NO. 02-1580

IN THE
Supreme Court of the United States

RICHARD VIETH, *et al.*,

Appellants,

v.

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

Appellees.

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

AMICUS BRIEF OF PUBLIC CITIZEN, COMMON CAUSE, DEMOCRACY 21 AND CENTER FOR VOTING AND DEMOCRACY IN SUPPORT OF APPELLANTS

ALAN B. MORRISON
Counsel of Record
AMANDA FROST
SCOTT NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

August 29, 2003

QUESTION PRESENTED

Whether a State presumptively violates the Equal Protection Clause when it subordinates all traditional, neutral districting principles to the overarching goal of drawing a congressional redistricting map that achieves maximum partisan advantage for members of one political party.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Pages**

OTHER AUTHORITES **Pages**

INTERESTS OF AMICI CURIAE[1]

Public Citizen, Inc., is a non-profit advocacy group with more than 145,000 members nationwide. It appears before Congress, administrative agencies, and the courts on a wide range of issues. Public Citizen has a longstanding interest in the fairness of the electoral process. As a result it has participated in cases concerning campaign finance reform, *see, e.g.*, *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), candidate free speech, *see, e.g., Republican Party of Minnesota v. White*, 122 S. Ct. 2528 (2002), and third party ballot access, *see, e.g., Twin Cities Area New Party v. McKenna*, 73 F.3d 196 (8th Cir. 1996).

Common Cause is a non-profit citizen action organization with approximately 200,000 members and supporters across the United States. Common Cause promotes, on a non-partisan basis, its members' interests in open, honest and accountable government and political representation, and it seeks to achieve this objective by making government more responsive to citizens through government and electoral reform. Common Cause has long worked for reform of the redistricting process by supporting both state and federal legislative efforts, and state ballot initiatives, designed to make the redistricting

---

[1] Letters of consent to the filing of this brief from both parties have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

process less susceptible to manipulation for purely partisan motives. Common Cause participated as an amicus curiae in *Davis v. Bandemer*, 478 U.S. 109 (1986).

The Center for Voting and Democracy is a non-partisan, non-profit corporation incorporated for educational purposes. The Center researches and distributes information on the impact of electoral structures on voter participation and representation. Since 1995 the Center has released bi-annual reports about U.S. congressional elections that provide information on competitiveness, representation and voter turnout. Since 1998 it has released bi-annual reports that project winners in most U.S. House of Representative races based primarily on the partisan balance of districts. It has a 50-state on-line guide to redistricting. *See* www.fairvote.org. The Center has been active in encouraging government officials, judges and the public to explore alternatives to current approaches to territorial districting.

Democracy 21 is a non-profit, non-partisan public policy organization that works to eliminate the undue influence of big money in American politics and to ensure the fairness and integrity of our democracy. Democracy 21 supports campaign finance and other political reforms. It conducts public education efforts to accomplish these goals, participates in litigation involving the constitutionality and interpretation of campaign finance laws and other political reforms, and engages in efforts to help ensure that political reform laws are effectively and properly enforced and implemented.

STATEMENT OF THE CASE

Pennsylvania redrew its congressional districts in response to the 2000 census, which required reducing its congressional delegation to 19 members from 21. J.S. App. 14a. Republicans, who were in the majority in both houses of the Pennsylvania General Assembly, altered district lines in a manner designed to force several Democratic incumbents to run against one another and ensure that Republican candidates would win the majority of congressional seats in that State even when Republican candidates receive less than half of the vote for Congress state-wide. *Id.* at 15a -17a.

The population of Pennsylvania is evenly divided between the two major political parties. In the November 2000 election—the last to be held under the 1992 districting plan—Pennsylvanians elected eleven Republicans and ten Democrats to represent them in Congress. J.S. App. 17a. In those 21 Congressional races, Democrats obtained 50.6 percent of the vote, Republicans 49.4 percent. *Id.* at 137a. The five statewide races in 2000 were even more closely divided: Democratic candidates won 50.1 percent of the vote to Republicans' 49.9 percent. *Id.*

Even though Republicans and Democrats are near parity in Pennsylvania, the General Assembly's 2002 redistricting plan ensures that Republicans will dominate the Pennsylvania congressional delegation by a margin of at least 12-7. *See* J.S. App. 137a-138a. To achieve this

outcome, the plan's Republican authors ignored traditional districting principles by splitting precincts, municipalities and counties. In total, the plan at issue divides 29 counties and 81 municipalities to achieve its highly partisan result. *Id.* at 150a.

On January 11, 2002, Appellants Richard Vieth, Norma Jean Vieth, and Susan Furey filed this case in federal court challenging the Pennsylvania Congressional redistricting. Appellants claimed that the Republican redistricting plan ("Act 1") was an extreme political gerrymander that deprived Pennsylvania's Democratic voters of their rights under the Equal Protection Clause and violated Article I of the Constitution by consistently frustrating the will of the majority of voters over the course of the next decade. J.S. App. 139a-144a.

A three-judge district court granted Pennsylvania's motion to dismiss the Appellants' political gerrymandering claims. The Court held that Appellants had met only the first prong of the two-pronged test for analyzing political gerrymandering claims under this Court's decision in *Davis v. Bandemer*, 478 U.S. 109 (1986). The district court agreed that Appellants' allegations that the Pennsylvania Republicans had "prevented all Democratic input on Act 1 in order to establish a Republican supermajority in Pennsylvania's congressional caucus" were sufficient to establish "discriminatory intent." J.S. App. 32a-33a. However, the district court dismissed Appellants' equal protection claim on the ground that they had not demonstrated that they would suffer a sufficient

discriminatory effect from the partisan gerrymandering.

According to the district court's reading of *Bandemer*, Appellants could not prevail unless they showed not only extreme partisan gerrymandering, but also that they would be "completely shut out of the political process." J.S. App. 33a. Because the Appellants could not demonstrate that they would be prevented from "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," the district court concluded that Pennsylvania's lopsided redistricting was not constitutionally suspect. *Id.* at 39a. The district court did not address Appellants' separate claim that the Pennsylvania General Assembly transgressed the limits of Article I of the Constitution by enacting such a politically biased redistricting plan.

However, Appellants did prevail on their "one person, one vote" claim by demonstrating that Act 1's population deviation was not justified by any neutral redistricting policy. In response, the General Assembly enacted a second plan, Act 34, which addressed the population deviation problems in Act 1. J.S. App. 3a. In most respects, Act 34 is virtually identical to Act 1: each of the new Act 34 districts has at least 97.8 percent of the same population as in the map that constituted Act 1. *Id.* at 9a. The Act divides even more counties and municipalities than had been split apart in Act 1. As the district court stated, "[d]espite an opportunity to improve upon the numerous deficiencies of Act I, Defendants have

returned to this court with essentially the same map." *Id.* at 9a n.3.

As the November 2002 elections approached, the district court stayed its earlier decision and the election was conducted under Act 1. All but one of the Republican incumbents won re-election by more than 14 percentage points. Republicans also won two newly created open seats. Three Democratic incumbents lost, creating a 12-7 Republican advantage in a state that, based on voter registration, should have sent something close to an evenly divided delegation to Congress in 2002.

On January 24, 2003, the District Court approved Act 34, concluding that it remedied the population disparities in Act 1 and satisfied the one person, one vote requirement. J.S. App. 12a. The District Court did not revisit its earlier conclusion that Appellants had failed to demonstrate a violation of the Equal Protection Clause. Nor did the District Court discuss Appellants' Article I claim.

SUMMARY OF ARGUMENT

In *Davis v. Bandemer*, 478 U.S. 109 (1986), this Court held that there are constitutional limits on the legislature's ability to divide up state legislative districts on partisan grounds. Dividing legislative districts for political gain violates the Equal Protection Clause, which prohibits "intentional discrimination against an identifiable political group" that has "an actual discriminatory effect on that group." *Bandemer*, 478 U.S. at 127. *Bandemer* established that a redistricting plan is unconstitutional if it excessively manipulates the electoral system to favor one party's voters over another. 478 U.S. at 119-127. Contrary to the district court's view, Appellants are not required to show complete exclusion from the political process to prevail. Because Appellants demonstrated that the General Assembly intentionally redrew districts so as to heavily disadvantage Democrats, they have met their burden under *Bandemer*.

We also write to ensure that this Court does not foreclose future attacks on *bipartisan* gerrymandering, which is equally destructive to the democratic process. Although *Bandemer*, like this case, concerned partisan gerrymandering that advantages one party over the other, the Equal Protection Clause is just as fully implicated when the two major political parties act in unison to divvy up the electorate between them to ensure that each has a number of "safe" districts. In that situation, registered independents with centrist views are the clear losers because they are deprived of their potential power as

swing voters to choose between major party candidates. Challengers to incumbents and third party voters and candidates are also disadvantaged when the two major political parties create safe seats for themselves. Thus, like partisan gerrymandering, bipartisan gerrymandering violates the Constitution's Equal Protection Clause by intentionally discriminating against identifiable groups and diminishing those groups' political power.

ARGUMENT

POLITICAL GERRYMANDERING, WHETHER PARTISAN OR BIPARTISAN, VIOLATES THE EQUAL PROTECTION CLAUSE.

Congressional elections are becoming less competitive every year. In 2002, over 80 percent of the U.S. House of Representatives races were won by landslide margins of at least 20 percent. Overall, in only one out of ten races was the margin less than ten percent. Thus, over ninety percent of Americans live in congressional districts that are essentially one-party monopolies. *See* Center for Voting and Democracy, "Overview: Dubious Democracy 2003-2004," www.fairvote.org/dubdem/overview.htm. The situation is even worse in some states. For example, in California, 50 out of 53 races were decided by margins of greater than 20 percent.

In a related phenomenon, incumbents are now, more than ever, nearly guaranteed reelection: whereas

incumbents' losses to general election challengers averaged 22 per election in 1972, 1982, and 1992, incumbents lost only eight seats in 2002, including four in incumbent-on-incumbent races. *See* Sam Hirsch, "The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting," 2 Election Law Journal 179, 183 (2003).

This situation is not mere happenstance, but rather the result of carefully orchestrated political gerrymandering—sometimes by one of the major political parties to the disadvantage of the other, and sometimes by the two political parties colluding to protect their seats and their incumbents. A comparison of the competitiveness of U.S. House races in 2002 to statewide races demonstrates the extraordinary effect of political gerrymandering. Out of 70 statewide races for governor and Senate in 2002, the winner obtained 55 percent or more of the vote in less than half (33) of those races, and only 24 percent (17) of those races were won by 60 percent or more. Yet the elections for most of the U.S. House of Representatives were won by a landslide: Out of the 435 races, the winner had 55 percent or more of the vote in 91 percent (396) of those races, and candidates in 81 percent of the races won by 60 percent or more. *See* www.fairvote.org/redistricting/incumbentprotection.htm. These statistics demonstrate that even though most States are close to evenly divided between the two major political parties, the vast majority of districts for the U.S. House of Representatives are drawn so as to prevent any real competition.

A. Pennsylvania's Partisan Gerrymander Violates The Equal Protection Clause.

In *Davis v. Bandemer*, the plurality held that the Equal Protection Clause places limits on political gerrymandering in state legislatures. The Court stated that the Constitution prohibits "intentional discrimination against an identifiable group" that has "an actual discriminatory effect on that group." 478 U.S. at 127. To be sure, the evidentiary burden is high: To establish such a violation, the plaintiff must show that the discrimination "substantially disadvantages certain voters in their opportunity to influence the political process effectively." *Id.* at 133. Nonetheless, *Bandemer* made clear that claims of partisan gerrymandering are justiciable and, when evidentiary burdens have been met, remediable by a court.

Moreover, *Bandemer* concerned redistricting of state legislative elections. This Court has stated that the constitutional standards governing congressional reapportionment are even more stringent than those for redistricting for state office. *See, e.g, Gaffney v. Cummings*, 412 U.S. 735, 741-42 (1973); *Mahan v. Howell*, 410 U.S. 315, 322-323 (1973). Thus, the evidentiary standard enunciated in *Bandemer* for establishing an equal protection violation should be applied more leniently in a congressional redistricting case such as this one.

This case presents a classic example of one type of political gerrymandering—the partisan gerrymander. The

Pennsylvania redistricting put Democrats at a significant disadvantage. Even though the two major political parties hold nearly equal support among Pennsylvania residents, *see* J.S. App. 137a, the 2002 redistricting ensures that Republicans will win a supermajority of seats in Pennsylvania's congressional delegation. Indeed, that is just what was intended and what happened. In the 2000 elections, ten Democrats and eleven Republicans represented Pennsylvania in Congress. Under the new plan, Democrats lost three seats in the 2002 elections, and Republicans now dominate 12-7.

The district court found that this lopsided outcome was an intentional act of partisan gerrymandering by the Republicans in Pennsylvania's General Assembly. J.S. App. 33a. Nonetheless, the district court rejected the Appellants' equal protection claim because they could not show that they would be "completely shut out of the political process." *Id*. The court believed that unless Appellants could demonstrate that they were prohibited from "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," they did not have a cognizable equal protection claim under *Bandemer*. *Id.* at 39a.

Bandemer does not require such a showing, even in the context of state legislative elections. Indeed, if complete exclusion from the political process were the standard, then political gerrymandering would *never* be judicially remediable, so long as everyone was allowed to

cast a ballot, no matter how little impact their vote might have. Moreover, the specific prohibitions listed by the district court would clearly be unconstitutional regardless of whether they accompanied a discriminatory redistricting plan. Thus, the district court's analysis renders meaningless *Bandemer*'s recognition that political gerrymandering can violate the Equal Protection Clause.

True, the right to participate in the political process does not guarantee a right to vote for a winning candidate. Those individuals who voted for the loser are presumed to be adequately represented by the winning candidate and to have the same opportunity to influence their representative as any other voter in the district. *Bandemer*, 478 U.S. at 132. That presumption, however, is overcome in the most extreme cases of political gerrymandering, as where one political party significantly fences out the other (partisan gerrymandering), or where Republicans and Democrats agree to carve up the state into safe districts for their incumbents to lock in the current legislative proportions (bipartisan gerrymandering). *Bandemer* acknowledged as much, explaining that although the presumption is that an elected candidate will not entirely ignore the interests of those who voted against him or her, that presumption can be overcome by "actual proof to the contrary." *Id.*

For example, in *Bandemer*, the plurality concluded that for a State's redistricting to be held unconstitutional, there must be "evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political

process." 478 U.S. at 133; *see also id.* at 126 n.9. "[U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or group of voters' influence on the political process as a whole." *Id.* at 132. This Court explained that the "question is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process." *Id.* at 132-33.

Although merely showing that Democratic candidates were not elected in proportion to Democrats in the general population is not enough to prevail on a claim of partisan gerrymandering, *Bandemer* does not require Appellants to show complete exclusion from the political process, as the district court erroneously concluded. Because Appellants have demonstrated that Democrats were the victims of intentional discrimination that significantly diminished their political influence in the 2002 election, and threatens to continue to do so throughout the decade, they have done all they could to show that Pennsylvania's redistricting violated the Equal Protection Clause.

Applying the limits established in *Bandemer* is now more important than ever, as new technologies have transformed the process of political gerrymandering into a near-perfect science. *See Shaw v. Hunt*, 861 F. Supp. 408, 457 (E.D.N.C. 1994) (describing computer programs); Richard H. Pildes & Richard G. Niemi, "Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election-District Appearances After *Shaw v.*

Reno," 92 Mich. L. Rev. 483, 574 (1993). As this case demonstrates, modern computer districting software allows map-makers to carve up voting districts "with the precision of a surgeon." Michael W. McConnell, "The Redistricting Cases: Original Mistakes and Current Consequences," 24 Harv. J.L. & Pub. Pol'y 103, 103 (2000). "[W]hen [political profiles are] overlaid on a census map, it requires no special genius to recognize the political consequences of drawing district lines along one street rather than another." *Gaffney,* 412 U.S. at 753. Thus, the Court must make it clear that States cannot further alienate the electorate by redistricting so as make elections a foregone conclusion.

B. The Practice Of Bipartisan Gerrymandering Violates The Equal Protection Clause.

Although *Bandemer* concerned partisan gerrymandering, such as occurred here, its rationale applies equally to all political gerrymandering that discriminates against a cognizable political group—whether the impetus is partisan, bipartisan, or incumbent protection. In deciding this case, this Court should make clear that bipartisan gerrymandering similarly corrodes the democratic process and violates the Equal Protection Clause.

For instance, by creating "safe" districts for both political parties, bipartisan gerrymandering intentionally diminishes the influence of centrist voters, particularly registered independents. That is because internal party

selection of candidates, either through a primary or convention nomination, usually rewards the more polarized and activist wing of the party. *See* Samuel Issacharoff, "Gerrymandering and Political Cartels," 116 Harv. L. Rev. 593, 627-28 (2002). Normally, the general election acts as a counterweight, pulling the nomination process in both parties back toward the middle and closer to the majority of voters as they compete for the centrist votes. If the districts have been carved up into "safe" Republican or Democratic strong-holds, however, the general election is a foreordained conclusion that does not temper the primary as it would in a contested district. *Id.* Thus, while a bipartisan gerrymander may keep intact a balance of Republicans and Democrats proportional to those in the population, it is likely that those Republicans and Democrats will be, respectively, far more right and left of center than if districts had not created "safe" seats for each party. *See id.* at 629.

Discrimination against politically moderate independents is just as pernicious as discrimination against Republicans or Democrats, and leads to the same results that this Court has declared to be constitutionally impermissible. When the two major political parties create "safe" districts for each party's candidates, ensuring that Democrats and Republicans will win by wide margins in each of the districts, they eliminate the need for candidates from the two parties to compete for the votes of centrist independents and other swing voters. These voters' allegiances are vital in close elections, but can easily be ignored by Democrats and Republicans who have a

significant cushion of support in their districts. Thus, just as in partisan gerrymandering, the "excluded groups have 'less opportunity to participate in the political processes and to elect candidates of their choice.'" *Bandemer*, 478 U.S. at 131 (quoting *Rogers v. Lodge*, 458 U.S. 613, 624 (1982)). And in both cases, there is a "lack of responsiveness by those elected to the concerns of the relevant groups." *Id.*

Along with independents, challengers to incumbents are the clear losers of "sweetheart gerrymanders"—the term used when both parties protect their incumbents and preserve the status quo at the expense of drawing districts that would result in serious competition for votes. Issacharoff, 116 Harv. L. Rev. at 624; Mark E. Rush, "Voters' Rights and the Legal Status of American Political Parties," 9 Journal of Law and Politics 487, 505 (1993). Incumbents have a powerful advantage at all levels of state and federal elections, and their advantage has steadily increased since the 1940s. *See* McConnell, 24 Harv. J.L. & Pub. Pol'y at 103. Although bipartisan redistricting is not the only reason for incumbent dominance, it plays a significant role, such as when district lines are purposefully redrawn to increase support for an incumbent whose last election was too close for comfort. *See* Gary C. Jacobson, "Terror, Terrain and Turnout: Explaining the 2002 Midterm Elections," 118 Pol. Sci. Q. 1, 10 (Spring 2003); *see also* Center for Voting and Democracy, "Monopoly Politics 2002: How 'No Choice' Elections Rule in a Competitive House," www.fairvote.org/2002/mp2002.htm#overview

(describing how redistricting in 2002 shielded incumbents).

The 2001-2002 round of congressional redistricting was the most incumbent-friendly in modern history, and the dominance of incumbents at the national level is now nearly complete. *See* Hirsch, 2 Election Law Journal at 179. The numbers tell the story. In California and Texas, there were 14 competitive districts in 2000 (defined as districts in which the voters preferred one presidential candidate to the other by no more than 53 percent to 47 percent); after the redistricting of 2002, only two such districts remain competitive using that measure. *See* www.fairvote.org/redistricting/incumbentprotection.htm. As the Washington Post editorialized more generally about the 2002 election, the "magnitude of incumbency's triumph in last week's elections for the House of Representatives was so dramatic that the term 'election'—with its implication of voter choice and real competition—seems almost too generous to describe what happened on Tuesday." Editorial, "Broken Democracy," Washington Post, Nov. 10, 2002, at B6; *see also* Editorial, Richmond Times-Dispatch, March. 17, 2002, at E2 ("Citizens will cast ballots in November, but their votes effectively were counted when pols drew the lines.").

Perhaps most disturbing, more and more races are going uncontested as challengers choose not to spend the time and money on a race in which the result is predetermined. A record low of four challengers successfully upset incumbents in the 2002 House

elections, about one fifth as many successful challengers as in previous election years. *See* Hirsch, 2 Election Law Journal at 188. Challengers fared no better in the primaries. In 2002, only four Democratic incumbents (California's Gary Condit, Alabama's Earl Hilliard, Georgia's Cynthia McKinney, and Ohio's Tom Sawyer) and no Republican incumbents lost to non-incumbent challengers in their respective party primaries. *Id.* at 189. Thus, lack of competitiveness in the general elections is not offset by increased competition in the party primaries. *Id.*

Professor Issacharoff has likened the injuries caused by bipartisan gerrymandering to those produced by an anti-trust cartel. If two dominant rival firms producing similar products—Coke and Pepsi, for example—agreed to divide up geographic territory to avoid competition against one another, consumers would suffer because they would pay higher prices for fewer choices as each of the rivals enjoyed the benefits of noncompetition in its "safe" region. Such a market division agreement would unquestionably constitute a violation of the Sherman Act. *See* Issacharoff, 116 Harv. L. Rev. at 599. Of course, the consumer product market is not perfectly comparable to the market for political candidates. Nonetheless, Professor Issacharoff notes that the obvious injury to consumers that would result were two producers to divide up the market geographically has something to tell us about the injuries that arise when the two major political parties engage in similar collusion when re-drawing political districts. *Id.*

Indeed, bipartisan gerrymandering may be even more destructive to the health of our democratic system than partisan gerrymandering. When one party has redrawn districts to benefit itself at the expense of the other, dissatisfied voters can at least turn to the disadvantaged party for political support. However, when the two major political parties conspire to divide up the electoral map, all citizens suffer from the lack of competition between candidates, and yet they have nowhere to turn to try to regain political influence. *See* Issacharoff, 116 Harv. L. Rev. at 600. Bipartisan gerrymandering sharply reduces the accountability of candidates in *both* parties, because Democratic and Republican candidates know they are very likely to win regardless of their voting record or behavior.

Admittedly, all redistricting has some political impact. "[D]istricting inevitably has and is intended to have substantial political consequences." *Gaffney,* 412 U.S. at 753. In *Gaffney*, this Court rejected appellants' claim that Connecticut's state legislative reapportionment plan violated the Fourteenth Amendment because it was intended to create districts that would achieve "political fairness" between the political parties, concluding that "judicial interest should be at its lowest ebb" when reviewing state reapportionment for state legislature. *Id.* at 754. The redistricting in *Gaffney* may also have been less cause for concern because independent judges, not members of the legislature, were responsible for drawing the new districts. *Id.* at 736.

Just because politics often plays some role in districting, however, does not justify extreme political gerrymandering that so discriminates against a group of voters as to render their votes superfluous. Despite its holding, the decision in *Gaffney* acknowledged that reapportionment "to achieve political ends or allocate political power[]" is not "exempt from judicial scrutiny under the Fourteenth Amendment." 412 U.S. at 754. The Court explained that the Fourteenth Amendment guards against redistricting plans in which "racial or political groups have been fenced out of the political process and their voting strength invidiously minimized." *Id.* In line with those observations in *Gaffney,* the *Bandemer* plurality concluded that partisan gerrymandering is justiciable. For the same reasons, bipartisan gerrymandering must also be judicially remediable.

Finally, bipartisan gerrymandering is not constitutionally permissible simply because both major political parties agree to it. The Constitution no more permits Democrats and Republicans to rig an election together than it permits them to do so unilaterally. Just as the President and Congress cannot agree to subvert the constitutionally mandated process of enacting legislation—for example, by giving Congress a legislative veto, *I.N.S. v. Chadha*, 462 U.S. 919 (1983), or giving the President a line-item veto, *Clinton v. City of New York*, 524 U.S. 417 (1998)—so, too, the major political parties cannot agree to subvert the process by which the voters select their representatives. Protecting the two-party system is not the same as ensuring perpetual dominance of

the existing two major parties.

For these reasons, commentators consider the injuries caused by partisan and bipartisan gerrymandering to be closely related, and have urged courts to actively prevent both types of political gerrymandering. For example, Judge Richard Posner has suggested that federal courts should carefully scrutinize gerrymandering that "entrench[es]" either the "dominant [political] party" (as occurs in partisan gerrymandering) *or* "incumbents" (as occurs in bipartisan gerrymandering). Richard A. Posner, Law, Pragmatism, and Democracy 242 (2003); *see also* John Hart Ely, "Gerrymanders: The Good, The Bad, and the Ugly," 50 Stan. L. Rev. 607, 621 (1998) (criticizing "self-dealing maneuvers on the part of incumbents seeking to perpetuate their incumbency"). When deciding this case, the Court should make clear to the lower courts that they are obligated to remedy the serious harm to the democratic process that occurs whenever the two major political parties—separately or together—engage in extreme political gerrymandering.

CONCLUSION

For the reasons stated above, this Court should reverse the district court and hold that Pennsylvania's 2002 redistricting plan is unconstitutional.

Respectfully submitted,

ALAN B. MORRISON
Counsel of Record
AMANDA FROST
SCOTT NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

August 29, 2003