2006 WL 53992 (U.S.) (Appellate Brief)
Supreme Court of the United States.

LEAGUE OF UNITED LATIN AMERICAN CITIZEN, 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.

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

Brief for Amici Curiae League of Women Voters of the United States and League of Women Voters of Texas in Support of Reversal

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*i QUESTION PRESENTED

Whether claims that a state legislature lacked any non-partisan basis for a threshold decision to engage in redistricting are justiciable and state a constitutional violation.

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*1 INTEREST OF AMICI [1]

This brief is submitted on behalf of the League of Women Voters of the United States and the League of Women Voters of Texas (collectively, "the League"). The League of Women Voters of the United States is a nonpartisan, community-based political organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, it is organized in more than 850 communities and in every State, with more than 150,000 members and supporters nationwide. The League of Women Voters of Texas, with 3000 members grouped into 32 local organizations, is affiliated with, but separately incorporated from, the League of Women Voters of the United States. It actively opposed the districting plan at issue in this case.

One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive, and that assures opportunities for effective voter participation in government decisionmaking. To that end, the League espouses four basic principles for protecting the integrity of the electoral process. First, the bedrock "one person, one vote" guarantee of *Reynolds v. Sims,* 377 U.S. 533 (1964), should encompass not only mathematical proportionality in congressional districts, but also the right to an effective vote and responsive representation. Second, the redistricting process should promote full political participation by minority voters. Third, the redistricting process should be transparent and open to public participation.

***2** Finally, and most relevant to this case, partisan gerrymandering subverts the democratic system because it allows *politicians* to choose their *voters*, rather than vice versa, and thereby compromises the incentives of those politicians to respond to the preferences of their constituents.

SUMMARY OF ARGUMENT

The constitutional design requires the House of Representatives to represent the views of the people as closely as possible. State legislatures thwart that purpose when they gerrymander congressional districts for nakedly partisan advantage, concentrating the minority party's voters in as few districts as possible while ensuring margins sufficient to guarantee the election of the majority party's candidates in the other districts. Such gerrymanders produce districts in which the only seriously contested elections are party primaries, which tend to favor the politicians most committed to the party's national agenda rather than the views of the district's voters as a whole. Recent studies confirm that such gerrymanders, while rewarding party activists, undermine the responsiveness of Congress to the body politic. And such gerrymanders present special concerns when they occur not just after each decennial census, but, as here, in the middle of the decade as well, enabling partisans to fine-tune district boundaries to their advantage in advance of each congressional election.

In *Vieth v. Jubelirer,* 541 U.S. 267 (2004), all nine Justices appeared to agree that excessive partisanship in redistricting threatens democratic principles and violates the Constitution. They disagreed about whether, under the political question doctrine, courts could enforce that constitutional prohibition with judicially manageable rules. This case presents a textbook example of the availability of such rules.

For justiciability purposes, the Court should distinguish between two categories of excessive-partisanship challenges to state redistricting decisions. The first category consists of challenges, like this one, to a State's threshold decision to ***3** engage in any redistricting in the first place. The second category consists of challenges, like that in *Vieth*, to the details of whatever lines a State ultimately draws. The justiciability concerns the plurality expressed in *Vieth* arose in connection with the multifaceted inquiry a court must conduct when presented with a challenge to a State's choice of one among

thousands of possible district plans. Those concerns are far less substantial where, as here, the challengers claim simply that the State has demonstrated no plausible neutral basis for its threshold decision to redraw any district lines at all. Such claims are plainly justiciable.

They likewise state a clear constitutional violation. Under any level of equal protection scrutiny, the government must justify any action it takes by reference to *some* legitimate state interest. Promoting the interests of one political association at the expense of another - while a perfectly legitimate goal for a political party - is not a legitimate *state* interest.

Of course, the presence of a partisan objective would not necessarily invalidate a state redistricting decision if, in the absence of that objective, the State would have engaged in redistricting anyway for non-pretextual neutral reasons. But a partisan objective cannot itself justify such a decision. Here, appellants claim, quite plausibly, that the State acted for no purpose beyond advancing one party to the detriment of the other and would not have redrawn the existing district lines but for that partisan purpose. For our political system to function properly, the Judiciary not only can, but must resolve such claims on the merits, and should grant relief when the facts support the challengers. The courts are the only institutions that can be realistically expected to protect the political system from partisan gerrymanders.

ARGUMENT

As discussed in Part I below, excessive partisanship in redistricting decisions thwarts basic democratic principles, a concern expressed by all nine Justices in *Vieth v. Jubelirer,* 541 U.S. 267 (2004). A key question in this case is whether ***4** the courts can devise judicially discernible and manageable standards for protecting the redistricting process from excesses of partisanship. The answer to that question, as discussed in Part II, is yes - particularly in cases that, like this one, present a simple challenge to a State's threshold, yes-or-no decision to engage in *any redistricting at all.*

I. Excessive Partisanship in Redistricting Decisions Undermines Effective Representation

By constitutional design, the United States House of Representatives "is so constituted as to support in [its] members an habitual recollection of their dependence on the people." Federalist No. 57. House members are directly elected (unlike presidents); they serve two-year terms (unlike senators); and, in all but the smallest seven States, they represent only portions of their home States. Members of that body therefore have a unique capability - and responsibility - to advocate policies supported by their constituents. *See id.; see also Reynolds v. Sims,* 377 U.S. 533, 565 (1964).

The manner in which a State reapportions congressional districts is critical to ensuring the responsiveness of that State's House delegation. As this Court has explained, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live …. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Wesberry v. Sanders,* 376 U.S. 1, 17-18 (1964). To ensure that the electoral process promotes that right, the "basic aim" of any districting plan must be the "fair and effective representation of all citizens." *Reynolds*, 377 U.S. at 565-566; *see also Davis v. Bandemer,* 478 U.S. 109, 125-126 n.9 (1986).

To that end, the States may legitimately follow many criteria in establishing congressional districts. One important goal in redistricting is the preservation of identifiable communities of interest. *See, e.g., Shaw v. Reno,* 509 U.S. 630, 646 (1993). Other important goals recognized by this ***5** Court include "compactness, contiguity, and respect for political subdivisions." *See id.* at 647. But one characteristic of any "fair and effective" redistricting objective, *Reynolds*, 377 U.S. at 565-566, is a bedrock of political neutrality. While any redistricting policy is bound to have at least some effect on electoral outcomes, there is a stark difference in kind between, on the one hand, relying on neutral considerations that

incidentally affect partisan outcomes and, on the other, adopting exclusively partisan criteria for which specific partisan outcomes are the *goal.*

Districts based on legitimately nonpartisan concerns are more likely to elect responsive members of Congress simply because elections in such districts tend to be more competitive. Politically gerrymandered districts are designed to cram members of the minority party into a small number of districts to dilute their votes and, in all other districts, to assure margins large enough to ensure victory for the candidates of the majority party. New software has made it easy to draw district lines that maximize political power for the favored party and minimize it for the disfavored party. *See, e.g., Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment). The most contested election in such a district is typically a party primary, which favors the candidate that appeals most to the base of his or her party. The result is a highly polarized Congress composed of partisans bound to promote national party agendas rather than the interests of their diverse constituents. *See* Jason M. Roberts & Steven S. Smith, *Procedural Contexts, Party Strategy, and Conditional Party Voting in the U.S. House of Representatives, 1971-2000*, 47 Am. J. Pol. Sci. 305 (2003) (discussing explanations for increased polarization in Congress, including changes in electoral conditions, party strategies, and policy agendas); *cf. Shaw*, 509 U.S. at 648 (Elected officials in districts drawn for racial reasons "are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.").

***6** In short, partisan gerrymandering, like racial gerrymandering, "weaken [s] the link between popular opinion and electoral results" and thereby "contributes to the popular perception that elections do not matter, to the insulation of incumbents from political accountability, and to increased partisanship and extremism in legislative bodies." Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 Harv. J.L. & Pub. Pol'y 103, 112 (2000). [2] This is not a matter of mere speculation. Empirical studies confirm that, as partisan gerrymandering has become more sophisticated and effective, members of Congress have become measurably less responsive to changes in their districts' ideological composition. *See* Stephen Ansolabehere et al., *Old Voters, New Voters, and the Personal Vote: Using Redistricting to Measure the Incumbency Advantage*, 44 Am. J. Pol. Sci. 17, 31 (2000). It is also revealing that, precisely as the architects of political gerrymanders ***7** intended, the 2002 general elections for House seats were the least competitive in United States history. Richard H. Pildes, Foreword: *The Constitutionalization of Democratic Politics*, in *The Supreme Court, 2003 Term*, 118 Harv. L. Rev. 28, 62 (2004); *see also* Daniel R. Ortiz, *Got Theory?*, 153 U. Pa. L. Rev. 459, 477 (2004).

Finally, the dangers inherent in partisan gerrymandering are particularly acute where, as in this case, a State engages in mid-decade redistricting even though a lawful district plan is already in effect. Until the mid-decade redistricting at issue here, and recent mid-decade redistricting by Colorado and Georgia, States normally drew new district lines only once per decade after a new census was taken, even though partisan considerations played a role in the placement of those lines. Although such gerrymanders often skew the first election after they are implemented, their effects tend to wane over the life of the ten-year cycle. [3] A key reason is that populations within a district, and the politics of those populations, change unpredictably over time. *See Karcher v. Daggett,* 462 U.S. 725, 732 (1983) ("[T]he well-known restlessness of the American people means that population counts for particular localities are outdated long before they are completed."). So long as redistricting is conducted only once per decade, therefore, members of Congress seeking to represent such districts have strong incentives to accommodate those changes in their voting records. *See* Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U.L. Rev. 751, 771 (2004); *see also People ex rel. Salazar v. Davidson,* 79 P.3d 1221, 1242 (Colo. 2003) (striking ***8** down Colorado redistricting plan enacted in the middle of a decade on state constitutional grounds).

The party in control of a state legislature can undermine those incentives by redrawing district lines more often. *See Salazar*, 79 P.3d at 1242 (if district lines changed more than once a decade, "a congressperson would be torn between effectively representing the current constituents and currying the favor of future constituents"). Start-of-decade redistricting happens randomly from a political perspective - that is, parties cannot choose to redistrict at the moment when it helps them the most. But when States reapportion districts more frequently, parties in power have the means to lock in gains whenever possible. *See id.; see also Vieth*, 541 U.S. at 364 (Breyer, J., dissenting). Of course, this means that parties could - and, in most cases, would - redistrict every time they regained control of state legislatures, leading to greater polarization, less compromise, and less responsiveness to the body politic.

II. Claims That a State Legislature Lacked Any NonPartisan Basis for a Threshold Decision to Engage in Redistricting are Justiciable and State A Clear Constitutional Violation

Despite their disagreements, all nine Justices in *Vieth* agreed that, at some point, naked partisanship in redistricting decisions can so severely damage the integrity of the political process as to violate the Constitution. The plurality acknowledged "the incompatibility of severe partisan gerrymanders with democratic principles" and agreed with Justice Kennedy and the dissenters that "an excessive injection of politics is unlawful." 541 U.S. at 292-293 (emphasis and internal quotation marks omitted). The question here is whether the courts can and should intervene to protect the political process where a state government demonstrates no neutral, non-partisan justification for a decision to engage in redistricting in the first place. The answer is yes. Judicial oversight of such a decision is plainly subject to judicially discoverable and manageable standards, and indeed is critical to our democracy.

*9 A. Appellants' Excessive-Partisanship Claim Is Justiciable

The *Vieth* plurality concluded that all excessive-partisanship challenges to a redistricting scheme are nonjusticiable under the political question doctrine on the theory that they inevitably present "a lack of judicially discoverable and manageable standards." 541 U.S. at 277-278 (plurality opinion) (quoting *Baker v. Cart,* 369 U.S. 186, 217 (1962)). A majority of the Court, however, rejected that conclusion. As Justice Kennedy observed: "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." *Id.* at 312 (Kennedy, J., concurring in the judgment). "If that is so," he added, "we should admit the possibility remains that a legislature might attempt to reach the same result without that express directive" - and that the courts would properly invalidate the enactment. *Id.* Each of the four dissenting Justices likewise affirmed that excessive-partisanship claims can be susceptible to judicially manageable rules. *See id.* at 323-325 (Stevens, J., dissenting); *id.* at 343-344 (Souter, J., joined by Ginsburg, J., dissenting); *id.* at 355 (Breyer, J., dissenting).

This case likewise presents basic questions about the justiciability of excessive-partisanship challenges to redistricting decisions. In one key respect, however, this case is more obviously susceptible to judicial resolution. That is not just because these plaintiffs claim that naked partisanship formed the sole basis - rather than, as in *Vieth*, the "predominant" basis - of the State's redistricting decision. *See* J.S. 23-24. [4] The reason, more fundamentally, is that the type of electoral decision challenged here - a threshold decision to redistrict *at all* - is more readily amenable to judicial scrutiny ***10** than the precise details of where district lines should be drawn once that decision has been made.

For present purposes, "excessive partisanship" challenges to redistricting decisions can be divided into two broad categories. The first consists of challenges to a State's yes-or-no decision to engage in redistricting of any kind. The

second consists of challenges to the particulars of whatever new districting scheme a State adopts. We will call these, respectively, "step one" and "step two" challenges.

Most excessive partisanship cases fall in the latter category: they challenge the particulars of the lines drawn rather than the threshold decision to redraw lines. *Vieth* was such a case. The plurality concluded there that step two challenges necessarily elude resolution through judicially manageable rules because the details of district line-drawing are subject to limitless variation and will inevitably reflect a combination of many different considerations, some partisan and some not. *See, e.g.*, 541 U.S. at 290 (plurality opinion) (analysis of excessive-partisanship challenges would "cast[] [courts] forth upon a sea of imponderables"); *see also id.* at 285 (plurality opinion) ("Vague as the 'predominant motivation' test might be when used to evaluate single districts, it all but evaporates when applied statewide.").

Although the League disagrees with the plurality's conclusion that step two challenges are inherently nonjusticiable, the Court need not revisit that issue here, for this is a step one challenge. What appellants contest is not the State's choice of one among infinitely many districting options, but the State's threshold decision - one of two options in a binary choice - to conduct *any redistricting at all* even though a valid districting scheme was already in place. Appellants claim that the State, by its own admission, made that threshold decision solely to disadvantage a disfavored political association and not for any non-pretextual neutral reason. That claim, which presents none of the line-drawing details present in *Vieth*, is justiciable.

On the merits, appellants argue that partisan gain was the State's only objective in 2003 when it altered the lawful ***11** districting plan adopted by the district court in 2001. As they observe, the district court found in 2004 that "the *single-minded* purpose of the Texas Legislature … was to gain partisan advantage" for one party at the expense of another. J.S. App. 85a. In particular, "[t]he newly dominant Republicans … decided to redraw the state's congressional districts *solely* for the purpose of seizing between five and seven seats from Democratic incumbents." *Id.* at 88a-89a (emphasis added and alteration in original). Appellants further argue (J.S. 25-26) that this decision to maximize Republican gains in 2003 cannot be justified as a neutral attempt to undo an unlawful Democratic gerrymander in 1991. *Cf.* J.S. App. 20a-22a. They note that the intervening 2001 plan began, in the words of the district court itself, with "a blank map of Texas" (*id.* at 206a), produced a scheme that, as time eroded the influence of incumbency, was "likely to produce a congressional delegation roughly proportional to the party voting breakdown across the state" (*id.* at 209a), and "reflected the growing strength of the Republican Party in Texas, with 20 of 32 seats offering a Republican advantage" (*id.* at 85a). In any event, whether or not the Court accepts appellants' factual allegations on these points, the allegations themselves plainly establish the justiciability of this case.

B. Appellants' Excessive-Partisanship Claim States A Constitutional Violation

Under any level of equal protection scrutiny, the government must articulate *some* neutral, non-pretextual objective for any decision it makes.[5] Disadvantaging a disfavored ***12** political group in the electoral process - or favoring a particular political group - is, by definition, not a neutral objective, and standing alone it cannot justify governmental action. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare … desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Romer*, 517 U.S. at 634-635 (quoting *Department of Agric. v. Moreno,* 413 U.S. 528, 534 (1973)) (ellipsis and emphasis in original); *see also Vieth*, 541 U.S. at 316 (Kennedy, J., concurring in the judgment). Indeed, as discussed in Part I, districting decisions that reflect a bare desire to benefit one party to the detriment of another are highly corrosive to our democratic system and, in particular, to the unique constitutional role assigned to the House of Representatives.

That said, the mere fact that some or all legislators harbored a partisan purpose is not enough to invalidate a decision to engage in redistricting. If, in the absence of partisan objectives, a State would have engaged in redistricting anyway for non-pretextual neutral reasons, the fact that the majority party favored redistricting for partisan advancement as well would not necessarily invalidate the redistricting decision at step one. A State might have any number of neutral reasons for deciding to redistrict. For example, a State may need to respond to a new census showing shifts in population or altering the number of representatives. Or the State may need to respond to a court order invalidating the existing plan. In either case, a neutral rationale adequately and independently justifies the threshold decision to engage in redistricting, and that decision would almost certainly survive step one scrutiny.

But partisan considerations do not themselves serve any legitimate state interest and thus cannot by themselves justify a decision to engage in redistricting. Such a decision ***13** is therefore invalid if the State would not have made it but for the partisan objective and if, as intended, it harms the disfavored political party. [6] As the *Vieth* plurality recognized, "an excessive injection of politics in redistricting is unlawful." 541 U.S. at 293. And no governmental action can be more "excessively" partisan than one that would not have been undertaken at all but for a desire to favor one political association over another.

As discussed, enforcing the constitutional prohibition on such governmental actions, particularly in the context of a step one challenge, requires no recourse to judicially unmanageable rules. More generally, courts are uniquely competent institutions to adjudicate such matters. "[I]t has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." *Baker*, 369 U.S. at 226 (emphasis added). The fact that this dispute involves a challenge to a districting plan makes it, if anything, *more* appropriate for judicial resolution than many types of challenges to substantive legislation unrelated to the electoral process.

"[V]oting cases … involve rights (1) that are essential to the democratic process and (2) whose dimensions cannot safely be left to our elected representatives," with their "obvious vested interest[s]." John Hart Ely, *Democracy and Distrust* 117 (1980). For that reason, it is not only possible, but essential, for the courts to craft judicially manageable rules to police the integrity of the electoral process. With rare exceptions, voters cannot themselves serve as an effective check merely by threatening to unseat incumbents for acting on that incentive. The incumbents can continuously ***14** redraw district boundaries to mitigate that threat, *see Vieth*, 541 U.S. at 364 (Breyer, J., dissenting); few potential challengers within the majority party could credibly promise to disadvantage their party and ultimately their own political prospects by drawing district lines in a more non-partisan manner; and decisions to redistrict will rarely if ever stir voters as much as the substantive political debates of the day. As a result, courts will be the only effective check on partisan abuses in the redistricting process. "[U]nblocking stoppages in the democratic process is what judicial review ought preeminently to be about, and denial of the vote seems the quintessential stoppage." Ely, *supra*, at 117.

CONCLUSION

The judgment of the district court should be reversed.

Footnotes

1 In compliance with Rule 37.6 of this Court, amici curiae state that no counsel for any party authored this brief in whole or in part and that no person or entity, other than these amici curiae, their members or their counsel, made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

2 *See also Vieth*, 541 U.S. at 316-317 (Kennedy, J., concurring in the judgment) ("The ordered working of our Republic, and of the democratic process, depends on a sense of decorum and restraint in all branches of government, and in the citizenry itself. Here, one has the sense that legislative restraint was abandoned. That should not be thought to serve the interests of our political order. Nor should it be thought to serve our interest in demonstrating to the world how democracy works. Whether spoken with concern or pride, it is unfortunate that our legislators have reached the point of declaring that, when it comes to apportionment, 'We are in the business of rigging elections. "' (quoting state senator)); *id.* at 330 (Stevens, J., dissenting) ("Gerrymanders subvert th[e] representative norm [of responsiveness] because the winner of an election in a gerrymandered district inevitably will infer that her success is primarily attributable to the architect of the district rather than to a constituency defined by neutral principles."); *id.* at 343-344 (Souter, J., joined by Ginsburg, J., dissenting) (describing fairness principle implicit in redistricting as "each political group in a State having the same chance to elect representatives of its choice as any other political group" and noting that "[i]t is undeniable that political sophisticates understand such fairness and how to go about destroying it" in redistricting (quotation omitted)); *id.* at 361 (Breyer, J., dissenting) ("Where unjustified entrenchment takes place, voters find it far more difficult to remove those responsible for a government they do not want; and the[] democratic values [of responsiveness to the popular will] are dishonored.").

3 *See, e.g.*, Michael A. Carvin & Louis K. Fisher, "A *Legislative Task": Why Four Types of Redistricting Challenges Are Not, or Should Not Be, Recognized by Courts*, 4 Election L.J. 2, 10 (2005) (the effects of partisan gerrymandering are "unlikely to last very long, much less the entire decade until the post-census reapportionment"); Richard G. Niemi & Laura R. Winsky, *The Persistence of Partisan Redistricting Efforts in Congressional Elections in the 1920s and 1980d*, 54 J. Pol. 565, 571 (1992) (summarizing studies demonstrating diminution of effect of partisan gerrymandering over the ten-year cycle).

4 As used in this brief, "J.S." and "J.S. App." refer to the Jurisdictional Statement and its Appendix in No. 05-276.

5 *See, e.g., Romer v. Evans,* 517 U.S. 620, 623 (1996) (equal protection clause "state[s] a commitment to the law's neutrality"); *Lehr v. Robertson,* 463 U.S. 248, 265 (1983) ("The concept of equal justice under law requires the State to govern impartially."); *New York City Transit Auth. v. Beazer,* 440 U.S. 568, 587 (1979) (same); *Kramer v. Union Free Sch. Dist. No. 15,* 395 U.S. 621, 627-628 (1969) ("The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality." (footnote omitted)).

6 *See generally Easley v. Cromartie,* 532 U.S. 234, 242 (2001); *cf Crawford-El v. Britton,* 523 U.S. 574, 593 (1998) (defendant in mixed-motive employment discrimination case "prevails by showing that it would have reached the same decision in the absence of the protected conduct"); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 287 (1977) (same).