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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 14, 1985.

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

Amicus Curiae Brief of Common Cause

Philip Heymann [*], Harvard Law School, Griswold Hall, Room 306, Cambridge, MA 02138, 617-495-3137, D. Michal Freedman, Common Cause??, 2030 M Street, N.W., Washington, D.C. 20036, Counsel for Amicus

*i QUESTIONS PRESENTED

1. Whether the Equal Protection Clause protects individuals against discrimination intended to minimize or dilute their representation in the state legislature solely on the basis of their views of policy, their political philosophy, or their allegiance to a particular party.

2. Whether the District Court findings and the record below support a conclusion that the purpose and "necessary scope and operation" of the Indiana redistricting plan was to discriminate against those of particular political views and allegiances.

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*1 INTEREST OF THE AMICUS AND SUMMARY OF ARGUMENT

Common Cause is a non-partisan organization with 250,000 members, a central purpose of which, for fifteen years, has been to further responsible and honest government, accountable in practice as well as theory to the voters who elect it. Because we believe this case involves extraordinary stakes for democratic political institutions, Common Cause seeks leave to file an *amicus curiae* brief urging affirmance of the decision.

***2** The voting right at stake in this case is, quite simply, a right not to be discriminated against on the basis of one's political views and likely voting disposition with the effect, purposely brought about, of significantly diminishing the chances or extent of representation of those views in the state legislature. Such discrimination on political grounds has been held unconstitutional in other areas, such as government employment. Identical voting rights have been protected in the case of racial minorities, and have repeatedly and explicitly been declared to be protected for political groups as well.

There is no unusual difficulty in applying these familiar rules to gerrymandering. A pattern of districting decisions intended and designed to discriminate against voters of different views and loyalties in order to protect or increase the legislative control enjoyed by those doing the redistricting is as obvious and detectable as the design behind any repetitive, purposeful activity. It can be readily distinguishable from other purposes and from the results of coincidence. Its proof is objective and does not depend on evidence of the subjective motivation of legislators, although that, too, is clear in cases of partisan gerrymandering. The remedy in the case of gerrymandering is no different from that by now familiar in reapportionment cases.

Citizens are simply entitled not to be made the victims of legislative schemes intended and designed solely to deny political effect to their views or voting dispositions. The Fourteenth Amendment forbids such discrimination on the basis of political beliefs and allegiances, but it requires nothing more. There is, thus, no right to particular proportions of Democrats, Republicans, independents and others in a district. And there is no model districting, departures from which require justification. Any of a number of purposes and policies can justify any of a variety of districting schemes in a state. There is no right to a certain form of districting.

***3** In short, the doctrines applicable to this area are traditional and well established and their reach is modest, not supplanting broad political judgment. But the protection granted is crucial to dealing with the grave danger to the very legitimacy of our political processes posed by uninhibited partisan manipulation of district lines. Through the careful manipulation of district lines a party enjoying a majority in a state legislature can, for a period of many years, wall off, from the competing views of even a clear and substantial majority of the state's voters, the majority party's control of the legislature's decisions about programs, philosophies and individual issues.

In this case, for example, only a Democratic political tidal wave of "Watergate" proportions might bring the Democratic party into power in the Indiana legislature. In other states the positions of the parties are reversed, but the damage to fundamental democratic values is the same. Clever manipulation, uninhibited by the prospect of any form of judicial challenge, creates one-party government free of the inconvenience of shifting voting majorities. For this Court to refrain from applying traditional concepts to this area would be to leave the survival of vigorous, contested, two-party government in the hands of legislative powers that quite obviously have a vested interest in continuing and worsening, rather than rectifying, the purposeful discrimination against "unfriendly" groups of voters and the destruction of party competition that can be brought about by cleverly gerrymandered redistricting schemes.

*4 ARGUMENT

INTRODUCTION

This Court's decisions have made plain that discrimination against individual citizens on the basis of their views as to issues, their political philosophies, or their allegiance to a particular party is forbidden by the Fourteenth Amendment. *Elrod v. Burns,* 427 U.S. 347 (1976). This case presents the question whether such discrimination is permissible in the context of a legislature drawing district lines for a state's two legislative houses. The central question is therefore one of justiciability, but not because the area is richly infused with partisan political concerns; for this has been true of such related questions as those presented by *Baker v. Carr,* 369 U.S. 186 (1962) and *Elrod v. Burns,* 427 U.S. 347 (1976). And the question of remedy is identical to that repeatedly and successfully addressed in the reapportionment cases. The issues of justiciability here consist of two more specific questions: whether there is a form of harm to individuals cognizable under the Fourteenth Amendment and whether there are manageable, traditional standards for judicial review of claims in this area.

The individual right at stake-not to be subject to purposeful diminution of the impact of one's vote-is by now well established in a series of cases. Moreover, entirely familiar legal precedents and concepts for dealing with discrimination under the Fourteenth Amendment are all that a court needs to handle the obvious and blatant cases of gerrymandering which pose a significant threat to the health of our democratic institutions. There is no more reason to be deterred from dealing with blatant discrimination because other forms of discrimination will escape proof or present ambiguous circumstances in the area of partisan districting than there is reason to refuse to consider any of a number of other ***5** claims of discrimination on similar grounds. And this Court has never declined to deal with a class of claims of discrimination simply because many of them would inevitably fail to meet the heavy burdens imposed on those attacking legislation. *Cf. Perry v. Snidermann,* 408 U.S. 593 (1972); *Elrod v. Burns,* 427 U.S. 347 (1976).

Finally, we are not urging this Court to develop a law of proper districting. Nothing, here, corresponds to the principle of "one person, one vote." Neither precedent nor decent respect for the role of the political branches of state government would suggest that this Court undertake the development of a body of constitutional precedent defining the characteristics of a proper districting scheme. There are too many possible variations in districting plans based on differing judgments of democratic electoral theory and policy. But precedent does dictate, and respect for state legislation does not forbid, applying to districting schemes the same traditional principles that forbid discrimination in other phases of the process of governing.

I. THE EQUAL PROTECTION CLAUSE PROTECTS INDIVIDUALS AGAINST DISCRIMINATION INTENDED TO MINIMIZE OR DILUTE THEIR REPRESENTATION IN THE STATE LEGISLATURE SOLELY ON THE BASIS OF THEIR VIEWS OF POLICY, THEIR POLITICAL PHILOSOPHY, OR THEIR ALLEGIANCE TO A PARTICULAR PARTY.

A purposefully partisan gerrymander plainly violates rights protected by the Fourteenth Amendment, unless traditional constitutional standards cannot be applied in familiar ways to this form of legislation. In other contexts this Court has forbidden discrimination on the basis of political views or party allegiance. *Elrod v. Burns,* 427 U.S. 347 (1976); *Branti v. Finkel,* 445 U.S. 507 (1980). The rights of racial minorities to be protected against the "dilution" of voting rights have been established in cases dealing with multi-member districts and ***6** gerrymandered districting schemes. The effect on the right to vote in those circumstances is identical to that in the present case. The rule stated in the multi-member cases for some decades has explicitly included protection of political groups against purposeful vote dilution for partisan purposes.

A. Invidious Discrimination on the Basis of Political Beliefs or Allegiance is Forbidden by the Fourteenth Amendment.

A state may not make food stamps more available to those whose policy views, political philosophies, or party allegiances a majority of the legislature favors. *Cf. U.S.D.A. v. Moreno,* 413 U.S. 528 (1973). A state or local agency which can constitutionally fire for no reason at all cannot dismiss employees because of their party or because of a desire to favor those of a different party. *Elrod v. Burns,* 427 U.S. 347 (1976). The Fourteenth Amendment provides protection against invidious discrimination on the basis of views, philosophy, or party allegiance. And even more than equality is at stake. Such discrimination directly and severely threatens fundamental rights under the First Amendment as well as basic requirements for maintaining democratic government. *Elrod v. Burns,* 427 U.S. 347 (1976).

Reason alone would dictate that such discrimination would present even clearer Fourteenth Amendment problems when what was involved was the right to cast a meaningful vote, for this right implicates all others. *Reynolds v. Sims,* 377 U.S. 533 (1964). Where the purpose of a legislative act, such as the drawing of district lines, is to discriminate against members of some group, identified by its beliefs or party allegiance, by designing a system that requires a greater number of votes for the members of that group to achieve a given proportion of legislative seats (*Cf. Hunter v. Erickson,* 393 U.S. 385 (1969)), the members of that group have been deprived of much of their most fundamental right, the right to representation of their views in the elected legislature.

***7 B. The Harms Resulting from Purposeful Reduction of the Impact of One's Vote for Discriminatory Reasons Have Long Been Recognized as Justiciable.**

This Court's precedents have established a Fourteenth Amendment right to protection against purposeful vote "dilution." Cases dealing with racial minorities have made clear, for decades, that a purposeful legislative effort to diminish the effect of the votes of a minority group is prohibited by the Constitution, even if the members of the group retain all the formalities of voting rights. Established in *Gomillion v. Lightfoot,* 364 U.S. 339 (1960), where blacks were purposely districted out of a city's limits, this rule was then accepted in the context of congressional districting a few years later. *Wright v. Rockefeller,* 376 U.S. 52 (1964).

The very same right not to be subject to invidious discrimination designed "to minimize or cancel out the voting strength of racial or political elements of the voting population" has been discussed and applied in a large number of cases involving multi-member districts. In this context the inclusion of protection against political discrimination has been explicit and repeated. *Fortson v. Dorsey,* 379 U.S. 433, 439 (1965); *Burns v. Richardson,* 384 U.S. 73, 88 (1966); *Whitcomb v. Chavis,* 403 U.S. 124, 143 (1971); *Chapman v. Meier,* 420 U.S. 1, 17 (1975). *Cf. Gaffney v. Cummings,* 412 U.S. 735, 751 (1973).

The submersion of an individual's vote in a multi-member district is accomplished by adding enough voters of different views or party allegiance to the district until it is clear that the new, enlarged district will vote as the legislative majority would want it to. Since the district now may have a substantially greater population than that of an average single district, the Constitution requires the district to be given more than one representative. But if the representatives are elected ***8** at large they will all represent the views of the purposely "gerrymandered" majority.

Purposeful reduction of the representation of one group's views is the core of the violation in the multi-member district and racial gerrymandering cases. Discrimination on the basis of race, beliefs, or party allegiances is the wrongful action; dilution of the impact of the votes of certain groups of citizens is the harm. There is no underlying notion of a constitutionally correct set of boundaries for a city, a congressional district, or a legislative district. This is even so in the case of a multi-member district. Neither the wrong, invidious discrimination with regard to legislative representation, nor the harm to its victims is established by comparison with a "model" system of single-member districts but rather by

showing discriminatory purpose and its intended effects without regard to some "perfect model." *Cf. Branti v. Finkel,* 445 U.S. 507 (1980).

There is, in fact, no meaningful or intelligible way to compare the impact of the votes of a racial minority in a multi-member district with their presumed impact under a "model" scheme that used only single-member districts; for, depending on how the boundaries of the single districts were drawn, the racial minority might have had no more chance of electing representatives in the single-member districts. In the absence of constitutional restrictions, single-member districts could always be gerrymandered to produce the same unfavorable proportions and the same unlikely chances of winning representation as the minority faces when it is submerged in a multi-member district. In each case in which this Court has questioned multi-member districts, the harm has been purposeful reduction in representation for indefensible, invidious reasons, not departure from some constitutionally required districting plan.

***9 C. Discrimination Intended to Dilute the Impact of the Votes of Political, as well as Racial, Groups Has Been Forbidden in the Case of Multi-Member Districts.**

The long line of cases dealing with multi-member districts speaks very explicitly, and deliberately, in terms of Fourteenth Amendment protection against legislative measures designed and operating to minimize the voting strength of racial *or political* elements of the voting population. *See, e.g., Burns v. Richardson,* 384 U.S. 73, 88 (1966); *Whitcomb v. Chavis,* 403 U.S. 124, 143 (1971). *Cf. Gaffney v. Cummings,* 412 U.S. 735, 751 (1972). This Court has regularly stated that a purposeful discrimination intended to minimize the impact of votes by creating multi-member districts is prohibited when the victims are political groups.

Undoubtedly the same is true of ethnic, religious, economic, and social elements of the population. Italian Americans, Jehovah's Witnesses, farmers, and Freemasons, as well as Republicans and Democrats have a right not to be submerged in multi-member districts for the very purpose of diluting their voting strength. The evidence of purpose would have to be clear and persuasive. It is not enough that a group claims that its representation would be more with a different districting scheme, such as single-member districts. *Chapman v. Meier,* 420 U.S. 1, 17 (1975). But if purposeful discrimination were adequately proved, the case would be made out.

D. There is no Distinction in Purposes or Effects Between Cases Involving Multi-Member Districts and Cases of Gerrymandering.

The harm to an individual voter and the gain to the majority party in a legislature from a legislature's purposefully drawing single districts in such a way as to minimize the impact of the votes of a political group to which the individual belongs is identical to the harm ***10** and the gain that can be accomplished by placing that individual in a multi-member district.

It makes no difference to either the perpetrator *or* the victims of the discrimination whether the device is the manipulative creation of a multi-member district with carefully designed population ratios or the division of that area into smaller districts with identical, carefully designed population ratios. The process and results are fully interchangeable. Identical consequences can be accomplished with equal ease by simply drawing new districting lines for single-member districts which can readily be designed to have the same proportions as the multi-member district would have. If there were no constitutional protection against gerrymandering *any* prohibited multi-member district could simply be divided into carefully gerrymandered single-member districts without any significant change in the legislature's ability to dilute the votes of a political or racial group.

It therefore makes no sense to continue to recognize, as this Court has for many years, that members of political groups are protected against invidious discrimination in districting when the device used is a multi-member district but not recognize the same rule when the device used is gerrymandered single-member districts. The harm, purposefully diminished voter impact resulting from invidious discrimination, is identical and identically effective in both cases.

Nor does the possibility of extreme abuses depend upon the form the legislature uses. Nothing except the prohibition against purposeful discrimination in representation on the basis of political views or party allegiance prevents the state from using even noncontiguous districts to diminish to a point of marginal importance the votes of anyone identified with the opposition to the party then enjoying majority status in the legislature. In Indiana, were it not for the prohibition of purposeful discrimination against members of a political group, the ***11** Republicans could place Democrats from one corner of the state along with Democrats from a remote opposite corner in the same voting district. In other states, the Democrats could discriminate equally invidiously against the Republicans.

E. Maintaining the General Prohibition of Political Discrimination in Dealing with Redistricting is of Great Practical Importance.

The effects of retreating from the lines this Court has drawn which broadly prohibit discrimination on the basis of political views, philosophy, or party allegiance and which recognize the special importance of this prohibition in the area of voting, including efforts to diminish the impact of the votes of opponents, would be extremely dangerous to our democratic political processes. In all but the most unusual of circumstances, it is possible for a majority party in a legislature to wall off its control of the legislature's decisions so that the competing views of even a clear and substantial majority of the state's voters will not be reflected in legislative decisions. It is not difficult to construct, for example, illustrations where less than one-third of the voters can be given working control of more than sixty percent of the seats in a legislature of five districts. [1] All that is required is a careful manipulation of district lines for a momentary majority in a state legislature to make itself nearly immune from changing views of the voters.

All that stands in the way of this is a traditional constitutional doctrine prohibiting discrimination against a racial or political group, intended solely to diminsh the ***12** impact of that group's exercise of its voting rights. In this case, more particularly, the protected group is those who have been selected for discriminatory treatment solely on the basis of their policy views, their political philosophies and their party allegiances.

II. COURTS CAN APPLY FAMILIAR STANDARDS OF DISCRIMINATION IN A STRAIGHTFORWARD WAY TO ASSESS CHALLENGES TO A REDISTRICTING PLAN.

The fears that some have expressed regarding the amenability of districting plans to judicial review under familiar concepts are mistaken. As we have argued, there is no need to develop affirmative notions of what a proper districting plan should include; [2] traditional Fourteenth Amendment concepts forbid invidious discrimination on the basis of citizens' policy views, political philosophies, or party allegiances. It is also true that the evidence and record necessary to apply these concepts is as readily available and easily construed in this context as in any other.

To establish a violation of the Equal Protection Clause of the Fourteenth Amendment by a partisan gerrymander the plaintiffs must show that, in terms of inherent effects or pattern and also of motivation, important parts of the legislation were designed solely to reduce the legislative representation of those with particular policy views, political philosophies, or party allegiances. In the present case the class or "political elements" (*Whitcomb v. Chavis,* 403 U.S. 124, 143 (1971)) discriminated against consists of likely Democratic voters.

***13 A. The Redistricting Legislation Itself, Read in the Context of What was Known About Where Various Political Groups are Located, Must Display the Purpose and Effect of Lessening the Representation of Political Opponents.**

The purpose to discriminate must be shown in terms of the "inevitable effect" of the pattern built into the legislation, its "necessary scope and operation," and not merely by reference to indiscrete admissions. *United States v. O'Brien,* 391 U.S. 367, 385 (1968). Such evidence of design, pattern, or blueprint is what the Court relied upon in distinguishing *Gomillion v. Lightfoot,* 364 U.S. 339 (1960), from the draft card burning cases. Writing for the Court in *United States v. O'Brien,* 391 U.S. 367, 385 (1968) the Chief Justice emphasized that the crucial fact in *Gomillion* was, according to the Complaint, that:

> [T]he "inevitable effect", 364 U.S., at 341, 81 S. Ct. at 127 of the redrawing of municipal boundaries was to deprive the petitioners of their right to vote for no other reasons than that they were Negro. In these cases, the purpose of the legislation was irrelevant, because the inevitable effect-the "necessary scope and operation," McCray v. United States, 195 U.S. 27, 59, 24 S. Ct. 769, 777, 49 L. Ed. 78 (1904)-abridged constitutional rights.

Justices Powell and Rehnquist similarly insisted upon objective evidence of design, blueprint, or pattern of discrimination in their dissent in *Rogers v. Lodge,* 458 U.S. 613, 630 (1982).

The creation of multi-member districts whose designs reveal unmistakably their discriminatory purpose would provide such objective evidence. *Cf. Gomillion v. Lightfoot,* 364 U.S. 339 (1960). So would a pattern of decisions about the shape of individual districts if the discriminatory object of this blueprint of decisions was clear. *Cf. Yick Wo v. Hopkins,* 118 U.S. 356 (1886).

***14** This type of "objective" evidence is manifest in the present case (and will be whenever the gerrymander is significantly discriminatory). Even a stranger to Indiana who knew nothing of the history of this redistricting act would be able to tell that its purpose was to discriminate against likely Democratic voters, for that is the only purpose that explains a number of the central characteristics of the plan.

Objective evidence as to inevitable effect is hard to disguise. If a central purpose of the legislators who design the plan is either to maximize the representation of their own party (thereby minimizing the representation of the opposition) or to maximize the electoral security of incumbents of the majority party (thereby diluting the voting strengths of challengers and their supporters), a pattern of decisions must be taken affecting a number of districts. *Cf. Yick Wo v. Hopkins,* 118 U.S. 356 (1886). In the case of Indiana, for example, an effort to accomplish either of these purposes requires actions designed with those purposes in mind in each of a sizable number of the 100 House and 50 Senate districts.

The pattern of actions constitutes a blueprint. Judges can easily read the purpose of the pattern just as an architect can understand the building a blueprint contemplates. Where the pattern of changes is so likely either to minimize the legislative representation of a political group or to maximize the electoral security of incumbents of the majority party that one of these purposes seems built into the design of the districting plan, or where unusual districts such as those electing several members on an at-large basis are used in ways strongly suggestive of these purposes, so long as there is no non-partisan explanation or set of explanations that has been applied consistently in creating the plan-in these circumstances the "objective factors" (*Rogers v. Lodge,* 458 U.S. 613, 631 (1981) (Justices Powell and Rehnquist dissenting)) overwhelmingly display discrimination.

***15 B. The Court May Also Want to Require Historical Evidence of Subjective Motivation to Discriminate in Legislative Representation Against Citizens of Certain Political Views or Allegiances.**

Even if the Court should demand that "objective factors" be supplemented by evidence going to subjective motivation revealed by the history of the plan, that requirement is fully satisfied in the present case. *See infra* pp. 25-26. Such a requirement may be appropriate. There is far less reason for the courts to review legislation accomplishing redistricting if the plan has been developed through a fair and open process and if there is no evidence revealed in that open process of an attempt to discriminate on the basis of policy views, political philosophy, or party allegiance. [3]

This form of evidence of discrimination, evidence from the history of the enactment of the redistricting statute, will be particularly hard to hide in cases of partisan gerrymandering. It may of course be true that the legislators drawing the plan will not, in the future, be frank about their purposes. But evidence of motivation flowing from a process that denies some members of the legislature access to information and to important stages of the deliberative process cannot readily be concealed. And if the members of the minority in the legislature are given access to the information used by the majority and to its deliberations, invidious discrimination would be apparent if that in fact was the purpose of the majority legislators designing the redistricting plan.

Thus the crucial evidence may consist of a process that excludes representatives of the legislative minority from crucial information, from committee deliberations, or ***16** from the opportunity for full and open debate. In the alternative, the evidence of motivation may come from the public statements or testimony of the designers and sponsors of the redistricting plan. If the process is fair and open, the legislative minority will see and hear direct statements of discriminatory purpose *if* they are prominent. If there is no such salient purpose revealed after an open process, the courts may sensibly decline further review.

C. The Court Need not Address the Case of a Redistricting Plan Whose Features Could be Explained as Based Upon Non-Partisan Criteria.

The concern that has been felt about the justiciability of gerrymandering claims assumes that the Court would be asked, and would undertake, to review districting plans that were not discriminatory on their face when overlaid against the background of the location of voters of identifiably different policy views, political philosophies, or party allegiances. If the plan, in its very terms, did not systematically discriminate for the very apparent purpose of diluting the impact of the votes of political opponents, then judicial review would require *either* finding in the Constitution a required set of districting criteria (such as compactness and respect for boundaries used in local government) *or* relying exclusively on evidence of the subjective motivation of particular legislators to discriminate against some groups. But both alternatives are questionable in this context.

As to the first, no current understanding of the requirements of the Fourteenth Amendment would justify deciding among districting plans that did not discriminate invidiously against a racial, ethnic, religious, or political group or against those of certain beliefs. Seeking constitutional requirements as to optimal or even acceptable shapes of districts would in fact plunge the courts into the realm of political theory.

***17** As to reliance on subjective motivation alone, if there was no compelling and obvious pattern of discrimination when the districting plan was compared with the locations in the state of salient groups challenging the plan or if there were other consistent explanations for whatever pattern suggesting discrimination might emerge, a case of invidious discrimination cannot be made out even by evidence of "an alleged illicit legislative motive" (*United States v. O'Brien,* 391 U.S. 367, 383 (1968)) and certainly not by simply showing that the impact of the districting plan is to disadvantage a particular salient group. *Washington v. Davis,* 426 U.S. 229 (1976). These limitations are particularly important in the

area of districting for, as the Court has recognized, there will always be evidence of partisan motivation and the majority party will always like the plan better than the minority party does.

This Court has held that a combined showing of *both* a disproportionately harmful impact on a particular political group *and* evidence of subjective motivation to discriminate against that group would be adequate for challenging a multi-member district on grounds of racial discrimination. *See, e.g., Rogers v. Lodge,* 458 U.S. 613 (1981); *White v. Register,* 412 U.S. 755 (1972). Whether the same showing would be adequate to strike down a partisan districting plan even though it did not abuse multi-member districts and did not manifest *by its very terms* a pattern of invidious political discrimination, need not be decided at this time. For in this case multi-member districts *are* abused and the legislation itself *does* display a design characteristic of the purpose to discriminate on the basis of political views, philosophies, and allegiances.

Nor is the unaddressed problem of central importance. The worst abuses of gerrymandering-the greatest dangers to the political system-require districting plans that display an obvious pattern of discrimination when ***18** overlaid on a "map" showing the location of salient political, racial, ethnic, or other groups, and plans which cannot plausibly be defended by pointing to any set of non-discriminatory criteria which have been consistently applied.

Thus, a party challenging a redistricting plan on the grounds of invidious discrimination based upon politically partisan considerations would, under traditional equal protection doctrine, have to show far more than that the impact of an apparently neutral redistricting plan fell disproportionately against one party. *See Mobile v. Bolden,* 446 U.S. 55 (1980); *Washington v. Davis,* 426 U.S. 229 (1976). Nor would it be adequate simply to show that the legislative history indicated an illicit legislative motive, without any showing of disproportionate partisan impact. "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien,* 391 U.S. 367, 383 (1967).

Even the two factors combined, which would together satisfy the requirements this Court has imposed for establishing unconstitutional racial discrimination in the creation of multi-member districts, may not be enough to raise a claim of politically partisan gerrymandering. For it may be permissible for the majority party in a legislative house to select among the various non-partisan criteria for districting those apparently neutral ones (e.g., compactness or following county lines) which, on the whole, favor the interests of the party controlling the legislature.

But an entirely traditional and manageable "equal protection" challenge to a districting statute *is* stated by a plaintiff who shows that the "objective factors" or "inevitable effects" that display its design or blueprint clearly demonstrate an intention to minimize the legislative ***19** representation of citizens of a particular policy view, political philosophy or party allegiance. No need of recourse to disputable political theory makes such a claim "political." It is a traditional application of equal protection doctrine to a situation only slightly different from those where similar concepts have long been applied. The case becomes even more familiar if the Court *also* requires a showing of discriminatory motivation from the history of the legislation (particularly the process through which it was considered). And the remedies regularly applied in reapportionment cases are equally available here.

Whether a legislative redistricting that was shown in both these ways to be invidiously discriminatory on the basis of beliefs and party loyalties could ever also be shown to be justified and explained by non-partisan criteria such as compactness or following county lines, this Court need not decide in the present case. In all likelihood a showing of the consistent use of non-partisan criteria would defeat any effort to establish the objective indicia of a discriminatory pattern. Still, we can assume for the purposes of this case that such a showing would also constitute a separate defense. The Indiana legislature has made no such showing.

III. THE DISTRICT COURT'S FINDINGS AND THE AGREED RECORD SUPPORT A CONCLUSION THAT THE INDIANA REDISTRICTING PLAN VIOLATED FAMILIAR AND TRADITIONAL DOCTRINES OF EQUAL PROTECTION.

Political gerrymandering is always an effort either to increase the number of seats held by the majority party or to increase the security of incumbents (either all incumbents or, more often, those of the majority party) or to do some of each. A pattern of decisions, affecting some or all of the districts in a state, that can only plausibly be explained by one of these motivations is intended to do ***20** and does, in fact, reduce the representation of those who have been identified as having beliefs, political philosophies, or loyalties that may lead them to support the minority legislative party or to support challenges to incumbents. The evidence of this in the present case is very clear.

A. The "Inevitable Effect" and "Necessary Scope and Operation" of the Redistricting Statute Manifests a Design to Discriminate Against Those of Particular Political Views and Allegiances.

This Court has long treated the creation or maintenance of multi-member districts, where the impact is to submerge the views of "racial or political elements of the voting population," as a matter requiring a particular search for a discriminatory motivation and purpose. The suspicion is quickly confirmed in the present case. Alternatively, the necessary evidence can be found in the overall pattern of the redistricting decisions.

1. *The Misuse of Suspect Multi-Member Districts*.

The Indiana State plan reveals a melange of single-, double-, and triple-member districts, with no consistent, non-discriminatory principles explaining the assortment. The multi-member district lines break through city and county lines, creating new large districts out of a bewildering hodgepodge of political divisions. But the hodgepodge is readily explained.

The largest multi-member districts, in Marion and Allen Counties, betray brazen manipulation of district sizes and lines for clear partisan ends. The pattern, as would be expected, reflects decisions to "waste" Democratic votes in two ways: by concentrating them in excess of what would be required by winning candidates-"stacking"-and by splitting them in support of losing candidates-"cracking."

The choice to have multi-member districts in Marion County-and draw the particular districting lines chosen ***21** - involved both "stacking" Democrats and "cracking" and submerging them. Although the population of Marion County entitles it to almost exactly 14 representatives, the State plan created five three-member districts by reaching beyond the County borders and annexing areas from two different counties. Of these five large districts one (District 51) was heavily stacked with Democrats-the 1982 House races went to Democrats by more than 80 percent-and the others went safely, but not "wastefully" to Republicans. (Nearly all won by 55 to 60 percent.) (JA-(39-40)) [4] The Democrats won 48.5% of the Marion County vote in 1982 and only three out of its fifteen seats. (Def. Ex. X; Nov. R. 126 and 127)

That the Republicans won 12 out of 15 seats in the area was not just a product of concentrating Democratic votes in the central 51st district. As the district court below notes, the urban Democrats who were not included in the 51st district were split among three different multi-member districts. (A-15) In addition, the extreme peculiarities of the areas encompassed by District 48, one of the Marion County districts that the Republicans had to extend into other county land to create a three-member district, forced the lower court to conclude, "[t]here is simply no conceivable justification for this kind of district." (A-15)

The manipulation of districts in Allen County manifests the same discriminatory designs. The two three-member districts created here "[bisected] Democratic strength in the urban area." (A-16) Not only do the districts divide the urban Democratic voters, the necessary population to justify large three-member districts, which swamped the split urban Democratic voters, is produced by going beyond Allen County into three different ***22** neighboring counties. Thus District 20 is created out of a mixture of urban Democrats in Fort Wayne and farmers in outlying counties. The result is two districts that are safely, but not "wastefully," Republican. (In District 20 all three seats were won by Republicans in the 55 to 60 percent range, and in District 19-the other three-member district-the seats went Republican by slightly more than 60 percent.) (JA-(39-40))

The multi-member districts in Marion and Allen Counties illustrate precisely the pattern of decisions one would expect to see in a gerrymandered plan, with precisely the consequences. Democrats were effectively disenfranchised. Of the twenty-one representatives elected from these districts, only three were Democratic (14 percent), despite the fact that the vote was more than 46 percent Democratic. (Def. Ex. X; Nov. R. 126 and 127) As these twenty-one representatives account for more than one-fifth of the Indiana House, the discriminatory structuring of these multi-member districts significantly contributed to the discriminatory impact of the overall plan.

2. ***The Pattern of Discriminatory Actions Regarding all Districts.***

The best objective evidence of a discriminatory effort to reduce the representation of those of particular political beliefs or allegiances consists of the pattern of additions and subtractions of areas to create new districts in a gerrymandered redistricting plan. One would expect, for example, an effort to increase the percentage of supporters of the majority party in any district that party had barely won or had almost won, at the expense of reducing the number of supporters in overwhelmingly friendly or overwhelmingly hostile districts. Where areas populated with supporters or opponents are added to or separated from previous districts in a way that displays a systematic effort to make safer the seats of "marginal" incumbents of the majority party or to remove the seats of "marginal" incumbents of the opposition, the objective pattern displays the discriminatory purpose.

***23** In this case the best evidence of purpose is unavailable because the Republican legislative majority has never shared with anyone else the information about party percentages in each precinct on which it based its redistricting plan. *See infra* p. 25. Thus in this case we cannot examine the districts in terms of the percentages of Republicans and Democrats in each area that were included and excluded. Nonetheless, visual inspection of the districting map as well as various statistics provide strong indication of a pattern of discrimination.

First, some central purpose was plainly at work, overriding traditional concerns in districting. The Indiana plan aggressively disregarded existing political boundaries such as city and county lines. For example, despite a state constitutional prohibition against division of county lines for senatorial districts, the 1981 plan divided counties in Indiana 73 times. The district court opinion is replete with examples of bizarre combinations of political subdivisions. (A-(15-16), A-(28-29)) Moreover, as the district court points out, to add further confusion there is no relationship between the House and Senate districts, although fifty Senate districts would be more readily created by simply pairing each of the one hundred House districts with one another.

Second, the impact of all this was far from random. The results of the 1982 races reveal precisely the effects one would expect from a gerrymandered plan. First, and most obviously, the Dem crats lost a very clear majority of the House seats (they won 43%) despite having a majority of the statewide vote. (A-12) Not only did they lose, but the way in which they lost shows how difficult, if not politically infeasible, it would have been for them to win a majority of the

House. In the district with the 51st largest Democratic House vote, the Democrat lost by more than 1600 votes, a safe Republican victory. (JA-39)

***24** Finally, and most revealing, the Table below comparing election results before and after redistricting in the House conforms to the vote distribution changes gerrymandering produces. The Table shows the percentage of Democratic and Republican House seats in 1980 and 1982 that were won overwhelmingly (greater than 60%), won "safely" (55 to 60%), and won marginally (50 to 55%). As expected, in 1982 compared with 1980 Democrats won a greater percentage of their seats overwhelmingly-they had to waste more votes. By contrast, in 1982 compared to 1980 Republicans won a far smaller percentage of their seats by large margins and a far greater percentage by a secure but not excessive margin.

Table

Percentage of House Seats Won by Various Margins in 1980 and 1982

Democratic Victories

	1980	**1982**
Won by:		
60%+	54%	63%
	(20) [5]	(27)
55-60%	38%	19%
	(14)	(8)
50-55%	8%	19%
	(3)	(8)

Republican Victories

	1980	1982
Won by:		
60%+	70%	35%
	(44)	(20)

55-60%	10%	51%
	(6)	(29)
50-55%	21%	14%
	(13)	(8)

***25 B. The Historical Evidence Establishes Discriminatory Motivation and Purpose.**

Historical evidence of the motivating force of a plan to deny representation to those of certain views or party allegiances is best seen in a record of closed processes, manifesting an intent to hide the basis of decision by the legislative majority. Sometimes, it will also be provided by public statements or testimony.

1. *The Abuse of Fair Legislative Process*.

The legislative process itself was clearly designed to maximize the majority's opportunity to discriminate by excluding the participation of minority party members at every phase. Democrats were excluded from voting membership on the conference committee responsible for the mapmaking process, excluded from the data provided to a computer firm to analyze the implications of alternative mapmaking schemes, and excluded from the findings generated by the computer.

No hearings on reapportionment were ever held. *The Indiana Journal* reports comments by Senator Townsend for April 30, 1981 that the Democrats had only 40 hours to review the districting of more than 4,000 precincts. And the conference committee report was only introduced at the last minute, on the final day of the regular legislative session. As the lower court found, "the minority party was intentionally precluded from participating in the process by which the present plan was drawn up." (A-31)

Discriminatory procedures serve discriminatory ends. Here Democrats were excluded from the redistricting process to minimize their opportunity to prevent the discriminatory plan from being implemented.

***26 2. *The Statements and Testimony*.**

The flagrantly discriminatory procedures merely reflected what the mapmakers themselves candidly acknowledged that they set out to do. Speaker of the House Dailey testified in his deposition that maintaining or creating multi-member districts in Marion County was intended "to save as many incumbent Republicans as possible." (A-9) More pointedly, he admitted that the only reason multi-member districts were used there was to avoid the Republican losses that single-member districts might entail. (JA-19)

Charles Bosma, Chairman of the Senate Elections Committee, testified that one of their priorities was "to protect those who were already serving, particularly of our own party." (JA-13) He went on to admit that the plans were drawn to "hurt the Democrats as much as possible within the U.S. Supreme Court's guidelines." (JA-15)

C. There was no Adequate Showing by the Appellants that any Set of Non-Discriminatory Criteria was Consistently Applied to the Design of the Redistricting Plan.

Although appellants claim that neutral criteria account for the Indiana redistricting legislation, at least one of their criteria was so vague and broad that it serves more to obscure what was done than to explain the true controlling factors. The "neutral criterion of 'least changed plan'" acted as a wild card, allowing the majority party to preserve selectively features of the old plan that favored Republican incumbents and radically alter others to their benefit.

Specifically, appellants' brief states that "[t]he Indiana reapportionment acts also followed the neutral criterion of least changed plan by preserving multi-member districts in the House . . . ." (Appellants' brief at 30) Appellants wish us to believe that the large multi-member districts in Marion and Allen Counties inevitably follow ***27** from this "neutral" factor. But only one of the features of the old plan in these counties was their size. A feature equally characteristic of the districts in Marion County was that they all had fit neatly within the county borders. Yet, rather than retain the historical boundaries and change the size of some of the multi-member districts or shift to single-member districts, the majority party expanded the districts beyond Marion County lines into two other counties. Similarly, the three-member character of Districts 19 and 20 (largely Allen County) was retained, but at the cost of changing District 20, which had taken parts of Adams, Allen, and Wells Counties and creating a new Adams, Allen, Noble, and Whitley County district. What appellants try to pass off as the consistent application of neutral factors is the selective application of discriminatory ones.

More remarkably, appellants' other supposedly neutral explanation for the retention of multi-member districts effectively acknowledges the discrimination. They state that multi-member districts in the House were continued "except where all of the Representatives from any such multi-member district, of either party or race, requested a change to single member districts." (Appellants' brief at 7) But the self-interest of incumbents that have benefited from past discriminatory districting is not a neutral factor. In Marion and Allen Counties large multi-member districts that split and submerged Democrats were necessary to elect Republicans to 18 out of 21 seats. Allowing the Republican representatives in these counties to veto single-member districts made Republican partisanship the true deciding factor. Giving the three Democratic representatives as well the opportunity to reject single-member districts did not make this factor neutral.

***28 CONCLUSION**

For the foregoing reasons, this Court should affirm the judgment of the district court below.
Respectfully submitted,

PHILIP HEYMANN [*]

Harvard Law School

Griswold Hall, Room 306

Cambridge, MA 02138

617-495-3137

D. MICHAL FREEDMAN

COMMON CAUSE

2030 M Street, N.W.

Washington, D.C. 20036

Counsel for Amicus

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Footnotes

* Counsel of Record

1 Consider a state with one hundred voters, 67 of whom were supportive of A party and 33 of B party, which controlled the state legislature. The B group can create three districts in which it wins by 11 votes to 9, and two in which the A group wins unanimously with 20 votes.

2 A number of Common Cause state organizations have actively promoted a model reapportionment plan which includes specific standards. This plan has been urged on policy grounds, as one that would satisfy the Constitution-not as one that is constitutionally required.

3 Some states have created independent reapportionment commissions to eliminate the partisan conflicts of interest that have pervaded the redistricting process. That such a commission was responsible for the development of a state plan would be strong evidence of the fairness of the procedure governing its creation.

4 References to the Joint Appendix are in the form "JA-." References to the opinion of the court below, which is set forth in Appendix A to the Appellants' Jurisdictional Statement, are in the form "A-."

5 The absolute number of races won by this percentage of votes. (Note: These figures are derived from the General Election Statistics in Def. Exs. X and W; Nov. R. 126 and 127. In each multi-member district the calculations of the margins of victory were based on comparing the votes received by each victor with the losing candidate of the opposite party who did best.)

* Counsel of Record