No. 11-943

In the
Supreme Court of the United States

LEAGUE OF WOMEN VOTERS OF ILLINOIS,
APPELLANT,

v.

PAT QUINN, in his official capacity as Governor of the State of Illinois, *et al.*,
APPELLEES.

On Appeal From The United States District Court for the Northern District of Illinois

MOTION TO AFFIRM

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MOTION TO AFFIRM

Appellees file this motion to summarily affirm the judgment of the three-judge district court pursuant to Supreme Court Rule 18.6.* Appellant raises no substantial question warranting this Court's plenary review, nor does it identify any conflict in lower court authority—in fact, it admits that its theory is unprecedented—and the decision below was correct on the merits.

STATEMENT

1. Appellant's one-count first amended complaint alleged that Illinois' plan for redistricting the State's legislative districts violates the First Amendment because the plan places Illinois residents (including appellant's members) into districts "based at least in part on the partisan viewpoints and opinions such residents are likely to express or that they are likely to hear and receive." App. 15. Appellant alleged that this "unlawfully abridge[s] or regulate[s]" the residents' "expressive activity." App. 27.

2. In dismissing appellant's complaint, the district court acknowledged that "the First Amendment broadly protects political expression in order to foster the uninhibited exchange of ideas among the citizenry." App. 5. The Court held, however, that "[t]he problem with LWV's argument" is that the redistricting plan does not "actually restrict some form of protected

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* Although appellant identifies Illinois Governor Pat Quinn as an appellee in its Jurisdictional Statement, Governor Quinn is not a proper party to this litigation, as appellant conceded below. See App. 34.

expression." App. 5-6. Under the redistricting plan, appellant's members are not

> in any way prohibited from running for office, expressing their political views, endorsing and campaigning for their favorite candidates, voting for their preferred candidate, or otherwise influencing the political process through their expression[.]

App. 7-8. Appellant's "vague" allegations of First Amendment injury did not "even begin[] to * * * show[] that the redistricting plan is preventing LWV's members from engaging in expressive activities." App. 7.

The district court thus distinguished this Court's campaign finance cases (on which appellant heavily relied, as it does again in this Court) because they involved laws regulating campaign expenditures, which the Court has "long recognized as a form of *speech*." App. 6 (emphasis in original). Although appellant had asserted that the redistricting plan implicated First Amendment-protected speech, it alleged no injury to any "recognized categor[y] of expression." App. 7.

The court rejected appellants' reliance on *Martin v. City of Struthers*, 319 U.S. 141 (1943), for the same reason. App. 8. The law at issue in that case—which banned people from knocking on doors when distributing leaflets—impermissibly limited the "[f]reedom to distribute information," which unquestionably is a protected form of expression. *Martin*, 319 U.S. at 146. The redistricting plan, by contrast, merely makes "some political outcomes less likely than others." App. 9 (internal quotation marks omitted). But the First Amendment does not "'ensure

that all points of view are equally likely to prevail,'" and the plan does not prevent anyone from speaking or from being heard. *Ibid.* (quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1101 (10th Cir. 2006)).

The district court also observed the "ramifications" of appellant's position: "redistricting plans could never take partisanship into consideration without violating the First Amendment." App. 10. Such an outcome would be "untenable" in light of this Court's cases, the court reasoned, for these cases have "long emphasized that some 'burdening' of partisan viewpoints is an inevitable part of drawing district lines." *Ibid.* (citing *Gaffney v. Cummings*, 412 U.S. 735 (1973), and *Vieth v. Jubelirer*, 541 U.S. 267 (2004)).

3. Appellant filed a motion for reconsideration, which the district court denied. This appeal followed.

REASONS FOR AFFIRMANCE

The judgment of the three-judge district court dismissing appellant's complaint should be summarily affirmed. Appellant's admittedly "novel" argument proceeds from the assumption that Illinois lawmakers redrew the State's legislative map in an effort to make elections closer and more competitive in individual districts. Even if one is willing to overlook the fact that this presumption is without support in the brief—appellant purports to derive this motive from the Illinois Governor's reference to the State's new *congressional* (not state) map, and from an isolated statement by a legislator that the "map" generally is "competitive" and "fair," Juris. Stmt. 10—appellant's resulting legal theory is unworthy of plenary review and meritless. Appellant seeks a constitutional rule

prohibiting lawmakers from considering partisanship at all in their redistricting calculus, but such a rule is impossible to square with this Court's redistricting precedent. Nor is there any merit to appellant's reliance on this Court's recent campaign finance decisions, for neither of these decisions applies where, as here, there is no restriction on political speech.

I. THIS CASE DOES NOT WARRANT PLENARY REVIEW.

Relying on this Court's recent campaign finance decisions, appellant contends that "its members' rights to free speech were abridged merely by Appellees' consideration of partisan composition to determine legislative district boundaries." Juris. Stmt. 15. As appellant admitted in the district court (which charitably described this argument as "cutting edge," App. 10), "this is a novel legal theory for redistricting cases." App. 4. Thus, there is no conflict among the lower courts on the questions presented; rather, as shown below, the only conflict is between appellant's theory and a line of this Court's decisions upholding lawmakers' consideration of political affiliation in redistricting. This appeal accordingly presents no substantial federal question warranting full briefing and oral argument. See generally Eugene Gressman, *et al.*, SUPREME COURT PRACTICE 303-304, 541 (9th ed. 2007).

II. THE DECISION BELOW IS CORRECT ON THE MERITS.

A. Political Considerations Are A Traditional, And Constitutional, Redistricting Criterion.

Appellant argues that its members' rights were violated by appellees' "consideration of partisan composition to determine legislative district boundaries," Juris. Stmt. 15, and seeks "a redistricting process free of partisan considerations," *id.* at 13. But appellant's view that *any* consideration of partisan composition in the drawing of legislative districts raises constitutional concerns is impossible to square with this Court's prior decisions and would work an upheaval in traditional redistricting practices.

As the Court recognized in *Gaffney*, "[t]he reality is that districting inevitably has and is intended to have substantial political consequences." 412 U.S. at 753; see also *Miller v. Johnson*, 515 U.S. 900, 914 (1995) ("redistricting in most cases will implicate a political calculus"). Thus, the Court long ago held (and has consistently reaffirmed) that partisan gerrymanders, and the related aim of incumbency protection, are constitutionally legitimate considerations in redistricting.

Thus, in *Gaffney*, the Court rejected a claim—like appellant's here—that an otherwise acceptable redistricting plan was constitutionally infirm because it sought to achieve "'political fairness'" between the Democratic and Republican parties. 412 U.S. at 752. The Court held that a redistricting plan may "well determine what district will be predominantly Democratic or predominantly Republican, or make a

close race likely," without offending the Constitution. 412 U.S. at 753; see also *Easley v. Cromartie*, 532 U.S. 234, 248 (2001) (describing incumbent protection as "a legitimate political goal" when redistricting); *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) (Court's "decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering"). The Court subsequently established that partisan redistricting is lawful even where the legislature is aware that political affiliation is directly correlated with race. See *Hunt*, 526 U.S. at 551; *Bush v. Vera*, 517 U.S. 952, 968 (1996) (plurality op.).

More recently, in *Veith*, the four-Justice plurality would have gone even further and held that political gerrymandering claims are not even justiciable. See 541 U.S. at 281, 286, 300 (op. of Scalia, *J.*, joined by Rehnquist, *C.J.*, and O'Connor and Thomas, *JJ.*) ("partisan districting is a lawful and common practice" and incumbent protection a "time-honored criterion"). Four additional Justices confirmed that legislatures may lawfully consider politics when redistricting. See *id.* at 307 (Kennedy, *J.*, concurring in the judgment); *id.* at 344 (Souter, *J.*, dissenting, joined by Ginsburg, *J.*); *id.* at 355 (Breyer, *J.*, dissenting). Thus, one Member of the Court observed that "all but one of the justices agreed" in *Vieth* that "'politics as usual' * * * *is* a traditional criterion, so long as it does not go too far." *Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, *J.*, dissenting) (emphasis in original).

Appellant's only response is to argue that *Gaffney* did not address a First Amendment claim, and that the First Amendment claim discussed in *Vieth* was not identical to appellant's. See Juris. Stmt. 27-28. But this misses the point, which is that neither decision leaves

room for appellant's theory. The Court in *Gaffney* stated that "[i]t would be idle * * * to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." 412 U.S. at 752. And in *Vieth*, the four-Justice plurality indicated that it would have rejected a First Amendment claim "for the very good reason that a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting"—a result inconsistent with long-settled caselaw and practice. 541 U.S. at 294 (emphasis in original).

Even the one Member of the Court who posited that the First Amendment might be "relevant * * * in future cases that allege unconstitutional partisan gerrymandering," *Vieth*, 541 U.S. at 314 (Kennedy, *J.*, concurring in the judgment), would have rejected appellant's challenge here. Justice Kennedy suggested a First Amendment claim may lie where a partisan gerrymander "had the purpose and effect of imposing burdens on a disfavored party and its voters" and thus on the party's representational rights, *id.* at 315, whereas appellant disclaims any argument that the Democratically controlled Illinois legislature "considered partisan composition * * * to benefit the Democratic party," Juris. Stmt. 15. Rather, appellant's theory is that the Illinois plan was adopted to ensure competitive elections. *Ibid.* But when a State undertakes not to minimize the political strength of a group or party, but to enhance it through a competitive election, the State does not "burden[] a group of voters' representational rights," as Justice Kennedy would have required to state a First Amendment partisan gerrymandering claim. *Vieth*, 541 U.S. at 314. In

short, assuming appellant's claim is even justiciable—and it may not be under *Vieth*—this Court's prior decisions foreclose appellant's proposed rule that the First Amendment bars all partisan considerations in redistricting.

B. The Court's Campaign Finance Cases Are Inapposite.

Nor did the Court's recent *campaign finance* decisions work a sea change in constitutional *redistricting* doctrine, as appellant contends. Juris. Stmt. 16, 19-20. As the district court acknowledged, *Citizens United v. FEC*, 130 S. Ct. 876 (2010), and *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011), "strengthen[ed] the limiting effect of the First Amendment on government regulation of *campaign contributions*" (which had been "long recognized as a form of *speech*"). App. 6-7 (emphasis in original) (internal quotation marks omitted); see also *Arizona Free Enterprise*, 131 S. Ct. at 2828 (campaign contributions and expenditures are "political speech"). These cases did not, however, recognize redistricting and its consequences as a new form of protected speech.

Appellant agrees with the district court's "obviously truthful statement" that the redistricting plan does not prohibit appellant's members "'from engaging in any * * * 'vital' expressive act.'" Juris. Stmt. 17. Rather, appellant identifies three additional ways in which the plan purportedly "abridges" speech: appellant asserts that the plan unlawfully places its members in new districts (1) "because of * * * the views they are likely to express during [election] campaigns," *ibid.*; (2) "with the specific purpose of countering or offsetting speech in

favor of one political party with speech from the other," *id.* at 18; and (3) "to determine the views that LWV-IL members should hear and receive," *id.* at 23-24. Critically, however, as the district court held (and appellant admits), the plan does not prevent anyone from speaking or listening. Appellant's members may freely "run[] for office, express[] their political views, endors[e] and campaign[] for their favorite candidates, * * * and otherwise influenc[e] the political process through their expression" in their new district, their old district, or any other district. App. 7-8. Likewise, appellant's members are free to "hear and receive" political speech in any district they please, whether it is their home district or another.

Because the redistricting plan does not restrict political speech, this case bears no resemblance to *Arizona Free Enterprise*, where the Court invalidated a state campaign finance law that "penalize[d]" robust political speech by granting matching funds to a privately financed candidate's "political rival" as a "direct result" of campaign spending by the candidate and independent expenditure groups. 131 S. Ct. at 2821. Even accepting appellant's premise that Illinois lawmakers drew the map to make the races in individual districts more competitive, at worst such a plan would penalize past electoral success (not political speech). Appellant's theory is that the State "attempted to remove those affiliated with the dominant party from [a] district and move those affiliated with the weaker party into the district." Juris. Stmt. 18. Unlike spending on political campaigns, however, electoral success is not itself protected speech, as the district court recognized. See App. 9 ("while '[t]he First Amendment ensures that all points of view may be

heard[,] it does not ensure that all points of view are equally likely to prevail'") (quoting *Walker*, 450 F.3d at 1100) (brackets in original). Appellant's effort to analogize this redistricting case to campaign finance cases thus falls flat.

Ultimately, then, because the redistricting plan does not restrict political speech at all, this case does not present the question whether Illinois' ostensible interest in "'leveling electoral opportunities'" would provide a sufficiently compelling justification for a state law that did restrict such speech. Juris. Stmt. 26. In *Arizona Free Enterprise*, the Court rejected the "leveling" justification only *after* concluding that the matching funds provision "substantially burdened" political speech (by discouraging privately funded candidates and independent expenditure groups from making campaign expenditures). See 131 S. Ct. at 2817-2818, 2825-2826. Absent any burden on speech (and there is none here), the legitimacy of Illinois' alleged justification for the redistricting plan does not implicate First Amendment concerns.

CONCLUSION

The judgment of the three-judge district court should be affirmed.

Respectfully submitted.

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