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 LEADERSHIP OF THE ALABAMA SENATE AND HOUSE OF REPRESENTATIVES: LOWELL BARRON, JEFF ENFINGER, VIVIAN DAVIS FIGURES, RODGER SMITHERMAN, SETH HAMMETT, DEMETRIUS NEWTON, AND KEN GUIN IN SUPPORT OF APPELLEES

JAMES U. BLACKSHER
Counsel of Record
710 Title Bldg., 300 North
Richard Arrington, Jr., Blvd.
Birmingham, Alabama 35203-3352
(205) 322-1100

ROBERT D. SEGALL
COPELAND, FRANCO, SCREWS
& GILL, P.A.
444 South Perry Street
Post Office Box 347
Montgomery, Alabama 36101-0347
(334) 834-1180

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INTEREST OF AMICI CURIAE

This brief is filed on behalf of the leadership of the Alabama Senate and House of Representatives: Senator Lowell Barron, President Pro Tem of the Senate; Senator Jeff Enfinger, Senate Floor Leader and Majority Leader; Senator Vivian Davis Figures, Chair of the Senate Democratic Caucus; Senator Rodger Smitherman, Chair of the Alabama Legislative Black Caucus; Representative Seth Hammett, Speaker of the House; Representative Demetrius Newton, Speaker Pro Tem of the House; and Representative Ken Guin, House Majority Leader. All amici were elected and serve as Democrats. Senators Figures and Smitherman and Representative Newton are African Americans.[1]

Amici are concerned that a new constitutional rule prohibiting partisan gerrymandering, such as the one suggested by the Vieth appellants, will undermine the achievements of the Alabama Legislature when it enacted statutes in 2001 redrawing in a racially fair political process the districts from which members of Congress, the Alabama Senate and the Alabama House of Representatives are elected. All three of these redistricting statutes received preclearance under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. *See* http://www.usdoj.gov/crt/voting/sec_5/statewides.htm. This was the first time since 1901 that the Alabama Legislature was redistricted without intervention by the courts. It was made possible primarily

[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, amici state that none of the parties authored this brief in whole or in part and no one other than amici or counsel contributed money or services to the preparation and submission of this brief.

by the willingness of white and African-American Democratic legislators, who controlled majorities in both houses of the Legislature, to form coalitions that sought both to protect reliable Democratic seats with majority-black constituencies and to reduce the size of those black voter majorities in order to increase the number of reliable Democratic voters in several seats closely contested between Democrats and Republicans. As a result, in the 2002 elections, even though Republican candidates polled statewide majorities in Congressional and most statewide office contests, Democrats won 52% of the votes statewide for State Senate seats and 51% of the votes statewide for State House seats. Democrats captured 71% of the 35 Senate seats and 60% of the 105 House seats. *See* http://www.sos.state.al.us/cf/election/her/her-sw.cfm and http://www.legislature.state.al.us/.

After § 5 preclearance was obtained, the state legislative districts were successfully defended in a civil action claiming that they violated the constitutional principles of *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny. The State defendants, relying on *Easley v. Cromartie*, 532 U.S. 234 (2001), contended that politics, not race, was the predominant motive for the plans' designs, and the three-judge district court agreed. *Montiel v. Davis*, 215 F.Supp.2d 1279, 1283 (S.D. Ala. 2002) (3-judge court) ("Plaintiffs have proffered no evidence to refute the abundant evidence submitted by the defendants and defendant-intervenors which establishes that black voters and Democratic voters in Alabama are highly correlated; that the Legislature utilized recent election returns to ascertain actual voter behavior; and that Acts 2001-727 and 2001-729 were the product of the Democratic Legislators' partisan political objective to design Senate and House plans that would preserve their respective Democratic majorities.") (footnote omitted).

SUMMARY OF ARGUMENT

The Alabama Legislature in 2001 successfully redrew its Senate, House and Congressional districts for the first time since 1901 without judicial intervention. Heeding this Court's holding in *Easley v. Cromartie*, 532 U.S. 234 (2001), that the purposeful aggregation of African-American voters is justified when it is done primarily for partisan political purposes, the Democratic leadership pursued a biracial strategy aimed at safeguarding its governing majorities in both houses of the Legislature. Anticipating the coalitional politics endorsed by this Court in *Georgia v. Ashcroft*, 123 S.Ct. 2498 (2003), African-American representatives pulled, hauled and traded with their white colleagues in negotiations that necessarily reduced the size of black voter majorities in the "safe" black districts in order to increase the number of reliably Democratic voters in several contested black influence districts. This strategy aimed to increase the effective exercise of the electoral franchise for African Americans by preserving the important leadership roles of their representatives in governing Democratic majorities.

The biracial, coalition-building strategy succeeded. The 2002 general election returned Democratic candidates to 71% of the Senate seats and 60% of the House seats, with 52% of the statewide vote supporting Democrats in Senate races and 51% supporting Democrats in House races. Republican candidates, meanwhile, won most of the statewide offices, although the Democratic candidate won at least one of them. The Democratic leadership also managed to increase one of the black influence districts in the Congressional plan to 30% black voting-age population in hopes of capturing a vacant seat and improving Democratic representation in a Congressional delegation composed of five Republicans and two Democrats. However,

the Republican candidate narrowly won this open Congressional seat.

A new constitutional rule, such as the one proposed by appellants, which would put limits on the allowable variation between a party's share of the vote in some array of statewide elections and the number of seats it carries in legislative and Congressional elections, threatens the ability of African Americans in Alabama to continue the effective exercise of their newly won ability to participate in the political process. As an historically entrenched minority, African Americans can hope to move beyond permanent minority status in the Legislature only if they can provide partisan white politicians an incentive to build winning coalitions between white and black voters. That incentive would be seriously diminished, if not eliminated altogether, if this Court mandated redistricting rules that guarantee rough proportional representation between the two major parties.

This Court should be mindful of the potential conflict between the asserted rights of partisan elites and their supporters and the established rights of historically disadvantaged racial and ethnic minorities. This appeal does not present the question whether racial minorities may demand the creation of effective influence districts as a matter of statutory right; rather, it presents the question whether party partisans will be afforded constitutional rights that could trump both the statutory and constitutional rights of racial and ethnic minorities to participate equally in the political process and to negotiate influence districts that enhance their effective exercise of the electoral franchise. Perversely, such an anti-partisan gerrymandering rule would encourage the cracking of black influence districts, the repacking of majority-black districts and increased racial polarization of the electorate.

The identifiable political group whose vote is diluted by alleged partisan gerrymandering is fundamentally indeterminate. Appellants' arguments confuse conceptually the constitutional difference between individuals belonging to an immutable, ancestral group who share electoral preferences and all individuals who share political preferences. The former individuals do not change their group identity whether or not they share preferences. The latter individuals change their group identity as their electoral preferences change. The Constitution forbids discrimination against individuals based on a suspect group classification, but it does not guarantee individuals the right to have their preferences reflected proportionally in election results. Indeed, single-member districts are not designed to aggregate individual preferences. Only at-large election systems employing proportional representation rules are designed to aggregate individual preferences more or less accurately. The shares of the statewide vote garnered by Democratic and Republican candidates reflect the relative strengths of groups of individual voters who share preferences provisionally. They do not reflect stable associations of partisan supporters. In the United States, most persons vote for candidates, not for the more committed party cadres, who compete for the support of an electorate whose allegiance varies from candidate to candidate, from election to election and from generation to generation.

Finally, the original intentions of the founding generation do not, as the amici historians contend, lend any support to proposals for discovering in the Constitution a principle establishing even rough proportional representation for party partisans. But constitutional history leaves no doubt that it would be a travesty to subordinate to concerns of partisan fairness the ability of African Americans and other racial and ethnic minorities to participate

equally in the political process and to elect candidates of their choice.

ARGUMENT

I. THE FACTS IN ALABAMA: THE LONG JOURNEY FROM SLAVERY AND JIM CROW TO AFRICAN AMERICANS' EFFECTIVE EXERCISE OF THE FRANCHISE IN THE BIRACIAL POLITICS OF REDISTRICTING.

Alabama is the state in which this Court established "one person, one vote" as a substantive constitutional requirement for all state elective representation systems. *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (*quoting* Justice Douglas in *Gray v. Sanders*, 372 U.S. 368, 381 (1963)). Alabama's state legislative districts had not been redrawn since passage of its 1901 Constitution, which was enacted primarily for the purpose of disfranchising African-American voters. *Hunter v. Underwood*, 471 U.S. 222, 228-29 (1985); *Knight v. Alabama*, 787 F.Supp. 1030, 1090 (N.D. Ala. 1991), *aff'd in relevant part*, 14 F.3d 1534 (11th Cir. 1994); *Dillard v. Crenshaw County*, 640 F.Supp. 1347, 1358 (M.D. Ala. 1986); *Bolden v. City of Mobile*, 542 F.Supp. 1050, 1062-63 (S.D. Ala. 1982), *on remand from City of Mobile v. Bolden*, 446 U.S. 55 (1980). In the four decades following remand from *Reynolds*, the state House and Senate plans were drawn either by courts themselves or under the supervision of a court. *Kelley v. Bennett*, 96 F.Supp.2d 1301, 1308-10 (M.D. Ala.), *rev'd sub nom. Sinkfield v. Kelley*, 531 U.S. 28 (2000) (summarizing the history of legislative redistricting following the 1970, 1980 and 1990 censuses); *Burton v. Hobbie*, 561 F.Supp. 1029, 1030-32 (M.D. Ala. 1983) (3-judge court) (summarizing federal court involvement in legislative redistricting from 1962 to 1983).

As a result of court-ordered redistricting, the first two African Americans to serve in the Alabama Legislature since Reconstruction, Fred Gray and Thomas Reed, were elected to the House in 1970. FRED GRAY, BUS RIDE TO JUSTICE 237-53 (1995); ROBERT J. NORRELL, REAPING THE WHIRLWIND: THE CIVIL RIGHTS MOVEMENT IN TUSKEGEE 190-200 (1986). In the first election following the 1980 census, seventeen African Americans were elected to the House and three to the Senate.[2] Following the state court-ordered redistricting in 1993, *see Rice v. Sinkfield*, 732 So.2d 993 (Ala. 1999), 27 African Americans were elected to the House and 8 African Americans were elected to the Senate, all but one[3] from a majority-black single-member district. *See* submissions of the Alabama Attorney General to the U.S. Department of Justice, August 14, 2001, and September 4, 2001, http://www.legislature.state.al.us/senate/senatemaps2001/Act%20No.%202001-727%20Preclearance%20Letter.pdf (hereafter "Senate submission"); http://www.legislature.state.al.us/house/housemaps2001/Act%20No.%202001-729%20Letter.pdf (hereafter "House submission"). All the African-American legislators were elected as Democrats and were members of the House and Senate Democratic Caucuses and the Legislative Black Caucus. Democrats held substantial majorities in both houses of the Legislature, and African Americans held several important leadership positions, including Speaker pro tem of the House, Chair of the Senate Finance and Taxation

[2] *See* James U. Blacksher and Larry Menefee, *From* Reynolds, v. Sims *to* City of Mobile v. Bolden: *Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HAST. L.J. 1, 39 n.261 (1982).

[3] House District 85 had a black total population majority but a white voting-age majority. *Kelley v. Bennett, supra*, 96 F.Supp.2d at 1319.

Education Committee and Chair of the House Government Finance and Appropriations Committee.

The Alabama Attorney General, the Governor and the leadership of the Legislature spent most of the past decade defending inter-related *Shaw* challenges to the 1993 redistricting plan. *See Kelley v. Bennett, supra*; *Rice v. Sinkfield, supra*. The district court found *Shaw* violations in several House and Senate districts, but this Court reversed the judgment on standing grounds. *Sinkfield v. Kelley*, 531 U.S. 28 (2000). In these circumstances, as they undertook redistricting in 2001, the Democratic leadership took its cue from this Court's most recent *Shaw* decision, *Easley v. Cromartie*, 532 U.S. 234 (2001). *Easley* holds that a *Shaw* plaintiff has the burden of proving that the aggregations of African-American residents in legislative redistricting plans are *not* predominantly the product of "a constitutional political objective," such as the protection of partisan incumbents. 532 U.S. at 239, 247-48. "Caution is especially appropriate in this case, where the State has articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated." *Id*. at 242.

In Alabama, as was the case in *Georgia v. Ashcroft*, 123 S.Ct. 2498 (2003), "[t]he goal of the Democratic leadership – black and white – was to maintain the number of majority-minority districts and also increase the number of Democratic Senate seats." 123 S.Ct. at 2504 (citation omitted). African-American legislators in Alabama also recognized that they and their constituents had "a better chance to participate in the political process under the Democratic majority than [they] would have under a Republican majority," and they understood the many advantages they would enjoy in the actual work of the Legislature as leaders and members of a governing Democratic majority. *Id*. at 2513. So "[p]art of the Democrats'

strategy was not only to maintain the number of majority-minority districts, but to increase the number of so-called 'influence' districts, where black voters would be able to exert a significant – if not decisive – force in the election process." *Id.* at 2506 (citation omitted). Just as most African-American legislators in Georgia voted for the product of this biracial coalition strategy, *id*., so did all members of the Senate Black Caucus and 20 of 27 members of the House Black Caucus in Alabama vote for the finally enacted House plan, while all African-American Senators and 19 African-American House members voted for the final Senate plan. *See* House submission, *supra*, at 6-7; Senate submission, *supra*, at 13. They accepted the political risks of reducing the size of black voter majorities in the "safe" African-American districts and worked "to pull, haul, and trade to find common political ground" with their white Democratic (and Republican) colleagues. 123 S.Ct. at 2513 (*quoting Johnson v. De Grandy,* 512 U.S. 997, 1020 (1994)).

The strategy of coalition-building between white and black Democrats was explained to the U.S. Department of Justice during the preclearance process under § 5 of the Voting Rights Act. Unlike the data the Justice Department found insufficient to demonstrate the absence of retrogression in the Georgia Senate plan, the Democratic performance data provided by the Alabama leadership, which included voting returns from previous elections in the legislative districts as well as for statewide offices, clearly met the State's burden of demonstrating no retrogression in African-American voters' "effective exercise of the electoral franchise." 123 S.Ct. at 2504 (quoting *Beer v. United States,* 425 U.S. 130, 141 (1976)).

As indicated, before the first elections were held under the precleared House and Senate redistricting plans in 2002, a three-judge federal district court dismissed a *Shaw* challenge on the ground that partisan political motives predominated over any purely racial design. *Montiel v.*

Davis, supra. The 2002 general election results show that the Democratic leadership's coalition strategy was largely successful. All of the Democratic seats with black voter majorities in the 1993 plan continued to elect candidates favored by African-American voters in 2002, notwithstanding the reduction in the size of those black voter majorities. White Democrats won in all eight of the black influence districts in the Senate races, and Democratic candidates won twelve of the seventeen black influence districts in the House, including seven of the ten that were contested in the general election. *See* tables below.[4] In House District 84, with a black VAP of 48.954%, the white incumbent, Billy Beasley, was unopposed in both the Democratic primary and the general election. In House District 85, with a black VAP of 43.951%, the African-American incumbent, Locy Baker, won the Democratic primary and defeated a white Republican opponent in the general election.

Senate District	% black VAP	Winner	Winner's% of vote
7	30.624	Democrat	64.06
11	32.531	Democrat	64.02
21	22.633	Democrat	58.77
22	28.299	Democrat	51.11
27	20.296	Democrat	64.06
30	28.616	Democrat	unopposed
31	22.565	Democrat	65.17
35	27.764	Democrat*	50.93

* Defeated Republican incumbent

[4] The election returns displayed in these tables can be found at http://www.sos.state.al.us/cf/election/her/her-sw.cfm. The voting-age population figures are culled from the redistricting "map packages" which can be obtained from the State Reapportionment Office. *See* http://www.legislature.state.al.us/reapportionment/reap.html#anchor509416. The winner is listed as unopposed where he or she had no major party opposition.

House District	% black VAP	Winner	Winner's% of vote
6	26.863	Democrat	57.60
8	21.408	Democrat	73.98
21	24.293	Democrat	51.09
33	21.103	Republican	61.58
37	21.227	Democrat	74.22
38	28.432	Republican	58.53
61	27.078	Democrat	unopposed
64	23.822	Republican	55.20
65	24.768	Democrat	57.87
66	24.145	Democrat	unopposed
73	25.049	Republican	unopposed
75	20.982	Republican	unopposed
81	23.163	Democrat	69.93
84	48.954	Democrat	unopposed
85	43.951	Democrat**	60.64
89	31.123	Democrat	unopposed
90	31.895	Democrat	unopposed

** African American

The Democratic leadership of the Alabama Legislature also attempted to create an effective black influence district in the Congressional redistricting plan. Bob Riley was vacating his Third Congressional District seat to run for (and ultimately to win) the Governor's office. After hard bargaining between Democrats and Republicans in both houses and with the members of the Alabama Congressional delegation,[5] the plan enacted raised black VAP in District 3 to 30.215%. The size of the black voter majority in Congressional District 7 was reduced substantially in order to increase Democratic voting strength in District 3. *See* http://www.legislature.state.al.us/reapportionment/

[5] *See* Bill Poovey, *Alabama Demos, Republicans battle over new U.S. House districts*, The Associated Press, Sept. 17, 2001 (online edition); David White, *Governor signs district plan*, The Birmingham News, Feb. 2, 2002 (online edition).

congressional/congressional.html. The Department of Justice interposed no objection to Alabama's Congressional plan under section 5 of the Voting Rights Act. Nevertheless, the Republican candidate won this open seat by a narrow margin. *See* table below. The (white) Democratic candidate garnered 48.20% of the general election vote.

Congressional District	% black VAP	Winner	Winner's% of vote
1	25.731	Republican	60.83
2	27.444	Republican	68.75
3	30.215	Republican	50.31
4	4.774	Republican	unopposed
5	16.096	Democrat	73.28
6	7.291	Republican	unopposed
7	58.327	Democrat*	unopposed

* African American who defeated African-American incumbent in the Democratic primary.

It is clear from these data that, although African Americans reliably vote Democratic in substantial numbers, and although some white voters also usually support either Democrats or Republicans, many Alabama voters split their tickets and vote for the Democratic candidate for one office and the Republican candidate for another. The following table, which summarizes returns from the 2002 general election, demonstrates this fact dramatically:

Office	Statewide total vote	Repub total vote	Repub % vote	Demo total vote	Demo % vote	Demo seats	Demo % seats
State Senate	1,236,306	549,943	44.48	647,267	52.35	25	71.4
State House	1,199,583	558,087	46.52	616,224	51.37	63	60.0
US House	1,268,802	694,606	54.75	507,117	39.97	2	28.6
US Senate	1,353,023	792,561	58.58	538,878	39.83	0	0
Governor	1,367,053	672,225	49.17	669,105	48.95	0	0
Attorney General	1,326,304	780,524	58.85	515,123	38.84	0	0
Lieutenant Governor	1,349,038	630,839	46.76	694,442	51.48	1	100

The statewide offices selected by appellants to establish a Democratic benchmark in Pennsylvania would produce a Republican benchmark in Alabama, even though the results of other Alabama elections yield Democratic voting majorities. No identifiable political groups and not even a colorable partisan constitutional injury can be postulated when electoral support for the two major parties varies this much.

II. THERE IS A POTENTIAL CONFLICT BETWEEN A NEW PARTISAN GERRYMANDERING RULE AND THE VOTING RIGHTS OF AFRICAN AMERICANS AND OTHER RACIAL OR ETHNIC MINORITIES.

If this Court created a new constitutional rule along the lines proposed by the Vieth appellants, the coalition-building strategy that defeated the *Shaw* challenges against the plans black legislators successfully negotiated with white legislators likely would be turned around to attack those plans in new lawsuits alleging unconstitutional partisan gerrymandering. The State's successful politics-not-race defense has completely discouraged new *Shaw* challenges to any of Alabama's legislatively enacted redistricting plans. But a new wave of litigation in Alabama is bound to follow a ruling by this Court along the lines urged by the Vieth appellants. As we understand appellants' proposed constitutional standard, persons who voted for Republican House or Senate candidates anywhere in Alabama could initiate a civil action challenging the entire House and Senate plans. Under appellants' two-part test, the plaintiffs would have no difficulty showing "that partisan advantage was the predominant motivation behind the entire statewide plan," appellants' brief at 32, because an intent to safeguard Democratic seats was open and explicit. Second, to show allegedly impermissible

effects, they would point not to statewide totals in the House and Senate races themselves but to returns "for statewide offices such as U.S. Senator, governor, and attorney general." *Id*. at 38 n.32. Since those offices, along with most other statewide offices, have been won more often over the past decade by Republicans than by Democrats, http://www.sos.state.al.us/cf/election/her/her-sw.cfm, appellants' proposed constitutional standard could require the State – or, more likely, a federal court – to redraw the House and Senate plans to provide Republican candidates a better opportunity to be elected. That would mean, at a minimum, "cracking" African Americans in the black influence districts, either by repacking them in majority-black districts or by further dispersing them among majority-white districts.

Appellants do not explain how such a result could be squared with this Court's precedents prohibiting violation of the statutory and constitutional voting rights of African Americans and other racial or ethnic minorities. *E.g., Georgia v. Ashcroft, supra*, 123 S.Ct. at 2512 ("a court must examine whether a new plan adds or subtracts 'influence districts' – where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process"); *id*. at 2513-14 ("the dissent ignores that the ability of a minority group to elect a candidate of choice remains an integral feature in any § 5 analysis") (*citing, inter alia*, *Thornburg v. Gingles,* 478 U.S. 30, 98 (1986) (O'Connor, J., concurring in judgment)). This Court has not resolved the question whether diluting the electoral strength of protected minorities in influence districts may constitute a violation of § 2 of the Voting Rights Act, 42 U.S.C. § 1973. *See Parker v. Ohio*, 263 F.Supp.2d 1100 (S.D. Ohio 2003), *appeal pending*, No. 03-411 (U.S. S.Ct.) (whether racial minorities may maintain a cause of action under § 2 to challenge

state legislative redistricting plan that fails to provide them influence districts).[6]

But the issue presented in the instant appeal by the circumstances in Alabama is not whether African Americans are entitled to demand influence districts as a matter of right, but whether the exercise of their equal opportunity to participate in the political process and to negotiate influence districts shall be constrained constitutionally if the political party they support obtains a higher percentage of legislative seats than the party's percentage of the statewide vote. Will the elected representatives of African Americans who have pulled, hauled and traded with their white colleagues to preserve Democratic majorities in both houses of the Alabama Legislature by successfully encouraging the formation of black-white voter coalitions now be told they must repack their safe black districts, thereby reducing their ability to influence legislation and encouraging a racial re-polarization of the vote? An historically entrenched minority, like African Americans in Alabama, likely would be the only enduring losers if this Court established a new constitutional rule that requires rough proportional representation between the two major parties. As history demonstrates, eventually Democrats and

[6] We make no distinction for purposes of this brief between African-American "influence" districts and African-American "coalitional" districts. *E.g., Georgia v. Ashcroft*, 123 S.Ct. 2498, 2513 (2003); *id.* at 2518 (Souter, J., dissenting); *Hall v. Virginia*, __ F.Supp.2d __, 2003 WL 21957378 (E.D. Va., Aug. 7, 2003) (3-judge court), *appeal filed* Sept. 4, 2003. Historically in Alabama, a substantially larger black voter minority has been required to elect its preferred candidate if that candidate is an African American than if he is white. On the other hand, as noted above in the cases of Representatives Billy Beasley and Locy Baker, the preferred candidate of black voters has not always been an African American even in districts where the size of the black electorate is large enough to elect one.

Republicans will swap places in the driver's seat of the legislature even without such a judicially enforced mandate. But the more nearly permanent racial and ethnic minorities would forever lose much of the leverage they recently deployed in Alabama to be part of the governing majority, because white partisans would not have as strong an incentive to join inter-racial coalitions.

Indeed, reconciling the doctrinal tensions between racial and partisan gerrymandering was central to the several opinions in *Davis v. Bandemer*, 478 U.S. 109 (1986), including Justice White's plurality opinion, which announced the partisan gerrymandering standard appellants now ask this Court to relax. It is likely no coincidence that *Bandemer* was handed down the same day as was *Thornburg v. Gingles*, which adopted the three-pronged test for at-large vote dilution under section 2 of the Voting Rights Act, 42 U.S.C. § 1973. 478 U.S. at 48-49 ("Stated succinctly, a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group.") (*citing, inter alia*, Blacksher and Menefee, *supra* note 2, at 34). Justice O'Connor's concurring opinion in *Gingles* complained that Justice Brennan's majority opinion gave too much weight to the three-pronged test and ignored other factors in the "totality of circumstances" constitutional standard of *White v. Regester,* 412 U.S. 755 (1973), that Congress had intended to restore in response to *City of Mobile v. Bolden*, 446 U.S. 55 (1980). *Gingles, supra*, 478 U.S. at 96-97 (O'Connor, J., concurring in the judgment). Specifically, Justice O'Connor pointed to *White v. Regester*'s emphasis on historical and social factors which interact to entrench the racial minority's disadvantage in the political process, and she referred to Justice White's plurality opinion in the companion *Bandemer* case:

> By showing both "a history of disproportionate results" and "strong indicia of lack of political

> power and the denial of fair representation," the plaintiffs in *White* met this standard, which, as emphasized just today, requires "a substantially greater showing of adverse effects than a mere lack of proportional representation to support a finding of unconstitutional vote dilution."

Gingles, supra, 478 U.S. at 98 (O'Connor, J., concurring in the judgment) (*quoting Davis v. Bandemer,* 478 U.S. at 169-170 (plurality opinion)).

In the years since *Gingles*, a majority of this Court has come to endorse Justice O'Connor's concerns and has restored emphasis on the totality of circumstances in § 2 vote dilution cases. *Johnson v. De Grandy*, 512 U.S. 997, 1013-14 (1994). This is the same totality of circumstances standard, with its dependence on historically and socially entrenched discrimination, that Justice White said non-racial partisan political groups must meet to obtain a constitutional remedy.

> Although [*Rogers v. Lodge*, 458 U.S. 613 (1982), and *White v. Regester*] involved racial groups, we believe that the principles developed in these cases would apply equally to claims by political groups in individual districts. We note, however, that the elements necessary to a successful vote dilution claim may be more difficult to prove in relation to a claim by a political group. For example, historical patterns of exclusion from the political processes, evidence which would support a vote dilution claim, are in general more likely to be present for a racial group than for a political group.

Bandemer, 478 U.S. at 131 n.12 (plurality opinion). Appellants complain that Justice White was right about the difficulty political parties would have meeting this demanding standard for judicial intervention in the redistricting process. They want an easier constitutional test than the one African Americans must meet. But they do

not address the potentially damaging impact their new constitutional rule would have on racial minorities. Would it place new limitations on the ability of protected groups to guard against dilution of their voting strength under the Voting Rights Act and the Fourteenth and Fifteenth Amendments? Certainly, in Alabama there is a real danger that the electoral influence of African-American voters would have to suffer to pay the cost of providing political parties the opportunity to achieve more nearly proportional representation. There is shameful and familiar irony in the prospect that African Americans, who for the first time in over four centuries on this continent have been able effectively to influence the political process at its crucial constituency-building stage, should immediately be barred constitutionally from doing it again.

III. THERE IS FUNDAMENTAL CONCEPTUAL CONFUSION IN THE LEGAL ARGUMENTS FOR A CONSTITUTIONAL BAR OF PARTISAN GERRYMANDERING.

Behind the arguably irreconcilable conflict explored in *Bandemer* and *Gingles* with respect to extending Fourteenth Amendment protection against both racial and partisan gerrymandering is the potential conflation of two separate concepts: racial vote dilution entails discrimination against a group of persons who share immutable, ancestral characteristics; partisan gerrymandering entails discrimination against persons who share views, opinions or preferences. The former group may or may not share views and preferences from election to election, but its group identity does not change. The latter group changes its identity as its shared views and preferences change. Which is to say that the most judicially unmanageable criterion in the *Bandemer* standard is defining the "identifiable political group" whose rights allegedly have been

violated by the partisan gerrymander. *Bandemer*, 478 U.S. at 127 (plurality opinion); *id*. at 161 (Powell, J., concurring in part and dissenting in part). Are they only, as Justice White suggested, "a group of individuals who votes for a losing candidate"? *Id*. at 132. Would all those who voted for the losing candidate consider themselves to be Democrats or Republicans? Are they the same persons who formed the group who voted for the losing party's candidates in the preceding election and in the election before that? Are they the same persons who voted for other candidates nominated by the party? Must party affiliation be trans-generational to be constitutionally significant? This is a particularly relevant question for the South, which little more than one generation ago was "solid" for Democratic candidates, where from the Civil War until sometime around 1964 there was effectively only one party, and it stood for white supremacy. Until Franklin Roosevelt's presidency, those few African Americans in the South who were allowed to vote reliably supported the Republican candidates.[7]

Disagreements about how to define the identifiable political group victimized by partisan gerrymandering lie at the heart of the small cottage industry that emerged in academia following the *Bandemer* decision. *E.g.*, *see* BERNARD GROFMAN (ED.), POLITICAL GERRYMANDERING AND THE COURTS (1990) (collecting the competing views of over a dozen political scientists and law professors). The most

[7] *E.g., see generally* J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION (1999); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 (1994); J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910 (1974).

careful, in-depth analysis of the *Bandemer* opinions can be found in the dialogue between Professors Grofman and Lowenstein. *Compare* Bernard Grofman, *Toward a Coherent Theory of Gerrymandering: Bandemer and Thornburg*, in GROFMAN, POLITICAL GERRYMANDERING AND THE COURTS, *supra*, at 29, with Daniel Hays Lowenstein, *Bandemer's Gap: Gerrymandering and Equal Protection*, in GROFMAN, POLITICAL GERRYMANDERING AND THE COURTS, *supra*, at 64. With due respect for the thoughtful good intentions of Professor Grofman, it is Professor Lowenstein who perceives the conceptual confusion at the controversy's bottom and gets it right. Lowenstein correctly points out that this Court's constitutional jurisprudence dealing with electoral structures is grounded in the equal protection right of the individual citizen not to be discriminated against systematically on the basis of her membership in a suspect classification, as defined, for example, by the Fifteenth Amendment, or by arithmetically undervaluing her vote by classifying her on the basis of geographical residence, as prohibited by *Reynolds*. Lowenstein, *Bandemer's Gap, supra*, at 70-73. Citizens who give their support to a political party do not ordinarily fall in either classification. *Id*. at 75. Justice White's plurality opinion, Lowenstein argues, merely left open the possibility that the voter's political affiliation may correlate, through historical and social circumstances, with her membership in a suspect classification. *Id*. at 82.[8]

[8] Professor Lowenstein tries to hypothesize a situation in which a party supported by a minority of voters so successfully gerrymanders the state legislature that it totally blocks the ability to govern of officers elected to the other branches of government by the majority party's supporters. *Id*. at 88. He opines that, notwithstanding the absence of any constitutional cause of action based on the protection of fundamental rights or suspect classifications, this "Court should and would, if

(Continued on following page)

One amicus brief argues that the problem of indeterminacy of an identifiable partisan political group can be solved by addressing gerrymandering claims strictly as violations of individual rights rather than as violations of group rights. Brief of the Center for Research into Governmental Processes, Inc. as Amicus Curiae in Support of Appellants at 26. But such an atomizing approach would transform the nature of alleged gerrymanders from encroachments on the rights of members of protected classes to a failure accurately to aggregate individual opinions or preferences. Leaving aside the lack of any apparent constitutional basis for protecting individual preferences, the only way to maximize their aggregation is to install an election system designed to do that, which is what advocates of proportional representation urge. *See* Brief of the DKT Liberty Project as Amicus Curiae in Support of Appellants. As amicus concedes, the system of single-member Congressional districts prescribed by federal statute cannot possibly accomplish this task. Brief of the Center for Research into Governmental Processes, Inc., *supra*, at 27 n.8; *accord, e.g.*, Giovanni Sartori, *The Influence of Electoral Systems: Faulty Laws or Faulty Methods*, in BERNARD GROFMAN AND AREND LIJPHART (EDS.), ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES 43, 53

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confronted with the kind of breakdown I have hypothesized, find a way to restore democratic order." *Id*. at 89. However, Lowenstein does not suggest exactly what route this Court would take as it "blazed [a] new doctrinal trail[]." *Id*. In any event, no such situation is present in the Pennsylvania case *sub judice*. And in Alabama, such rigid partisan division almost never occurs. *E.g.*, David M. Halbfinger, *Alabama Voters Crush Tax Plan Sought by Governor*, THE NEW YORK TIMES, Sept. 10, 2003 (online edition) (reporting the voters' rejection of an historic tax reform plan proposed by the Republican Governor and passed through the Democratic controlled Legislature over the opposition of many Republicans).

(1986) ("The plurality [single-member district] formula (the first-past-the-post system) disregards proportions and represents, in principle, the very negation of proportionalism.").

There is no avoiding the problem of defining the identifiable political group allegedly injured by partisan gerrymandering. It has long been acknowledged that political parties in the United States are what political scientists call "cadre" parties, that is, political organizations controlled by relatively small groups of activists, including officeholders elected under the parties' banners, party officials and their paid consultants, who market their candidates to a mostly disengaged electorate. *See generally*, E.E. SCHATTSCHNEIDER, PARTY GOVERNMENT 53 (1942) ("Whatever else parties may be they are not associations of the voters who support candidates.") (*quoted in* Nancy L. Rosenblum, *Political Parties as Membership Groups*, 100 COLUM. L. REV. 813, 819 (2000)); DENISE L. BAER & DAVID A. BOSITIS, ELITE CADRES AND PARTY COALITIONS: REPRESENTING THE PUBLIC IN PARTY POLITICS (1988) (discussing the changing dynamics within party elites and between those elites and the electorate) (cited in Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1766 n.90 (1993)); Samuel Issacharoff, *Private Parties With Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 301 (2001). Even scholars who would valorize the role major political parties play in allowing voters to express their political identities acknowledge that roughly only a third of all voters strongly identify with the parties they vote for and that parties "are loose and decentralized voluntary associations." Rosenblum, *supra*, 100 COLUM. L. REV. at 818-20. Professor Rosenblum "concede[s] that party membership is not usefully defined in terms of registered party voters or primary voters. It is more plausible to

speak of membership as individuals increase their party involvement from partisanship to contributions, which are an express sign of association." *Id*. at 821.

So a threshold question is whether the constitutional jurisprudence this Court is being asked to create is primarily for the benefit of voters or for the benefit of party elites. Either way, the next question is whether the party and its purported constituents actually would benefit if they got what they asked for. Appellants are inviting this Court to resolve disputes about what constitutes fairness in the redistricting process that have evaded anything close to resolution for generations. Scholars cannot even agree on such foundational points as (1) whether there is a problem at all with respect to the ability of Republicans and Democrats to compete for control of the legislature; (2) if there is a problem, whether redistricting is to blame for it; (3) whether the creation of safe seats is a bad thing, and, if so, whether it can be avoided; and (4) whether neutral, nonpartisan redistricting standards and procedures are either theoretically or practically possible. *Compare* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002), *with* Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence To Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 650 (2002). None of these foundational issues has been explored in depth in this Court's jurisprudence, notwithstanding the pejorative connotation the term gerrymandering has acquired in the case law.

Certainly, with respect to the fourth issue, there are not many scholars who disagree with Professor Persily's characterization of neutral, nonpartisan gerrymandering as a myth. *Id*.; *accord, e.g.*, Pamela S. Karlan and Daryl L. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201, 1202-03 (1996) ("unlike most governmental decisions, the selection of particular district lines is amenable to no

objective, neutral, or merit-based criteria that provide judicially discoverable and manageable standards").[9] In his *Bandemer* opinion, Justice White cited the work of the late Robert G. Dixon, Jr., "one of the foremost scholars of reapportionment," for the proposition "that there are no neutral lines for legislative districts . . . every line drawn aligns partisans and interest blocs in a particular way different from the alignment that would result from putting the line in some other place." 478 U.S. at 129 n.10 (*quoting* Robert G. Dixon, *Fair Criteria and Procedures for Establishing Legislative Districts* 7-8, in REPRESENTATION AND REDISTRICTING ISSUES (B. Grofman, A. Lijphart, R. McKay, & H. Scarrow eds. 1982)). Elsewhere, Professor Dixon rebuked those of his colleagues who aspire to discover universal principles of fair representation: "My own experience tells me that although I may find nonpartisanship in heaven, in the real world, and especially in academia, there are no nonpartisans, although there may be noncombatants." Robert G. Dixon, *Fair Criteria and Procedures for Establishing Legislative Districts*, 9 POL'Y STUD. J. 839, 840 (1981).

[9] Specifically addressing the "most important factors" Justice Powell thought should guide legislative redistricting, namely, "the shapes of voting districts and adherence to established political subdivision boundaries," *Bandemer*, 478 U.S. at 173 (Powell, J., concurring in part and dissenting in part), Professor Lowenstein reports: "As Jonathan Steinberg and I have demonstrated, these criteria are not at all neutral in any normal sense of that term, since they disfavor a party whose voting strength is disproportionately concentrated in compact areas with municipal boundaries, and dispersed at less than majority levels throughout the rest of the state." Lowenstein, *Bandemer's Gap*, *supra*, at 93.

IV. THE NEW PARTISAN GERRYMANDERING RULE PROPOSED BY APPELLANTS IS CONTRARY BOTH TO THE EXPRESS TERMS OF THE CONSTITUTION AND TO THE HISTORICAL UNDERSTANDING OF THOSE TERMS.

If the briefs of appellants and other amici prove anything, it is that no one to date has been able to disprove Justice O'Connor's assertion in *Bandemer* that partisan gerrymandering claims are inherently nonjusticiable. Their efforts to do so flounder primarily for the lack of any historical support. They are asking this Court to ignore Justice Stewart's admonition in *City of Mobile v. Bolden* that, no matter what one's view of equal protection is "as a matter of political theory," unless it comports with one of the historical understandings of the Constitution, it slips into "judicial inventiveness that would go 'far toward making this Court a super-legislature.'" 446 U.S. 55, 75-76 (1980) (*quoting Shapiro v. Thompson*, 394 U.S. 618, 661 (1969) (Harlan, J., dissenting)).

One of the amicus briefs expresses the view of four historians who look to the founding generation for support of the proposition that "when state legislative majorities have consciously designed districts not only to preserve safe seats for their own party but to turn a minority of the popular vote into a supermajority of congressional seats," it violates a principle they say is embedded in Article I of the Constitution that members of the House should be elected in a way that "mirrors" representation of the people. Brief of Amici Curiae Jack N. Rakove, Alexander Keyssar, Peter S. Onuf and Rosemarie Zagarri in Support of Appellants at 25-26. But the constitutional rule they ask this Court to adopt is contrary both to their published descriptions of the Founders' intent and to the Founders' decision to entrust correction of alleged redistricting abuses to Congress. Professor Rakove's definitive treatise,

for example, concludes the chapter on "The Mirror of Representation" as follows:

> The Constitution made no effort to reduce or regulate the size of the national electorate; or to impose significant qualifications on eligibility for office; or even to determine how national elections were to be conducted. By basing the House of Representatives on the existing electorates of the states, the framers shrewdly defused a potentially powerful objection against the Constitution. But by allowing the state legislatures so much discretion in setting electoral rules, they left the national government susceptible to both the aspirations and the abuses of democratic politics. That politics sometimes widened the claims for inclusion well beyond the propertied freeholders whom Madison idealized; but it also perpetuated unjust distortions in the form of the suffrage restrictions and gross malapportionment that proved so effective from the late nineteenth century until the 1960s. . . . Given this ambiguous legacy, it is not surprising that disputes over how the mirror of representation is best polished remain as difficult to resolve today as they were contentious in 1787.

JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 243 (1997). The historians' brief concedes that the roles of political parties, which did not emerge until the Jacksonian era, were anticipated by the Founders only to the extent of a profound distrust of mass electorates, majoritarianism and political factions that were expressed by Madison and the Federalists. Instead of constitutional rules refereeing partisan dynamics and demanding fairness for the supporters of both parties, Madison would have preferred that parties be eliminated altogether. *See* Issacharoff, *Private Parties With Public Purposes*, *supra*, at 301 ("The emergence of these parties was, of course, all the more striking

for the extreme hostility of the founding generation to what were seen as permanent factions."). Professor Rakove notes that the Federalists in the Constitutional Convention "could easily have pressed the case for incorporating a suitable rule in the Constitution . . . requiring the *states* to apportion seats on an equitable basis." RAKOVE, ORIGINAL MEANINGS, *supra*, at 223 (emphasis in original). Instead, the Founders chose to "enable *Congress* to intervene against acts of injustice within the states (though in this case the object of regulation would be a factious minority improperly holding on to power)." *Id*. at 224 (emphasis added).

The historians' brief does not mention the fact that the dominant issue in the 1787 Convention, the issue that controlled the compromise over representation in both the Senate and the House of Representatives, was slavery. Rakove quotes the proceedings in which Madison said: "But he contended that the states were divided into different interests not by their difference of size but by other circumstances; the most material of which resulted partly from climate, but principally from <the effects of> their having or not having slaves." *Id*. at 69. Once the delegates compromised on apportionment of seats in the House of Representatives based on a population formula in which slaves would be counted as three-fifths persons, the pace of proceedings quickened because of "the recognition that the Convention would end in agreement rather than dissension." *Id*. at 83.

> The three-fifths clause, then, was neither a coefficient of racial hierarchy nor a portent of the racialist thinking of the next century. It was rather the closest approximation in the Constitution to the principle of one person, one vote – even if in its origins it was only a formula for apportioning representation *among*, as opposed to

> *within*, states, and even if it violated the principle of equality by overvaluing the suffrage of the free male population of the slave states.

Id. at 74 (emphasis in original). Discrimination against African Americans thus dominated the Founders' understanding of which "people" would be "mirrored" in Congress. "The franchise excluded not only the dependent classes of the unpropertied but a whole species of population whose bondage gave vivid meaning to the familiar definition of slavery as a condition in which laws were imposed on the governed without their consent." *Id*. at 212.

Professor Keyssar's recent treatise describes how the Reconstruction Congress rekindled a constitutional debate over voting rights for "the first time since the constitutional convention in Philadelphia," and why, for reasons of both ethnicity and class, the Fifteenth Amendment prohibited the states from denying the franchise on account of race but did not entrench the right to vote for all citizens. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 93-104 (2000). In his view, that is why this Court turned to the Fourteenth Amendment in the 1960s to establish the rule of population equality. "The Court's use of the equal protection clause was, in effect, a means of extending the ban on racial bars stated explicitly in the Fifteenth Amendment to other forms of discriminatory disfranchisement not expressly mentioned in the Constitution." *Id.* at 283.[10] Keyssar concedes that, however well it has enjoyed popular acceptance since *Reynolds v. Sims*,[11] even

[10] *Accord*, Blacksher and Menefee, *supra* note 2.

[11] *See* Lowenstein, *Bandemer's Gap, supra*, at 65 (summarizing the immediate post-*Reynolds* reaction).

the principle of one person, one vote does not derive from the Founders' original intent:

> Justices Frankfurter and Harlan surely were correct that neither the founding fathers nor the authors of the Fourteenth Amendment believed that an arithmetic equality of votes had to underlie all schemes of representation. The justices also were on solid ground in claiming that it was not irrational for states to factor in other considerations (such as geography or balancing rural versus urban interests) in devising systems of representation, and that these were essentially political matters or questions of political philosophy that belonged more appropriately in the hands of elected legislators than the judiciary.

ALEXANDER KEYSSAR, THE RIGHT TO VOTE, *supra*, at 186-87. According to Professor Keyssar, "the sweep of history suggests that democracy should not be imagined or understood as a static condition or a fixed set of rules and institutions; it may be more valuable – and accurate – to think instead of democracy as a project." *Id*. at 323. Nowhere does he suggest that courts should probe even deeper in the political thicket to regulate partisan redistricting. To the contrary, he thinks "[i]t would, alas, be utopian to expect that such conflicts will ever subside: that any tamperproof set of rules or institutions can be devised. . . . " *Id*. Certainly, read in its entirety, Keyssar's excellent narrative of how the right to vote has evolved in the United States leaves no doubt that, from the standpoint of history, it would be a travesty to subordinate to concerns of partisan fairness the ability of African Americans and other racial and ethnic minorities to participate

equally in the political process and to elect candidates of their choice.[12]

CONCLUSION

These amicus parties contend that neither appellants nor any of the amicus briefs in support of appellants have demonstrated that there are justiciable standards for adjudicating claims of strictly partisan gerrymandering of Congressional and other legislative districts. If this Court does not reverse the holding of *Davis v. Bandemer* that it is possible to articulate a justiciable partisan gerrymandering claim, we urge the Court to retain the burden of proof placed on partisan plaintiffs by the *Bandemer* plurality. Should this Court decide to modify the *Bandemer* standard, it should take care to do so in a way that does not diminish the constitutional and statutory voting rights of protected minorities and that does not subordinate the ability of African Americans to participate in the political process to the interests of party factions.

Respectfully submitted,

JAMES U. BLACKSHER
710 Title Bldg., 300 North
Richard Arrington, Jr., Blvd.
Birmingham, Alabama 35203-3352
(205) 322-1100

ROBERT D. SEGALL
COPELAND, FRANCO, SCREWS
& GILL, P.A.
444 South Perry Street
Post Office Box 347
Montgomery, Alabama 36101-0347
(334) 834-1180

[12] James U. Blacksher, *American Political Identity and History*, 95 NW. U. L. REV. 715 (2001) (reviewing ALEXANDER KEYSSAR, THE RIGHT TO VOTE, *supra*).