2006 WL 53995 (U.S.) (Appellate Brief)
Supreme Court of the United States.

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

Nos. 05-204, 05-254, 05-276, 05-439.
January 10, 2006.

On Appeal from the United States District Court for the Eastern District of Texas

Brief for the Center for American Progress as Amicus Curiae in Support of Appellants

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***1** The Center for American Progress respectfully submits this brief *amicus curiae* in support of the appellants in these cases. [1]

INTEREST OF *AMICUS CURIAE*

Founded in 2003, the Center for American Progress ("the Center") is a nonpartisan research and educational institute dedicated to promoting a strong, just, and free America that ensures opportunity for all. The Center works to find progressive and pragmatic solutions to significant problems facing our nation in order to foster a government "of the people, by the people, and for the people." In just over two years, the Center has held over 250 events featuring former presidents, Cabinet secretaries, and federal, state, and local elected officials. The Center's policy experts have authored more than 200 original reports on a wide array of public policy issues, including education, health care, tax policy, civil liberties, and international affairs, which have been cited by the media more than 1,000 times. The Center's research and policy proposals have been circulated widely on Capitol Hill and in state legislatures across the nation.

The Center has a strong commitment to good government and protecting the right of the American people to participate meaningfully in our democratic system. The Center has hosted expert policy discussions and published research on voting systems, election administration, redistricting, and expanding access to the franchise. The Center has filed *amicus curiae* briefs before this Court and other courts in cases, involving significant issues of public policy.

***2** SUMMARY OF ARGUMENT

The Texas Legislature's unprecedented mid-decade partisan gerrymander burdens recognized expressive rights, and this Court should apply heightened First Amendment scrutiny to invalidate the plan. Although the Court has noted that the redistricting process is always "root-and-branch a matter of politics," *Vieth v. Jubelirer,* 541 U.S. 267, 285 (2004), this case raises unique concerns about the role of partisan politics in redistricting.

Redistricting almost always involves the classification of voters based upon the exercise of core political expression. As this Court has recognized, legislators who control the redistricting process draw district lines with an eye toward achieving specific political outcomes. To accomplish their aims, such legislators must examine and assign voters to districts using prior voting patterns and registration data. Both voting and affiliating with a political party constitute exercises of political expression that are plainly protected by the First Amendment. At its core, gerrymandering thus impinges upon recognized First Amendment rights by benefiting some individuals and penalizing others based on how those individuals have exercised their First Amendment rights.

In the past, this Court has evaluated election laws and regulations that burden voters' First Amendment rights under a flexible standard, subjecting regulations that impose significant burdens to heightened scrutiny. Although this Court has not applied this standard in the gerrymandering context, it has also never confronted a case like this one. This case involves a legislative effort to replace a *valid* court-drawn plan for no reason other than naked partisan politics; indeed, there is no dispute that the "single-minded purpose" of this plan was "to gain partisan advantage." Jurisdictional Statement of *Jackson* Pls. App. at 89a. Moreover, in replacing one valid map with another, the Texas Legislature failed to ***3** take into account new population data of any kind, despite overwhelming evidence of important changes in the State's population and demographics. These facts call for the application of heightened scrutiny under this Court's flexible standard for assessing the permissibility of election laws and regulations that impact voters' First Amendment rights.

Under that flexible standard, election laws subjected to heightened scrutiny can only be sustained if they serve an important state interest. Traditional redistricting has always involved the important state interest of bringing district lines into compliance with the Constitution and federal law. But that interest is not at stake when, as here, a valid map is already in place. The burden therefore lies with Texas to identify an alternative interest important enough to justify its discrimination against certain of its citizens based on prior exercises of their fundamental rights. Texas cannot satisfy that burden in this case.

The Center agrees with the *Jackson* appellants that the 2003 Plan is unconnected to any legitimate state interests, and therefore fails even rational-basis review. The Center writes separately, however, to urge the Court to apply heightened scrutiny to the 2003 Plan. In any other context, government classifications based so patently on protected expressive and associational rights would be subject to strict judicial scrutiny. The fact that this case involves redistricting, rather than some other government action, should not render those very same classifications subject to rational-basis review, the default standard applicable to garden-variety economic regulations.

As this Court has recognized, partisan gerrymandering has been part of the American political landscape for several centuries. In recent years, however, both major political parties - aided by constantly improving computer technology -

have engaged in increasingly aggressive and sophisticated partisan gerrymanders. The application of heightened scrutiny ***4** is appropriate in this case to ensure that unusually naked and pernicious *mid-decade* partisan gerrymandering does not become part and parcel of both parties' efforts to entrench their positions in Congress.

ARGUMENT

All election regulations burdening expressive rights are subject to review under this Court's standards. Consistent with basic due process protections against arbitrary state action, even incidental burdens are subject to rational-basis scrutiny. The Center agrees with the *Jackson* appellants that the Texas Plan cannot even survive this level of scrutiny because the 2003 Plan is " 'inexplicable by anything but animus toward the class it affects.' " Jurisdictional Statement of *Jackson* Pls. at 14 (quoting *Romer v. Evans,* 517 U.S. 620, 632 (1996)). If the Court agrees, it need not consider whether to apply heightened scrutiny to the 2003 Plan.

Should the Court reach that question, however, the Center submits that heightened scrutiny *is* appropriate in the unusual and limited context of this type of mid-decade redistricting. The First and Fourteenth Amendments prohibit the government from inflicting injury on citizens for no reason other than political outlook, and heightened scrutiny ensures that the Court can distinguish justifiable redistricting classifications from naked or pretextual partisan gamesmanship. Indeed, this Court has already adopted a flexible standard for assessing the permissibility of election-related regulations, and that standard is easily and properly applied to this partisan gerrymander. Applying heightened scrutiny to the 2003 Plan requires its invalidation. The Court should thus invalidate the 2003 Plan and reinstate the court-drawn 2001 map.

*5 I. THE TEXAS REDISTRICTING PLAN PLACES UNPRECEDENTED BURDENS ON EXPRESSIVE RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS, WARRANTING HEIGHTENED SCRUTINY

The freedom to express one's viewpoints at the ballot-box lies at the core of our democratic system of government. Indeed, this Court has described the "political franchise of voting" as "a fundamental political fight, because [it is] preservative of all rights." *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886). The expressive quality of voting operates in at least two distinct dimensions. First, citizens express their political choices in the voting booth by marking and casting their ballots at election time. *Cf. Burdick v. Takushi,* 504 U.S. 428, 437-39 (1992) (recognizing limited expressive function of voting); *Ill. State Bd. of Elec. v. Socialist Workers Party,* 440 U.S. 173, 184 (1979) (noting that ballot access restrictions impair "the voters' ability to express their political preferences"). Second, citizens express their political associations when they vote for candidates of particular parties, as well as when they engage in election-related activities such as registration or membership. *See, e.g., NAACP v. Button,* 371 U.S. 415, 430 (1963) (recognizing that affiliation with political parties represents an exercise of associational rights under the First Amendment).

Viewpoint- and content-based regulation of such core political expression is normally subject to the strongest level of scrutiny under the First Amendment. Under strict-scrutiny review, a State must advance a "compelling" government interest in such regulations, and it must then show that the regulation in question is narrowly tailored to advance that interest. *E.g., Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 101-02 (1972) (striking down an ordinance regulating picketing on all but labor-dispute-related subjects).

***6** But at the same time, elections themselves are not " 'Hyde Parks open to every would-be pamphleteer and politician.' " *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 49 n.9 (1983) (quoting *U.S. Postal Service v. Council of Greenburgh Civic Ass'ns,* 453 U.S. 114, 130 n.6 (1981)). Rather, the electoral process operates as a limited public forum that is subject to regulations which "channel" expressive activity in a manner "compatible with the intended uses" of

the forum. *See Burdick*, 504 U.S. at 438 (approving "politically neutral regulations that have the effect of channeling expressive activity at the polls"); *cf. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 819 (1985) (Blackmun, J., dissenting) ("In a limited public forum … the need to confine expressive activity on the property to that which is compatible with the intended uses of the property will be a compelling interest that may justify distinctions made between speakers."). The States and the Federal Government accordingly enjoy the necessary flexibility to ensure that elections are "fair and honest and [that] some sort of order, rather than chaos, [accompanies] the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). The mere fact that "[e]lection laws will invariably impose some burden upon individual voters" does not mean that all such laws are categorically or even presumptively invalid. *Burdick*, 504 U.S. at 433; *see also Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

This Court has instead adopted a "flexible standard" to evaluate election-related laws that impact expressive rights. "A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.' " *Burdick*, 504 U.S. at 434 (quoting ***7** *Anderson*, 460 U.S. at 789). "Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Id.* As in other limited-forum contexts, the burden on the State to defend its election regulations increases as the burdens on the voter are more severe. *See id.* (citing *Norman v. Reed*, 502 U.S. 279, 289 (1992)). When an election regulation "imposes only 'reasonable, nondiscriminatory restrictions' upon First and Fourteenth Amendment rights of voters," however, " 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting and citing *Anderson*, U.S. 460 at 788, 788-89 & n.9). Even then, of course, the State must identify a cognizable interest served by the regulation. But when severe burdens are placed on voters' First and Fourteenth Amendment rights, the law in question must be "narrowly drawn to advance a state interest of compelling importance." *Id.* (quotation omitted).

The Court has never applied this flexible standard to a case involving partisan gerrymandering. Instead, in its limited political gerrymandering jurisprudence, the Court has relied upon equal-protection analysis. *See generally Davis v. Bandemer*, 478 U.S. 109 (1986). Moreover, a plurality of the Court recently announced that it was prepared to abandon the search for "judicially discernible and manageable standards by which political gerrymander cases are to be decided" and to declare such cases to be nonjusticiable. *Vieth*, 541 U.S. at 278 (quoting *Davis*, 478 U.S. at 123 (plurality opinion)). Casting the pivotal fifth vote in *Vieth*, however, Justice Kennedy suggested that the continued search for manageable standards in political gerrymandering cases might find fertile ground in the First Amendment. *See id.* at 314 (Kennedy, J., concurring in the judgment). Justice Kennedy explained that "[t]he First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering. After all, ***8** these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Id.* Justice Kennedy suggested "that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights," *id.*, and that heightened scrutiny (specifically, strict scrutiny) would apply under such circumstances.

The flexible standard this Court has adopted in evaluating the First Amendment burdens created by election regulations in other contexts is well-suited to implement Justice Kennedy's approach and thus to evaluate the 2003 Plan in this case. The standard was designed to accommodate the reality that States must be permitted some discretion in conducting elections. Those cases have focused on a State's interest in ensuring orderly elections that are fair and honest. The redistricting context is analogous: here States must be given some room to serve valid interests, such as satisfaction of the one-person, one-vote requirement and Voting Rights Act obligations, as well as traditionally recognized districting interests. At the same time, the flexible-standard test recognizes that States do not always regulate in a valid way. In cases

involving pronounced or obvious burdens on expressive rights, closer scrutiny must be brought to bear to determine whether the justifications offered by the State are sufficiently important and sufficiently advanced by the state action to justify those burdens.

The application of this standard does not call into question the permissibility of the vast majority of Congressional redistricting plans. The reason is that in the modem era, legislatures have undertaken redistricting efforts when valid district lines do not exist and where new lines therefore must be drawn to bring a map into compliance with controlling law. Although politics and partisanship are all but inherent ***9** in such normal redistricting efforts, [2] the impingement on various voters' First Amendment rights is justified in such circumstances because drawing new lines also serves important state interests.

But this is not the usual case. As noted above, redistricting in the modern era has been limited to those situations *where no valid map exists.* Indeed, "[s]ince 1910, when the House was fixed in size at 435, the norm has been that a census is followed by reapportionment across states to fit the population, and is followed in turn by redistricting within the states. After 1910, no state undertook a second redistricting within the 10-year period between censuses except when ordered by the courts." Norman Ornstein, *One Person, One Vote Is Vital - When It's Applied Within Reason*, Roll Call, Dec. 14, 2005, at 2, *available* at 2005 WLNR 20068295. In other words, redistricting has occurred when it needs to occur - usually when new census data render extant maps invalid under the one-person, one-vote principle.

Here, by contrast, redistricting was undertaken even though the existing Congressional map was valid and would have remained so until the next census. *See* Tex. Att'y Gen. Op. GA-0063 (Apr. 23, 2003) (concluding that State law did not require a new map and that 2001 map would remain valid until 2010 census). It was also undertaken without reference to any new population data - and without any effort to obtain or create such data - that could in theory justify a mid-decade redistricting. These differences are of profound ***10** consequence, because they squarely raise the question whether any cognizable state interest was served by the promulgation of a new map in 2003.

Indeed, the normal presumption that new maps are valid should not apply here without (at the very least) a careful examination of what interest the State has offered in place of the valid interests at stake when redistricting to replace an invalid map. The absence of those interests in the context of replacing a valid map means that there is necessarily a new balance of interests under this Court's "flexible standard" for measuring burdens on First Amendment rights under election regulations.

Without the usual presumptions in place, heightened scrutiny is triggered due to the burdens on expression inherent in redistricting and present to a self-evident degree here. Redistricting based on instincts of political self-preservation or partisan gain implicates "the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment) (citing *Elrod v. Burns,* 427 U.S. 347 (1976) (plurality opinion)). This is so because voters are entitled to vote their conscience and to align with political parties that share their views without the specter of viewpoint-based government action predicated on the exercise of that expression. In this instance, the Texas Legislature chose to redraw two-year-old district lines that had been drawn to reflect voting trends in the State and that had in the prior election produced results consistent with expectations solely and specifically to suppress further the representation of their political opposition.

It is neither surprising nor significant that this Court has not previously employed this flexible standard in a partisan gerrymandering case. This Court has often extended its First ***11** Amendment jurisprudence in the past to account for new sets of circumstances. *See Denver Area Educ. Telecomms. Consortium, Inc. v. FCC,* 518 U.S. 727, 740 (1996) ("The

history of this Court's First Amendment jurisprudence, however, is one of continual development, as the Constitution's general command that 'Congress shall make no law … abridging the freedom of speech, or of the press,' has been applied to new circumstances requiring different adaptations of prior principles and precedents. The essence of that protection is that Congress may not regulate speech except in cases of extraordinary need and with the exercise of a degree of care that we have not elsewhere required."). Indeed, members of this Court have already recognized the relevance of the First Amendment in the partisan gerrymandering context. *See Vieth*, 541 U.S. at 314-15 (Kennedy, J., concurring in the judgment); *id* at 324-25 (Stevens, J., dissenting).

For these reasons, the Texas Legislature's decision to draw patent viewpoint-based classifications during an unprecedented mid-decade redistricting in which no new population data was used requires the application of heightened judicial scrutiny.

II. THE TEXAS REDISTRICTING PLAN IS INVALID UNDER THIS COURT'S FLEXIBLE STANDARD FOR EVALUATING ELECTION REGULATIONS

Texas cannot identify a state interest that is sufficiently important to justify the First Amendment burdens imposed by the 2003 Plan. Between them, Texas and the court below identified two purported state interests. Although the State on remand principally asserted that its actions should be considered nonjusticiable, it also argued that it had a valid purpose in realigning the map to make "Texas's congressional delegation more like Texas's voting patterns." *See* State Defs' Opening Br. on Remand, *available* at 2003 WL 24051486. The three-judge panel below endorsed that principle and identified a second putative state interest: permitting ***12** state *legislatures* to replace even valid court-drawn maps. *See Henderson v. Perry,* 399 F. Supp. 2d 756, 767-69 (E.D. Tex. 2005) (political purposes) (citing *Gaffney*, 412 U.S. at 754); *id.* at 775-76 & n.82 (replacing court-drawn maps) (collecting cases). Even if these ostensible interests provided "rational" bases for legislation - which the Center does not concede - they could not rise to the level of "important" state interests satisfying any form of heightened scrutiny.

1. The only interest actually advanced by the State of Texas below was that of securing a "congressional delegation more like Texas's voting patterns" at a time when a current and valid districting map was in effect. Put more directly, the State argues that it has an important state interest in securing further partisan advantage for one political party in the state's congressional delegation over others. Such a bare desire to advantage one political party and harm others based on their political views is not even considered a legitimate state interest, let alone an important one. A State has no legitimate interest in the success of any particular political party. *See Abate v. Mundt,* 403 U.S. 182, 187 (1971) (indicating that partisanship in favor of groups was not a legitimate state interest sufficient to justify population deviations among legislative districts); *Kirkpatrick v. Preisler,* 394 U.S. 526, 534 (1969) (same). If this were not so, then all sorts of discriminatory election laws might be permissible. *See Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment) ("If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles,' we would surely conclude the Constitution had been violated.").

In addition, the fact that Texas frames its interest in electing more Republicans to Congress in terms of an interest in ***13** better reflecting Texas voting patterns does not make the asserted interest any more capable of surviving heightened scrutiny. The notion that there is such a thing as a fairly "balanced" map that accurately reflects statewide voting patterns is illusory. A party's share of the vote varies from race to race and election cycle to election cycle, and which race or aggregation of races constitutes the appropriate proxy essentially is a matter of perspective. A state interest that is so elusive and ephemeral by nature cannot be an "important" state interest sufficient to justify burdening certain voters' First Amendment rights. To hold otherwise would be to invite States to draw new lines for every election cycle on the

grounds that - based on whatever race a State wished to use at the moment - the new map better reflected statewide voting patterns. Permitting States to re-redistrict whenever they believed that the current map failed to sufficiently reflect statewide voting patterns would result in constant re-redistricting that would wreak the kind of "chaos" on the "democratic processes" that is antithetical to the very purpose of election regulations.[3] *Burdick*, 504 U.S. at 433 (quotation omitted).

2. The other interest offered by the court below fares no better. The panel explained that it is "within the prerogative ***14** of the state legislatures" "to draw their own map to replace one imposed by a court." *Henderson*, 399 F. Supp. 2d at 775. But the court strained to find any precedent to support such a broadly framed proposition, settling instead for two cases that involved court-made maps that - unlike the 2001 map - contained built-in expiration dates and another case arising under circumstances entirely unlike those in this case. *See id.* at 775 n.82 (collecting cases). It failed to identify any precedent that demonstrates that a State's purported interest in permitting a legislature to replace a valid court-imposed map is sufficiently important to justify the infringement of certain voters' core expressive rights.

To be sure, this Court has recognized that, in the absence of an extant valid map, a new map drawn by a state legislature is preferable to one drawn by a federal court. *E.g., Gaffney*, 412 U.S. at 749 ("Nor is the goal of fair and effective representation furthered by making 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 …. From the very outset, we recognized that the apportionment task, dealing as it must with fundamental 'choices about the nature of representation,' … is primarily a political and legislative process.") (quoting *Burns v. Richardson,* 384 U.S. 73, 92 (1966), and citing *Reynolds v. Sims,* 377 U.S. 533, 586 (1964)); *see also Branch v. Smith,* 538 U.S. 254, 262 (2003); *Connor v. Finch,* 431 U.S. 407, 414-15 (1977). But that principle was not abrogated here. The intervention of a federal court in this case was made necessary only by the Texas Legislature's inability to perform its duty following the 2000 census. When the legislature is unable to complete its task in a timely fashion, a court may step in and promulgate a new set of lines. *Connor*, 431 U.S. at 415. The fact that there is a *preference* for having legislatures rather than courts draw district lines when new maps need to be drawn does not ***15** mean the State has any interest, much less an "important" one, in replacing a court-drawn map with one drawn by the legislature.

Moreover, the insufficiency of this purported state interest is further made apparent by the fact that the 2003 Plan governed *Congressional* elections, matters which are not within a State's unfettered discretion to regulate. The Texas Legislature's authority to draw the boundaries of Congressional districts does not inhere in its sovereign power as a State. Rather, this authority derives from the Elections Clause of the United States Constitution, which permits States to regulate only the "Times, Places, and Manner" of elections for the U.S. House of Representatives. U.S. Const. art. I, § 4. Importantly, this Court has made clear that a state legislature's power to regulate federal elections - including its redistricting power - was not one of the powers "reserved by" the States under the Tenth Amendment. *Cook v. Gralike,* 531 U.S. 510, 522 (2001) ("Because any state authority to regulate election to those offices could not precede their very creation by the Constitution, such power 'had to be delegated to, rather than reserved by, the States.' ") (quoting *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 804-05 (1995)). Just as important, "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and *not as a source of power to dictate electoral outcomes*, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *Thornton*, 514 U.S. at 833-34 (emphasis added). By definition, a State cannot have an important interest in permitting the legislature to craft a map that "dictate[s] electoral outcomes" when a valid court-crafted map already secures the State's other legitimate interests.[4]

***16** 3. Finally, even assuming that one of these asserted state interests was sufficiently important to justify replacing the valid 2001 Plan with a new Congressional map, the 2003 Plan is not narrowly tailored to that purpose. As noted above, election regulations that burden voters' First and Fourteenth Amendment rights are evaluated under a flexible

standard and the constitutional harm inflicted should not significantly exceed the important state interest being served. *Burdick*, 504 U.S. at 434. In drafting the 2003 Plan, however, the Texas Legislature utilized 2000 census data - data which was by then three years out of date. In so doing, the Legislature not only burdened certain voters' fundamental rights, but it also drew districts in a manner wholly indifferent to the one-person, one-vote constitutional requirement. Even if "partisan balancing" or legislative prerogative is a sufficiently important ground for redrawing a valid Congressional map, neither supposed interest can justify drawing a new map that makes no effort to ensure actual population equality exists between Congressional districts. [5]

*17 III. THE FLEXIBLE STANDARD IS NEITHER UNLIMITED NOR UNMANAGEABLE AS APPLIED TO THE REDISTRICTING PLAN IN THIS CASE

The foregoing framework for analyzing mid-decade partisan gerrymandering claims is both limited in application and sufficiently manageable. For the reasons stated above, this Court's flexible standard, which it has already applied in the context of other election regulations, has limited applicability to a map promulgated to satisfy a State's obligation to comply with one-person, one-vote requirements. That interest is concededly a compelling one, and in such cases the federal courts cannot "tie the hands of States," even though the new maps "will invariably impose some burden upon individual voters." *Burdick*, 504 U.S. at 433. Indeed, it is uncertain whether this framework would even result in the invalidation of all mid-decade redistricting plans.

In addition, the standard is also a manageable one. This Court already has a wealth of experience in applying the flexible standard to other election regulations that burden voters' First Amendment rights. That precedent provides guideposts for applying the test in a consistent and predictable way. Furthermore, in contrast to the standard partisan gerrymandering case, this standard does not require this Court to judge how much partisanship is too much. Instead, this Court merely needs to examine whether a State can provide an important state interest that would justify redistricting when a valid map was already in place.

CONCLUSION

For the foregoing reasons, and for the reasons stated by appellants, this Court should reverse the ruling of the District Court and remand the case with instructions to reinstate the valid map promulgated by the Eastern District of Texas.

Footnotes

FN

* admitted only in New York:
supervised by principals of the firm

1 Letters of consent from all parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief.

2 See *Vieth*, 541 U.S. at 285 ("The Constitution clearly contemplates districting by political entities, see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics."); *Miller v. Johnson,* 515 U.S. 900, 914 (1995) ("[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition"); *Gaffney v. Cummings,* 412 U.S. 735, 753 (1973) ("Politics and political considerations are inseparable from districting and apportionment. … The reality is that districting inevitably has and is intended to have substantial political consequences.").

3 Of course, a State may attempt to achieve what it believes to be a politically balanced map in the course of normal redistricting. *See Gaffney*, 412 U.S. at 754. But merely because it is permissible for a State to pursue such an end does not mean that political

balance is an important state interest. Indeed, unlike the predicates for a traditional redistricting, political balance is neither a constitutional nor a legal requirement. *See Davis*, 478 U.S. at 130 ("Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be."); *id.* at 131 ("*Gaffney* in no way suggested that the Constitution requires the approach that Connecticut had adopted in that case.").

4 This is not to say that a State can never have an interest in permitting a legislature to replace a court-drawn map. The Center does not dispute that a legislative map that replaced a court-imposed one could be valid, even if done mid-decade, if it advanced an important state interest, such as updating population data, without unnecessarily classifying voters on the basis of their expressive rights.

5 The Center does not suggest that the 2001 Plan's districts presently contain equal populations or that they contained equal populations at the time the 2003 Plan was enacted. Rather, it merely points out that, at the time the 2001 Plan was put in place, that Plan created districts with equal populations based on population data that was valid for that redistricting. In contrast, the 2003 Plan used population data which, for the reasons set forth by the *Travis County* appellants, was not valid for that redistricting. Thus, regardless of the extent to which the districts under the 2003 Plan actually deviate from population equality, the fact remains that the 2003 Plan was enacted without any regard for the one-person, one-vote constitutional requirement and without any effort to minimize actual population deviations. The Center merely posits that a mid-decade redistricting that involves the redrawing of valid district lines should not be deemed to be sufficiently tailored to an important state interest absent an effort to create actual population equality.

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