Nos. 05-204, 05-254, 05-276, 05-439

IN THE

Supreme Court of the United States

EDDIE JACKSON; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; TRAVIS COUNTY; GI FORUM OF TEXAS,
Appellants,

v.

RICK PERRY, *et al.*,
Appellees.

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

BRIEF OF *AMICI CURIAE* PROFESSORS GARY KING, BERNARD GROFMAN, ANDREW GELMAN, AND JONATHAN N. KATZ, IN SUPPORT OF NEITHER PARTY

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INTERESTS OF *AMICI CURIAE*

Amici are professors of political science, government, and statistics who have written, published, and testified about partisan bias in redistricting.[1] They have testified on behalf of States and of private parties. They have testified in favor of Democratic plans in some instances and in favor of Republican plans in others. They have written and published extensively on the subjects of voting rights and statistical methods and more specifically on redistricting. And they have won numerous prizes and awards for their work in this area. *Amici* take no position on whether the Texas redistricting plan at issue in this case is unconstitutional. Rather, they write to explain that an "agreed upon substantive principle[] of fairness in districting" exists. *Vieth v. Jubelirer*, 541 U.S. 267, 312-13 (2004) (Kennedy, J., concurring in the judgment).

Amicus Gary King (http://gking.harvard.edu) is the David Florence Professor of Government and the Director of the Institute of Quantitative Social Science at Harvard University. He has been elected Fellow of the American Association for the Advancement of Science, Fellow of the American Academy of Arts and Sciences, Fellow of the American Academy of Political and Social Science, President of the Society for Political Methodology, and Vice President of the American Political Science Association. Along with Andrew Gelman, he wrote the software program JudgeIt, which is a widely-used tool for measuring partisan bias in districting plans.

Amicus Bernard Grofman (http://www.socsci.uci.edu/~bgrofman/) is Professor of Political Science at the University of California, Irvine. He has been elected Fellow of the

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* and their counsel has made a monetary contribution toward its preparation or submission. By letters filed with the Clerk, counsel for all parties have consented to this filing.

American Academy of Arts and Sciences and President of the Public Choice Society. This Court cited his work in *Thornburg v. Gingles*, 478 U.S. 30, 52-53 & n. 20 (1986), and both this Court and other federal courts have cited his research on racial voting patterns and other topics related to elections.

Amicus Andrew Gelman (http://stat.columbia.edu/~gelman/) is Professor of Statistics and Professor of Political Science at Columbia University. He has been elected Fellow of the Institute of Mathematical Statistics and Fellow of the American Statistical Association, and is the founding director of the Quantitative Methods in the Social Sciences program at Columbia. As noted, he and Gary King wrote the software program JudgeIt.

Amicus Jonathan N. Katz (http://jkatz.caltech.edu/) is the Co-Director of the Caltech/MIT Voting Technology Project. He is Professor of Political Science at the California Institute of Technology and Director of Graduate Studies for the Social Sciences. He is also currently a Fellow at the Center for Advanced Study in the Behavioral Science at Stanford University. He is on the editorial boards of *Political Analysis*, *Political Research Quarterly*, and the *American Journal of Political Science*.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the partisan gerrymandering context, this Court has not adopted any governing rule to determine whether a plan is unconstitutional. The Court may or may not choose to do so in this case. If the Court chooses to do so, however, a principle known as the symmetry standard presents a "substantive definition of fairness in districting" that "command[s] general assent." *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring in the judgment). The symmetry standard compares how similarly-situated political groups would fare hypothetically if they each (in turn) receive the

same given percentage of the vote. The difference in how parties would fare in terms of legislative seats is the "partisan bias" of the electoral system.

While *amici* take no position on whether this Texas plan is constitutional, the ability to measure partisan bias using objective and neutral criteria allows this Court to determine when a particular plan crosses the constitutional threshold. Three potential approaches are (1) a rule that creates as little partisan bias as possible; (2) a rule that prevents a political party from gaining a seat to which it otherwise would not be entitled; or (3) a rule prohibiting egregious gerrymanders that show a bias over a certain percentage.

ARGUMENT

I. THE "SYMMETRY STANDARD" DEFINES PARTISAN FAIRNESS IN LEGISLATIVE REDISTRICTING

"The object of districting is to establish 'fair and effective representation for all citizens.'" *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment) (quoting *Reynolds v. Sims*, 377 U.S. 533, 565-68 (1964)). This Court and other courts consistently determine whether States have crossed the constitutional line by drawing districts in a manner that impermissibly burdens one group or another. In the racial context, for example, courts have examined the shape and appearance of district lines in order to resolve whether a State was engaging in a racial gerrymander. *See, e.g, Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Shaw v. Reno*, 509 U.S. 630 (1993).

In the partisan gerrymandering context, dissenting Justices have proposed examining a variety of criteria such as shape, compactness, contiguity, and respect for political subdivisions in order to determine whether a plan unconstitutionally burdens a particular group. *See, e.g., Davis v. Bandemer*, 478

U.S. 109, 165 (1986) (Powell, J., dissenting) (looking to the "configurations of districts, the observance of political subdivision lines, and other criteria that have independent relevance to the fairness of districting"); *Vieth*, 541 U.S. at 335 (Stevens, J., dissenting); *id.* at 347-48 (Souter, J., dissenting). While all of these criteria may have some value, they are simply proxies for determining what is normally the fundamental issue in partisan gerrymandering cases: whether a districting plan unfairly burdens the representational rights of a particular political group.

As this Court has recognized, because criteria such as compactness and traditional political boundaries are merely proxies, they do not provide judicially-manageable standards that courts can apply in politically-neutral and even-handed ways. *See, e.g.*, *Vieth*, 541 U.S. at 307-309 (Kennedy, J., concurring in the judgment); *id.* at 289-90 (plurality opinion); *id.* at 359-60 (Breyer, J., dissenting); *Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring in the judgment). In addition, as legislators employ more and more sophisticated tools for redistricting, they can comply quite easily with some of these criteria while still burdening the right to fair and effective representation through political gerrymandering. *Cf. Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment) (recognizing that technology gives parties even more "temptation to use partisan favoritism in districting").

In evaluating political fairness, social scientists do not use proxies to measure the existence and extent of partisan bias. Instead, they have defined a clear and appropriate standard for what constitutes partisan fairness. It is called the symmetry standard. The symmetry standard was not before the Court in *Vieth*, 541 U.S. at 267.

The symmetry standard measures fairness in election systems, and is not specific to evaluating gerrymanders. The symmetry standard requires that the electoral system treat similarly-situated political parties equally, so that each

receives the same fraction of legislative seats for a particular vote percentage as the other party would receive if it had received the same percentage. In other words, it compares how both parties would fare hypothetically if they each (in turn) had received a given percentage of the vote. The difference in how parties would fare is the "partisan bias" of the electoral system. Symmetry, however, does not require proportionality.

For example, suppose the Democratic Party receives an average of 55% of the vote total across a state's district elections and, because of the way the district lines were drawn, it wins 70% of the legislative seats in that state. Is that fair? It depends on a comparison with the opposite hypothetical outcome: it would be fair only if the Republican Party would have received 70% of the seats in an election where it had received an average of 55% of the vote totals in district elections. This electoral system would be biased against the Republican Party if it garners anything fewer than 70% of the seats and biased against the Democratic Party if the Republicans receive any more than 70%.

In other words, the symmetry standard is that "each political group in a State [has] the same chance to elect representatives of its choice as any other political group." *Davis v. Bandemer*, 478 U.S. at 124. The symmetry standard is a "clear, manageable, and politically neutral" measure of "the particular burden a given partisan classification imposes on representational rights." *Vieth*, 541 U.S. at 307-08 (Kennedy, J., concurring in the judgment). The symmetry standard can be used in all types of election systems and districting arrangements, such as single-member districts, multimember districts, or any other valid electoral rule. Moreover, it works regardless of the number of parties that field candidates. *See, e.g.*, Gary King, *Electoral Respons-*

iveness and Partisan Bias in Multiparty Democracies, 15 Leg. Stud. Q., 159, 163-65 (1990).[2]

The symmetry standard has been the subject of scholarly work for at least three decades. *See, e.g.*, Edward R. Tufte, *The Relationship Between Seats and Votes in Two-Party Systems*. 67 Am. Pol. Sci. Rev. 540 (1973); Bernard Grofman, *Measures of Bias and Proportionality in Seats-Votes Relationships*, 9 Am. Pol. Sci. Rev. 295, 327 (1983); Andrew Gelman & Gary King, *A Unified Method of Evaluating Electoral Systems and Redistricting Plans*, 38 Am. J. Pol. Sci. 514 (1994). The scholarly literature has been united in supporting the symmetry standard as the definition of partisan fairness in electoral systems at least since the clarification of the standard introduced by Gary King and Robert X. Browning in *Democratic Representation and Partisan Bias in Congressional Elections*, 81 Am. Pol. Sci. Rev. 1251 (1987). *See, e.g.*, Dennis Thompson, *Election Time: Normative Implications of Temporal Properties of the Electoral Process in the United States*, 98, Am. Pol. Sci. Rev. 51, 53 n. 7 (2004); Thomas W. Gilligan & John G. Matsusaka, *Structural Constraints On Partisan Bias Under The Efficient Gerrymander*,

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[2] Indeed, the symmetry standard is itself a reflection of fundamental American tenets such as fairness and equality of treatment. It stems from the same principle that drives the belief that the legislative candidate with the most votes in a district should win the seat. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 562 (1964) ("As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system."). In particular, elections are "fair" when they set objective and symmetrical guidelines for determining who wins: One candidate can win with a plurality of votes because if another candidate had received a plurality of votes instead, that other candidate would have won the seat. Fairness exists because the political process treats each candidate equally. The symmetry standard takes this same principle and applies it to political groups at the statewide level.

100 Pub. Choice 65, 65 (1999); Ernesto Calvo & Maria Victoria Murillo, *Who Delivers? Partisan Clients in the Argentine Electoral Market*, 48 Am. J. Pol. Sci. 742, 747 (2004); Erik J. Engstrom & Samuel Kernell, *Manufactured Responsiveness: The Impact of State Electoral Laws on Unified Party Control of the Presidency and House of Representatives, 1840-1940*, 49 Am. J. Pol. Sci. 531, 541 (2005). In short, "[s]cholars have reached near consensus on *partisan symmetry* as a standard of partisan fairness and have made great progress on developing measures that can be used to see whether electoral systems and districting plans meet this standard." Gary King, John Bruce & Andrew Gelman, *Racial Fairness in Legislative Redistricting*, in *Classifying by Race* 85, 85 (Paul E. Peterson, ed., 1996).

The symmetry standard also is a regular feature of expert testimony in redistricting litigation. Experts representing both political parties use it, as do neutral officials such as courts and non-partisan members of redistricting commissions. Indeed, in this very litigation, experts from both sides used the symmetry standard to ascertain whether the plan was biased. *See* Expert Report of John R. Alford at 26-27 & Graph 2, Jackson Pls. Exh. 44 (Expert for Plaintiffs); Expert Report of Ronald Keith Gaddie, Jackson Pls. Exh. 141 at 18-22 & Fig. 1 (Expert for the State); Gaddie Report at 18 (noting that the three-judge panel which drew the non-partisan map in 2001 measured partisan bias by using the approach "widely accepted by the experts involved in this matter, and it is the approach used here to facilitate comparison").

Measuring symmetry and partisan bias does *not* require "proportional representation" (where each party receives the same proportion of seats as it receives in votes). Of course, an electoral system that is proportional, like any electoral

system, may treat the parties symmetrically and thus fairly.[3] Yet symmetry can exist (or not exist) in all types of electoral systems. Because most electoral systems in the United States are single-member districts that are winner-take-all, in practice they normally give a "bonus" of varying sizes (above proportionality) in seats to the party that wins a majority of the votes across a state. This common pattern does not violate the symmetry standard.[4] Nothing in the symmetry standard prevents States, either directly or because of the way in which districts happen to be drawn, from giving a greater percentage of seats to the victorious party than that party's total vote proportion. Indeed, in States where the plan is "fair" either because of bipartisan redistricting or a neutral districting commission, symmetry exists in complete harmony with the "bonus" given to the majority party due to the United States' single-member district system.

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[3] Electoral systems that mandate versions of proportional representation do not necessarily produce partisan symmetry. See Browning & King, *Democratic Representation*, 81 Am. Pol. Sci. Rev. at 1257 Fig. 2 (modeling bias in a proportional representation system). Many European nations that use proportional representation have electoral systems that show partisan bias. *See* King, *Electoral Responsiveness*, 15 Leg. Stud. Q. at 174 & Tbl. 3.

[4] Partisan bias is the deviation from partisan symmetry. A separate concept is "electoral responsiveness." Electoral responsiveness indicates how responsive changes in seat outcomes are to changes in voter preferences. Electoral responsiveness, also referred to as the "bonus" for the majority party, the "swing ratio," or the "degree of representation," measures how much the seat division between the parties change as the vote proportions change. A purely proportional system is one in which a one percent increase in the votes for a party leads to a one percent increase in seats for that party. In the United States, a one percent increase in votes for a party normally leads to a two to three percent increase in seats. Under the symmetry standard, there is nothing necessarily unfair about one party winning a greater proportion of seats than the other. An electoral system may have any degree of partisan bias, no matter what level of responsiveness happens to exist. See Browning & King, *Democratic Representation*, 81 Am. Pol. Sci. Rev. at 1254-58 & 1259 Fig. 3.

The guiding test of the symmetry standard is whether the map treats similarly-situated parties equally—whether both parties have the *opportunity* to capture the same amount of seats, if they receive a particular percentage of the statewide vote. That the Democratic Party may receive only 38% of the seats if it receives 45% of the Statewide vote matters only in comparison to how the Republican Party would fare if it receives 45% of the Statewide vote.

II. WELL-ACCEPTED AND WIDELY USED METHODS EXIST FOR MEASURING THE PARTISAN BIAS OF PROPOSED LEGISLATIVE REDISTRICTING PLANS

A consensus exists about using the symmetry standard to evaluate partisan bias in electoral systems. But such a consensus does not answer the subsidiary question: how to measure symmetry itself in order to determine whether partisan bias exists. Over the more than thirty years that scholars have worked on defining fairness as partisan symmetry, they also have developed a sequence of closely related, and steadily improving, statistical methods that measure the degree of partisan bias in proposed legislative redistricting plans. These methods, outlined in the articles cited in Section I, rely on well-tested and well-accepted statistical procedures.

Statistical methods and computer software using the symmetry standard examine all relevant election-related data, and employ an approach to calculate the difference in seats that the two parties would receive at a given vote level.[5] Using well-accepted techniques, these models allow experts to measure the number of seats that a party would win at a

[5] This brief provides a relatively non-technical introduction to the research methodology used in the field. The articles cited in the text, published in peer-refereed academic journals, describe the methodology more fully.

given vote level. And the methods can separate partisan bias from other factors. While the actual inputs may vary to some degree from approach to approach, most rely on details of the proposed redistricting plans, all recent election results, the presence of an incumbent in the district, and whether the race is contested. Gelman & King, *Unified Method*, 38 Am. J. Pol. Sci. at 523-25. Other factors may include party registration data, prior party control of the district, candidate quality, and demographic characteristics of the voting age population. *Id.* at 525-26.[6]

Experts can disagree about which set of input data is relevant for a given case, but the resulting measures of partisan bias normally will not differ to any significant degree.[7] Because social scientists studying partisan bias rely on the

[6] Any number of programs, both commercial and free, can analyze the relevant data to measure partisan bias.

[7] The methodology of quantifying the amount of partisan bias in a particular plan of course is subject to the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 573, 573-75 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149-52 (1999), as is any application of statistical methodology. While the standard methodology for measuring symmetry and partisan bias is well-established, peer-reviewed, and reliable, the question whether it meets *Daubert* is not a question that this Court needs to decide in order to adopt the symmetry standard. Rather, courts will apply the traditional criteria for admitting expert evidence and determine in each case (1) whether the experts are qualified; and (2) whether their particular methodology is reliable. Indeed, a similar process already exists in other voting rights contexts. Under *Thornburg v. Gingles*, 478 U.S. 30, 52-54 (1986), and its progeny, courts regularly use statistics to determine racial bloc voting and to decide whether a minority group can elect a candidate of its choice. In each instance, the court must make a judgment about the expert and the methodology. For a thorough discussion of the different statistical standards used to determine whether a plaintiff has met the *Gingles* test and their reliability, see *Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 995-1005 (D.S.D. 2004) (discussing the various standards and surveying cases that apply these standards).

symmetry standard as the baseline for attempting to calculate the degree of bias, any difference of opinion is limited in scope and concerns chiefly the methodology used to calculate the percentage of seats that a particular party would receive at a given vote level. In practice, these differences have been minor.

Models applying the symmetry standard are by their nature predictive, just as the legislators themselves are predicting the potential impact of the map on partisan representation. The symmetry standard and the resulting measures of partisan bias, however, do not require forecasts of a particular voting outcome. Rather, by examining all the relevant data and the potential seat divisions that would occur for particular vote divisions, it compares the potential scenarios and determines the partisan bias of a map, separating out other potentially confounding factors. Importantly, those drawing the map have access to the same data used to evaluate it, and no data is required other than what is in the public domain. The question is not whether a particular party *will* win; it is whether one party has stacked the deck to such a degree that the plan burdens the other party's "rights of fair and effective representation." *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment). *Cf.* Doris Kearns Goodwin, *Team of Rivals: The Political Genius of Abraham Lincoln* 209 (2005) (noting that in the 1858 Lincoln-Douglas Senatorial election, Lincoln lost even though he received a majority of votes cast because the State Legislature, which picked Senators at the time, was heavily gerrymandered for the Democrats).

III. THE SYMMETRY STANDARD ALLOWS THIS COURT TO DECIDE BY POLITICALLY-NEUTRAL AND OBJECTIVE PRINCIPLES WHETHER A PARTICULAR PLAN IS OVERLY PARTISAN

The ability to quantify partisan bias in a redistricting plan, and to distinguish partisan bias from other factors, permits this Court to adopt a rule that prevents gerrymandering from inhibiting a political group's representational rights. *Amici* take no position on how this Court could best implement a test for unconstitutional partisan gerrymandering that is based on evaluating the level of partisan bias in a plan. Yet the symmetry standard and the methodology applying it are just as "clear, manageable, and politically neutral," *Vieth*, 541 U.S. at 307-08 (Kennedy, J., concurring in the judgment)—if not more so—than other standards used to evaluate districting plans. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 55-61, 74-77 (1986) (using statistics to determine the existence of racial bloc voting, a necessary part of any § 2 claim); *Shaw v. Reno*, 509 U.S. 630, 646-49 (1993) (explaining how to decide whether a racial gerrymander is unconstitutional and examining "appearance," among other factors); *Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003) (discussing influence and coalitional districts and noting that "[t]he ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine"). And this Court's jurisprudence in other voting rights contexts suggests three different possible approaches for using the symmetry standard to determine the existence of an unconstitutional partisan gerrymander.

First, this Court could announce a rule of allowing a State to engage in as little partisan bias as necessary to further other compelling interests. In the one-person, one-vote context, this Court has required zero deviation for Congressional districts, while still permitting the State to justify any dis-

crepancy in population with a showing of compelling need. *See, e.g.*, *Karcher v. Daggett*, 462 U.S. 725, 740–41 (1983). Moreover, the State need only achieve complete population equality "as nearly as practicable." *Id.* at 730. So long as a State attempts in good faith to create equal districts, the plan passes constitutional muster. *Id.* at 730-31.

The symmetry standard allows this Court to announce a similar rule in the partisan gerrymandering context: States must make a good-faith effort to achieve as little partisan bias as possible. States could justify any deviation by pointing to a legitimate interest such as compactness, respecting municipal boundaries, or preserving the core of prior districts. *Cf. id.* at 740.

States can comply with the "as little as possible" rule quite simply. The sophistication of computer mapping technologies allows States to add "no partisan bias" to their criteria in creating a redistricting plan. *Cf. id.* at 733 (noting that in 1983, "[t]he rapid advances of computer technology and education during the last two decades make it relatively simple to draw contiguous districts of equal population and at the same time to further whatever secondary goals the State has"). Whenever a State redistricts, it is possible to measure the partisan bias in a plan using the symmetry standard. Likewise, States know the total population before redistricting, and because application of the one-person, one-vote standard is simple, relatively little litigation results. Just as in the one-person, one-vote context, if this Court sets a clear rule beforehand, the amount of litigation about the rule post-issuance would be relatively limited. Finally, a rule of "as little as possible" captures both the "subtle" and the "blatant" gerrymander, each of which burdens a group's representational rights. *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring in the judgment).

Second, this Court could establish a rule that prevents partisan bias to the extent that it allows the manipulating

party to gain control of one or more legislative seats to which it otherwise would not win. In other words, the symmetry standard allows courts to propound a simple and politically-neutral rule—whether the proposed map is so partisan that, as compared to a politically neutral map, it would cause one party to lose a legislative seat. Through the use of experts, a plaintiff would have to prove that a map would cause a group to lose a seat. *Cf. Gingles*, 478 U.S. at 44-46 (imposing a test for justiciability under § 2 of the Voting Rights Act, 42 U.S.C. § 1973, that requires a showing that the minority population is "sufficiently large and compact to constitute a majority in a single-member district" so there exists a potential remedy plan with at least one more district in which minorities have a realistic opportunity to elect candidates of choice than is found in the challenged plan).

Third, this Court could allow partisan bias in districting so long as it does not rise above a certain percentage. The symmetry standard allows courts to calculate the percentage difference in seats that a party would receive at any given level of the vote. If the average percentage difference between the two parties is above a particular threshold (whether it be 3, 5, or 10%), the plan would be unconstitutional. For example, if the court set the standard at 10%, a plan would not be unconstitutional unless the Democratic Party would capture 55% of the seats with 50% of the vote whereas the Republican Party would capture only 45% of the seats with 50% of the vote. *Cf. Brown v. Thompson*, 462 U.S. 835 (1983) (above 10% population deviation is *prima facie* unconstitutional for state legislative districts); *id.* at 852 (outlining test for determining when a plan is unconstitutional).

This third approach allows courts to consider what level of partisan gerrymandering is unconstitutionally "egregious." *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring in the judgment). Studies of past partisan gerrymanders have shown that many gerrymanders have a partisan bias of 1-3 percentage points. In egregious cases, the difference is

greater than 5 percentage points, and it is only in the very rare and extreme case that a gerrymander results in a difference of over 10 points. Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 Am. Pol. Sci. Rev. 541, 546 Fig. 2 (1994) (showing 15 states over a twenty-year period where the partisan bias rarely exceeded 5 percentage points and never exceeded 10 percentage points); Gary King, *Representation through Legislative Redistricting: A Stochastic Model*, 33 Am. J. Pol. Sci. 787, 814 (1989) (noting that the effect of the partisan gerrymander passed by Connecticut in the early 1970s that was at issue in *Gaffney v. Cummings*, 412 U.S. 735 (1973), was 3 percentage points); Robert X. Browning & Gary King, *Seats, Votes, and Gerrymandering: Estimating Representation and Bias in State Legislative Redistricting*, 9 Law & Pol'y 305, 318 (1987) (examining the Indiana plan in the 1980s that was the subject of *Davis v. Bandemer* and concluding that the House plan had a bias of 6.2 percentage points while the Senate plan had a bias of 2.8 percentage points); King & Browning, *Democratic Representation*, 81 Am. Pol. Sci. Rev. at 1262 Fig. 5 (showing bias in all States, with the plurality showing little if any bias, the vast majority falling within 5 percentage points, a few between 5 and 10, and even fewer above 10); *id.* at 1269 (listing bias figures for all States and showing only one State with a bias of above 10 percentage points); Gary W. Cox & Jonathan N. Katz, *Elbridge Gerry's Salamander: The Electoral Consequences of the Reapportionment Revolution* 57-59 (2002) (finding extreme cases of gerrymandering at as much as 8 percentage points).

A rule that tolerates a particular degree of partisan bias would recognize that this Court is willing to permit some amount of burden on the rights of political groups in exchange for limited court involvement in only the most extreme of cases. As experience has shown, and as this Court has recognized, savvy legislators will take advantage of all the leeway that this Court will allow. *Cf. Karcher*, 462 at 731

("If state legislators knew that a certain *de minimis* level of population differences were acceptable, they would doubtless strive to achieve that level rather than equality."). Yet even a rule that policed only extreme cases would curtail some abuses. *Cf.* Gelman & King, *Enhancing Democracy*, 88 Am. Pol. Sci. Rev. at 541 (noting that while a redistricting plan may increase partisan bias in a particular instance, regular redistricting every ten years leads to less partisan bias than no redistricting at all over a period of decades).

Regardless of any rule that this Court adopts—especially if it is no rule—redistricting always will be political to some degree. Yet not all political consequences lead to an unconstitutional burden on the minority party. Any rule limiting partisan gerrymandering still preserves some political component to redistricting. Decisions of where to draw the lines and what communities to include inevitably have some political fallout. The symmetry standard does not necessarily affect the decision of where to place politically-sensitive land. *Cf. Vieth*, 541 U.S. at 358 (Breyer, J., dissenting). Moreover, the majority party may well decide to give the party that wins a majority of the vote (say 51%) an even-greater majority of seats (say 60%). Such a plan favors the majority party, but would not be unconstitutional under any approach so long as the minority party could win the same 60% of seats if it receives 51% of the vote.

And if this Court adopts any rule based on the symmetry standard, lower courts and this Court will flesh out the particulars of the rule in the future. Indeed, in the one-person, one-vote context, once this Court determined the general standards in *Reynolds v. Sims*, 377 U.S. at 377, and *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964), subsequent cases simply became legal arguments about exactly what level of population deviation was unconstitutional in given circumstances. *See, e.g., Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Mahan v. Howell*, 410 U.S. 315 (1973); *White v. Weiser*, 412 U.S.

783 (1973); *Gaffney v. Cummings*, 412 U.S. 735 (1973); *White v. Regester*, 412 U.S. 755 (1973); *Connor v. Finch*, 431 U.S. 407 (1977); *Brown v. Thompson*, 462 U.S. at 835; *Karcher v. Daggett*, 462 U.S. at 725; *Larios v. Cox*, 300 F.Supp. 2d 1320 (N.D. Ga. 2004) (three-judge panel) (per curiam), *aff'd*, 542 U.S. 947 (2004). Similarly, this Court could set a general rule prohibiting partisan gerrymanders, and let courts decide the specifics of the issue as facts develop in the future. *Cf. Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment) (suggesting that no manageable standard developed after *Davis v. Bandemer* because lower courts could do nothing except follow that decision); *id.* at 344-45 (Souter, J., dissenting) (same).

The signatories of this brief take no position on whether the particular Texas plan in this case is unconstitutional. None has independently examined the partisan bias in the current Texas map. The symmetry standard has achieved consensus within the social science community as a measure of bias because it is a politically-neutral measure that does not require examining proxies such as shape of the district, compactness, or traditional political boundaries. Instead, it evaluates the bias directly by comparing whether the plan treats similarly-situated parties similarly. Regardless of the merits of this particular lawsuit, the symmetry standard is "a suitable standard[] with which to measure the burden a gerrymander imposes on representational rights." *Vieth*, 541 U.S. at 313 (Kennedy, J., concurring in the judgment).

CONCLUSION

In deciding this case, this Court should take into consideration the symmetry standard, as it measures partisan bias itself and it allows courts to decide in a politically-neutral and objective manner whether the State's plan is fair to all political groups.

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