1985 WL 670022 (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.
May 8, 1985.

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

Amicus Curiae Brief of the Senate of the State of California in Support of Brief of Appellants

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***1** In accordance with Rule 36.2 of the *Rules of the Supreme Court of the United States,* the Senate of the State of California (hereinafter the "California Senate") submits this brief, as *amicus curiae,* in support of appellants' appeal from the decision of the United States District Court for the Southern District of Indiana in *Bandemer v. Davis,* Cause Nos. IP 82-56-C and IP 82-164-C. [1]

***2 I**

STATEMENT OF INTEREST OF AMICUS CURIAE.

Amicus is the duly elected and constituted Senate of the State of California and, along with the Assembly of the State of California, has the primary responsibility for reapportioning California's forty-five (45) Congressional districts, eighty (80) Assembly districts, and forty (40) Senate districts. The California Senate files this *amicus* brief because the decision of the district court in *Bandemer v. Davis,* if allowed to stand, will have a substantial impact far beyond the borders of Indiana and will likely trigger protracted litigation in virtually every state in the Union. California, in particular, has already suffered through nearly four and one-half years of bitter litigation stemming from its most recent reapportionment, and faces the almost certain probability of further litigation in the wake of the *Bandemer* decision - litigation which could very well extend through the end of the decade.

II

SUMMARY OF CONTENTIONS.

The California Senate urges this Court to reverse the decision of the district court below, on the following grounds:
A. The decision of the district court runs directly contrary to established law on the issue of the justiciability of claims of political or partisan gerrymandering, as articulated by numerous decisions of this Court and of various circuit courts of appeals.

B. The decision of the district court fails to articulate judicially manageable standards for reviewing claims of political gerrymandering, and indeed, a review of the specific factors focused upon by the district court (statistical analyses and the configuration ***3** of electoral districts) clearly demonstrates that judicially manageable standards for the review of such claims are incapable of judicial articulation. As a result, claims of political gerrymandering should continue to be considered nonjusticiable.

C. The decision of the district court, if allowed to stand, will have a substantial and continued impact throughout the country and will no doubt result in numerous state and federal courts being dragged unnecessarily into the "political thicket" of vast and inconclusive reapportionment litigation, while state legislators will be transformed into professional litigants unable to devote significant time to their legislative duties.

III

THE DECISION OF THE DISTRICT COURT IS CONTRARY TO ESTABLISHED LAW.

The district court's decision in *Bandemer* is in clear conflict with previous decisions of this Court, the Seventh Circuit Court of Appeals, and courts of appeals from various other circuits. This conflict has been thoroughly briefed by appellants and by various other *amici,* and it is sufficient simply to note that, insofar as the decision purports to recognize the justiciability of a claim for political gerrymandering, that decision is contrary to established law as articulated by cases including *Jiminez v. Hidalgo County Water District No. 2,* 424 U.S. 950 (1976);[2] *Gaffney v. Cummings,* 412 U.S. 735, 752-53 (1973); *YMCA v. Lomenzo,* 382 U.S. 4 (1965); ***4** *Russo v. Vacin,* 528 F.2d 27 (7th Cir. 1976); and *Cousins v. Chicago City Council,* 466 F.2d 830 (7th Cir.), *cert. denied,* 409 U.S. 893 (1972).[3]

IV

CLAIMS OF POLITICAL GERRYMANDERING ADMIT OF NO JUDICIALLY DISCOVERABLE AND MANAGEABLE STANDARDS FOR REVIEW AND HENCE SHOULD CONTINUE TO BE CONSIDERED NONJUSTICIABLE.

It has long been recognized that claims of constitutional violations are to be considered nonjusticiable "political questions" where there is "a lack of judicially discoverable and manageable standards for resolving [such claims]". (*Baker v. Carr,* 369 U.S. 186, 217 (1962); *see also Coleman v. Miller,* 307 U.S. 433, 454-55 (1939) (justiciability depends on existence of "satisfactory criteria for judicial determination").)

As the *Baker* decision teaches, the question of justiciability depends in large measure upon "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded". (*Baker,* 369 U.S. at 198.) It is submitted that such tasks, while often difficult, take on near herculean proportions when a court is confronted with claims of political or partisan gerrymandering.

***5 A. Precise Identification Of The Allegedly Disfavored Class Of Voters Is Impossible In A Political Gerrymandering Case.**

A threshold inquiry in any equal protection analysis is the identification of a specific class of individuals which has been singled out for discriminatory or unequal treatment. In this regard, the decision of the court below treats the *political preference* of voters *in a single election* as a status equivalent to membership in a *racial or ethnic minority,* and thus finds such "political groups" to be entitled to the same protections long accorded racial or ethnic minorities.

Simply stated, however, there are fundamental dissimilarities between membership in an identifiable racial or ethnic group, on the one hand, and an individual's one-time voting preference, on the other hand. These important distinctions preclude treating claims of political gerrymandering in the same manner as claims of racial or ethnic gerrymandering.

The lower court identified, as the class supposedly placed in a disfavored position under the apportionment plans adopted by the Indiana Legislature, *those persons who cast votes for Democratic Party candidates in the 1982 Indiana House and Senate elections*. Unlike members of racial or ethnic minorities, however, members of such a "political group" do not share any "immutable" characteristic which is capable of subjecting members of the group to legal or social stigma. (*Compare Plyler v. Doe,* 457 U.S. 202 (1982) (status as undocumented alien *not* an immutable characteristic); *Parham v. Hughes,* 441 U.S. 347 (1979)); *with Gomez v. Perez,* 409 U.S. 535 (1973); *Graham v. Richardson,* 403 U.S. 365 (1971); *Oyama v. California,* 332 U.S. 633 (1948) (holding, respectively, that *illegitimacy, alienage,* and *national origin* do constitute such immutable characteristics).)

Similarly, members of such political groups, unlike members of racial or ethnic minorities, cannot point to any ***6** history of purposeful discrimination impeding their ability to participate in the political process. (*See United States v. Carolene Products,* 304 U.S. 144 (1938).) Thus, these traditional bases for special protection are not implicated by a claim of partisan gerrymandering.

Nor do persons who cast votes for Democratic candidates in the 1982 Indiana House and Senate elections constitute members of a "discrete and insular minorit[y]" entitled to, or in need of, special protection. (*Carolene Products,* 304 U.S. at 153 n.4.) Rather, precisely the opposite is true -membership in a particular political party or political group is *highly transitory*. Individuals may, *and often do,* change party affiliation and, even if they do not, party affiliation does not

guarantee that they will vote for candidates fielded by their party. Rather, Americans are notorious for *crossing party lines* in order to cast their ballots for candidates who, although affiliated with other parties, are considered to be more attractive or more qualified than their opponents.

As a result, a federal court attempting to evaluate a partisan gerrymandering claim cannot, with any degree of precision, *even attempt to identify the supposedly disadvantaged class,* either by reference to political registration *or* to the percentage of ballots cast for candidates fielded by that party. For this reason, it simply cannot be argued that "the duty asserted [by parties alleging partisan discrimination] can be judicially identified" and, for this reason, claims of political gerrymandering should continue to be recognized as nonjusticiable. (*Baker,* 369 U.S. at 198.) [4]

***7 B. Nor Can Judicially Manageable Standards Be Articulated To Assess Whether A "Political Gerrymandering" Has Actually Taken Place.**

As noted, claims of political gerrymandering present a *preliminary* problem of justiciability for the simple reason that members of the supposedly disfavored class cannot be identified with any degree of certainty. Assuming, however, that an identifiable political group entitled to constitutional protection could be clearly defined, a *second* justiciability problem is presented by the fact that the conduct of a state legislature which is claimed to unlawfully disfavor this group cannot be measured against the required "judicially discoverable and manageable standards". (*Baker,* 369 U.S. at 217.)

Claims of "political gerrymandering" arising from the apportionment of a state's electoral districts have long been considered nonjusticiable primarily because the apportionment process has been correctly perceived as a "political thicket" into which courts should not lightly step. (*Colegrove v. Green,* 328 U.S. 549, 556 (1946).) As a result, ***8** reapportionment has long been considered a task best left to the legislatures of the various states *and best left alone, wherever possible, by the federal judiciary. (E.g., Reynolds v. Sims,* 377 U.S. 533, 586 (1964); *Gaffney,* 412 U.S. at 749-51 (courts should not seek to improve upon constitutionally sufficient apportionment plans).)

While this Court in *Baker* and its progeny did choose to enter the "political thicket", and ultimately concluded that claims of *significant population disparities* among legislative or congressional districts *did* present a justiciable controversy under the Fourteenth Amendment, *it did not do so until it was able to articulate perhaps the paradigm example of a "judicially discoverable and manageable standard*[]" - the requirement of *"one person, one vote"*. Application of this requirement, first enunciated in *Gray v. Sanders,* 372 U.S. 368, 381 (1963), and made applicable to the apportionment of state legislative bodies by *Reynolds,* 377 U.S. at 568, and related cases, is elegant in its utter simplicity.

All that a court considering claims of unconstitutional population disparities need do is to ascertain and compare the population figures for the various electoral districts and ensure that each elector has been given the opportunity to cast a vote equal in strength to that cast by his or her fellow electors. Simple arithmetic is all that is needed. The ease with which this particular constitutional standard may be applied thus provides *a well marked and easily travelled pathway through the otherwise impassable "political thicket",* and allows a federal court to act with confidence in its ability to identify *and* rectify situations in which the dictates of the equal protection clause have been ignored. [5]

***9** By contrast, claims of political gerrymandering *cannot* be evaluated by reference to similarly discoverable or manageable judicial standards. In fact, the decision of the *Bandemer* court itself demonstrates the lack of sufficient standards with which to ascertain whether a political gerrymander has indeed taken place. Neither the *statistical analysis* employed by the district court nor *its focus upon the size and shape of specific districts* can provide standards sufficiently specific to allow future courts to identify and rectify specific acts of claimed political gerrymandering.

1. The Statistical Analysis Employed in Bandemer Does Not Provide A "Judicially Manageable Standard".

Despite purportedly disavowing any notion that proportional representation for political parties is required under the Constitution (a conclusion too well established to be questioned at this point), the *Bandemer* court nevertheless used its "finding" of a lack of proportional representation for Indiana Democrats as the springboard to its eventual conclusion that an unconstitutional political gerrymander had occurred.[6] Thus, in branding the reapportionment of the Indiana House and Senate a "political gerrymander", the district court placed primary emphasis upon statistics showing that, *although Democratic candidates received 51.9% of all votes cast in the Indiana House* ***10** *elections, Democrats were elected to only 43 of the 100 seats in that body*.[7]

The majority found that this statistical discrepancy created, at the very least, a *prima facie* case of discrimination, requiring substantial scrutiny of the specific details of the challenged plans and placing the burden of justifying *each* particular district configuration *on the state*. However, it is submitted that such blind reliance upon potentially misleading statistical analyses cannot provide the "judicially discoverable and manageable standards" necessary to evaluate claims of political gerrymandering.

Indeed, Judge Pell, in dissent, suggested an alternative statistical approach focusing, not on the often hotly contested Senate and House races reviewed by the majority, but instead on *low visibility races* in which, according to researchers, candidate personalities are often *less important than straight party affiliation* in determining the outcome.[8] Utilizing this approach, which Judge Pell suggests provides a more accurate measure of the partisan voting ***11** strength of the majority and minority parties, Democratic voting strength in Indiana was estimated to be *46.8 percent,* rather than the *51.9 percent* figure identified by the majority.

Applying this figure to the results of the 1982 Indiana House and Senate elections, Judge Pell then found that the Democrats did win slightly fewer House seats than might have been expected by reference to their base voting strength, *but nevertheless won more seats in the Senate than would have been expected* - winning, indeed, a *majority* of those seats. Judge Pell concluded, on this basis, that the disproportionate results in the Indiana House could *not* be considered to have resulted from purposeful discrimination or political gerrymandering by the Republican majority.

While the statistical analysis employed by Judge Pell may or may not be considered to enjoy greater empirical validity than the analysis employed by the majority, this is not the critical point; rather, what is important is the fact that different analytical approaches, based upon competing statistical analyses *designed to measure the same basic characteristic* - partisan voting strength - *led to wholly contradictory conclusions*.[9] This conflict merely exemplifies ***12** a fact which is well known among researchers - statistical analyses may be manipulated to reach a variety of different conclusions, some of which are completely contradictory.[10] More importantly, however, the contradictory factual conclusions reached by the majority and the dissent in *Bandemer* clearly point up the *complete lack of "judicially discoverable and manageable standards"* with which claims of partisan gerrymandering may be evaluated and decided.

Future courts faced with the task of identifying and rectifying alleged political gerrymanders will not be able to test such claims by reference to a simple constitutional yardstick such as the "one person, one vote" standard used in *Baker* and *Reynolds,* but will instead be inundated with conflicting statistical analyses, yielding contradictory results, even with regard to the preliminary question of whether there has been a disproportionate *impact* upon the minority party. As in *Bandemer,* the minority party will invariably be able to present statistics indicating a *lack* of proportional representation, while the majority party will invariably be able to present similar statistical analyses suggesting a *contrary* conclusion.

***13** Given that the statistical analyses employed by the *Bandemer* court do not provide manageable standards for review, litigation involving such claims is likely to degenerate into protracted and inconclusive factual disputes, and different results may obtain in different jurisdictions despite similar sets of facts. Courts attempting to evaluate claims of partisan discrimination under this approach will thus be left to flounder in the "political thicket" and become "bogged down in a vast apportionment slough". (*Gaffney,* 412 U.S. at 750.)

2. The Statistical Approach Employed By The District Court Provides No Guidance For Legislatures Engaged In The Task Of Reapportionment.

A second problem arising from the lower court's focus upon the 1982 election results is the fact that this approach cannot possibly provide any guidance to a state legislature engaged in reapportionment. *A fortiorari,* future election results will not be available until *after* the task of reapportionment has been completed. State legislators will thus be left to rely only upon party registration statistics, as available *at the time of reapportionment*.

However, such statistics have proven to be notoriously poor predictors of election results for various reasons, including candidate personalities, shifting political tides, variable voter turnout, current issues of particular primacy, cross-over voting, and the "coattail" effect which often accompanies the election of a popular presidential or gubernatorial candidate. Past election results likewise constitute a poor predictor of future elections for similar reasons. [11]

***14** As a result, it is possible that a legislature might promulgate a reapportionment plan designed to insure proportional representation for all political parties, based upon voter registration statistics, but that the election results nevertheless show a definite skewing in favor of the majority party. Under the approach adopted by the district court, such a result, though *wholly unintended,* would establish at least a *prima facie* case of partisan gerrymandering and would shift the burden of justifying every single aspect of the challenged plan to the state. Given the multitude of factors which may be taken into consideration by a legislature reapportioning a state's electoral districts (as discussed in greater detail *infra*), this approach would place an incredible burden on the state - a burden it might not be able to carry even though no *intent* to discriminate ever existed. [12]

Because the statistical approach utilized by the district court focuses upon post-apportionment election results, it cannot provide guidance to state legislatures engaged in the already complex task of reapportionment and, perhaps more importantly, will not allow a court to differentiate between a purposeful gerrymander and situations in which disproportionate election results are the wholly unintended ***15** result of decisions made to foster legitimate state goals or to address legitimate state concerns. Reliance upon statistical analyses thus does not, and cannot, provide a judicially manageable standard for identifying alleged political gerrymanders, and such an approach should therefore be rejected.

3. The Shape And Size Of Districts And Related Factors, As Employed By The Bandemer Court, Do Not Provide Judicially Manageable Standards For Ascertaining Intent.

After determining, by its statistical analysis, that the minority party had been unable to achieve proportional representation in the Indiana Legislature, the *Bandemer* court then reviewed the *shapes* of the districts involved, placing special emphasis upon a perceived lack of *compactness and contiguity,* and concluded that there had been intentional discrimination against voters who wished to cast their ballots for candidates fielded by the Democratic Party. However, as with its reliance upon statistical analyses, these amorphous concepts related to district configurations simply cannot be utilized to frame standards sufficiently precise to differentiate between purposeful gerrymanders and apportionment plans which, though not deliberately discriminatory, nevertheless may have some disproportionate *impact* on the minority party. [13]

Initially, it must be noted that this Court has already refused to hold that compactness should constitute an ***16** independent constitutional requirement. (*Gaffney,* 412 U.S. at 752 n.18.) Perhaps more importantly, however, state and federal courts alike have long recognized that reapportionment is an essentially legislative function best left to the wisdom of a state's elected officials and that state legislatures are to be given wide latitude in identifying and giving effect to various concerns in this process. (*Reynolds,* 377 U.S. at 586.)

For example, in addition to the *required* focus on equality of population among districts, factors as diverse as the compactness and contiguity of districts, [14] respect for political, economic, and geographic communities of interest, [15] the avoidance of contests between incumbents, [16] the enhancement of minority participation in the electoral process, [17] respect for city and county boundaries, [18] as well as ***17** basic geographic regions, [19] the availability and ease of transportation within districts, [20] and the flexibility afforded by the use of multi-member districts, [21] to name but a few, have been recognized as proper considerations which may legitimately be taken into account in the reapportionment of a state's electoral districts. Indeed, many state legislatures are *required,* by state law, to utilize one or more of these factors as guidelines in fashioning new apportionment plans. [22]

Moreover, it has also been recognized that, because changes in the boundaries of one district require concomitant changes in adjacent districts in order to equalize the ***18** populations of these districts, the use of one criteria in constructing any particular district may have far ranging effects on the configuration of other districts. As stated by the California Supreme Court in *Legislature v. Reineke,* 10 Cal.3d 396, 418 n.18 (1973): "Any person with even a passing acquaintance with reapportionment becomes aware of what is known as the 'ripple effect', whereby the casting of one district on the water produces ripples felt throughout the state." (*See also McBride v. Mahoney,* 573 F.Supp. 913, 916 (D. Mont. 1983); *Burton v. Hobbie,* 561 F.Supp. 1029 (M.D. Ala. 1983).)

By virtue of this "ripple effect", the construction of one particular district to effectuate one particular legislative concern (for example, the adjustment of district boundaries to coincide with the unique topography of the area or the boundaries of a political subdivision) will necessarily alter the shapes of districts many miles removed, causing, perhaps, significant deviation from the theoretical ideals of compactness and contiguity. In a state as large and geographically and demographically diverse as California (which ranges from sparsely populated desert and mountain regions, through rural farming communities, to industrial centers and the densely populated coastal cities), the "ripple effect" will have a significant impact on district configurations far removed from the originally constructed district. [23]

Despite the fact that each of the considerations listed above, and others, have been judicially recognized to constitute appropriate factors to be taken into consideration in the reapportionment process, the approach employed by ***19** the district court in *Bandemer* would lead to an intolerable situation in which a state legislature, *whenever it chose to favor one such consideration over another, would invite a legal challenge to the reapportionment plan involved.* For example, were a state legislature to conclude that city and county boundaries or considerations of contiguity and compactness should be disregarded where necessary to leave intact certain geographic or political communities of interest or to enhance minority participation, and the resulting district configurations arguably created some dilution of the voting strength of a particular political party, that party could then assert a *Bandemer* type claim of political gerrymandering which would be difficult to combat.

Likewise, if the California Legislature decides that portions of Los Angeles and Orange Counties should be lumped together into one district because the combined area constitutes part of a larger metropolitan area, but this choice results in those two counties and some of the cities contained therein being split more times than strictly necessary by virtue

of their populations, as well as a deviation from compactness and contiguity in other districts far removed through operation of the "ripple effect", claims of political gerrymandering might again follow. *The possibilities for litigation are simply endless*.

Indeed, given that state legislatures often emphasize one particular consideration, such as compactness and contiguity of districts, *in one area of a state* (for example, urban areas with high population density), while being more concerned with other factors such as basic communities of interest *in other areas of the state* (e.g., in rural areas where the interests of the residents are more closely tied to the geographical features of the land), with yet a third consideration, such as the prevention of a race between two popular incumbents living in close proximity, influencing the drawing of district lines in a *third* region, reapportionment ***20** plans *invariably resemble patchwork quilts or jigsaw puzzles*.

While consideration of each of these factors has been recognized to be proper, their consideration in this particular manner could lead to charges of "irrational mapmaking". (Jurisdictional Statement, at A-29.) Those dissatisfied with the plans enacted would of course claim that no cohesive rationale underlies the entire plan and that, in reality, such purported considerations simply mask a discriminatory intent. Again, under the approach adopted by the district court, such claims could prove extremely difficult to refute.

Simply stated, given the multitude of factors which may (but need not be) taken into account in fashioning new reapportionment schemes, a federal court would be faced with a wholly unmanageable task in attempting to determine whether the minimization of county or city splits in one particular area, or a special emphasis on compactness and contiguity or the protection of incumbents in another, evidenced *legitimate state concerns or an intent instead to discriminate against the minority political party or parties*.

Thus, the considerations noted by the *Bandemer* court simply do not provide any guidance for a court about to enter the "political thicket" in search of partisan or political gerrymanders. Neither statistical analyses, used to measure disproportionate *impact,* nor the consideration of the shape of various districts, supposedly indicative of discriminatory *motive,* provide the type of "judicially discoverable and manageable standards" necessary to render such claims justiciable. (*Baker,* 369 U.S. at 217.)[24] For this ***21** reason, and because of the tremendous avalanche of frivolous and inconclusive litigation which is likely to follow, the decision of the court below must be reversed.

V

THE BANDEMER DECISION, IF NOT REVERSED, WILL CREATE CHAOS IN VIRTUALLY EVERY STATE IN THE UNION.

As noted hereinabove, the lack of any judicially discoverable or manageable standards for evaluating claims of political gerrymandering will create a situation in which the minority party in any state, if dissatisfied with the reapportionment process, may easily bring (simply by alleging disproportionate impact and the preference of one particular consideration over another) superficially plausible challenges to the reapportionment plan enacted by that state's legislature. As a result, federal courts will be inundated with challenges to various state and local apportionment schemes and, given the fact that courts will have no clear guidance in evaluating such claims, it will be difficult to quickly dispose of frivolous or insubstantial actions.

The legacy of *Bandemer* will then be a clogging of the federal court system and the creation of a climate in which the members of state legislatures will be forced to spend *more time litigating than legislating*. Reapportionment has already proved to be a tremendously litigious subject, even ***22** without recognition of political gerrymandering as a justiciable

constitutional claim. [25] California, for example, has suffered through *three decades* of ever-increasing reapportionment litigation, with the result being that the reapportionment which followed the 1980 decennial census spawned no fewer than *eight* separate actions, some of which are still pending nearly five years later. The following will briefly summarize this history.

A. The 1960 California Reapportionment.

Following issuance of this Court's landmark decision in *Baker v. Carr,* actions were filed challenging the validity of California's reapportionment schemes in both state and federal courts. (*See Yorty v. Anderson,* 60 Cal.2d 312 (1964); *Silver v. Jordan,* 241 F.Supp. 576 (S.D. Cal. 1964).) And, after announcement of this Court's equally significant *Reynolds v. Sims* decision, the United States District Court for the Southern District of California found the apportionment of the *State Senate* to be constitutionally invalid. (241 F.Supp. at 582.) This conclusion was affirmed by this Court in *Jordan v. Silver,* 381 U.S. 415 (1965).

The California Supreme Court, in *Silver v. Brown ("Silver I"),* 63 Cal.2d 270 (1965), likewise found the *Assembly* reapportionment plan to be invalid, and thereupon took it upon itself to prepare temporary reapportionment plans which would be used in the 1966 elections were the Legislature to fail to enact valid plans. Although the Legislature ***23** did pass new reapportionment plans which were then signed into law by the Governor, further judicial intervention was necessary when the Governor refused to sign a follow-up bill designed to correct certain "technical errors" in the plans. (*Silver v. Brown ("Silver III"),* 63 Cal.2d 841 (1966).) All told, the California Court was forced to issue *six* separate opinions regarding the 1960 reapportionment. [26]

B. The 1970 California Reapportionment.

In 1971, the California Legislature again apportioned the state's Congressional, Senate, and Assembly districts, based upon the results of the 1970 decennial census. However, the Governor this time refused to sign the bills passed by the Legislature and intervention by the California Supreme Court became necessary. In *Legislature v. Reinecke ("Reinecke I"),* 6 Cal.3d 595 (1972), the state high court, responding to this legislative deadlock, ordered that the 1972 elections be conducted in the districts enacted in the late 1960s (after the *Silver* series of decisions), and retained jurisdiction to promulgate its own set of reapportionment plans for the 1974 elections in the event that the Legislature and the Governor were unable to resolve their impasse.

The Supreme Court was subsequently forced to exercise its retained jurisdiction and appoint a commission of Special Masters to formulate appropriate apportionment plans for the State's Congressional, Senate, and Assembly districts. (***24** *Legislature v. Reinecke ("Reinecke III"),* 9 Cal.3d 166 (1973).) [27] Over a four-month period, these Special Masters completed the arduous task of reapportioning California's legislative and congressional districts, and the Supreme Court, after reviewing other plans offered by various parties and *amici* for its consideration, adopted the plans formulated by the Special Masters in its *fourth* decision addressing the 1970 reapportionment controversy. (*Legislature v. Reinecke ("Reinecke IV"),* 10 Cal.3d 396 (1973).)

C. The 1980 California Reapportionment.

While the reapportionment disputes of the 1960s and the 1970s required *ten* separate opinions from the California Supreme Court, as well as federal court litigation ultimately culminating in this Court's *Jordan v. Silver* decision, this previous litigation unfortunately pales into insignificance when compared to the litigation following the *1980*

reapportionment. Statutes reapportioning these districts were originally passed in 1981, based, of course, upon the results of the decennial census conducted in 1980.

When members of the minority party then qualified three separate referenda challenging those reapportionment statutes, both houses of the Legislature requested that the California Supreme Court remove the referenda from the ballot. [28] Ultimately, the Court ruled that the referenda petitions, ***25** although facially defective, would nevertheless be considered to have qualified for the ballot.

As the qualification of a referendum petition challenging a statute prevents that particular statute from going into effect, California was faced with the prospect of holding its 1982 elections in outmoded districts which had become severely malapportioned due to population shifts occurring since implementation of the *Reinecke* plans. Reasoning that elections in such obsolete districts would contravene the constitutional standard of "one person, one vote", the California Court ordered that the plans formulated by the Legislature, but stayed by the referenda, be employed *on a temporary basis* for the 1982 elections. (*Assembly v. Deukmejian,* 30 Cal.3d 628 (1982).) A subsequent petition for *certiorari* was denied by this Court. (*Republican National Committee v. Burton,* 456 U.S. 941 (1982).) [29]

Far from *resolving* the dispute underlying the apportionment of California's legislative and congressional districts, the California Supreme Court's decision in *Assembly v. Deukmejian* spawned litigation in *three of California's four federal district courts*. [30] Nor did this litigation end the ***26** matter. After the electorate rejected (in the 1982 elections) the reapportionment plans originally promulgated by the Legislature, the Legislature adopted new sets of district lines. True to form, however, the new enactments triggered a new round of litigation, consisting of *not one, but four* separate actions, filed in both state and federal court.

The first arose from an attempt by dissatisfied members of the minority party to bypass the legislative process by submitting to California voters an initiative which, if passed, would have supplanted the legislatively enacted replacement plans with new plans designed by the minority party. However, under the California Constitution, the State may reapportion itself, either by legislation *or* by initiative, *only once per decade,* and the California Supreme Court therefore ordered the Secretary of State, in *Legislature v. Deukmejian,* 34 Cal.3d 658 (1983), to remove this initiative from the ballot.

The remaining actions each addressed the constitutionality of the new districts, as enacted by the Legislature and signed by the Governor. Two of these actions are currently pending, as is the holdover *Halliwell* action referenced in footnote 30, *supra*. [31] As a result of this ongoing partisan ***27** dispute, California has been forced to conduct its last three statewide elections in *three successive sets of legislative districts* and faces the very real possibility that litigation regarding the 1980 reapportionment will extend well beyond the mid-point of the decade, even without serious consideration of claims of political gerrymandering. [32]

Recognition of the justiciability of such claims such as that involved in *Bandemer* will do nothing more than add *yet another layer of litigation* to an already arduous and painful process. Moreover, given the amorphous nature of the standards relied upon by the *Bandemer* court, it is likely that actions seeking redress for alleged partisan gerrymandering will stretch on for years, leaving state legislatures such as that of California to become professional litigants, rather than lawmakers. [33] Such a result, it is submitted, ***28** will inure to the benefit of no one, least of all to California's already reapportionment weary electorate. [34]

Because of the severe impact which the *Bandemer* decision will have, if left intact by this Court, and because claims of political gerrymandering simply cannot be evaluated by the required judicially discoverable and manageable standards,

the California Senate urges this Court to immediately reverse the decision of the court below. Any other result will create havoc in virtually every state, and further clog the federal court system. [35]

***29 VI**

CONCLUSION.

For all of the foregoing reasons, the California Senate respectfully requests that this Court continue to treat claims of alleged political gerrymandering as nonjusticiable and, on that basis, reverse the opinion of the court below.
Respectfully submitted,

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Footnotes

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1 By letters submitted herewith, all parties to the case have consented to the filing of this *amicus curiae* brief by the California Senate.

2 Although issued as an affirmance without further opinion, the *Jiminez* decision is a decision on the merits and thus has precedential value. (*E.g., Meek v. Pittenger,* 421 U.S. 349, 367 n.16 (1975); *Edelman v. Jordan,* 415 U.S. 651, 671 (1974); *Richardson v. Ramirez,* 418 U.S. 24, 53 (1974).)

3 Inasmuch as these cases have been thoroughly briefed, the California Senate will not devote considerable space to reviewing the previous decisions but will instead confine itself to arguing that there are compelling practical reasons for continuing to treat claims of political gerrymandering as nonjusticiable. Chief among these reasons, as articulated hereinbelow, is the fact that claims of political gerrymandering admit of no judicially discoverable and manageable standards by which they may be properly evaluated.

4 Other difficulties in identifying the relevant "political groups" entitled to special protection were pointed out by this Court in *Mobile v. Bolden,* 446 U.S. 55 (1970). There, the Court noted that the notion of a constitutional right to proportional representation for political groups at the municipal level raised "preliminary questions [which] may be largely unanswerable", including such questions as:
Can only members of a minority of the voting population in a particular municipality be members of a "political group"? How large must a "group" be to be a "political group"? Can any "group" call itself a "political group"? If not, who is to say which "groups" are "political groups"? Can a qualified voter belong to more than one "political group"? Can there be more than one "political group" among white voters (e.g., Irish-American, Italian-American, Polish-American, Jews, Catholics,

Protestants)? Can there be more than one "political group" among nonwhite voters? Do the answers to any of these questions depend upon the particular demographic composition of a given city? Upon the total size of its voting population? Upon the size of its governing body? Upon its form of government? Upon its history? Its geographic location?

(446 U.S. at 78 n.??.) These questions become even more difficult to address when courts are asked to identify "political groups" among *state-wide* pools of voters.

5 Indeed, Justice Stevens has emphasized that the prime significance of the "one person, one vote" standard, as developed in the years since *Baker,* stems in large part from the fact that this particular constitutional guideline "attache[s] no significance to the subjective intent of the decisionmakers who adopted or maintained the official rule under attack". (*Rogers v. Lodge,* 458 U.S. 613, 102 S.Ct. 3272, 3285 (1982) (Stevens, J., dissenting).)

6 It cannot be too strongly emphasized that no minority group, whether it be *racial, ethnic,* or *political,* is constitutionally entitled to proportional representation in any state legislature. (*E.g., Mobile v. Bolden,* 446 U.S. at 78-79; *United Jewish Orgs. v. Carey,* 430 U.S. 144, 166-67 (1976); *White v. Regester,* 412 U.S. 755, 765-66 (1973); *Wright v. Rockefeller,* 376 U.S. 52 (1964).)

7 Although the very same statistical analysis, when applied to the Indiana Senate elections, showed that Democratic candidates for the Senate received approximately 53.1% of the vote, and had elected 13 of the 25 State Senators (i.e., 52% of the State Senate), the *Bandemer* court found, for some inexplicable reason, that the *Senate reapportionment also constituted an unconstitutional political gerrymander*.

8 Thus, Judge Pell reviewed past races for State Auditor, Clerk of the Supreme Court and Court of Appeals, and the Reporter of the Supreme Court and Court of Appeals, all low-profile races in which the determining factor in voter selection is more likely to be *party affiliation* than candidate personality. Such an approach is considered by researchers who have studied the issue to provide a more reliable method for ascertaining party voting strength. (*See* Backstrom, Robins & Eller, *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota,* 62 Minn. L. Rev. 1121, 1131 (1978).)

9 Indeed, the same researchers who suggested the alternative analysis employed by Judge Pell have noted that such statistical analyses suffer from severe flaws in general:

[This statistical] approach fails to account for the fact that the difference between percentage of vote and number of seats captured may in fact be the result of natural advantages - the inordinate concentration of partisans in one place - rather than any deliberate partisan districting scheme. For example, it is well known that Michigan Democrats are heavily concentrated in Detroit but are in a minority in many other parts of the state.

(Backstrom, Robins & Eller, 62 Minn. L. Rev. at 1127.) The authors go on to point out that, although Detroit Democratic candidates will generally win their elections, the ?? areas will be "wasted" and it will appear, in a blind statistical analysis of Michigan elections, that Democratic voters have been discriminated against in the construction of electoral districts.

10 Federal courts too are well aware of the potentially misleading nature of statistical analyses, especially when used as evidence of purposeful discrimination. As stated in *Hester v. Southern Ry. Co.,* 497 F.2d 1374, 1381 (5th Cir. 1974), an action brought under Title VII of the Civil Rights Act of 1964:

We recognize that statistics are a powerful tool in the hands of a Title VII plaintiff, but we are also aware that undue emphasis on their use *may obscure rather than advance the judicial process*. (Emphasis supplied, footnote omitted.)

(*See also International Bhd. of Teamsters v. United States,* 431 U.S. 324, 340 (1977); *New Jersey Welfare Rights Org. v. Cahill,* 483 F.2d 723, 727 (3d Cir. 1973).)

11 As stated in *Wells v. Rockefeller,* 311 F.Supp. 48, 51-52 (S.D. N.Y.), *aff'd mem.,* 398 U.S. 901 (1970):

Recent election figures . . . are only indicative of the voters' reaction to a particular candidate. . . . Plaintiff's approach of a fixed Republican-Democrat society ignores the all-important factors, amongst others, of the candidate's personality, the public's conception of his ability and integrity and the current issues which he may espouse, or offer to espouse, on behalf of his constituents.

12 Similarly, the results of an *initial* election may be found to be in statistical accord with partisan voting strength, as measured by the district court in *Bandemer,* but *subsequent elections* may exhibit some skewing of the results in favor of the majority party. Would such an event be viewed as indicative of a partisan gerrymander, or should such disproportionate results in a *second tier election* more appropriately be attributed to shifting political alignments, candidate personalities, or the vagaries of individual elections? The statistical approach employed by the district court simply cannot provide an answer to this question.

13 As previously noted (*see* footnote 6, *supra*), no group, whether it be racial, ethnic, or political, is entitled to proportional representation. Rather, even if claims of political gerrymandering are to be recognized as justiciable, a clear discriminatory

intent to dilute the voting strength of the minority political party must be demonstrated before relief can issue from the court. As argued in the text, this inquiry into *motive* also admits of no judicially discoverable or manageable standards.

14 *Reynolds v. Sims,* 377 U.S. 533, 578-79 (1964); *Mader v. Crowell,* 498 F.Supp. 226 (M.D. Tenn. 1980); *Legislature v. Reinecke ("Reinecke IV"),* 10 Cal.3d 396, 411 (1973); *see also Wyche v. Madison Parish Police Jury,* 653 F.2d 1151 (5th Cir. 1981); *Cousins v. Chicago City Counsel,* 466 F.2d 830 (7th Cir.), *cert. denied,* 409 U.S. 893 (1972) (indicating that court-ordered apportionment plans should attempt to create compact and contiguous districts).

15 *NAACP v. Gadsden County School Board,* 589 F.Supp. 953 (N.D. Fla. 1984); *Terrazas v. Clements,* 581 F.Supp. 1329 (N.D. Tex. 1984) (cautioning against fragmentation of minority communities of interest); *McBride v. Mahoney,* 573 F.Supp. 913, 915 (D. Mont. 1983); *Reinecke IV,* 10 Cal.3d at 412.

16 *White v. Weiser,* 412 U.S. 783, 791 (1973); *Burns v. Richardson,* 384 U.S. 73, 89 n.16 (1966); *Gingles v. Edmisten,* 590 F.Supp. 345, 382 (E.D.N.C. 1984); *Cosner v. Dalton,* 522 F.Supp. 350, 360 (E.D. Va. 1981).

17 *See Karcher v. Daggett,* 462 U.S. 725, 103 S.Ct. 2653, 2664 (1983); *Rome v. United States,* 446 U.S. 156, 185 (1980); *Ketchum v. Byrne,* 740 F.2d 1398, 1407 (7th Cir. 1984).

18 *Mahan v. Howell,* 410 U.S. 315 (1973); *Reynolds,* 377 U.S. at 580-81; *McBride v. Mahoney,* 573 F.Supp. at 915; *Cosner v. Dalton,* 522 F.Supp. at 360-61; *Reinecke IV,* 10 Cal.3d at 412.

19 *Reinecke IV,* 10 Cal.3d at 412.

20 *Karcher,* 462 U.S. 725, 103 S.Ct. at 2674 n.20 (Stevens, J., concurring); *Whitcomb v. Chavis,* 403 U.S. 124 (1971); *Reinecke IV,* 10 Cal.3d at 411.

21 *Reynolds,* 377 U.S. at 579; *White v. Regester,* 412 U.S. 755, 765 (1973), and cases cited therein.

22 For example, Article XXI of the California Constitution provides that:

In the year following the year in which the national census is taken under the direction of Congress at the beginning of each decade, the Legislature shall adjust the boundary lines of the Senatorial, Assembly, Congressional, and Board of Equalization districts in conformance with the following standards:

(a) Each member of the Senate, Assembly, Congress, and the Board of Equalization shall be elected from a single-member district.

(b) The population of all districts of a particular type shall be reasonably equal.

(c) Every district shall be contiguous.

(d) Districts of each type shall be numbered consecutively commencing at the northern boundary of the state and ending at the southern boundary.

(e) The geographical integrity of any city, county, or city and county, or of any geographical region shall be respected to the extent possible without violating the requirements of any other subdivision of this section.

23 Again as explained by the California Supreme Court, the ripple effect, "[i]f uncontrolled, . . . may result in the initial choice of a perfect district in one place leading to intolerably imperfect districts elsewhere". (*Reinecke IV,* 10 Cal.3d at 418 n.18.)

24 The district court also focused upon what it termed the "inconsistent and unexplained use of multi-member districts". (Jurisdictional Statement, at A-30.) Inasmuch as Article IV, § 6, of the California Constitution forbids the use of multi-member districts, the California Senate will not address the issue of whether the "use of multi-member districts" in a state redistricting scheme can provide a judicially manageable indice of partisan gerrymandering. While a judicial focus on this objective factor may be somewhat more reliable than a focus on amorphous concepts related to district configurations or statistical analyses given to varying interpretations, the California Senate must note that the use of multi-member districts has been sanctioned by previous decisions of this Court. (*See, e.g., Reynolds,* 377 U.S. at 579; *White v. Regester,* 412 U.S. at 765; *Whitcomb v. Chavis,* 403 U.S. 124 (1971).)

25 This Court noted that, within nine months of its decision in *Baker v. Carr,* litigation challenging the constitutionality of state legislative reapportionment plans had been instituted in *at least 34 of the 50 states in the Union. (Reynolds,* 377 U.S. 556 n.30.) It is submitted that the recognition of the justiciability of claims of "political gerrymandering" will likely trigger a similar avalanche of litigation, especially in light of the fact that, as discussed hereinabove, there simply are no clear-cut standards with which to properly define and evaluate such claims.

26 In addition to the four decisions concerning *state* legislative districts, the California Supreme Court addressed the reapportionment of California's *Congressional* districts in *Silver v. Brown ("Silver II"),* 63 Cal.2d 316 (1965), and again in *Silver v. Reagan,* 67 Cal.2d 452 (1967).

27 The Court had previously extended the time for legislative enactment of replacement plans but the deadlock remained unresolved. (*Legislature v. Reinecke ("Reinecke II"),* 7 Cal.3d 92 (1972).)

28 Under Article II, §§ 9 and 10 of the California Constitution, the California electorate, through its reserved referendum power, may, with certain limited exceptions, veto any statute passed by the Legislature. Pursuant to this constitutional provision, a referendum petition which qualifies for the ballot normally stays operation of the challenged statute until the matter is resolved by the voters. (*Assembly v. Deukmejian,* 30 Cal.3d 638 (1982).)

29 Justice Mosk of the California Supreme Court, commenting in *Assembly v. Deukmejian* upon the "wrenching experiences of 1971 and 1981", dubbed the reapportionment process a "decennial debacle". (30 Cal.3d at 693-94, Mosk, J., dissenting.) Unfortunately, given the fact that the current reapportionment controversy shows no signs of abatement, as exemplified by the *three currently pending* actions discussed *infra,* Justice Mosk's 1982 assessment of the process as a "*decennial* debacle" has apparently proved to be overly *optimistic*.

30 Actions were filed in the United States District Court for the *Central* District of California (*Chavez v. Eu,* Case No. 82-0571 CBM), the United States District Court for the *Northern* District of California (*Richardson v. Eu,* Case No. C-82-1035-WAI), and the United States District Court for the *Eastern* District of California (*Halliwell v. Eu,* Case No. Civ. S-82-147 LKK), all challenging the use of the Court-ordered districts. Although both the *Richardson* and *Chavez* matters were dismissed at an early stage, the *Halliwell* matter, filed by a *pro se* litigant, is still pending in the Eastern District.

31 These actions are *Badham v. Eu,* No. 85-1266, which has already resulted in decisions from the United States District Court for the Northern District of California and the Ninth Circuit Court of Appeals (*Badham v. District Court,* 721 F.2d 1170 (1983)), as well as a petition for *certiorari* to this Court; *Members of the California Democratic Congressional Delegation v. Eu,* now pending in the Superior Court of the State of California for the County of Los Angeles (Case No. C 450 827); and *Santillan v. Eu,* the newest arrival, recently filed in the United States District Court for the Central District of California (Case No. 84-7181 PAR), but later dismissed by the plaintiffs.

32 California's 1980 elections were held in the districts created by *Reinecke IV;* the 1982 elections were held in the districts promulgated by the California Legislature after the 1980 census and ordered into temporary effect by the *Assembly v. Deukmejian* decision; and the 1984 elections were held in the replacement districts subsequently enacted by the California Legislature but now the subject of new legal challenges.

33 Indeed, given the emphasis placed upon the deposition testimony of Indiana legislators by the court below, it is likely that litigants serious about pressing claims of political gerrymandering will attempt to depose virtually every state legislator who cast a vote in favor of the apportionment plan or plans at issue. Not only is such inquiry into the personal motives of state legislators generally frowned upon (*see, e.g., United States v. O'Brien,* 391 U.S. 367, 383-84 (1968); *Arizona v. California,* 283 U.S. 423, 455 (1931)), but allowing such discovery would also distract state legislators from the business of legislating and thereby impede important governmental functions.

34 Indeed, the summary of California reapportionment litigation set forth in the text does not even begin to address the tremendous volume of litigation which has arisen from the reapportionment of local governing bodies. (*See, e.g., Calderon v. Los Angeles,* 4 Cal.3d 251 (1971); *Miller v. Board of Supervisors,* 63 Cal.2d 343 (1965); *Henderson v. Superior Court,* 61 Cal.2d 883 (1964); *Visnich v. Board of Education,* 37 Cal.App.3d 684 (1974); *Griswold v. San Diego,* 32 Cal.App.3d 56 (1973).) The reapportionment of such local governmental bodies is of course subject to the dictates of the Fourteenth Amendment. (*E.g., Avery v. Midland County,* 390 U.S. 474 (1968).) Nor has the Senate elected to discuss two successive and hotly debated reapportionment initiatives presented to, but rejected by, California voters, which initiatives would have placed the task of reapportionment in the hands of an "independent" commission.

35 As an alternative, the Court could summarily vacate and remand the matter. This approach would be consistent with the recent disposition of *Escambia County v. McMillan,* 466 U.S. 48, 104 S.Ct. 1577 (1984). In *Escambia,* the district court had found that the use of at-large elections for County Commissioners discriminated against black voters in violation of the Voting Rights Act *and* the Fourteenth and Fifteenth Amendments. The Eleventh Circuit affirmed on the constitutional claims, without considering the Voting Rights Act claims. This Court vacated the subsequent appeal and remanded the matter to the Court of Appeals for consideration of the Voting Rights Act claims, noting that "normally the Court will not decide a constitutional question if there is some other ground [such as the Voting Rights Act claim] upon which to dispose of the case". (104 S.Ct. at 1579.) As *Bandemer* also involved claims of Voting Rights Act violations brought by the NAACP, the matter could be vacated and remanded to the district court for consideration of these ??

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