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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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League of Women Voters of Pennsylvania, *et al.*, *Petitioners*, v. The Commonwealth of Pennsylvania, *et al.*, *Respondents*.	Civ. No. 261 MD 2017

RESPONDENTS PENNSYLVANIA GENERAL ASSEMBLY, MICHAEL C. TURZAI, AND JOSEPH B. SCARNATI III'S REPLY BRIEF IN SUPPORT OF THEIR APPLICATION TO STAY ALL PROCEEDINGS

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PRELIMINARY STATEMENT

In their Application to Stay Case Pending the U.S. Supreme Court's Ruling in *Gill v. Whitford* (the "Stay Application"), Applicants[1] identified numerous reasons why a stay of all proceedings is warranted in this matter. Applicants submit this Reply Brief to respond to several mischaracterizations of law and fact set forth in Petitioners' Answer to the Stay Application.

First, Petitioners are incorrect that the U.S. Supreme Court's *Whitford* decision—which will address partisan gerrymandering claims arising under the U.S. Constitution—will not affect Petitioners' claims, which have been advanced under the Pennsylvania Constitution. In fact, the very foundation on which the current state of Pennsylvania law governing partisan gerrymandering claims is based comes from U.S. Supreme Court precedent. Specifically, the Pennsylvania Supreme Court had historically found that partisan gerrymandering claims were non-justiciable, but subsequently changed course after the U.S. Supreme Court decided *Davis v. Bandemer*, 478 U.S. 109 (1986). The Pennsylvania Supreme Court relied upon *Bandemer* not only for its conclusion that partisan gerrymandering claims could be justiciable, but for its determination as to the elements necessary to establish a prima facie case. The continued viability of the *Bandemer* decision, however, has been called into question by multiple subsequent

[1] Unless otherwise noted herein, capitalized terms shall have the meaning afforded such terms in the Stay Application.

U.S. Supreme Court opinions, and the Pennsylvania Supreme Court has not had the opportunity to address whether *Bandemer* remains good law in Pennsylvania in light of these decisions. Now that the U.S. Supreme Court in *Whitford* will be addressing the issues of both justiciability and the standard of review (if any) that will govern political gerrymandering claims, the *Whitford* case will necessarily affect this matter, and a stay is warranted pending the Supreme Court's decision.

Second, although Petitioners contend that Pennsylvania is free to deviate from U.S. Supreme Court precedent even on issues where Pennsylvania has traditionally interpreted its Constitution coextensively with the Federal Constitution, Pennsylvania has always followed U.S. Supreme Court law when assessing equal protection-based claims like those asserted here. The Pennsylvania Supreme Court often also follows U.S. Supreme Court First Amendment jurisprudence when interpreting Pennsylvania's Free Speech and Expression Clause under Article I, § 7. Because the U.S. Supreme Court's opinion in *Whitford* will almost certainly address the standard that should govern Petitioners' equal protection and free speech and expression claims, this Court should stay this case pending the outcome in *Whitford*.

Third, Petitioners argue that this case is distinguishable from *Whitford* because Petitioners rely upon different evidence and tests to evaluate their partisan gerrymandering claims. But even a cursory review of the filings in *Whitford*

establishes that the gerrymandering tests used by Petitioners and the *Whitford* plaintiffs overlap substantially. Indeed, not only do Petitioners and the *Whitford* plaintiffs all rely upon the so-called "efficiency gap" test, they all also cite to the same computer modeling test set forth in an article by Jowei Chen, as well the "mean-median" and "partisan bias" tests. Because Petitioners and the *Whitford* plaintiffs both advance substantially similar claims, evidence, and tests, there can be no dispute that the decision in *Whitford* will bear upon many of the fundamental issues in this action.

Fourth, in drawing this Court's attention to other jurisdictions that have considered staying proceedings pending the outcome in *Whitford*, Petitioners fail to note that the District of Maryland recently granted a stay after acknowledging that *Whitford* would provide much needed clarity regarding the standard to resolve partisan gerrymandering claims. And Petitioners' citation to a recent decision from the Middle District of North Carolina in which the court declined to grant a stay pending the outcome in *Whitford* is inapposite. The North Carolina action—which has concluded discovery and dispositive motions, and is trial-ready—is in a very different procedural posture than the present matter. Here, a stay would ensure that the parties and the Court would have the benefit of the Supreme Court's *Whitford* decision as they proceeded through the discovery process and

prepared pre-trial motions (assuming *arguendo* that Petitioners overcome Applicants' pending potentially case-dispositive preliminary objections).

Finally, any attempt by Petitioners to resist the imposition of a stay on the basis that this case needs to be resolved before the 2018 or 2020 elections should not be credited by this Court. Petitioners waited for six years and three election cycles to pass before filing suit, and Petitioners' delay does not warrant expediting this case now. In short, any alleged emergency is of Petitioners' own making. There is certainly no need to rush this case to judgment before the U.S. Supreme Court addresses some of the very same core issues extant in this case, which it will do in *Whitford* this October 2017 term.

ARGUMENT

I. THIS COURT SHOULD STAY ALL PROCEEDINGS PENDING THE U.S. SUPREME COURT'S DECISION IN *WHITFORD*

A. A Stay is Warranted Because Pennsylvania Law Governing Partisan Gerrymandering Claims is Expressly Derived from U.S. Supreme Court Precedent That Will be Addressed by the Supreme Court Again in *Whitford*

1. The Pennsylvania Supreme Court Relied Upon U.S. Supreme Court Precedent to Assess the Justiciability of Partisan Gerrymandering Claims

Petitioners contend that because their claims arise under the Pennsylvania Constitution, and because the Pennsylvania Supreme Court has twice held that partisan gerrymandering claims are justiciable, *Whitford*'s ruling on the justiciability of claims arising under the Federal Constitution would have no effect

on this outcome of this case. (Pets.' Br. at 9-11) (citing *Erfer v. Com.*, 794 A.2d 325 (Pa. 2002); *In re 1991 Reapportionment*, 609 A.2d 132 (Pa. 1992)).

In making this argument, however, Petitioners ignore the fact that partisan gerrymandering claims had historically been non-justiciable under Pennsylvania law, and that such claims only became justiciable after the Pennsylvania Supreme Court decided to adopt the U.S. Supreme Court's decision in *Davis v. Bandemer*, 478 U.S. 109 (1986). *See Erfer*, 794 A.2d at 331. In other words, even though the justiciability of partisan gerrymandering claims in Pennsylvania is expressly and exclusively derived from this U.S. Supreme Court precedent, Petitioners contend that Pennsylvania law would not be affected if the Supreme Court overruled that precedent in *Whitford*. This makes little sense. If the U.S. Supreme Court holds that partisan gerrymandering claims are non-justiciable, the cornerstone of Pennsylvania jurisprudence on this issue would crumble.

On this point, it is significant that the U.S. Supreme Court in *Whitford* agreed to hear *all* of the issues raised in the Appellants' brief, including justiciability. *Gill v. Whitford*, 137 S. Ct. 2268 (2017).[2] If the Court thought that the question of justiciability was settled, it could have, and presumably would

[2] Additionally, five justices, including Justice Kennedy, agreed to stay the *Whitford* district court's remedial order. *See Gill v. Whitford,* 137 S. Ct. 2289 (June 19, 2017). This is significant because to obtain a stay pending appeal, the party requesting the stay must demonstrate "a fair prospect" that the Court will reverse the decision below. *See Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers).

have, issued an order limiting Appellants' appeal to the four other issues raised. *See, e.g.*, *Harris v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2946 (2015) (in which the U.S. Supreme Court noted probable jurisdiction but limited its review to only two of the questions presented).[3] In addition, both of the parties in *Whitford* spend significant portions of their briefs addressing justiciability. The U.S. Supreme Court is therefore poised to rule on whether partisan gerrymandering claims are justiciable.

Because justiciability of partisan gerrymandering claims under Pennsylvania law is expressly predicated on the U.S. Supreme Court's decision in *Bandemer*, and because the issue of justiciability has been called into question in *Whitford*, this Court should stay this action pending a ruling from the U.S. Supreme Court.

2. The Pennsylvania Supreme Court Relied Upon Outdated and Splintered U.S. Supreme Court Precedent to Establish the Criteria for Assessing Partisan Gerrymandering Claims, Which Will Now be Addressed Again in *Whitford*

Petitioners contend that even if the U.S. Supreme Court promulgates a new standard for assessing partisan gerrymandering claims, it would have no effect on this matter because its claims arise exclusively under the Pennsylvania Constitution. (Pets.' Br. at 11). Petitioners' Brief, however, is devoid of any discussion as to how Pennsylvania courts actually analyze partisan gerrymandering

[3] Even Justice Kennedy—whose decisions are cited repeatedly by Petitioners as evidence that the justiciability of partisan gerrymandering claims is settled law—has concluded that the arguments against justiciability are "weighty" and in fact "may prevail in the long run." *Vieth v. Jubelirer*, 541 U.S. 267, 309 (2004).

claims. This omission is significant; as with justiciability, the Pennsylvania Supreme Court relied upon U.S. Supreme Court precedent to construct its standard. Specifically, both the *1991 Reapportionment* case and *Erfer* adopted and used the *Bandemer* plurality's standard to evaluate partisan gerrymandering claims under Pennsylvania's Constitution. *See In re 1991 Pa. Reapportionment*, 609 A.2d 132 at 141-142 ("This Court is persuaded by the holding of the Supreme Court of the United States [in *Bandemer*] with regard to the elements of a prima facie case of political gerrymandering."); *Erfer v. Commonwealth*, 794 A.2d 325, 332 (Pa. 2002).

However, the Supreme Court subsequently discarded the *Bandemer* plurality's test in *Vieth*. *See* 541 U.S. at 283-84 (plurality op.); *id*. at 308 (Kennedy, J., concurring); *id*. at 318 (Stevens, J., dissenting); *id*. at 346 (Souter and Ginsburg, JJ., dissenting); *id*. at 355-56 (Breyer, J., dissenting). In place of *Bandemer*'s test, *Vieth* produced several different potential standards for determining whether a partisan gerrymandering violation has occurred. *Vieth*, 541 U.S. at 292. The Supreme Court's disagreement over the applicable standard (if any) for assessing a partisan gerrymandering claim persisted in *LULAC v. Perry*, 548 U.S. 399, 414 (2006). *See also id.* at 512 (Scalia, J., and Thomas, J., concurring in judgment in part and dissenting) ("[W]e again dispose of this claim in a way that provides no guidance to lower court judges and perpetuates a cause of

action with no discernible content."); *see id*. at 493 (Roberts, C.J., and Alito, J., concurring in judgment in part and dissenting in part) (reserving judgment as to whether partisan gerrymandering claims are non-justiciable because the parties did not argue the issue).

In sum, Pennsylvania law governing partisan gerrymandering claims is premised upon the standard set forth in the U.S. Supreme Court's decision in *Bandemer*, which was ultimately discarded by the Supreme Court itself in *Vieth* and *LULAC*. In *Whitford*, the U.S. Supreme Court is again called upon to assess the appropriate standard (if any exists) for addressing such claims. Given the Pennsylvania Supreme Court's predilection for following the U.S. Supreme Court when crafting Pennsylvania law governing partisan gerrymandering claims—and given that Pennsylvania law on this issue is premised upon a standard that the U.S. Supreme Court itself no longer applies—this Court should stay the present action until *Whitford* is decided, as history suggests that the Pennsylvania Supreme Court will look to the *Whitford* decision for guidance as to the continued viability of political gerrymandering claims in Pennsylvania.

B. Petitioners Cannot Escape The Effect Of *Whitford* By Advancing Claims Solely Under The Pennsylvania Constitution

Petitioners advance two claims in this action: (1) that the 2011 Plan violates the Free Speech and Expression and Freedom of Association Clauses codified at Art. I, §§ 7 and 20 of Pennsylvania's Constitution because it prevents Democratic

voters from electing the representatives of their choice and from influencing the legislative process, and suppresses their political views (Pet. ¶¶ 99-112); and (2) that the 2011 Plan violates the equal protection provisions of the Pennsylvania Constitution codified at Art. I, §§ 1 and 26, and Art. I, § 5 because the Plan was allegedly enacted with discriminatory intent and has a discriminatory effect. (Pet. ¶¶ 116-17).

As explained in the Stay Application, the Pennsylvania Supreme Court has held that the equal protection provisions in Pennsylvania's Constitution are co-extensive with the Fourteenth Amendment's Equal Protection Clause. *See Erfer*, 794 A.2d at 332. This means that Pennsylvania will follow the U.S. Supreme Court's *Whitford* decision concerning equal protection, and thus a stay pending that decision is appropriate.

Petitioners do not dispute that Pennsylvania and federal law are coextensive on issues pertaining to equal protection rights. Rather, they try to avoid the ineluctable effect that *Whitford* will have on their equal protection claim by explaining that, in other contexts, Pennsylvania has chosen not to follow federal constitutional law on an issue that it had traditionally interpreted coextensively. (Pets. Br. at 14). The only decision cited by Petitioners in support of this position, however, pertains to the double jeopardy clause, (*id.*), and Petitioners have failed to cite any authority that would suggest that the Pennsylvania Supreme Court

would deviate from federal law on matters of equal protection.

Petitioners also assert that because Pennsylvania's Free Speech and Expression Clauses are broader than the federal free speech clause, *Whitford* will not resolve or moot Petitioners' case. (Pets.' Br. at 12-13). But the Supreme Court of Pennsylvania "ordinarily" and "often" follows U.S. Supreme Court First Amendment jurisprudence when interpreting Pennsylvania's Free Speech and Expression Clause under Article I, § 7. *See Pap's A.M. v. City of Erie*, 812 A.2d 591, 611 (Pa. 2002). And, there can be no question that the Pennsylvania Supreme Court has followed the lead of the U.S. Supreme Court in addressing partisan gerrymandering claims. *See, e.g.*, *In re 1991 Pa. Legislative Reapportionment Comm'n*, 609 A.2d at 141-142 ("This Court is persuaded by the holding of the Supreme Court of the United States [in *Bandemer*] with regard to the elements of a prima facie case of political gerrymandering."); *Erfer v. Commonwealth*, 794 A.2d at 332.

Because the Pennsylvania Supreme Court ordinarily looks to the U.S. Supreme Court for guidance when assessing claims arising under Pennsylvania's Free Speech and Expression Clause, and because the Pennsylvania Supreme Court has *adopted* the U.S. Supreme Court's standard in *Bandemer* to evaluate partisan gerrymandering claims, this Court should presume that the Pennsylvania Supreme Court will again look to the U.S. Supreme Court for guidance on how to evaluate

partisan gerrymandering claims. Because the U.S. Supreme Court's opinion in *Whitford* will almost certainly address Petitioners' equal protection claims and their free speech and expression claims, this Court should stay this case pending the outcome in *Whitford*.

C. Notwithstanding Petitioners' Assertions To The Contrary, Their Claims And Proposed Tests To Evaluate Those Claims Are Nearly Identical To Those Set Forth in *Whitford*

Petitioners go to great lengths in attempting to explain why their claims, along with the evidence and tests they intend to rely upon to support those claims, are starkly different from those in *Whitford*. But even a cursory review makes clear that these two cases are substantially similar and overlap in multiple material respects.

First, Petitioners assert that their claims are different from *Whitford* because they have advanced free speech retaliation claims. (Pets.' Br. at 13). In fact, the *Whitford* Plaintiffs also asserted a First Amendment claim, arguing that the Wisconsin Republicans intentionally gerrymandered Wisconsin's Assembly districts to harm Wisconsin Democrats, and that the map of congressional districts had the effect of burdening the free speech and association rights of Democrats. *See Gill* Appellees' Br. 36, a true and correct copy of which is attached hereto as **Exhibit A**; *see also Whitford v. Gill*, 218 F. Supp. 3d 837, 855 (W.D. Wis. 2016) (three-judge court) (describing plaintiffs' First Amendment claim as unreasonably

burdening their First Amendment rights); *compare with* Pet. ¶¶ 100-113; (Pets.' Br. at 6) (describing free speech claim as alleging the 2011 Plan had the "purpose and effect" of disfavoring Democrat voters because of their political views and protected speech).

Second, Petitioners assert that this case is distinguishable from *Whitford* because Petitioners rely upon different tests to evaluate their partisan gerrymandering claims. (Pets.' Br. at 16, 18). Specifically, Petitioners state that in addition to the so-called "efficiency gap" test—which is also advanced in *Whitford*—they also rely upon the Markov chain analysis, mean-median difference test, partisan bias test, and a computer modeling test set forth in an article by Jowei Chen. (Pets.' Br. at 19-21).

With respect to Professor Chen's article, Petitioners state that "[t]he substance of the Chen approach is not addressed in the district court's opinion in Gill or in the Gill defendants' Supreme Court briefs." (Pets.' Br. at 19). But this argument oddly ignores the fact that the *plaintiffs* in Gill did specifically rely upon the Chen article in their appellate briefing. *See* Gill Appellee Br. at 55 (citing Chen for the proposition that "there are hundreds of Assembly maps that exhibit very small asymmetries and that perform at least as well as Act 43 in terms of compactness, political subdivision splits, and Voting Rights Act compliance that partisan asymmetry"). The Gill plaintiffs also cited this article as evidence that

redistricting plans could be drawn in a manner that better adhered to traditional redistricting criteria and were not as partisan. *See* Gill Appellee Br. at 19.

With regard to Petitioners' assertion that the Gill defendants did not assert the mean-median test or the partisan bias test, (Pets.' Br. at 20), Petitioners conveniently ignore that those tests, too, were relied upon by the Gill plaintiffs to prove an unconstitutional partisan gerrymander. Gill Appellees' Br. 13-14 and 13 n.5 (using mean-median difference test and partisan bias test to demonstrate that Wisconsin's Assembly district maps were largely symmetric from 1970s to the 2000s, but that the 2010 map was asymmetrical, had a high mean-median difference score, and had a high efficiency gap while also stating that the mean-median difference test and the partisan bias test share "most of its properties.").

Finally, Petitioners assert that their evidence is unique because they have alleged Congress is plagued by extreme partisanship. (Pets.' Br. at 7, 21). But here again the *Whitford* plaintiffs have advanced an identical contention: "As voters have become more partisan, legislators have grown more polarized. Both in state legislatures *and in Congress*, there is now virtually no ideological overlap between Democratic and Republican legislators…. Extreme polarization exacerbates the effects of partisan gerrymandering." **Exhibit A**, *Gill* Appellees' Br. at 23 (emphasis added).

In sum, Petitioners are incorrect when they repeatedly declare that a ruling in *Whitford* will have no effect here because of vast differences inherent in Petitioners' claims. The reality is that the plaintiffs in *Whitford* and Petitioners here both raise substantially similar claims, advance substantially similar evidence, and articulate substantially similar tests to adjudicate those claims.[4] A ruling in *Whitford* that the plaintiffs' claims are non-justiciable, or that sets forth a proper standard for assessing such claims, will directly impact the case here because of the Pennsylvania Supreme Court's historic reliance on U.S. Supreme Court precedent in this area.

D. Partisan Gerrymandering Cases from Other Jurisdictions Further Underscore Why a Stay is Appropriate in this Case

In a Praecipe filed with this Court, Petitioners noted that the U.S. District Court for the Middle District of North Carolina denied a request for a stay pending the U.S. Supreme Court's decision in *Whitford*. *See Common Cause v. Rucho*, No. 16-012026, 2017 U.S. Dist. LEXIS 145590 (M.D.N.C. Sept. 8, 2017). However, Petitioners have conveniently failed to inform the Court that, following the U.S. Supreme Court's grant of a stay in *Whitford*, the District of Maryland *did* grant a stay of all proceedings in a substantially similar partisan gerrymandering case pending there. *See Benisek v. Lamone,* No. 13-3233, 2017 U.S. Dist. LEXIS

[4] It is worth noting that Petitioners' Response to the Stay Application was filed five dates late, on August 28, 2017, presumably because Petitioners wished to have the benefit of citing to anything they perceived to be helpful in the *Whitford* plaintiffs' appellate brief, which was filed a few hours before Petitioners' Response.

136208, *12 (D. Md. Aug. 24, 2017) (in which the majority of a three-judge panel found that the Supreme Court's stay should come "as no surprise" because the justiciability of partisan gerrymandering claims have "plagued the Court for decades"); *id.* at *19 ("A final decision by a majority of the Justices instructing lower courts to apply a particular standard to resolve partisan gerrymandering claims would be a welcome development in the law.").

In addition, *Common Cause*—the North Carolina case cited by Petitioners—is distinguishable from this matter in that it was filed on August 5, 2016, while *Whitford* was still pending in the Western District of Wisconsin. Discovery, expert witness reports, and expert depositions had already been completed in *Common Cause* by the time the Supreme Court noted jurisdiction in *Whitford*. As such, many of the considerations that weigh in favor of staying the present matter—such as preservation of the time, money, and other resources that would be spent during discovery—are not at issue in *Common Cause*, which is already trial-ready. This case could not be in a more different procedural posture. For example, many parties have not yet even answered the Petition for Review, and a briefing schedule has not yet been issued regarding multiple preliminary objections.

Following the well-reasoned opinion in *Benisek*, this Court should likewise stay all proceedings in this matter pending the outcome in *Whitford*.

II. The Balance Of The Equities Tips Decidedly In Applicants' Favor

Petitioners contend that a stay will jeopardize their ability to obtain a remedy before the 2018 elections and even the 2020 elections. (Pets.' Br. at 25-26). But it is precisely Petitioners' delay in bringing this lawsuit that has placed Petitioners in this alleged predicament. Indeed, Petitioners did not file suit until three elections had occurred and eight months had passed following the *Whitford* district court decision (the first district court decision in 30 years to hold that a redistricting map constituted an unconstitutional partisan gerrymander).[5] By choosing to sit on their claimed harms *for years*, any alleged "emergency" or need for urgency is of Petitioners' own making, and should not be credited by this Court in considering the Stay Application, especially when issues critical to this case are likely to be directly addressed by the U.S. Supreme Court when it considers *Whitford* this term.

CONCLUSION

For all of the foregoing reasons, as well as the reasons identified in the Stay Application and supporting Brief, this Court should grant the requested stay.

[5] Petitioners suggest that their delay in bringing suit was necessary because they needed time to gather evidence of the 2011 Plan's "discriminatory effect." (Pets.' Br. at 26-27). However, even if it were true that Petitioners needed an actual election to take place in order to demonstrate the alleged "discriminatory effect" of the 2011 Plan, Petitioners have failed to identify any reason why they needed *three* election cycles over the course of more than four years in order to prove their case. Indeed, if Pennsylvania is the "worst offender" in the entire United States in terms of partisan gerrymandering, as Petitioners contend, then surely the evidence demonstrating "discriminatory effect" would have been sufficiently apparent after the 2012 election (or, at the very latest, after the 2014 election, when the *Whitford* plaintiffs commenced their action).

Dated: September 25, 2017

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Pennsylvania Rule of Appellate Procedure 2135(d), I, John P. Wixted, counsel for Respondent Joseph B. Scarnati III, hereby certify that the foregoing Brief in support of the Application to Stay All Proceedings does not exceed 7,000 words.

Dated: September 25, 2017 */s/* John P. Wixted

EXHIBIT "A"

No. 16-1161

IN THE
Supreme Court of the United States

BEVERLY R. GILL, ET AL.,
Appellants,
v.
WILLIAM WHITFORD, ET AL.,
Appellees.

On Appeal from the United States District Court
for the Western District of Wisconsin

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QUESTIONS PRESENTED

1. Whether the district court correctly held that Appellees have standing to challenge in its entirety the district plan for Wisconsin's State Assembly as an unconstitutional partisan gerrymander?

2. Whether the district court correctly held that partisan gerrymandering claims are justiciable pursuant to the test the court adopted—requiring discriminatory intent, a large and durable discriminatory effect, and a lack of any legitimate justification?

3. Whether the district court correctly held that compliance with traditional districting criteria is not a safe harbor that precludes any possibility of liability for partisan gerrymandering?

4. Whether Appellants are entitled to a remand on the issue of entrenchment even though Appellees and the district court emphasized the durability of a party's advantage throughout the litigation?

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STATEMENT

"Partisan gerrymanders . . . are incompatible with democratic principles." *Ariz. State Legis. v. Ariz. Indep. Redist. Comm'n*, 135 S. Ct. 2652, 2658 (2015) (quotation marks and alterations omitted). They violate the Equal Protection Clause by discriminating against the targeted party's voters, preventing their ballots from translating into "fair and effective representation." *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964). They thus can entrench the line-drawing party in power, even if that party lacks majority support among the electorate. Gerrymanders also amount to forbidden viewpoint discrimination in contravention of the First Amendment. They "penaliz[e] citizens"—by diluting their electoral influence—"because of their . . . association with a political party, or their expression of political views." *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment).

As the record in this case makes clear, partisan gerrymanders have become more common, more severe, and more durable in their effects since this Court last considered their constitutionality more than a decade ago. This is the product of better map-drawing technology utilizing more sophisticated voter data about an increasingly polarized electorate. The result, in too many states, has been a subversion of democracy, as officeholders have wrested power from voters. As Judge Niemeyer put it recently, "The problem is cancerous, undermining the fundamental tenets of our form of democracy." *Benisek v. Lamone*, No. JKB-13-3233, slip op. at 27 (D. Md. Aug. 24, 2017) (Niemeyer, J., dissenting).

In this Court's decision in *Vieth*, not a single Justice disagreed with the principle that the excessive injection of politics into redistricting severely distorts democracy and violates the Constitution. 541 U.S. at 292 (plurality opinion); *id.* at 314-17 (Kennedy J., concurring); *id.* at 317-18 (Stevens, J., dissenting); *id.* at 343 (Souter, J., dissenting); *id.* at 355 (Breyer, J., dissenting). Nor do Appellants disagree with that principle. Instead, they argue that courts are powerless to redress this affront to the Constitution, because, they say, there is no principled way to distinguish between permissible partisanship in redistricting and unlawful gerrymandering.

The district court properly rejected this argument. The three-pronged test the court derived from this Court's jurisprudence provides a judicially discernible and manageable approach for identifying district plans that transgress basic constitutional norms. Under this test, before invalidating a plan, a court must make a series of findings. First, it must find that the map was designed with *discriminatory intent*: "to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation." JSA109a-110a.[1] Second, it must determine that the map causes a "large and durable" *discriminatory effect*: one that is "sizeable" and likely to "persist throughout the decennial period." JSA166a, 172a-173a. And third, it must conclude that there is no valid *justification* for this effect: no way to explain it "by

[1] Appellees abbreviate Volume I of the Joint Appendix "JA," Volume II of the Joint Appendix "SA," and the Jurisdictional Statement Appendix "JSA."

the legitimate state prerogatives and neutral factors that are implicated in the districting process." JSA178a.

After extensive discovery and a four-day trial, the district court applied this test and held that the plan for the Wisconsin State Assembly, Act 43, is unconstitutional. The court found, first, that Act 43 was crafted with an obsessive focus on partisan advantage. Its drafters systematically cracked and packed Democratic voters, seeking to guarantee Republicans a supermajority of Assembly seats even if they garnered only a minority of the statewide vote. Second, the court concluded that Act 43 performed exactly as intended. According to quantitative measures of partisan asymmetry, "[i]t is undisputed that, from 1972 to 2010, not a single legislative map in the country was as asymmetric in its first two elections" as Act 43. JA120a. This asymmetry is so deeply rooted that it would take an "'unprecedented political earthquake'" to dislodge it. JSA164a. And third, the court determined that there was no neutral justification for Act 43's discriminatory effect. To the contrary, several sets of alternative maps demonstrated that Appellants could have achieved their valid redistricting goals without handicapping either party's supporters.

This Court should affirm because the district court's test provides a judicially discernible and manageable standard for adjudicating partisan gerrymandering claims, and there is no dispute that under this standard, Act 43 is unconstitutional. An affirmance would strike a blow against a practice, engaged in by both parties, that increasingly threatens American democracy. By contrast, a decision barring any judicial remedy in cases

like this one would leave voters with nowhere to turn. The legislators who benefit from gerrymandering have no incentive to curb it. The voters victimized by the practice cannot oust their representatives even if they change their votes in very large numbers. Moreover, in most states, voters are unable to impose state constitutional constraints without legislative assent. It is thus only through the courts' intervention that "fair and effective representation" can be restored. *Reynolds*, 377 U.S. at 565-66.

The impact of an affirmance would be neutral and limited, yet potent. Both parties' gerrymanders would be equally vulnerable to legal challenge. Only a relatively small percentage of current plans would become actionable. But, as preparations begin for the next redistricting cycle, mapmakers would be powerfully reminded of "'the core principle of republican government,' namely 'that the voters should choose their representatives, not the other way around.'" *Ariz. State Legis.*, 135 S. Ct. at 2677 (citation omitted).

I. Act 43 Was Intended to Give Republicans a Large and Durable Advantage.

Throughout their brief, Appellants paint a rosy picture of Act 43's enactment, with traditional redistricting criteria predominating and politics entering only as an afterthought. App. Br. 13-16, 63-66. But this narrative represents "a desperate attempt to hide from both the Court and the public the true nature of exactly what transpired in the redistricting process." *Baldus v. Members of Wis. Gov't Accountability Bd.*, 843 F. Supp. 2d 955, 959 (E.D. Wis. 2012) (*Baldus I*). Indeed, the narrative is "almost laughable" because "partisan

motivation . . . clearly lay behind Act 43." *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 843 (E.D. Wis. 2012) (*Baldus II*).

The district court exposed the "true nature" of Act 43's enactment in painstaking detail. When the process commenced, in early 2011, Republicans enjoyed full control of Wisconsin's state government. This was the first time in more than forty years that there was unified government at the start of a redistricting cycle. JSA 9a-12a. The Republican legislative leadership immediately launched an elaborate effort to "secure Republican control of the Assembly under any likely future electoral scenario for the remainder of the decade." JSA140a. The leadership began by outsourcing the plan's design to a private law firm, thus avoiding ordinary rules of legislative transparency. JSA12a; Exs. 355-356. This firm set up a "map room" to which only a handful of attorneys and legislative aides had access. JSA12a; SA355. The crafting of Act 43 took place, in secret, in this room. *Id.*

Next, Act 43's drafters created "composite scores" that predicted electoral performance by averaging Republican candidates' vote shares in recent statewide races. JSA126a-127a. To assist the drafters with their analyses, the leadership retained political scientist Professor Keith Gaddie. He constructed a regression model that used past Assembly election results to assess the underlying partisan character of every geographic unit in Wisconsin. JSA 127a. He wrote in a memo that this model would *not* be used to "create[] a fair, balanced, or even a reactive map." SA322. Rather, it would be used to verify the accuracy of the drafters' composite scores.

Id. The drafters sent their scores to Professor Gaddie, who confirmed that they were an "almost perfect proxy" for his more sophisticated measure. Ex. 175.

Armed with these scores, Act 43's authors designed a series of provisional plans that combined the authors' names with the plans' goals: "Adam Assertive," "Joe Aggressive," and the like. JSA19a-20a. For each of these plans, the authors generated a spreadsheet that tallied each district's expected electoral performance. SA323-37, 353-54, 356-58. In doing so, they estimated that Republicans would win 48.6% of the statewide Assembly vote. *Id.* For this *minority* of the vote, the plans steadily ratcheted upward the expected number of Republican seats: from forty-nine (out of ninety-nine) under the court-drawn 2000s map to a supermajority of *fifty-nine* under the "Final Map." JSA129a-130a; SA359.

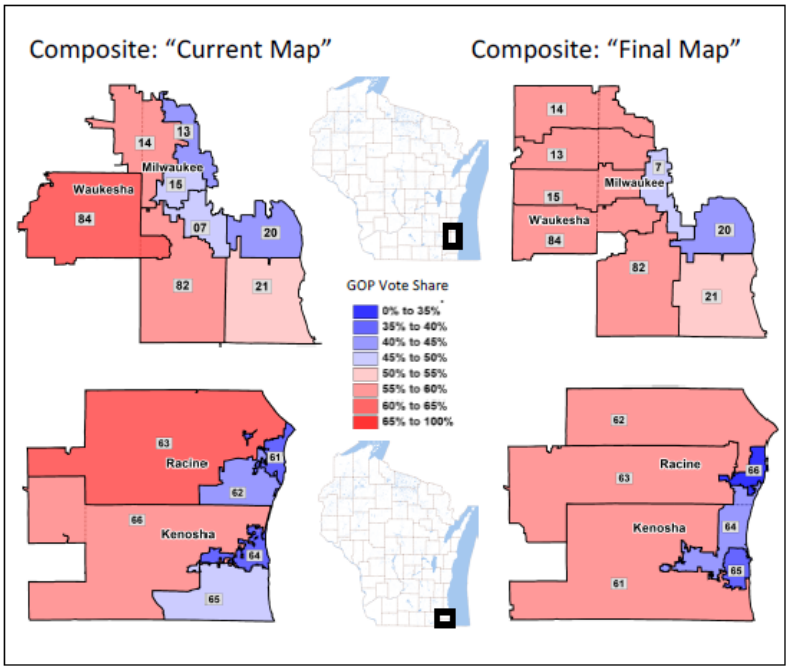
Beyond the plan-specific spreadsheets, Act 43's drafters analyzed their maps' electoral implications in several more ways. Their "Tale of the Tape" document, for example, tracked the numbers of "GOP" and "DEM" seats under four separate plans. JSA133a; SA340-43. It trumpeted that under the 2000s map, "49 seats are 50% [Republican] or better," while under the near-final "Team map," "59 Assembly seats are 50% or better." *Id.* Similarly, the drafters sorted the Team Map's districts into nine categories: "Statistical Pick Up," "GOP seats strengthened a lot," "GOP seats strengthened a little," "GOP Donors to the Team," "DEMS weakened," "Pairings," and so on. JSA133a-135a; SA344-45. Fully twenty-five Republican seats were strengthened. Five Democratic incumbents were also pitted against

Republican incumbents in districts that were safely (at least 57%) Republican. *Id.*

To create this advantage, Act 43's authors both "cracked" Democratic voters among numerous districts and "packed" them in others. The first pair of maps below highlight cracking in and around Milwaukee. A series of elongated districts (all won by Republican candidates) extract urban Democratic voters from Milwaukee County and combine them with larger numbers of suburban Republicans in Ozaukee, Washington, and Waukesha Counties. The result is a reduction in the number of Democratic districts in the region from four to two. The second pair of maps illustrate packing in Kenosha and Racine. Four lakeside districts previously won by Democrats are collapsed into three even more heavily Democratic districts, in the process unnecessarily dividing Kenosha and Racine Counties.[2]

These examples could be multiplied many times over. In sum, Act 43's cracking and packing produced forty-two districts where Republicans were expected to receive between 50% and 60% of the vote, compared to only seventeen such districts for Democrats. There were also eight districts where Democrats were expected to receive more than 80% of the vote, compared to zero such districts for Republicans. JSA147a-148a; SA67.

[2] The shading of these maps is based on the composite scores created by Act 43's drafters to predict electoral performance. SA325.



The district court found that Act 43's authors not only intended to achieve a large Republican advantage, but also "were concerned with, and convinced of, the *durability* of their plan." JSA139a. Notably, the spreadsheet for the Final Map showed the number of "Swing" seats plummeting from nineteen to ten. JSA133a; SA325. With so few competitive seats, a gerrymander becomes even harder to uproot. Additionally, the Legislature's consultant, Professor Gaddie, conducted "sensitivity testing" to evaluate Act 43's effects over a wide range of electoral conditions. He swung the expected statewide vote by up to ten percentage points in each party's direction, and then calculated what each party's performance would be in each district if it swung by the same margin as the statewide vote. JSA131a. This testing revealed that

"Democrats . . . would need 54% of the statewide vote to capture a simple majority of Assembly seats"—a feat achieved just once by either party over the last generation. JSA47a n.124, 135a; SA339.[3]

In contrast to their relentless focus on partisan advantage, Act 43's drafters paid little attention to traditional districting principles. As the district court found, "measures of traditional districting criteria were [not] being scrutinized on a regular basis or with the intensity that partisan scores were being evaluated." JSA130a n.195. As a consequence, Act 43 divided fifty-eight of seventy-two counties, which was seven more than any other plan in Wisconsin's modern history. JA216. Act 43's districts were also less compact, on average, than those of any other Wisconsin map for which data is available. *Id.* Act 43 further moved more than two million people into new districts, or seven times more than was necessary to attain population equality. JSA214a. It paired twenty-two incumbents as well, or six more than a court had previously paired in its Assembly and Senate plans combined. Ex. 178 at 34; *see Prosser v. Elections Bd.*, 793 F. Supp. 859, 871 (W.D. Wis. 1992). And Act 43's initial treatment of Latino voters in Milwaukee was so deficient that portions of the map were ruled unlawful under Section 2 of the Voting Rights Act. *See Baldus II*, 849 F. Supp. 2d at 854-58.

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[3] Between 1990 and 2016, a party exceeded 54% of the statewide vote only in 2006. SA222. Appellants note that Professor Gaddie's sensitivity testing did not take into account incumbency. App. Br. 57. This is true—and means that Democrats would need substantially *more* than 54% of the statewide vote to oust enough Republican incumbents to win a majority of Assembly seats.

Moreover, "upending more than a century of practice," new ward lines were drawn after Act 43 was enacted. *Id.* at 846. In every previous Wisconsin redistricting, municipalities had designed wards first, and districts had then faithfully followed the wards' boundaries. *Id*

After Act 43 was fine-tuned in secret for four months, it was introduced, debated, and passed (on a party line vote) in nine days in July 2011. JSA29a. Promoting the bill, one of Act 43's drafters told the Republican caucus, "The maps we pass will determine who's here 10 years from now. . . . We have an opportunity and an obligation to draw these maps that Republicans haven't had in decades." SA330.

II. Act 43 Has Exhibited a Large and Durable Pro-Republican Partisan Asymmetry.

The district court concluded that "[i]t is clear that the drafters got what they intended to get." JSA146a. Act 43 in fact "secured for Republicans a lasting Assembly majority" by "allocating votes among the newly created districts in such a way that, in any likely electoral scenario, the number of Republican seats would not drop below 50%." JSA145a. Strikingly, the 2012 election almost perfectly fulfilled the drafters' forecasts. They had anticipated Republican candidates winning 48.6% of the statewide vote along with fifty-nine Assembly seats. SA358. Republicans indeed won 48.6% of the vote, but converted this vote share into sixty rather than fifty-nine seats. JSA148a. In both 2014 and 2016, Republicans received 52.0% of the statewide vote. With this narrow majority, they won sixty-three seats in 2014 and sixty-four seats in 2016. *Id.*; Br. of Eric McGhee as Amicus Curiae ("McGhee Br.") at 33.

The district court's finding that Act 43 produced a discriminatory effect was "further bolstered" by measures of partisan asymmetry that social scientists have developed to assess the severity of partisan gerrymandering. JSA159a. Partisan symmetry is the intuitive idea that "'the electoral system [should] treat similarly-situated parties equally'" so that they are able to translate their popular support into legislative representation with approximately equal ease. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 466 (2006) ("*LULAC*") (Stevens, J., concurring in part and dissenting in part) (citation omitted). Partisan symmetry is "widely accepted by scholars as providing a measure of partisan fairness in [single-member-district] electoral systems." *Id.* Indeed, "for many years such a view has been virtually a consensus position of the scholarly community." Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering After* LULAC v. Perry, 6 Election L.J. 2, 6 (2007). Precisely because of its widespread acceptance, line-drawers (including in Wisconsin) have often sought to achieve partisan symmetry when crafting their maps. *See, e.g.*, *Robertson v. Bartels*, 148 F. Supp. 2d 443, 459 (D.N.J. 2001), *summarily aff'd*, 534 U.S. 1110 (2002); *Prosser*, 793 F. Supp. at 868; *Maestas v. Hall*, 274 P.3d 66, 79 (N.M. 2012).

The Court discussed a particular asymmetry metric, usually called "partisan bias," in *LULAC*. *See* 548 U.S. at 419-20 (opinion of Kennedy, J.); *id.* at 466 (Stevens, J., concurring in part and dissenting in part). Partisan bias is defined as the difference between the shares of seats that the major parties would win if they each received

the same share (typically 50%) of the statewide vote. *See id.* Justice Kennedy correctly observed that partisan bias "depend[s] on conjecture" about what would transpire in a hypothetical tied election. *Id.* at 420 (opinion of Kennedy, J.). This conjecture is quite speculative when one party predominates statewide. *See* Grofman & King, *supra*, at 18-19. But in a competitive jurisdiction like Wisconsin, where both parties receive close to 50% of the statewide vote, the adjustments needed to simulate a tied election are minor, and partisan bias can be used reliably. *See id.*

In this litigation, Appellees also presented evidence about another measure of partisan asymmetry: the "efficiency gap."[4] This metric is based on the insight—repeatedly expressed in the Court's opinions—that partisan gerrymandering is always carried out by cracking a party's supporters among many districts, in which their preferred candidates lose by relatively narrow margins; and/or by packing a party's backers in a few districts, in which their preferred candidates win by enormous margins. *See, e.g.*, *Vieth*, 541 U.S. at 286 n.7 (plurality opinion); *Davis v. Bandemer*, 478 U.S. 109, 117 n.6 (1986) (plurality opinion); *Karcher v. Daggett*, 462 U.S. 725, 754 n.13 (1983) (Stevens, J., concurring). As the Court has recognized, both cracking and packing produce votes that are "wasted" in the sense that they do not contribute to a candidate's victory. *See, e.g.*, *Georgia v. Ashcroft*, 539 U.S. 461, 469 (2003); *Bandemer*, 478 U.S. at 117 n.6 (plurality opinion). In the case of

[4] This metric was developed in a peer-reviewed political science journal. *See* Eric McGhee, *Measuring Partisan Bias in Single-Member District Electoral Systems*, 39 Legis. Stud. Q. 55 (2014).

cracking, all votes cast for the losing candidate are "wasted." In the case of packing, all votes cast for the winning candidate, above the 50% (plus one) threshold needed for victory, are "wasted." The efficiency gap is calculated by taking one party's total wasted votes in an election, subtracting the other party's total wasted votes, and dividing by the total number of votes cast. It captures in a single number the extent to which district lines crack and pack one party's voters more than the other party's voters. JSA159a-162a.[5]

Unlike partisan bias, the efficiency gap does not "depend on conjecture" about what would occur in a hypothetical election. *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.). As the district court found, it "is calculated using the results of *actual elections*," and so "does not suffer from this drawback." JSA169a n.300. The efficiency gap is therefore meaningful no matter how competitive or uncompetitive a jurisdiction happens to be. In a competitive state, the efficiency gap and partisan bias are highly correlated, and so generally point in the same direction. SA346; Dkt. 149:191-93. But in an uncompetitive state, as already noted, partisan bias is less dependable. *Id.*

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[5] Social scientists also assess partisan gerrymandering by calculating the difference between a party's *mean* vote share and *median* vote share across all of a plan's districts. When a party's median vote share is smaller than its mean vote share, the district distribution is skewed against it. *See, e.g.*, Michael D. McDonald & Robin E. Best, *Unfair Partisan Gerrymanders in Politics and Law*, 14 Election L.J. 312 (2015). The mean-median difference is mathematically related to partisan bias, *see id.* at 315, and thus shares most of its properties.

Appellees showed at trial that Wisconsin's Assembly plans were highly symmetric from the 1970s through the 1990s. Over this three-decade period, they averaged a partisan bias of 0.4% and an efficiency gap of -1.5%. SA347. (By convention, positive scores denote pro-Democratic asymmetries and negative scores pro-Republican asymmetries.) Wisconsin's 2000s map was moderately asymmetric—though a far cry from Act 43[6]—averaging a partisan bias of -6.6% and an efficiency gap of -7.6%. *Id.* The reason may be that the court relied on the Republican litigants' expert when designing its plan. As one of Act 43's drafters boasted in an e-mail, "Without Grofman in 2001 we would not have succeeded in getting the map we did get as [the court] followed his direction in drawing the map." SA352.

In the current cycle, Act 43 exhibited partisan biases of -12.6%, -11.6%, and -12.7%, respectively, in 2012, 2014, and 2016. In other words, had these elections been perfectly tied, Republicans would have won between 61.6% and 62.7% of the seats in the Assembly. SA347; McGhee Br. at 33. Act 43 also exhibited efficiency gaps of -13.3%, -9.6%, and -10.7% in 2012, 2014, and 2016. That is, votes for Democratic Assembly candidates were wasted at a rate from 9.6 to 13.3 percentage points higher than the rate at which Republican votes were wasted. *Id.*; JSA173a.[7]

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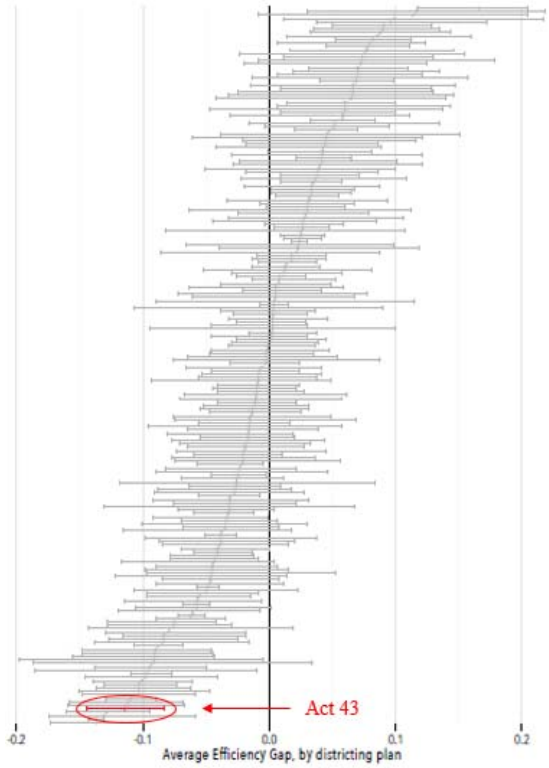
[6] Act 43's drafters expected Act 43 to yield *ten* more Republican seats than the 2000s map. JSA129a-130a; SA359.

[7] Act 43 further exhibited mean-median differences of -5.6%, -6.9%, and -7.0% in 2012, 2014, and 2016. Dkt. 134:39; McGhee Br. at 33.

These asymmetries are not only more severe than any that Wisconsin has experienced over the last half-century, but also extreme outliers compared to the nation as a whole. Appellees' expert, Professor Simon Jackman, calculated the average efficiency gap of almost every state house plan in America from 1972 to 2014. SA187. As the below chart illustrates, Act 43's skew was exceeded by only four other plans over this period. JSA50a. In fact, it is undisputed that prior to this decade, "not a single legislative map in the country was as asymmetric in its first two elections" as Act 43. JA120.



That Act 43 has produced historically large asymmetries in three straight elections—more than half of a redistricting cycle—itself establishes "the durability of Act 43's pro-Republican [tilt]." JSA173a. These election results were corroborated by Professor Jackman's analysis of how plans' initial efficiency gaps are related to the average efficiency gaps they exhibit over their lifetimes. Based on this analysis, the district court found that "Republicans' ability to translate their votes into seats will continue at a significantly advantageous rate through the decennial period." JSA173a-174a.

The election results were further supported by the sensitivity testing conducted by both of Appellees' experts (Professor Jackman and Professor Kenneth Mayer) and the Legislature's consultant (Professor Gaddie). As noted above, Professor Gaddie did not take incumbency into account, and determined that Democrats would need 54% of the statewide vote to win a majority of the Assembly. JSA135a; SA339. Professor Jackman did consider incumbency, and showed that Act 43 would continue exhibiting double-digit pro-Republican efficiency gaps even if Democrats reached *56%* of the statewide vote (or five points better than their 2012 showing). JSA165a; SA360. Professor Mayer also considered incumbency, and concluded that even in the event of the largest Democratic wave in a generation, Democrats would still win only forty-five Assembly seats. JSA152a; SA310.[8] Thus, as the district

[8] Appellants criticize Professor Mayer for considering incumbency one paragraph after attacking Professor Gaddie for not taking incumbency into account. App. Br. 57-59. No matter how they

court noted, "[t]here was consensus among the experts"—for *both* sides—about the persistence of Act 43's skew under different electoral conditions. JSA149a n.255.

III. No Neutral Justification Exists for Act 43's Large and Durable Partisan Asymmetry.

The district court further found that Act 43's large and durable partisan asymmetry could not be justified by Wisconsin's political geography or by any efforts to comply with traditional districting criteria. These factors "simply do[] not explain adequately the sizeable disparate effect seen in 2012 and 2014." JSA180a. This finding is backed, first, by Wisconsin's Assembly plans in previous decades. All of these maps exhibited much smaller partisan biases and efficiency gaps than Act 43. SA347. They did so, moreover, while splitting significantly fewer counties than Act 43, pairing fewer incumbents, not violating the Voting Rights Act, and performing equally well in terms of contiguity, compactness, municipality splits, and compliance with the one person, one vote requirement. JA216.

Second, as the district court emphasized, Act 43's own authors "produced several statewide draft plans that performed satisfactorily on legitimate redistricting criteria without attaining the drastic partisan advantage demonstrated . . . in Act 43." JSA218a. One draft, for example, forecast only three more Republican seats than the 2000s map—compared to the ten of the "Final Map." JSA207a-208a. This map, and others like it in the record,

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treated incumbency, all of the experts reached the same conclusion about the durability of Act 43's skew.

demonstrate that Wisconsin's current political geography is perfectly compatible with far more symmetric plans.

And third, as the district court also stressed, Professor Mayer's demonstration plan showed that "it is very possible to draw a map with much less of a partisan bent than Act 43 and, therefore, that Act 43's large partisan effect is not due to Wisconsin's natural political geography." JSA217a. The demonstration plan matched or exceeded Act 43 on every federal and state criterion. It had a total population deviation below 1%, the same number of majority-minority districts, somewhat more compact districts, and somewhat fewer political subdivision splits. JSA212a. The demonstration plan's efficiency gap, however, was fully *ten* percentage points lower than that of Act 43. *Id.*[9]

Appellants do not challenge these findings (or any others) as clearly erroneous. Nevertheless, they claim that Wisconsin's political geography inherently favors Republicans based on an article by Professors Jowei Chen and Jonathan Rodden. App. Br. 50-51. The article Appellants cite, however, does not address Wisconsin at all. In subsequent studies, moreover, Professors Chen and Rodden did analyze Wisconsin's political geography,

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[9] Appellants recycle complaints about the demonstration plan that the district court rejected. App. Br. 65-66. In particular, while it is true that if incumbency is ignored, Republicans would pick up several seats if the statewide vote shifted in their direction, "had the opposite happened, and Democrats received a higher vote share . . . the EG would have skewed toward the Democrats." JSA213a. "This is because the Demonstration Plan was designed to have competitive districts, and the EG will be reactive to such districts." JSA213a-214a.

and found that it does not sizably advantage either party. Using his simulation technique, Professor Chen created two hundred separate Wisconsin Assembly plans without consulting any electoral data. *Every one* of these maps featured more compact districts than Act 43 and split fewer political subdivisions. *Every one* also exhibited a much smaller efficiency gap, thus refuting any claim that Wisconsin voters' spatial patterns are responsible for Act 43's skew. Jowei Chen, *The Impact of Political Geography on Wisconsin Redistricting*, 16 Election L.J. (forthcoming 2017) (manuscript at 12), http://www.umich.edu/~jowei/Political_Geography_Wisconsin_Redistricting.pdf.

Professor Rodden, in turn, directly studied how Democrats and Republicans are distributed in Wisconsin. He concluded that, if anything, Democrats enjoy a modest spatial advantage in redistricting for the Assembly. This is because they are "dispersed relatively efficiently across medium-size cities," including "old industrial towns like Appleton, Neenah, Oshkosh, and Green Bay." Nicholas Eubank & Jonathan Rodden, *Who Is My Neighbor? The Spatial Efficiency of Partisanship* 2, 14 (Aug. 23, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3025082.

IV. The District Court Invalidated Act 43 After Extensive Discovery and a Four-Day Trial.

Appellees—a group of registered voters in Wisconsin who support the Democratic Party and its candidates—filed their complaint challenging Act 43 as an unconstitutional partisan gerrymander under the First and Fourteenth Amendments in July 2015. JA25-65. The district court unanimously denied Appellants'

motion to dismiss. The court observed that members of this Court "have pointed to partisan symmetry as a theory with promise." JA100. The court also explained that the efficiency gap does not require proportional representation because "an election's results may have a small efficiency gap without being proportional or they may be proportional and still have a large efficiency gap." JA99. The court further rebuked Appellants for their "mischaracterizations of plaintiffs' proposed standard" and for "ignor[ing] step one and step three of plaintiff's standard." JA101-02.

Extensive discovery yielded a record of unprecedented scope. This record included, for the first time, (1) mapmakers' own analyses of their drafts' implications, (2) asymmetry scores for hundreds of plans over five redistricting cycles, (3) extensive sensitivity testing; and (4) several sets of alternative maps. Because of this evidence, the district court found that "[t]he record here is not plagued by the infirmities that have precluded the Court," in *Bandemer*, *Vieth*, and *LULAC*, "from concluding that a discriminatory effect has been established." JSA155a.

At the close of discovery, the district court unanimously denied Appellants' motion for summary judgment. The court held that there remained contested factual issues with respect to each of the three prongs of Appellees' test. The court also noted "the need 'to define clear, manageable, and politically neutral standards for measuring [burdens] on representational rights,'" adding, "[t]his is exactly what plaintiffs are attempting to do with the efficiency gap." JA129 (citation omitted).

The court further confirmed that "plaintiffs' test does not require proportional representation." JA130.

Over a four-day trial, Appellees presented evidence (summarized above) about each of their test's three prongs. In November 2016, the district court adopted this test and ruled that, under it, Act 43 is unconstitutional. In January 2017, the district court enjoined further use of Act 43 and set a November 1, 2017 deadline for the enactment of a contingent remedial plan. JSA323a. Appellants appealed in February 2017. JSA334a. In June 2017, this Court agreed to hear the case, while staying any remedial proceedings pending the Court's decision.

V. Partisan Gerrymandering Has Become More Extreme, More Persistent, and More Impactful.

Appellants begin their brief with a selective history of gerrymandering in the eighteenth and nineteenth centuries, apparently seeking to establish its historical pedigree. App. Br. 5-12. But malapportionment, racial vote dilution, and outright disenfranchisement have similar historical pedigrees and are no more constitutional. Nor does Appellants' history undermine the conventional understanding of strange district shape (and other violations of traditional districting principles): that they are *techniques* that are sometimes used to *implement* partisan gerrymanders. That gerrymandering is not simply creating odd borders is confirmed by Elmer Griffith, the author on whom Appellants primarily rely. He writes that gerrymandering is "accomplished by forming into a few districts territory where the vote is overwhelmingly in

favor of the opposition; and on the other hand by spreading out the dominant party's vote so as to carry the remaining districts by a safe but small margin." Elmer C. Griffith, *The Rise and Development of the Gerrymander* 21 (1907). This passage is a pithy explanation of cracking and packing—the techniques at the heart of this case.

Appellants' history also omits more recent developments, which are alarming. Analyzing district plans from 1972 onward, Professor Jackman showed at trial that partisan gerrymandering has surged to unprecedented levels of severity. At both the state legislative and congressional levels, the plans now in effect have exhibited the worst asymmetries in modern times. SA227; *see Benisek*, *supra*, slip op. at 27 (Niemeyer, J., dissenting) ("The widespread nature of gerrymandering in modern politics is matched by the almost universal absence of those who will defend its negative effect on our democracy."); Anthony J. McGann et al., *Gerrymandering in America* 4-5, 97-98 (2016). Professor Jackman also determined that gerrymanders' persistence has increased markedly. In previous periods, a plan's initial asymmetry was only a moderately strong predictor of its future performance. SA241. But in the present decade, plans that have *begun* skewed have typically *continued* to tilt in the same party's direction as long as they have been in use. SA317-318.

There are two clear explanations for these troubling trends. One is that "[t]echnological advances have allowed gerrymanderers to gain better information about voters . . . and draw boundaries with a finer pen."

John N. Friedman & Richard T. Holden, *Optimal Gerrymandering*, 98 Am. Econ. Rev. 113, 135 (2008). These advances include individual-level data from enhanced voter files, automated redistricting algorithms, and rigorous sensitivity testing. The other driver is voters' rising partisanship. Split-ticket voting is rarer now than in earlier eras, and voters change their party preferences less from year to year. *See, e.g.*, Corwin D. Smidt, *Polarization and the Decline of the American Floating Voter*, 61 Am. J. Pol. Sci. 365 (2017).

As voters have become more partisan, legislators have grown more polarized. Both in state legislatures and in Congress, there is now virtually no ideological overlap between Democratic and Republican legislators. *See, e.g.*, Boris Shor & Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 Am. Pol. Sci. Rev. 530, 540 (2011). Extreme polarization exacerbates the effects of partisan gerrymandering. It means the Democrats or Republicans elected due to the practice are not "wishy-washy" moderates, but rather "hardcore" ideologues who render the legislature non-responsive to voters' wishes. *Vieth*, 541 U.S. at 288 n.9 (plurality opinion). As one recent study shows, an efficiency gap in a party's favor causes both the legislature's ideological midpoint and the state's enacted laws to become significantly more extreme, even holding voters' preferences constant. Just by drawing clever lines—without persuading a single voter—a party thus pulls policy outcomes toward its preferred pole. *See* Devin Caughey et al., *Partisan Gerrymandering and the Political Process*, 16 Election L.J. (forthcoming 2017) (manuscript at 17-23), http://cwarshaw.scripts.mit.edu/papers/CTW_efficiency_gap_170515.pdf.

SUMMARY OF ARGUMENT

1. Appellees have standing to bring their statewide claim. As a matter of precedent, *every* partisan gerrymandering challenge this Court has heard has been statewide in nature. Yet the Court has never suggested that it lacked jurisdiction due to the plaintiffs' lack of standing. More generally, standing "turns on the nature and source of the claim asserted." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). The "claim asserted" here is unquestionably statewide: the intentional, severe, durable, and unjustified dilution of Democratic votes throughout Wisconsin. It follows that if this claim is justiciable, Appellees have standing to pursue it.

The Court's racial gerrymandering cases are not to the contrary. Crucially, the "claim asserted" in these cases is district-specific: that "race was improperly used in the drawing of the boundaries of one or more *specific electoral districts*." *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015). Since this claim is limited to the design of particular districts, only these districts' residents have standing to bring it. The racial gerrymandering cases are also inapposite here because they involve the injury of racial classification. The harms alleged in this case, in contrast, are the completely different ones of vote dilution and viewpoint discrimination.

2. Partisan gerrymandering claims are justiciable under the district court's discernible and manageable test. As to discernibility, the test captures the constitutional wrongs of partisan gerrymandering. Gerrymandering violates both the Equal Protection Clause, by diluting the electoral influence of a targeted

group of voters, and the First Amendment, by penalizing these voters because of their political beliefs. The test accurately addresses these violations. A district plan that fails the test is deliberately, highly, persistently, and unjustifiably dilutive. Such a map also seeks to—and does—subject certain voters to disfavored treatment due to their political philosophy.

The district court's test is also discernible because it is based on the concept of partisan symmetry. Partisan symmetry is a "comprehensive and neutral principle[] for drawing electoral boundaries." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment). It is a "comprehensive" principle because it can be applied to any district plan. It is "neutral" as well because its very point is to treat the parties symmetrically in terms of the conversion of votes to seats. Partisan symmetry further corresponds to the Court's conception of gerrymandering and is distinct from proportional representation.

The district court's test is discernible as well because all of its elements are rooted in the Court's partisan gerrymandering case law, which establishes that any gerrymandering standard should require showings of discriminatory intent, a large and durable discriminatory effect, and a lack of any legitimate justification. The test does just that.

The district court's test is judicially manageable too. Its intent and justification prongs have already been employed—without any apparent difficulty—in other redistricting contexts. Likewise, its effect prong is easy to administer because the size and durability of a plan's partisan asymmetry can be ascertained using reliable

social scientific techniques. As noted above, all asymmetry metrics tend to converge in competitive statewide environments like Wisconsin's. None of these metrics' scores—in Wisconsin or in any other state over nearly half a century—were disputed by Appellants. And there is widespread agreement that sensitivity testing is the appropriate method for evaluating the persistence of a plan's skew.

The district court's test is also workable because it reflects contemporary political realities. Both in Wisconsin and nationwide, party affiliation is the most potent driver of voter and legislator behavior. By examining the ballots cast for, and seats won by, each party's candidates, the test focuses on the key aspects of modern voting and representation.

The district court's test is "limited and precise" as well, in that its implications are confined to both parties' most egregious gerrymanders. *Vieth*, 541 U.S. at 306-07 (Kennedy, J., concurring in the judgment). The test's impact can be estimated by tallying the number of highly asymmetric plans designed by a single party in recent decades. This number is small, and pales compared to the vast volume of redistricting litigation over other claims. The number also includes roughly equal shares of pro-Democratic and pro-Republican maps, thus dispelling any fear that the test is a stalking horse for partisan interests.

Nor is it difficult for jurisdictions to avoid liability under the district court's approach. A state may ensure that its plan is not severely and durably asymmetric by using the same data and analyses as Act 43's drafters—except to *limit* partisan unfairness rather than to

augment it. A state may also eliminate any possibility of discriminatory intent being found by adopting a bipartisan or nonpartisan redistricting process. And if a state learns that its political geography or its valid redistricting goals impel a significant asymmetry, it is not placed in an impossible position. Rather, it is insulated from liability because the asymmetry is then justified.

3. The Court should adhere to its holding in *Vieth* that noncompliance with traditional districting criteria is not an element of a partisan gerrymandering claim. As the plurality explained (and Justice Kennedy agreed), "it certainly cannot be that adherence to traditional districting factors negates any possibility of intentional vote dilution." *Id.* at 298 (plurality opinion). Gerrymanders, that is, may exist even when they do not announce themselves with strange shapes or carved communities.

4. The Court should reject Appellants' request for a remand on the issue of entrenchment. This issue was not sprung on Appellants after trial. Rather, from the very beginning of the case, both Appellees and the district court made clear their emphasis on the durability of a party's advantage.

ARGUMENT

I. Appellees Have Standing to Bring Their Statewide Claim.

Despite effectively conceding that severe gerrymanders violate the Constitution, Appellants assert that no one has standing to seek redress for that constitutional harm. This claim is at war with the Court's precedent. In every partisan gerrymandering case the Court has heard, the plaintiffs' challenge was statewide in nature. *See LULAC*, 548 U.S. at 416 (opinion of Kennedy, J.); *Vieth*, 541 U.S. at 285-87 (plurality opinion); *Bandemer*, 478 U.S. at 127 (plurality opinion). Yet in none of these cases did a majority (or a plurality) of the Court hold (or hint) that the voters bringing the action did not have standing for this reason. To the contrary, six Justices in *Bandemer* agreed that "unconstitutional vote dilution" may be "alleged in the form of statewide political gerrymandering." 478 U.S. at 132 (plurality opinion). In his controlling concurrence in *Vieth*, Justice Kennedy also repeatedly contemplated partisan gerrymandering claims proceeding on a statewide basis. *See* 541 U.S. at 312, 316 (Kennedy, J., concurring in the judgment). And in *LULAC*, five Justices left the door open to a test based on the inherently statewide concept of partisan symmetry. *See, e.g.*, 548 U.S. at 420 (opinion of Kennedy, J.).

Even if it were not precluded by precedent, Appellants' position would conflict with the precept that standing "turns on the nature and source of the claim asserted." *Warth*, 422 U.S. at 500. Standing, that is, must be congruent with the kind of legal theory that is being advanced. This rule is followed fastidiously in each

redistricting domain. In a one person, one vote case, for example, the claim is that districts *throughout a state* have been malapportioned, thus overrepresenting certain voters and underrepresenting others. *See Reynolds*, 377 U.S. at 560. Accordingly, "any underrepresented plaintiff may challenge *in its entirety* the redistricting plan that generated his harm." *Larios v. Perdue*, 306 F. Supp. 2d 1190, 1209 (N.D. Ga. 2003); *see also Evenwel v. Abbott*, 136 S. Ct. 1120, 1131 n.12 (2016) ("[S]tanding . . . has rested on plaintiffs' status as voters whose votes were diluted.").

In a racial vote dilution case under Section 2 of the Voting Rights Act, on the other hand, the claim is typically *regional*: that minority voters in a specific portion of a state have been denied an equal opportunity to elect the representatives of their choice. *See Shaw v. Hunt*, 517 U.S. 899, 917 (1996) (*Shaw II*) (noting that "a § 2 violation is proved for a particular area"). Therefore only minority voters who "reside in a[n] . . . area that could support additional [majority-minority districts]" have standing to sue. *Pope v. Cty. of Albany*, No. 11-cv-0736, 2014 WL 316703, at *5 (N.D.N.Y. Jan. 28, 2014).

Under the logic of these cases, the dispositive question for standing purposes is whether Appellees' claim is statewide in nature. If it is, then Appellees have standing to pursue it on a statewide basis. Any other result would drive an impermissible wedge between "the nature and source of the claim asserted," *Warth*, 422 U.S. at 500, and the scope of Appellees' standing. There is no doubt, of course, that Appellees' theory applies statewide. The theory is that Act 43 intentionally, severely, durably, and unjustifiably dilutes Democratic

votes throughout Wisconsin. This theory may or may not be "judicially discoverable and manageable," *Baker v. Carr*, 369 U.S. 186, 217 (1962), but it cannot be justiciable yet incapable of being advanced statewide.

Appellants resist this conclusion by invoking the Court's racial gerrymandering cases. App. Br. 28-30. But as the district court correctly held, "[t]he rationale and holding of [these cases] have no application here." JSA224a. Unlike Appellees' theory, the claim in a racial gerrymandering challenge is clearly district-specific: "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). That is why only residents of the allegedly racially gerrymandered district have standing; only they "suffer the special representational harms racial classifications can cause in the voting context." *United States v. Hays*, 515 U.S. 737, 745 (1995). Racial gerrymandering also involves the injury of voters being classified by race. In contrast, partisan gerrymandering entails the completely different harms of voters being subjected to vote dilution and viewpoint discrimination. *See Shaw v. Reno*, 509 U.S. 630, 649-50 (1993) (*Shaw I*) ("Classifying citizens by race . . . threatens . . . harms that are not present in our vote-dilution cases.").

Recognition of standing to bring statewide partisan gerrymandering claims would not create any kind of "loophole" in racial gerrymandering doctrine. App. Br. 29-30. In fact, a viable partisan gerrymandering claim would improve that body of law by reducing litigants' incentive to disguise their partisan grievances as racial

ones. As members of the Court have recently recognized, this incentive is very real. If a plaintiff can cause a court to "mistake[] a political gerrymander for a racial gerrymander," then the racial gerrymandering suit is "transformed into [a] weapon[] of political warfare." *Cooper v. Harris*, 137 S. Ct. 1455, 1490 (2017) (Alito, J., concurring in the judgment in part and dissenting in part). Such subterfuge would become less common if plaintiffs could simply bring partisan gerrymandering claims. They might win or they might lose these suits—but they would stop injecting partisanship into a doctrine where it does not belong.

Appellants reveal their impoverished understanding of voters' interests when they contend that voters suffer a concrete harm only when their preferred candidates do not prevail in their own districts. App. Br. 30-32. Voters *do* have an interest in their district-level representation. But as the district court rightly held, they *also* have an interest in their collective representation in the legislature—in their ability as a group "to translate their votes into seats as effectively" as the other party's supporters, JSA221a, and thus to have the same opportunity to influence the legislature's composition and policymaking. Echoing *Reynolds*, Justice Kennedy has referred to this interest as voters' "right[] to fair and effective representation." *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment). Equivalently, the *Vieth* plurality called it the "degree of representation or influence to which a political group is constitutionally entitled." *Id.* at 297 (plurality opinion).

Notably, if this interest did not exist, then neither would the Court's one person, one vote or racial vote

dilution doctrines. After all, it is perfectly possible for a voter to elect her preferred candidate, in her own district, *and* for this district to be overpopulated. The cause of action for malapportionment presupposes that a voter also values "hav[ing] an equally effective voice in the election" of the legislature as a whole. *Reynolds*, 377 U.S. at 565. Likewise, on Appellants' account, a minority voter in a "packed" district—who already elects the candidate of her choice—should not be able to bring a Section 2 claim. But the Court has always held that *all* minority residents in a given region may sue, because they all incur the "[d]ilution of racial minority group voting strength." *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986).[10]

II. Partisan Gerrymandering Claims Are Justiciable Under the District Court's Test.

Not only do Appellees have standing to allege a statewide partisan gerrymandering claim, but the claim itself is justiciable. Justiciability has two components: whether there is a standard for adjudicating the claim that is "judicially discernible in the sense of being relevant to some constitutional violation," *Vieth*, 541 U.S. at 288 (plurality opinion), and whether the standard is "judicially manageable" in that it would produce outcomes that are "principled, rational, and based upon

[10] As for Appellants' argument about interstate congressional dynamics, App. Br. 30-31, it has already been rejected in other redistricting contexts. One person, one vote plaintiffs cannot complain about interstate malapportionment, nor can Section 2 plaintiffs allege racial vote dilution on a national scale.

reasoned distinctions," *id.* at 278. The district court's test is both.

As noted above, a court must find discriminatory intent, a large and durable discriminatory effect, and a lack of any legitimate justification in order to invalidate a plan under the test. JSA109a-110a. Discriminatory intent may be proven by evidence, direct or circumstantial, about the motives of those who designed a map and passed it into law. JSA126a-140a. Next, the magnitude of a plan's discriminatory effect may be established through election results as well as measures of partisan asymmetry like partisan bias and the efficiency gap. JSA176a. The persistence of a plan's skew, in turn, may be shown through the sensitivity testing that both sides' experts endorsed. JSA149a n.255. Lastly, whether a plan's tilt is justified may be addressed through alternative district maps, including ones used in earlier periods, ones crafted by the drafters themselves, ones offered by the plaintiffs, and ones generated through computer simulations. JSA203a-218a.

A. The District Court's Test Is Judicially Discernible.

The district court's test is discernible for three reasons. It (1) captures the constitutional harms inflicted by partisan gerrymandering; (2) is based on the "comprehensive and neutral principle" of partisan symmetry; and (3) incorporates elements that are rooted in the Court's gerrymandering case law.

1. The Test Captures the Constitutional Harms Inflicted by Partisan Gerrymandering.

Partisan gerrymandering inflicts (at least) two kinds of constitutional injuries. One of these, cognizable under the Equal Protection Clause, is the deliberate dilution of a group of voters' electoral influence, yielding a legislature that is not responsive to their concerns. The other, arising under the First Amendment, is viewpoint discrimination against certain voters, penalizing them because of the political beliefs they espouse. The district court's test captures both of these harms.

The Court has historically conceived of partisan gerrymandering as causing the equal protection injury of intentional vote dilution. In *Bandemer*, the plurality stated that "unconstitutional discrimination occurs" when a district plan "degrade[s] . . . a group of voters' influence on the political process." 478 U.S. at 132 (plurality opinion). In *Vieth*, Justice Kennedy confirmed that one constitutional problem with gerrymandering is "the particular burden a given partisan classification imposes on representational rights." 541 U.S. at 308 (Kennedy, J., concurring in the judgment); *see also LULAC*, 548 U.S. at 418 (opinion of Kennedy, J.) (requiring "a burden . . . on the complainants' representational rights"). Other Justices have also observed that gerrymandering dilutes the votes of targeted voters, thus making it more difficult for them to elect their preferred candidates. *See, e.g.*, *Vieth*, 541 U.S. at 298 (plurality opinion) (characterizing gerrymandering as "intentional vote dilution"); *id.* at 354

(Souter, J., dissenting) ("gerrymandering is . . . a species of vote dilution").

As the Court has recognized, the reason vote dilution is so invidious is that it results in representation that is not responsive to voters' needs and interests. "Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will." *Reynolds*, 377 U.S. at 565; *see also, e.g.*, *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part) ("Democracy is premised on responsiveness."). But when a gerrymander dilutes the votes of certain voters, their voices are *not* heard in the legislature, and the legislature does *not* accommodate their views. Elected officials become "unresponsive and insensitive to [these voters'] needs," *Rogers v. Lodge*, 458 U.S. 613, 625 (1982), thus "freez[ing] the political status quo," *Jenness v. Fortson*, 403 U.S. 431, 438 (1971).

The district court's test reflects these precepts. Partisan asymmetry—the concept at the core of the test's effect prong—is a measure of vote dilution. It indicates whether certain voters are less able to convert their ballots into representation, and thus whether they suffer a "burden on [their] representational rights." *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring in the judgment). When all three of the test's prongs are satisfied, not only is there vote dilution, but it is deliberate, extreme, persistent, and unjustified. These are exactly the circumstances where the Court has indicated there should be liability.

Beyond diluting votes, partisan gerrymandering offends First Amendment values by "penalizing citizens because of . . . their association with a political party, or their expression of political views." *Id.* at 314. That the government may not "punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys" is "a fundamental principle of the First Amendment." *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., concurring in part and concurring in the judgment). This rule applies even if the governmental retaliation does not directly burden speech; such action nevertheless "*inhibits* protected speech and association." *Elrod v. Burns*, 427 U.S. 347, 359 (1976) (plurality opinion) (emphasis added). And the reason for the rule is that when the government injures voters on political grounds, it engages in viewpoint discrimination—an "egregious form of content discrimination" that is "'presumptively unconstitutional.'" *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995) (citation omitted).

Again, the district court's test dovetails with this well-established doctrine. Indeed, a law that fails the test is a classic case of forbidden governmental retaliation. Such a law seeks to harm one party's voters because of their political views. In fact, the law's authors typically scrutinize those views (in the form of election results) while crafting their map, hoping to prevent the targeted party's voters from effectively translating their ballots into seats. Such a law also achieves its intended goal. The targeted party's voters are, in fact, impaired in their ability to influence the political process, solely because of the political philosophy they espouse.

2. The Test Is Based on the "Comprehensive and Neutral Principle" of Partisan Symmetry.

The district court's test is also discernible because it is based in part on the concept of partisan symmetry. Partisan symmetry attracted the attention of five Justices in *LULAC*; it is a "comprehensive and neutral principle" for designing and evaluating plans; and it is entirely distinct from proportional representation.

The social scientific tenet that maps should treat parties symmetrically—by enabling them to translate their popular support into legislative representation with approximately equal ease—was first presented to the Court in *LULAC*. A majority of the Justices expressed interest in the idea. *See* 548 U.S. at 420 (opinion of Kennedy, J.) (not "discounting its utility in redistricting planning and litigation"); *id.* at 468 n.9 (Stevens, J., concurring in part and dissenting in part) (labeling it a "helpful (though certainly not talismanic) tool"); *id.* at 483-84 (Souter, J., concurring in part and dissenting in part) (noting "the utility of a criterion of symmetry as a test"); *id.* at 492 (Breyer, J., concurring in part and dissenting in part). This array of favorable comments led the district court to observe that "the justices have pointed to partisan symmetry as a theory with promise," JA100, and to incorporate measures of asymmetry into its test's effect prong, JSA159a-177a.

Appellants incorrectly contend that *LULAC* rejected partisan symmetry. App. Br. 43-44. While Justice Kennedy "conclude[d] asymmetry *alone* is not a reliable measure of unconstitutional partisanship," *id.* at 420 (opinion of Kennedy, J.) (emphasis added), he plainly

did not rule out tests that rely on it *in part*. That is why Justice Stevens "appreciate[d] Justice Kennedy's leaving the door open to the use of the standard in future cases." 548 U.S. at 468 n.9 (Stevens, J., concurring in part and dissenting in part). That is also why Justice Souter remarked that "[i]nterest in exploring this notion is evident." *Id.* at 483 (Souter, J., concurring in part and dissenting in part).

Beyond its doctrinal support, partisan symmetry is a "comprehensive and neutral principle[] for drawing electoral boundaries"—a "substantive definition of fairness in districting [that] command[s] general assent." *Vieth*, 541 U.S. at 306-07 (Kennedy, J., concurring in the judgment). Partisan symmetry is "comprehensive" because it can be calculated for any district plan. Indeed, Appellees' expert *did* compute it for almost every state house map from 1972 onward. SA212-216. Partisan symmetry is also "neutral" in that its very definition is the symmetric treatment of voters no matter which party they support. A symmetric plan is inherently a neutral one that gives each party's backers the same opportunity to convert their ballots into representation.

Partisan symmetry further enjoys "general assent" in that it corresponds to the Court's definitions of partisan gerrymandering. In *Vieth*, for instance, the plurality conceived of the practice as "giv[ing] one political party an unfair advantage by diluting the opposition's voting strength." 541 U.S. at 271 n.1 (plurality opinion). This is another way of saying that a gerrymander asymmetrically impairs the opposition's ability to translate its voting strength into legislative

seats. In *Arizona State Legislature*, similarly, the Court described partisan gerrymandering as "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power." 135 S. Ct. at 2658. Gerrymandering, in other words, is the durably asymmetric treatment of the parties' respective devotees. *See also Bandemer*, 478 U.S. at 132 (plurality opinion) (a gerrymander asymmetrically "degrade[s] . . . a group of voters' influence on the political process").

Contrary to Appellants' arguments, partisan symmetry has nothing in common with proportional representation—a goal the Court has repeatedly (and rightly) rejected as a constitutional requirement. *See, e.g.*, *LULAC*, 548 U.S. at 419 (opinion of Kennedy, J.); *Vieth*, 541 U.S. at 288 (plurality opinion). Proportional representation is not a catch-all label for every analysis that relies in some way on statewide seat and vote shares. If it were, the Court would not have cited these statewide statistics over and over in its partisan gerrymandering cases. *See, e.g.*, *LULAC*, 548 U.S. at 411-13 (opinion of Kennedy, J.); *Vieth*, 541 U.S. at 289 (plurality opinion); *Bandemer*, 478 U.S. at 134 (plurality opinion). Rather, proportional representation has a specific, universally accepted definition: a share of legislative seats that is *equal* to a party's share of the jurisdiction-wide vote. As the Court has explained, proportional representation means that a party "win[s] the number of seats that *mirrors* the proportion of its vote." *Vieth*, 541 U.S. at 291 (plurality opinion) (emphasis added).

Properly defined, proportional representation is unrelated to any measure of partisan asymmetry.

Consider partisan bias: If a party receives 55% of the vote and 60% of the seats, a plan's bias is *zero* if the other party would also win 60% of the seats if it garnered 55% of the vote. *See* Grofman & King, *supra*, at 8-9. Likewise, as the district court found, "the [efficiency gap] does not impermissibly require that each party receive a share of the seats in proportion to its vote share." JSA168a-169a. This is because "the efficiency gap is about comparing the wasted votes of each party, not determining whether the party's percentage of the statewide vote share is reflected in the number of representatives that party elects." JA99.

The district court used a simple example to prove the point. Take a ten-district map where "'Party A wins two districts by a margin of 80 to 20 and four districts by a margin of 70 to 30,'" and "'Party B wins four districts by a margin of 60 to 40.'" JA99 n.1 (citation omitted). "'Then there is perfectly proportional representation'" because Party A receives 60% of the vote (600/1000) and 60% of the seats (6/10). *Id.* "'But the efficiency gap here is *not* zero'" because votes for Party A are wasted at a rate ten percentage points higher than votes for Party B (30% versus 20%). *Id.* (emphasis added).

Unable to challenge the district court's findings as clearly erroneous,[11] Appellants instead assert that the efficiency gap requires "hyperproportionality." App. Br. 49-50. It is true that when a map has a low efficiency gap, a party's seat share tends to change at roughly double the rate of its vote share. JSA162a. But this is a feature

[11] Indeed, Appellants conceded below that "the efficiency gap does not call for one-for-one proportional representation." Dkt. 46:47; JA130.

of the efficiency gap, not a bug. Members of the Court have often acknowledged that single-member-district systems produce a "'seat bonus' in which a party that wins a majority of the vote generally wins an even larger majority of the seats." *LULAC*, 548 U.S. at 464 (Stevens, J., concurring in part and dissenting in part); *see also Vieth*, 541 U.S. at 357 (Breyer, J., dissenting); *Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring in the judgment). The seat bonus implied by the efficiency gap—approximately a twofold rise in seat share for an increase in vote share—is *exactly* the seat bonus that American elections have exhibited for generations. JSA162a, 170a. The efficiency gap is thus deeply grounded in historical practice, and captures a plan's deviation from the historical norm. When used as part of the analysis, it can provide "helpful historical guidance" to courts and mapmakers alike. *Vieth*, 541 U.S. at 309 (Kennedy, J., concurring in the judgment).[12]

3. The Test Is Rooted in the Court's Partisan Gerrymandering Case Law.

The district court's test is discernible as well because all of its elements are rooted in the Court's partisan

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[12] As for the "technical defects" alleged by Appellants, App. Br. 51-52, they were already presented to, and rejected by, the district court in findings that are not clearly erroneous. For instance, the court pointed out that if a plan sought to enhance electoral competitiveness, then "[i]t would be difficult to establish that drafters . . . had the requisite partisan intent to show a constitutional violation." JSA175a. Similarly, the court relied on extensive expert analysis—including sensitivity testing and a comparison of plans' initial and lifetime average efficiency gaps—to conclude that a large efficiency gap is a durable plan characteristic. JSA163a-164a.

gerrymandering case law. Its intent prong, first, reflects the basic First and Fourteenth Amendment principle that "plaintiffs [are] required to prove . . . intentional discrimination against an identifiable political group." *Bandemer*, 478 U.S. at 127 (plurality opinion). Thus, under the prong, "political classifications" that assign voters to districts on electoral grounds are not inherently problematic, but become so when "applied in an invidious manner." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment).

Second, the district court's requirement of a large discriminatory effect is consistent with the Court's guidance that "more than a *de minimis* effect" is necessary before liability may be imposed. *Bandemer*, 478 U.S. at 134 (plurality opinion). By not disrupting plans with small partisan asymmetries, the "analysis allows a pragmatic or functional assessment that accords some latitude to the States." *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring in the judgment).

Third, by further restricting liability to plans with durable discriminatory effects, the district court heeded Justices' comments about the special harms of partisan entrenchment. Maps that "entrench[] a party on the verge of minority status" subvert the will of the electorate for an entire redistricting cycle. *LULAC*, 548 U.S. at 419 (opinion of Kennedy, J.). They ensure that partisan asymmetries "will remain constant notwithstanding significant . . . shifts in public opinion." *Id.* at 472 (Stevens, J., concurring in part and dissenting in part).

Appellants claim that *Vieth* barred any consideration of the durability of a party's advantage, App. Br. 54-56,

but it did no such thing. Rather, it rejected the *Bandemer* plurality's standard, under which "plaintiffs [had] to show even that their efforts to deliberate, register, and vote had been impeded." *Vieth*, 541 U.S. at 345 (Souter, J., dissenting). This sort of participatory exclusion is plainly unrelated to the persistence of a plan's partisan skew. *Vieth* also declined to adopt Justice Breyer's proposed test focusing on "*minority* entrenchment." *Id.* at 360 (Breyer, J., dissenting) (emphasis added). But again, minority control of the legislature is distinct from a durable tilt in favor of the gerrymandering party (be it a majority or a minority).[13]

Lastly, the district court's justification prong echoes Justices' remarks that maps should not be struck down if their partisan imbalances can be explained by neutral factors. "[P]olitical classifications" based on electoral data are constitutionally troublesome only if applied "in a way unrelated to any legitimate legislative objective." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment). When a jurisdiction can justify its plan's discriminatory effect "by reference to objectives other than naked partisan advantage," judicial intervention is unwarranted. *Id.* at 351 (Souter, J., dissenting).

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[13] The district court's finding of a durable pro-Republican advantage also distinguishes this case from *Bandemer*, where "had the Democratic candidates received an additional few percentage points of the votes cast statewide, they would have obtained a majority of the seats." 478 U.S. at 135 (plurality opinion).

B. The District Court's Test Is Judicially Manageable.

Manageability is the other side of the justiciability coin. The district court's test is manageable because (1) its intent and justification prongs have already been used successfully; (2) its effect prong is easy to administer due to its reliance on established metrics and methods; (3) the test reflects political realities; (4) the test's implications are neutral and limited; and (5) compliance with the test is straightforward.

1. The Test's Intent and Justification Prongs Have Already Been Used Successfully.

Appellants do not dispute that the district court's intent prong is judicially workable. App. Br. 20. And for good reason. Over a series of partisan gerrymandering and malapportionment cases, the Court has shown that it is quite capable of distinguishing between plans "intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation," JSA109a-110a, and maps drawn without this aim. The *Bandemer* plurality, for example, was "confident that . . . th[e] record would support a finding that the discrimination was intentional" where voluminous material "evidenced an intentional effort . . . to disadvantage Democratic voters." 478 U.S. at 116, 127 (plurality opinion). In *LULAC*, similarly, Justice Kennedy had little trouble concluding that "[t]he legislature does seem to have decided to redistrict with the sole purpose of achieving a Republican congressional majority." 548 U.S. at 417 (opinion of Kennedy, J.).

Conversely, in *Gaffney v. Cummings*, 412 U.S. 735 (1973), the Court properly rejected a claim that state legislative maps were "invidiously discriminatory" where the maps were designed by "a three-man bipartisan Board" that "followed a policy of 'political fairness.'" *Id.* at 736, 738, 752. Likewise, in *Harris v. Arizona Independent Redistricting Commission*, 136 S. Ct. 1301 (2016), the Court unanimously rebuffed the argument that "illegitimate considerations were the predominant motivation" behind an Arizona state legislative plan crafted by an "independent redistricting commission" that made "'good-faith efforts to comply with the Voting Rights Act.'" *Id.* at 1305, 1309 (citation omitted).

Appellants also wisely refrain from challenging the manageability of the district court's justification prong. This prong is drawn verbatim from the Court's one person, one vote cases—where for more than five decades it has enabled the Court to separate plans where large population deviations are justified by legitimate factors from maps where malapportionment cannot be properly explained. *Compare, e.g.*, *Brown v. Thomson*, 462 U.S. 835, 844 (1983) (upholding a plan where "population deviations [were] no greater than necessary to preserve counties as representative districts"), *and Mahan v. Howell*, 410 U.S. 315, 323 (1973) (same), *with Chapman v. Meier*, 420 U.S. 1, 25 (1975) (invalidating a map where the state's interests did not "prevent[] attaining a significantly lower population variance"), *and Kilgarlin v. Hill*, 386 U.S. 120, 124 (1967) (same).

2. The Test's Effect Prong Is Easy to Administer.

The district court's effect prong is manageable too, because it relies on widely accepted metrics and methods, the results of which are rarely contested. Again, to satisfy this prong, a plaintiff must show that a plan has exhibited a partisan asymmetry that is both large and durable. As in this case, to establish the size of a map's asymmetry, a plaintiff would likely provide evidence about the map's partisan bias and efficiency gap. The plaintiff's case would be bolstered if these measures both revealed a sizable asymmetry by historical standards. On the other hand, a court would rightly be skeptical if the metrics conflicted. Also as in this case, to demonstrate the persistence of a plan's asymmetry, a plaintiff would likely subject the plan to sensitivity testing. To avoid dismissal, the testing would have to indicate that the map's asymmetry would endure over a range of plausible electoral conditions.

Importantly, there is not an "unbounded variety of [asymmetry] metrics." App. Br. 46. Rather, all of these measures resemble either partisan bias (because they focus on a counterfactual election) or the efficiency gap (because they are based on actual votes and seats won).[14] That is why Appellees have highlighted these metrics throughout this litigation. Also importantly, there is virtually no disagreement over plans' asymmetry scores. In this case, Appellees' expert computed every well-known measure for almost every state house map from

[14] The mean-median difference, for instance, is a mathematical function of partisan bias. *See supra* note 5.

1972 onward. SA212-216, 346. *Not one of these scores was disputed.* In fact, Appellants' experts confirmed the calculations. Dkt. 150:94, 161-62, 210; *see also* Grofman & King, *supra*, at 16 (noting the "congruence among experts [calculating partisan bias] for opposing sides").

This "consensus among the experts" extends to the study of durability. JSA149a n.255. Four separate experts—two for each side—conducted some kind of sensitivity testing in this litigation, adjusting election results and determining how each party would do given each modification. *Id.* All of these experts agreed that sensitivity testing is "the accepted method of testing how a particular map would fare under different electoral conditions." *Id.* The experts also concurred that Act 43's pro-Republican asymmetry is highly persistent. JSA135a, 152a, 165a.

Appellants mock the idea of incorporating social science into a test for gerrymandering, App. Br. 45-48, but the Court historically has not shared their aversion to empirical evidence. To the contrary, Justice Kennedy expressed optimism in *Vieth* that "new technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties." 541 U.S. at 312-13 (Kennedy, J., concurring in the judgment). The tools Appellees have deployed in this litigation fulfill Justice Kennedy's hope. Asymmetry metrics like partisan bias and the efficiency gap capture the representational burdens of gerrymanders relative to a benchmark of neutral treatment. Computer simulations of large numbers of alternative maps reveal how the challenged plan performs compared to other

lawful options. And sensitivity testing indicates how a map's skew would change if the electoral environment shifted in either party's favor.

Appellants also complain about the use of multiple metrics, App. Br. 45-48,[15] but it has never been the Court's approach to search for a single holy grail. Rather, in every other redistricting domain, the Court has employed a range of useful techniques. In the reapportionment context, for instance, the Court has variously cited plans' *total* population deviation, *see, e.g.*, *White v. Regester*, 412 U.S. 755, 761 (1973), *average* population deviation, *see, e.g.*, *Mahan*, 410 U.S. at 319, and proportion of the population that could elect a legislative majority, *see, e.g.*, *Swann v. Adams*, 385 U.S. 440, 442-43 (1967). Under Section 2, similarly, the Court has endorsed two procedures for calculating racial polarization—"extreme case analysis" and "bivariate ecological regression"—referring to them as "complementary methods of analysis" that are "standard in the literature." *Gingles*, 478 U.S. at 52, 53 n.20. And in its racial gerrymandering cases, the Court has measured district noncompactness using both

[15] Appellants fixate on an amicus brief in *LULAC* that introduced partisan bias to the Court. App. Br. 47-48. That is all the brief did; it did not mention any other asymmetry metric or say a word about discriminatory intent, durability, or justification. Appellants also wrongly claim that Appellees did not advocate the use of multiple metrics below. To the contrary, as Appellees explained in their trial brief, "[f]rom the beginning of this case, [Appellees] have argued that the Court may use . . . other measures instead of, or in addition to, the efficiency gap to assess plans' partisan consequences." Dkt. 134:26; *see also, e.g.*, JA61; Dkt. 31:11; Dkt. 68:76; Dkt. 149:159-167, 190-197, 230-231.

geographic dispersion and perimeter irregularity. *See Bush v. Vera*, 517 U.S. 952, 973 (1996) (plurality opinion).

The Court's openness to multiple metrics makes perfect sense. They do not "sow chaos," App. Br. 46, but rather build judicial confidence in the facts the metrics seek to establish. Here, for example, it is highly probative information that Act 43 not only exhibits an enormous efficiency gap but *also* scores very poorly in terms of partisan bias—and, indeed, every other measure of partisan asymmetry. Without this information, one could not be as sure that Act 43 is an extreme outlier. This basic point, that more data improves judicial decision-making, has never been lost on the Court.

3. The Test Reflects Political Realities.

Asymmetry metrics are also valid because they correspond to the realities of modern American politics. In particular, by focusing on the votes cast for, and seats won by, each party's candidates, the measures reflect the facts that (1) party affiliation is the dominant driver of voter behavior; (2) voter behavior is largely consistent from year to year; and (3) legislators are highly polarized along party lines. Evidence establishing these points at the national level was discussed above. *See supra* Statement Part V. The record leaves no doubt that they hold for Wisconsin as well.

The analyses of Professor Gaddie and Act 43's own drafters demonstrate that party affiliation dwarfs all other influences on voting in Wisconsin. Professor Gaddie's estimates of wards' partisanship were based on Assembly election results, SA322, while the drafters' composite scores were not, JSA126a. The measures

nevertheless exhibited a 96% correlation, indicating that Wisconsin voters behave almost identically in Assembly and non-Assembly races. Ex. 175. This finding was confirmed by Appellees' expert, who determined that a model including the presidential vote explains about 99% of the variance in the Assembly vote. SA47.

Professor Gaddie also showed that Wisconsin voting patterns have been remarkably stable over time. He created a "giant correlation table" displaying how the results of every race from 2002 to 2010 were related to the results of every other race over this period. Dkt. 108:106. These links were uniformly strong. *Id.* Thus, as Professor Gaddie wrote in a memo to Act 43's drafters, "the top-to-bottom party basis of the state politics" persisted over this period, with "the partisanship of Wisconsin . . . invading [even] the ostensibly non-partisan races on the ballot." SA322.

The district court further found that because of Wisconsin's strong caucus system, Assembly members are extremely polarized. There is "very little effort to woo colleagues from 'across the aisle,'" JSA139a n.227, and "Republican legislators who win by slimmer margins" are not "more receptive to the needs of their Democratic constituents," JSA155a n.266. The court's conclusion is backed by the academic literature, which reveals that Wisconsin's Legislature is even more ideologically polarized than the U.S. Congress. *See* Shor & McCarty, *supra*, at 540.

It is true, of course, that there are *some* swing voters and moderate legislators. But measures of partisan asymmetry cannot be tarred as "reductionist," App. Br. 50, when they capture the key elements of contemporary

voting and representation. Moreover, to the extent that voters do split their tickets or change their views over time, sensitivity testing registers the impact of this behavior. Again, under the district court's test, a plan would be in jeopardy only if this analysis confirmed that its skew would endure even if many voters switched their allegiance from one party to the other.

4. The Test's Implications Are Neutral and Limited.

The district court's test is also manageable because it plays no favorites. It neither threatens nor shields one party's plans more than the other's. As a legal matter, this neutrality stems from the interplay of the test's three prongs. Assume (as Appellants allege without evidence, App. Br. 50-51) that the political geography of certain states benefits Republicans because their voters are distributed more efficiently. This fact does *not* render pro-Republican plans in these states more legally vulnerable, so long as their skew is actually the result of political geography rather than the deliberate and disparate cracking and packing of voters. In such a case, defendants could avoid liability by invoking either the test's first prong (lack of discriminatory intent) or its third one (legitimate justification).

Historically as well, the measures of partisan asymmetry that underpin the district court's test have not been slanted in either party's direction. Appellees' expert found that in state house elections from 1972 onward, partisan bias and the efficiency gap have both exhibited means and medians very close to zero. SA215; Dkt. 149:199. This means that over the modern redistricting era, neither party has enjoyed a consistent

edge over its opponent. And while the average efficiency gap nationwide has trended in a Republican direction in recent years, this shift is entirely attributable to more plans being enacted by state governments under unified Republican control. SA273-74; Dkt. 149:206. If Democrats had designed more maps, the average efficiency gap would have moved in the opposite direction. *Id.*[16]

Unsurprisingly, given these facts, Appellants are wrong that the district court's test is "biased against Republicans" and would invalidate "one of every three plans." App. Br. 50, 52. As the district court noted, the test's implications can be estimated by tallying the number of prior maps that were (1) designed by a party in full control of the redistricting process, and (2) highly asymmetric. JA134. This approach does not consider the durability of, or justification for, any asymmetry. It also treats unified government as a proxy for discriminatory intent even though not all parties in charge of redistricting seek to handicap their rivals. *Id.* The resulting figures therefore represent the far upper limit of the test's potential reach.

With these caveats in mind, Appellees' expert analyzed over two hundred state house plans spanning the period from 1972 to 2014. JA195-196. Of these plans, only one-fifth were enacted by a party in full control of redistricting and then exhibited an initial efficiency gap

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[16] Precisely because partisan gerrymandering can be carried out by Democrats as easily as by Republicans, the Republican National Committee urged the Court to curb the practice in *Bandemer*. *See* Br. of Republican National Committee as Amicus Curiae, *Davis v. Bandemer*, 478 U.S. 109 (1986), 1985 WL 670030.

above 7%. (Appellees' expert found that efficiency gaps above 7% are historically anomalous and particularly durable. SA236-249, 259-271, 315-20.) And less than one-tenth of the plans were enacted by a party in full control of redistricting and then exhibited an initial efficiency gap above 10%. (Justice Stevens floated 10% as a possible asymmetry threshold in *LULAC*. *See* 548 U.S. at 468 n.9 (Stevens, J., concurring in part and dissenting in part).) Furthermore, of the plans flagged using a 7% threshold, three-fifths were enacted by—and subsequently favored—Democrats. Similarly, more than half of the plans flagged using a 10% cutoff were pro-Democratic in intent and effect.[17]

These statistics refute Appellants' claims about the test's consequences. Far from being biased against pro-Republican maps, historically it would have called into question more *pro-Democratic* ones. And far from striking down one-third of prior plans, it actually would have allowed plaintiffs to challenge, at most, one-tenth to one-fifth of them. These are the hallmarks of a "limited and precise" standard—one that does not "commit federal and state courts to unprecedented intervention," *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment), or "throw into doubt the vast majority of the Nation's . . . districts," *Miller*, 515 U.S. at 928 (O'Connor, J., concurring). Indeed, compared

[17] Appellees do not ask the Court to set an asymmetry threshold. As the district court observed, because Act 43's asymmetry "is one of the largest in recent history, determining a threshold may . . . wait for another day." JA137. The Court's reapportionment decisions, which took more than a decade to arrive at the presumptive 10% population deviation cutoff for state legislative plans, further support this approach.

to other redistricting theories, the impact of the district court's test would be quite minor. *See* Gary W. Cox & Jonathan N. Katz, *Elbridge Gerry's Salamander* 4 (2002) (noting that almost every map in the country was redrawn during the reapportionment revolution of the 1960s); Ellen D. Katz et al., *Documenting Discrimination in Voting*, 39 U. Mich. J.L. Reform 643, 655 (2006) (counting more than 800 Section 2 suits since the Court's decision in *Gingles*).

5. Compliance with the Test Is Straightforward.

Even if the district court's test is judicially manageable, the Court might still worry that ex ante compliance with it would be difficult. But it would not be hard for states to avoid liability under the test, nor would doing so interfere with any of their other legal obligations.

First, a state could prevent a large and durable asymmetry by employing the same tools that all modern mapmakers already rely on: data sets of past election results, redistricting software, regression modeling, sensitivity testing, and so on. At present, these tools are often exploited to make plans severely and persistently asymmetric. But it would be just as easy to harness the tools for the opposite purpose: to curb rather than to enhance partisan unfairness. As the district court pointed out, "drafters can assess the durability of their partisan maps, even absent an actual electoral outcome, by employing [sensitivity testing]." JSA176a n.314.

A state could also eliminate any possibility of a finding of discriminatory intent by adopting a bipartisan or nonpartisan redistricting process. In the district

court's words, "[i]f a nonpartisan or bipartisan plan displays a high [asymmetry], the remaining components of the analysis will prevent a finding of a constitutional violation." JSA171a. More than a dozen states currently use commissions to design their state legislative districts. *See* National Conference of State Legislatures, *Redistricting Law 2010*, at 163-68 (2009). Plans enacted by divided state governments—and so approved by elected officials from both parties—are even more common. SA273. In neither of these scenarios would there be any serious prospect of liability.

What if a state determines, over the course of its redistricting process, that it can avoid a large and durable asymmetry only by compromising its other legitimate goals? The district court's test would not compel the state to make this sacrifice—say, to draw bizarrely shaped districts, to divide more political subdivisions, or to disrupt districts protected by the Voting Rights Act. To the contrary, the state would be able to insulate itself from liability by pointing to these valid aims. They would be an ironclad justification for the plan's skew. JSA177a-218a.

In fact, conflict between partisan symmetry and other redistricting objectives is infrequent. Due to the near-infinite number of possible district configurations, it is generally possible for plans both to be symmetric and to satisfy all other criteria. In Wisconsin, for example, Professor Chen showed that there are hundreds of Assembly maps that exhibit very small asymmetries *and* that perform at least as well as Act 43 in terms of compactness, political subdivision splits, and Voting Rights Act compliance. *See* Chen, *supra*, at 12;

see also, e.g., Jowei Chen & Jonathan Rodden, *Cutting Through the Thicket*, 14 Election L.J. 331 (2015) (reaching the same conclusion for congressional plans in Florida).

In any event, history shows that even if there were a short-term rise in partisan gerrymandering lawsuits, this uptick would fade over time as mapmakers learned to abide by the new legal limit. Reapportionment litigation, for instance, has never approached its 1960s peak in five subsequent cycles. Nor has racial gerrymandering litigation been nearly as prevalent since the 1990s. The same pattern would likely hold for partisan gerrymandering cases: They would be infrequent in the future because line-drawers would take the necessary steps to avoid liability. *See* Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28, 68-69 (2004).

III. Compliance with Traditional Districting Criteria Is Not a Safe Harbor.

After contending that partisan gerrymandering claims are non-justiciable, Appellants assert that even if they are justiciable, they must include as an element noncompliance with traditional districting criteria. App. Br. 59-67. It is hard to think of an argument that has been raised and rejected as often as this one. As far back as *Gaffney*, a unanimous Court was unimpressed by evidence that "irregularly shaped districts" "wiggle[d] and joggle[d] boundary lines." 412 U.S. at 752 n.18. "[C]ompactness or attractiveness," declared the Court, "has never been held to constitute an independent federal constitutional requirement." *Id.*

The Court has adhered to this position in its partisan gerrymandering cases. In *Bandemer*, Justice Powell urged that the "most important" factor should be "the shapes of voting districts and adherence to established political subdivision boundaries." 478 U.S. at 173 (Powell, J., concurring in part and dissenting in part). The plurality specifically "disagree[d] with [his] conception of a constitutional violation" because noncompliance with traditional criteria does "not show any actual disadvantage beyond that shown by the election results." *Id.* at 138-40 (plurality opinion).

In *Vieth*, likewise, Justice Souter proposed a test requiring a plaintiff to show that a district "paid little or no heed to . . . traditional districting principles." 541 U.S. at 348 (Souter, J., dissenting). An outright majority of the Court dismissed this test. The plurality stressed the unmanageability of the approach, asking "*How much* disregard of traditional districting principles?" and "What is a lower court to do when . . . the district adheres to some traditional criteria but not others?" *Id.* at 296 (plurality opinion). The plurality also observed that aesthetically pleasing districts nevertheless can be grossly gerrymandered: "it certainly cannot be that adherence to traditional districting factors negates any possibility of intentional vote dilution." *Id.* at 298. Justice Kennedy further explained that traditional principles are not "sound as independent judicial standards for measuring a burden on representational rights." *Id.* at 308 (Kennedy, J., concurring in the judgment). Their defect is that "[t]hey cannot promise political neutrality when used as the basis for relief," but rather "unavoidably have significant political effect." *Id.* at 308-09.

The Court has also repeatedly rebuffed Appellants' claim in the racial gerrymandering context. Over and over, the Court has made clear that noncompliance with traditional criteria is probative evidence of a predominant racial purpose, but *not* a prerequisite for liability. *See Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017) ("[A] conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement or a mandatory precondition . . . ."); *Miller*, 515 U.S. at 913 ("[B]izarreness is [not] a necessary element of the constitutional wrong or a threshold requirement of proof . . . ."); *Shaw I*, 509 U.S. at 647 ("[T]hese criteria . . . are [not] constitutionally required . . . .").

There are good reasons for this unbroken line of precedent. On the one hand, traditional criteria may be disregarded for many reasons other than partisan gain: a predominant racial motivation, an effort to comply with the Voting Rights Act, the presence of irregular geographic boundaries, and so on. On the other hand, as the district court pointed out, "[h]ighly sophisticated mapping software now allows lawmakers to pursue partisan advantage without sacrificing compliance with traditional criteria." JSA121a-122a. "A map that appears congruent and compact to the naked eye may in fact be an intentional and highly effective partisan gerrymander." JSA122a. Appellants' approach would thus produce an inordinate number of false positives (plans noncompliant with traditional criteria for nonpartisan reasons) *and* false negatives (compliant plans that still intentionally, severely, durably, and unjustifiably discriminate against a party's voters).

None of this is to say that traditional criteria are irrelevant under the district court's test. As in racial gerrymandering cases, a failure to abide by them may be persuasive evidence of discriminatory intent. *See Bethune-Hill*, 137 S. Ct. at 799; *Miller*, 515 U.S. at 913. And as in one person, one vote cases, respect for traditional principles may provide a legitimate justification for a plan's discriminatory effect. *See Brown*, 462 U.S. at 844; *Mahan*, 410 U.S. at 323. Traditional factors did not play a large role in this litigation only because Appellees had direct proof of discriminatory intent (and so did not need to resort to circumstantial evidence) and because Appellants "made no effort to justify the plan['s skew] using neutral criteria." JA146. In a typical case under the district court's test, traditional principles would likely receive much more attention.

In any event, contrary to Appellants' claim, it is far from "undisputed" that Act 43 complies with traditional criteria. App. Br. 25, 62. As documented above, the plan (1) divided seven more counties than any other map in Wisconsin's modern history; (2) had less compact districts, on average, than any other Wisconsin map for which data is available; (3) moved seven times more people than necessary to achieve population equality; (4) paired six more Assembly incumbents than a previous map paired for both legislative chambers; and (5) violated Section 2 of the Voting Rights Act through its treatment of Latino voters. *See supra* Statement Part I. This poor record is what arises when mapmakers use traditional principles as a fig leaf to conceal their pursuit of partisan gain.

IV. Appellants Are Not Entitled to a Remand.

Appellants' final argument is that they were caught unaware by the district court's consideration of partisan entrenchment, and so are entitled to a remand on this issue. App. Br. 25, 53. 56. This claim cannot be seriously entertained. Appellees stressed the durability of a party's advantage throughout the litigation, and the district court made it abundantly clear, prior to trial, that it shared this concern.

Starting with their complaint, Appellees argued that an "extremely durable" gerrymander is constitutionally problematic because "it is unlikely that the disadvantaged party's adherents will be able to protect themselves through the political process." JA30. Appellees maintained this "emphasis on the durability of gerrymandering" in every subsequent filing. Dkt. 68:74; *see also*, *e.g.*, Dkt. 31:11; Dkt. 134:51. At trial too, Appellees presented extensive evidence about the intent of Act 43's drafters to entrench the Republican Party in power, as well as the persistent pro-Republican skew that in fact ensued. Dkt. 148:222-235; Dkt. 149:231-246; Ex. 161:126-181.[18]

For its part, the district court could not have indicated more plainly its interest in entrenchment. The court stated in its summary judgment decision: "Focusing on durability makes some sense because it is an indication that ordinary political processes cannot fix the problem." JA129. "[D]urability is an appropriate

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[18] Given Appellees' focus on durability, Appellants' claim that Appellees implicitly *waived* any reliance on entrenchment, App. Br. 53, cannot be taken seriously.

measure of discriminatory effect." *Id.* "[T]he collective will of the people should not be subverted indefinitely." JA132. And "plaintiffs [should] show that defendants had the intent to prevent the minority party from regaining control throughout the life of the districting plan." JA141.

Appellants apparently overlooked these comments (as well as Appellees' filings and evidence). But they have only themselves to blame for this oversight, and are not entitled to a remand because of it.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

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