No. 02-1580

IN THE
Supreme Court of the United States

RICHARD VIETH, *et al.*,

Appellants,

v.

ROBERT C. JUBELIRER, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION AND THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW IN SUPPORT OF APPELLANTS

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INTERESTS OF THE *AMICI CURIAE*

Amici curiae, the American Civil Liberties Union and the Brennan Center for Justice at NYU School of Law, are non-partisan organizations that defend representative democracy under the United States Constitution.[1] *Amici* believe partisan gerrymandering will continue to undermine representative government unless restrained by the courts.

SUMMARY OF ARGUMENT

Partisan gerrymandering is more brazen than ever. Otherwise conscientious legislators publicly boast of skewing electoral outcomes. Openly rigging control of legislatures a decade in advance is considered neither unusual nor improper. Seventeen years after the Court found partisan gerrymandering claims to be justiciable, politicians regularly behave as if the Court had reached the opposite conclusion.

How did we reach this pass? In *Davis v. Bandemer*, 478 U.S. 109 (1986), the Court held that victims of partisan gerrymanders could, in theory, turn to the courts for relief. Unfortunately, the *Bandemer* plurality failed to enunciate a practicable standard for legislators to follow and lower courts to apply. As a result, the past seventeen years have witnessed increasingly effective manipulation of district lines by both major parties, even as lower courts lamented their perceived inability to do anything about it. This appeal provides an opportunity to give practical meaning to *Bandemer*'s theoretical holding and eliminate one of the most egregious kinds of partisan gerrymander: those that guarantee a favored party control of a majority of legislative seats even if another party wins a majority of the votes.

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[1] No party's counsel authored any part of this brief. No person or entity other than *amici* and counsel contributed monetarily to preparing or submitting the brief. Letters from all parties' counsel consenting to the filing of this brief have been lodged herewith.

From *Baker v. Carr*, 369 U.S. 186 (1962), to *Bush v. Gore*, 531 U.S. 98 (2000), the Court has insisted on equal treatment for all voters. The same principle should apply when improper differential treatment is based on political expression or association. Under *Bandemer*, the Constitution does not require proportional partisan representation, nor is a voter entitled to elect a candidate of his or her choice. But all voters should have an opportunity to compete in the electoral arena and to aggregate their votes with likeminded voters on the same terms as their ideological rivals. A scheme like Pennsylvania's, in which it is irrelevant which faction receives the most votes, intentionally penalizes voters with disfavored political viewpoints and violates the most elementary principles of democracy.

Treating voters unequally because of their beliefs denies the vision of representative democracy embodied in the Constitution's structure and illuminated by its history. That vision includes majority rule, accountability of the government to the electorate, and the political equality of all citizens. Insulating a governing faction from removal by a majority of voters violates each of these principles and is proscribed by the First Amendment, the Equal Protection Clause, and (depending on whether federal or state legislatures are at issue) the Elections Clause or the Guarantee Clause.

ARGUMENT

I.
In the Two Decades Since *Bandemer*, Partisan Gerrymandering Claims Have Been Justiciable in Name Only.

Contemporary redistricting practices are subverting American democracy. As then-Professor (now Judge) McConnell put it, the precise tools available to today's line-drawers lead to "[p]rotection for incumbents, a tendency toward homogeneous—and hence more partisan—districts,

racial and partisan gerrymandering, and ultimately, a widespread sense that elections do not matter." Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 Harv. J.L. & Pub. Pol'y 103, 103–04 (2000). The legitimacy of a democratic government depends on citizens' confidence that they ultimately control the government through the ballot. Thus, even if citizens were mistaken in their "sense that elections do not matter," their belief alone would be cause for grave concern. But the evidence shows that the partisan balance of many legislatures is determined long before elections are held, and citizens' belief that their votes are generally irrelevant is eminently reasonable. More troubling still, gerrymanders have become more severe even as courts have entertained—and rejected—challenges under *Bandemer*.

A. Both Major Parties Regularly Create Partisan Gerrymanders.

Gerrymandering has made elections "less a reflection of popular opinion than of legislative craftsmanship." *Id.* at 103. Skewing electoral outcomes has long been a bipartisan sport. *See Martinez v. Bush*, 234 F. Supp. 2d 1275, 1297 (S.D. Fla. 2002) (three-judge court) ("This raw exercise of majority legislative power does not seem to be the best way of conducting a critical task like redistricting, but it does seem to be an unfortunate fact of political life around the country."). What is new is computer software that projects electoral outcomes with unprecedented ease and accuracy. *See id.* at 1352 (Hinkle, J., concurring) ("[T]he 'sea change' of advancing technology . . . has substantially increased the *extent* of successful political gerrymandering that is achievable . . . .").

Michigan, for example, lost a single House seat after the 2000 census, yet the Republican-dominated state legislature managed to pair six Democratic incumbents in three districts. *How to Rig an Election*, The Economist, Apr. 27, 2002, at 47.

The task was skillfully accomplished. Although Republican Congressional candidates garnered 35,000 fewer votes than their Democratic counterparts in the 2002 general election, the State sent nine Republicans and only six Democrats to the House of Representatives. *See* http://miboecfr.nicusa.com/election/results/02GEN/06.HTM.[2] In the previous Congress, the Michigan delegation had split 9–7 in favor of the Democrats. *See O'Lear v. Miller*, 222 F. Supp. 2d 850, 853 (E.D. Mich.) (three-judge court), *aff'd*, 123 S. Ct. 512 (2002).

Similarly, the Florida delegation is nearly three-quarters Republican, and both houses of the state legislature are two-thirds Republican, even though statewide races are closely fought between the two major parties. This was the legislature's avowed aim. *See Martinez*, 234 F. Supp. 2d at 1350–51 (Hinkle, J., concurring) ("From all indications, the legislature did an outstanding job; in a state with a notoriously close division of Democratic and Republican voters statewide, 18 of the 25 congressional districts have been drawn to cover areas in which voters have exhibited a clear voting preference for Republicans. A similar pattern is present for the State Senate and House.") (footnote omitted).

Republicans are only doing unto Democrats as Democrats have done unto them. In the 1980s, for example, California's Democratic legislators redistricted the state's Congressional districts to the extreme disadvantage of the Republican Party. The state's voters passed a referendum rejecting

[2] There were no Republican candidates in two districts, which affects the utility of the statewide aggregate vote. *See infra* n.9 Other measures, however, also show that a fair set of districts would have produced a drastically different outcome, including: the Democratic gubernatorial candidate's 127,000-vote victory; the reelection of an incumbent Democratic U.S. Senator by more than 700,000 votes; the Democratic presidential candidate's carrying the state in 2000; and the unseating of an incumbent Republican U.S. Senator in the same election.

the redistricting. Nonetheless, the legislature reenacted virtually the same plan, which was signed by a lame-duck Democratic governor shortly before his Republican successor took office. *See Badham v. Eu*, 694 F. Supp. 664, 666 (N.D. Cal. 1988) (three-judge court), *aff'd*, 488 U.S. 1024 (1989). In the next Congressional election, Republican candidates received 50.1% of the vote, but Democrats took 60% of California's House seats. *Id.* at 670.

More recently, Maryland's Democratic governor drafted state and federal redistricting plans that were assailed in part as gerrymanders, both on party grounds and for the way in which they punished individual legislators whom the governor considered political enemies. The state redistricting plan was struck down for violating the state constitutional requirement to give "due regard" to the boundaries of political subdivisions. *In re Legislative Districting of the State*, 805 A.2d 292 (Md. 2002). The House of Representatives plan, which was designed to (and did) eliminate Republican Congresswoman Connie Morella, helped to convert the state's delegation from 4–4 to 6–2 in favor of the Democrats, but was upheld by the Fourth Circuit. *See Duckworth v. State Admin. Bd. of Election Laws*, 332 F.3d 769 (4th Cir. 2002); Sarah Koenig, *Congressional Districts Fought in Federal Suit*, Baltimore Sun, June 19, 2002, at 1B ("Even many Democrats have been hard-pressed to defend the congressional map's lines, which in places look as if they were drawn by a child experimenting with an Etch-A-Sketch.").

Around the same time, Georgia's Democratic governor and Democrat-controlled legislature used serpentine district lines and novel multi-member districts to squeeze every possible drop of partisan advantage from Georgia Senate elections. Their effort paid off: Republican candidates received 55% of the two-party vote in 2002, but Democrats won 55%

of the seats. *See* http://www.sos.state.ga.us/elections/results/2002_1105/senate.htm.[3] Democrats also gained two seats in Congress, in an election in which voters rejected Democratic incumbents in races for Governor and U.S. Senator. At the same time, Democrats eliminated Republican Congressman Bob Barr, a manager of President Clinton's impeachment trial, by putting him in the same district as another Republican incumbent, in spite of the state's having received two additional seats in the House.[4]

Republicans had Georgia on their minds when they gerrymandered Pennsylvania and provoked this litigation. "Democrats rewrote the book when they did Georgia, and we would be stupid not to reciprocate," said Virginia Rep. Thomas M. Davis III, Chairman of the National Republican Congressional Committee. Rep. Davis promised that the Pennsylvania redistricting "will make Georgia look like a picnic." Thomas B. Edsall, *Democrats Hold Edge Over GOP in Redistricting; Gains Still Possible for Republicans*, Washington Post, Dec. 14, 2001, at A55.

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[3] Four Democratic Senators later switched parties, giving Republicans control of the senate. Majority rule should not depend on individual officials' idiosyncratic decisions. Furthermore, Republicans were lucky in the senate election. They won four seats by fewer than 1000 votes, including three by fewer than 300 votes. If Democrats had received 1500 more votes in the right districts (of more than 1.8 million votes cast), they would have won 60% of the seats with 45.1% of the vote. *See* http://www.sos.state.ga.us/elections/results/2002_1105/senate.htm.

[4] Four-color maps and other information about the Georgia Congressional and state legislative districts are available at http://www.georgia2000.org/redistricting/. Republican voters have sued, contending among other things that the new districts intentionally diminish plaintiffs' voting power on the basis of their political beliefs and party affiliation. *See Larios v. Perdue*, No. 03-CV-693 (N.D. Ga.) (three-judge court), am. cplt. filed Aug. 6, 2003.

Rep. Davis's blunt talk—"we would be stupid not to reciprocate"—is typical. There is no shame among politicians in using the ostensibly governmental function of redistricting to pursue pure partisan advantage; the shame would be displaying "stupidity" by acting evenhandedly. Pennsylvania media publicized a letter from the Speaker of the U.S. House and the U.S. House Majority Leader to the state's Republican leadership: "We wish to encourage you in these efforts, as they play a crucial role in maintaining a Republican majority in the United States House of Representatives." Letter from Hastert and DeLay to Pa. Senate Repub. leaders 1/2/02; *see also* John L. Micek, *GOP-run Legislature Approves Redistricting Map,* Morning Call (Allentown, Pa.), Jan. 4, 2002, at B2. Pennsylvanians know that district lines are drawn, not to ensure that their wishes are respected, but to bolster the control of the party in power.

B. The Vague *Bandemer* Standard Has Not Slowed the Proliferation of Partisan Gerrymanders.

More galling than the fact of partisan gerrymandering is that it has flourished in the face of this Court's decision in *Bandemer*. Since 1986, victims of gerrymanders have been, in theory, entitled to redress if they establish "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Bandemer*, 478 U.S. at 127–28. But lower courts have erected barriers to relief that are practically insuperable. "As a result, although partisan gerrymandering is rife, the courts have done virtually nothing to control it." Richard A. Posner, *Law, Pragmatism, and Democracy* 245 (2003) (footnote omitted).

Bandemer rightly subjected partisan gerrymandering to judicial review, but the job is only half done. What remains is giving more precise content to the constitutional test by holding that a particular set of facts makes out a viable claim.. "[L]ower courts continue to struggle in an attempt to interpret

and apply the 'discriminatory effect' prong of the standard articulated by the *Bandemer* plurality." *Martinez*, 234 F. Supp. 2d at 1352 (Jordan, J., concurring); *see also O'Lear*, 222 F. Supp. 2d at 855 (finding discriminatory effect prong "somewhat murky"). While lower courts have been clear about what *Bandemer* does not require—proportional representation, for example—there has been little guidance on what *Bandemer* does require.

The *Bandemer* test's vagueness has rendered it useless in practice. Judge McConnell considers the *Bandemer* standard "so toothless that [the Court] might as well have held partisan gerrymandering nonjusticiable." McConnell, 24 Harv. J.L. & Pub. Pol'y at 114. His conclusion is shared by virtually all judicial and academic observers. *See Martinez*, 234 F. Supp. 2d at 1352–53 (Jordan, J., concurring) (collecting authorities). The futility of challenging partisan gerrymanders in court has freed legislators to engage in the most egregious behavior, justifiably believing they will not be brought to account. *See* Claude R. Marx, *Democrats Vow Lawsuit over State's Congressional Redistricting*, Intelligencer Journal (Lancaster, Pa.), Jan. 5, 2002, at B1 (quoting Pennsylvania House Democratic Whip Mike Veon) ("To the victors go the spoils. No state court or federal court will overrule this.").

Lower courts' attempts to clarify the *Bandemer* standard have not helped. Reformulations of the test have tended either to be equally vague themselves or, to the extent they enunciate clear rules, to be impossible to satisfy. For instance, what is a legislator to make of this pronouncement:

> *Bandemer* draws no bright lines, and neither do we attempt to set forth the *sine qua non* of an unconstitutional reapportionment scheme, except to say that the plaintiffs must set forth allegations which, if proven, justify court intervention into an essentially legislative process.

O'Lear, 222 F. Supp. 2d at 859. *Terrazas v. Slagle*, 821 F. Supp. 1162, 1174 (W.D. Tex. 1993) (three-judge court), tried to do better, saying a disfavored group of voters could prevail

> if it presents evidence of a group perpetuating its power through gerrymandering in one political structure and that the wronged partisan group cannot over the long haul counteract this tactic through its influence in another relevant political structure or structures.

But how long is "the long haul"? How many years—or decades—must the victimized party vainly try to overcome the effects of gerrymandering before it can satisfy the *Terrazas* standard?

Terrazas, besides failing to enunciate a clear standard, also exemplifies another trend in lower courts' treatment of *Bandemer*: imposing impossible proof requirements on plaintiffs. Indeed, it appears most cases are dismissed at the pleading stage because there is no prospect of producing the kinds of evidence courts demand. The Michigan gerrymander, for instance, transformed the state's delegation from 9–7 in favor of Democrats to 9–6 in favor of Republicans in an election in which Democratic Congressional candidates received more votes statewide than Republicans and the state elected a Democratic governor. Democratic voters "alleged disproportionality in abundance, and . . . the amended complaint contains ample charges of discriminatory motive and procedural irregularities." *O'Lear*, 222 F. Supp. 2d at 859. Nonetheless, the complaint was deemed deficient, and the case was dismissed.

Also as in *Terrazas*, other courts have demanded proof that attempts to rectify a gerrymander are doomed to fail over "the long haul." *O'Lear* held that when a minority party rigs district lines to give it a majority of seats, majority-party

voters must prove the discriminatory scheme has "some substantial permanency" because it cannot be "overcome through the political process." *Id.* at 856. Demanding "permanency" or effects over "the long haul" renders *Bandemer*'s protection illusory. For biennially elected legislatures, each redistricting is used for only five elections, which the *Terrazas* and *O'Lear* courts might not regard as enough iterations to prove long-term effects. It seems the only way to satisfy these courts would be to suffer through several successive decennial gerrymanders. By this point, many affected voters will have died, and survivors will have gone decades without fair representation.

Even the most vigorous short-term efforts to undo a gerrymander have not sufficed. Recall that in *Badham*, California voters passed a referendum to rescind the gerrymandered map. The Democratic legislature, working with a lame-duck Democratic governor, rushed through a nearly identical redistricting plan that hamstrung Republican Congressional candidates for the rest of the decade. What more could Republican voters have done to show they could not repair the gerrymander through political channels? Whatever it was, they failed to do it, and their complaint was dismissed.

Badham applied another standard that dooms many cases: a stringent definition of what it means to "consistently degrade a voter's or a group of voters' influence on the political process as a whole," as *Bandemer* requires. The complaint failed, the *Badham* court ruled, because plaintiffs did not plead

> that anyone has ever interfered with Republican registration, organizing, voting, fund-raising, or campaigning. Republicans remain free to speak out on issues of public concern; plaintiffs do not allege that there are, or have ever been, any impediments to their full participation in the 'uninhibited, robust,

> and wide-open' public debate on which our political system relies.

Badham, 694 F. Supp. at 670 (citation omitted). This test, which the court below adopted, *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 545–47 & n.12 (M.D. Pa. 2002), requires a level of persecution that is hard to imagine being visited on a party that could win a significant number of seats in a fair election. The court below, following *Badham*, required a record of widespread violations of First Amendment rights. *Bandemer* teaches, however, that victims of a gerrymander suffer an independent constitutional injury; the test cannot depend on establishing constitutional violations separate from the gerrymander itself.

Bandemer is like *Baker v. Carr*: it announced that the dispute was justiciable without laying down precise standards to resolve it. *See* Richard L. Hasen, *The Benefits of "Judicially Unmanageable" Standards in Election Cases Under the Equal Protection Clause*, 80 N.C. L. Rev. 1469, 1501 (2002). Just as the Court developed *Baker*'s germinal principle into a manageable doctrine in *Reynolds v. Sims* and later cases, the *Bandemer* test needs further definition. The current standard has countenanced a race to the bottom in which each party tries to outdo the other in abusing control of state legislatures. The extraordinary mid-decade "re-redistrictings" in Colorado and Texas (and threatened elsewhere by both major parties) are only the latest level to which partisan manipulation of the democratic process has sunk.

None of this is necessary. If the Court enunciates clear and enforceable standards, legislators will have an incentive to adhere to them and avoid judicial intervention. Further, with fewer "spoils" available, there should be fewer political deadlocks that require courts to draw districts in the first instance. (Both the Texas and the Colorado re-redistrictings follow such judicial line-drawing). The Court's decision can

stem the antidemocratic tide—a rip tide that, as we shall now show, has tumbled the Constitution's structural requirements on their head.

II.
Partisan Gerrymanders Deny the Majority Rule and Electoral Accountability the Constitution Requires.

Representative democracy, protected by federalism and the separation of powers, is the essence of the Constitution. Two democratic postulates—government is constituted by the will of the majority, and must remain regularly accountable through meaningful elections—are embedded in the very structure of the Constitution. These principles are also crystallized in particular clauses, examined below.[5]

A. The Constitution Embodies the Framers' Vision of Representative Democracy.

The Court has attended to the Constitution's structure, as well as to the text of specific clauses, in adjudicating the division of power both among the branches, s*ee, e.g.*, *INS v. Chadha*, 462 U.S. 919, 946 (1983) ("The very structure of the Articles delegating and separating powers under Arts. I, II, and III exemplifies the concept of separation of powers . . . ."); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982) (plurality opinion) ("[T]he literal command of Art. III, assigning the judicial

[5] Political gerrymanders derogate from both majority rule and accountability. Accountability is also violated by another common practice: entrenching incumbents of both parties. For example, California Democrats avoided a referendum on redistricting by effectively guaranteeing no diminution for ten years in the number of Assembly, state Senate, and federal House seats held by Republicans. *See* Carl Ingram, *Davis OKs Redistricting that Keeps the Status Quo*, L.A. Times, Sept. 28, 2001, at B12. Such "bipartisan gerrymanders" should receive greater judicial scrutiny than they have, but the issue is not presented in this case and should be subject to a different analysis.

power of the United States to courts insulated from Legislative or Executive interference, must be interpreted in light of the . . . structural imperatives of the Constitution as a whole."), and between the federal and state governments, s*ee, e.g.*, *Alden v. Maine*, 527 U.S. 706, 728 (1999) ("[S]overeign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself."); *Fed. Maritime Comm'n v. S. Car. State Ports Auth.*, 535 U.S. 743, 754 (2002) (applying "the sovereign immunity embedded in our constitutional structure").

The most fundamental division of power in our democracy—between the government as a whole and the people from whom it derives all legitimate authority—similarly suffuses the Constitution. *See Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) ("[V]oting is of the most fundamental significance under our constitutional structure."). The Constitution embodies a normative vision of democratic self-governance amenable to coherent judicial protection. The Framers included in the text numerous structural elements to give effect to the popular will.[6] Other elements are designed to temper excessive swings in the public mood and moderate the effect of popular opinion on the government, such as the six-year term for Senators, the life-tenured judiciary, and the Bill of Rights. But there can be no question when it comes to the House of Representatives, the body at issue in this case, that the Framers intended direct and almost instantaneous response to shifting popular majorities to be its animating principle.

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[6] *See, e.g.*, art. IV, § 4 (guaranteeing states a republican form of government); art. I, § 2, cl. 1 (requiring periodic election of House members by "the people"); art. I, § 2, cl. 3 (providing for decennial enumeration and establishing minimum population of House districts); art. 1, § 2, cl. 4 (requiring House vacancies to be filled by elections, not appointments).

Of the 17 amendments adopted after the Bill of Rights, 12 deal with the democratic process and the government's ongoing accountability to the people. The Fourteenth Amendment establishes national citizenship, requires states to provide equal protection of the laws (including voting districts of equal population), and makes states' representation in Congress depend on their granting suffrage to newly freed slaves. The Fifteenth, Seventeenth, Nineteenth, Twenty-Third, Twenty-Fourth, and Twenty-Sixth Amendments implement equal universal suffrage by banning voting discrimination on the basis of race, sex, wealth, or youth; providing for direct popular election of Senators; and permitting residents of the District of Columbia to participate in presidential elections. The Twelfth, Twentieth, Twenty-Second, and Twenty-Fifth amendments provide for separate elections of the President and Vice-President, limit a lame-duck President's term, impose a two-term limit on the Presidency, and provide for orderly succession in time of Presidential disability. The Twenty-Seventh amendment regulates Congressional self-interest, by forbidding Members to raise their own pay.

Thus, the contemporary text of the Constitution views every American as a member of a self-governing community of political equals and guarantees to each the right to participate in democracy through voting, running for office, and fair representation. It is this normative vision that underlies *Baker* and *Kramer v. Union Free School District*, 395 U.S. 621 (1969). It is this vision that empowers, indeed commands, the Court to prevent partisan gerrymanders that mock representative democracy.

B. Modern Redistricting Reverses the Framers' Conception of the Houses of Congress.

For the first 120 years of our constitutional history, the people elected Representatives, and state legislatures selected

Senators. Now, the reverse is true: Senate races, not being subject to districting, are decided by voters, while legislatively drawn House districts make foregone conclusions of the overwhelming majority of races. Further, as in the Michigan, Florida, and Pennsylvania redistrictings described in *O'Lear*, *Martinez*, and this case, state legislatures can target individual Representatives for defeat (by pairing incumbents in a new district or changing the political makeup of a district) or re-election (by creating a "safe" seat). To a significant extent in many states, the legislature selects the delegation to the House of Representatives.

Gerrymanders frustrate not only the Framers' plan for the House to reflect fluid popular majorities, but also their insistence that Representatives remain accountable through frequent elections. The House was meant to be a "numerous and changeable body" whose membership would reflect shifting popular will. *See The Federalist* No. 63, at 305 (James Madison) (Terence Ball ed., 2003). Madison's task in the two Federalist papers on the House of Representatives was to persuade doubters that two years was not too long a period for the people to wait to replace their legislators. *See The Federalist* No. 53, at 259 (James Madison) ("I shall here perhaps be reminded of a current observation, 'that where annual elections end, tyranny begins.'"); *The Federalist* No. 52, at 256 (James Madison) ("[I]t is particularly essential that the [House] should have an immediate dependence on, and an intimate sympathy with the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured.").

Representatives must face the prospect of defeat frequently, lest they forget the source of their authority. *See The Federalist* No. 57, at 279 (James Madison) ("[T]he House . . . is so constituted as to support in the members an habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode

of their elevation, can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease . . . ."). The House was, as then-Professor (now Judge) Bybee noted, "the Eighteenth Century equivalent of government by poll." Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 Nw. U. L. Rev. 500, 516 (1997).

Where the House was designed to be volatile, the Senate was intended to be stable. Madison explained that Senators would serve six-year terms as a defense against "the impulse of sudden and violent passions" to which the body more immediately responsive to the public would be prone. *The Federalist* No. 62, at 302 (James Madison). To serve that stabilizing function, the Senate must "possess great firmness, and consequently ought to hold its authority by a tenure of considerable duration." *Id*; *see also* Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and its Implications for Current Reform Proposals*, 45 Clev. St. L. Rev. 165, 180 (1997) (quoting Roger G. Brooks, Comment, *Garcia, The Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism*, 10 Harv. J.L. & Pub. Pol'y 189, 195 & n.36 (1987)); Bybee, 91 Nw. U. L. Rev. at 512–16.

The two bodies were designed to serve different purposes; the rapid changeability of the House was a virtue, so long as it was tempered by the Senate's slower reflexes. Thus, Madison contended that the Senate must be stable in membership, because "[e]very new election in the states, is found to change one half of the representatives." *The Federalist* No. 62, at 303 (James Madison). How different a nation we live in today. In 2002, aspiring Representatives defeated incumbents not one-half of the time, as Madison expected, but one-one hundredth.

It is now the Senate that is (relatively) changeable and the House whose membership is nearly immutable. In 2002, of the 386 incumbent Representatives who ran for re-election against non-incumbents,[7] all but four won. By contrast, three of 26 incumbent Senators were defeated—not a large number, to be sure, but proportionately almost 12 times the fraction of beaten Representatives. This number does not include one Senator (Robert Torricelli of New Jersey) who withdrew from the race when it became clear he would lose, another (Paul Wellstone of Minnesota) who died a few days before what was expected to be a very close contest, and a third (Tim Johnson of South Dakota) who won re-election by barely 500 votes. As Professor Garrow observed, contrary to the Framers' expectation, "it is the House that has become uncompetitive, sclerotic and immune to change. The culprit is the gerrymandering of Congressional districts. If reform is not enacted soon, democratic choice will be sapped out of the House altogether." David J. Garrow, *Ruining the House*, N.Y. Times, Nov. 13, 2002, at A29; *see also How to Rig an Election*, The Economist, Apr. 27, 2002, at 47 ("If the average Californian doesn't like his Congressman, the only option is to call the moving vans.") (quoting Republican advisor Dan Schnur).

It is doubtless true that helpful district lines are not the only reason incumbents do well. But it is also true that many districts are designed to make it futile for the opposing party to challenge an incumbent, or even to field a candidate for an open seat. There were 49 House races in 2002 in which no incumbent ran. Of those, more than 70% were "uncompetitive" by the standards of political science, i.e., the winner had more than a ten-point margin over the runner-up. Fiercely partisan redistricting does not simply protect incum-

[7] Because of redistricting, there were four races in which two incumbent Representatives faced each other.

bents. It allocates 90% or more of House seats to one party or the other, leaving a relative handful of voters in 35 or so "swing" districts to decide which party controls Congress. The time, energy, and political capital spent on redistricting suggest that the power to draw the map is very nearly the power to control the government.

Thus, while the primary vice of a political gerrymander is its violation of majority rule and political equality, it also derogates from the principle of governmental accountability. We have "a system of government that relies upon the ebbs and flows of politics to 'clean out the rascals.'" *United States Trust Co. v. New Jersey*, 431 U.S. 1, 45 (1977) (Brennan, J., dissenting). A House in which 99% of incumbents who run for reelection defeat their challengers, and in which 400 seats are essentially locked up by one party or the other, is not the responsive body the founding generation had in mind. *See* Daniel R. Ortiz, *Federalism, Reapportionment, and Incumbency: Leading the Legislature To Police Itself*, 4 J.L. & Pol. 653, 675 (1988) (noting that representatives in gerrymandered districts can "pursue their self-interests at the expense of their constituents' interests with less fear of being unseated"). An entrenched legislature lacks the essential democratic feature of accountability to the people.

It need not be so. In Iowa, for example, the civil servants charged with drawing districts are directed not to take account of incumbency or other political factors.[8] Not coincidentally, four of Iowa's five Congressional races in 2002

[8] All redistricting processes, including non-legislative processes like Iowa's, must comply with the Voting Rights Act. In jurisdictions subject to Section 5's preclearance provisions, 42 U.S.C. § 1973c, non-legislative redistricting bodies must be directed to take race into account. No set of districts in any jurisdiction, no matter who draws them, may dilute minority voting strength in violation of Section 2, 42 U.S.C. § 1973.

were competitive. A State with one-ninetieth of the House seats produced one-tenth of the meaningful elections.

C. Four Constitutional Clauses Directly Protect Voters from Extreme Partisan Gerrymanders.

1. Elections Clause.

The Pennsylvania legislature openly sought to assure one party almost two-thirds of the House seats, whether or not the party garnered anything close to a plurality of votes. That exercise in viewpoint discrimination falls outside the power the Elections Clause delegates to state legislatures: "The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each state by the legislature thereof . . . ." U.S. Const. art. I, § 4. The Elections Clause was meant to limit state legislatures' influence over the House. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 808 (1995). Electoral mechanisms designed to "place their targets at a political disadvantage" are outside states' Elections Clause authority. *Cook v. Gralike*, 531 U.S. 510, 525 (2001) (invalidating indication on ballot of candidates' failure to support term limits).

Limits on the legitimate use of time, place, or manner regulations are not unknown to constitutional jurisprudence. In the analogous First Amendment context, the Court has repeatedly ruled that viewpoint-based regulations of speech cannot be defended as mere time, place, or manner regulations. *E.g.*, *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972); *Carey v. Brown*, 447 U.S. 455 (1980). Indeed, as the Chief Justice and Justice O'Connor noted in their concurrence in *Cook*, 531 U.S. at 531–32, the Election Clause mirrors the First Amendment in forbidding content-based, let alone viewpoint-based, time, place, or manner regulations. *Cf. Tashjian v. Republican Party*, 479 U.S. 208 (1986) (upholding power to set content-neutral procedures for Congressional elections).

Abusive partisan gerrymanders grant decisive power to citizens who have expressed favored political views and make it as difficult as possible for citizens with disfavored views to elect like-minded candidates. A state cannot possibly defend as a time, place or manner regulation an electoral system openly adopted for that viewpoint-based purpose. *See Cook*, 531 U.S. at 523 ("[T]he 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.") (internal quotation marks omitted).

2. First Amendment.

The six textual clauses of the First Amendment form a set of concentric circles with the democratic citizen at the focus. The text opens with Establishment Clause protection of private conscience, moves to Free Exercise protection of public displays of conscience, continues with Free Speech protection of individual expression, extends to institutional expression of ideas by guaranteeing a Free Press, then goes on to Free Assembly protection of collective action, and culminates in protecting formal interaction with the government through Petitions for Redress of Grievances. The sequence is not random. The textual rhythm of Madison's First Amendment reprises the life cycle of a democratic idea, moving from the interior recesses of the human spirit to individual expression, public discussion, collective action, and finally direct interaction with government. Madison's vision remains one of our most valuable guides to the kind of democracy the Constitution guarantees.

Electoral politics thus implicate the First Amendment's core purpose. Much of this Court's First Amendment jurisprudence has been devoted to the proposition that government must remain neutral regarding its citizens' ideological

expression and association. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Mosley*, 408 U.S. at 95. The political acts of voting and running for office are quintessential exercises of free speech and free association. *See, e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (recognizing right to run for office as act of political association between candidate and supporters); *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992) (noting regulation of voting burdens First Amendment rights but holding that standard of review varies with circumstances). The neutrality principle has particular force when it comes to elections.

Elections are a formal, structured marketplace of expression. Each candidate seeks to persuade voters that his or her ideas (and the ideas of the party to which the candidate belongs) should be enacted into law. Unless government remains neutral in administering the contest, the electoral competition cannot operate fairly. It would be self-defeating to expend substantial judicial resources defending a neutral marketplace of ideas on sidewalks and in parks, only to allow the government to rig the outcome of elections that are the culmination and object of the First Amendment's textual protections. If the Constitution forbids denying governmental employment because of an individual's political affiliation or belief, *see Elrod v. Burns*, 427 U.S. 347 (1976), and forbids conditioning government contracts on support for political incumbents, *see O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996), it cannot countenance burdening the right to vote on the same forbidden bases.

This Court has recognized that the First Amendment's structure implies essential non-textual rights. Thus, in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Court, through Justice Harlan, interpolated a non-textual right of association between the textual rights of speech and

assembly, recognizing that freedom of association is necessary to the enjoyment of the six textual rights. *See also, e.g.*, *NAACP v. Button*, 371 U.S. 415 (1963); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). The right to have one's vote count equally irrespective of the viewpoint the vote expresses is also a logical and necessary extension of the textual rights of speech, assembly, and petition.

3. Equal Protection Clause.

Burdening the rights of voters who express certain viewpoints, or who have certain political affiliations, also violates equal protection. In *Baker* and its progeny, the Court prohibited apportionments that systematically underweight the votes of citizens in particular districts. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964) ("[D]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race."). In *Kramer* and *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), the Court barred allocating the franchise on differential grounds. This jurisprudence has provided powerful protection of the right to vote on equal terms, culminating in *Bush v. Gore*, which stopped a recount because of a lack of uniform standards for counting votes.

The essence of *Baker* and *Bush* is equal treatment of each voter. Partisan gerrymanders fly in the face of the Court's voting equality jurisprudence by allowing legislators to alter the weight of a vote depending on the voter's residence and political views. Although vote dilution is inevitable under any districting scheme, and some voters will consistently be outvoted, "[i]t is one thing for a phenomenon to exist by necessity, and quite another for someone to distribute or redistribute it selectively." Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9

Yale L. & Pol'y Rev. 301, 313 (1991). Intent converts an unfortunate inequity into an actionable injury. *See Washington v. Davis*, 426 U.S. 229 (1976). The Pennsylvania case is typical: politicians controlling the process openly admitted their intention to make some votes count more than others; and they succeeded, dooming disfavored voters to a decade of distorted representation. It was just such violations of the principles of representative government that *Baker* and *Bush* condemned.

The Court has struck down electoral systems in which one voter had a mathematically more potent vote than another, or in which different standards were used to count contested votes. Measured by the norms of statewide equal treatment mandated by *Bush*, Pennsylvania's gerrymander is clearly unconstitutional. Republican voters in Pennsylvania cast votes with twice as much electoral power as their Democratic fellow citizens. In 2002, in the sole statewide race, the Democratic candidate for governor won with 55% of the major-party vote in a race between non-incumbents. Yet Republicans won 63% of the Congressional seats, implying that there are fewer than half as many Republican voters per Republican Representative than Democratic voters per Democratic Representative.[9]

Of course, *Bandemer* does not require proportionality in these measures, but the Pennsylvania skew goes beyond mere disproportionality in one election. While a minority of Republican voters can regularly elect at least 63% of the delegation, the record suggests[10] that Democratic voters

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[9] It is difficult to make a similarly meaningful calculation using the aggregate votes cast for Republican and Democratic Congressional candidates because there were no Democratic candidates in five of the 19 districts and no Republican candidate in another district.

[10] Because the partisan gerrymandering claim was dismissed on the pleadings, the parties could not present all of the available evidence of the (cont'd)

would have to outnumber Republicans by between 8 and 20 percentage points to have any hope of electing even a majority of Pennsylvania's Representatives. Democratic voters will suffer this devaluation of their votes in every election for the rest of the decade. Such significant disparity in the electoral power of different citizens' votes is far more destructive of genuinely equal treatment than the often nominal mathematical disparities found unconstitutional by the Court in the one person, one vote cases. *See Karcher v. Daggett*, 462 U.S. 725 (1983).

4. Guarantee Clause.

The federal government must "guarantee to every State in [the] Union a Republican Form of Government . . . ." U.S. Const. art. IV, § 4.[11] Hamilton explained: "The true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect in pro-

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(cont'd)
Pennsylvania plan's partisan effects. The case should be remanded for specific factual findings on this issue.

[11] This case does not directly implicate the Guarantee Clause because it involves a Congressional electoral system, while the Clause applies to state governments. Legislators and lower courts will believe that the standard applied to state legislative redistricting can be no stronger, and may be weaker, than the standard the Court adopts in this case for Congressional redistricting. *See Mahan v. Howell*, 410 U.S. 315, 321–22 (1973) (applying more stringent standard to Congressional redistricting under Elections Clause than to state redistricting under Equal Protection Clause). Yet partisan gerrymanders are if anything more problematic in the state context, for two reasons: those drawing the lines may be the very candidates who stand to benefit from unfair districting; and a minority that controls a majority of state legislative seats controls the legislature itself, not just one delegation to a 435-member House. Accordingly, *amici* respectfully suggest that should the Court ground its decision on the Elections Clause, it make clear that the question remains open whether the same standard would apply to state redistricting under the Guarantee or Equal Protection Clauses.

portion as the current of popular favor is checked." *Powell v. McCormack*, 395 U.S. 486, 540–41 (1969) (quoting 2 *Debates on the Federal Constitution* 257 (J. Elliot ed. 1876)). However this constitutional mandate is reduced to operational doctrine, "at a minimum, the Clause must mean that a majority of the whole body of the people ultimately governs." McConnell, 24 Harv. J.L. & Pub. Pol'y at 114.

Partisan gerrymanders frustrate this command. Although a majority may fortuitously govern after a gerrymander, the presence of a majority ceases to be dispositive. "The members of a partially self-constituted legislature depend to a degree upon one another rather than upon their constituents for their tenure in office. Whatever 'representation' means, it cannot possibly mean that." Polsby & Popper, 9 Yale L. & Pol'y Rev. at 305.

The Court's one person, one vote cases are grounded in this conception of republican government as representative democracy. Equipopulation itself is not the ultimate goal, but an instrument for achieving "fair and effective representation." *Reynolds*, 377 U.S. at 565–66; *see also* Gordon E. Baker, *The Unfinished Reapportionment Revolution*, *in Political Gerrymandering and the Courts* 11, 11 (Bernard Grofman, ed., 1990) (arguing Court's leading cases show "population equality [is] merely a means to the end.").

The Framers warned against governmental thwarting of citizens' free selection of their representatives. "A Republic," said Madison, "may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect." 2 *Records of the Federal Convention of 1787* at 250 (Max Farrand ed. 1911). By ensuring that votes cast for one party have less effect than votes cast for another, partisan gerrymanders impose the limits Madison feared. *See* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593, 615

(2002) ("The electorate can only express a 'free and uncorrupted choice' if it has the ability to select among competing political prospects."). A republican form of government cannot be one in which legislatures may with impunity insulate themselves or their allies from challenge.

III.
No State May Surrender Legislative Control, Irrespective of the Votes of the Majority, to a Favored Faction

The essential constitutional principle is that all voters must vote on equal terms. The government may not intentionally administer elections in a non-neutral fashion to debase any person's vote for partisan purposes. This case presents perhaps the clearest kind of violation of the fundamental requirement of government neutrality: an electoral system deliberately enacted to give a political faction control over a majority of seats regardless of whether it attracts the support of a majority, or even a plurality, of voters.

Entrenched minority control is the cardinal sin of malapportionment. *See Reynolds*, 377 U.S. at 570, 576 (decrying "a minority strangle hold on the State Legislature" and "frustration of the majority will"); *Baker*, 369 U.S. at 258–59 (Clark, J., concurring) (noting lack of "practical opportunities" for the "majority of the people" to correct malapportionment at the polls). Even in dissent from the trend towards a "one person, one vote" standard, Justice Stewart said that a districting plan "must be such as not to permit the systematic frustration of the will of a majority of the electorate of the State." *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 753–54 (1964) (Stewart, J., dissenting). When line-drawers intentionally cause a favored minority of voters to control a majority of legislative seats, the scheme is flatly unconstitutional. Such a blatantly anti-democratic practice stands the principle of majority rule on its head.

In Pennsylvania, whose voters divide almost evenly between two parties, the improperly entrenched party may win a majority of the votes in some elections but not in others. The Constitution views these two outcomes as fundamentally different. Pennsylvania treats them as indistinguishable. In a democracy, the connection between winning more votes than the opposition and gaining control of the government is not supposed to be fortuitous. Politicians deliberately designed Pennsylvania's Congressional districts to make the will of the majority irrelevant, an intentional perversion of democracy that the Constitution simply cannot abide. A districting plan that intentionally creates, or perpetuates, substantial disparities in a voter's or group of voters' influence on the political process violates the Constitution; enabling a political faction to retain control over a majority of the contested seats regardless of whether the faction attracts the support of a majority of the voters is among the clearest ways of creating such forbidden disparities.[12]

There remain four final considerations. First, the requirement for plaintiffs to prove discriminatory intent should not be overlooked. Such intent is often openly admitted in today's lawless redistricting environment, but courts should defer to future legislatures that have internalized the Constitution's requirements and adopted reasonable plans in good faith. It would be foolish to deny that redistricting is an inherently political process, particularly when carried out by a legislature. Judicial intervention is called for when intentional discrimination is so apparent and severe as to forsake majority rule. As Justice Powell explained, a legislature's abandonment of traditional criteria like contiguity and com-

[12] The Constitution's prohibition of anti-majoritarian partisan entrenchment does not conflict with the Fourteenth and Fifteenth Amendments' ban of racial discrimination or the federal Voting Rights Act. Accordingly, no jurisdiction may justify the dilution of minority voting strength by claiming it was necessary to avoid a partisan gerrymander.

pactness, and its failure to follow fair procedures in adopting the plan, indicate that a plan's severe partisan skew was intended. *See Bandemer*, 478 U.S. at 166-67, 173 (Powell, J., concurring in part and dissenting in part).[13]

Second, it would be best for legislatures, not courts, to develop alternatives to unconstitutional systems of entrenched party control. Accordingly, the preferred remedy when redistrictings are struck down should be to ask the legislature to go back to the drawing board. Only when exigencies of time or legislative recalcitrance demand it should courts order specific redistricting plans adopted. *See Abrams v. Johnson*, 521 U.S. 74, 79 (1997) ("When faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying the existing plan, to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.").

Third, the entrenchment of a favored party irrespective of a majority vote is not the only circumstance in which a partisan gerrymander could be unconstitutional. For example, a system could be rigged to give one party a "winner's bonus" of a supermajority of seats when it won a bare majority of votes, but to deny a winner's bonus to competing parties under the same circumstances. The permutations, particularly when state and local legislative races are con-

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[13] *Amici* do not intend to suggest their agreement with every factor that has been referred to in various Court opinions as "a traditional redistricting factor." In particular, *amici* believe that incumbent protection is not a legitimate reason for adopting a set of districts with a severely disproportionate partisan skew, and that partisan advantage clearly cannot justify a plan like Pennsylvania's without completely vitiating *Bandemer*. The pairing of incumbents in the Pennsylvania plan is objectionable not because incumbents should be protected, but because the pairing was designed to eliminate Representatives of only one party.

sidered, are numerous. We respectfully suggest that the Court indicate that this case does not exhaust the categories of unconstitutional gerrymandering, and leave it to lower courts to address other concrete factual circumstances in light of the principles announced in this case. *Cf. Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294 (1955) (*"Brown II"*).

Finally, certainty and repose may be even more important in this area of the law than in others. Candidates and parties, as well as voters, should be confident that a set of districts established early in the decade will endure until the next census. Ideally, courts should be able to judge whether a redistricting is constitutional when the redistricting is first adopted, rather than waiting for it to be used in one or more elections. Similarly, litigation can be more easily avoided if legislatures can evaluate a plan's lawfulness accurately before putting the plan into effect.

Courts can achieve these salutary results by using voting data from previous elections in the same way that politicians do when they draw the new lines. It was only in the 1980 census that the Census Bureau first provided states data, including voting-age population, broken down by electoral precinct. *See* Pub. L. No. 94-171 (1975). Those data, and previous election returns from each precinct, permit computers to create equipopulous districts and accurately project how the districts will "perform" for the favored party. Even before the 2002 election, any competent analyst could predict that Pennsylvania's Congressional districts would preclude a Democratic majority in the delegation unless Democrats won the statewide vote by a landslide. Voters who are discriminated against should not have to suffer through two or three unfair elections before vindicating their rights, nor should the general public have to face the uncertainty of mid-decade litigation over redistricting, when there is reliable evidence of a plan's discriminatory intent and its probable discriminatory effect from the outset.

CONCLUSION

The District Court's judgment should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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