92 counties 73 times (Pl. Ex. 48; JA-52). This was far more than necessary to meet the requirements of equal population (A-28), far more than the previous apportionment which divided counties only 59 times (Pl. Ex. 47), and far more than an alternate map presented to the General Asembly which divided counties only 38 times (Pl. Ex. 48; JA-52).

***10** The 1980 census revealed a statewide population of 5,490,179 resulting in a perfect House district of 54,902 and a perfect Senate district of 109,804 (Pl. Ex. 23; Oct. R. 44 and 48). As a result, Indiana has a number of natural modules for the construction of any legislative map. These include Marion County (which is the same as the city of Indianapolis). Its population was 765,233 or a nearly perfect 14 House and 7 Senate seats (*Id.*). The city of South Bend (109,727, two House and one Senate seats), Vanderburgh County which contains the city of Evansville, (167,515, three House seats), LaPorte

County (108,632, two House seats), St. Joseph Township in Allen County (55,381, one House seat), and Jeffersonville Township in Clark County (55,831, one House seat) are other examples (*Id.*). Not a single one of these obvious districts was constituted as either one or more self-contained single districts or a multimember district. Instead, every one, like every other district in the state, was divided up and patched onto other areas to create the map that emerged.

3. Nesting. The Senate districts bear no relationship to the House districts. Despite the fact that Indiana's General Assembly consists of 50 senators and 100 representatives not a single Senate district consists of two House districts (Pl. Ex. 4). Indiana has ten seats in Congress. No Congressional district is composed of either ten House or five Senate districts.

4. District Shapes. The shapes of some of these districts are described by the district court (A-14, 15, 16, 27, 28 and 29). They can be fairly characterized as enjoying no basis in natural geography, political boundaries, community of interest or any other factor. And no justification was offered in the district court for these configurations. The lines routinely deviate from well established and recognized landmarks such as major streets, township lines, political subdivisions, school districts ***11** and towns with the result that most voters do not know in what district they reside. [11]

5. Relationship to Past Practices. The Plan deviated wholly from Indiana's historical practice of allocating seats among counties or groups of counties. Prior to 1972, each apportionment plan, including the one involved in *Whitcomb v. Chavis,* elected at-large delegations from various counties, including Marion, in proportion to their population. Because Marion County elected 15% of the entire General Assembly and was potentially winnable by either party, the effect of this approach was to permit either party to sweep Marion County and thereby gain control of the legislature. [12] The 1981 Plan eliminated this possibility by creating five triple-member districts giving the minority three certain seats but precluding any greater representation.

6. Factors Relevant to Understanding Indiana's Map. Indiana has no significant geographic limitations. As a part of the Northwest Territory it is laid out by township ***12** and range in squares. With the exception of the Ohio River on the south and the Wabash River on a part of the Illinois border, there is no irregular shape at all in its boundaries (Pl. Exs. 1-6). There are no significant bodies of water or mountains that could reasonably affect the configuration of any political districting. Indeed, most counties and townships are essentially square as are all of the counties discussed in the foregoing description except Vanderburgh which has the Ohio River as its southern boundary. [13] Finally, in most rural areas, the minimal voting unit is the township, which is usually a square or rectangle (Pl. Ex. 6). Because any district must be composed of voting units, township lines, and therefore superficially regular lines, necessarily appear in some parts of the state as district boundaries. [14] Nonetheless, virtually no district in the entire state is regular in shape. Even in wholly rural areas, projections, indentations and bottlenecks are commonplace.

F. The Political Impact of the Plan

1. Measured by the Parties' Baseline Support. The baseline statewide party vote, eliminating the effects of any particular candidate or issue, is 51.2% Republican and 48.8% Democratic over the past thirty years' elections (Pl. Ex. 30; JA-37). [15] In November 1982, a general ***13** election was held under the Plan. That election turned out to be a normal year, virtually a dead heat between the two major parties statewide. Of the three statewide races for anonymous offices (auditor, treasurer and court clerk), two Republicans and one Democrat were victorious. Each of the six candidates received between 48.9% and 51.1% of the statewide vote (Pl. Ex. 31; JA-38). The Democratic baseline vote was 50.009%, or approximately 1.2% better than the Democrats' historical average of 48.8%.

Judged by the 1982 baseline party vote, the effect of the Plan in the House was to create 62 Republican seats and 38 Democratic seats (Pl. Ex. 36; JA-47). The Senate seats are 30 Republican and 20 Democratic (Pl. Ex. 39; JA-50). The result in the seven triple-member districts in and around Marion and Allen Counties was 18 seats that were from 55.6% to 63.6% Republican and 3 that were 84% Democratic (Pl. Ex. 35; JA-45 and 46).

2. The Actual 1982 Election Results. Democratic candidates for the Indiana House received 51.9% of all votes cast statewide for House races (Pl. Ex. 31; JA-38). Nevertheless, only 43 Democrats were elected to the 100-member House of Representatives. Notwithstanding a slightly Democratic year, the Democratic vote in the 51st most Democratic House district was only 44.4% (Pl. Ex. 32; JA-39), 5.6% shy of the amount needed to unseat the majority. In the triple-member districts in and around Marion and Allen Counties, Democratic candidates ***14** for the House of Representatives received 46.3% of the vote, but won only 3 of 21 seats (Def. Ex. X; R. 126, 127).

In the Senate, of the 25 seats up for election, 13 were favorable to Democrats and 12 favorable to Republicans (Pl. Ex. 39; JA-50). As would be expected because 1982 was a normal year, the results of the 1982 elections were the same as these statistics (13 Democrats elected to 12 Republicans) (Pl. Ex. 33; JA-41), although not precisely the same seats were carried by the respective parties as the baseline vote would indicate. Presumably for reasons having to do with individual races, two Republican senators won in races favorable to the Democrats and vice versa. [16] Of the remaining 25 seats not up for election until 1984, 18 were favorable to Republicans (Pl. Ex. 39; JA-50). If the 1984 election produced the same Democratic vote as 1982, only seven more Democrats would be expected to win for a total of 20 Democratic senators (Pl. Ex. 39; JA-50). [17] Thus, under the Plan, consecutive elections with a 50% Democratic vote would result in a Senate which is only 40% Democratic.

G. Defendants' "Facts"

Defendants' "statement of the case" contains a number of matters that plaintiffs view as either pure argument or incorrect or misleadingly incomplete. Defendants also attempt to defend the contrived legislative process they employed by advancing a variety of claims that plaintiffs ***15** submit are both irrelevant and not grounded in facts or the record. [18]

Defendants include in their statement of the case the contention that "the General Assembly followed certain neutral criteria in adopting the Indiana reapportionment acts in 1981" (Def. Br. 6). But the district court found that "the present plan is without a rational basis in neutral criteria" (A-32). The court found that the majority party adhered to the "unavoidable constitutional consideration" of "one person, one vote" (A-17), but could find no evidence "that the district lines as they exist are necessary in order that the 'one person, one vote' constitutional ***16** tenet be preserved" (A-30). And, of course, there is no such evidence. The district court also characterized defendants' argument that the reapportionment plan was the result of the application of a "no retrogression" or "proportionality" policy with regard to black voters as representing "hindsight and chance-an argument asserted after the accidental fact of proportional representation" (A-17 and 18). Plaintiffs submit that a review of the Plan shows it enjoys no justification whatever, and defendants cite none other than their own conclusory assertions. The district court found that the majority party was "most notably" motivated by a desire "to insulate itself from risk of losing control of the General Assembly," and had "no apparent concern for either 'community of interest' or compactness" (A-17). In short, defendants continue to assert as fact contentions rejected by the trial court and without foundation in the evidence or in persuasive reasoning.

SUMMARY OF ARGUMENT

The 1981 Indiana apportionment Plan is a law of the State of Indiana. The Plan denies equal protection of the laws to identifiable groups of individuals. This is true regardless of whether proof of the legislature's intent to harm the group is required or whether the law is judged by objective criteria. Under either standard, and under conventional equal protection doctrines, the Plan fails. Both logic and precedent compel the conclusion that political affiliation cannot constitutionally be penalized as the Plan seeks to do.

Because the Plan can be analyzed in conventional equal protection terms, the claims are justiciable. Moreover, under this Court's precedents, notably *Baker v. Carr,* the claims are justiciable.

The Plan contains population deviations from the optimum district of over 2% (over 4% from high to low) without any justification. The lines for each house adhere ***17** neither to established political or other subdivisions, to any identifiable community of interest nor even to lines for the other house. Multimember districts are used arbitrarily and solely for political advantage. In short, the Plan is an example of the equipopulous gerrymander made possible by modern technology and predicted by this Court and knowledgeable political scientists as a threat to representative government equal to or greater than population deviations. To reverse the district court in this case and on this record is to overrule *Reynolds v. Sims* for all practical purposes.

Resolution of this case involves application of recognized judicial doctrines and can be accomplished by significant objective standards that do not embroil the courts in continuous review of nuances or debatable judgments.

ARGUMENT

I. THE 1981 INDIANA APPORTIONMENT PLAN VIOLATES BASIC PRINCIPLES OF EQUAL PROTECTION

Under well established principles of constitutional law an equal protection violation occurs to the extent that a statute either intentionally disadvantages a class of citizens or creates a legislative classification of citizens that does not advance a legitimate state interest. The Indiana reapportionment law fails under either analysis.

The fourteenth amendment provides that no state may "deny to any person within its jurisdiction the equal protection of its laws." Of course, no construction of the equal protection clause can "take from the States all powers of classification," since in one or more respects, "[m]ost laws classify." *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256, 271-272 (1979). But the equal protection clause does establish the fundamental requirement that under any legislative classification, explicit ***18** or implied, "all persons similarly circumstanced shall be treated alike." *Plyler v. Doe,* 457 U.S. 202, 216 (1982) (quoting *F.S. Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920)). The bottom line of the equal protection mandate is the "fundamental principle" that "the State must govern impartially." *New York City Transit Authority v. Beazer,* 440 U.S. 568, 587 (1979).

A state denies equal protection under its laws to a group of residents or citizens if it acts in either of two fundamental ways. First, a statute, even if neutral on its face, violates the equal protection requirement when it has been passed with the intent to discriminate or facilitate discrimination among citizen groups and has that effect. *Gomillian v. Lightfoot,* 364 U.S. 339 (1960); *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). Where such discriminatory intent is charged, the courts customarily move from the "important starting point" of the impact of the legislation in question and proceed to assess intent in light of the historical background of the statute, the specific sequence of events leading to its passage, procedural and substantive departures from decisionmaking norms and other aspects of the legislative and administrative history. *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 267-268 (1977). Legislative history becomes especially relevant "where there are contemporary statements by members of the decisionmaking body, minutes

of its meetings, or reports." *Id.* at 268. In the event that such a "blend of history and an intensely local appraisal of the design and impact" of the statute in question reveal a discriminatory design, the principles of equal protection require that the statute must be struck down. *Rogers v. Lodge,* 458 U.S. 613, 622 (1982) (quoting *White v. Regester,* 412 U.S. 755, 769-770 (1973)); *Hunter v. Erickson,* 393 U.S. 385 (1969). As shown in Part III *infra,* the Indiana laws fail this test.

***19** The equal protection guarantee imposes not only a primary "intent" test but also a second "rational action" test. Legislation must "proceed upon a rational basis" without "resort to a classification that is palpably arbitrary." *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 527 (1959). Though legislation may escape the rigors of an exact science, there can be no constitutional excuse for any classification or division of citizens that is "wholly without any rational basis." *United States Dept. of Agriculture v. Moreno,* 413 U.S. 528, 538 (1973); *Rinaldi v. Yeager,* 384 U.S. 305, 308 (1966). To be deemed rational, even under less than strict scrutiny, a legislative classification must "serve important governmental objectives" and be "substantially related to achievement of those objectives." [19] *Craig v. Boren,* 429 U.S. 190, 197 (1976); *see also Mills v. Habluetzel,* 456 U.S. 91, 99 (1982); *Wengler v. Druggists Mutual Insurance Co.,* 446 U.S. 142, 150 (1980); *Jimenez v. Weinberger,* 417 U.S. 628 (1974). As shown in Part IV *infra,* the 1981 Indiana Plan imposes a wholly irrational classification of voters and is sustained by no legitimate governmental objective.

***20 II. THE COURT BELOW CORRECTLY DECIDED THAT PLAINTIFFS' CLAIMS ARE JUSTICIABLE**

Defendants simply never address the fundamental equal protection doctrines outlined above. Because one test of justiciability is susceptibility to analysis in conventional judicial doctrines, this itself is fatal to defendants' claim of nonjusticiability. But defendants and the amici supporting them fail even on their own terms. First, they argue that this Court has already held that any claim of partisan political gerrymandering is not justiciable. This argument is simply wrong. Second, they argue that any claim of partisan political gerrymandering should be held to be nonjusticiable because it would involve "political questions" best left beyond judicial intervention. This argument is based on a complete misapprehension of the political question doctrine and is flatly at odds with *Baker v. Carr,* 369 U.S. 186 (1962), the leading case on the "political question" branch of justiciability and the controlling case here.

A. Prior Teachings of this Court Support Judicial Resolution of Plaintiffs' Claims

Defendants rely on this Court's summary rulings in a handful of prior apportionment cases to support their claim that the Court has "rejected partisan political gerrymandering as a justiciable issue" (Def. Br. 13). Defendants' contention is flawed for three reasons. First, it misperceives the significance of a dismissal or affirmance.

> A summary dismissal of an appeal represents no more than a view that the judgment appealed from was correct as to those federal questions raised and necessary to the decision. It does not, as we have continued to stress, . . . necessarily reflect our agreement with the opinion of the court whose judgment is appealed. It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action.

***21** *Washington v. Confederated Bands and Tribes,* 439 U.S. 463, 476 n.20 (1979); *see also Edelman v. Jordan,* 415 U.S. 651, 671 (1974); *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 308 n.1 (1976); *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 14 (1976). The fact that the Court "affirm[s] the judgment but not necessarily the reasoning by which it was reached" (*Fusari v. Steinberg,* 419 U.S. 379, 391 (1975) (Burger, C.J., concurring)), is significant here because in two of the cases cited by defendants the lower court found that the plaintiffs had failed to prove the alleged gerrymander even if the claim was justiciable. *See, e.g., Wells v. Rockefeller,* 311 F. Supp. 48, 53 (S.D.N.Y. 1970); *Kelly v. Bumpers,* 340 F. Supp. 568, 580 (E.D. Ark. 1972).

Secondly, the summary affirmances relied on by defendants do not do the job. None involves jurisdictional statements concerning (1) the use of different sized districts to disadvantage the opposition party, (2) express statements of invidious intent by the authors of the plan, (3) an absence of nesting, or (4) state legislative districts drawn without regard for political subdivision boundaries. [20]

Most importantly, defendants' argument simply ignores numerous recent statements by this Court supporting the justiciability of the claims presented here. In *Whitcomb* ***22** ?? that "we have deemed the validity of multimember district systems justiciable." And defendants' review of applicable case law omits to mention *Fortson v. Dorsey,* 379 U.S. 433 (1965). The Court there expressly recognized that political gerrymandering may give rise to a justiciable constitutional claim:

> It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial *or political* elements in the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster. This question, however, is not presented by the record before us.

379 U.S. at 439 (emphasis added).

In the years after *Fortson,* this Court has repeatedly recognized that "a districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed to 'minimize or cancel out the voting strength of racial or political elements of the voting population"'. *Gaffney v. Cummings,* 412 U.S. 735, 751 (1973) (quoting *Fortson); Burns v. Richardson,* 384 U.S. 73, 88 (1966); *Whitcomb v. Chavis,* 403 U.S. at 143; *Chapman v. Meier,* 420 U.S. 1, 17 (1975); *United Jewish Organizations of Williamsburg, Inc. v. Carey,* 430 U.S. 144, 167 (1977) (italicizing "racial or political groups"); *see also Abate v. Mundt,* 403 U.S. 182, 185-86 (1971) (noting that the Court has "underscored the danger of apportionment structures that contain a built-in bias tending to favor particular geographic areas or political groups"). That is the precise factual situation presented ***23** by this case. As the district court found and as elaborated below, the majority party in Indiana through the use of multimember districts stacked or split concentrations of Democratic voters to minimize their electoral power (A-30). And Justice Rehnquist, joined by the Chief Justice, recently observed that at least in the context of multimember districts, vote dilution is a meaningful and presumably justiciable concept. *Mississippi Republican Executive Committee v. Brooks,* ---- U.S. ----, 105 S.Ct. 416, 422 (1984).

Recently a majority of the members of this Court appeared to recognize that gerrymandering may be justiciable beyond the discriminatory use of multimember districts. In *Karcher v. Daggett,* 462 U.S. 725 (1983), a plurality of the Court ruled that New Jersey's plan for congressional districting failed to limit population variances among districts to those which were unavoidable. The plurality opinion did not address plaintiffs' alternative claim that the plan constituted an actionable political gerrymander. However, Justice Stevens, in a concurring opinion, stated that "political gerrymandering is one species of 'vote dilution' that is proscribed by the Equal Protection Clause." 462 U.S. at 744. In a separate dissent, Justice Powell stated "I also believe that the injuries that arise from gerrymandering may rise to constitutional dimensions." *Id.* at 787. Justice Powell too was "prepared to entertain constitutional challenges to partisan gerrymandering that reach the level of discrimination described by JUSTICE STEVENS." *Id.* Furthermore, Justice White in a dissent joined by the Chief Justice and Justices Powell and Rehnquist after noting that the gerrymander was "a far greater potential threat to the equality of representation," restated the point that "neither the rule of absolute equality

nor one of substantial equality can alone prevent deliberate partisan gerrymandering." *Id.* at 776 (quoting *Kirkpatrick v. Preisler,* 394 U.S. 526, 555 (1969) (White, J., dissenting)).

24 B. Defendants' Argument Was Rejected 20 Years Ago in *Baker v. Carr

Defendants' claim that this case presents a nonjusticiable political question has a familiar ring. It is virtually the same argument presented to this Court in *Baker v. Carr,* 369 U.S. 186 (1962). [21] The argument, rejected 23 years ago, deserves no better fate today.

Baker v. Carr teaches that "the nonjusticiability of a political question is primarily a function of the separation of powers." 369 U.S. at 210. Just because a case involves the protection of political rights, or may be labeled a political case, does not mean that the wrong has no judicial remedy. The issue of justiciability must be determined by an examination of the facts of the particular case presented. In the words of the Court:

> ***25** Much confusion results from the capacity of the "political question" label to obscure the need for case-by-case inquiry.

Id. at 210-11.

> The doctrine of which we treat is one of "political questions" not one of "political cases." The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloging.

Id. at 217.

After analyzing past cases and summarizing the "elements which identify it as essentially a function of separation of powers", 369 U.S. at 217, the Court resoundingly rejected arguments of nonjusticiability strikingly similar to those presented here:

> We come, finally, to the ultimate inquiry whether our precedents as to what constitutes a nonjusticiable "political question" bring the case before us under the umbrella of that doctrine. A natural beginning is to note whether any of the common characteristics which we have been able to identify and label descriptively are present. We find none: The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has ***26** been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.

Id. at 226 (footnote omitted).

For all these reasons, defendants' nonjusticiability argument fails here. Although this case clearly involves infringement of political rights, it involves no political question. There is no question presented here as to the actions of another branch of the federal government and no risk of uncertainty or inconsistency in the treatment of the same question by various governmental departments.

C. Defendants' and Amici's Arguments Are Misplaced on this Record

Defendants and amici seek to raise a number of issues that are not presented in this case. Moreover, contrary to defendants' and amici's hypothetical and hyperbolic arguments, resolution of this case does not require the Court to make any determination in the absence of judicially manageable standards. When the record here is examined, the alleged difficulties proposed in the abstract by defendants and amici simply disappear. Contrary to defendants' argument that "a protectible political class cannot be judicially defined" (Def. Br. 14-16), the record here demonstrates that plaintiffs, the Democratic voters in Indiana, are not only identifiable, but were in fact identified and targeted by the map-makers for discriminatory treatment. *See* Parts III and IV-A *infra*. Similarly, contrary to the assertion that adverse political impact cannot be judicially determined (Def. Br. 17-18) the effect of the Plan upon Democratic voters in Indiana has been overwhelmingly demonstrated. *See* pp. 12-14 *supra* and Part III *infra*. Indeed, to contend otherwise is to ask the courts to blind themselves to a reality that any thoughtful citizen recognizes as not only likely but inevitable. And, finally, this case presents no "political ***27** question" regarding legislative intent (Def. Br. 19-21). Here the intent of the map-makers was unabashedly admitted in the testimony below. *See* Part IV-A *infra*.

In sum, well developed and judicially manageable standards under the equal protection clause are readily available for judicial resolution of this case. This is true whether this Court chooses to resolve this case by application of long established equal protection doctrines prohibiting intentional and invidious discrimination against one group of citizens and in favor of another (*see* p. 18 *supra* and Part IV *infra*); or by application of well developed objective criteria for judicial review of reapportionments that disadvantage an identifiable group without neutral or rational justification (*see* p. 19 *supra* and Part V *infra*); or by application of any of several "bright line" tests available to the Court on this record (*see* Part VI *infra*). In short, on the facts presented by this record, judicially manageable standards for resolution of this case are not merely available, they abound.

III. DEMOCRATS IN INDIANA ARE INJURED MEMBERS OF AN IDENTIFIABLE GROUP ENTITLED TO CONSTITUTIONAL PROTECTION

A. Democrats Can Invoke the Equal Protection Clause

Members of political parties are entitled to the protection of the Constitution whether this is viewed as an individual right or a group right. [22] Surely the equal protection clause prohibits a state from imposing a tax only on members of one party, justified by the specious claim that the tax is avoidable by changing parties. The Indiana apportionment laws are no different. They seek to, and do, prevent a party from obtaining control of the ***28** legislature even if its votes warrant that control. [23] Moreover, the first amendment right of association is one of the core values that requires "special scrutiny" of any law that seeks to deviate, impair or penalize that right. *Elrod v. Burns,* 427 U.S. 347 (1976); *NAACP v. Button,* 371 U.S. 415, 439 (1963). [24] Democratic voters in Indiana are identifiable, as the district court found (A-26). [25] Defendants' argument to the contrary is especially curious in light of the history of this case. The majority party spent $250,000 on sophisticated computer equipment, created ***29** an elaborate security system to safeguard the information produced by its computer analysis, and distorted the legislative process to exclude public participation, all because they too believed that they could identify Democratic voters in the State of Indiana and measure the handicap

placed on them. The method employed by defendants' highly paid consultants to achieve that goal was exactly the same as that employed by plaintiffs in this case: identifying and measuring party affiliation by analysis of historical votes for court reporter and clerk races (Schneider Dep. 13-14, Exs. 104-107). This use of baseline party vote to evaluate and handicap the districts is not just theory. It is what the majority's hired experts actually did to draw the 1981 maps (A-26).

Defendants' contention that many groups other than Democrats cannot be readily identified is simply not at issue here. On this record and in this lawsuit the Court is presented with a group that is identifiable and was in fact identified by the mapmakers as Democratic voters in the State of Indiana. Their status as such and their location are identifiable from public records. By virtue of that fact and that fact alone plaintiffs have suffered a diminution of a fundamental right-the right to vote and to have that vote counted fairly and equally. In that respect there is no distinction whatever between Democratic voters in this case and urban voters in *Baker v. Carr*. [26]

The implications of defendants' claim that plaintiffs do not constitute a protectible class are enormous. In the case of reapportionment it would mean that literally no attempt by the party in power to minimize the effectiveness of the minority vote would be actionable so long as the principle of equal population was met. The absurd ***30** hypothetical of a three district Indiana could become a reality, [27] and the status of the map-makers as the majority party would be immune from challenge at the ballot box.

The fact that voters can change their party affiliation does not remove the group from constitutional protection. It is well settled that members of groups defined by characteristics that can be changed are still entitled to the protection of the fourteenth amendment. For example, "discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible." *Davis v. Mann,* 377 U.S. 678, 691 (1964). *See also, Mahan v. Howell,* 410 U.S. 315, 331-32, *modified,* 411 U.S. 922 (1973). Indeed, in *Baker v. Carr* and *Reynolds v. Sims,* individual members of the disadvantaged urban populations could move to the countryside if they wished. And in other contexts penalties based on political affiliation have been held unconstitutional. *Elrod v. Burns,* 427 U.S. 347 (1976).

B. Democrats Are Impermissibly Handicapped by the Plan

Plaintiffs' proof of the disadvantage imposed by the Plan does not rest on the election results of 1982. Rather, as shown below, the 1982 results simply confirm the severe bias of the Plan that is shown by this record. [28] 1976 ***31** and 1982 were the most normal years among the last several elections. In both years the State split essentially evenly between the two major parties. Plaintiffs' exhibit 41 shows the outcome of the 1976 and 1982 anonymous races poured into the House districts of the Plan. These returns yield a Democratic vote in the 51st most Democratic seat under the Plan of 46.3% and 45.7% respectively. Plaintiffs' exhibit 35 (JA-45) shows the results of a nearly dead-even hypothetical anonymous race using the average of the 1982 Auditor and Supreme Court Clerk races. In this hypothetical race the Democratic candidates receive 50.15% of the vote statewide but capture only 38 of the 100 House seats under the Plan. There can be no more severe handicap than a scheme that assures a Republican majority on any foreseeable electoral result.

The central point is that these baseline data are not predictions of a given race, but rather are a measure of the districts' handicaps or advantages. It is this data, not the actual results in a given election, that is most significant to measure the handicap and therefore the harm. The fact that a given runner wins a race does not preclude his being unfairly handicapped. And when the handicap is the result of state law unjustified by any legitimate state interest, an equal protection violation is shown.

Once this point is grasped, many of the "horribles" raised by defendants and some amici simply evaporate. No revisions of apportionment laws are necessary as a result of future election results. No claim to proportional representation is

made. Indeed, no right to any representation is claimed-only a right to be free from state imposed arbitrary obstacles that leave the currently "out" party "barred from the pluralist's bazaar". Brief of Amicus Curiae Assembly of The State of California In Support of Appellants at 12 (quoting ELY, DEMOCRACY ***32** AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) at 152).

The role of the 1982 actual election results is simply to confirm the Plan's handicaps. That the majority party succeeded in minimizing or canceling out the vote of Democrats in Indiana was clear from the results of the election under the Plan. Despite receiving 51.9% of the statewide vote, the Democrats captured only 43 of the 100 seats in the House. Although the results in the Senate, if viewed superficially, may appear "fair" they actually reflect the same extreme bias against the minority. Thirteen of the 25 seats up for election in 1982 were Democratic in composition. In contrast only seven of the 25 seats up for election in 1984 were Democratic in composition. Even if Democrats received a slight majority of the statewide vote again in 1984, they would have gained only another seven Senate seats for a total of 20 of the 50 seats. Thus the contention by the dissent below and the defendants that the 1982 Senate results show the fairness of the Plan rest on a fundamental logical error. The effect of the Plan is severe, indeed prohibitive of an effective vote by the transient minority.

IV. THE REAPPORTIONMENT PLAN IS UNCONSTITUTIONAL BECAUSE IT WAS INTENTIONALLY DESIGNED TO, AND DOES DISADVANTAGE DEMOCRATS IN INDIANA

A. The Evidence as to Subjective Intent

The subjective intent that was proved here is plainly an improper one-to design a law that minimizes the legislative voice of a major portion of the population. In that respect this case is the flip side of *Gaffney v. Cummings,* 412 U.S. 735 (1973), which held legitimate an intent to provide representation reflecting voting strength. Presumably the nature of the acting entity (in *Gaffney* ***33** a bipartisan commission and here a transient partisian majority) gives a strong indication of presumed intent. But this case presents an unusually strong proof of intent. Unlike the traditional discrimination case where the focus of the inquiry is whether intent may be inferred from the facts surrounding the adoption of legislation, in this case that analysis is made unnecessary by express statements from the majority party's legislative leaders-the authors of the Plan.

Thus there is no need to prove a history of discrimination when it is admitted that the law was intended to have an adverse impact on a given group. Such factors as historical practices are simply one of several means of showing the unlawful purpose of the law. Here the unlawful purpose was proven directly. A history of discrimination is not an element of plaintiffs' case; it is one of several means of proof of the element of intent. To illustrate the point, blatantly segregationist laws would be no less unconstitutional if passed today in a state with an impeccable racial record. Nor would a law aimed at persons of English descent be constitutional by reason of its novelty.

The evidence is overpowering in support of the district court's findings. The Speaker of the Indiana House identified a goal of reapportionment as having "as many Republican districts as possible" (Dailey Dep. 20, 63; Oct. R. 29-30) and testified that the *sole* reason for maintaining multimember districts in and around Marion County was the probable loss of Republican seats if single-member districts were used (*id.* at 33-34). In the Senate, the leadership also freely admitted that the Plan was drawn "to hurt the Democrats as much as possible" (Bosma Dep. 110; Oct. R. 29-30). Senator Bosma also explained that the Legislative Services Agency was not used in the reapportionment process because "any partisan activity was strictly prohibited on the part of the [Agency's] employees" (*Id.* at 163). In short, the intent to discriminate against Democrats was freely admitted by the General ***34** Assembly leadership, secure in the incorrect belief that a 2% population deviation would provide a safe harbor for the Plan.

Faced with these admissions, defendants belatedly ask this Court to ignore them, claiming that legislative intent cannot be inferred from the statements of individual legislators. [29] But this evidence is properly considered. First, the cases on which defendants rely deal with a fictional legislative "intent" urged as a guide to construction of a statute. But here the operation of the law is clear; it is the actual purpose of the law that is in issue. And as to that issue there can be no better evidence than admissions by the legislative leaders. [30] Further, the usual roles of the agent and principal are reversed in this situation. The Plan was created by the very persons whose testimony is offered. It was simply ratified by the legislature at the instance of the leadership. There are, in this case, no better indicia of legislative intent than the expressions of intent by the individuals who drafted the Plan, explained it to their fellow majority legislators, and prevented its analysis by the minority or the public. The issue raised by some amici-whether discovery or subpoena of legislative leaders is appropriate-is not preserved on this record. No objection was made to the offered evidence and no effort was made to block discovery. Perhaps legislators who do not consent to give testimony ***35** as to legislative intent may not be compelled to do so for reasons of interbranch comity. But that is an issue for another day.

B. The Objective Evidence of Intent

Even in the absence of expressions of the majority's intention to disadvantage Democratic voters, the district court's finding of specific subjective intent is fully supported by the record. Indeed, it is obvious from the fact that the resulting Plan is otherwise inexplicable. No conceivable neutral criteria could explain, for example, the majority party's decision to take Marion County, a large metropolitan county with a population entitled to exactly 14 representatives, and add to it parts of surrounding rural counties in order to create five triple-member districts. Similarly, the decision to split the city of Fort Wayne and County of Allen in half creating two triple-member districts is explainable only by political motives. The same is true of Senate District 39, ranging over many miles to combine parts of downtown Terre Haute with rural and mining areas of three other counties. There is no need to belabor this point here. A review of the statement of the case demonstrates that the district court's finding of subjective intent is not clearly erroneous. It is clearly correct whether one considers only the direct evidence or only the subjective evidence or both.

V. THE PLAN IS OBJECTIVELY INDEFENSIBLE AS AN ARBITRARY CLASSIFICATION UNDER STANDARD EQUAL PROTECTION DOCTRINES

The Plan is, first and foremost, a law of the State of Indiana. It is a law that was specifically and intentionally passed for purposes of advantaging one group of citizens to the disadvantage of another. The right that underlies plaintiffs' claim is readily identifiable-it is the right created by the fourteenth amendment to be free from any unjustified state action disadvantaging any person ***36** or group. The apportionment of legislative districts so as to prevent a political group from obtaining majority status, even if its votes justify that status, is a disadvantage of monumental proportions. [31] That the Plan imposes such a disadvantage has already been established. The district court's finding that there is no justification for this result is equally sound.

A. Use of Isolated Multimember Districts

Rather than using only single-member legislative districts the majority created Plan mixes 61 single-member districts with nine double-member and seven triple-member districts. On its face this scheme treats different groups of citizens differently. This is not just mathematical theory; it is common sense. In both urban or rural areas, the larger the district, the more difficult it is to have face-to-face contact between voters and representatives. In many urban areas, access to media is a practical impossibility because of the expense of media aimed at large populations. [32] And without adherence

to ***37** any established lines, districts leave voters ignorant of even the names of their representatives. [33] These factors can be overcome in a smaller, single-member district. They are insurmountable in the multimember district with the result that party machinery controls nominating procedures and party votes dominate in the fall. In short, multimember districts constitute a separate classification. ***38** And, as Justice Stevens observed, "it is by no means obvious that an occasional multimember district in a State which typically uses single-member districts can be adequately explained on neutral grounds." *City of Mobile v. Bolden,* 446 U.S. 55, 92 n.14 (1980) (Stevens, J., concurring). No neutral criterion is at play here-only the desire of the majority to protect its status as the legislative majority irrespective of its majority at the polls.

These districts are at the core of the constitutional violation. Undaunted by the fact that the population of Marion County entitled it to precisely fourteen representatives and seven senators, the majority created five triple-member House districts for Marion County by patching on areas from two contiguous counties. This creative cartography enabled the majority to continue to stack Democratic voters in one triple-member district in the hole of the donut while diluting significant concentrations of Democratic voters into the four triple-member districts in the surrounding area. The result is 12 safe seats for the majority.

In Allen County, which, like Marion County, is essentially square in shape, the same goal gave rise to a different scheme. Rather than "stacking" the minority vote, the majority "cracked" it in half by splitting the otherwise Democratic city of Fort Wayne in two and combining each half with parts of the rest of Allen County and parts of *three* surrounding rural counties to create two solidly Republican triple-member districts. In sum, the result of these techniques was the election of 18 (86%) Republican representatives and 3 (14%) Democratic representatives from these two areas whose populations comprise 21% of the state. This despite the fact that the vote in these areas was 46.3% Democratic.

Finally, the Court's treatment of multimember districts fully supports a finding of unconstitutionality. ***39** This Court has long recognized that "multimember districts may be vulnerable, if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized." *Gaffney v. Cummings,* 412 U.S. 735, 754 (1973). *White v. Regester,* 412 U.S. 755 (1973), is the only case decided by this Court in which multimember districts enjoyed no independent and legitimate justification and had a demonstrable adverse effect. The Court there sustained a claim that the use of multimember districts in Bexar and Dallas counties unconstitutionally diluted the voting strength of Mexican-Americans and blacks respectively. The Court's finding was based on effect, absence of rational grounds apart from race, and intent as garnered from evidence of (1) a long history of discrimination, (2) indifference on the part of elected officials, and (3) restricted access to the political process. Each factor is equally present here.

On the occasions the Court has rejected challenges to multimember districts, each involved either or both of (a) rational grounds for the districts apart from disadvantaging a minority-typically preservation of political boundaries, or (b) failure to allege any effect or, if alleged, to prove it. [34]

*40 B. The House and Senate Plans Are Not Nested

Indiana's bicameral legislature is divided into a 50-member Senate and a 100-member House. If the districts were truly drawn to reflect neutral criteria, common sense and logic would dictate that the apportionment plans be arranged so that each Senate district contain two House districts. [35] Indeed, until the equipopulous gerrymanders came along in 1972, Indiana plans did just that by treating counties or groups of counties as units for this purpose. But neutral criteria have no place in Indiana's 1981 reapportionment. In no instance are two House districts "nested" in a single Senate district. Especially when added to the Plan's wholesale disregard for county lines, this legislative Rohrschach test means that

"the potential for voter disillusionment and nonparticipation is great, and the fundamental American principle of self-government is threatened" (A-29).

C. Existing Political Boundaries Are Wholly Disregarded

The majority's blatant disregard for existing political boundaries is apparent in view of the fate of political ***41** subdivisions under the Plan which are themselves a multiple (within the 2% population deviation utilized by the majority) of the ideal district size. Rather than use these natural building blocks, the majority split every one of them. Examples appear at page 16 of the Motion to Affirm and at p. 10 *supra*.

D. Bizarre Shapes Abound

As is typical of gerrymandering for whatever purpose, the Plan employed by the majority includes many grotesque districts. *Reynolds v. Sims,* 377 U.S. at 568, observed that "the existing apportionment * * * presented little more than crazy quilts, completely lacking in rationality, and could be found invalid on that basis alone." If not an independent basis for unconstitutionality, at least these shapes are an indication of improper purpose calling for an explanation. As the district court found, the plan "is replete with 'uncouth' and 'bizarre' configurations that beg for some rationale, yet the state has set forth none which justify either the shapes or the concomitant adverse impact upon the plaintiffs" (A-27). [36]

E. The Legislative Process Was Exclusionary

The Plan was developed by use of a very expensive and sophisticated computer program bought and paid for, not by the General Assembly, but by the Republican State Committee. The bills that became the law went through the entire legislative process with no content. These "vehicle bills" were adopted in insignificantly different forms by each house so that they could be assigned to a conference committee comprised *solely* of Republicans. When the Plan was finally unveiled, literally in the middle of the night at the end of the session, it was in the form of a conference committee report. Each house then adopted the Plan by a party line vote and adjourned. The result of this process was the effective ***42** exclusion of any opportunity for comment on the Plan prior to its adoption.

"If the process for formulating and adopting a plan excluded divergent viewpoints, openly reflected the use of partisan criteria, and provided no explanation of the reasons for selecting one plan over another, it would seem appropriate to conclude that an adversely affected plaintiff group is entitled to have the majority explain its action." *Karcher v. Daggett,* 462 U.S. 725, 759 (1983) (Stevens, J., concurring). The only explanation is that candidly offered by the majority leadership: It is raw use of political power to perpetuate that power.

F. The Plan Is Wholly Inconsistent

Other than acting on the stated intention to disadvantage members of the minority, the Plan does not reflect the application of any consistent principle. In some cases the Plan goes out of its way to create districts that encircle a city (*e.g.,* Richmond in House District 56 encircled by District 55 and Kokomo in House District 30 encircled by District 29). In others it splits a city down the middle (*e.g.,* Fort Wayne in Senate Districts 15 and 16 and House Districts 19 and 20, Evansville in House Districts 75 and 77 and Senate Districts 49 and 50, and Muncie in House Districts 34 and 35).

In the major metropolitan areas of Indiana one finds:
(a) Five triple-member House districts in Marion County (population 765,233) and environs.

(b) Six double-member and two single-member districts in Lake and Porter Counties (populations 522,965 and 119,816 respectively) and environs.

(c) Two triple-member districts in Allen County (population 294,335) and environs.

(d) One double-member and five single-member districts in St. Joseph and Elkhart Counties (populations 241,617 and 137,330 respectively).

***43** (e) One double-member and two single-member districts in Vanderburgh County (population 167,-515) and environs.

Thus, the Plan creates multimember districts in populous (Marion and Allen counties) and relatively unpopulated areas (Grant and Madison counties, District 31). It has single-member districts in many rural areas and also in the most densely populated (Lake County, District 13, Vanderburgh County, District 77).

VI. "BRIGHT LINE" STANDARDS ARE AVAILABLE

Just as population ratios can serve as bright lines for guidance of courts and legislatures, so can other readily administered and mechanical tests restrict arbitrary legislation without embroiling the courts in endless fine distinctions. Each of these tests enjoys a sound basis in the fundamental equal protection notion that a state "must govern impartially." If a state elects to breach any of these tests, it must bear the burden of demonstrating the need for that breach. And here, as the district court held, there is no justification whatever for the 1981 Indiana maps. Each is independently sufficient to strike down the 1981 Indiana Plan, because the Plan violates all three. The first two by definition apply only to state and local bodies.

A. Mix of Different Sized Districts

The presence of different sized districts in the same plan clearly gives the map-maker a discretion that does not otherwise exist. This is demonstrated by plaintiffs' exhibit 54 (JA-61) showing how an evenly divided electorate can produce a three to one majority for either of two parties by use of a mix of triple-member and single-member districts. There is no qualitative difference among that simple example, the absurd three district Indiana plans (*see* footnote 27 *supra*) and the actual 1981 Indiana Plan. Each uses the flexibility afforded by multimember districts to accomplish an illegitimate end. None is justified by any proper objective. And each is readily identified.

***44 B. Nesting**

Nesting provides another simply administered restriction. What is proper for one house is proper for the other. By requiring nested districts where applicable, another element of discretion is restricted. If a boundary is justified by any neutral principle it is likely to be justified for both houses, and the State should be required to prove the need for any deviations from this principle. Again, as a matter of equal protection, this is simply a matter of treating everyone the same. To the extent the legislature wishes to justify its deviation from this neutral criterion, it must bear the burden of showing a proper state interest.

C. Deviation from Political Units

Because the state legislative districts in most states are smaller than congressional districts, this factor, like the first two, may have little application to congressional maps. [37] This Court has recognized that allowances for representation of political units may justify population deviations that are unwarranted in congressional maps. *Gaffney v. Cummings,* 412 U.S. at 742 (quoting *Reynolds v. Sims,* 377 U.S. at 577). If so, however, "[t]he inquiry then becomes whether it can reasonably be said that the state policy urged by [the state] to justify the divergences in the legislative reapportionment plan . . . is, indeed, furthered by the plan adopted by the legislature, and whether, if so justified, the divergences are also within tolerable limits." *Mahan v. Howell,* 410 U.S. at 326. As further observed in *Mahan v. Howell*: "The policy of maintaining the integrity of political subdivision lines in the process of reapportioning a state legislature * * * is a rational one," *id.* at 329, and multimember districts ***45** may be used to that end under some circumstances. This greater latitude exists because of the state interest in protecting existing political boundaries. It goes back to *Reynolds v. Sims*: "A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions as political subdivisions. * * * And a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering." 377 U.S. at 580-81. But when, as here, the rational state policy is not served, indeed, is flaunted, the reason for greater latitude evaporates. *Cf. Brown v. Thomson,* 462 U.S. 835, 850-60 (1983) (Brennan, J., joined by Justices White, Marshall and Blackmun dissenting). For that reason, court-ordered apportionments may not create multimember districts and must meet the more rigorous "congressional standard" for population deviation. *Chapman v. Meier,* 420 U.S. at 18; *Connor v. Finch,* 431 U.S. at 414; *City of Mobile v. Bolden,* 446 U.S. at 66.

The Indiana Plan would have it both ways: population deviation without any justification in geographic or political units or any other legitimate state interest. [38] By requiring that natural building blocks be used within the state-selected population deviations, the state may choose between these priorities but may not arbitrarily disregard both. Just as *Reynolds v. Sims* requires population equality, a requirement of adherence to political units (cities, towns, counties and combinations of contiguous units) that meet the general population deviation selected (2% in the 1981 Indiana plan) is easily and mechanically applied. [39] If, on the 1980 Indiana census, the natural ***46** building blocks were used, that too would significantly restrict the potential for arbitrary action and further both commonality of interest and the voters' awareness of who their representatives are. It simply recognizes that the rationale for allowing greater population deviation in state maps to permit recognition of political lines does not apply if the maps disregard those units. As a result, a plan that goes beyond minimal deviations without any justification is unconstitutional.

CONCLUSION

Reynolds v. Sims has led to revitalized state governments and renewed vigor of state legislative process. It was a landmark, yet modern technology has now effectively overruled *Reynolds v. Sims* and restored the monarchy of the "ins" at the expense of the current "outs". The notion of majority rule as a cornerstone of the republic turns on the ability of any minority or group of minorities to attain majority status if its voting power warrants. The courts must act to preserve access to the levers of government where, as here, there is no other recourse to prevent the abuse of power to perpetuate itself. The judgment of the district court should be affirmed.

Respectfully submitted,

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APPENDIX

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Footnotes

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1 Citations to "A - -----" refer to the Appendix to defendants' Jurisdictional Statement. "JA- -----" refers to the Joint Appendix. "Oct. R. -----" and "Nov. R. -----" refer to the pages of the separately paginated transcripts of the proceedings below held on October 12, 1983, and November 16, 1983, respectively. Pursuant to Rule 34.5, in the case of exhibits, these references are to the transcript pages where the exhibits were offered and admitted.

2 Plaintiffs' expert so testified (JA-26) and defendants' expert agreed (Nov. R. 243). The theoretical basis for this is set forth in Backstrom, Robins & Eller, *Issues In Gerrymandering: An Exploratory Measure Of Partisan Gerrymandering Applied To Minnesota,* 62 Minn. L. Rev. 1121 (1978).

3 All of plaintiffs' statistical exhibits (Pl. Exs. 26 through 52) were offered and admitted into evidence at Oct. R. 70.

4 *See* Wallace, *Legislative Apportionment In Indiana: A Case History,* 42 Ind. L. J. 6, App. J-1 to W-1 (1966).

5 Four Democrats were appointed as nonvoting "advisors" to the committee, but not a single senator or representative of the minority party was appointed as a conferee (A-7).

6 The details of the districts are too finely drawn to be accurately depicted in a document the size of this brief. Plaintiffs' exhibit 12 is a map of Marion County showing the House district lines in black. This and other maps in evidence were not included in the record initially sent to the Court by the district court clerk but were subsequently forwarded to this Court. All of the maps used by plaintiffs at trial (Pl. Exs. 1 through 22) were identified, offered and admitted in evidence at Oct. R. 33-4??.

7 Schematic displays of the districts in and around Marion and Allen Counties appear in the Appendix to this brief. The political makeup of these areas can be seen from an inspection of plaintiffs' exhibits 7 (Marion) and 13 (Allen) which are color coded to reflect the baseline Democratic and Republican votes in various areas of these counties. The detail of the parts of the districts inside these counties appears in overlays as plaintiffs' exhibits 8 and 9 (Marion) and 14 and 15 (Allen).

8 Lake County's House and Senate districts are shown on plaintiffs' exhibit 19. Lake County's Democratic core vote is in the northwest corner of the state. As a result, the scheme used in Marion and Allen counties (patching suburban areas onto the Democratic core) was not feasible within the state boundaries.

9 Vanderburgh County's House and Senate districts are shown on plaintiffs' exhibit 22.

10 At the time the Plan was adopted Art. 4, § 6 of the Indiana Constitution so provided. The Constitution was amended in 1984 to eliminate this provision.

11 Some of the shapes of rural districts appear at pages 18 and 19 of the Motion To Affirm. As will be seen, they include many bottlenecks, projections and indentations. The urban districts are sufficiently irregular that their shapes cannot be viewed except on larger maps (Pl. Exs. 12, 16, 19 and 22).

12 Jewell, *The Consequences of Single- and Multimember Districting,* in REPRESENTATION AND REDISTRICTING ISSUES 129, 131 (B. Grofman, A. Lijphart, B. McKay and H. Scarrow eds. 1982). Defendants observe that under the 1960 plan Democrats won 15 of 75 seats up for election in the 5 general elections of that decade. Under the Plan, Democrats can be expected to win 3 of 15 seats in each of five elections for a total of 15 seats for the decade (Def. Br. 31). The difference of course is that in the 1960s, the 15 were won all at once (1964) and gave the Democrats control of the legislature. *Whitcomb v. Chavis,* 403 U.S. at 134 n.11. This illustrates the effect of large multimember districts observed in *Whitcomb v. Chavis,* to submerge individual candidates and reduce all races to baseline party strength.

13 A map (Pl. Ex. 51) displaying the county lines appears at JA-57. The significance of the other materials on the map appearing at JA-57 is explained in note 27 *infra*.

14 It is presumably this phenomenon to which defendants refer when they state, incorrectly and free of record reference, that House districts generally follow township lines (Def. Br. 30). That claims certainly not true of urban areas. *See* Pl. Exs. 7, 8 and 9 (Marion County), 19 (Lake County), 13, 14 and 15 (Allen County) and 22 (Vanderburgh County).

15 The method of measuring baseline vote is explained at p. 3 *supra*. The average (mean) of the baseline results in 1976 and 1982, the two years in recent electoral history that were neither heavily Republican nor heavily Democratic, was 50.9% Republican to 49.1% Democratic. If all years since 1954 are averaged, the result is essentially the same at 51.2% and 48.8%. The dissent below concluded that the statewide vote was 53.2% Republican (A-45). This conclusion is based on a plainly faulty methodology. It averages only 1980 (a Republican landslide) and 1982 (a normal year). This is no more appropriate than averaging 1974 (a Democratic landslide) and 1976 (a normal year) to conclude that Indiana was 52.35% Democratic in 1978 (Pl. Ex. 30; JA-37).

16 This is to be expected. Baseline figures are offered to show the bias inherent in a district and in a statewide plan, not to predict the result in any district. The strength of a given candidate, at least in a single-member district can overcome significant handicaps. But statewide, as a matter of random distribution, these effects tend to neutralize each other as they in fact did in the 1982 (and 1984) Senate races.

17 In fact, in the 1984 election seven Democrats were elected.

18 First, defendants contend that "vehicle bills are used by the legislative leadership of both parties" (Def. Br. 4). Defendants' sole support for this claim is an exhibit (Def. Ex. Y; R. 126, 127) showing that during the 1981-82 legislative session the Senate minority leader introduced nine bills designated as "vehicle bills." But the exhibit gives no indication as to whether, as is usually the case, the bills gained content in the normal committee process before action by either house. Nor does it reveal any parallel empty vehicles proceeding simultaneously through the House in order to throw empty bills into a single party conference committee as happened in this extraordinary case.

Defendants also argue that because a few changes were made in the plan reported by the conference committee the legislative process was in fact open (Def. Br. 5). Defendants' "facts" do not support their proposition. Of the 127 legislative districts, the majority's leaders could recall only four instances of accommodations made to the minority party. These accommodations were both few in number and of no significance to the overall effect of the plan.

Lastly, defendants use the statement of the case to argue that their actions were consistent with the rules of legislative procedure and "were substantially the same as the procedures followed in previous years" (Def. Br. 6). Whether the actions of the majority were in technical compliance with legislative rules created and adopted by them is beside the point. Whether similar procedures had or had not been followed in the past is also irrelevant. But, more to the point, the record is devoid of any testimony or exhibits substantiating defendants' claim.

19 Although no "strict scrutiny" is necessary to invalidate the 1981 Indiana apportionment, laws affecting voting are among those which receive this highest degree of equal protection attention, because the franchise is "the guardian of all other rights." *Plyler v. Doe,* 457 U.S. at 217 n.15. Where the right to vote is infringed, or, as in this case, rendered ineffective, there is no longer a basis for the Constitution's generally optimistic presumption "that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process." *Vance v. Bradley,* 440 U.S. 93, 97 (1979). Consequently, any law having "a real and appreciable impact on the exercise of the franchise" must be "'closely scrutinized' and found reasonably necessary to the accomplishment of legitimate state objectives." *Bullock v. Carter,* 405 U.S. 134, 144 (1972) (quoting *Harper v. Virginia State Bd. of Elections,* 383 U.S. 663, 670 (1966)); *see also Reynolds v. Sims,* 377 U.S. 533, 562 (1964); *Wesberry v. Sanders,* 376 U.S. 1, 17 (1964); *Yick Wo v. Hopkins,* 118 U.S. at 370.

20 Summary affirmances reject only the specific questions presented in the jurisdictional statement. *Mandel v. Bradley,* 432 U.S. 173, 176 (1977). Defendants' reliance on decisions by federal courts of appeal and district courts is likewise unpersuasive. *WMCA, Inc. v. Lomenzo,* 238 F. Supp. 916 (S.D.N.Y. 1965), for example, is premised on an incorrect reading of this Court's opinion in *Fortson v. Dorsey,* 379 U.S. 433 (1964). The district court in *WMCA* believed *Fortson* ". . . makes it clear that the Supreme Court has refrained from condemning partisan gerrymandering as unconstitutional." 238 F. Supp. at 926. As indicated at p. 22 and n.34, the Court made no such finding. To the extent the Seventh Circuit's opinion in *Cousins v. Chicago City Council,* 466 F.2d 830 (7th Cir. 1972), suggests that a claim of gerrymandering is a nonjusticiable political question that opinion was clearly modified by *Russo v. Vacin,* 523 F.2d 27, 30 (7th Cir. 1976). There the circuit court, in keeping with the opinions of this Court, emphasized that "redistricting . . . for political purposes is not wholly exempt from judicial scrutiny."

21 Plaintiffs in *Baker v. Carr* challenged the apportioning of the State of Tennessee for purposes of electing representatives to the state assembly. The voting districts of Tennessee, like those of most states, had not been changed in several decades notwithstanding dramatic shifts in the size and location of the state's population. Plaintiffs alleged that the apportionment violated the equal protection clause because it disadvantaged voters in heavily populated (urban) districts by virtue of the "debasement of their votes." 369 U.S. at 187-188. The district court, believing that the case presented a "question of the distribution of political strength for legislative purposes" dismissed the plaintiffs' claim at least in part because it believed the claim raised a nonjusticiable political question. This Court reversed, holding:

We understand the District Court to have read [*Colegrove v. Green*] as compelling the conclusion that since the appellants sought to have a legislative apportionment held unconstitutional, their suit presented a "political question" and was therefore nonjusticiable. We hold that this challenge to an apportionment presents no nonjusticable "political question." . . .

. . . .

. . . Appellants' claim that they are being denied equal protection is justiciable, and if "discrimination is sufficiently shown, the right of relief under the Equal Protection Clause is not diminished by the fact that the discrimination relates to political rights." *Id.* at 209-10 (citation omitted).

22 The distinction, at least in voting terms, is meaningless. *See* Note, *The Constitutional Imperative Of Proportional Representation,* 94 Yale L.J. 163, 175-82 (1984).

23 In this regard the case is very different from *United Jewish Organizations of Williamsburg, Inc. v. Carey,* 430 U.S. 144, 166 (1977), where the Court held "as long as whites in Kings County, as a group, were provided with fair representation, we cannot conclude that there was a cognizable discrimination against whites or an abridgement of their right to vote on the grounds of race." Here there is no statewide fair representation of Indiana Democrats. The Court in *United Jewish Organizations,* analogized the plaintiffs in that case to a political minority "submerged year after year by the adherents to the majority party who tend to vote a straight party line." *Id.* at 167. Indiana Democrats are submerged year after year not by the vote of the majority party, but by the vote of an at best sometime majority party serving as a permanent majority because of a gerrymandered apportionment.

24 This proposition is discussed more fully in the Brief Amicus Curiae of the Republican National Committee In Support of Appellees.

25 If one has, as MOR does, a data base containing each precinct's results in the anonymous races, a computer can readily measure the baseline party vote in any hypothetical district. This information is not at all easily assembled. It exists in public records only in the form of hand posted results in the office of the clerk of each of the 92 counties. Results from previous elections are not always readily found. Even after the results for a given election are known, because precinct lines change from time to time, one cannot just compare the totals from the same numbered precinct from year to year. And simply the mechanics of adding and balancing all these results are overwhelming. For these reasons, anyone who had no access to MOR's computer was wholly unable to respond to the plan unveiled in the legislation in the forty hours the Democrats were given to accomplish that task.

26 *See* Howard and Howard, *The Dilemma of the Voting Rights Act-Recognizing the Emerging Political Equality Norm,* 83 Colum. L. Rev. 1615 (1983); *The Constitutional Imperative,* note 22 *supra.*

27 Plaintiffs' Exhibit 51 (JA-57) shows an equipopulous gerrymander using only three districts and adhering perfectly to county lines. It creates an unassailable majority for the Republicans under any foreseeable electoral result. Plaintiffs' Exhibit 52 (JA-58-60) is an example of a three district map that produces the same permanent control for the Democrats. The point is that districts of different sizes alone give the mapmakers sufficient discretion to override population and every other consideration.

28 Because of the "balloon effect" correctly observed by some amici and spelled out in Backstrom, note 2 *supra* at 1134-1136, Democrats receiving 52% of the vote should receive 55% to 65% of the seats in a fair apportionment.

29 Defendants' challenge to the relevance of statements made by the majority's leadership is apparently limited to instances in which those comments hurt defendants' case. Defendants repeatedly rely on comments of individual purpose by those same individuals in seeking to identify a neutral criterion, *e.g.,* claimed concern for preservation of black representation, that might have been employed. As the district court found, however, none of these self-serving claims withstands even superficial analysis. None justifies the plan as adopted (A-32). Nor was any of these purportedly neutral criteria consistently applied.

30 *See Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977).

31 Stacking members of the minority party together so as to prevent them from electing more than one representative, or splitting them into various districts so as to prevent them from electing any representative, have precisely the same effect as other clear cases of denial of equal protection such as failing to count votes (*United States v. Mosley,* 238 U.S. 383 (1915)), stuffing the ballot box (*United States v. Saylor,* 322 U.S. 385 (1944)), imposing a poll tax (*United States v. Texas,* 252 F. Supp. 234 (1966), *aff'd,* 384 U.S. 155 (1966)), or allowing districts to have great population disparities (*Reynolds v. Sims,* 377 U.S. 533 (1964)). They have the effect of foreclosing participation by a group of citizens in the most fundamental of all governmental acts-the passage of laws. The effect is to wall that group out of the process of formulating state policy.

32 Jewell, note 12 *supra* at 131:

The tactics and costs of state legislative campaigns are quite different in single-member and in large multimember districts. In single-member districts most legislative candidates run their own campaigns. They raise their own funds and build small organizations of volunteers. They run personal campaigns, going door-to-door, frequenting the shopping centers and other gathering places, and speaking to neighborhood groups. There is a maximum of personal contact, and a minimum of emphasis of issues. Candidates may seek the support of organized groups and may get some help in the general election from the party organization, but their success does not depend heavily on such groups. Except in the larger, more populous districts (such as those in California, New York, or Ohio), the cost of such campaigns is relatively low.

33 The Court has repeatedly recognized the many problems inherent in multimember districts: Confusion among voters is prevalent. *Chapman v. Meier,* 420 U.S. at 15. Ballots are long and cumbersome. *Lucas v. Forty-Fourth General Assembly of Colorado,* 377 U.S. 713, 731 (1964). Bloc voting by delegates from multimember districts may result in excessive representation of residents of those districts relative to voters in single-member districts. *Chapman v. Meier,* 420 U.S. at 16. And electoral minorities may be submerged. *Connor v. Finch,* 431 U.S. 407, 415 (1977). The point is not that these districts are per se unconstitutional. They are not. *Whitcomb v. Chavis,* 403 U.S. at 158. The point is that they are different, and therefore constitute a classification of citizens requiring justification.

Others share the Court's view that there are problems inherent in the use of multimember districts. The Justice Department has rejected apportionment schemes using multimember districts in a number of states covered by the Voting Rights Act. Engstrom, *Racial Vote Dilution: Supreme Court Interpretation of Section 5,* 4 S.U.L. Rev. 139 (1978). And the use of multimember districts by states has been declining. In 1970 46% of the upper houses and 62% of the lower houses in state legislatures contained some multimember districts. *Whitcomb v. Chavis,* 403 U.S. at 157. By 1981 those figures had declined to 22% (11 of 49) and 43% (21 of 49) (Def. Ex. GG; Nov. R. 126, 127). Nebraska has a unicameral legislature which also has no multimember districts.

34 In *Fortson v. Dorsey,* 379 U.S. 433 (1965), senate districts were made up of one or more counties. In *Kilgarlin v. Hill,* 386 U.S. 120 (1967), complete and contiguous counties were used for multimember and "flotarial" districts. *Abate v. Mundt,* 403 U.S. 182, 187 (1971), emphasized "the long tradition of overlapping functions and dual personnel in Reckland County government and the fact that the plan before us does not contain a built-in bias tending to favor particular political interests or geographic areas."

Fortson v. Dorsey observed that the question whether multimember districts minimize or cancel out the voting strength of racial or political elements of the voting population was not presented by the record. 379 U.S. at 439. *Burns v. Richardson,* 384 U.S. at 88, stated that:

The demonstration that a particular multimember scheme effects an invidious result must appear from evidence in the record. That demonstration was not made here.

And in *Whitcomb v. Chavis,* 403 U.S. at 124, the Court explicitly noted that:

There is no suggestion here that Marion County's multimember districts or similar districts throughout the state, were conceived or operated as purposeful devices to further racial or economic discrimination.

35 As of 1981, 16 states had nested plans (Def. Ex. GG; R. 126, 127). Other than Indiana, only seven states with a number of House districts that was an even multiple of the number of Senate districts did not have nested plans (*Id.*). All but two of those seven states are required by state law to preserve political boundaries when apportioning. Grofman, *Criteria for Districting: A Social Science Perspective,* table 3 (1985 forthcoming).

36 The district court described some of these shapes at A-14 through 16 and 28 through 29.

37 "[A]lmost invariably, there is a significantly larger number of seats in state legislative bodies to be distributed within a State than congressional seats, and . . . therefore it may be feasible for a State to use political subdivision lines to a greater extent in establishing state legislative districts . . ." *Mahan v. Howell,* 410 U.S. at 321.

38 The 2% deviations (4% in range from high to low) allowed by the Plan would be unacceptable in a Congressional map. *Karcher v. Daggett,* 462 U.S. 725 (1983).

39 "A better constraint on potential gerrymandering [than compactness and contiguity] is imposed by the use of established political boundaries * * * to the extent that the attainment of precisely equal districts requires abandonment of longstanding political boundaries, gerrymandering is that much easier." *Connor v. Finch,* 431 U.S. at 429-30 (Blackmun, J., concurring in part and concurring in the judgment joined by the Chief Justice).??

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