No. 02-1580

IN THE

Supreme Court of the United States

RICHARD VIETH, *et al.*

Appellants,

v.

ROBERT C. JUBELIRER and JOHN M. PERZEL, *et al.*

Appellees

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

BRIEF OF AMICUS CURIAE, THE DEMOCRATIC LEADER OF THE SENATE OF PENNSYLVANIA, IN SUPPORT OF APPELLANTS

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I. INTEREST OF AMICUS CURIAE

This Amicus Curiae brief is filed pursuant to Rule 37 of the Rules of this Court in support of Appellants. Counsel for both Appellants and Appellees have consented to the filing of this brief and their consent letters have been filed with the Clerk of the Court. [1]

Amicus Curiae, the Honorable Robert J. Mellow, the Democratic Leader of the Senate of the Commonwealth of Pennsylvania, fully supports the position of Appellants and urges this Court not only to reaffirm its decision in *Davis v. Bandemer*, 478 U.S. 109, 106 S.Ct. 2797 (1986), stating that a partisan gerrymandering claim raised in the context of redistricting is a "justiciable controversy," but also to clarify the threshold for bringing such claims.

As a voter, taxpayer, candidate, and as an elected official who has sworn to protect the interests of this Commonwealth in securing an orderly, efficient, and fair election process, Amicus has an obvious and substantial interest in Congressional Reapportionment in Pennsylvania.

Amicus has served as a member of the Senate of Pennsylvania for more than 30 years; almost 14 years as Democratic Leader and 18 months as President Pro Tempore. Additionally, Amicus has participated actively in the 1980, 1990 and 2000 reapportionment process, twice having served as the Senate Democrats' representative on the Pennsylvania Legislative Reapportionment Commission. Over that period of time, the level of partisanship, not only in the redistricting

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[1] Pursuant to Supreme Court Rule 37.6, Amicus affirms that no counsel for any party in this case in whole or in part authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution for the preparation or submission of this brief.

process but also in the Pennsylvania political arena in general, has risen so dramatically that the citizens of the Commonwealth have suffered as a result. Indeed, following the most recent census, as the result of the unprecedented partisan gerrymandering by the Republican Party in the Pennsylvania Legislature, the majority of voters have been ignored and relegated to minority status.

Although Appellants sought relief in the present case from this gerrymandering, the lower court dismissed the gerrymandering claim, applying a standard that makes it effectively impossible for parties to establish a cause of action.

Amicus seeks to provide this Court with an important and unique perspective on the Pennsylvania legislative process and the politically inspired maneuvers that characterized the 2000 congressional redistricting process. Amicus thus seeks to give this Court a clearer picture of the increasingly partisan nature of the legislative process and the congressional redistricting process, which has resulted in the establishment of barriers that effectively block equal access to the electoral and legislative processes for Democratic members of the General Assembly and their constituents. The 2000 redistricting plan seriously harms the Pennsylvania Democratic Party's ability to fully represent the interest of its constituencies. In fact, as a result of the Republican drawn plan at issue here, Democrats are relegated to minority status in the Congressional delegation (potentially only 5 of the 19 seats) for the foreseeable future.

Finally, Amicus describes the legislative redistricting process, in which a bipartisan commission draws a redistricting plan. This process, although less partisan than the congressional redistricting process, has become more partisan over the last three cycles of redistricting.

A. THE LEGISLATIVE HISTORY REVEALS AN INCREASE IN POLITICAL PARTISANSHIP IN THE REDISTRICTING AND LEGISLATIVE PROCESS

1. Partisan Congressional Redistricting Plan

Based on the 2000 census, Pennsylvania lost two Congressional seats, decreasing the number of congressional seats from 21 to 19. As a result of this loss of two seats, and shifts in population during the 1990s that rendered the congressional districts used during the 1990s substantially unequal in population, Pennsylvania had to draw new congressional districts in order to comply with the "one person, one vote" rule.

On January 3, 2002, the General Assembly passed a Conference Committee Report of Senate Bill 1200, a congressional redistricting bill originally introduced by Republican members of the Senate on December 10, 2001.

Consideration of SB 1200 was done in true partisan fashion. Amicus, along with other members of the Senate, expressed their concerns during its consideration, noting on the evening of December 10, 2001 that

> "it was after the hour of 5 o'clock this evening before we really had an opportunity to look at a map and to go through congressional reapportionment, and now we are being asked to vote on that same map that I am sure took many months to put together, in a period of just about 5 hours." *Senate Journal* 1193 *(December 10, 2001*) (statement of Senator Mellow).

Amicus further went on to state,

> "Mr. President, we are very upset about the lack of opportunity to present what we think would be important issues into this particular map. Mr.

> President, we feel that millions and millions of voters in Pennsylvania, based on this map, will be disenfranchised. And I do not think there has ever been a clear indication to the people of Pennsylvania that when you have one party in control in the General Assembly, when you have one party control in the Senate, when you have one party control in the House of Representatives, and you have the same party controlling the Chief Executive Office, that absolute power will corrupt absolutely." *Senate Journal* 1198 *(December 10, 2001)* (Statement of Senator Mellow)

These same sentiments were echoed by Senator Michael O'Pake when he stated that

> "[n]o one who looks at this plan can have any doubts. It has only one goal, to put as many Republican Members in Congress as possible, probably 13 or 14 Republicans, and only 5 or 6 Democrats from Pennsylvania. While almost 500,000 more Pennsylvanians regard themselves as Democrats than Republicans, and despite the fact that many years of very important seniority and experience will go into the garbage can when eight Democratic Congressmen are jammed into four district, we are asked to vote on a plan that so disfigures the interests of Pennsylvanians of the Commonwealth and of its communities that the term gerrymander would be a complement to this monstrosity." *Senate Journal* 1199 *(December 10, 2001)* (Statement of Senator O'Pake)

On January 7, 2002, Governor Schweiker signed Senator Bill 1200 into law as Act 1 of 2002. This plan changed the current congressional representation from 11 Republicans and 10 Democratic seats to a plan that resulted

in the election of 12 Republicans and only 7 Democratic representatives in the 2002 congressional elections. Act 1, and now Act 34, could have resulted in 14 Republican and 5 Democratic seats in subsequent elections. Act 1 was challenged in both the state and federal courts. The Pennsylvania Supreme Court upheld it against a challenge that it violated the Pennsylvania Constitution, *Erfer v. Commonwealth*, 568 Pa. 128, 794 A.2d 325 (2002), but the federal court invalidated Act 1 on the grounds that it violated the United States Constitution, *Vieth v. Commonwealth*, 195 F. Supp. 2d 672 (M.D.Pa.) (2002), *app. dismissed sub. nom. Jubelirer v. Vieth*, 123 S.Ct. 67, (2002) and *Schweiker v. Vieth*, 123 S.Ct. 68 (2002). The federal court explained that Act 1 violated the "one-person, one-vote" rule because the plan's deviation of 19 people was avoidable and the reason offered by defendants to justify the deviation – a purported desire to avoid splitting precincts – was a mere pretext. The federal court did not, however, impose a new plan. Rather, the court gave the Pennsylvania General Assembly until April 29, 2002, to enact a revised congressional redistricting plan.

In light of the District Court's order, on April 9, 2002, the Republicans in the Senate of Pennsylvania quickly introduced Senate Bill 1234, a congressional redistricting plan designed to remedy the deficiencies in Act 1. A subsequent amendment, which was drafted without any Democratic participation and with very little notice of its content, was offered on April 15, 2002. The Senate Journal of April 15, 2002, reveals that the Senate Democrats expressed concern that they were not given enough time to review this amendment. One Democratic Senator accurately noted that this new plan still pitted two Democratic incumbents against each other in one district and paired a Republican Incumbent and Democratic incumbent running in another district against each other in a district favoring the Republican. Finally, this plan creates a new district, in a

Republican area of the state, where no incumbent currently resides. *Senate Journal, 1601,(April 15, 2002)*. Democrats in the Senate of Pennsylvania proposed a redistricting plan as an amendment to Senate Bill 1234. The Democratic plan paid attention to the Court's concern with compactness, it respected municipal boundaries and had fewer municipal splits than the Republican plan, it preserved the core of prior districts and it avoids contests between incumbent Congressmen. *Senate Journal 1610 (April 15, 2002)*. The Senate's Republican majority voted down the Democratic alternative by a party-line vote. *Senate Journal 1611-1612 (April 15, 2002)*. This bill was sent to the House for consideration.

On April 17, 2002, the Senate passed House Bill 2545, with a Republican congressional redistricting amendment. Both the amendment and the bill passed on a straight party –line vote. As a result of the amendment, HB 2545 was identical to SB 1234, which was passed by the Senate on April 15, 2002. The House subsequently passed House Bill 2545, as amended, which was signed into law and became Act 34. *Senate Journal 1654-1655 (April 17, 2002).*

2. Legislative Reapportionment Commission

The Pennsylvania Constitution provides for the members of the Legislative Reapportionment Commission, which is established after each decennial census for the purpose of "reapportioning the Commonwealth.[2]" Section 17(b) further provides for the selection of the fifth member of the commission by the four legislative leaders on the commission. If these members fail to come to an agreement on the fifth member, the fifth member, who will be the Chairman of the Commission, is chosen by a majority of members of the Pennsylvania Supreme Court.

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[2] Art II, Section 17(a)

The Legislative Reapportionment Commission has been in place since Constitutional Convention amended the Pennsylvania Constitution, in 1967. For the first two rounds of reapportionment after 1967, the members of the Legislative Reapportionment Commission were able to select the fifth member. For the Legislative Reapportionment Commissions established after the 1990 and 2000 census, the Pennsylvania Supreme Court chose the fifth member due to the inability of the legislative members to agree on the fifth person. This evidences the escalating partisanship and the knowledge that control of the redistricting process has long-term political advantages. However, Amicus concurs in previous floor remarks that the Commission process has at least allowed the voice of the minority party to be heard and its plans to be considered, unlike the process used to enact Acts 1 and 34.

> "In the Legislative Reapportionment, there was a tremendous amount of dialogue and discussion with the chairman of the Reapportionment Commission. We were given the opportunity to present our plans to the gentlemen. We had an opportunity to discuss them in an open forum and have public hearings. The difference between congressional reapportionment and legislative reapportionment is that in the legislative reapportionment we dealt with it in an upright, open manner. In congressional reapportionment, we [the Democratic Party] have been completely shut out of the process." *Senate Journal,1601 (April 15, 2002).*

II. THE SUPREME COURT SHOULD REAFFIRM ITS DECISION IN *DAVIS V. BANDEMER,* 478 U.S. 109, 106 S.CT. 2797 (1986), WHICH HELD THAT PARTISAN

GERRYMANDERING CLAIMS ARE JUSTICIABLE CONTROVERSIES, AND ENSURE THE VIABILITY OF THE POLITICAL GERRYMANDERING CAUSE OF ACTION BY CLARIFYING THE STANDARD FOR ADJUDICATING SUCH CLAIMS.

A. Summary of the Argument

The Supreme Court should reaffirm its decision in *Davis v. Bandemer*, 478 U.S. 109, 106 S.Ct. 2797 (1986), which held that partisan gerrymandering claims are justiciable controversies not shielded from judicial review by the "political question" doctrine, and clearly articulate the standard an aggrieved party needs to meet to establish such a claim. In the 17 years since the Supreme Court decided *Bandemer*, the level of political partisanship has increased dramatically. In relation to the redistricting process, current technology makes it possible to dilute the voting strength of an entire segment of citizenry via the use of a computer program that surgically manipulates district boundary lines to maximize partisan advantage. Communities, voting blocs and other groups with common political interests that possess strong voting tendencies and stronger voting records can be dissected and rendered impotent through the simple click of a computer mouse.

Undoubtedly, there is a significant level of partisanship in drawing any redistricting plan and this court has recognized that fact on numerous occasions. Importantly, Amicus Curiae does not purport to favor a system of proportional representation. Rather, it is Amicus Curiae's position that the Equal Protection Clause of the United States Constitution does not permit the rights of an entire voting group to be dissected, diluted, or suppressed by the political party controlling a state legislature for the sole purpose of increasing the controlling party's political power.

The *Bandemer* Court recognized the dangers of political gerrymandering in 1986. Those dangers remain and, in fact, are more prevalent today as evidenced by the blatant political gerrymandering that exists in Act 34. However, lower courts interpreting *Bandemer* have created a standard with which aggrieved parties cannot comply, thereby effectively rendering the decision meaningless. Consequently, in addition to reaffirming the justiciability issue, this Court should clarify the burden of proof for adjudicating such claims in a manner that makes the cause of action meaningful. The judgment of the district court dismissing plaintiffs' claim that Act 34 is a partisan gerrymander in violation of the Equal Protection Clause of the United States Constitution should be reversed and remanded to the district court for further proceedings in accordance with this Court's decision.

B. Argument

1. Justiciability of Political Gerrymandering Claims

In *Bandemer*, this Court, relying on cases such as *Baker v. Carr*, 369 U.S. 186 (1962), *Reynolds v. Sims*, 377 U.S. 533 (1964), *Whitcomb v. Chavis*, 403 U.S. 124 (1971), *White v. Regester*, 412 U.S. 755 (1973), and *Gaffney v. Cummings*, 412 U.S. 735 (1973), concluded that the adequacy of representation in the legislative branch of government presents a justiciable issue. In so doing, the Court extended the scope of the Equal Protection Clause to voting members of a political party seeking "the same chance to elect representatives of their choice as any other political group." 478 U.S. at 124. Justifying the extension, the *Bandemer* Court noted the fact that *Gaffney* demonstrated

> "that the claim is submitted by a political group, rather than a racial group, does not distinguish it in terms of justiciability. That the characteristics of the complaining group are not immutable or that the group

has not been subject to the same historical stigma may be relevant to the manner in which the case is adjudicated, but these differences do not justify the refusal to entertain such a case." *Id.* at 125.

The *Bandemer* decision provides a clear and cogent analysis of the applicability of the *Baker v. Carr* "political question" test to political gerrymandering decisions. As set forth in *Baker*,

> "[p]rominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or the lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of the court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." 369 U.S. at 217.

The *Bandemer* court applied the *Baker* court's "political question" analysis and reasoning and concluded that partisan gerrymandering claims are justiciable controversies. Specifically, the *Bandemer* court found that resolving the claim did not involve the federal judiciary in a matter more properly decided by a co-equal branch of government; there was no risk of foreign or domestic disturbance if the court resolved the issue; and that judicially discernible and manageable standards exist through which political gerrymandering cases could be decided. 478 U.S. at 123. The reasoning of *Baker* and *Bandemer* is equally applicable in this matter.

Notwithstanding the fact that *Baker* and *Bandemer* addressed state legislative redistricting rather than congressional redistricting, the rationale behind *Baker* and *Bandemer* remains persuasive. In fact, lower courts addressing political gerrymandering challenges to congressional redistricting plans have refused to distinguish *Bandemer* because it addressed state legislative redistricting rather than congressional redistricting. *See e.g.*, *Badham v. Eu*, 694 F.Supp. 664 (1988). In so doing, it was noted "nothing in the Bandemer analysis turned on the distinction between congressional redistricting and state legislative redistricting." *Id.* at 668. Consequently, simple application of the *Baker* test to the facts before the court support this Court's continued recognition of political gerrymandering claims as justiciable controversies.

2. Standard for Adjudication

Although the *Bandemer* Court was correct in finding political gerrymandering claims justiciable, application of the test enunciated by the plurality of the Court has proven problematic. The *Bandemer* test requires a plaintiff alleging political gerrymandering to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group. 478 U.S. at 127. To prove discriminatory effect, first a plaintiff must prove an actual or projected history of disproportionate election results. Second, plaintiff must establish "that the electoral system is arranged in a manner that will consistently degrade a voter's, or group of voters', influence on the political process as a whole." *Id.* at 132. It is judicial interpretation of the "political process" prong by lower courts that has resulted in the de facto overruling of *Bandemer*.

The *Bandemer* court recognized the inherent difficulty in applying its test, noting that "[d]etermining when an electoral system has been 'arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole […] is of necessity a difficult

inquiry." *Id.* at 142-143 (internal citations omitted). That sentiment was echoed in this case where the district court noted that "the recondite standard enunciated in *Bandemer* offers little concrete guidance." *Vieth v. Commonwealth*, 188 F.Supp.2d 532, 544 (2002). As a result of this lack of guidance, lower courts applying the *Bandemer* test have effectively rendered it meaningless by establishing a standard that is virtually impossible to meet. Consequently, this Court needs to craft a standard that will allow plaintiffs to pursue a political gerrymandering claim past the pleadings stage in an appropriate case and thus ensure that *Bandemer* does not create an illusory cause of action.

The fact that political gerrymandering claims are justiciable is irrelevant if complaining parties cannot meet the standard for proving such claims. The *Bandemer* test, and its subsequent interpretation has created such a scenario, as evidenced by the lower court's decision in this matter. Simply, the "political process" prong of the *Bandemer* effects test is overbroad.

In reality, a major political party will never be successful in proving that it has been "essentially shut out of the political process," 478 U.S. at 139-140, because of a redistricting plan. Nor will a redistricting plan wholly prevent a major party from registering voters and organizing. If such proof is required, voters from a major party will never be able to demonstrate that they have been unconstitutionally discriminated against.

While the *Bandemer* Court concluded that a redistricting plan that makes winning elections more difficult is not necessarily unconstitutional, 478 U.S. at 131, a plan that makes winning elections practically impossible surely violates the Equal Protection Clause. When an apportionment plan creates severely skewed or lopsided districts, voters in those districts undoubtedly suffer. By tilting the playing field to favor of one party's political efforts and against the others, potential candidates with a

track record of appealing to voters may nonetheless opt not to seek office because districts are so heavily skewed in favor of the opposing parties. Moreover, such candidates may be extremely disadvantaged in the ability to raise funds solely because of the appearance of the unlikelihood of election success based upon the makeup of the district in the redistricting plan. The prospect of voters not having the choice of Democratic candidates or Democratic candidates without the ability to raise the funds necessary to run a competitive campaign, solely as a result of a redistricting plan can only lead to voter apathy and relegate those voters to perpetual minority status.

Former Chief Justice Zappala of the Pennsylvania Supreme Court, in his dissenting opinion in *Erfer v. Commonwealth of Pennsylvania*, 568 Pa. 128, 794 A.2d 325 (2002), a challenge to Act 1 brought in Pennsylvania state court, accurately recited the reasons Act 1 was a political gerrymander in violation of the Equal Protection Clause. This reasoning is relevant to an analysis of Act 34 because the district court in this matter concluded that the Republican Party passed a plan nearly identical to Act 1 after that court found Act 1 unconstitutional. *See Vieth v. Commonwealth of Pennsylvania*, 241 F.Supp.2d 478, 485 (2003).

Chief Justice Zappala concluded that Act 1 "was formulated so as to intentionally discriminate and dilute the vote of an identifiable political group and had an actual discriminatory effect on that group." *Erfer*, 794 A.2d 325, 335. Specifically, he found that "the plan effectively secures an advantage to Republican candidates of 13-6 or 14-5 in the Pennsylvania congressional delegation" and that the "continual succession of Republican candidates is also achieved by the reasonable likelihood that they will prevail in 2002 and beyond." *Id.* at 339-340 .

Chief Justice Zappala recognized that "an equal protection challenge will not be sustained merely because particular candidates may not win in any given election." *Id.*

at 340. However, he also recognized that the fundamental principle at stake is "that we are governed by democracy and not oligarchy." *Id.* When that principle is disregarded, Zappala noted, "we have lost more than the representation of a Republican of Democratic elected official in the United States Congress." *Id.*

Justice Zappala's opinion accurately characterizes Amicus' interest in this litigation. Act 34 denies voters who support Democrats a fair chance to influence the election process. It creates an oligarchy. Act 34 effectively renders it impossible for voters who prefer Democratic candidates to elect a majority of Pennsylvania's congressional delegation, even if those voters form a majority of the electorate in a given election. Indeed, because of the way the districts are gerrymandered, Democrats can never win more than 7 of Pennsylvania's 19 congressional seats, and can potentially win only 5 of those seats. Thus, the plan guarantees that Democrats will be a minority for the foreseeable future. The overreaching by the Pennsylvania Republican Party in an effort to increase its power has effectively disenfranchised and diluted the voice of Democratic voters within this Commonwealth.

III. CONCLUSION

Amicus is well aware that the redistricting process is inherently political. Amicus is also aware of the *Bandemer* plurality's opinion that the party in control of state government at the time district lines are drawn is to be given some leeway when drawing districts. However, when the controlling political party draws district boundaries in such an egregious and blatantly partisan fashion so as to relegate the supporters of the majority to minority status, as the Pennsylvania Republican Party has done to Pennsylvania Democratic voters in Act 34, courts should be available to a

voter to remedy such action. Simply, a redistricting plan should not make it effectively impossible for one party, especially the majority party in many elections, to win a majority of congressional seats.

The Pennsylvania Republican Party executed an old-fashioned political power grab when it passed Act 34. At its core, Act 34 is a blatantly partisan redistricting plan that effectively thwarts majority rule and "consigns the majority to minority status." 478 U.S. at 126, n.9. Undoubtedly, its intent was to increase its hold on congressional seats, cripple the Democratic Party, and ensure that for the next 10 years the citizens of the Commonwealth who vote for Democrats will have virtually no chance to elect representatives of their choice despite being the majority party in Pennsylvania.

This Court should overturn the lower court decision in this matter. Act 34 is a pure political gerrymander in violation of the Equal Protection Clause of the United States Constitution. Consequently, it is the perfect case for this Court to reaffirm and clarify its holding in *Bandemer* because as Former Pennsylvania Supreme Court Chief Justice Zappala noted "if this case does not establish unconstitutional political gerrymandering, no such claim exists" and this Court should not "waste its valuable judicial resources entertaining illusory claims that, in reality, can never be established." 794 A.2d at 343.

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