2006 WL 247771 (U.S.) (Appellate Brief)
Supreme Court of the United States.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, et al., Appellants,
v.
Rick PERRY, et al., Appellees.
TRAVIS COUNTY, TEXAS, et al., Appellants,
v.
Rick PERRY, et al., Appellees.
Eddie JACKSON, et al., Appellants,
v.
Rick PERRY, et al., Appellees.
GI FORUM OF TEXAS, et al., Appellants,
v.
Rick PERRY, et. al., Appellees.

Nos. 05-204, 05-254, 05-276, 05-439.
February 1, 2006.

On Appeal from The United States District Court For the Eastern District of Texas

Brief Amicus Curiae of the American Legislative Exchange Council and Free Enterprise Coalition in Support of Appellees

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*i QUESTIONS PRESENTED

Does Article I, § 4 prohibit state legislatures and/or voters exercising their reserved legislative power through the initiative, from redistricting more than once in a decade, thereby eliminating the possibility of political remedies to post-census partisan gerrymanders, and increasing the frequency of lawsuits challenging such gerrymanders?

Does Article I, § 4 require federal court-ordered redistricting plans to remain in effect during an entire decade, insulated from any changes by subsequent redistricting legislation enacted by the Legislature or the voters of the state by initiative?

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*1 STATEMENT OF INTERESTS OF *AMICUS CURIAE*

The American Legislative Exchange Council ("ALEC") is the nation's largest nonpartisan individual membership association of state legislators. ALEC has more than 2,400 members, comprising approximately one-third of all state legislators in the United States. Its mission is to discuss, develop, and disseminate public policies that expand free markets, promote economic growth, limit government, and preserve economic liberty. It is also generally concerned with matters of legislative accountability and governmental structure. ALEC serves as a "think tank" on many specific legislative issues and provides for its members a variety of additional resources, including a number of publications, a website (*www.alec.org*), and affiliation with more than 300 corporate and private foundation members. ALEC's interest in this proceeding is the protection of the state legislatures' authority over redistricting, thereby promoting the vital principle of federalism (ALEC represents *state* legislators) and a sound separation of powers (ALEC represents state *legislators*) in the areas of redistricting and elections - domains traditionally entrusted to the care of the state legislatures. U.S. Const. art. I, § 4. [1]

The Free Enterprise Coalition ("FEC") is a non-profit organization incorporated in the State of Virginia. The Coalition's purpose is to engage in activities that promote policies that are supportive of the free enterprise system. The Chairman of FEC is Robert L. Livingston. For the past two years the coalition has concentrated on ensuring fair ***2** election systems that allow citizens who are supportive of the free enterprise system to elect candidates of their choice. The coalition, principally through litigation, seeks to eliminate gerrymanders of legislative and congressional districts and replace those gerrymandered schemes with districts that provide fair representation to all citizens. During the past two

years the coalition has assisted litigants and attorneys involved in redistricting litigation in Arizona, Colorado, Georgia, North Carolina, Virginia and Texas.

*3 INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should decline to read a once-per-decade limitation into Article I, § 4. Such a limitation would largely displace state legislatures from their constitutional redistricting role, a result for which there is no authority. Additionally, adopting such a limitation would have the unintended and undesirable consequence of shielding gerrymanders from traditional political remedies, and would mire the judiciary even more deeply in the political bog.

The facts of this very case demonstrate that adopting a once-per-decade rule *will have the direct and ironic effect of insulating post-census partisan gerrymanders from subsequent legislative remedies.* As the district court held below, its 2001 redistricting plan perpetuated the most notorious partisan gerrymander of the 1990s. That gerrymander was replaced by the Texas Legislature's 2003 plan that is challenged in this case. A once-per-decade rule would leave the court-perpetuated gerrymander in place for the rest of this decade, immunized from political remedy.

Imposing a once-per-decade limitation would also crush redistricting reform movements in many states. Many of these popular movements, embodied in initiatives, include proposals to replace perceived 2001 congressional gerrymanders with new, non-gerrymandered plans before the 2010 census. A constitutional rule prohibiting redistricting more than once in a decade would snuff-out these reform efforts and lock in early-decade gerrymanders until 2012.

By adopting a rule prohibiting redistricting more than once in a decade, this Court would also hasten the fulfillment of Alexis de Tocqueville's trenchant observation that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial ***4** question." 1 A. de Tocqueville, Democracy in America 280 (P. Bradley ed. 1948). A once-per-decade rule will increase the demand for judicial redistrictings in two ways. First, it will increase the incentive for political parties who do not control post-census legislative redistricting to do whatever they can to stymie the process and force redistricting into the courts in the hope of receiving better treatment than from the computers of the majority party. Intervening in this most political of activities is a task that this Court has repeatedly characterized as "unwelcome." Alternatively, in those states where legislative redistricting *does* take place, the rule will lead to an increase in post-enactment legal challenges: deprived of any political remedy for perceived post-census partisan gerrymanders, the aggrieved will have no choice but to turn to the courts for relief. Thus, after the decade's first plan is in place, the proposed once-per-decade rule would exclude political actors from the redistricting process, formerly deemed to be solely a "political question", and invest the courts as the primary tenants of the "political thicket." Such a result is one the Court should accept only if the Constitution demands it, and the Constitution does not.

*5 ARGUMENT

I. STATE LEGISLATURES HAVE CONSTITUTIONAL AUTHORITY TO REDISTRICT MORE THAN ONCE PER DECADE.

The U.S. Constitution vests the power to draw congressional district boundaries "in each state by the legislature thereof," subject to such regulations as Congress may enact. U.S. Const. art. I, § 4; *Smiley v. Holm,* 285 U.S. 355, 366-67 (1932). That authority is unqualified as to frequency; one would search the Constitution in vain for any constitutional provision that prevents the state legislatures from exercising this authority more than once per decade. Similarly, though Congress

has exercised its power to regulate congressional districting in certain respects, *see* 2 U.S.C. §§ 2a & 2c (2005), it has not limited redistricting to once-per-decade. [2]

There is no authority supporting an interpretation of Article I, § 4 as imposing a "once-per-decade" rule. This Court has never done so. It has established that redistricting immediately following each decennial Census is the minimum constitutional requirement. *See Wesberry v. Sanders,* 376 U.S. 1 (1964) (overturning Georgia's 1931 congressional redistricting plan that was malapportioned based on 1960 census data); *Reynolds v. Sims,* 377 U.S. 533 (1964). In *Reynolds v. Sims,* this Court held that failure to redistrict *at least* once every ten years "would assuredly be constitutionally suspect." *Id.* at 583-84. It further held that decennial redistricting "would clearly meet the *minimal* ***6** *requirements* for maintaining a reasonably current scheme of legislative representation." *Id.* (emphasis added). The Court also noted with apparent approval, however, that "the constitutions of seven States either require or permit reapportionment more frequently than every 10 years," *id.* at 583 n.65, and it disclaimed the notion that redistricting more than once in a decade is unconstitutional, stating, "[W]e do not mean to intimate that *more frequent reapportionment would not be constitutionally permissible or practicably desirable.*" *Id.* at 583-84 (emphasis added); *see also Whitcomb v. Chavis,* 403 U.S. 124, 163 n.43 (1971) (quoting *Reynolds*). [3]

Federal courts have universally applied *Reynolds v. Sims* as imposing only the constitutional *minimum* for the frequency of redistricting in the context of both legislative and congressional redistricting. These courts have also recognized that more frequent redistricting is permissible and perhaps desirable. *See, e.g., Daly v. Hunt,* 93 F.3d 1212, 1228 n.15 (4th Cir. 1996) (noting, in challenge to congressional district plan, this Court's statement in *Reynolds* that "more frequent reapportionment might be 'practicably desirable.' "); *Johnson v. Mortham,* 926 F. Supp. 1460, 1494 (N.D. Fla. 1996) ("*Johnson II*") (three-judge panel) ***7** (noting in challenge to congressional districting, "Since decennial redistricting is the constitutional minimum required, a state is free to adopt new redistricting plans in between regularly scheduled decennial reapportionments."), *aff'd sub nom., Johnson v. Smith,* 132 F.3d 1460 (11th Cir. 1997); *Klahr v. Williams,* 339 F. Supp. 922, 925 (D. Ariz. 1972) (three-judge panel) (holding, in challenge to both congressional and state legislative districts, "Obviously, we could not but approve a plan which the Arizona Legislature might adopt providing districting and apportionment based upon dependable population figures to be carried out more frequently than every ten years; but that we cannot require the Legislature to do so clearly appears from" *Reynolds*); *see also Garza v. County of Los Angeles,* 918 F.2d 763, 772 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991) ("*Reynolds* did not institute a constitutional maximum frequency for reapportionment; rather, it set a floor below which such frequency may not constitutionally fall."); *French v. Boner,* 786 F. Supp. 1328, 1331 n.4 (M.D. Tenn. 1992) ("Legislative reapportionment more frequently than every ten years, although not required, is permissible. *Reynolds*, 377 U.S. at 583-84.…"); *Buckley v. Hoff,* 243 F. Supp. 873, 878 (D. Vt. 1965) (three-judge panel) ("All the parties apparently also concede that reapportionment … of the [Vermont State] House of Representatives every eight years … is in full accord with the Equal Protection Clause. We again agree.").

No state's supreme court has ever found a "once-per-decade" limitation buried in the language of Article I, § 4. State supreme courts that invalidated a subsequent redistricting after the first post-census plan was enacted, have all done so based solely on unique state law provisions, rather than federal law. *See, e.g., People ex rel. Salazar v. Davidson,* 79 P.3d 1221 (Colo. 2003), *cert. denied sub nom., Colo. Gen. Assembly v. Salazar,* 541 U.S. 1093 (2004); *Legislature v. Deukmejian,* 669 P.2d 17, 23 (Cal. 1983) (collecting cases); *Harris v. Shanahan,* 387 P.2d 771 (Kan. 1963); ***8** *Jones v. Freeman,* 146 P.2d 564 (Okla. 1943); *People ex rel. Mooney v. Hutchinson,* 50 N.E. 599 (Ill. 1898); *Harmison v. Ballot Comm'rs,* 31 S.E. 394 (W. Va. 1898).

Furthermore, a number of states have adopted explicit state constitutional or statutory rules prohibiting congressional redistricting after the first mandatory post-Census plan. *See* Ariz. Const. art. IV, pt. 2, § 1; Conn. Const. art. III, § 6; Haw.

Const. art. IV, §§ 1, 2; Mont. Const. art. V, § 14; Idaho Code § 72-1501 (2005); 21 Maine Rev. Stat. Ann. § 1206 (2005); N.J. Stat. § 19:46-12 (2005); Tenn. Code Ann. § 2-16-102 (2005); Wash. Rev. Code §§ 44.05.030 & 44.05.110 (2005). Of course, had the U.S. Constitution been understood to preclude redistricting more than once a decade, these enactments would have been unnecessary. By the same token, if Congress wished to impose a once-a-decade rule for congressional districting, Article I, § 4, plainly authorizes it, but Congress has not chosen to do so. [4]

The understanding of Article I, § 4 evidenced by the foregoing authorities is consistent with the historical record of the founding era. For example, the experience of New Jersey in the years immediately following the Constitution's adoption betrayed no hint of an understanding that the Constitution limited the frequency with which legislatures might change congressional electoral systems. Within the space of 15 years, from 1798 to 1813, for purely partisan reasons, the New Jersey legislature switched four times from at-large to district-based congressional elections, with one ***9** switch to at-large elections taking place just days before the 1800 election. Rosemarie Zagarri, The Politics of Size: Representation in the United States, 1776-1850 (Cornell 1987), at 115-17. And one New York assemblyman objected to district-based elections in the year following the Constitution's adoption on the ground that the principle of population equality would "render it necessary to pass a new bill every year or two; our election law, therefore, could only be a temporary one." *Id.* at 120-21 (quoting *Daily Advertiser*, Dec. 19, 1778).

These voluminous authorities demonstrate, that there is no constitutional basis for morphing Article I, § 4's *minimum* requirement of redistricting once per decade into the constitutional *maximum* as well.

II. ENSHRINING A "ONCE-PER-DECADE" RULE INTO THE CONSTITUTION TO LOCK-IN A FEDERAL COURT-DRAWN PLAN WOULD DISPLACE STATES FROM THEIR CONSTITUTIONAL ROLE UNDER ARTICLE I, § 4.

The enunciation of a "once-per-decade" rule in this case would unnecessarily cement in place a congressional redistricting plan drawn by a federal district court, and severely transgress the long-recognized authority of state legislatures, and, as needed, state courts, to draw redistricting plans. This Court has repeatedly held that, "the Constitution leaves the States primary responsibility for apportionment of their federal congressional … districts." *Growe v. Emison,* 507 U.S. 25, 34 (1993); *see also Branch v. Smith,* 538 U.S. 254, 261 (2003) ("[Redistricting] is primarily the duty and responsibility of the State through its legislature."); *Chapman v. Meier,* 420 U.S. 1, 27 (1975) ("We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court."). The deference mandated by these ***10** precedents extend to redistricting plans crafted by state courts as well. *Growe*, 507 U.S. at 34 (citing *Scott v. Germano,* 381 U.S. 407 (1965); *Chapman*, 420 U.S. at 27.)

The Constitution requires deference to the States. A district court is precluded by the principle of separation of powers from usurping a state legislature's authority to adopt a constitutional redistricting plan, except in narrowly defined circumstances. Separation of powers does not arise from any provision of the Constitution, but exists because "behind the words of the constitutional provisions are postulates which limit and control." *Principality of Monaco v. Mississippi,* 292 U.S. 313, 323 (1934). Under the doctrine of separation of powers, government is composed of three separate but coequal branches. Consequently, unless otherwise expressly provided or incidental to the powers conferred, … the judiciary cannot exercise either executive or legislative power." *Springer v. Phillipine Islands,* 277 U.S. 189, 201-202 (1928). Deference to legislative redistricting enactments, based upon the doctrine of the separation of powers, has been exercised in cases ranging from congressional redistricting to the apportionment of local parish councils. *Upham v. Seamon,* 456 U.S. 37 (1982); *Grisbaum v. McKeithen,* 336 F. Supp. 267 (E.D. La. 1971).

The express grant to the States in Article 1, § 4 of the power to draw congressional district lines also implicates principles of federalism. Federalism is based upon the belief that a diffusion of power between two governments, federal and state, will enhance the freedom of the people. *See Gregory v. Ashcroft,* 501 U.S. 452, 458-59 (1991); *see also New York v. United States,* 505 U.S. 144 (1992) ("The Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself; 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.' " (quoting *Coleman v. Thompson,* 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)). ***11** *Johnson II*, 926 F. Supp. at 1494 n.72 ("we cannot deny the Florida Legislature the first opportunity to adopt a new redistricting plan. Not only is it required under existing constitutional law and the doctrines of federalism and separation of powers, but to do otherwise would encourage the very type of judicial activism in the political process that this Court has a duty to avoid.").

There are practical reasons for the delegation of this responsibility to the States:

> [A] state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality. The federal courts by contrast possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name.

Connor v. Finch, 431 U.S. 407, 414-15 (1977); *Upham*, 456 U.S. at 43-44 (quoting *Connor* in the context of congressional redistricting); *see Vera v. Bush,* 933 F. Supp. 1341, 1344 (S.D. Tex. 1996) ("*Vera I*") (following affirmance in *Bush v. Vera,* 517 U.S. 952 (1996), district court opinion about remedy for unconstitutional congressional districts). [5]

***12** In the face of the Constitution's express grant of redistricting power to the States, and the principles of separation of powers and federalism, the federal courts' role is necessarily a limited one. They are called upon to take up the unwelcome task of redistricting only when a state legislature fails to enact a plan that meets federal constitutional or statutory requirements, or fails to redistrict in a timely manner. *Reynolds*, 377 U.S. at 586 ("…[R]eapportionment is primarily a matter for legislative consideration and determination, and … judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so."); *Growe*, 507 U.S. at 34 ("Absent evidence that these state branches will fail timely to perform that [redistricting duty], a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it."); *Upham*, 456 U.S. at 41-42 ("From the beginning, we have recognized that 'reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in ***13** a timely fashion after having had an adequate opportunity to do so.' … In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.' " (quoting *White v. Weiser,* 412 U.S. 783, 794-95 (1973))).

Moreover, even in circumstances where a legislature's plan is determined to be infirm, the rule is that a federal court must accord the legislature a reasonable opportunity to remedy the defect before a judicial plan is imposed. *Wise v. Lipscomb,* 437 U.S. 535, 540 (1978) ("When a federal court declares an existing apportionment scheme unconstitutional, it is therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan."); *Vera I*, 933 F. Supp. at 1345-46.

A state legislature is not deposed from its redistricting role for an entire decade either because it failed, for whatever reason, to enact a new plan in timely fashion after the Census data were released, or because it was unable to enact a

remedial plan when given an opportunity to do so. A contrary rule would overrule decades of federal court precedent heeding this Court's admonition to defer to the States to redistrict. *See Session v. Perry,* 298 F. Supp. 2d at 460 n.14 (citing numerous cases).

Federal courts imposing remedial congressional district plans have routinely designated them "interim" plans and indicated their expectation that the plans would (or should) be replaced with appropriate legislatively-drawn plans. *See id; see also Colleton County Council v. McConnell,* 201 F. Supp. 2d 618, 670-71 (D.S.C. 2002) (future elections to be conducted according to court-drawn congressional plans "unless and until the South Carolina General Assembly … ends its current impasse and enacts an alternative redistricting plan for the legislative body at issue"); ***14** *Vera v. Bush,* 980 F. Supp. 251, 253 (S.D. Tex. 1997) ("*Vera II*") ("Because the legislature has failed to act, this Court is left with the 'unwelcome obligation' of providing a congressional redistricting plan for the 1998 and millennial election cycles *pending later legislative action.*" (emphasis added)); *Johnson v. Mortham,* 915 F. Supp. 1529, 1544 (N.D. Fla. 1995) ("*Johnson I*") (revising prior injunction to clarify that court-drawn congressional plan not "permanent," *i.e.*, effective until the next census, because "the law is clear that a state legislature always has the authority to redistrict or reapportion, subject to constitutional constraints."); *Vera I,* 933 F. Supp. at 1346 ("[T]his Court's remedy is an interim plan and the Court will require the legislature to prepare its own constitutional redistricting plan next year."); *Burton ex rel. Republican Party v. Sheehan,* 793 F. Supp. 1329, 1369 (D.S.C.) ("It is our hope that the General Assembly and the Governor will work together and fashion acceptable plans. In the interim, [this is] the plan[] for the…United States Congressional districts."), *vac'd on other grounds sub nom., Statewide Reapportionment Advisory Comm. v. Theodore,* 506 U.S. 951 (1992); *Jordan v. Winter,* 604 F. Supp. 807, 809 (N.D. Miss. 1984) (imposing, at plaintiffs' request, a "court-ordered interim plan for the 1982 congressional elections and thereafter *until changed by law.*" (emphasis added)). Thus, the district court below is merely the latest in a long line of federal courts to have recognized, relying on *Reynolds*, the authority of state legislatures to redistrict as frequently as they deem it to be "practicably desirable." *Reynolds*, 377 U.S. at 584; *see Henderson v. Perry,* 399 F. Supp. 2d 756, 2005 U.S. Dist. LEXIS 38273, *64 n.85 (E.D. Tex. 2005) (three-judge court).

***15 III. LIMITING REDISTRICTING TO ONCE PER DECADE IS AT LEAST AS LIKELY TO ENTRENCH PARTISAN GERRYMANDERING AS TO DISCOURAGE IT.**

A. Prohibiting Redistricting More Than Once Per Decade Would Deprive States Of An Important Tool For Combating Egregious Gerrymanders.

Perhaps the foremost irony of this case is that, if the Court were to strip the Texas Legislature of its ability to replace the federal-court drawn plan, *it would thereby have the direct effect of locking in an admitted partisan gerrymander.* As the district court explained below, "The State's description of the 2003 Texas legislative plan as dismantling a prior partisan gerrymander that had entrenched a minority party, in order to allow a party with overwhelming statewide voting strength to capture two-thirds of Texas's congressional delegation, is a characterization that the record supports." *Henderson*, 399 F. Supp. 2d at --, 2005 U.S. Dist. LEXIS 38273, at *44. The district court further elaborated,

> While the present plan, drawn by a Republican Party majority in 2003, has been decried as egregious, the story must begin with the earlier map drawn by a Democratic Party majority in 1991. *That plan, put in place following the 1990 census, was cited in the political science literature as an extreme example of what one party can do in drawing a redistricting map to the detriment of the other.* In 2000, the Democratic Party gerrymander was still in place and, although Republicans now enjoyed substantial statewide majority strength, the results of the congressional elections favored Democrats by a seventeen to thirteen margin. … [¶] ***16** … *The map drawn by this court in 2001 perpetuated much of this gerrymander.*

Id. at *37-*38 (emphasis added; footnotes omitted); *see also id.* at *37 n.47 (Texas Democratic plan the "shrewdest gerrymander of the 1990s" (*quoting* Michael Barone, The Almanac of Am. Politics 2002, at 1448 (2001))).

Teasing a once-per-decade rule out of Article I, § 4, would eliminate an important political remedy against a post-census gerrymander, namely subsequent legislative actions designed to undo the gerrymander's deleterious effects.

Perhaps the most widely-documented example of this effect is the California Supreme Court's adoption of a once-per-decade rule in 1983, applicable to both the Legislature and the people acting through the initiative. *Legislature of the State of Cal. v. Deukmejian,* 669 P.2d 17 (Cal. 1983). Following the 1980 Census, Democratic majorities controlled the California Legislature. *Badham v. Eu,* 694 F. Supp. 664, 666 (N.D. Cal. 1988). In 1981, voting along party lines, the Legislature adopted a new plan for congressional and legislative districts. *Id.* That plan, authored by the late Congressman Philip Burton and dubbed by pundits the "Burtonmander," was "considered one of the most notoriously partisan gerrymanders in recent years." Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno,* 92 Mich. L. Rev. 483, 573 (1993); John H. Fund, *Beware the Gerrymander, My Son*, Nat'l Rev., Apr. 7, 1989, at 34.

California voters promptly qualified a referendum to rescind the "Burtonmander," which the Democratic State Assembly challenged in California's courts. The state Supreme Court upheld the referendum, but ordered the Burton plan to be used for the 1982 congressional and legislative elections. *Assembly v. Deukmejian,* 639 P.2d 939 (Cal. 1982); Fund, *supra*, at 34. Consequently, though ***17** California's voters "overwhelmingly rejected" the Burton plan at the June 1982 primary, Democrats made significant gains in the Legislature and in the congressional delegation that November. *Legislature v. Deukmejian,* 669 P.2d at 684 (Richardson, J., dissenting); *Badham*, 694 F. Supp. at 666; Fund, *supra*, at 34.

Despite the voters' disapproval of the Burtonmander, at an extraordinary session that fall the Legislature adopted a new plan - dubbed "Son of Burton" - making only minor changes to the rejected gerrymander, and locking in the new Democratic gains; it was signed by outgoing Governor Brown just hours before the new Republican Governor, George Deukmejian, was sworn into office. Fund, *supra*, at 35; *Badham*, 694 F. Supp. at 666. The Legislature designated the new plan "urgency" legislation, precluding further use of the referendum power. *Legislature v. Deukmejian,* 669 P.2d at 684 (Richardson, J., dissenting).

California voters reacted again, promptly qualifying an initiative that would have repealed the "Son of Burton" plan, and replaced it with a new plan thought to embody "good government" principles. *Id.*; Fund, *supra*, at 35. In another legal challenge by the Democratic Legislature, the California Supreme Court prohibited a vote on the initiative, holding that under California's Constitution a valid redistricting could only be enacted, whether by the Legislature or by initiative, once per decade, and "Son of Burton" was that plan. *Id.* at 22-31 (majority opinion). The effect was predictable: The following year, Republicans received an absolute majority (50.1%) of the congressional vote statewide, but only 40% of the state's congressional seats. *Badham*, 694 F. Supp. at 670. A similar disparity prevailed throughout the decade. Fund, *supra*, at 34. Consequently, the adoption of California's once-per-decade rule locked in an acknowledged partisan gerrymander. The adoption of such a rule in this case would do the same.

***18 B. A "Once-Per-Decade" Rule Would Also Stymie Redistricting Reform Efforts By Voters Themselves.**

More recently, movements to reform redistricting have sprung up across the nation in response to perceived redistricting abuses after the 2000 Census, including in California (again), Ohio, Michigan, Florida, Georgia, Maryland, Massachusetts, and Rhode Island. *See* Adam Nagourney, *States See Growing Campaign for New Redistricting Laws*,

N.Y. Times, Feb. 7, 2004, at A1. A number of these reform efforts are incorporated in initiative proposals and include provisions to replace existing post-2000 redistricting plans with new plans during the decade. Yet a rule interpreting the federal Constitution as prohibiting redistricting more than once per decade would also apply to the people exercising their reserved legislative power [6], and would threaten to stymie such reform efforts, again locking in the alleged existing gerrymanders.

For example, 2005 witnessed renewed efforts in California to reform the redistricting process by means of direct democracy. Douglas Johnson, *et al.*, Restoring the Competitive Edge: California's Need for Redistricting Reform and the Likely Impact of Proposition 77, at 16 (Rose Institute 2005), *at* http:// rose.claremontmckenna. ***19** edu/ redistricting/redistricting.asp. Voters qualified an initiative measure, Proposition 77, which would have amended the State's constitution to require an independent commission to conduct all future redistrictings of state legislative and congressional districts. It would have also required the commission to adopt a redistricting plan to replace the perceived bipartisan gerrymander enacted in 2001 by the Legislature. These efforts were endorsed by good-government groups including Common Cause, and all of the State's major newspapers. *See* Editorial, Our Election Guide, L.A. Times, Nov. 8, 2005, at B12; *Common Cause, Two Other Groups Back Redistricting Measure*, Assoc. Press, Oct. 5, 2005 (On Lexis-Nexis); Paul Thornton, *Editorials Elsewhere: Endorsements Elsewhere*, L.A. Times, Nov. 8, 2005, at B12.

Likewise, in Ohio an initiative was recently qualified to implement redistricting by commission, which also would have replaced the current congressional plan, believed to be a gerrymander, with a new plan. That measure was also backed by good government groups including Common Cause. *See* Dean E. Murphy, *Ohio Critics of G.O.P. Start Battle to Change Election Process*, N.Y. Times, Aug. 10, 2005, at A12; Dean E. Murphy, *Schwarzenegger Enters Debate Over Redistricting In Ohio*, N.Y. Times, Oct. 17, 2005, at A22.

Similar reform efforts are also underway in Michigan and Florida and include new redistricting to undo perceived gerrymanders in those states. Editorial, *Districts*, Lansing St. J., Apr. 6, 2005, at 6A. *See* Fla. Dept. of State, Div. of Elec., Implementation of Apportionment & Districting Comm'n No. 05-16, *at* http://election.dos.state.fl.us/initiatives/ initdetail.asp? account=41643&seqnum=3.

This Court should not adopt a rule prohibiting redistricting more than once in a decade. Such a rule not only would insulate post-census gerrymanders from subsequent political remedies, but also would jeopardize popular reform efforts like those detailed above. What's more, it would also frustrate the opportunity for voters to ***20** attempt to overturn a gerrymander by electing new officeholders who might take on the task, because that task would be foreclosed by the once-per-decade rule.

IV. A PROHIBITION ON REDISTRICTING MORE THAN ONCE IN A DECADE WOULD RESULT IN A MULTIPLICITY OF POST-CENSUS PARTISAN GERRYMANDER SUITS AND WOULD INCREASE THE DEMAND FOR COURT-DRAWN PLANS.

In defending the overall justiciability of partisan gerrymandering claims in *Vieth*, Justice Breyer noted in dissent that "[c]ourts need not intervene often to prevent the kind of abuse I have described, because those harmed constitute a political majority, and a majority normally can work its political will." 541 U.S. at 362 (Breyer, J., dissenting). He premised this observation on the existence of numerous political remedies available to "undo the harm that districting has caused the majority's party, in the next round of districting *if not sooner.*" *Id.* (emphasis added). If this Court adopts a prohibition on redistricting more than once in a decade, however, courts will be forced to intervene more frequently, because interim political solutions will be precluded. Indeed, such a prohibition would significantly increase the burdens on the judiciary in two ways.

First, such a rule will mean that courts will increasingly be compelled to accept the "unwelcome obligation" of drawing plans in the first instance. *Connor v. Finch,* 431 U.S. at 415. The party whose legislative members are likely to lose out in post-census redistricting will have every incentive to stall in an effort to force the process into the courts instead, hoping to fare better in the judicial arena than in the political, and knowing that a court plan would foreclose any subsequent plans by the political branches.

Second, in those states where legislative districting *does* take place, a prohibition on subsequent redistricting would almost surely result in a greater number of post-census ***21** partisan gerrymandering claims. Litigation will be the only remedy for those aggrieved by perceived gerrymanders because political remedies will have been precluded by this Court. *See Badham*, 694 F. Supp. at 666-67 (deciding partisan gerrymandering challenge to "Son of Burton" plan after Cal. Supreme Court enunciated state "once-per-decade" rule).

Increasing the frequency with which redistricting will default to the federal courts is inconsistent with this Court's precedents. Those precedents have sought to prevent federal courts from becoming "bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so." *Gaffney v. Cummings,* 412 U.S. 735, 749-50 (1973). Thus, the Court has sought to avoid standards that would draw the judiciary so decisively into the political redistricting bog, and has held, in the context of congressional reapportionment, that courts "should not … 'intrude upon state policy any more than necessary.' " *White v. Weiser,* 412 U.S. at 795 (quoting *Whitcomb v. Chavis,* 403 U.S. at 160). Consistent with this principle, the Court held in *Gaffney* that it would not

> mak[e] the standards of reapportionment so difficult to satisfy that the reapportionment task is recurringly removed from legislative hands and performed by federal courts which themselves must make the political decisions necessary to formulate a plan or accept those made by reapportionment plaintiffs who may have wholly different goals from those embodied in the official plan...

Id. at 749-50.

Similarly, in *Davis v. Bandemer,* the Court was careful not to adopt too lenient a test for identifying unconstitutional partisan gerrymanders, noting,

> Inviting attack on minor departures from some supposed norm would *too much embroil the judiciary* in second-guessing what has consistently been ***22** referred to as a political task for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from legislative halls. *We decline to take a major step toward that end, which would be so much at odds with our history and experience.*

478 U.S. 109, 133-34 (1986) (emphasis added); *see also Vieth*, 541 U.S. at 300 (plurality opinion) ("Is the regular insertion of the judiciary into districting, with the delay and uncertainty that brings to the political process and the partisan enmity it brings upon the courts, worth the benefit to be achieved…? We think not.").

An increase in court-drawn plans and judicial "second-guessing" of legislatively-drawn plans would be the inevitable impact of a prohibition on redistricting more than once in a decade. These are results to be avoided, if possible, in the absence of a clear constitutional mandate to the contrary - a mandate that is lacking here.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Footnotes

1 As required by Rule 37.3(a) of this Court, *amicus curiae* have sought and received the written consent of all parties to file this brief presented. Copies of letters of consent signed by counsel are filed herewith with the Clerk of the Court. Pursuant to this Court's Rule 37.6, *amicus curiae* state that none of the parties authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

2 Several Appellants in this case contended otherwise in the district court, but that court properly rejected such claims, noting, "It would have been remarkably easy for Congress to impose such a limitation in the text of § 2c, but it did not." *Session v. Perry,* 298 F. Supp. 2d 451, 465 (E.D. Tex. 2004) (three-judge court). No Appellant (or *amicus*) has reargued in this Court that a statutory basis exists for the alleged "once-per-decade" rule.

3 A substantial majority of this Court in *Vieth v. Jubelirer,* 541 U.S. 267 (2004), seems to have assumed that congressional redistricting more than once per decade occurs as a matter of course. In dissent, Justice Breyer argued for a measure of impermissible partisan gerrymandering based upon a range of factors, including, most prominently, the presence of mid-cycle redistricting. *Id.* at 365-67 (Breyer, J., dissenting). This proposed standard was rejected outright by five Justices of this Court. *Id.* at 541 U.S. at 299 (plurality opinion), 308 (Kennedy, J., concurring in judgment) (rejecting "the standards proposed … by our dissenting colleagues…."), 317 (Kennedy, J., concurring in judgment). No other Justice endorsed it, nor did any other Justice question the practice of more than one redistricting in a decade. *See id.* at 317-42 (Stevens, J., dissenting) & 342-55 (Souter, J., dissenting).

4 Of course, if the U.S. Constitution had ever been understood to preclude redistricting more than once in a decade, congressional action would be unnecessary as well. Nevertheless, there are currently three separate bills pending before Congress that would expressly prohibit redistricting after a valid post-census plan is enacted. *See* H.R. 4094, 109th Cong. § 2 (2005) (Rep. Lofgren); H.R. 2642, 109th Cong. § 2 (2005) (Rep. Tanner); H.R. 830, 109th Cong. § 1 (2005) (Rep. Waters).

5 For a discussion of various competing factors and interests (besides partisanship) that legislatures are best equipped to consider as part of the redistricting process, including, *inter alia*, compactness, contiguity, preservation of political subdivisions, concerns voiced by the public, concerns voiced by organized groups, whether and how to maintain continuity in the delegation so that the state may still have access to federal largesse and have better influence on legislation, and competing communities of interest, *see* Clark Benson, *Substantial Political Consequences, A Practitioner's Perspective on Redistricting*, Extenstions (Carl Albert Congressional Stud. & Research Ctr. Fall 2004), *at* http:// www.ou.edu/special/albertctr/extensions/fall2004/Bensen.html. *See also Georgia v. Ashcroft,* 539 U.S. 461, 483-84 (2003) ("the State's choice [whether to use influence or coalitional districts in avoiding retrogression under Voting Rights Act § 5] ultimately may rest on a political choice of whether substantive or descriptive representation is preferable."); *Gonzalez v. Monterey County,* 808 F. Supp. 727, 733-34 (N.D. Cal. 1992) ("In delaying the election, foremost in the court's mind is the Supreme Court's observation that a 'legislature is … by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality.' … ¶ … The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution dictates that redistricting plans achieve fair representation for all citizens. [Citation.] On the other hand, California recognizes the importance of '(a) topography, (b) geography, (c) cohesiveness, contiguity, integrity, and compactness of territory, and (d) community of interests' in drawing legislative districts.").

6 *See Ohio ex rel. Davis v. Hildebrandt,* 241 U.S. 565 (1916) (redistricting by the "legislature" includes the people acting by direct democracy, because they exercise part of the state's legislative power); *see also Smiley v. Holm,* 285 U.S. at 355 (redistricting by the "legislature" includes the law-making power as defined by the State's constitution, including Governor's veto power). Furthermore, this Court has held that "the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." *Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290, 295 (1981); *Buckley v. Am. Constitutional Law Found.,* 525 U.S. 182, 194 (1999).

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