No. 02-1580

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD VIETH, et al., *Appellants,*

v.

ROBERT C. JUBELIRER AND JOHN M. PERZEL, et al., *Appellees.*

On Appeal from the United States District Court for the Middle District of Pennsylvania

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BRIEF OF APPELLEES

JOHN P. KRILL, JR.
(*Counsel of Record*)
LINDA J. SHOREY
JULIA M. GLENCER
KIRKPATRICK & LOCKHART LLP
240 NORTH THIRD STREET
HARRISBURG, PENNSYLVANIA 17101
(717) 231-4500
COUNSEL FOR APPELLEES JUBELIRER & PERZEL

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QUESTIONS PRESENTED

1. Should a three-judge court's dismissal of a claim for partisan gerrymandering for failure to allege the "actual discriminatory effect" required by the plurality in *Davis v. Bandemer*, 478 U.S. 109 (1986), be summarily affirmed, when it is consistent with the decision in *Bandemer* and with the decisions of other three-judge courts, many of which have been summarily affirmed by this Court?

2. Is a claim that a congressional redistricting plan established by state law will elect a disproportionate number of representatives from one political party non-cognizable under U.S. CONST. art. I, §4?

3. As an alternative basis for affirmance, should this Court hold that voters who prefer the candidates of one party, in a state where voters frequently and massively engage in cross-over and split-ticket voting, cannot be considered an "identifiable political group" for purposes of asserting a partisan gerrymandering claim under *Davis v. Bandemer*, 478 U.S. 109 (1986)?

4. As an alternative basis for affirmance, should this Court reconsider and overrule its decision in *Davis v. Bandemer*, 478 U.S. 109 (1986), that a claim of partisan gerrymandering presents a justiciable political question?

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COUNTERSTATEMENT OF THE CASE

A. Background: Pennsylvania Politics in 2001

Pennsylvania's congressional seats dropped from 21 to 19 after the 2000 Census. When census data were released in 2001, the Pennsylvania General Assembly considered redistricting legislation. At that time, both state houses had Republican majorities. Appellee Robert C. Jubelirer, a Republican, was elected to what would be his 15th year as Senate President *pro tempore*. A Republican was in his 7th consecutive year as House Speaker.[1] THE PENNSYLVANIA MANUAL 3-269, 3-270, 3-273 (115th ed. 2001). A Republican had been Governor since 1995. *Id*. at 4-20. Both U.S. senators and a majority of the U.S. House delegation were Republican. *Id.* at 8-11. In 2001, all statewide executive offices, with one exception, were held by Republicans. *Id.* at 7-22 – 7-24. Republicans achieved this prominence through successive wins in elections where gerrymandering was not at issue.[2]

For example, in 1998, Republicans won both statewide elections with large margins: U.S. Senator (61%) and Governor (57%). Jurisdictional Statement ("JS") at 85a.[3]

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[1] Speaker Matthew J. Ryan died in March 2003. His successor is appellee John M. Perzel. Jubelirer and Perzel are the "Presiding Officers" elected by their respective houses.

[2] Statewide offices cannot be gerrymandered. The General Assembly's districts are drawn by a bipartisan commission that tries to make districts compact and contiguous, without splitting political subdivisions. PA. CONST. art II, §16. No such restriction is placed on drawing congressional districts.

[3] Appellants' Jurisdictional Statement reprints *Erfer v. Cmwlth. of Pennsylvania*, 794 A.2d 325 (Pa. 2002), the Pennsylvania Supreme Court's decision in a parallel case. *Erfer* includes "Recommended Findings of Fact and Conclusions of Law" by Commonwealth Court Judge Pellegrini. JS 77a-109a. The *Erfer* Court did not adopt them, ruling the evidence

In 2000, Republicans won 60% of the statewide races. JS 86-87a, 137-38a. Republican U.S. Senator Rick Santorum won by a bigger percentage (52.4%) than Vice-Pres. Gore (50.6%). *Id.* The Republican Attorney General not only won by a bigger percentage than Mr. Gore but also received more votes. *Id.*

In 2000, Republicans also won a majority of the state's congressional seats, although Democrats received a slight majority (50.04%) of total votes. STATISTICAL ABSTRACT OF THE U.S.: 2001 (U.S. Census Bureau 121st ed.) ("Abstract"), Tables 385 & 386. Two years earlier Democrats won a majority, even though Republicans got 50.8% of the vote. *Id.* The 2000 elections were run using 1992 court-drawn districts. *See Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992).

In the 2001 elections, just as the General Assembly took up redistricting, Republicans won all 7 open seats on statewide appellate courts with 54% of the total vote, JS 87a, despite Democrats having 500,000 more registered voters. In 2001, Pennsylvania's registered voters were 48% Democrat, 41.6% Republican and 10.3% other. JS 84a.

In 2001, the Democrat Party was a major, although not *majority*, party in Pennsylvania. With its registration plurality, it could have won control of statewide offices and the General Assembly. But voters in Pennsylvania frequently and massively engage in cross-over and split-ticket voting. E.g., since 1956, in 6 out of 8 elections with presidential and Senate races on the same ballot, candidates of different parties won. *See Pennsylvania: Ticket Splitting Is Not a Recent Voting Phenomenon*, Center for Politics &

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insufficient to support relief. JS 76a n.5. However, the findings contain judicially noticeable statistics (e.g., census and election data) and are an easy reference for the Court. Presiding Officers cite the findings only for objective and noticeable data.

Public Affairs, Millersville University (2002) (www.muweb.millersville.edu/~politics/ticketsplitting.htm) (visited 10/8/03).[4]

B. Redistricting Legislation in Pennsylvania

Congressional redistricting legislation, Senate Bill ("SB") 1200, was introduced on Nov. 16, 2001. The bill had to eliminate 2 seats and reallocate population after a decade of population decline in the 2 largest cities (Pittsburgh & Philadelphia) and population growth in suburban counties around Philadelphia and in the Poconos. *See* JS 83-84a. The bill also had to preserve majority-minority districts in Philadelphia. *See Mellow v. Mitchell*. Protecting the dean of the delegation was also important. The General Assembly ultimately achieved these purposes.

The Legislative Journal shows that members in each house debated a wide variety of issues.[5] SB 1200 passed the Senate on a near party-line vote but was not so favored in the House, where it was amended before passing with strong bipartisan support. After resolving differences, both houses adopted SB 1200. Forty-two House Democrats voted in favor of SB 1200.[6] JS at 89a. The Governor signed SB 1200 into law as Act 2002-1 ("Act 1") on Jan. 7, 2002.

Of the 19 new districts, 7 had a majority of registered Republicans, 7 had a majority of registered Democrats, 3 had a plurality of registered Republicans and 2 had a plurality of registered Democrats. JS 90-91a. Act 1 was

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[4] In the 2 elections where the same party's candidates won for President and Senator, Republicans won. In 5 of the 6 split-ticket elections, the winning Senate candidate was Republican.

[5] The legislative history of SB 1200 is reproduced in the Lodging Material ("LM") at 31-52, 61-78, 82-90, 93-103.

[6] The bill needed 102 votes to pass the House. PA. CONST. art. III, §4. Enough Republicans opposed SB 1200 to require Democrat support to pass it. *See* LM 88, 196-221.

used in the 2002 elections but was then superceded by Act 2002-34 ("Act 34"), which made minor alterations in district boundaries to equalize population.[7]

C. Pennsylvania Elections After Redistricting

In 2002, a Democrat won the governorship, defeating the Republican Attorney General who 2 years earlier had received more votes than Vice-Pres. Gore. The Democrat candidate for Governor also set a Pennsylvania record for campaign fund raising.[8] But he had no coattails. Under the bipartisan commission's plan for the General Assembly, Republicans in 2002 got 52.5% of the vote for the state House, winning 109 of the 203 seats. *See* 2002 Official Election Results ("2002 Election Results"), Pa. Dept of State (www.dos.state.pa.us/DOS/site/default.asp) (visited 10/8/03). Republicans won 60% of 25 state Senate seats up for election, with 51.5% of the vote. *See id.*

In the 2002 congressional races, under the allegedly biased plan, Republicans won 56% of the vote and 63% of the seats.[9] *Id.* But, in the 17th, a senior Republican incumbent lost to a Democrat incumbent and, in the open seat in the new 6th, the Republican won by less than 6,000

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[7] The district court upheld Act 34, but stated in dictum, without trying the facts, that Act 34 disregarded all other neutral districting criteria. JS 9a.

[8] Sullivan & Cattabiani, *Rendell's Old Foes Become Donors*, PHILA. INQUIRER (Feb. 1, 2003) A01.

[9] The candidate in the 10th was the nominee of both parties but is here listed (and serves) as a Republican. If listed Democrat, the outcome was: Republicans 51.6% of the vote, 57.9% of the seats. *See* 2002 Election Results. No Democrat ran in 4 districts, including the 3rd with its majority of registered Democrats. *Id.* The Republicans left only the 14th uncontested. *Id.*

votes. *Id.* No Democrat incumbent was defeated.[10]

D. The Amended Complaint

1. Undefined "Democratic voters"

Appellants did not allege that they, as individuals, were hindered by Act 1 from voting, organizing or exercising any political rights, nor that they would be unable to elect candidates of their choice in their districts of residence. Rather, they alleged that "Democratic voters" would be harmed because Democrats could not win a majority of districts despite constituting, by an unspecified measure, a "small majority" of Pennsylvania voters. *See* JS 139-40a.

The Complaint appeared to define "Democratic voters" by the results of the Bush-Gore race in Pennsylvania in 2000, citing Vice-Pres. Gore's win with 50.6% of the votes. JS 137a; *see* Appellants' Br. at 6 n.9. Yet, the Complaint also cited election data showing massive cross-over voting in Pennsylvania, such that, on the same election day, Republicans won 60% of statewide races and a Republican state Attorney General received more votes than Mr. Gore. *Id.* It is impossible to deduce whether "Democratic voters" are the majority voting for Mr. Gore or the even larger majorities voting for 2 statewide Republican candidates.[11]

The Complaint also did not state where members of the group of "Democratic voters" reside, whether they are uniformly dispersed throughout the state or whether they reside disproportionately in one or more areas, such as Pennsylvania's large cities. The Complaint did not define

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[10] An incumbent Democrat who lived in the 18th chose to oppose a incumbent Democrat in the 12th and was defeated in the primary. A representative need only be a state inhabitant, *see* U.S. CONST. art. I, §2, so a candidate may run in any district.

[11] Comparing the positions of Vice-Pres. Gore and Sen. Santorum would, we think, show a chasm between them on "hot-button" issues, such as abortion and guns. *See* n.21 below.

"Democratic voters" by some immutable characteristic such as race. Indeed, since Appellants sought to define a group by its political preferences, the characteristics of the group were inherently mutable, as shown by the disparate election results cited in the Complaint. The Complaint also did not define "Democratic voters" by an objectively identifiable criterion, such as voter party registration.

The Complaint did not identify a cognizable group, much less a cohesive group.

2. Political gossip and legal conclusions

Appellants did not allege legislative history to show intent to engage in partisan gerrymandering but instead cited media reports and political gossip, s*ee e.g.*, JS 133-34a, from which they formulated conclusions of law about legislative intent.[12] The Complaint characterizes the legislative process as one where Democrat state legislators "were shut out." JS 134a. But the Legislative Journal shows vigorous debate on plan details both in the House (where over 40% of Democrat members voted for it over the opposition of their caucus leader) and in the Senate (where *amicus* Sen. Mellow detailed his view of the plan's defects). *See* LM 61-78, 82-88 (House), 101-02 (Senate).

E. Colorful But Inaccurate Characterizations

Appellants' Brief is full of hyperbole, insinuation and colorful verbiage, but the simple facts are otherwise. For example, Appellants say that state legislators, "armed with the supercomputer facilities at Carnegie Mellon University, sacrificed every traditional districting principle – slashing through municipalities and neighborhoods, splitting counties and producing oddly misshapen districts, especially where Democratic voters are concentrated."

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[12] A court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

Appellants' Br. at 12. But there is nothing in the record of how or even whether a "supercomputer" was used to aid the General Assembly or its members in redistricting.[13]

Moreover, Pennsylvania has 2,636 local governments (counties, cities, townships, boroughs, town). *See* JS 84a. Under Act 1, only about 3% of local governments were split between 2 or more congressional districts. *See* JS 84a, 97a. Pennsylvania also has 501 school districts, numerous special units of government and a plethora of municipal authorities, whose jurisdictions often overlap or intersect local government boundaries. Pennsylvania has more general and special purpose units of government than probably any other state. Patterns of growth do not respect these artificial jurisdictional boundaries.

In their Brief, Appellants characterize the districts' shapes but do not base their colorful descriptions on any findings below. While in the one-person, one-vote trial, over objection, the district court allowed Appellants to present testimony on partisan issues from a congressman (Mascara), a Democrat media pundit (Ceisler) and a political scientist (Lichtman), the court did not adopt either the methodology or the opinions of these witnesses and made no findings as to their credibility.[14]

F. Appellants' Flawed Predictions and Analysis

The Complaint predicted Act 1 would "likely result in a

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[13] Appellants subpoenaed documents concerning a contract between the House Republican Caucus and Carnegie Mellon Univ. Over objection that it violated legislative privilege, this discovery was allowed. The documents produced were not used at trial. The privilege issue is before the Court in *Republican Caucus v. Vieth*, No. 03-371 (Petition for Writ of Certiorari).

[14] These witnesses were rebutted by Appellees' witnesses. *Cf.* Ceisler testimony (JA 117-60) with Hallowell (JA 223-59) & Lichtman testimony (JA 28-117) with Brunell (JA 185-222).

congressional delegation consisting of 13 Republicans and 6 Democrats." JS 138a. Also predicted were various dire effects on the Democrat Party's ability to raise money and recruit candidates. JS 141a. These predictions, as shown above, were wrong.

At the one-person, one-vote trial, Appellants introduced tables showing how votes in 2000 for statewide candidates would have been allocated among the 19 new districts. Joint Appendix ("JA") at 273-74.[15] The tables show that:

- voters in 4 districts gave majorities to both a Democrat for President and a Democrat for U.S. Senator;
- voters in 9 districts gave majorities to Republicans both for President and for U.S. Senator;
- voters in 0 districts gave majorities to both a Democrat for U.S. Senator and Republican for President;
- voters in 6 districts (the 6th, 7th, 8th, 11th, 13th & 15th) gave majorities to both a Democrat for President and a Republican for U.S. Senator.

The last statistic, showing that Vice-Pres. Gore and Sen. Santorum achieved majorities in the same 6 districts indicates that, with good candidates and effort, the Democrat Party could take all of these districts and, with its 4 Democrat-Democrat districts, get a majority of the congressional seats. In addition, since a Democrat won in a supposedly Republican district (the 17th) and a Republican won in a district with a majority of Democrat-registered voters (the 4th), *see* JS 92a, 95a, Democrats could plausibly capture 12 seats in a future election, reducing Republican seats to 7 and reversing what happened in 2002.

SUMMARY OF ARGUMENT

Pennsylvania's redistricting statute is not an extreme

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[15] The tables were admitted, but the district court made no findings about them; nor did it have to, as the only issue before it was Act 1's compliance with one-person, one-vote.

partisan gerrymander. Appellants failed to state a claim under *Davis v. Bandemer*, 478 U.S. 109 (1986), as they could not show they had suffered individual harm to their voting rights or that they were members of an identifiable group. The *Bandemer* standard should not be relaxed. Alternatively, the claim is nonjusticiable.

ARGUMENT

I. APPELLANTS' CLAIM FAILED TO MEET THE *BANDEMER* PLURALITY'S STANDARD

A. The *Bandemer* Plurality's Standard

In *Bandemer* a state-legislative redistricting plan was alleged to violate the Equal Protection Clause because it "discriminate[d] against Democrats on a statewide basis." 478 U.S. at 127. After the Court resolved justiciabilty, a plurality concluded that, in order to state a claim for partisan gerrymandering, the plaintiffs had to show "[1] intentional discrimination against [2] an identifiable political group and [3] an actual discriminatory effect on that group." *Id.* at 127 (citing *Mobile v. Bolden*, 446 U.S. 55, 67-68 (1980)). This threshold standard *is* difficult to meet, as the plurality intended:

> [T]he mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm. This conviction, in turn, stems from a perception that the power to influence the political process is not limited to winning elections. An individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district. … Thus, a group's electoral power is not unconstitutionally diminished by the simple fact of

> an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause.

478 U.S. at 131-32 (citing *Mobile*, 446 U.S. at 111 & n.7) (Marshall, J., dissenting)); *see also id.* at 132 n.12 ("elements necessary to a successful vote dilution claim may be more difficult to prove in relation to a claim by a political group"). Given the constant admonition that "legislative reapportionment is primarily a matter for legislative consideration and determination," *Reynolds v. Sims*, 377 U.S. 533, 586 (1964), the *Bandemer* plurality had good reason to set the standard high:

> Inviting attack on minor departures from some supposed norm would too much embroil the judiciary in second-guessing what has consistently been 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 towards that end which would be so much at odds with our history and experience.

478 U.S. at 133-34. To argue that the *Bandemer* standard should now be discarded because it is difficult to meet ignores the reasoning that intentionally set the bar high.

Instead of treating it as *malum in se*, the Court has even *relied* on partisan gerrymandering as a basis to uphold a redistricting plan. *See Easley v. Cromartie*, 532 U.S. 234 (2001) (primary intent to gerrymander on a partisan basis defeats claim that a district was racially gerrymandered).

The threshold for partisan gerrymandering claims, as the plurality noted, 478 U.S. at 131 n.12, reflected the standard, used to assess vote dilution claims under the

Equal Protection Clause, "that [a] State has enacted a particular voting scheme as a purposeful device 'to minimize or cancel out the voting potential of racial or ethnic minorities[.]'" *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (quoting *Mobile*, 446 U.S. at 66, in explaining the difference between equal protection claims of racial gerrymandering and racial vote dilution).

1. Requirement: intentional discrimination

The *Bandemer* plurality noted only that redistricting "is intended to have substantial political consequences" and, therefore, "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." 478 U.S. at 129. Intent to discriminate on a partisan basis was not suspect but expected by the *Bandemer* plurality. *See id*. at 128-29; *see also White* v. *Weiser*, 412 U.S. 783, 795-96 (1973) ("Districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task."). *Bandemer* did not discuss the means of proving legislative intent, a serious problem discussed below.

2. Requirement: identifiable group

The *Bandemer* plurality did not discuss the "identifiable group" requirement. But whether a group is identifiable may be ascertained by considering the underpinnings of an equal protection claim and decisions exploring equal protection claims brought by groups.

Basic to an equal protection claim are allegations of government action treating similarly-situated classes of individuals differently. *See e.g., City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). The "identifiable group" requirement in *Bandemer* equates to the class in an equal protection case. In the racial vote dilution cases relied on by the *Bandemer* plurality, the disadvantaged group was identifiable because the race of

voters in a district was known and the results in the precincts where minority voters predominated showed they tended to vote for the same candidates election after election while white voters tended to vote differently. *Cf. Rogers v. Lodge*, 458 U.S. 613, 616 (1982). In other words, there was no difference in treatment as to any right to vote unless there were enough individual voters *of the claimants' race* in a geographic area who preferred the same candidate *and* enough individual voters *not of the claimants' race* who preferred a different candidate such that the claimants' preferred candidate usually lost.

A connection between the group and the claimed discrimination is crucial to identifying a disadvantaged group. In *Gordon v. Lance*, 403 U.S. 1 (1971), the Court upheld a state law restricting political subdivisions from incurring bonded indebtedness or increasing tax rates beyond set limits without obtaining approval of 60% of the voters in a referendum. When a referendum to increase indebtedness and levy additional taxes was defeated even though 51.5% voted for it, disappointed voters sought a declaratory judgment that the 60% requirement violated their right to equal protection by diluting their vote. They alleged that 4 similar referenda had also been defeated, even though majorities ranging from 52.51% - 55.84% had voted for an increase. The Court affirmed dismissal because it could "discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing [and] [c]onsequently no sector of the population may be said to be 'fenced out' from the franchise because of the way they will vote." *Id*. at 5.

Similarly, in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), plaintiffs, citing the disparity of the property tax basis among school districts, claimed that the Texas school finance system violated equal protection. The Court disagreed with the lower court's

conclusion that the local property tax system discriminated on the basis of wealth, chiding it for "ignor[ing] the hard threshold questions, including whether it makes a difference … that the class of disadvantaged 'poor' cannot be identified or defined in customary equal protection terms[.]" *Id.* at 19. The Court noted, *id*. at 22-23, that

> appellees have made no effort to demonstrate that [the system] operates to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any designated poverty level. Indeed, there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts.

Also, *Growe v. Emison*, 507 U.S. 25 (1993) (where the Court extended *Thornburg v. Gingles,* 478 U.S. 30 (1986), to single-member districts) provides insight on the nature and importance of the "identifiable group" requirement. As stressed in *Growe*, 507 U.S. at 40-41 (citations omitted):

> The 'geographically compact majority [of minority voters]' and 'minority political cohesion' showings are needed to establish that the minority has the potential to elect a representative of its choice in some single-member district, [a]nd the 'minority political cohesion' and 'majority bloc voting' showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population. Unless these points are established, there neither has been a wrong nor can be a remedy.

The three-judge court in *Martinez v. Bush*, 234 F. Supp.2d 1275 (S.D. Fla. 2002), applied the *Gingles*[16]

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[16] N.B. that *Gingles* was a case under §2 of the Voting Rights Act of 1965, 42 U.S.C. §1973, as amended after *Mobile*.

conditions to a claim that Florida's congressional districts discriminated against Democrat voters and explained why those requirements were encompassed within *Bandemer*'s "identifiable group" requirement:

> The reality of American politics is that 'voters sometimes prefer Democratic candidates, and sometimes Republican,' without regard to the party affiliation noted on their voter registration cards. [Bandemer, 478 U.S.] at 135. … As Justice Stevens recognized in his concurrence to [Mobile v.] Bolden, 'it is only when common interests are strong enough to be manifested in political action that the need [for protection] arises. For the political strength of a group … is a function of numbers–specifically the number of people who will vote in the same way.' In the political gerrymandering context, the best evidence of political identity will thus necessarily consist of proof of bloc voting and political cohesiveness. These factors are the 'glue' that binds together voters and makes them an identifiable political group.
>
> As with claims of racially polarized voting, establishing politically polarized voting requires both a showing of political cohesiveness among members of the minority political group and a showing of bloc voting by the majority group.

Appellants' claim is not statutory but constitutional. *Gingles* may provide a useful analogy for identification of a group but it does not define a constitutional claim for racial vote dilution, much less for partisan gerrymandering. *Gingles* set conditions for a §2 claim, that a minority group: (1) "is sufficiently large and geographically compact to constitute a majority in a single-member district," (2) "is politically cohesive," and (3) that "the white majority votes sufficiently as a bloc to enable it … usually to defeat the minority's preferred candidate." 478 U.S. at 50-51.

> These elements, in turn, may most easily be established by a showing that the members of each group tend to vote for the same candidate and that the candidate supported by each group is different from that supported by the other. This examination requires evidence of cohesiveness and bloc voting over some significant period . . . and may not be satisfied merely with proof of the minority party's actual or predicted loss in a single election.

Id. at 1336-37 (selection citations and footnotes omitted).

As post-*Bandemer* precedent clarifies, a partisan gerrymandering claim requires an "identifiable group" exhibiting political cohesion of, and bloc voting by, the individual members of the group *and* bloc voting by the remaining voters against candidates for which the allegedly disadvantaged group votes as a bloc. While this standard is not insuperable in racial vote dilution cases, it is necessarily much more difficult in partisan gerrymandering cases. The difference arises from the fact that race is an immutable and observable characteristic, while partisan preference is highly mutable and unattributable to individual voters comprising a putative group.

3. Requirement: actual discriminatory effect

Bandemer's third requirement of actual discriminatory effect requires a plaintiff to show that "the electoral system is arranged in a manner that will consistently degrade … a group of voters' influence on the political process as a whole." 478 U.S. at 132. A "mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination" because an equal protection violation occurs only where "a history of disproportionate results appear[s] in conjunction with strong indicia of lack of political power and the denial of fair representation." *Id*. at 132, 139. The plurality refused to presume that "those who are elected will disregard the

disproportionately underrepresented group," explaining that "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Id*. at 132. The plurality both distinguished and analogized vote dilution in an individual district and statewide, stressing the principles that would guide its analysis, *id* at 133:

> [A]s in individual district cases, an equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. In this context, such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.

Justice White revisited the actual discriminatory effects requirement in *Shaw v. Reno*, emphasizing its importance:

> Because districting inevitably is the expression of interest group politics, and because 'the power to influence the political process is not limited to winning elections,' [Bandemer] at 132, the question in gerrymandering cases is 'whether a particular group has been unconstitutionally denied its chance to effectively influence the political process,' id. at 132-133. Thus, 'an equal protection violation may be found only where the electoral system *substantially disadvantages certain voters in their opportunity to influence the political process effectively*.' Id. at 133 (emphasis added). By this, I meant that the group must exhibit 'strong indicia of lack of political power and the denial of fair representation,' so that it could be said that it has 'essentially been shut out of the political process.'

509 U.S. 630, 662-63 (1993) (White, J., dissenting).

The *Bandemer* plurality explicitly drew the requirement of actual discriminatory effect from prior decisions involving claims by racial groups that their ability to elect representatives of their choice had been negated or lessened by an electoral process. *See* 478 U.S. 132-33. The "indicia" of lack of political power and the denial of fair representation necessary to meet this requirement as developed in those decisions help in evaluating whether discriminatory effects have been alleged against an identifiable group in a partisan gerrymandering case.

B. Application Of The *Bandemer* Standard Here

1. Application: intentional discrimination

The district court summarized the allegations of the Complaint as: "the Republican majority ... prevented all Democratic input on Act 1 in order to establish a Republican super-majority in Pennsylvania's congressional caucus" and found the allegations "sufficient to satisfy [the] pleading requirement." JS 33a. The district court ignored legislative privileges in reaching this conclusion.

Allegations going to the state of mind of individual, or even a sub-group of, legislators have no place in determining the intent of the legislative body that passed the challenged measure.[17] *See Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130-31 (1810) (explaining it is not consonant with the American scheme of government for a court to inquire into legislators' motives); *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) ("claim of an unworthy purpose does not destroy the [common law legislative] privilege"); *cf. United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) ("[i]nquiries into congressional motives or purposes are a

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[17] Many redistricting cases, including this one, bring assertions of the common law legislative privilege. *See Republican Caucus v. Vieth*, No. 03-371 (Petition for Writ of Certiorari).

hazardous matter"). Courts do not inquire into the internal workings of the legislative body to determine the quantity or quality of consideration the body or any individual legislator gave to the measure. *See Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892); *Kilgore v. Magee*, 85 Pa. 401 (1877). Therefore, an allegation that members on one side of the aisle were "shut out" cannot be proven in court because the means of proof (e.g., summoning legislators as witnesses) would violate legislative privilege and the Enrolled Bill Doctrine. Any other rule would invite a replay of the legislative process in court, with legislators and interested parties complaining about legislative procedures and asking judges to pry into the reasoning and influences affecting each legislator's vote.

Since state legislatures have a direct role in congressional redistricting under U.S. CONST. art. I, §4, *see* below, their enactments deserve as much deference as an act of Congress and their deliberations are entitled to the same privileges. The district court should have ignored the allegation that Democrats were "shut out" of the enactment process in assessing the Complaint's sufficiency.[18]

2. Application: identifiable group

The district court found that Appellants had alleged an identifiable group. This finding was erroneous and dismissal should be affirmed here on the alternative basis that Appellants failed to allege an identifiable group.

First, the allegations do not even satisfy what the district court identified as necessary to meet the identifiable group requirement. Plaintiffs are registered Democrats

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[18] In any event, the allegation was false. Democrat input included public hearings, *see* LM 222-23 (letter submitted by Democrat Congressman Mascara during public hearing on congressional redistricting), and Democrat legislators debated and voted both for and against the plan. *See* LM 9-110.

living in only 2 of the state's new 19 congressional districts.[19] JS 129a. The Complaint does not allege that Plaintiffs vote for Democrat candidates, just that they are registered Democrats. Nor does the Complaint allege anything about the geographic distribution of registered Democrats or Democrat voters. *See* JS 128-44a.

Second, although the Complaint did allege the results of the 2000 elections, that allegation can hardly be viewed as showing that an identifiable group of voters who vote Democrat, or Republican, even exists in Pennsylvania. Rather, those results show significant cross-over voting. If the voters who voted Democrat for President always voted Democrat, Republican Attorney General Fisher could not have gotten more votes, and Republican Sen. Santorum a higher percentage, than Vice Pres. Gore did on the same day. The Complaint itself shows that many "Democrat voters" were simultaneously "Republican voters."

Moreover, the Complaint is silent on issues often touted as the difference between Democrats and Republicans, perhaps because, on hot-button issues, the 2000 candidates defied classification by party platform. For example, the Republican Treasurer was "pro-choice," while the

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[19] Despite living in only 2 districts, Appellants challenged all districts. As in *United States v. Hays*, 515 U.S. 737 (1995), however, individuals not resident in a challenged district can show no individualized harm and therefore lack standing. Appellants did not allege that their districts are gerrymandered or that, *see* below, they suffered any individualized harm. Thus, the district court's finding of standing was based on faulty reasoning. *See Larios v. Perdue*, No. 1:03-CV-693-CAP (Mem. Op. at 46 n.11 (Aug. 29, 2003) (unpub., available on PACER) (*Hays* applies to partisan gerrymandering and *Vieth* creates an "anomalously more lenient standard for standing to assert a political gerrymandering claim than applies in … a racial gerrymandering claim").

Democrat Auditor General was "anti-choice." Both won. The 2000 election shows as much about voter preference on abortion as voter preference for party label – nothing.

Third, the Complaint is devoid of allegations showing cohesiveness. There is no allegation that Democrat voters vote as a bloc or share a core set of interests. And the statewide election results would belie such an allegation. As the *Martinez* court explained, 234 F.Supp.2d at 1343, the average percent of Democrat votes, even if calculated from statewide elections over many years,

> does not identify a group of voters at all; it merely reflects a result without explaining which voters produced that result. It is not necessarily true, for example, that the voters who voted for Democrats (or Republicans) in a given election were the same people voting for Democrats (or Republicans) in other elections.

Because the Appellants did not allege an identifiable group, they failed to meet one of the *Bandemer* requirements and accordingly did not state a claim.

3. Application: actual discriminatory effect

The district court dismissed Appellants' partisan gerrymandering claim for failure to allege the requisite discriminatory effects under *Bandemer*. The allegations were described as: (1) harm from disproportional representation, which had been rejected by the *Bandemer* plurality; (2) a presumption of inadequate representation, also rejected by the *Bandemer* plurality; and (3) harm to the Democrat Party in that it would be harder to field competitive candidates, which the district court explained is irrelevant because it is harm to Democratic *voters* that is key, "not the Democratic party's health in Pennsylvania," which "do[es] not have the right to vote." JS 37-38a. The court rejected the allegation that the plan "'essentially shuts … Democratic voters out of the political process[,]'"

because it was a legal conclusion. JS 38-39a. The court also explained that the Complaint lacked allegations indicative of discriminatory effects, such as that Appellants had been prevented from "registering to vote; organizing with other like-minded voters; raising funds on behalf of candidates; voting; campaigning; or speaking out on matters of public concern." JS 39a. Appellants did not seek to replead to cure those defects, nor did they have a basis to do so. The district court's analysis should stand.

4. This is not an extreme partisan gerrymander

Appellants have not shown an extreme partisan gerrymander in this case. The situation they depict in Pennsylvania is much less extreme than the facts in *Bandemer* and even in *O'Lear v. Miller*, 222 F. Supp.2d 850 (E.D. Mich.), *aff'd*, 537 U.S. 997 (2002), which the Court recently summarily affirmed. In their brief, Appellants even use conditional phrases about the future impact of the Pennsylvania plan. E.g., "even *if*, as often occurs ... Democratic candidates receive more total votes … ." Appellants' Br. at 12 (emphasis added). A hypothetical does not create a constitutional controversy.

C. The *Bandemer* Standard Should Not Be Relaxed

Because they cannot meet the high threshold standard established in *Bandemer*, Appellants urge the Court to reinterpret and lower the standard for stating a partisan gerrymandering claim or to discard the *Bandemer* plurality's standard altogether in favor of their proposed 2-step test. The Court should decline both invitations.

1. No policy reasons to relax *Bandemer*

Appellants and their *amici*, attributing various ills to gerrymandering, beg the Court to relax *Bandemer*. These cries for reform rest on false premises and are misdirected.

a. Polarization in U.S. House not due to partisan gerrymandering

Appellants posit that gerrymandering is transforming the institution of Congress. Appellants' Br. at 9. They contrast the U.S. Senate with the House, where, they say, "much more than in the Senate, bipartisan compromise around moderate policies takes a backseat to party loyalty, resulting in historic levels of polarization." *Id*. However, the House is neither more nor less polarized than in the past, and the Senate is neither better nor worse than the House.

The Senate, where gerrymandering is impossible, is an excellent control group for testing Appellants' theory. In both the Clinton and Bush administrations, the Senate has been controlled by a partisan opposition that refused to bring many judicial nominations to a vote. *See* William H. Rehnquist, 1997-2002 YEAR-END REPORTS ON THE FEDERAL JUDICIARY. As to legislation, there is no reason to believe that the Senate is less polarized than the House. Partisan filibusters have long blocked legislation that has cleared the House.[20] The polarization of the un-gerrymandered Senate shows the falseness of the proposition that gerrymandering has caused polarization in the House. Ascertaining polarization's true cause is beyond the scope of this Brief and constitutional jurisprudence.

Amici Grofman & Jacobson attempt to show that polarization is increasing in the House using a method (DW-NOMINATE) created by Professors Poole & Rosenthal. Grofman Br. at 9 n.6. However, Poole & Rosenthal have used this method to calculate polarization in both the House and Senate and their latest report states

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[20] *See e.g.*, Dewar, *Mitchell Vows to Extend Senate Session to End GOP Filibusters*, WASH. POST (Oct. 4, 1994) A04 (Democrat leader calls "unprecedented in his 15 years in the Senate" the 5 simultaneous Republican-filibuster threats on nominations and bills, including House-passed education bill).

that "[b]oth the DW-NOMINATE and the optimal classification methods show a persistent trend towards ideological polarization within both chambers." Poole & Rosenthal, *D-NOMINATE After 10 Years*: A COMPARATIVE UPDATE TO CONGRESS: A POLITICAL ECONOMIC HISTORY OF ROLL CALL VOTING, 26 LEGIS. STUDIES Q. 5, 18 (2001). They also report that in the Senate "the two parties are almost perfectly separated in the liberal-conservative ordering." Poole, *108th Senate Rank Ordering*, (http://voteview.uh.edu/sen108.htm) (visited 10/8/03).

Amici Grofman & Jacobson also contend there has been increasing partisan polarization of the two parties' electoral base in the House, which they consider in part a consequence of redistricting. *See* Grofman Br. at 12. For support, they cite one of their own recent articles. *Id*. at 12 n.9. The article, however, uses the same flawed premise of Appellants - that the 2000 Bush-Gore race is a benchmark of partisan divisions in congressional districts. This assumption reflects scholarly myopia that focuses only on the presidency, rather than looking at cross-currents at the state level. Jacobson's book, THE POLITICS OF CONGRESSIONAL ELECTIONS (Addison-Wesley Educ. 5th ed. 2001), contradicts his argument here, by noting a growing proportion of voters in congressional races "who vote contrary to their expressed party affiliation." *Id*. at 108. This is corroborated by the phenomenon in Pennsylvania of a "liberal" Democrat (Vice-Pres. Gore) and a "conservative" Republican (Sen. Santorum) winning the same state and many of the same districts on the same day.[21] Moreover, since Grofman & Jacobson concede there is national polarization in presidential contests and rely on a methodology that also shows polarization as a "persistent trend" and "almost perfect" in the un-gerrymandered

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[21] Sen. Santorum is 1 of the 4 most "conservative" Senators in Poole's rankings, with Sen. Clinton the most "liberal."

Senate, the cause cannot be attributed to gerrymandering of House districts.

The history of polarization and partisanship in the House further shows that gerrymandering is not to blame. The first House elections in 1788 were hotly contested between Federalists and Anti-federalists, although there were no national party organizations. Party structure was inchoate, but partisanship was in full bloom. The first federal elections in Pennsylvania "were in large measure the continuation of a struggle between two well-defined political parties which began forming within weeks after the writing of the Pennsylvania Constitution of 1776. By the end of the War for Independence, the parties were commonly known as the Constitutionalists and the Republicans." I DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 1788-1790, 229-34 (Univ. of Wisc. Press 1976) ("FED. ELEC."). In Pennsylvania, most Republicans became Federalists, while most Constitutionalists became Anti-federalists. *Id.* These competing factions clashed, even physically, over ratification of the U.S. Constitution. In 1787, when the Pennsylvania Assembly convened to consider calling a ratifying convention, the Anti-federalist members absented themselves from the chamber so as to deny it a quorum. The Speaker sent the sergeant-at-arms "to collect the absent members." II DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, 95 (State Hist. Soc. of Wisc. 1976) ("RATIF."). A posse seized enough absent members, brought and kept them in by force, to make a quorum. *Id.* at 104-09. The Assembly then voted to hold elections for delegates, who thereafter met in a state convention and ratified the Constitution. The absenting members were fined. *Id.* at 106. *Cf.* Brief of *Amici* Texas House Democratic Caucus *et al.*, at 10-12 (citing similar legislative tactics in modern times).

After ratification of the Constitution, the Republican/ Federalist majority in the Pennsylvania Assembly passed an election law in 1788 calling for the statewide election of representatives to the U.S. House. Perceiving partisan advantage, they rejected the demand of the Constitutionalist/Anti-federalists for district elections. I FED. ELEC. at 231-32.

The history of uninterrupted partisanship in Congress is beyond the limits of this Brief. It must suffice to note that Poole & Rosenthal, after finding polarization from the 1st through the 107th Congress, conclude that "compared to some earlier periods in the history of our Republic, the polarization in recent times is not terribly severe and there are no issues on the agenda that could destabilize the political system as slavery did in the 19th Century." Poole& Rosenthal, 26 LEGIS. STUDIES Q. at 24.

b. The House is not unrepresentative of the people due to gerrymandering

Appellants contend partisan gerrymandering has made the House unrepresentative of, and unresponsive to, the people. *See* Appellants' Br. at 4, 9. Their premise - that incumbents in safe seats can cater to donors and partisan interests without fear of reprisal by the voters - is sheer opinion and rebutted by many facts of common knowledge.

America continues to have peaceful revolutions at the polls. A stunning example is less than 10 years old, well within the period of allegedly gerrymander-induced petrification. In the mid-90s, Republicans, running on the "Contract with America," took control of the House (going from 176 members to a majority of 230); Senate control also changed (Republican seats going from 43 to 52). *See* Abstract, Table 387.

Although the 1994 Republican landslide stands out, Congress has had "steady and significant turnover."

Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 654 (2002). About 10% to 20% of the House membership has changed in each election over the past 30 years. *Id.* While retention of incumbents is high, many factors other than gerrymandering contribute to it: "The list of possible causes for the growth of the incumbency advantage is quite long [and] includes the rise of candidate-centered politics, the increased use of the perquisites of office (such as porkbarreling,[22] the franking privilege, credit claiming and casework), and rising campaign costs that inhibit effective challengers." *Id.* at 666. The House and Senate have comparable incumbent-retention rates. *Id.* Redistricting is not a major cause of increased incumbent-retention rates. *See* Ansolabehere & Snyder, *The Incumbency Advantage in U.S. Elections: An Analysis of State and Federal Offices, 1942-2000*, 1 ELEC. L.J. 315, 326 (2002).

Appellants also assume that a high rate of retention of incumbents or a high percentage of "safe seats" for a party, due to gerrymandering, is a cause of partisanship. There is no reason to connect safe seats with partisanship. On the contrary, the Republican revolution of 1994 brought a flood of freshman members to the House and did not noticeably decrease partisanship in that body. There is every reason to believe instead that incumbents holding safe seats are more inclined to seek compromise. "Competitive seats" lead to more partisanship in campaigns and thereafter in Congress. *See* Salmore & Salmore, CANDIDATES, PARTIES AND CAMPAIGNS: ELECTORAL POLITICS IN AMERICA, 251-52 (CQ Press 2d ed. 1989)

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[22] A desire to receive "pork" may explain the curiously-shaped 12th District represented by Democrat Jack Murtha, dean of Pa.'s delegation and a very senior member of the Appropriations Committee. www.house.gov/murtha/bio02.htm (visited 10/8/03).

(noting growth in competitive districts in the 1980's and the increase in polarization in Congress).

There is also no reason to believe that voters want a system in which close contests result in frequent changes in representation. Voters develop relationships with incumbents that they want to preserve and use. Incumbents have responded by increasing congressional staff to handle more and more constituent services. *See* Cox & Katz, *Why Did the Incumbency Advantage in U.S. House Elections Grow*? 40 AM. J. POL. SCI. 478, 481 (1996). A judicial desire for close contests should not override voter preferences to retain popular incumbents.

There is good reason to conclude that redistricting by partisan-controlled state legislatures actually increases electoral responsiveness and produces fairer electoral systems. *See* Gelman & King, *Enhancing Democracy Through Legislative Redistricting*, 88 AM. POL. SCI. REV. 541 (1994). This conclusion may be surprising and counterintuitive to many scholars and laymen alike, yet is supported by empirical data. *See id.*

The Rakove *amici* say the U.S. House must be a "mirror" or "exact portrait in miniature" of larger society and that Act 1 sullied this principle. Their noteworthy citations for this include John Adams, who used the portrait metaphor in his 1776 tract THOUGHTS ON GOVERNMENT, and George Mason's and James Wilson's remarks at the Constitutional Convention, echoing Adams' notion.[23] *See* Rakove Br. at 7, 11. The Rakove *amici* - historians all - have gotten their constitutional history wrong.

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[23] The Rakove *amici* also cite early writers who focused on representation in state legislatures, not the U.S. House. Oddly, they also cite Anti-federalists who were *criticizing* deficiencies in representation. The Anti-federalists had an aspiration that was compromised to arrive at an agreement on governance.

John Adams was not a delegate to the Convention and his decade-earlier musings plainly did not move the Framers, who put into U.S. CONST. art. I, §2 not a "mirror" requirement but quite the contrary: age and residency requirements for House members, a slavery-skewed population count and a voter-qualification provision allowing state legislatures to limit voting.[24] The House could not have "mirrored" society at that time because typical voter qualifications of age, property, gender, servitude and residency would have excluded women, slaves, the poor, the illiterate, the young and the many immigrants continually arriving.[25]

George Mason did indeed want the House to mirror the people, such that even their diseases would be represented. I RECORDS OF THE FEDERAL CONVENTION OF 1787, 142 (M. Farrand ed. 1911) (1937 Revised ed.) ("Farrand"). But Mason did not achieve his goal, refused to sign the Constitution and campaigned against ratification, stating: "In the House of Representatives there is not the substance but the shadow only of representation; which can never produce proper information in the legislature." II Farrand at 638.

James Wilson was speaking against a proposal to have the House elected by state legislatures when he remarked that it "ought to be the most exact transcript of the whole society." I Farrand at 132, 141. However, Wilson subsequently acted inconsistently with his words,

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[24] Art. I, §2 also, by confining congressional districts to state boundaries, made it impossible to create equal populations in districts nationally. At present there is a difference of 408,413 people between the largest district and the smallest. *See* Abstract, Tables 18, 384. Such disparity also precludes the House from being a "mirror" of representation.

[25] *See e.g.,* N.C. CONST. §VII (1776); GA. CONST. art. IX (1777); MASS. CONST. §4 (1780).

proposing variously that the citizenship qualification for members of the House be raised from 3 to 7 years, II Farrand at 230, then lowered from 7 to 4 years, *id.* at 268, and even that the House be chosen by electors, not directly by the people. *Id.* at 414. Wilson later told Pennsylvania's ratification delegates that "[t]he convention endeavored to steer a middle course." III Farrand at 159. Wilson distinguished representation in the U.S. House from that in the state legislatures, *id*. at 160, stating:

> In them [state legislatures] there ought to be a representation sufficient to declare the situation of every county, town and district, and if of every individual, so much the better, because their legislative powers extend to the particular interest and convenience of each; ... No one power is of such a nature as to require [in the U.S. House] the minute knowledge of situations and circumstances necessary in state governments possessed of general legislative authority.

The Rakove *amici* are not arguing history as much as they are urging the Court to give the nation a "constitutional moment" to reflect what they believe the law ought to be.[26] But their aspiration is inconsistent with the Framers' fundamental departure from the British Constitution. The Framers put ours in writing and debated its language minutely. The Court should not undo their compromises, regardless of popular thinking then or now.

To become a mirror, the House would have to expand its membership and give representation to all political views, like the Italian Chamber of Deputies, a relatively huge body (475 members for a nation 1/5th our size) elected by single-member districts and by a proportional formula.

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[26] *See* Bruce Ackerman, WE THE PEOPLE 1 FOUNDATIONS (Belknap Press, Harv. Univ. 1991).

See Alvarez-Rivera, *Elections to the Italian Parliament* (2003) (http://electionresources.org/it/) (visited 9/14/03). The Italian system gives seats to a rainbow of parties but also resulted in 52 governments from 1945 to 1993, after which Italians, impressed by the swift formation of a new, stable government in Great Britain under its "first-past-the-post" elections, slightly modified their proportional system. Italy has since had 7 governments in 9 years. *Id.* While Congress may well have power under U.S. CONST. art. I, §4 to experiment with proportional representation, cumulative voting or other devices, *see e.g.* Brief of *Amicus* DKT Liberty Project, such is not within the judicial power.

c. Gerrymandering is self-limiting

The extreme gerrymandering that Appellants would have the courts curtail is, ironically, self-limiting. An extreme gerrymander stretches support margins so thin that it may often backfire. *See* Grofman & Brunell, *The Art of the Dummymander: The Impact of Recent Redistrictings on the Partisan Makeup of Southern House Seats*, in REDISTRICTING IN THE NEW MILLENIUM (Peter F. Galderisi ed., Lexington Books) (expected publication 2004).

A gerrymander also has limited useful life. As incumbents retire or move on to other offices, their districts become more open to party shift. Constituents move in and out of the district, residential development changes its character, as does business expansion or contraction. In 10 years, there may be a split in control of the state legislature or governorship, so that a compromise must be reached, merely to equalize district populations. *See Bandemer*, 478 U.S. at 152 (O'Connor, J., concurring). "Gerrymandering is not a potent enough instrument to permit a minority to dominate state government and perpetuate itself from decade to decade . . ." Lowenstein, *Bandemer's Gap: Gerrymandering and Equal Protection*, in POLITICAL GERRYMANDERING AND THE COURTS, 95 (B. Grofman ed.,

Univ. of Cal., Irvine 1990).

2. Interpretation of *Bandemer* is not informed by Article I or the 1st Amendment

Appellants contend that the Court in *Bandemer*, "extrapolating" from *Reynolds*, "held that the Equal Protection Clause mandates 'a level of parity between votes and representation sufficient to ensure ... that majorities are not consigned to minority status.'" Appellants' Br. at 21 (quoting 478 U.S. at 125 n.9). But, footnote 9 had no bearing on the *merits* of the partisan gerrymander claim; rather, it contains the plurality's response to Justice O'Connor's criticism that finding partisan gerrymandering claims justiciable would embroil the Court in "illegitimate policy determinations." *See* 478 U.S. at 158-60 (O'Connor, J., concurring). Appellants' reading of *Bandemer* is inconsistent with the plurality's recognition that identifiable political groups, like identifiable groups of racial minority voters, have no right to proportional representation. *See id*. at 132, 139. Appellants conflate a rationale for justiciability with a standard of proof so as to ease their burden to state a claim.

The one-person, one-vote situation, treated as perfectly analogous by Appellants, is quite distinct from what is now before the Court. The right not to have the power of one's vote diminished, which is at the heart of the one-person, one-vote cases, is a right unique to each individual voter. Diminishment of that right in a one-person, one-vote situation is direct and easily discerned from a review of district population, thus making the disadvantaged class immediately identifiable. *See Reynolds*, 377 U.S. at 567-68. The diminishment is not dependent, as it is here, on, at a minimum, the presence of enough voters who prefer the same candidate for the same reason (e.g., race, political party, religious belief, etc.). In other words, in the one-person, one-vote situation, *each* member of the

disadvantaged class is directly affected, while, in this alleged vote-dilution case, it is only the putative class (i.e., the group) that is disadvantaged; *no* member of the group is directly affected. The disparate treatment in racial vote dilution and partisan gerrymandering claims is one that occurs only in the group context. As such, these claims do not involve the individual right to vote that is diluted in the one-person, one-vote situation.

From 1st Amendment cases, Appellants derive a right "barring governmental imposition of a political orthodoxy and other forms of governmental discrimination based on viewpoint," which they claim "provides additional support for effective limits on partisan gerrymandering." Appellants' Br. at 23. 1st Amendment principles did not figure in *Bandemer*. The individual right to be free from governmental coercion in regards to belief – political or otherwise – does not equate to harm to a particular political party in the absence of any connection between the individual right and the asserted harm.

3. Article I is not an independent prohibition

Article I does not prohibit partisan gerrymandering. U.S. CONST. art. I, §4 invests state legislatures with broad discretion to regulate the time, place and manner of congressional elections. *See Smiley v. Holm*, 285 U.S. 355, 366 (1932) ("these comprehensive words embrace authority to provide a complete code for congressional elections"); *United States v. Classic*, 313 U.S. 299, 311 (1941) ("states are given, and in fact exercise a wide discretion in the formulation of a system for the choice by the people of representatives in Congress").

The Framers knew that gerrymandering was within the scope of the power given the States, yet did not narrow the grant of power. Instead, they gave Congress the power to override any state regulation that Congress deemed contrary to the nation's interests. The latter was

controversial in the Convention. When Charles Pinckney and John Rutledge moved to strike the grant of power to Congress, James Madison defended it:

> The necessity of a Genl. Govt. supposes that the State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices. … It was impossible to foresee all the abuses that might be made of the discretionary power. … Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as *to favor the candidates they wished to succeed*. … What danger could there be in giving a controuling power to the Natl. Legislature?

II Farrand at 240 (emphasis added). Madison's remarks show that art. I, §4 empowers the states to do precisely what has since become known as gerrymandering. Even so, the potential for the states "so to mould their regulations as to favor the candidates they wished to succeed" was not addressed by cabining state power. Rather, the Framers created a check by giving Congress the power to make or alter such Regulations. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 808 (1995).[27]

Appellants nevertheless see restrictions on the states that the Framers did not. Invoking *Wesberry*, they argue that the provision for election "by the people of the several states" under art. I, §2 implicitly restricts the states from using predominantly partisan considerations in districting. Although *Wesberry* reached the right result, its rationale is

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[27] *See also Wesberry v. Sanders*, 376 U.S. 1, 33 (1964) (Harlan, J., dissenting) ("the Convention understood the state legislatures to have plenary power over the conduct of elections for Representatives, including the power to district well or badly, subject only to the supervisory power of Congress").

a weak support, already bearing too heavy a load.[28] Using *Wesberry* to discover a new restriction on the states in art. I, §2 is even less supportable, especially when the Framers stated in the Convention their awareness of the broad discretion being vested in state legislatures, subject only to congressional oversight. Appellants' argument would substitute the Court for Congress under art. I, §4.

Appellants also rely on *dicta* in *Term Limits* to support their Article I theory. There, the Court stated: "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." 514 U.S. at 833-34. This observation was repeated in *Cook v. Gralike*, 531 U.S. 510 (2001). But this language does not establish a test for assessing congressional districting plans; read in context, it merely reinforces the holdings in *Term Limits* and *Gralike* that a state cannot, under the guise of regulating the *manner* of elections, add *qualifications* for

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[28] *See* 376 U.S. at 24-25, 30-42 (Harlan, J., dissenting) (criticizing Court for confusing population equality principles among states and within each state); *id* at 18-20 (Clark, J., dissenting) (disagreeing that art. I, §2 "lays down the *ipse dixit* 'one person, one vote' in congressional elections" and citing equal protection as the source). Justice Harlan also faulted the Court for ignoring the existence and exercise of Congress' exclusive supervisory power. *Id.* at 23 (Harlan, J., dissenting). Current Justices have also expressed reservations about *Wesberry*. *See Karcher v. Daggett*, 462 U.S. 725, 745-47 (1983) (Stevens, J., concurring) ("the holding in *Wesberry*, as well as [the] holding [in *Karcher*], has firmer root in the Constitution than those provided by Article I, 2," notably, the Equal Protection Clause); *id*. at 782 n.14 (White, J., joined by Burger, C.J., Powell, J., & Rehnquist, J., dissenting) (no principled reason why source of one-person, one-vote principle different for state-legislative and congressional redistricting).

candidates beyond those enumerated in the Constitution.

D. Appellants' Proposed Test Is Flawed

Instead of explaining how their Complaint met the *Bandemer* standard, Appellants propose a standard not raised below, purportedly drawn from this Court's "other redistricting jurisprudence." The proposed test consists of: (1) an "'intent' element" positing that "politics can be a permissible redistricting consideration but cannot override all other considerations" and (2) an "'effects' element" said to build on the Court's "jurisprudence on vote dilution." Appellants' Br. at 31. The test is seriously flawed.

Under Appellants' test, a plaintiff need not show causation of harm from the alleged partisan gerrymander to some identifiable voter or group of voters. Appellants discuss at length how "harm" should be shown (their effects prong), but they never identify *how* that harm disadvantages an identifiable voter or group of voters by diluting an individual's vote. Harm not affecting some right of an individual or group of individuals is not cognizable. *See e.g., Grutter v. Bollinger*, 123 S.Ct. 2325, 2337 (2003) (reiterating that since the 14th Amendment protects persons, courts must assess whether "the *personal* right to equal protection" has been infringed) (emphasis original). This very basic requirement cannot be ignored in any valid test for partisan gerrymandering.

Appellants' proposed intent element is supposedly drawn from racial gerrymandering decisions including *Shaw*. But, because districting is political by nature, it is ludicrous to have "intent" satisfied by a showing that politics were the predominant reason for district lines. When a legislature draws boundaries, it is defining political communities of interest. Since representation itself is political, it would be incongruous to define communities of interest in non-political terms. One could, for example, redistrict according to popular preferences for college

football teams. The districts would reflect communities of interest, yet such boundaries would be irrelevant to the object of redistricting: political representation.

Appellants' intent element also founders in equating boundaries based on politics with those based on race. Race is an immutable characteristic, which has been, and regrettably too often still is, a basis of purposeful discrimination against individuals. Political preference, in contrast, is a very mutable characteristic over which individuals have absolute control. Race is also an observable characteristic that allows targeted individual discrimination. Political preference, as expressed by the ballot, is private and the secrecy of the ballot precludes even the identification of the voter's preference.

Using race as the predominant basis for government action is always suspect. On the other hand, use of political considerations as a predominant basis underlies our American system of government. That concepts applicable to racial gerrymandering are not compatible with partisan gerrymandering claims was recognized by the Court in two recent decisions. In *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999), the Court deemed "constitutional political gerrymandering" (i.e., that which is not invalid under *Bandemer*) to be a "traditional race-neutral principle." In *Easley*, 532 U.S. 234, the Court concluded that politics, not race, was the predominant (and valid) reason for how the challenged district was drawn.

Another difference between racial and partisan gerrymandering is the level of scrutiny applied. For racial gerrymandering claims, once race is identified as the predominant reason for drawing a district, the burden shifts to the plan's proponent to identify a compelling state interest to justify the use of race - i.e., strict scrutiny applies. *Miller*, 515 U.S. at 920. Partisan gerrymandering is different. Classification on the basis of political party,

party registration, or voter performance is not suspect and is not, in and of itself, unconstitutional. For that reason, political gerrymandering is not subject to strict scrutiny. *See Bush v. Vera*, 517 U.S. 952, 964 (1996) ("We have not subjected political gerrymandering to strict scrutiny"); *Shaw*, 509 U.S. at 650 ("nothing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny"). The racial gerrymandering cases offer no guidance in evaluation of a partisan gerrymandering claim.

Moreover, there are no truly neutral, non-partisan districting principles. Even the "traditional" districting principles have partisan effects. *See* below, Arg. Sec. II.B. Appellants' test would lead to a subtler form of gerrymandering, where partisan effects are hidden behind "traditional" principles. The party most adept at camouflaging its intended results would be the likely winner. State legislators know their districts and people better than courts can and are unlikely to be thus deceived.

Finally, the intent element of Appellants' test already was rejected. *See Bandemer*, 478 U.S. at 138-39 (rejecting Justice Powell's stance that "the intentional drawing of district boundaries for partisan ends and for no other reason violates the Equal Protection Clause in and of itself").

Appellants' test also posits that they should not be required to show they will be "'shut out of the political process'" but merely to identify "partisan *effects* on a statewide basis." Appellants' Br. at 33-34, 36 (emphasis original). Not having shown an actual discriminatory effect under *Bandemer*, Appellants now lobby for a lax test. Instead of requiring a showing of consistent degradation of influence, Appellants propose a "majoritarian standard" to show "partisan effects on a statewide basis." While they claim their test is "built on this Court's well-established jurisprudence on vote

dilution," Appellants' Br. at 31, the real building blocks are the theories of political scientists.

Appellants "operationalize" their test using selected and incomplete statistics showing only how the candidates of the two major political parties might fare in upcoming general elections under an as yet unused districting plan. *See* Appellants' Br. at 38, 45-46. Political *parties* have no constitutional right to vote and no right to a certain number of seats. *See Bandemer*, 478 U.S. at 132, 139.

Moreover, Appellants' proposed statistical test is manifestly defective. Citing the testimony of Prof. Lichtman at the one-person, one-vote trial, they state that he "analyzed (on a district-by-district basis) the results of all 18 statewide contests for single-member offices … held in the previous decade." Appellants' Br. at 45. Lichtman, though, excluded important statewide races. He did not include any appellate judicial races, which are typically contests where name recognition of candidates is low and partisan affiliation matters a great deal. Those races would have undermined his conclusion because Republicans won all 7 judicial races in 2001 with 54% of the total vote. *See* JS 87a. Lichtman's predictions were also proven wrong in 2002, with Republicans winning fewer seats and even losing what he called a "heavily Republican" district. If the district court had enjoined the use of Act 1 based on Appellants' theory and their expert's analysis, the truth would never have been known.

Lichtman's methodology also wrongly "post-dicted" the results of congressional races from 1992-2000 in 9 situations. JA 74-75. And, one need only observe that the core of the 3 least competitive districts (1st, 2nd & 14th) under Act 34 are located in Pennsylvania's two big cities (Philadelphia & Pittsburgh), JS 164a, to know that those districts contain many Democrat voters and why those districts indicate nothing about the plan's partisan nature.

The methodology for Appellants' "majoritarian standard" is also contradicted by other data not considered by Lichtman in comparing statewide races with congressional races. These data are from the 7 states having only one congressional district. In those states, all races are statewide races, including House races. Yet comparing non-congressional statewide races in those states with congressional races shows results that are as incongruous as the 2000 statewide races in Pennsylvania. In 6 of the 7 states, the parties split the congressional and other statewide races in either 2000 or 2002 or both.[29]

The Lichtman methodology uses a false premise, namely that statewide races can be used as valid indicators of the partisan leanings of congressional districts, and then violates its own premise by excluding some elections.

In short, there is nothing to commend the "majoritarian standard" as a way to show the effects of redistricting. Whatever Appellants' standard shows, it is not degradation of the political power of any identifiable group of voters.

II. PARTISAN GERRYMANDERING IS A NONJUSTICIABLE POLITICAL QUESTION

Certain questions "in their nature political" are wholly outside the purview of the federal courts. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). Political questions not amenable to judicial resolution are identified using the following factors:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or

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[29] *See* Barone & Cohen, ALMANAC OF AMERICAN POLITICS 2004, at 82-91, 358-66, 951-59, 1232-39, 1457-68, 1622-30, 1762-67 (Nat'l Journal Group 2003) ("Almanac"). The Almanac, cited also by Appellants, compiles useful statistics; but is also an idiosyncratic commentary on politics, often based on press and other hearsay.

> a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). *See also Nixon* v. *United States*, 506 U.S. 224, 228 (1993). Because redistricting "is fundamentally a political affair," partisan gerrymandering raises a political question "in the truest sense of the term." *Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring). Factors identified in *Baker* militate in favor of either overruling *Bandemer* or limiting it to the redistricting of state legislative bodies.

A. Textually-Demonstrable Commitment

"The nonjusticiability of a political question is primarily a function of the separation of powers," as "it is the relationship between the judiciary and the coordinate branches of the Federal Government … which gives rise to the 'political question.'" *Baker*, 369 U.S. at 210. Courts must "interpret the [constitutional] text in question and determine whether and to what extent the issue is textually committed" to a coordinate branch. *Nixon*, 506 U.S. at 228; s*ee also Powell v. McCormack*, 395 U.S. 486, 519 (1969). But once it is determined that the Constitution invests a co-equal branch with final discretion of the issue presented, the judiciary's role terminates.

In *Bandemer*, where "[d]isposition of th[e] question d[id] not involve [the Court] in a matter more properly

decided by a coequal branch of our Government," the Court held that partisan gerrymandering challenges to state legislative redistricting were justiciable. 478 U.S. at 123. In the case of congressional redistricting, there *is* a textually demonstrable commitment of an exclusive and final character to Congress. Art. I, §4 (emphasis added) provides that the "time, places and manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; *but Congress may at any time by Law make or alter such regulations*[.]" This provision subordinates state legislative authority to a supervisory and even superceding power vested in Congress. *See* Arg. Sec. I.C.3.[30]

Congress has exercised its authority. In 1842, Congress required all representatives to be elected from single-member, contiguous districts, *see* Act of June 25, 1842, 5 Stat. 491; in 1872, Congress required vacancies to be filled by special election and congressional elections to be held every 2nd year on the 1st Tuesday in November, Act of Feb. 2, 1872, 17 Stat. 28; in 1882, Congress required districts to contain "as nearly as practicable an equal number of inhabitants," Act of Feb. 25, 1882, 22 Stat. 5; in 1901, Congress required that districts be compact as well as contiguous, Act of Jan. 16, 1901, 31 Stat. 733, but in 1929, Congress failed to re-enact these requirements and they lapsed. *See* Act of June 18, 1929, 46 Stat. 21; *Wood v. Broom*, 287 U.S. 1, 7 (1932). Today, the only requirement is that Representatives be elected in single-member

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[30] *See also e.g.*, VI RATIF. at 1218 (Parsons) ("Without these powers in Congress, the people can have no remedy; But the 4th sect. Provides a remedy – A controuling power in a legislature composed of senators and representatives of twelve States, without the influence of our commotions and factions, who will hear impartially, and preserve and restore to the people their equal and sacred rights of election.").

districts, although election on a statewide basis is permitted in certain circumstances. *See* 2 U.S.C. §§2c, 2a(c); *see also Branch v. Smith*, 123 S. Ct. 1429 (2003).

Since 1980, at least 5 bills have been introduced in Congress to regulate gerrymandering in congressional districting.[31] To date Congress has declined to exercise its discretion to alter state regulations by restricting the use of political considerations. This Court should not interfere with Congress's judgment that it has sufficiently exercised its power. Each member of Congress answers to constituents who may demand more if they wish. *See Bandemer*, 478 U.S. at 144 (Burger, C.J., concurring) ("the Framers … placed responsibility for correction of such flaws in the people, relying on them to influence their elected representatives"); *id.* at 145 (O'Connor, J., concurring) ("the Court offers not a shred of evidence to suggest, that the Framers of the Constitution intended the judicial power to encompass the making of such fundamental choices about how this Nation is to be governed.").[32]

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[31] *See* H.R. 5037, 101st Cong., 2d Sess.; H.R. 1711, 101st Cong., 1st Sess.; H.R. 3468, 98th Cong., 1st Sess.; H.R. 5529, 97th Cong., 2d Sess.; H.R. 2349, 97th Cong., 1st Sess.

[32] Precedent involving congressional redistricting plans does not dictate justiciability of Appellants' claim. In *Baker*, the Court cited cases said to "settle[] the issue in favor of justiciability of questions of congressional redistricting," 369 U.S. at 232 (citing *Colegrove v. Green*, 328 U.S. 549 (1946); *Smiley*, 285 U.S. 355; *Koenig v. Flynn*, 285 U.S. 375 (1932); *Carroll v. Becker*, 285 U.S. 380 (1932)), but those cases did not address partisan gerrymandering. *Smiley* and its progeny involved constitutional interpretation, not review of the substantive validity of a plan. *Colegrove* did not decide justiciability, as Justice Rutledge, the pivotal vote, read *Smiley*

B. Other *Baker* Factors Favor Nonjusticiability

To decide a partisan gerrymandering claim a court would be forced to make forbidden policy determinations "about how this Nation is to be governed." 478 U.S. at 145 (O'Connor, J., concurring). In contrast, in one-person, one-vote cases the courts accept and incorporate the basic legislative choices previously made.

This distinction between the two types of cases becomes clear in contemplating relief. Every one-person, one-vote case to date has been resolved either by a legislature enacting a new plan or, if the legislature is deadlocked, by a court drawing a new map. In the latter instance, when the court draws a map to achieve population equality, the court must deviate as little as possible from the previously enacted map, thus preserving the policy choices inherent in the map. S*ee White*, 412 U.S. at 795-97. But, if the courts are tasked with exorcising partisanship from mapmaking, they would not be able to

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too broadly and, also, favored dismissal. 328 U.S. at 565 (Rutledge, J., concurring).

The substantive validity of a congressional redistricting plan was addressed in *Wesberry*, based on *Baker*. *See* 376 U.S. at 6. But *Baker* addressed state legislative districting, which involves no textual commitment to Congress. To the extent *Baker* stands for the broader principle that an election regulation impinging on the individual right to vote cannot escape judicial scrutiny, the one-person, one-vote claim in *Baker* and *Wesberry* is distinguishable from the claim here, because, as explained in Arg. Sec. I.C.2, a one-person, one-vote violation obviously and directly implicates an individual right, while a partisan gerrymandering claim requires a group. Further, judicial assessment of a one-person, one-vote claim, involving only a mathematical determination, uses a judicially-manageable standard that does not impinge upon legislative prerogatives or require any forbidden policy determination about the preferred nature of representation.

use previous legislative enactments as the historical base for map-drawing because those plans will themselves be infected with politics. Even if the judiciary tried to retain some "good" political choices by the legislature while discarding other "bad" partisan choices inherent in a previous enactment, the judiciary would still be making basic legislative choices and would find both its decisions and its decision-makers being scrutinized and critiqued for partisan bias.

Amici Texas House Democratic Caucus cite their state as an example of partisan abuses in districting. Yet Texas's experience is actually an example of the judiciary's shortcomings as political mapmakers.

In 2001, when the Texas legislature deadlocked, a federal court drew a congressional districting plan to bring Texas districts into compliance with the one-person, one-vote principle. *Balderas v. Texas*, No. 6:01-CV-158 (E.D. Tex. 2001), *aff'd*, 536 U.S. 919 (2002). The court sought to use neutral principles, so as "to keep our thumb off the political scale." *Id.* at 10. Relying on a political scientist's testimony, the court gave weight to: preserving majority-minority districts; allocating Texas's 2 new seats to areas of population growth; general historic locations of districts in the state; emphasizing compactness and contiguity; and following local political boundaries that historically defined communities. The court then looked at the effect of its draft plan on 3 senior incumbents of each party and found they would not be harmed. Finally, the court checked its plan by comparing the number of districts leaning to each party based on prior elections. The court found its plan likely to produce a congressional delegation roughly proportional to past party voting across Texas. The court declined to create new minority influence districts for either African-American or Latino voters, noting that creating an "opportunity district" was a political

choice for the legislature. *Id*. at 6-10.

The 2002 elections were a test of the court's plan. Republicans took control of both state houses, and took every statewide race, winning for U.S. Senator (55% of the vote), Governor (58%), Lt. Governor (52%), Attorney General (57%), Comptroller (64%), General Land Office Commissioner (53%), Railroad Commissioner (55%), Agriculture Commissioner (60%), Chief Justice (58%), 4 Supreme Court Justices (54-57%) and 3 judges of the Court of Criminal Appeals (57-58%). *See* Texas Election Results (www.sos.state.tx.us/elections/forms/2002nov.pdf)(visited 10/13/03). But, under the court's plan for congressional districts, Republicans got 53.33% of the total vote yet won only 15 seats (47%), while Democrats got 43.89% of the vote yet still won 17 seats (53%).[33] Clerk of the House, Statistics of the 2002 Congressional Election (http://clerk.house.gov/members/election_information/elections.php) (visited 10/11/03).

Under Appellants' theories, the 2002 elections revealed inherent partisan bias in the Texas court's plan.[34] When the legislature did not act, the court had no alternative but to seek to use "neutral" principles in drawing a plan to achieve population equality. Yet, despite its non-partisan goal and methods, the court's plan was out of sync with the peoples' preferences in the very next election. The *Balderas* court's error was political, not judicial. Seeking only to equalize populations, the *Balderas* court largely

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[33] The Republican vote total was even more impressive, since they left 5 seats uncontested, while Democrats contested all 32.

[34] The Texas legislature has now passed a plan. Democrat legislators delayed it by the ancient tactic of absenting themselves to deny their chambers a quorum. *Amici* Texas House Democratic Caucus Br. at 10-12. The houses compelled their attendance, an equally ancient power, used to obtain ratification of the Constitution itself. *See* Arg. Sec. I.C.1.a.

incorporated past political decisions into its map-making, resulting in a plan with an inherent partisan bias.[35]

Given its limited objective, i.e., population equality, the *Balderas* court accomplished its mission, even though there was partisan bias inherent in its work. But, if a court were to undertake the broader task of remedying partisan bias, a court could not justify setting its anchor in past policy choices. A court trying to draw a map to achieve partisan "fairness" would have to discard all prior legislative decisions as tainted by the political process. It would then have to make political decisions *ab initio*.

Yet the courts cannot replicate what legislators do in expressing the will of the people. The *Balderas* court, for example, received its input in public; it could have no private discussions with constituents, local officials or members of Congress to find out what they really wanted. True likes and, perhaps more importantly, dislikes and local rivalries are apt to elude a court, which will hear only the sanitized views of those witnesses who choose to speak in a public forum. Legislators, though, may actively seek out constituent comment rather than wait for counsel to present a witness list. Expert witnesses have inordinate influence on courts, whereas legislators rely on their intimate knowledge of constituencies despite what the experts say.[36] Most importantly, legislators may initiate

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[35] The court's use of historical and traditional factors introduced bias from the 1991 plan enacted by a Democrat-controlled legislature. That plan has been described as the Democrats' "masterpiece," drawn by *amicus* Democrat Rep. Martin Frost's aide. *See* Almanac at 1510. In each election under the 1991 Frost plan from 1994 on, Republican candidates won a majority of statewide votes but a minority of the seats. *Id*.

[36] "[I]t is quite typical for nonpartisan experts to attempt to make district lines as coterminous with political subdivision boundaries as possible. Pursuing such a goal . . . often conflicts

policy changes, discarding even their own precedent.

Unable to function as legislatures, the courts lack discoverable and manageable standards for addressing partisan gerrymandering in 4 critical areas: defining groups, setting constitutional limits, measuring partisan effects and crafting relief.

The standards developed under the 14th Amendment do not transfer to a partisan gerrymandering claim, which, by its very nature, implicates the rights of a group as opposed to an individual. *See* 478 U.S. at 149-152 (O'Connor, J., concurring). Moreover, defining a group is itself problematic as this case shows: are Appellants the Santorum Democrats or the Gore Democrats?

Drawing a constitutional line also defies judicial management. How disproportionate must election results be before they are "too" disproportionate? Even more treacherous is measuring partisan effect. What races, of what vintage, should a court choose to weigh the electoral strength of different groups? The more a court reaches back in time to weigh voting strength, the more it risks invalidating subsequent changes in voter preference and stifling future change. For example, Republican majorities took control of Congress in 1995, but had the courts in 1991 tried to assure partisan balance based on past electoral strength, that change might have been obstructed. The courts must not become an obstacle to political change.

There are no "neutral principles" with which to craft relief. Every principle, whether applied, modified or disregarded, has political consequences for representation. And "traditional" principles often conflict with one

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with attention to communities of interest that straddle such boundaries and with a state's public policy goal of regionalism in uniting cities and suburbs." Persily, 116 HARV. L. REV. at 678.

another, requiring basic policy choices in weighing them.[37] E.g., using political subdivision boundaries and compactness can pack Democrats and minorities into urban constituencies. And growth has blurred the boundaries between city, suburbs and countryside.[38] Federally-subsidized highways and regional sewerage, linking development along corridors that join city, suburb and farm, may actually define new communities of interest better than boundaries set in the 19th century. Growth produces "ugly" shapes in such corridors, but courts should not use an aesthetic standard for evaluating representation.[39] Judicial enforcement of traditional criteria will stifle representation of emerging communities.

Even when political boundaries make sense, a legislature may still rationally decide that it does not want

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[37] *See* Butler & Cain, CONGRESSIONAL REDISTRICTING COMPARATIVE AND THEORETICAL PERSPECTIVES, Ch. 4 ("Values and Trade-Offs") (Macmillan Pub. Co. 1992).

[38] Many areas have been split by freeways, which have become new "natural boundaries" that define political districts and communities of interest. *See* Mac Donald, *Redistricters are Rethinking Communities of Interest*, 42 Public Affairs Report (Inst. of Gov. Studies, Univ. of Cal., Berkley 2001) (www.igs.berkeley.edu/publications/par/fall2001/redistrict.htm) (visited 10/12/03). Further, urban sprawl, the predominant mode of development for 50 years, disperses population in unplanned and uncoordinated single use developments that are not functionally related to surrounding land uses and which appear as "'low-density, ribbon or strip, scattered, leapfrog, or isolated development.'" Carruthers & Ulfarsson, *Fragmentation and Sprawl: Evidence from Interregional Analysis*, 33 GROWTH AND CHANGE 312, 314-15 (2002) (internal citations omitted).

[39] *Cf. Shaw v. Reno*, *supra*. But there were two facial aspects of the long string of a district that combined to produce the result in *Shaw*: the shape of the district and the color of its residents.

constituencies stacked neatly within one another like nested Russian dolls. Especially for Congress, a state legislature may wish to promote a multi-regional or statewide outlook, believing state legislators already address local issues. The Constitution "forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the state legislatures." THE FEDERALIST PAPERS No. 10 (Fairfield ed., 2d ed. The John Hopkins Univ. Press 1981) (Madison).[40] In any event, local officials and members of Congress may lobby for having intact political units in congressional districts, because, contrary to Madison's vision, they subscribe to the view that "all politics is local." These choices are all open to legislatures but not to the judiciary.

The courts cannot overcome their limitations by engaging in a "sensitive and searching inquiry."[41] The inquiry will necessarily be political, yet unable to replicate either the constituent communication or the future-shaping vision permitted to legislators. Districting is not a question with merely incidental political overtones. "Politics and political considerations are inseparable from districting and apportionment." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973).

Legislatures are institutionally equipped to handle the competing considerations and interests implicated by the task. *See Connor v. Finch,* 431 U.S. 407, 414-15 (1977) ("[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

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[40] *See also* James Wilson's remarks, above at Arg. Sec. I.C.1.b.

[41] *Bandemer*, 478 U.S. at 165 (Powell, J., dissenting).

people's name"); *Miller*, 515 U.S. at 915 ("Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions … the States must have discretion to exercise the political judgment necessary to balance competing interests"); *Abrams v. Johnson*, 521 U.S. 74, 101 (1997) ("The task of redistricting is best left to state legislatures, elected by the people and as capable, if not more so, in balancing the myriad of factors and traditions in legislative districting policies.")

Hearing partisan gerrymandering claims against congressional districting plans would evidence a lack of respect for the legislative branches, which the Constitution identifies and the Court has historically recognized, as the proper locus for the political task of redistricting. *See e.g*, *Reynolds*, 377 U.S. at 586 ("reapportionment is primarily a matter for legislative consideration and determination"); *Gaffney*, 412 U.S. at 749 ("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") (internal citations omitted); *Connor*, 431 U.S. at 413-15; *Upham v. Seamon*, 456 U.S. 37, 41-42 (1982).

CONCLUSION

The Court should affirm the district court's judgment for the reasons stated above.

Respectfully submitted,

JOHN P. KRILL, JR.
(*Counsel of Record*)
LINDA J. SHOREY
JULIA M. GLENCER