No. 02-1580

In The
Supreme Court of the United States

RICHARD VIETH, NORMA JEAN VIETH
and SUSAN FUREY,

Appellants,

v.

ROBERT C. JUBELIRER, President of the
Pennsylvania Senate, et al.,

Appellees.

On Appeal To The United States District Court For The Middle District Of Pennsylvania

BRIEF AMICUS CURIAE OF PENNSYLVANIA VOTERS JOANN ERFER AND JEFFREY B. ALBERT IN SUPPORT OF APPELLANTS

PROFESSOR EINER ELHAUGE
Counsel of Record
1575 Massachusetts Ave.
Cambridge, MA 02138
Telephone: (617) 496-0860
Fax: (617) 496-0861

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTEREST OF THE AMICI CURIAE[1]

JoAnn Erfer and Jeffrey B. Albert are Democratic voters in Pennsylvania who believe their voting rights have been infringed by the partisan gerrymandering alleged in this case. Ms. Erfer is a voter in the Sixth Congressional District and Mr. Albert a voter in the Eighth Congressional District, both of which have had their boundaries oddly misshaped in a way that ignored municipal and county lines to maximize the number of safe seats for Republican legislators statewide. They were previously petitioners in the state court case challenging this same redistricting. *Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002). They have a strong interest in having this redistricting overturned to halt discrimination against their political group.

INTRODUCTION AND SUMMARY OF ARGUMENT

Factual and legal developments since *Davis v. Bandemer* have only increased the importance of restraining partisan gerrymandering designed to give one party a majority of seats even when it loses a majority of the votes.

First, technological changes have made partisan gerrymandering increasingly easy and precise. While historically parties could surely predict whether a given

[1] All the parties have provided written consent to the filing of this amicus brief. This brief has been prepared entirely by counsel for amici with the extraordinarily helpful assistance of Harvard Law Student David Schleicher, and no counsel for a party has authored this brief in whole or in part. This brief is being prepared on a pro bono basis by counsel and his assistant, and with the exception of printing and service costs reimbursed by Harvard Law School, no person or entity other than counsel has made a monetary contribution to the preparation or submission of this brief. The views expressed in this brief are in no way intended to represent the position of Harvard Law School.

set of district lines would benefit them or not, at least there was some roughness to the process of selecting those lines that made the partisan advantage smaller. But modern software now allows any party in control to click to get the computer to draw whichever district lines will *maximize* its partisan advantage, and to do so not just on a ward by ward or precinct by precinct basis but block by block (and, perhaps in the future, house by house). As a result, the partisan advantages have only grown larger – and more tempting to seize – thus increasing the degree and frequency of discrimination against voters who belong to parties who are temporarily out of power.

Second, political developments have also increased the ability to reap partisan advantages from gerrymandering. The electorate has become both more evenly divided between the two major parties and more predictable in voting for the same party across offices. This increases the gains from partisan gerrymandering and decreases the risk. Further, in part because the above factors have increased the temptation, the prior norm that limited such partisan gerrymandering to once every ten years has broken down, with state legislatures now often redistricting every election cycle to gain partisan advantage. *See* George Will, *Careless People in Power*, The Washington Post B-7, 2003 WL 56510154 (August 3, 2003) (objecting that this "shreds a settled practice that limits to once after each census the bruising business of seeking political advantage through redistricting."); David Halfbinger, *Across U.S., Redistricting as a Never-Ending Battle*, N.Y. Times. A1 (July 1, 2003). The breakdown of this norm not only means that the problem arises more often, but itself provides another reason why partisan gerrymandering has become more effective and less risky. When limited to once a decade, demographic changes over time could soften the partisan advantage provided by gerrymandering, and increase the risks of seeking too great an advantage. But now that parties feel free to gerrymander every two years, greater partisan advantages are possible with less risk

because district lines can be repeatedly fine-tuned to take into account any demographic changes from the last election.

These technological and factual developments make judicial enforcement of constitutional protections against gerrymandering more important than ever. These developments also ameliorate two serious objections to the justiciability of such claims that were raised by Justice O'Connor in her important separate opinion in *Davis*. One objection was that partisan gerrymandering was self-deterring because, in order to maximize the number of seats a party won, a controlling party had to lower the predicted margin of victory in those districts, thus increasing the risks of losing those seats. 478 U.S. at 152. But this point was far stronger in 1986 than today, for the above technological and political developments have greatly lowered any downside risk to partisan gerrymandering.

Another objection was that partisan gerrymandering involved political judgments best resolved or corrected by the political process. *Id.* at 145-52. But the enhanced precision of partisan gerrymandering removes any doubt that it can thwart correction by the political process by entrenching a party in power even when it loses a majority of the vote. Further, the increased partisan temptations and breakdown of the norm of decennial redistricting have left the major political parties with an insuperable prisoner's dilemma both across states and over time. Even if each party would be better off if there were no partisan gerrymandering, so that each party would have a fair crack at winning a majority in each state, their prisoner's dilemma will lead them to defect by engaging in partisan gerrymandering to gain local or temporary partisan advantage. One thus cannot take the decisions of each state party or legislature as reflecting their judgment of the general merits of partisan gerrymandering.

Third, there has also been an important legal development since 1986 – the decision in *Bush v. Gore*, 531 U.S. 98 (2000), which made clear that the Court is prepared to adjudicate and vigorously enforce the equal protection clause's prohibition on political discrimination. In *Bush v. Gore* that proposition was applied to prohibit the use of arbitrary and standardless discretion in vote counting that would permit a form of undetectable *sub rosa* discrimination on the basis of political viewpoint. *See* Einer Elhauge, *The Lessons of Florida 2000*, 110 POLICY REVIEW 15 (Dec 2001-Jan 2002). If the Court is prepared to enforce the equal protection clause against that sort of subtle political discrimination, then *a fortiori* it should be willing to do so against the more blatant type of political discrimination at issue here.

While the political vice is clear, courts have reasonably shared Justice O'Connor's remaining concern about whether administrable standards exist for identifying partisan gerrymandering. One important source of standards analogizes political competition by parties to economic competition by firms, and thus draws on antitrust principles for curbing anticompetitive behavior. *See, e.g.*, RICHARD POSNER, LAW, PRAGMATISM, AND DEMOCRACY 234-47 (2003); JOHN HART ELY, DEMOCRACY AND DISTRUST 102-03 (1980); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002); Persily & Cain, *The Legal Status of Political Parties*, 100 COLUM. L. REV. 775, 788-792 (2000); Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605 (1999); Issacharoff & Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998). The most analogous body of antitrust law is the doctrine on monopolization. That doctrine requires the establishment of two elements: (1) a monopoly power to price substantially above the competitive level; and (2) exclusionary conduct that lacks any legitimate purpose and hampers rival competition. This suggests the following analogous

two elements to judge efforts to monopolize political markets.

> (1) *Political Monopoly Power* – One political party controls all the relevant state political branches and has a demonstrated ability to garner a number of seats above the competitive level – that is, above the reasonable range reflected in the percentage of seats that such a statewide vote percentage has historically or contemporaneously produced in comparable elections when district lines were not the product of partisan gerrymandering.
>
> (2) *Political Exclusionary Conduct* – The district lines cannot be explained by any legitimate purpose and have been drawn in such a way that the rival party predictably needs a higher statewide vote percentage than the controlling party to get a statewide majority of the seats.

These two elements provide concrete content to the discriminatory effects and intent tests adopted by a majority of the Justices in *Davis v. Bandemer*.

Applying those standards to the complaint in this case reveals that the lower court erred in dismissing the complaint. Indeed, it applied what amounted to a standard of per se legality. This Court should thus reverse and remand for application of the correct standards.

I. Judicial Enforcement of Constitutional Protections Against Partisan Gerrymandering Is More Important Than Ever

In *Davis v. Bandemer*, the Court held that partisan gerrymandering was a justiciable claim under the Equal Protection Clause. 478 U.S. 109, 113, 118-127 (1986). The Court made clear that voters that tended to support one political party were, like racial minorities, a cognizable group for the purposes of an Equal Protection analysis. *Id.* at 125 ("[T]hat the claim is submitted by a political group, rather

than a racial group, does not distinguish it in terms of justiciability.") The reason is that the Equal Protection clause ensures "that each political group in a State should have the same chance to elect representatives of its choice as any other political group." *Id.* at 124. Partisan gerrymandering denies the disfavored political group that equal chance and thus raises a justiciable claim.

Since the 1986 *Davis* decision, technological, political and legal developments have only increased the justification for enforcing equal protection norms against partisan gerrymandering. These changes have not only increased the harm caused by partisan gerrymandering but also militate against some reasonable concerns about judicial enforcement in this area. Moreover, experience since 1986 has made clear that, without some judicial enforcement of constitutional limits, bouts of "revenge" gerrymandering will continue and the democratic right of voters to replace their government will be weakened.

Technological Changes. As this Court has held, technological and social developments can change what the Constitution deems permissible electoral regulation. *See Anderson v. Celebrezze*, 460 U.S. 780, 796-97 (1983) (holding that, although they had a long and accepted history, early filing deadlines for independent candidates had become unconstitutional because changed technology and expanded literacy made spreading information about late-developing independent candidates more feasible). Here, increasingly sophisticated software and information of individual voting patterns has vastly increased the precision of partisan gerrymandering. In 1986, the *Davis* plurality noted that, with political voting records "'available precinct by precinct, ward by ward'" it would be relatively easy for any legislature to predict the political consequences of particular district lines. *Id.* at 128 (plurality) (quoting *Gaffney v. Cummings*, 412 U.S. 735, 752-53 (1973). Since then, the available precision has gotten much greater. "Beginning 10 years ago, sophisticated computer-software packages have allowed partisan mapmakers to

match new census data with their own files on neighborhoods' voting histories – down to the level of individual blocks. That lets them design districts with predictable partisan preferences." John Harwood, *No Contests: House Incumbents Tap Census, Software to Get a Lock on Seats: Latest Redistricting Succeeds In Entrenching Status Quo; More Gridlock Guaranteed*, Wall St. J., at A1 (June 19, 2002).

This new sophisticated software and voter information makes it possible to draw district lines less crudely and with less guesswork. One need only click to get the district lines that maximize a party's partisan advantage given a specified safe seat buffer constraint. Parties who engage in partisan gerrymandering can thus secure greater partisan advantages with less political risk than ever before.

Political Developments. Other important factual developments have been political. How voters vote for one office has offered an increasingly accurate prediction of how they will vote for other offices. This makes gerrymandering based on prior election results far more precise and accurate. Further, as the 2000 election showed, the electorate has become quite evenly divided between the two major parties, probably because both parties have increasingly sophisticated information about where median voter preferences lie. This equal division greatly increases the potential gain from partisan gerrymandering.

The above technological and political developments have increased the temptations of partisan gerrymandering and thus contributed to the breakdown of the customary norm about the frequency of redistricting. Traditionally, redistricting took place only once every ten years after the required census. Now, this custom has broken down, with controlling parties willing to engage in biennial redistricting when it advantages them. *See* George Will, *supra*; Halfbinger, *supra*. This does more than shatter a comfortable tradition – it allows a controlling party to

continually fine-tune district lines to offset demographic changes and keep itself in power.

The old system of redistricting every ten years allowed population shifts and gradual political change to overcome the effect of the original gerrymander. This made any effects of partisan gerrymandering less permanent. Further, controlling parties had to anticipate that future demographic shifts might make what looks like a comfortable safe seat margin in year 1 very unsafe five to ten years later. To avoid this problem, they thus had to build in a greater buffer of safety into their gerrymanders, which reduced the extent of the partisan advantage they could reap. Thus, limited to once every ten years, partisan gerrymandering was both less permanent and less extreme.

In contrast, now that legislatures feel free to redistrict every two years, partisan gerrymandering can be both more permanent and extreme. The majority party can continually tinker with district lines in response to gradual changes in population and voting patterns and thereby maintain its undemocratic lock on power. Further, because it now knows it will be able to fine-tune its district lines in future years, the controlling party will not need to create as great a buffer to secure safe seats in any redistricting it does. Its very first redistricting after a census can claim an even more extreme partisan advantage without increasing the risk of losing seats in future years.

This is thus not a problem that arises only when legislatures in fact have redistricted twice since the last census. The mere prospect that the new norm makes biennial redistricting permissible in future years makes legislatures willing to engage in more extreme partisan gerrymandering from the start. This prospect of repeated redistricting also makes it even more likely that partisan gerrymandering "will consistently degrade a voter's or a group of voters' influence on the political process as a

whole" and thus constitute unconstitutional discrimination. *Davis,* 478 U.S. at 132, 142-43 (plurality).

The Implications for Various Prudential Concerns. The *Davis* plurality noted that "the mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm." *Id.* at 131 (plurality). But the above technological and political developments allow redistricters to go well beyond making it more difficult for certain voters in a particular district to win races. Partisan gerrymandering can now be used to effectively guarantee a large and safe majority for the party that controls redistricting even when it receives only a minority of the vote. This severely limits rival competition, since other parties will now need a substantial supermajority to overcome such partisan gerrymandering. It also lessens the responsiveness of the controlling party and legislators to the voters, for they can now lose a majority of the voters without fearing a loss of political power.

The new level of precision generated by modern technological and political developments also ameliorates one of the serious concerns Justice O'Connor raised about adjudicating partisan gerrymandering claims. Justice O'Connor argued that one reason not to engage in such adjudication was that "political gerrymandering is a self-limiting enterprise . . . In order to gerrymander, the legislative majority must weaken some of its safe seats, thus exposing its own incumbents to greater risks of defeat – risks they may refuse to accept past a certain point." *Davis*, 478 U.S. at 152 (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., concurring in the judgment) (citations omitted). And if parties did engage in excessive partisan gerrymandering, that could backfire if there were a swing in votes. *Id.* However, the above developments now mean that a legislative majority can achieve even greater partisan advantage without weakening its safe seats or risking such a backfire because they

can better predict how each district will vote, draw district lines along political lines more precisely, and make future adjustments to make sure the requisite margin of safety is maintained as demographics change over time. Thus, while Justice O'Connor is right that the legislative majority will not accept greater risks of defeat past a certain point, the fact is that developments since then have greatly minimized that risk, and thus removed any self-limiting constraints that once existed on partisan gerrymandering.

In the future, the available precision will only increase. We are probably not too far from the day when computers could draw district lines house by house, which could permit a legislature to, say, create districts composed 100% of houses with Republican voters in order to concentrate Republicans in the fewest possible districts and diminish their statewide electoral strength. Presumably, at that point, a reasonable skeptic about justiciability would have to concede that such extreme redistricting must raise a justiciable claim that the courts would vindicate. But it is hard to discern what persuasive principle would distinguish that sort of partisan gerrymandering from the only somewhat milder forms of partisan gerrymandering that are now possible on a block by block basis.

Why the Political Process Cannot Itself Redress the Problem of Partisan Gerrymandering. Another important prudential objection to having judges enforce the equal protection clause against partisan gerrymandering is the view that such redistricting decisions involve political judgments that are best resolved or corrected by the political process. *Davis,* 478 U.S. at 144-55 (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., concurring in the judgment); *id.* at 143-44 (Burger, C.J., concurring in the judgment). Justice O'Connor puts it well when she sensibly asks for some explanation or evidence for why the Court should believe "that political gerrymandering is an

evil that cannot be checked or cured by the people or by the parties themselves." 478 U.S. at 152.

Part of the answer is that the enhanced precision of partisan gerrymandering allows controlling parties to safely perpetuate themselves in office even when they lose a majority of the vote. Thus, the extreme advantage created by modern partisan gerrymandering itself suffices to prevent a majority of the electorate from voting out the representatives who adopted the gerrymander. Where legislators engage in such counter-majoritarian entrenchment, this Court has traditionally been at its most vigorous (not most deferential) in enforcing constitutional limitations on legislative action. *See* Michael Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1997). Nor do the minority of voters who favor the political party in control have any incentive to change a system that gives them disproportionate political influence.

Further, even if controlling parties and their voters agree that both they and the nation would be better off without partisan gerrymandering, prisoner's dilemma problems would induce them to engage in the practice nonetheless. Thus, one cannot assume that the adoption of a redistricting plan indicates a legislative judgment that partisan gerrymandering reflects wise policy or even the best interests of its party. And again, this is a problem that has only gotten worse since 1986, because factual developments and the breakdown of the norm of decennial redistricting have only exacerbated these prisoner's dilemma problems.

Over time and across all the states, each of the two major parties is probably equally likely to find itself the exploiter or victim of partisan gerrymandering. They may enjoy the power to exploit partisan gerrymandering in some states but know they will suffer from it in others. Or they may enjoy it now, but realize that in the future the shoe will eventually be on the other foot. Further, because

being a victim means that a temporary loss of elections will relegate the party in one state to a near-permanent minority, the downside risks are enormous. And the victim party and their voters will reasonably fear that the controlling party that benefits from partisan gerrymandering will be more likely to exploit the minority because they no longer need a majority to stay in office. Given these factors, both parties (and their respective voters) should prefer a rule that prohibited either side from engaging in partisan gerrymandering.[2] Reinforcing this conclusion is the fact the parties would likely realize that the current system, featuring fewer and fewer competitive districts, is widely credited with turning the public away from politics and from both major parties. *See, e.g.*, Richard Morrill, *A Geographer's Perspective* 212, 213 in POLITICAL GERRYMANDERING AND THE COURTS (Bernard Grofman ed., 1990).

The trouble is that, even if the parties (and their voters) did prefer a world without partisan gerrymandering, prisoner's dilemma problems will make it irresistible for them to engage in it when they can. *See generally* RUSSELL HARDIN, COLLECTIVE ACTION 1-13 (1982) (describing prisoner's dilemma issues). Instead of cooperating (by refraining from partisan gerrymandering), each party will have an incentive to defect (by engaging in it). The reason is that it knows that, regardless of what the other party does in other times or states, its individual decision to defect by engaging in partisan gerrymandering will make it better off. Engaging in partisan gerrymandering is thus

[2] A similar argument provides one set of explanations for why voters chose to impose term limits on their representatives. *See* Einer Elhauge, *What Term Limits Do That Ordinary Voting Cannot*, CATO POLICY ANALYSIS, No. 328, at I.D (Dec. 16, 1998), *available at* http://www.cato.org/pubs/pas/pa-328es.html; Edward Glaeser, *Self-Imposed Term Limits*, 93 PUBLIC CHOICE 389 (1997); Alexander Tabarrok, *A Survey, Critique, and New Defense of Term Limits*, 14 CATO JOURNAL 333, 345-47 (1994).

what game theorists call a "dominant strategy" even though it makes both parties worse off. *See* ERIC RASMUSEN, GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY 19-22 (3d ed. 2001) (defining dominant strategy equilibria).

If the party enjoys temporary control over the political branches, it will have incentives to engage in partisan gerrymandering because it knows that refraining from doing so would not alter the incentives of the other party to engage in it in the future when they enjoy a temporary majority. Nor can state legislatures that conclude partisan gerrymandering is undesirable prohibit it in a way that binds future legislatures, for each legislative session is fully sovereign and could overrule any legislative prohibition. *Cf.* Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2111 (2002) (discussing the phenomenon of trans-temporal collective action problems for legislatures across time, and noting that "Curbing such governmental collective action problems is one important reason to have constitutional laws that put certain matters off limits as a matter of social contract.").

Similarly, if a party controls the political branches in one state, it will have incentives to engage in partisan gerrymandering of congressional districts because it knows that, whether or not it does so, the rival party will have incentives to engage in it in any state where it enjoys similar control over redistricting. One might hope that a mutually beneficial norm would curb such a practice. But to each state party that enjoys control over redistricting, the incentives to defect by engaging in partisan gerrymandering will be irresistible since it will confer great partisan benefits in that state whether or not parties in other states adhere to a norm limiting such a practice. Indeed, given the number of states, their coordination problem would involve the sort of super-prisoner's dilemma problems that economists call a collective action problem.

See MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 2, 11-16, 21 (2d ed. 1971).

There is recent evidence that this prisoner's dilemma problem has manifested itself both across states and in states over time. Parties in control of redistricting have justified their extreme partisan gerrymanders on the ground that the other party was doing the same thing in other states or the last round of elections. *See Draw The Line Here*, The Hill, at 16 (July 8, 2003) (noting that recent events have pointed to the strong likelihood of "the unwelcome prospect of an all-out, cross-country redistricting war."). *See also* Todd J. Gillman, *Lawmakers Bitter After Standoff*, The Dallas Morning News, at A7 (May 18, 2003). The above factual and political developments have increased the benefits from defecting from any norm against extreme forms of partisan gerrymandering. Indeed, those developments have apparently made these benefits so large that the parties have even defected from the prior quasi-cooperative norm of at least limiting such partisan gerrymandering to once a decade.

Where such collective action problems exist, the normal solution is a collective agreement to restrain deviations from the collective interest. Here that agreement already exists in the social contract we call the Constitution, whose equal protection clause bars temporary or regional majorities from discriminating against the minority. It is up to the Courts to enforce that collective agreement both for the People and for the long-run benefit of the major parties.

The *Bush v. Gore* Commitment to Vigorously Enforce the Equal Protection Clause Ban on Political Discrimination. Enforcing the equal protection clause against political discrimination is even more justified by the need to be consistent with an important legal development. In *Bush v. Gore,* 531 U.S. 98 (2000), this Court considered a claim that the equal protection clause was violated by allowing vote counters to exercise arbitrary and

standardless discretion. Such standardless discretion raises the risk of *sub rosa* discrimination based on political viewpoint that, precisely because of the lack of any standards, cannot effectively be proven. *See* Elhauge, *The Lessons of Florida 2000*, *supra*. The Court held that this claim was not just justiciable but proved a violation of the equal protection clause, thus extending prior caselaw holding that standardless discretion that permitted such *sub rosa* political discrimination violated the First Amendment. *See Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 131 (1992); *City of Lakewood v. Plain Dealer*, 486 U.S. 750 (1988). And previously this Court has held that a facially neutral filing deadline that was not shown to be intentionally discriminatory nonetheless violated the First and Fourteenth Amendments because its effects discriminated against late-developing independent candidates. *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

If these sorts of subtle and relatively limited forms of political discrimination merit vigorous enforcement of the equal protection clause, then that goes double for partisan gerrymandering, which is openly intentional and had far more extensive and longlasting discriminatory effects. Legal consistency requires no less.

II. Administrable Standards for Judging Partisan Gerrymandering Can Be Developed From Antitrust Monopolization Doctrine

One of the most significant movements in studies of "law and democracy" has been analyzing elections as if they were the end product of electoral markets. *See, e.g*, Persily & Cain, *supra*; Issacharoff & Pildes, *supra*. In both political and economic markets, rivals (firms or parties) compete for the favor of the public, whose voting and purchasing decisions aggregates information about public preferences. Not surprisingly, a number of notable scholars have thus looked to antitrust law as a way to analyze anti-competitive actions

taken by political parties in charge of government. *See, e.g.*, POSNER, *supra*, at 244-45; ELY, *supra*, at 102-03; Pildes, *supra,* at 1614; Issacharoff, *supra*. The Court has effectively endorsed a similar understanding through its embrace of competition as a major value to be protected in its election law jurisprudence. "Competition in ideas and governmental policies is at the core of our electoral process." *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

One extreme in this literature suggests a per se rule that all redistricting done by politicians is unconstitutional. Issacharoff, *supra*, at 601, 641-48. Such a per se rule would certainly be administrable. But it would contravene this Court's election law precedent, which clearly establishes that nonpartisan gerrymandering to secure each party a share of seats proportional to its voting strength is perfectly constitutional. *Gaffney,* 412 U.S. at 754; *Davis,* 478 U.S. at 130-31 (Plurality Opinion of Justice White, joined by Brennan, Marshall & Blackmun, JJ.); *id.* at 154 (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., concurring in the judgment). Nor is it justified by antitrust analogy. Even though antitrust law is limited to policing decisions by financially interested actors, *see* Einer Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667 (1991), it does not deem such self-interest to be sufficient grounds for imposing a per se rule. Instead, it applies the per se rule only to categories of conduct that virtually never have any redeeming virtue to offset their anticompetitive effect. *Northern Pacific v. United States,* 356 U.S. 1, 5-6 (1958). Here, Supreme Court precedent recognizes that legislatures can draw district lines to further the legitimate political purposes of either (a) assuring each party representation proportional to its voting strength, *see supra,* or (b) maximizing competition for each seat even though, in a winner-take-all system, that can mean that a party that wins a bare majority can get a supermajority of seats that is disproportionate to its voting strength, *Davis,* 478 U.S. at 129-30 (Plurality Opinion); *id.* at 158-60 (O'Connor concurrence). *See generally* Nathaniel Persily,

In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protection Gerrymanders, 116 HARV. L. REV. 649 (2002) ("There is no a priori reason to prefer a districting system that produces many competitive races over one that produces proportional representation.") Thus, one cannot say that legislative gerrymandering virtually always lacks a legitimate purpose.

But there is a body of antitrust law that offers a better analogy that can provide the basis for administrable standards: the antitrust doctrine on monopolization. The typical monopolization case involves a firm that, having earned a temporary monopoly through legitimate competition, tries to extend that monopoly power by impairing rival competition with conduct that lacks any legitimate business purpose. *See* Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. at IV.C (forthcoming November 2003), *available at* http://www.law.harvard.edu/faculty/elhauge/. Partisan gerrymandering presents the same problem on political markets. A party, having earned a temporary monopoly by winning elections for governor and both legislative houses, seeks to extend that monopoly by impairing the ability of rivals to compete through gerrymandering that lacks any legitimate political purpose.

In both sorts of cases, the mere possession of a monopoly share earned through competition is no cause for legal concern – there is no reason to worry about either a party that is popular enough to win all seats, or a firm that is so efficient that all consumers want to buy from it. The concern arises only when the firm or party abuses its power to ensure the continuation of its monopoly control. In both sorts of cases, a key requirement to proving abuse is normally a showing of discrimination against rivals: in an antitrust case, discrimination against rival firms or those who deal with them, *id.* at III.A.4 & B, in a political case, discrimination against rival parties or those who vote for them. Finally, in both cases, there are requirements of

proving intent that pose no serious obstacle since they boil down to the objective intent that can be inferred from the conduct. Just as "no monopolist monopolizes unconscious of what he is doing," *Aspen Skiing v. Aspen Highlands*, 472 U.S. 585, 602 (1985), so too no legislature redistricts unconscious of the political implications, *Davis*, 478 U.S. at 128-29 (Plurality Opinion); *Gaffney*, 412 U.S. at 752-53.

The antitrust monopolization doctrine requires two elements: (1) monopoly power and (2) exclusionary conduct. *See* Elhauge, *Defining Better Monopolization Standards, supra,* at I. Proving monopoly power requires proving not just a dominant market share, but an ability to price substantially above the competitive level. *Id.* Proving exclusionary conduct requires proof that the conduct not only hampers rival competition but does so without any legitimate business purpose. *Id.* These time-honored antitrust standards offer a natural basis for developing administrable standards for judging efforts to monopolize a political market through partisan gerrymandering.

Defining Political Monopoly Power. Antitrust courts determine "monopoly power" based on two factors: market share and the firm's ability to price above the competitive level. *See id.* at I.A., IV.A-B. A court investigating partisan gerrymandering should investigate similar factors.

The standard for determining how much market share a firm must have to be a monopoly has never been precisely clear. *See id.*; *Eastman Kodak v. Image Technical*, 504 U.S. 451, 481 (1992). Comparably, there is a far more administrable analogous element for partisan gerrymandering – unless a party has control over both legislative houses and the governor's office, there can be no partisan gerrymandering claim, for otherwise any redistricting would require the approval of the rival party. Such monopoly control by one party has traditionally subjected it to heightened constitutional scrutiny. *See Terry v. Adams*,

345 U.S. 461, 496 (1953); *Morse v. Republican Party,* 517 U.S. 186, 269 (1996) (Thomas, J., dissenting).

Also necessary to establishing antitrust monopoly power is proof that a firm can raise prices over the competitive level. Without that ability, even a firm with high market share cannot cause any economic harm. *See* Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981). Similarly, to have political monopoly power, a party must not only enjoy a dominant market share of legislative seats, but a demonstrated ability to garner a number of seats above the competitive level.

Showing that a party has won a proportion of seats that exceeds its proportion of the vote does not suffice to prove that it has gained a number of seats that exceeds the competitive level. After all, it would be constitutionally permissible to dispense with districts and elect all legislators through statewide votes, even though that would result in the party that gets the majority of votes statewide winning all the seats. And a completely random districting system would likely have close to the same result. In either case, the result reflects competition, not monopoly power. Nor would the disproportion that results from such politically random districts in a winner-takes-all system prove any discrimination in favor of one party. District lines that allow a party that wins 51% vote to reap 80% of seats create no political discrimination when a 51% vote for the other party would have the same result in reverse.

Showing that party has control of seats above the competitive level instead requires proof that its statewide percentage of seats is above the reasonable range of what its percentage of the statewide vote typically produces in competitive political markets without similar partisan gerrymandering. Courts can determine this by comparing the party's percentage of seats and votes to the same figures in elections that occurred under district lines that

were drawn by politically divided governments, either historically in that state or contemporaneously in other states.

Because voters are not geographically distributed in random ways, such a historical or contemporaneous comparison will provide a natural range of reasonable variation rather than a strict requirement that winning a majority of the vote must always translate to winning a majority of the seats. *Davis,* 478 U.S. at 134-40 (Plurality Opinion) (rejecting any such strict requirement). But when a redistricting plan has given a party a statewide majority of seats even though it earned a minority of the statewide vote, then it is reasonable to at least presume that the requisite ability to secure a number of seats above the competitive level has been established. Such a showing would then shift the burden of proof on this element to the defender of the gerrymander to show that the results were within the reasonable range produced by past or contemporaneous nonpartisan redistricting.

Again, this test seems even more administrable than its antitrust counterpart, which instead asks whether the monopolist has an ill-defined "substantial" degree of market power, which is in turn defined to exist only when it confers an ability to raise prices "substantially" over competitive levels. *See* Elhauge, *Defining Better Monopolization Standards, supra,* at I.A.

Political Exclusionary Conduct. Merely having monopoly power is not enough to constitute monopolization. Exclusionary conduct must also be proved. This requires proof that conduct "not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." *Aspen*, 472 U.S. at 605 n.32 (1985) (quoting 3 AREEDA & D. TURNER, ANTITRUST LAW 78 (1978)). Conduct that impairs the ability of rivals to compete does not constitute exclusionary conduct if it can

be explained by a legitimate business purpose. *Aspen*, 472 U.S. at 605, 608.

Again, this suggests natural analogues in the political context. First, to constitute illegal partisan gerrymandering, the district lines must impair the ability of rivals to compete. Here, that element would be proven by demonstrating that, because of how the district lines were drawn, the rival party predictably needs a higher statewide vote percentage than the controlling party to get a statewide majority of the seats. Such a standard would not require proof that the monopoly party has totally excluded its rivals from any chance at winning. But that is an unrealistic standard for proving exclusionary conduct and does not constitute the rule in antitrust law either. Rather, improper conduct that impairs the efficiency of rivals without utterly driving them out of the market is considered exclusionary because it reduces their ability to constrain the monopolist from raising prices. *See* Elhauge, *Defining Better Monopolization Standards, supra,* at III.B; *Aspen Skiing*, 472 U.S. at 587 (affirming monopolization for conduct that did not drive out rival but did impair its ability to compete). Likewise, if partisan gerrymandering means that rival parties would need a higher percentage of the statewide vote than the redistricting party to win a statewide majority of the seats, then their ability to compete has been impaired in a way that increases the discretion of the party with monopoly power to deviate from the wishes of the electorate. It is that sort of system that discriminates against one party and leaves the political process unresponsive to changes in majority preferences.

Second, just as even conduct that impairs rival competition is not exclusionary under antitrust law if it has a legitimate business purpose, so too drawing district lines in a way that impairs rival competition should not be deemed to be exclusionary if it serves a legitimate governmental purpose. One such purpose might be keeping districts reasonably compact and respecting municipal

borders. For example, it is very difficult to district New York state without packing Democratic voters into districts in New York City because of its voting patterns. Such districting does not constitute an unfair abuse of political monopoly, even though it presumably makes it harder for New York Democrats to translate a majority of the statewide vote into a majority of legislative seats. Likewise, it would be a legitimate governmental purpose to draw district lines to comply with the Voting Rights Act even though that might create majority black districts that also tend to make it harder for a Democratic majority in statewide vote to secure a majority of seats. But if the actual district lines drawn are only explicable by a desire to secure crass partisan advantage by giving one party a statewide majority of the seats even when it gets a minority of the statewide vote, then those lines cannot be explained by a legitimate governmental purpose.

Since there are many cases defining the legitimate purposes that can justify district lines, this standard for political exclusionary conduct is, if anything, far more administrable than the comparable antitrust standard, which has not yet resolved what the criteria are for determining when a business purpose is "legitimate" enough to offset any exclusionary effect on rivals. *See* Elhauge, *Defining Better Monopolization Standards, supra,* at I.B.

Administrability and Consistency with *Davis*. In short, the proper antitrust analogy for judging partisan gerrymandering would require proving two elements, each of which has two subelements.

> (1) *Political Monopoly Power* – One political party (a) controls all the state political branches drawing the district lines and (b) has a demonstrated ability to garner a number of seats above the competitive level. The latter would be presumptively shown by evidence that a party was able to get a statewide majority of the seats with a minority of the statewide vote. But that presumption could be rebutted by evidence that

> its percentage of seats was within the reasonable range reflected in the statewide percentage of seats that such a statewide vote percentage has historically or contemporaneously produced in comparable competitive elections when district lines were not the product of partisan gerrymandering.
>
> (2) *Political Exclusionary Conduct* – The district lines (a) cannot be explained by any legitimate purpose and (b) have been drawn in such a way that the rival party predictably needs a higher statewide vote percentage than the controlling party to get a statewide majority of the seats.

These standards are consistent with those used by the *Davis* Court and plurality, but add content that makes those standards more administrable and addresses many of the reasonable concerns raised by Justice O'Connor's concurrence. Indeed, as noted above, these standards on political monopoly power and exclusionary conduct are actually far more administrable and certain than their antitrust analogues. Given that these existing antitrust standards have for decades been routinely enforced by courts to impose treble damages on firms, it would be inconsistent to say that comparably more administrable parallel political standards are too uncertain for courts to enforce.

Six justices in *Davis* concluded that the justiciable standard for determining whether partisan gerrymandering violated the equal protection clause was whether it had both a discriminatory intent and a discriminatory effect on a political group. *Davis,* 478 U.S. at 127 (Plurality Opinion of Justice White, joined by Brennan, Marshall & Blackmun, JJ.); *id.* at 161 (Powell, J., joined by Stevens, J., concurring in part and dissenting in part) (agreeing on the standard but not on its application). Those factors correspond to the two political monopolization elements noted above.

The discriminatory intent element corresponds to proving political exclusionary conduct. As noted above, this generally does not require proof of subjective intent, since no monopolist – economic or political – is unconscious of what it is doing. Rather, as under antitrust law, the inquiry is mainly into the objective intent implied by the conduct, although proof of subjective intent can (where available) usefully help resolve ambiguities about that conduct. Here the objective intent can be inferred from whether the district lines objectively hampered the ability of rivals to compete in a way that could not be explained by any legitimate governmental purpose. *See Karcher v. Daggett,* 462 U.S. 725, 748 (1983) (Stevens, J., concurring) (gerrymandering violates the Equal Protection Clause only when the redistricting plan serves "no purpose other than to favor one segment – whether racial, ethnic, religious, economic, or political – that may occupy a position of strength at a particular time, or to disadvantage a politically weak segment of the community."); *Davis,* 478 U.S. at 164 (Powell, J., joined by Stevens, J., concurring in part and dissenting in part) (same). Such an inquiry into objective intent would reinvigorate the "discriminatory intent" prong, which has proven somewhat empty as applied by lower courts.

The discriminatory effects element corresponds to proving political monopoly power. Proving that the controlling party was able to secure a number of seats above the reasonable range of seats its vote percentage produced in comparable elections under bipartisan districting would show that "the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively," leaving them with "'less opportunity to participate in the political processes and to elect candidates of their choice.'" *Davis,* 478 U.S. at 131, 133 (Plurality Opinion). And the combination of proving such a past discriminatory effect with proving that a rival party predictably needs a higher statewide vote percentage than the controlling party to get a statewide majority

of the seats would suffice to show that "the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole" and provides the necessary "evidence of continued frustration of the will of a majority of the voters." *Id.* at 132-33. *See also id.* at 140 (requiring "more than a showing of possibly transitory results").

Further, the proposed standard would avoid the defects in district court findings that led the *Davis* plurality to reverse. The plurality rejected the proposition that unlawful discrimination could be established by proof that in one election a party gained a majority of seats in one legislative house with a minority of the vote. *Id.* at 134-40. Likewise, such proof would not suffice to prove unconstitutionality under the proposed two-part standard. Indeed, such proof would not even suffice to meet the closest subelement under monopoly power, which allows such a showing to be rebutted by proof that the number of seats obtained was within the reasonable range that the relevant vote percentage has produced in competitive political markets without similar partisan gerrymandering. Further, an exclusionary subelement would require the additional proof that the situation would continue because the rival predictably needed a higher vote percentage than the controlling party to gain a majority of seats. This would necessarily mean the disfavored party would need some supermajority to win a majority of seats and had no reasonable prospect than winning a mere majority of the vote would suffice. *Compare id.* at 135 (noting that *Davis* district court "refused to hold that those results were a reliable prediction of future ones," and "did not ask by what percentage the statewide Democratic vote would have had to increase to control either the House or the Senate"). To show the remaining two subelements, a litigant would also have to show control over both legislative houses and the governor's office, as well as the absence of any legitimate governmental purpose.

The proposed standard would provide more concrete content to the applicable test in a way that avoids two

serious concerns raised by Justice O'Connor's *Davis* concurrence. First, Justice O'Connor was concerned that the *Davis* plurality's test would inevitably lead to a requirement of proportional representation that was inconsistent with our history, traditions or political institutions. *Id.* at 145, 147, 156-60 (O'Connor concurrence). The proposed standard avoids that result because it makes clear that gaining a supermajority of seats with a bare majority of the vote does not in any way prove partisan gerrymandering. But while Justice O'Connor is certainly correct that prohibiting such a winner-takes-all approach is inconsistent with our political traditions, nothing in those traditions suggests any inconsistency with the proposition that parties should not be able to guarantee themselves a majority of seats with a minority of the vote. At the same time, the proposed standard would meet the *Davis* plurality's conclusion that the Constitution requires not "a preference for proportionality *per se* but a preference for a level of parity between votes and representation sufficient to ensure . . . that majorities are not consigned to minority status, [which] is hardly an illegitimate extrapolation from our general majoritarian ethic . . . " *Davis*, 478 U.S. at 129 n.9 (plurality). In short, a redistricting plan need not assure that the majority's representation in the legislature is proportional to its share of the electorate, but also cannot thwart the principle of majority rule itself by assuring a consistent majority to the minority of voters.

Second, Justice O'Connor worried that the *Davis* plurality had failed to provide "judicially manageable standards" for identifying unconstitutional partisan gerrymandering. *Id.* at 147-48, 156-58 (O'Connor concurrence). As she correctly observed, in order to determine whether partisan gerrymandering has improperly "degraded" the electoral strength of a political party, courts have to adopt some baseline norm about what degree of electoral strength the party should have had given its share of the vote. *Id.* at 157. Yet the plurality had not identified what baseline norm it had in mind other than

the norm of proportional representation that it had rejected. *Id.* This is hardly surprising for the very first decision finding the issue justiciable, since the Court might reasonably have been reluctant or unable to adopt a more definitive standard before having the issue percolate in the lower courts to create more judicial experience on the topic. But in any event the antitrust norms identified above can provide the requisite baseline norm without resorting to any mandate of proportional representation. That baseline norm is provided by (a) the reasonable range in the share of seats a party typically obtains with the same percentage of the statewide vote in competitive political markets without similar partisan gerrymandering, and (b) the absence of obstacles that, without any legitimate purpose, require the rival party to get a higher statewide vote percentage than the controlling party to get a statewide majority of the seats.

III. Applying These Political Monopolization Standards to this Case

If the Court adopts this standard, it is relatively clear that the plaintiffs in this case alleged enough for the claim to defeat the motion to dismiss. They alleged that, despite normal statewide majorities for Democrats in congressional elections, the Republicans predictably would win between 12 and 14 of the 19 available Congressional districts. J.S. App. 137a-140a. They also alleged that no legitimate purpose could explain the district lines that were drawn, *id.* at 139a-144a, a proposition with which the district court agreed. J.S. App. 9a n.3. And it is undisputed that the Republican Party controlled both legislative houses and the Governor's office at the time of redistricting.

Moreover, as a result of the odd procedural history of this case, there was already a trial on the merits about Act 1, which was in no material way different from the Act 34 map in question here. In it, a districting expert – Professor Alan Lichtman – gave testimony that included a serious

statistical analysis of the Act 1 Map. He studied election returns from 18 different past statewide elections and found that each party had close to fifty percent of the vote on average. *See* Tr. 95. He found that when you broke down this data and figured out how a 50/50 split in the vote translated into Congressional districts, that "for the enacted plan, 14 of the districts have a Republican majority across on average on 19 elections and only five districts have a Democratic majority." Tr. 96. He did a number of robustness checks to make sure that the voting in statewide races corresponded closely to how people vote in Congressional races. Tr. 99-106. He also conducted tests that measured compactness and respect for political subdivisions, and found that the district lines scored very poorly as means of furthering those legitimate purposes. Tr. 116-18, 124-27. The district court agreed with that conclusion. J.S. App. 55a. And the 2002 election confirmed the above allegations and evidence, with the Republicans winning 63% of the seats with less than 50% of the vote.

Thus, the allegations and evidence indicate that: (a) one party controlled all the political branches of government that drew the redistricted lines; (b) the districting plan assured one party a number of seats at least presumptively beyond the competitive level suggested by its minority of the vote; (c) the districting plan required the Democratic party to get a higher percentage of the statewide vote than Republicans to garner a statewide majority of seats, and (d) the controlling party had no legitimate purpose that explained how it drew its districting lines. On remand, a trial court could consider any evidence defendants might want to introduce either on these issues or to rebut their presumptive implication by trying to show the election results were within the reasonable range reflected in the statewide percentage of seats that such a statewide vote percentage has historically or contemporaneously produced in comparable elections when district lines were not the product of partisan gerrymandering.

Even if the Court does not adopt the above proposed test, the district court should be reversed because it adopted

a standard of effective per se legality that is clearly inconsistent with *Davis*. The district court judgment reflected its conclusion that partisan gerrymandering can only give rise to a claim if it completely shut out one party or set of voters from the political process. J.S. App. 11a, 33a. The problem with this reasoning is that it is impossible that decisions on districting could "shut out" anyone from the political process if "shut out" is defined in the way the district court did. Redistricting simply has no impact on "registering to vote; organizing with other like-minded voters; raising funds on behalf of candidates; voting; campaigning; or speaking out on matters of public concern." *Id.* at 39a. If partisan gerrymandering can give rise to a justiciable claim, this standard cannot be good law, as even the most egregious partisan gerrymandering would not stop anyone from registering to vote or organizing.[3]

[3] In *O'Lear v. Miller*, 222 F. Supp. 2d 850 (E.D. Mich. 2002), another district court announced an only slightly less impossible standard. "Plaintiffs do not allege (1) that they have no chance of obtaining more favorable congressional districts in the next reapportionment; (2) that Republican candidates would be indifferent to the interests of Democratic citizens; or (3) that the challenged plan would result in Democrats being essentially 'shut out' of the political process; therefore, plaintiffs do not state a cognizable equal protection claim. Nor does the amended complaint contain allegations from which these consequences could be inferred." The last two points have nothing to do with districting – they would require a showing of an alternate law or some type of social bias that rendered fair representation impossible. The first would render every partisan gerrymandering claim unjusticiable because it is always the case that in the next reapportionment a party could win the governorship by majority vote (since governors are elected statewide) and then have that governor veto any further redistricting that had excessive partisan effects. But that provides no meaningful protection in the years before the next mandatory reapportionment nor any protection even then if the disfavored party that year happens to be unsuccessful in the gubernatorial race.

CONCLUSION

The Court should reverse the district court decision dismissing the complaint and remand for application of clarified standards.

Respectfully submitted,

EINER ELHAUGE,
Counsel of Record
Counsel for Amici Curiae August 29, 2003