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IN THE SUPREME COURT OF PENNSYLVANIA

League of Women Voters of Pennsylvania, *et al.*, *Petitioners*, v. The Commonwealth of Pennsylvania, *et al.*, *Respondents*.	No. 159 MM 2017

RESPONDENTS, PENNSYLVANIA GENERAL ASSEMBLY, MICHAEL C. TURZAI AND JOSEPH B. SCARNATI III'S ANSWER TO PETITIONERS' APPLICATION FOR EXTRAORDINARY RELIEF UNDER 42 PA. C.S. § 726 AND PA. R.A.P. 3309

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Respondents, Pennsylvania General Assembly, Michael C. Turzai and Joseph B. Scarnati III (the "Legislative Respondents"), by and through their undersigned counsel, respectfully submit this Answer to Petitioners' Application for Extraordinary Relief under 42 Pa. C.S. § 726 and Pa. R.A.P. 3309 (the "Application").

I. INTRODUCTION

This matter concerns the constitutionality of the General Assembly's 2011 plan redrawing the Commonwealth's federal congressional districts (the "2011 Plan")[1] to comport with the results of the 2010 census. *See Congressional Redistricting Act of 2011*, 2011 Pa. SB 1249 (Dec. 22, 2011). The 2011 Plan was passed by both Chambers of the General Assembly and signed into law by the Governor on December 22, 2011. Petitioners filed their Petition for Review with the Commonwealth Court on June 15, 2017 – nearly six (6) years after the enactment of the 2011 Plan; after three (3) consecutive elections cycles were already completed under the 2011 Plan; and, only after having the benefit of the federal trial court's decision in *Gill v. Whitford*, a case in which nearly identical partisan gerrymandering claims were advanced and which is currently under review, and for which a stay has been issued, by the U.S. Supreme Court. *See Gill*

[1] Unless otherwise noted herein, capitalized terms shall have the meaning afforded such terms in Legislative Respondents' Application for Stay and accompanying briefs filed with the Commonwealth Court.

v. Whitford, No. 16-1161, 2017 U.S. Dist. LEXIS 4040 (U.S. June 19, 2017, argued October 3, 2017).

Now, four (4) months after filing this matter in the Commonwealth Court, Petitioners seek to have this Court exercise its extraordinary power to review this matter *only after* the Commonwealth Court stayed most aspects of the case pending the U.S. Supreme Court's decision in *Whitford* – a decision by the Commonwealth Court with which Petitioners, of course, do not agree.[2] The U.S. Supreme Court's decision in *Whitford* will directly impact the validity of the claims raised herein and, based on this Court's own 50 year old precedent of following federal law in this area, will almost certainly govern how such claims are to be litigated and decided on the merits, if at all. Viewing the procedural history of this case in its entirety, it is clear that Petitioners' Application is a transparent attempt to forum shop and to remedy Petitioners' own deficiencies in their handling of this matter.

In support of their arguments that this case should be resolved "expeditiously and in time for the 2018 elections," Petitioners resort to arguing the ultimate factual merit of their claims. In this regard, their Application presumes that their claims will succeed at trial.[3] Petitioners brazenly assert that statistical

[2] The Commonwealth Court's Order granting the Stay Application in part was entered on October 16, 2017. *See* Order signed by the Honorable Dan Pellegrini attached as **Exhibit A.**

[3] Legislative Respondents have filed Preliminary Objections on the grounds that the claims asserted should be dismissed as a matter of law. Those remain pending. In attempting to argue the merits of their claims, Petitioners claim that Legislative Respondents have only raised

measures—that no court has adopted—prove with certainty that the 2011 Plan was solely adopted with impermissible Republican bias. But, such an argument is not properly before this Court given the stage of the case and the dubious nature of Petitioners' proposed statistical measures. Moreover, in asking this Court to exercise its extraordinary jurisdiction, Petitioners conveniently ignore several salient, undisputed facts, including that their own delay in initiating the case, and their handling of the case since filing, are the sole causes of the "urgency" they now claim exists.

First, the 2011 Plan was created and enacted by the General Assembly entirely in accordance with the Elections Clause of the U.S. Constitution. *See* U.S. CONST. art. I, §4. Petitioners have not complained that the Plan's creation and enactment process was anything other than the process which has been followed for many decades.[4] Rather, they claim that the development of "new mathematical

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defenses that are legal in nature and will therefore somehow be precluded from factually defending the claims. (App. at 15). As this Court is well aware, it is improper under the Pennsylvania Rules of Civil Procedure to raise factual challenges in Preliminary Objections advanced under Pa. R.Civ.P. 1028. Put differently, Petitioners' claim that Legislative Respondents are somehow limited to their "legal" defenses by virtue of having filed Preliminary Objections is nonsensical. The fact that Legislative Respondents did not engage in a factual challenge in the Preliminary Objections is not, in any way, indicative of the absence of facts in favor of Legislative Respondents' defense. Similarly unfounded is Petitioners' suggestion that because Legislative Respondents have asserted privileges to discovery propounded upon them, Legislative Respondents must have no witnesses or evidence to support their defense.

[4] In fact, this Court and the United States Supreme Court declined to invalidate the maps adopted following the 2000 census, which were proposed and enacted through nearly the same process as utilized in connection with the 2011 Plan.

measures" since the 2011 Plan was adopted, and three cycles of election results, somehow now gives rise to their claims.[5]

Second, there has been no change in the law governing gerrymandering claims since the 2011 Plan was enacted. The *only* thing that has changed since 2011 is that last year – for the first time in more than a generation – a three-judge federal panel recognized that partisan gerrymander claims were justiciable and ordered Wisconsin's state's legislative map to be redrawn. *Whitford v. Gill*, 218 F.Supp.3d 837, 837-965 (W.D. Wisc. 2016) (stayed by order of the U.S. Supreme Court on June 19, 2017).[6] Yet, Petitioners did not file their *Whitford*-based claims until June 15, 2017, when *Whitford* was already pending before the U.S. Supreme Court.

Third, any claim based on Legislative Respondents' purported partisan intent is meritless; the U.S. Supreme Court has held on numerous occasions that partisan influence is not only constitutional, but to be expected in laws passed by

[5] Once again, even these basic allegations are belied by the facts. The partisan split in the Congressional delegation did not change after the 2012 elections. The notion that three elections were needed to realize that Petitioners' "rights" were somehow being violated is a novel claim. Additionally, every mathematical model identified so far by Petitioners' analysis was available and has been applied by social scientists or mathematicians to redistricting matters for years. But even if this were not the case, there has been no change in applicable law or operative facts since the 2011 Plan was enacted. The formulation of new mathematical models does not constitute a change in the applicable facts or law.

[6] Since this Court's decision in *Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002), which incorporated an analysis of *Davis v. Bandemer*, 478 U.S. 109 (1986), the Court has not had the occasion to consider the impact of *Vieth v. Jubelirer*, 541 U.S. 267 (2004) and *LULAC v. Perry*, 548 U.S. 399 (2006) on *Bandemer*, 478 U.S. 109.

legislatures, particularly in redistricting. *See Cooper v. Harris*, 137 S.Ct. 1455, at *1488, 2017 U.S. LEXIS 3214 (May 22, 2017) ("Partisan gerrymandering dates back to the founding and while some might find it distasteful, our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering ….") (Alito, J., concurring in part and dissenting in part, joined by the Chief Justice and Justice Kennedy) (internal quotations and citations omitted); *LULAC*, 548 U.S. at 459 n.4 (noting that it is expected that legislatures will use partisanship in the redistricting process); *Vieth*, 541 U.S. at 285-86 (noting that partisan districting is a "lawful and common practice"); and, *Gaffney v. Cummings*, 412 U.S. 735 (1973) ("Politics and political considerations are inseparable from districting and apportionment…The reality is that districting inevitably has and is intended to have substantial political consequences."). Partisan influence, therefore, is precisely what the United States Constitution anticipates.

Finally, even if this matter were to be expedited, there are certain time constraints rendering it impossible for the General Assembly to create and enact a new map before the 2018 election cycle. As detailed *infra*, even if Petitioners were to prevail, it is simply far too late for any new Congressional map to be enacted in time to impact the 2018 primaries.

Legislative Respondents recognize that this Court has the power to exercise extraordinary jurisdiction. However, Petitioners have not presented any valid or

compelling reason for this Court to exercise that rarely used power. Any "urgent" or "immediate" issues of public importance advanced in support of Petitioners' Application exist solely because of Petitioners' own inexcusable delay and their quibbles with the Commonwealth Court's administration of its docket in this matter.

Accordingly, for these reasons and those more fully explained below, Legislative Respondents respectfully request that the Supreme Court deny Petitioners' Application.

II. FACTUAL and PROCEDURAL BACKGROUND

Petitioners consist of the League of Women Voters of Pennsylvania and individual voters – all registered Democrats – who allege that they have consistently voted for Democratic candidates, and who allegedly reside in all of Pennsylvania's 18 Congressional Districts. (Ex. A to Application, the Petition for Review ("Pet.") ¶¶ 14-31). On June 15, 2017, Petitioners filed their Petition for Review before the Commonwealth Court alleging that Republican legislators, in conjunction with National Republican leaders, created the 2011 Plan in a manner that would maximize the elected number of Republican Congressional representatives. (Pet. ¶¶ 42-49). Formal service of the Petition was, by stipulation of the parties, deemed effective July 14, 2017. (*See* Commw. Ct. Docket No. 261 MD 2017, Stipulation filed July 14, 2017).

The Petition contains two claims: (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 (the "First Amendment Claim") 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 Pennsylvania's Constitution codified at art. I, §§ 1 and 26, and art. I, § 5 because the Plan was allegedly created with discriminatory intent and has a discriminatory effect (the "Equal Protection Claim"). (Pet. ¶¶ 116-17).

To prove their claims, Petitioners rely upon the same two-part test that was proposed in *Whitford*: (1) that the 2011 Plan was adopted with partisan intent; and (2) had a partisan effect. (Pet. ¶ 115 (citing *Whitford*, 218 F. Supp. 3d at 837)). With regard to partisan intent, Petitioners allege that Republicans utilized an opaque process producing districts that transformed competitive districts into reliably Republican districts. (Pet. ¶¶ 65-67). This was purportedly accomplished by "packing" more Democrats into jurisdictions that are already overwhelmingly Democrat and "cracking" Democrat leaning jurisdictions into multiple Republican leaning jurisdictions. (Pet. ¶¶ 61-66, 73-74). As to the alleged partisan effect, Petitioners rely in large part on an "efficiency gap" analysis identical to that relied upon in *Whitford*. (Pet. ¶¶ 88-89).

Legislative Respondents were served with the Petition as of July 14, 2017 and had thirty (30) days to respond. Legislative Respondents filed the Application for Stay on August 9, 2017 requesting that the Commonwealth Court stay the matter pending the U.S. Supreme Court's decision in *Whitford*. Shortly thereafter on August 14, Legislative Respondents filed Preliminary Objections. Less than two (2) weeks later on August 23, 2017, the Commonwealth Court scheduled oral argument for October 4, 2017, to adjudicate *inter alia*, Legislative Respondents' Application for Stay. That timing allowed the Commonwealth Court to consider the lengthy briefing on the important issues before the Court. Petitioners waited three (3) weeks after the scheduling order was issued, until September 12, 2017, to request an earlier hearing on the Application for Stay.

Oral argument was held as scheduled on October 4. Following oral argument, the Commonwealth Court held a chamber conference and advised the parties that it intended to grant a partial stay pending the Supreme Court's decision in *Whitford.* One week after being advised of the Commonwealth Court's intention to grant the stay in part, Petitioners filed the instant Application. While the partial stay is in place, the Commonwealth Court has ordered the parties to submit briefing concerning Legislative Respondents' assertions of legislative and other privileges advanced in response to Petitioners' discovery requests, which

briefing will be completed by December 29, 2017. Thereafter, the Commonwealth Court, *en banc*, will rule on the privilege assertions.

The history of this matter readily demonstrates that Petitioners unduly delayed not only in filing and serving this action, but also in requesting that this Court exercise its plenary jurisdiction. Tellingly, at no point have Petitioners even attempted to offer a plausible reason, other than election results and allegedly "unavailable" social science measures, for their delay in commencing this case. In reality, Petitioners only seek the extraordinary relief requested herein after having lost on the stay issue before the Commonwealth Court, despite their previous acknowledgments that they could have filed this Application at the outset of this litigation (in June) or at any point thereafter, but chose not to. (*See* Transcript of the 10/4/17 Oral Argument, Exh. B to the Application, 24: 6-10, 19-23; 28: 7-15 ("10/4/17 Trans.")).

III. STANDARD FOR THE EXERCISE OF JURISDICTION UNDER 42 Pa. C.S. § 726

Petitioners' Application presents the simple question of whether the Supreme Court should exercise plenary jurisdiction to review Petitioners' challenge to the validity of the 2011 Plan, or allow it to proceed in the ordinary course of litigation in the Commonwealth Court.

This Court may assume, at its discretion, plenary jurisdiction over a matter of "immediate public importance" that is pending before another court of this

Commonwealth. *See* 42 Pa. C.S. § 726. While similar in its result, the Supreme Court's extraordinary jurisdiction under § 726 is distinct from its King's Bench jurisdiction, the latter of which allows the Court to exercise power of "general superintendency" over inferior courts even when a matter is not pending before a lower court. *In re Dauphin Cnty. Fourth Investigating Grand Jury*, 943 A.2d 929, 933 n.3 (Pa. 2007). Given that this action, including the same claims and parties, is already pending before the Commonwealth Court, the appropriate question is whether this Court should exercise extraordinary jurisdiction under § 726. *Bd. of Revision of Taxes v. City of Phila.*, 4 A.3d 610, 620 (Pa. 2010). In evaluating whether to exercise discretion and assume plenary jurisdiction, the Court will consider the immediacy and public importance of the issues raised. *See* 42 Pa. C.S. § 726.

It is well-settled that plenary jurisdiction is invoked sparingly and only where the record clearly demonstrates the petitioners' rights. *Commonwealth v. Morris*, 771 A.2d 721, 731 (Pa. 2001); *Philadelphia Newspapers, Inc. v. Jerome*, 387 A.2d 425, 430 n.11 (Pa. 1978). Indeed, "[e]ven a clear showing that a petitioner is aggrieved does not assure that this Court will exercise its discretion to grant the requested relief." *Jerome*, 387 A.2d at 430 n.11 (citing *Illinois v. City of Milwaukee*, 406 U.S. 91, 92 (1972)). In determining whether to assume jurisdiction, the Court may look at conserving judicial resources, providing guidance to lower courts as to a question likely to recur, and the likelihood that the

case would eventually become subject to the United States Supreme Court's review. *See Commonwealth v. Lang*, 537 A.2d 1361, 1364 n. 1 (Pa. 1988).

For the reasons discussed herein, Legislative Respondents respectfully submit that Petitioners have not met their heavy burden of establishing that the circumstances of this case warrant the Court's use of plenary jurisdiction over Petitioners' challenges to the 2011 Plan. *See, e.g., Washington Cty. Comm'rs v. Pa. Labor Relations Bd.*, 417 A.2d 164, 167 (Pa. 1980) (describing the burden in requesting the exercise of extraordinary jurisdiction as "heavy"); *Rapaport v. Interstate Gen. Media, LLC*, 99 A.3d 528, 528-29 (Pa. 2014) (same).

IV. ARGUMENT

A. Petitioners' Own Delay Does Not Support Any Urgency For The Court To Exercise Jurisdiction To Review the Commonwealth Court's Stay Order Pending The *Whitford* Decision.

Petitioners' own actions in this matter have manufactured their claim of "urgency" to have this matter rushed to adjudication on the merits. The fact that they sat on their hands for nearly six (6) years and three (3) election cycles between 2012 and 2016, then waited an addition eight (8) months to file their initial Petition, and nearly another four (4) additional months to file for the relief they now request, undercuts Petitioners' request that this Court exercise its extraordinary and rarely-used power to assume plenary jurisdiction. Simply put, Petitioners should not now benefit from their own intentional delay.

i. Petitioners Created Their Own Emergency.

The 2011 Plan has been in place for nearly six (6) years and, as Petitioners point out in their Application, three election cycles have already taken place under the 2011 Plan. No challenge was brought to the 2011 Plan until eight months after the third election run under that Plan when, on June 15, 2017, Petitioners filed the instant matter with the Commonwealth Court.[7] At the time Petitioners instituted this action, they were fully aware of their ability to request that this Court exercise its plenary jurisdiction and/or extraordinary King's Bench power, but opted not to pursue that strategy. (10/4/17 Trans. at 24: 6-25). This was true notwithstanding Petitioners' awareness that this matter might only be effectively resolved by the Pennsylvania Supreme Court. (*Id.* at 25:11-14; 26:5-8, 21-25). Yet, Petitioners elected to first proceed in the Commonwealth Court, and even argued to Judge Pellegrini two (2) weeks ago that the matter could be decided by the Commonwealth Court without having to ask this Court to exercise extraordinary jurisdiction.[8] (*Id.* at 25:1-11).

[7] Legislative Respondents posit that the Wisconsin District Court's decision in *Whitford,* 218 F. Supp. 3d 837 (W.D. Wis. 2016) was the impetus for the filing of the instant matter because the *Whitford* trial court advanced a potential change in the law regarding the justiciability of partisan gerrymander claims. Tellingly, prior to the decision in *Whitford,* there seems to have been no great urgency to remedy the manner in which the 2011 Plan was drawn or implemented.

[8] Petitioners also at any time could have sought summary relief under Pa. R.A.P. 1532(b)) which provides that "[a]t any time after the filing of a petition for review in an … original jurisdiction matter[,] the court may on application enter judgment if the right of the applicant thereto is clear." Pa. R.A.P. 1532(b); *Myers v. Commonwealth,* 128 A.3d 846, 849 (Pa. Commw. Ct. 2015); *Jubelirer v. Rendell,* 953 A.2d 514, 521 (Pa. 2008). However, Petitioners did not do so.

The purported "urgency" of having this Court resolve this matter was apparently nonexistent until October 4, 2017 – three and a half months after the Petition for Review was first filed – when the Commonwealth Court granted the partial stay pending the U.S. Supreme Court's decision in *Whitford*.

The purpose of extraordinary jurisdiction "is not to permit or encourage parties to bypass an existing constitutional or statutory adjudicative process and have a matter decided by this Court, but aids the Court in its duty to keep all inferior tribunals within the bounds of their own authority." *In re Bruno*, 101 A.3d 635, 670 (Pa. 2014). Here, Petitioners should not be permitted to bypass the Commonwealth Court merely because they do not agree with Judge Pellegrini's correct decision to issue a partial stay in this matter. *See also Bruno*, 101 A.3d at 670 (the Court's exercise of supervisory authority and general power to "minister justice" is employed as a last resort) (citing *In re President Judge for 30th Judicial Dist.*, 216 A.2d 326, 326 (Pa. 1966); *accord In re Smith's Estate*, 275 A.2d 323, 326 (Pa. 1971)).[9]

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[9] As this Court is well aware, Judge Pellegrini is one of the few Judges within the Commonwealth who has experience with redistricting matters, as he served as this Court's master in *Erfer*, 794 A.2d 325. Additionally, as noted in *Erfer*, the Presiding Officers in that matter appear to have provided little in the way of factual presentation, which Legislative Respondents have indicated before the Commonwealth Court will not be the posture of this case. Among other things, significant factual questions remain open about the various social science methods now being advanced by Petitioners, questions that require reasonable examination periods as well as expert and judicial review.

A good portion of Petitioners' Application is spent attempting to place the blame for the delay solely on the Commonwealth Court's management of its docket. But, in casting such blame, Petitioners completely disregard that the Commonwealth Court entertained lengthy briefing from the parties and argument on the Application for Stay, and then promptly decided to grant that Application in part based on arguments and reasoning that Petitioners do not address or explain to this Court. Petitioners' dissatisfaction with the Commonwealth Court (their chosen forum) cannot provide compelling grounds for this Court to exercise its extraordinary jurisdiction.[10]

For these reasons, Legislative Respondents respectfully submit that Petitioners have failed to demonstrate any valid or compelling reason warranting this Court's exercise of its plenary jurisdiction. Therefore, the Application should be denied.

[10] Such circumstances have resulted in other Courts dismissing late filed redistricting challenges on the basis of laches. *See, e.g.*, *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990) (dismissing redistricting case on the ground of laches); *Ariz. Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Comm'n*, 366 F. Supp. 2d. 887 (D. Ariz. 2005) (dismissing redistricting challenge on the basis of laches where challengers waited years to bring challenge with an upcoming election cycle on the horizon); *Ole Ole Inc. v. Kozubowski*, 187 Ill. App. 3d 277 (Ill. App. 1989) (dismissing redistricting challenge on the basis of laches while noting the challenge to the plan was ripe at the time the plan was enacted); *New Democratic Coalition v. Secretary of State*, 200 N.W.2d 749, 756 (Mich. App. 1972) (agreeing that laches was viable defense to redistricting challenge because a late challenge "would seriously strain the lection machinery and endanger the election process."). The two elements of laches are inexcusable delay and prejudice to the party asserting the defense. *Hart v. Armstrong World Indus.*, 14 Phila. 25 (Ct. Cm. Pl. 1985). Given that Legislative Respondents' Preliminary Objections remain pending at this time, Legislative Respondents have not had opportunity to raise and develop their affirmative defense of laches.

ii. Even Assuming Arguendo Petitioners Were To Prevail On Their Claims, There Is Insufficient Time To Enact A New Plan Before The 2018 Election Cycle Begins.

Petitioners argue that the Court could still possibly resolve this case in time for the 2018 elections, given that "despite the delays in the Commonwealth Court, there are still nearly five months before the due date for nomination petitions for the 2018 elections." (App. at 17). In support of their timing theory, Petitioners discuss the timeline at issue in *Erfer v. Commonwealth*, 794 A.2d 325, in which the petitioners there filed a partisan gerrymandering challenge to the redistricting plan that was enacted following the 2000 census. In *Erfer*, however, all in a span of two weeks, the petitioners: (1) filed their case on January 10, 2002; (2) asked for expedited review in the Commonwealth Court the following day, on January 11, 2002; and, (3) asked this Court to assume plenary jurisdiction less than two weeks later, on January 25, 2002. 794 A.2d at 328, 335. Most notably, the petitioners' challenge in *Erfer* was filed *within two (2) months of the enactment of the 2002 plan* being challenged therein and long before the first election cycle using the 2002 plan. Petitioners here fail to appreciate these important distinguishing facts, which only further support Legislative Respondents' position that Petitioners should not be rewarded with expedited and extraordinary relief when they needlessly created their own purported emergency.

Additionally, Petitioners' argument ignores several unavoidable realities applicable to this case. As recognized by Judge Pellegrini during the October 4, 2017 argument, even if the case "moved as fast as possible," there is no way any decision could affect the 2018 elections. (10/4/17 Trans. at 27:5-25; 28:1-6). There are several reasons why it would be impossible, even if Petitioners were entitled to the relief they seek, for any new redistricting plan to be implemented in time to impact the 2018 elections.

First, the 2018 election cycle is already underway. Many individuals have already announced their candidacy for Congressional seats in the 2018 primaries, and have hired staffs, begun fund-raising and started campaigning in Congressional districts as they currently exist. These efforts were all initiated in reliance on the Congressional map passed into law six years ago in 2011, and which has never before been challenged. Indeed, thirty-four (34) individuals have sought to intervene before the Commonwealth Court to express these very concerns, including candidates for office, fund-raisers, donors and others who have already been working in furtherance of electing candidates in the 2018 primary elections already running in the districts created long ago under 2011 Plan. (*See* Commw. Ct. Docket No. 261 MD 2017, Application to Intervene filed August 10, 2017).

Second, the Elections Clause itself leaves the passage of any Congressional maps to the State legislature. *See* U.S. CONST. art. I, §4 Thus, even if a new map

is ordered to be drawn in early December, it would then have to be created consistent with whatever directives the Court should mandate, and then passed through both chambers of Pennsylvania's General Assembly and signed by the Governor.[11] This legislative process will take a considerable amount of time, especially given that any bill needs to be considered on multiple days in both the Senate and the House and each has limited session days in December and January. If the political branches are unable to arrive at and agreement on a map that can be enacted into legislation, it would fall on this Court to establish and carry out a process resulting in a valid map. Thus, even at its fastest possible pace, it is virtually impossible to envision any scenario whereby this case is finally adjudicated, Petitioners prevail, this Court issues an Opinion mandating how a new map should be drawn, a new map is created, and a new redistricting plan is signed into law, all in time to impact the 2018 election cycle.[12]

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[11] By way of example, it took the trial court in *Whitford* seven months after the trial concluded to issue its two separate opinions which, combined, totaled over 125 pages in length. It took eight and six months, respectively, for the maps to be created in 2001 and 2011. *See* note 12, *infra.*

[12] Following the release of the 2000 and 2010 census results, it took eight and six months, respectively, for new plans to be created. After the 2010 census, redistricting data was released on March 24, 2011, and the initial version of the 2011 Plan was not submitted to the General Assembly until September 14, 2011. *See* Legislative History of the 2011 Plan *available at* http://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?syear=2011&sind=0&body=S&type=B&bn=1249; and, 2010 Census Data Products (May 22, 2015), *available at* https://www.census.gov/population/www/cen2010/glance/. Similarly, following the 2000 census, redistricting data was released between March 7 and March 30, 2001, and the initial version of the 2002 redistricting plan was not submitted to the General Assembly until November 16, 2001. *See* Legislative History of the 2001 redistricting plan *available at*

Third, even if a new plan could is enacted, the Commissioner of Elections must then prepare, finalize and circulate paperwork relating to the 2018 primaries weeks in advance of the first filing deadline on February 13, 2018.[13] Therefore, even if Plaintiffs prevail in this case, it is simply far too late for any new Congressional map to be enacted in time, *i.e.* by January 23, 2018, to impact the 2018 primaries, which are essentially already underway. (*See* Commw. Ct. Docket No. 261 MD 2017, Application to Intervene filed August 10, 2017 at pp. 2-4, 19-20). Given that the 2018 election cycle cannot possibly be impacted by any disposition of this case, there is no reason to unnecessarily and hastily rush this matter to final judgment. This is especially true given the importance and

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http://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?syear=2001&sind=0&body=S&type=B&bn=1200 (last visited Oct. 20, 2017).

[13] This was made clear during the October 10, 2107 pretrial conference held before Judge Baylson in the *Agre* matter, discussed in note 14, *infra*. During that conference, counsel for the Executive Branch Defendants in that matter, including the Commissioner of the Elections Bureau, advised the court that Pennsylvania's Bureau of Elections needs a significant amount of time to prepare in advance of the 2018 elections. (*See* Transcript of 10/10/17 conference before Judge Baylson at 17: 22-25; 18: 1-20, attached as **Exhibit B**). Counsel for the Commissioner of the Elections Bureau submitted a document entitled "2018 Pennsylvania Elections Important Dates to Remember [the "Official Schedule]." *Id.* at 24: 4-14. The Official Schedule sets forth events that must occur prior to congressional elections taking place, such as when official nominations must occur and when the primaries will occur. The first event on the Official Schedule will occur February 13, 2018, and that deadline is followed by seventeen other events leading up to the election that will take place on November 6, 2018. *Id.* at 24:16-21. As Counsel for the Executive Branch Defendants explained, the Official Schedule is "very compressed" and "there is not a lot of room [to adjust the dates]." *Id.* at 25: 8-13. Counsel also made clear that, in light of the size of the bureaucracy overseeing the state's elections, the Elections Bureau needs, at an absolute minimum, three weeks to prepare for the elections prior to the events listed in the schedule. *Id.* at 25: 15-21. Factoring in this three week period, the Elections Bureau must have the final redistricting plan for the 2018 election, at the very latest, on or before January 23, 2018, three weeks before the first deadline published in the Official Schedule.

magnitude of the substantial public interests at stake and the substantial legal questions that must be addressed before any trial could be scheduled.[14]

Critically, the 2011 Plan has existed for nearly six (6) years and Petitioners have done *nothing* to challenge this map until now, just a few months before the 2018 primaries. Surely there is no reason why Petitioners could not have asserted these very same claims many years ago, or, at a minimum, in 2016 following the decision of the District Court in *Whitford*. They have not offered any justifiable reasons for their delay. Petitioners should not be rewarded with this Court's exercise of extraordinary jurisdiction based on an alleged crisis that is entirely of their own creation. This is especially so when this case would put an extraordinary – and potentially wholly unnecessary – burden on Pennsylvania taxpayers, this Court, the Commonwealth Court, Legislative Respondents, the entire Pennsylvania

[14] In footnote 6 in Petitioners' Application, they cite to various other cases from other jurisdictions for the proposition that this Court can resolve their claims in a short amount of time before the 2018 elections. (App. at 17). Petitioners fail to point out, however, that each of those cases were set for trial and/or resolved before the U.S. Supreme Court granted review in *Whitford.* As to the *Agre v. Wolf* matter initiated in the Eastern District of Pennsylvania on October 2, 2017, Civ. A. No. 17-cv-4392 (E.D. Pa.), which challenges the 2011 Plan under federal law, on October 16, 2017, Legislative Respondents Turzai and Scarnati, proposed intervenor-defendants therein, filed a Motion for Review and Reconsideration of Judge Michael Baylson's October 10, 2017 Scheduling Order by the Three Judge Panel requesting that the full panel reconsider and strike the deadlines given the proposed intervenor-defendants' forthcoming: (1) Motion to Dismiss; and (2) Motion to Stay and/or Abstain. It must be noted that Petitioners acknowledged in their Application that the *Agre* matter should be stayed or that that court may be required to abstain. (App. at 20). Legislative Respondents here, which are the Proposed Intervenors in *Agre*, maintain that the United States District Court's scheduling order in that matter violates the U.S. Supreme Court's command in *Growe v. Emison*, 507 U.S. 25 (1993) to abstain from deciding matters related to a redistricting plan when there is already ongoing proceedings in the state's courts concerning the same plan.

General Assembly and anyone already running, or planning to run, for Congress in 2018.

For the reasons, Petitioners' Application should be denied.

B. The Commonwealth Court Properly Stayed This Matter Pending The U.S. Supreme Court's *Whitford* Decision

i. Petitioners' Argument that Whitford Will Have No Impact On This Case Is Incorrect.

Petitioners argue that the *Whitford* decision should not have any impact on this case because the Pennsylvania Supreme Court has held that partisan gerrymandering claims under the Pennsylvania Constitution are justiciable, and thus, *Whitford* cannot moot this case. (App. at 13, 18-19). In support of this argument, Petitioners point to this Court's decisions in *Erfer*, 794 A.2d 325 and *In re 1991 Pa. Legis. Reapportionment Comm'n*., 609 A.2d 132 (Pa. 1992). But in so doing, Petitioners neglect to mention that prior to *Erfer* and the *1991 Pa. Legis. Reapportionment* decisions, partisan gerrymandering claims were not justiciable in Pennsylvania. Indeed, Pennsylvania law was reversed in *1991 Pa. Legis. Reapportionment* when this Court decided to adopt and rely upon the U.S. Supreme Court's decision in *Davis v. Bandemer*, 478 U.S. 109 (1986). *See 1991 Pa. Legis. Reapportionment*, 609 A.2d at 141-42, and *Erfer*, 794 A.2d at 331-32 (wherein this Court held that political gerrymandering claims were cognizable as a violation of the Equal Protection Clause).

Specifically, this Court not only relied upon *Bandemer* for its conclusion that gerrymandering claims are justiciable, but for articulating the requisite elements for a plausible claim. But, *Bandemer* has since been repeatedly discredited by the U.S. Supreme Court, and this Court has not been presented with the opportunity to address whether *Bandemer* remains good law in Pennsylvania. *See, e.g.*, *Vieth*, 541 U.S. at 283-84 (ruling that partisan gerrymandering claims are non-justiciable because there are no judicially manageable standards to govern the disposition of such claims); and *LULAC v. Perry*, 548 U.S. at 413-14. In other words, it is, at best, questionable, whether this Court will continue to find political gerrymandering claims justiciable after *Whitford*.

Moreover, Petitioners blatantly ignore that *Erfer* was premised entirely on the U.S. Supreme Court's decision in *Bandemer*. But since *Erfer* was decided, the U.S. Supreme Court, in a series of decisions, has significantly departed from *Bandemer*. *See Veith*, 541 U.S. at 283-84; and *LULAC*, 548 U.S. at 413-14. Moreover, the core issue in *Bandemer* – whether partisan gerrymandering claims are even justiciable and, if so, what standards should apply to them – is now squarely before the Court again in *Whitford*. Should the Supreme Court now overrule *Bandemer* – the very foundation upon which this Court's decision in *Erfer* was based – *Erfer* would be of limited import going forward. What the *Erfer* decision does clearly reflect, however, is that this Court, even when considering

claims brought under the Pennsylvania Constitution only, will be guided substantially by related precedent from the U.S. Supreme Court in partisan gerrymandering cases.

Accordingly, the Commonwealth Court correctly stayed the matter pending the decision in *Whitford*, as the standards for evaluating and proving Petitioners' claims will be inevitably controlled by that decision, or could be rendered moot entirely if the U.S. Supreme Court finds that such claims are non-justiciable.

ii. Despite Being Advanced Under Pennsylvania Law, Petitioners' Claims Will Be Impacted by Whitford.

Although Petitioners' Equal Protection and First Amendment Claims are couched as violations of the Pennsylvania Constitution only, these claims still require the exact same analysis as the federal law claims currently being considered by the U.S. Supreme Court in *Whitford*. As argued at length in the Commonwealth Court, this Court has held that 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. Petitioners do not dispute this. Indeed, Petitioners have not offered any legal support or authority to suggest that this Court would deviate from decades of precedent and federal law on matters of equal protection. Thus, as recognized by Judge Pellegrini, Pennsylvania will find guidance in the forthcoming *Whitford* decision concerning equal protection claims based upon Pennsylvania's Constitution. (*See* 10/4/17 Trans. at 26:17-25).

As for their First Amendment Claim, Petitioners argue that because Pennsylvania affords "broader protections" than the federal free speech clause, any ruling in *Whitford* would not be controlling of their First Amendment Claim. (App. 19 (citing *Pap's A.M. v. City of Erie*, 812 A.2d 591, 611 (Pa. 2002)). But, Petitioners fail to address the discussion in *Pap's* where this Court recounted that it "has often followed the lead of the U.S. Supreme Court in matters of free expression under Article I, § 7[.]" *Pap's*, 812 A.2d at 611; *see also DePaul v. Commonwealth*, 969 A.2d 536, 547 (Pa. 2009) ("[R]eference to First Amendment authority remains instructive in construing Article I, Section 7" of the Pennsylvania Constitution). Considering this Court's prior deference to the U.S. Supreme Court's Free Speech and Expression Clause analyses and its history in following the lead of the U.S. Supreme Court in addressing partisan gerrymandering claims, *see, e.g., 1991 Pa. Legis. Reapportionment*, 609 A.2d at 141-42 and *Erfer*, 794 A.2d at 332, Legislative Respondents respectfully submit that this Court will likely look again to the U.S. Supreme Court for guidance – this time to *Whitford* – as to how to evaluate First Amendment partisan gerrymandering claims. Accordingly, the Commonwealth Court properly stayed this matter.

Petitioners next argue that *Whitford* should not be controlling because of the purported "extensive factual and evidentiary differences … including that Petitioners rely upon several statistical measures and modeling techniques" which

were not presented in *Whitford*. (App. at 19). Yet, even a perfunctory review makes clear that the two cases are substantially similar and overlap in multiple material areas. Both cases advance and/or rely on the following: (1) free speech retaliation claims; (2) the "efficiency gap" test; (3) Professor Jowei Chen's article discussing a computer modeling test; (4) the mean-median test or the partisan bias test; and, (5) the allegation that evidence to be presented will establish "extreme partisanship." *See Whitford*, 218 F.Supp. 3d at 855; Petitioners' Petition for Review, *passim*; and, Appellees' Brief in *Whitford*, attached hereto as **Exhibit C**, at 13-14, 19, 23, 36, 55.

In sum, Petitioners are incorrect that *Whitford* will have no effect here because of the purported differences in Petitioners' claims. A ruling in *Whitford* as to justiciability and a proper standard for assessing these claims will directly impact the case here because of this Court's historic reliance on U.S. Supreme Court precedent in the area of partisan gerrymandering claims.

For these reasons, Legislative Respondents submit that the Commonwealth Court's actions in staying this matter pending *Whitford* were proper and that this matter does not present an immediate need for this Court to assume plenary jurisdiction.

V. CONCLUSION

Based on the foregoing reasons and authorities, Respondents, Pennsylvania General Assembly, Michael C. Turzai and Joseph B. Scarnati III respectfully request that this Court deny Petitioners' Application for Extraordinary Relief under 42 Pa. C.S. § 726 and Pa. R.A.P. 3309 and permit this matter to proceed in accordance with the schedule as set forth by the Commonwealth Court in its Order dated October 16, 2017.

Dated: October 20, 2017

Respectfully Submitted,

HOLTZMAN VOGEL
JOSEFIAK TORCHINSKY PLLC

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EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

League of Women Voters of Pennsylvania, Carmen Febo San Miguel, James Solomon, John Greiner, John Capowski, Gretchen Brandt, Thomas Rentschler, Mary Elizabeth Lawn, Lisa Isaacs, Don Lancaster, Jordi Comas, Robert Smith, William Marx, Richard Mantell, Priscilla McNulty, Thomas Ulrich, Robert McKinstry, Mark Lichty, Lorraine Petrosky, Petitioners	:	
v.	:	NO. 261 M.D. 2017
The Commonwealth of Pennsylvania; The Pennsylvania General Assembly; Thomas W. Wolf, In His Capacity As Governor of Pennsylvania; Michael J. Stack III, In His Capacity As Lieutenant Governor of Pennsylvania And President of the Pennsylvania Senate; Michael C. Turzai, In His Capacity As Speaker of the Pennsylvania House of Representatives; Joseph B. Scarnati III, In His Capacity As Pennsylvania Senate President Pro Tempore; Pedro A. Cortes, In His Capacity As Secretary of the Commonwealth of Pennsylvania; Jonathan M. Marks, In His Capacity As Commissioner of the Bureau of Commissions, Elections, and Legislation of the Pennsylvania Department of State, Respondents	:	

ORDER

AND NOW, this 16th day of October, 2017, having heard oral argument on October 4, 2017 from the parties regarding the Application for Stay filed by Respondents Joseph B. Scarnati, President Pro Tempore of the Pennsylvania Senate, Michael C. Turzai, Speaker of the Pennsylvania House of Representatives, and the General Assembly of Pennsylvania ("Moving Respondents"), it is hereby ordered as follows:

1. The Moving Respondents' Application for Stay is GRANTED. With the exceptions of those matters listed in Paragraph 2 of this Order, all aspects of this case are stayed pending the decision of the Supreme Court of the United States' final decision in *Gill v. Whitford*, No. 16-1161, 2017 U.S. LEXIS 4040 (argued October 3, 2017).

2. Within thirty (30) days of the entry of this Order, the Moving Respondents shall file a brief in support of all claims of privilege which the Moving Respondents have asserted and/or intend to assert with respect to the discovery propounded by the Petitioners in this matter. With respect to the Moving Respondents' objections based on legislative privilege to service of the proposed third-party subpoenas, the factual statement shall identify with specificity the connection between the proposed third-party recipient and the legislature, if any, during the relevant period, and whether the General Assembly paid for those recipient services. Moving Respondents shall also identify facts on which they intend to rely in support of their "First Amendment" privilege claim.

3. Petitioners shall file a responsive brief within thirty (30) days of service of the Moving Respondents' brief. The Moving Respondents shall have fifteen (15) days after service of the Petitioners' brief in which to file a reply brief. Upon review of the briefs, the Court will determine if oral argument is appropriate and, if so, schedule the same in accordance with the Court's calendar.

Dan Pellegrini

DAN PELLEGRINI, Senior Judge

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

- - -

LOUIS AGRE, et al., Plaintiff	:	CIVIL NO. 17-4392
v.	:	
THOMAS W. WOLF, et al., Defendant	:	Philadelphia, Pennsylvania October 10th, 2017 10:04 a.m.

- - -

TRANSCRIPT OF PRETRIAL HEARING
BEFORE THE HONORABLE MICHAEL M. BAYLSON
UNITED STATES DISTRICT JUDGE

- - -

APPEARANCES:

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William Ewing,
Floyd Montgomery
Joy Montgomery
Rayman Solomon

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APPEARANCES: (Continued)

For the Defendants: Thomas W. Wolf, Pedro Cortes, Jonathan Marks

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- - -

Audio Operator: Janice Lutz

Transcribed By: Michael T. Keating

- - -

Proceedings recorded by electronic sound recording; transcript produced by computer-aided transcription service.

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(The following was heard in open court at 10:04 a.m.)

THE COURT: Okay. Good morning, everyone.

ALL: Good morning, Your Honor.

THE COURT: Hi. Please be seated. Okay. We're here for a preliminary hearing on case management scheduling issues in a case that was filed last week, Agre versus Wolf, A-G-R-E versus Governor Wolf, civil action 17-4392. So let me just -- oh, and I understand there's some counsel here who would like to be admitted, and we're going to do that shortly. But for the plaintiff, we have Alice Ballard and Thomas -- how do you pronounce your last name?

MR. GEOGHEGAN: Geoghegan, Your Honor.

THE COURT: Okay, thank you. Okay. All right, good morning. And then for -- is anyone -- and then representing the three named defendants -- that's Governor Wolf, Mr. Cortes, Mr. Marks -- is Michele Hangley. How are you?

MS. HANGLEY: Good morning, Your Honor.

THE COURT: And Claudia De Palma.

MS. DE PALMA: Good morning, Your Honor.

THE COURT: How are you? Okay.

MS. DE PALMA: Fine.

THE COURT: Good afternoon. All right. Then we also have the Governor's Office of General Counsel, Gregory Schwab.

MR. SCHWAB: Yes, good morning, Your Honor.

THE COURT: All right. Good morning. And for the Defendants Cortes and Marks, Kathleen Kotula.

MS. KOTULA: Yes, Your Honor.

THE COURT: Okay, good morning.

MS. KOTULA: Good morning.

THE COURT: Okay. And for Prose Interveners, they sent me a letter on I believe Thursday that they intended to intervene on behalf of Senator Turzai and representatives -- or I guess the Speaker of the House, Mr. Scarnati. Did I pronounce that correctly? Mr. Torchinsky?

MR. TORCHINSKY: It's --

THE COURT: Mr. Paszamant?

MR. PASZAMANT: Yes.

THE COURT: Okay.

MR. PASZAMANT: Good morning, Your Honor.

THE COURT: All right. Jason Torchinsky?

MR. TORCHINSKY: Yes, Your Honor.

THE COURT: Did I pronounce -- and Kathleen Gallagher?

MS. GALLAGHER: Yes, sir.

THE COURT: Okay, thank you. Okay. Well, I don't think there's going to be much question of your right to intervene. If you want to come sit at counsel table, you're welcome to do that.

(Pause in proceedings.)

THE COURT: All right. Now, I understand that one or two attorneys here would like to be -- are members of the Bar of Pennsylvania and would like to be admitted to this court. Ms. Kotula, you're one of those?

MS. KOTULA: Yes, correct, Your Honor.

THE COURT: Anyone else? Mr. Schwab, you as well?

MR. SCHWAB: I'm here to sponsor Ms. Kotula.

THE COURT: Oh, all right, fine. Okay. Well, please come up to the podium. Anyone else who needs to be admitted?

MS. GALLAGHER: Yes, Your Honor.

THE COURT: All right, Ms. Gallagher?

MS. GALLAGHER: Yes, sir.

THE COURT: Okay. Come on. Who's going to admit -- who's going to move your admission?

MS. GALLAGHER: Mr. Abbott.

THE COURT: Okay.

MR. ABBOTT: Good morning, Your Honor.

THE COURT: Good morning. Proceed.

MR. SCHWAB: Your Honor, I would -- Gregory Schwab on behalf of Governor Wolf. I would like to move for the admission of Kathleen Kotula to the bar of this court. I have been a member of the bar of this court since October of 2005 and I have been acquainted personally with Ms. Kotula's work since I took my position in July of 2016. She is an excellent lawyer for the Department of State and the Governor's Office of General Counsel, and she is an expert in election law in Pennsylvania, and I know her to be of excellent character.

THE COURT: All right. Thank you very much. All right, welcome. All right. Step aside one second, Ms. -- okay, please come forward.

MR. ABBOTT: Good morning, Your Honor. My name is Michael Abbott. I'm an attorney with the Law Offices of Cipriani & Werner. I'm here for the moving of Ms. Kathy Gallagher into admission via pro hac vice. I have known --

THE COURT: Well --

MR. ABBOTT: Just admission.

THE COURT: -- admission.

MR. ABBOTT: I apologize, Your Honor.

THE COURT: That's right.

MR. ABBOTT: I apologize.

THE COURT: All right. She's a member of the Bar of Pennsylvania I gather, right?

MR. ABBOTT: She has been since 1983. She's a member in good standing. She's also a member of the Eastern -- Western District as well as the Middle District and has previously been admitted to this court as an associate counsel back in 2011.

THE COURT: Yes.

MR. ABBOTT: And she --

THE COURT: All right, fine. Thank you. All right, welcome to you two. Okay. All right, well, both motions will be granted. We're pleased to have you. All right, please rise and we'll administer the -- Ms. Lutz will administer the oath.

MS. BALLARD: Your Honor, may I move for admission --

THE COURT: Oh.

MS. BALLARD: -- of Thomas Gallagher?

THE COURT: Sure.

MS. BALLARD: He is a member of the --

THE COURT: Well, come up. Come up, please.

MS. BALLARD: -- Illinois Bar --

THE COURT: I didn't know we had one. Go ahead.

MS. BALLARD: -- and the D.C. Bar.

THE COURT: All right, Ms. Ballard, go right ahead.

MS. BALLARD: All right. We have filed a motion for admission pro hac vice.

THE COURT: Well, you don't have to move for pro hac vice. Are -- you're a member --

MS. BALLARD: I am. Mr. Geoghegan is not.

THE COURT: No. Yes, you're --

MS. BALLARD: So we would move to --

THE COURT: -- a member of the bar of this court?

MS. BALLARD: I certainly am.

THE COURT: If he -- just want him to be pro hac vice on this case --

MS. BALLARD: That's right.

THE COURT: -- we don't -- we don't have to do that by motion. I'll grant that --

MS. BALLARD: Okay.

THE COURT: -- automatically. If you want -- if he wants to be admitted to the bar of this court, then you have to admit him, but then you have to pay a fee -- you have to pay a fee and become a

member of the court.

MS. BALLARD: All right. And, Your Honor, since we haven't had a ruling on the motion for admission pro hac vice --

THE COURT: It's granted.

MS. BALLARD: -- Mr. Geoghegan has not yet entered an appearance.

THE COURT: Okay.

MS. BALLARD: Can he do that right now?

THE COURT: It will be granted, and any other pro hac vice. I can't imagine -- but yes, there's a fee for that too. You have to pay the clerk a pro hac vice fee. All right.

MS. BALLARD: We did pay that fee.

THE COURT: Yes.

MS. BALLARD: Yes.

THE COURT: Okay, fine.

MS. BALLARD. Okay, thank you.

THE COURT: Okay. All right. Well, we'll proceed with the oath of -- for new lawyers in this court. All right, everyone rise, please.

KATHLEEN KOTULA, KATHLEEN GALLAGHER, and THOMAS GEOGHEGAN, New Attorneys, Sworn.

THE COURT: Okay. Thank you. Very well. Congratulations and best wishes in this court. Okay.

Now, I have obviously read the complaint and issued a short order setting up this hearing, and I want to let you all know that I also sent a copy of the complaint and the request for three-judges, as well as the copy of my orders setting up this hearing, to Chief Judge Smith of the Third Circuit pursuant to the statute and requested that he appoint the two other judges. One would be a circuit judge and one would be another judge of this court. But I haven't gotten any results of that request as of this morning.

Now, the statute is clear in my mind that the pretrial proceedings will take place in front of me and that the three-judge court is specific reserved for trial or possibly also in the event of a motion for preliminary injunction, which we don't have yet and I'm not really sure I think is necessary in this case.

I also just want to bring up the fact that Mr. Paszamant -- did I pronounce that correctly?

MR. PASZAMANT: You did, Your Honor.

THE COURT: All right. Okay. -- that you intend to move for the intervention of Senator Turzai and Speaker Scarnati.

MR. PASZAMANT: Your Honor, yes, with the

exception that it's Senator --

THE COURT: Oh, all right.

MR. PASZAMANT: -- Scarnati and Speaker Turzai --

THE COURT: Excuse me.

MR. PASZAMANT: -- not --

THE COURT: All right, I apologize. All right. Okay. When -- how soon do you propose to do that?

MR. PASZAMANT: We would propose to do it within a week, Your Honor, by next Tuesday.

THE COURT: All right. Any objection from the plaintiff or anyone else?

MR. GEOGHEGAN: Your Honor, we don't object to the filing of the motion. We reserve the right to oppose.

THE COURT: All right. Ms. Hangley?

MS. HANGLEY: No objection, Your Honor.

THE COURT: All right. Well -- okay. With the -- well, under Rule 24, when you file that motion you have to attach a pleading of some sort. Do you have any idea what the pleading is going to consist of at this time?

MR. PASZAMANT: So, Your Honor, we currently envision a motion to stay this action, and

perhaps the alternative, a motion to dismiss some or all of the complaint that has been advanced. In light of what Your Honor has just reminded me of, we may need some more time than one week if we need the full blown motion or pleading to accompany it. We talked amongst ourselves and we are moving quick here. We thought a week for the intervention and then two weeks thereafter for whatever our motion was going to be.

THE COURT: Well, the way I read the rule, your motion to intervene has to be accompanied by a pleading or similar document.

MR. PASZAMANT: Well, with that in mind, Your Honor, may I step back from what I said earlier and propose two weeks to get that entire --

THE COURT: Well, I'm not sure --

MR. PASZAMANT: -- filing on file?

THE COURT: I'm not sure that is -- that's really -- I'm not sure you need that much time. Secondly, I'm not sure that -- let me just explain -- have a seat. Let me just explain how I view this pro -- this case should proceed. And this is without prejudice to any of you getting up and telling me that I'm totally wrong and I should be doing it some other way. All right. But I've done a little bit of

reading about the topic of three-judge courts and election law. And we all know that there's a case pending in the Supreme Court which I'll refer to as the Hill case, which is from Wisconsin that was just argued last week. But I've checked the documents related to that case and that case did not raise the same claim that's being raised by the plaintiffs in this case. The -- as I read the plaintiffs -- the complaint -- and, Ms. Ballard, you can correct me if I'm wrong. But you're -- on all three counts, you're relying on what you refer to as the election clause in Article 1, is that correct --

MS. BALLARD: Yes, Your Honor.

THE COURT: -- of the Constitution?

MS. BALLARD: Yeah.

THE COURT: All right.

MS. BALLARD: Mr. Geoghegan is going to be our spokesperson today --

THE COURT: Okay.

MS. BALLARD: -- if that's all right.

THE COURT: All right. Well, I don't intend today to get into detailed substantive discussions, but that claim -- that claim is not present in the -- in the Wisconsin case that was argued in front of the Supreme Court. So I -- and

for that reason -- and this doesn't -- this doesn't stop anybody from filing any motions you want to. As I like to say, you know, court is open 24/7, so we get motions filed at all times of night and day and with all stripes and colors as well. But that's what we're here for. So -- but -- and I know you, in your letter, that you mention that the -- in the case in front of the Commonwealth court, which was filed by the League of Women Voters, that there was an argument there and you were expecting that that court might stay that action pending the Hill case, okay?

Now, I'm not familiar with the League of Women Voters case, but if it was filed in the Commonwealth Court, my hunch is that it relies at least to some extent on state law, Pennsylvania State law, rather than exclusively federal law. This case relies exclusively on federal law. So I am not inclined to stay this proceeding pending the Hill case and there are several reasons for that. But it is not a definitive ruling, but if you want to file a motion to stay, you ought to address the reasons that I don't think this case should be stayed.

First is this is a different claim that is pending in front of the Supreme Court. Secondly, that as far as I can tell, this is a novel claim

period on a so-called gerrymandering cause of action. I may be wrong about that too, but that's my impression. Third of all, the Third Circuit's jurisprudence is, in my view, very clear that cons -- claims of constitutional deprivation should not be stayed pending results in another case. And I believe there are a lot of cases that discuss that. We're here to decide claims of constitutional deprivation, and if one is filed and it meets the pleading standards, et cetera, then we're supposed to go to the merits.

Lastly, is that it would be my intent that we would structure any discovery in this case and pretrial preparations such as expert reports fairly quickly, in the next 60 days, and that we would commence a trial of this case right after Thanksgiving. And hopefully it would conclude the record before Christmas or, if necessary, maybe go into January if it required that much time, and that this -- our three-judge court would do its best to file an opinion so that an appeal could be taken to the Supreme Court, which would be heard this term and presumably decided by the end of June. And that would be necessary in order to determine if the plaintiffs are entitled to any relief for the

Congressional elections which take place in next November, November 2018.

Now, in coming to this, I have -- or in preparation for this hearing, I've read a case called Vieth versus Jubelirer, V-I-E-T-H versus Jubelirer. Maybe some of you were involved in that case. That's a prior gerrymandering case that was -- but it's really not gerrymandering. It's not -- that's not -- probably not the correct totally -- as I -- and I haven't read anything in that case, but it was a three-judge court and my colleague, Judge Yon, was one of the judges. I don't know who the other two were at the moment. But that result -- that was a one person, one vote issue, and the three-judge court entered an order requiring the Pennsylvania legislature to redistrict, which the legislature then did. And then there were still further objections to it, but the Court upheld it, and then the Supreme Court reversed. And the citation there, if anyone wants to look at it, is 531 U.S. 267.

Now, I don't think anybody is going to get a lot of direction from that decision as bearing on this case because it was a four-four split with Justice Kennedy concurring the judgment. So there's no -- there's only -- there only is a plurality and

there are several defendants, but because Kennedy did not rule at all on the merits, I don't think anybody can say that the Vieth case has any substantive precedential value for this case. But it does a little bit for me in terms of the case management. It confirms my belief that this case should move ahead quickly and promptly. And I want to be fair to everybody, but I'm telling you really on the first day of our getting together that that's my intention. And I'm going to also set some dates for document production and objections and things like that, so if there are going to be some pretrial discovery, we will have it done promptly.

Okay. Now --

MS. HANGLEY: Your Honor, may I --

THE COURT: -- Ms. Ballard, let me -- yes, Ms. Hangley?

MS. HANGLEY: So the defendants -- I want to raise a very practical point.

THE COURT: Yes. Pull the microphone closer to you, please.

MS. HANGLEY: Practical, but very important, and that's the timing.

THE COURT: Yes, please.

MS. HANGLEY: I have here, if you'd like to

see it, a calendar of the election dates for 2018. The first day to file nomination petitions is February 13th of 2018. The Commonwealth, the Department of State needs five or six weeks before that to update the databases, to set the lines, to tell everyone where they're going to be circulating the nomination petitions.

THE COURT: Did you say February 15th?

MS. HANGLEY: February 13th is the day when the nomination petitions get circulated.

THE COURT: Okay.

MS. HANGLEY: The Commonwealth needs a firm, certain map by the beginning of January to get the process started. If we don't have that by the beginning of January, then there will be a lot of chaos. So it's odd, as a defendant, to be telling the Court that your very expedited schedule is actually too long, but the dates that you've mentioned, it's hard to understand how we can have a map in place by the beginning of January --

THE COURT: Right.

MS. HANGLEY: -- that everyone can rely on.

THE COURT: Well, I appreciate your telling me that. All right, Ms. Ballard, what's -- is there anything else you wanted to say on behalf of your

clients just on the scheduling? I'm talking to Ms. Hangley.

MR. GEOGHEGAN: Okay, sorry.

THE COURT: Anything else you want to -- you and your colleagues want to say about your -- let me ask you this. Do you know what your response to the complaint is going to be, whether it's going to be an answer or a motion or nothing or --

MS. HANGLEY: At this point I don't know. I'd like to know more about the claims.

THE COURT: Okay.

MS. HANGLEY: We are not opposed to having a preliminary injunction hearing. We're not opposed to the plaintiffs, you know, explaining what their case is.

THE COURT: Okay.

MS. HANGLEY: So I mean we only -- the timing --

THE COURT: All right.

MS. HANGLEY: -- is our main concern.

THE COURT: All right. Your partner, Mr. Aronchick, was one of the lawyers in the Vieth versus Jubelirer case.

MS. HANGLEY: Correct, Your Honor.

THE COURT: Yes, okay. Thank you. All

right, Ms. Ballard, what's your reaction to this, or does your colleague want to speak up?

MR. GEOGHEGAN: Your Honor, Tom Geoghegan.

THE COURT: Yes.

MR. GEOGHEGAN: We would like to accommodate the state; however, if there is a serious constitutional violation, it's plaintiffs' views that these dates aren't necessarily binding. In the case of Judge versus Quinn, a Seventh Circuit case, the court, to accommodate an election right, moved certain of the state deadlines so that an election could occur on a timely basis in a way that was constitutional. So while we are sympathetic and would like to meet the state's deadlines as they currently exist, those deadlines, in our view, are not necessarily cast in absolute concrete. And, in particular, in this case, it's not clear to us just how long the state needs to prepare for the February 13th date.

THE COURT: Well --

MR. GEOGHEGAN: But we would be interested in having this case resolved by February 13th and we don't think that there's any irreparable injury to the state or the candidates, at least at this time, based on what we know, by having the case resolved by

early to mid-February.

THE COURT: All right. Well, let me just ask -- and I'll let you speak up, but let me just ask you a question. Let's assume that the schedule I have in mind, it will work, at least from the Court's point of view, and we start a trial on December 4th and 5th. How long -- do you have any idea how long -- how much time you would need to present your case, plaintiffs' case?

MR. GEOGHEGAN: We haven't given that a lot of thought, but I would think two to three days --

THE COURT: All right.

MR. GEOGHEGAN: -- because our case is primarily that the State of Pennsylvania engaged in an intentional act of gerrymandering and that is a per se violation of the elections clause. We're less focused than cases like Gill in showing that it's absolutely impossible for any democratic voter to elect a candidate or that they're shut out from the political process in the terms that are now being presented to the Court in the Gill case.

Our case is pretty simple, which is just the state acted with intent, it intended to gerrymander, it achieved some gerrymandering effect that was significant by any common sense standard,

and that the legal act itself, the intent to try to have a certain number of republican seats and a certain number of democratic seats went way beyond the state's authority under Article 1 Section 4, should be enjoined, and a map that doesn't have that abusive effect should be put into place. That's our case.

THE COURT: Okay.

MR. GEOGHEGAN: And I think two to three days to put that on.

THE COURT: All right. Well, if that's -- if you end up being correct about that, or even if you take a couple of days longer, and the defendants or the interveners or however they decide to proceed were to request a similar time, then it's quite possible that this three-judge court could come to a decision before Christmas. And then whether there would be -- and I don't know what the result would be, but if it was negative to the plaintiffs, well, then you could appeal to the Supreme Court and how you dealt with the election laws would be -- I'm not sure that would be -- I mean I imagine you may move for a stay. I don't know what you would do, and I'm not suggesting that you have to tell me today what you would do in that event.

If you want, well, then I presume the defendants or the interveners would move for a stay, and we would address that issue at that time. And then whatever -- and assuming that the winners -- presuming that the losers, whoever -- whichever side they may be, wanted relief, you would have to go to the Supreme Court to get it. You would have to file a petition -- or probably an appeal, and then you would have to seek either from the Supreme Court an injunction against the state proceeding with its usual election schedule, or a -- I don't know. We're -- I think we're -- you know, we're getting into a topic that I don't know a lot about and I think -- I'm not sure it's worth spending a lot of time talking about it today. But I -- but I do think that -- and what I intend to do is set a schedule today that I think is fair so that we can proceed towards a prompt trial.

I don't see -- I don't see how I can give both sides a chance to present their legal positions and gather facts and witnesses and experts, if there are going to be experts -- there were experts in the Vieth case -- and be ready in less than 60 days, which is what -- that would really be December 11th, but -- so that's -- those are my thoughts. Okay.

Ms. Hangley?

MR. GEOGHEGAN: Thank you.

THE COURT: Yes.

MS. HANGLEY: Yes, if I could just educate Your Honor a little bit about the scheduling?

THE COURT: Yes.

MS. HANGLEY: May I hand up the schedule --

THE COURT: Please.

MS. HANGLEY: -- for 2018?

THE COURT: Yes. I'd be happy to look at it. Thank you.

(Pause in proceedings.)

THE COURT: All right. This is entitled "Commonwealth of Pennsylvania Department --

MS. HANGLEY: Thank you.

THE COURT: -- of State, Bureau of Commissions, Elections, and Legislation, 2018 Pennsylvania Elections Important Dates to Remember." All right, and the first thing on -- the first event on here is February 13th, the first day to circulate and file nomination petitions.

MS. HANGLEY: Correct.

THE COURT: Do counsel have this?

MR. PASZAMANT: We were just --

THE COURT: You're probably familiar with

it as well.

MR. PASZAMANT: We were just handed a copy, Your Honor.

THE COURT: All right, thank you.

MS. HANGLEY: So this is from the Department of State website.

THE COURT: Right.

MS. HANGLEY: And I won't go through the whole thing, but you can see from it that the date -- the timeline is very compressed. There's not a lot of room in here so the dates are not arbitrarily early. And the first two dates give the part -- give nominees or potential nominees three weeks --

THE COURT: All right.

MS. HANGLEY: -- to get their nomination petitions. So pushing back the February 13th date, you know, with a -- with a bureaucracy this size, with this many people involved, would be extraordinarily difficult and chaotic. My clients tell me they would like five or six weeks before February 13th.

THE COURT: Five or six weeks to --

MS. HANGLEY: They --

THE COURT: -- do what?

MS. HANGLEY: To have boundaries in place,

to know exactly what they're doing so that they can set up the maps. But they can do it in three if --

THE COURT: Well, you know, without -- and I don't know to what extent the other two judges who get appointed to sit with me might have any different views, but if I was correct that it's possible that if the plaintiffs were to finish their case in two, three, or even four days, and the defendants had a similar amount of time, and we issued a decision before Christmas, that would seem to be fine as far as your clients are concerned.

MS. HANGLEY: It's quick, but it could work --

THE COURT: All right.

MS. HANGLEY: -- Your Honor.

THE COURT: Okay. All right, thank you.

MR. PASZAMANT: Your Honor, may we be heard on --

THE COURT: Yes, sure.

MR. PASZAMANT: -- this particular issue. Just a couple of things.

THE COURT: But I'm not going to rule on any of this right now.

MR. PASZAMANT: No.

THE COURT: But sure, go right ahead.

MR. PASZAMANT: Fair enough.

THE COURT: Yes.

MR. PASZAMANT: But just commenting upon the schedule that --

THE COURT: Yes.

MR. PASZAMANT: -- Your Honor seems inclined to put in place -- and I understand where your head is right now. Your Honor talks about the potential appeal to the U.S. Supreme Court. Let's assume a scenario whereby your panel issues a decision by before Christmas, let's say, and an appeal is then taken. Let's assume for a moment that the panel determines that a new map needs to be drawn. You know, that takes time, Your Honor. And in addition to that, to get back to what the current defendants seem to be saying, we have a situation whereby they would have a level of uncertainty as to which particular math they're going to have to run the election under under that very scenario. And while I understand, Your Honor, that, you know, you could apply for a stay, we could apply for a stay if we were on the losing side of this to the U.S. Supreme Court.

In case and point, these things don't happen quite that fast, so I just put out there that

while I understand where Your Honor is coming from, I'm not sure that even on a schedule moving at this breakneck speed, given that they waited six and a half years to come forward with this, is something that will ultimately give the defendants the clarity that they're looking for.

THE COURT: Well, I mean you raise a lot of important issues there. You really do. But, you know, this is a -- this is a -- you know, an attack on the democratic process. And I mean do you dispute the need for three judges?

MR. PASZAMANT: No.

THE COURT: All right.

MR. PASZAMANT: No, Your Honor.

THE COURT: You agree that's required?

MR. PASZAMANT: We do, Your Honor.

THE COURT: Okay. So would you want to have a trial earlier than December 4th or 5th?

MR. PASZAMANT: Your Honor, I don't think it --

THE COURT: Your position is that that's why I ought to stay this until After the Hill case?

MR. PASZAMANT: Well, the Gill case I think you should because what I heard from plaintiffs' counsel here, while these claims are shrouded in

1983, when you start talking about the test that they're advancing it sounds an awful lot like the kinds of tests that the Supreme Court is currently wrangling with in the Gill case, and Dandimer (ph) before that, and Vieth, and these other cases that Your Honor is talking about --

THE COURT: Yes.

MR. PASZAMANT: -- in addition to the Commonwealth court case, which is the League of Women Voters case, and the Supreme Court guidance under Germano and Grow in terms of sitting back and waiting to see what the state courts are going to do with this.

My point is simply, Your Honor, that even speeding things up more I don't think gets us to a point where the legislature -- let's assume it goes bad for my clients. They got to go back and draw a map and then that map has to be signed by the governor, let's assume. That all takes time with breaks and recesses and things like that that the legislature has, and then you build on top of that a Supreme Court challenge listening to what the defendants are currently saying. And I was involved in the 2011 redistricting process, as was Ms. Gallagher. We had a challenge to Judge Surrick back

at that point in time having to do with the maps, and Judge Surrick hung back under Grow and Germano and said it's too close in time. There's a disenfranchisement problem here, Your Honor.

Respectfully, I think that that's exactly what we're looking at if we're talking about the 2018 elections. It's been six and a half years, three election cycles, and here we are trying to figure out why they waited as long as they did, and now running around trying to figure out whether we can give them any sort of relief. I'd suggest --

THE COURT: All right.

MR. PASZAMANT: -- to Your Honor it's more important to get it right than to get it done quickly, notwithstanding the types of claims that they've advanced.

THE COURT: All right. I -- you know, I have an open mind about the position you just took. When are you going to file your motion to stay?

MR. PASZAMANT: Well, again, Your Honor, I'm sorry --

THE COURT: I want to give you time, but it needs to be done promptly.

MR. PASZAMANT: May I have two weeks to file the intervention coupled with the draft motion

that will come along with it, which will be a combined motion to dismiss and/or stay?

THE COURT: All right. Ms. Ballard, what's --

MR. GEOGHEGAN: Your Honor, I agree that we should have some briefing of this rather than try to decide it right now and that one of the considerations in equitable relief is whether it's practical to get this map in place prior to the 2018 election. No dispute from us. I would note, however, that this map that we were challenging was introduced and adopted in the Pennsylvania State Senate on the same day. So the notion that this is a long legislative process is belied by --

THE COURT: All right.

MR. GEOGHEGAN: -- the history of this particular map.

THE COURT: All right. Okay. I will -- all right, I will give you another two weeks --

MR. PASZAMANT: Thank you, Your Honor.

THE COURT: -- but we're going to start discovery in the meantime. Now, what that discovery entails I don't know, but -- yes, but that's what we're going to do.

MR. PASZAMANT: And --

THE COURT: All right, so --

MR. PASZAMANT: And, Your Honor, the response time on those motions, is it going to be the standard two weeks?

THE COURT: No, I'm going to require the plaintiffs and the -- and the -- I'm going to call them the state -- how should I refer to Ms. Hangley's clients? The executive branch defendants?

MR. PASZAMANT: Your Honor, that would be fine. Whatever Your Honor prefers.

THE COURT: They're all in the executive branch. I mean you're going to intervene on -- as defendants? You're going to intervene as defendants, right?

MR. PASZAMANT: We are, Your Honor.

THE COURT: Okay. All right.

MR. PASZAMANT: And --

THE COURT: So --

MR. PASZAMANT: And the discovery, Your Honor, frankly, I suspect is going to be impacted by plaintiffs' legislative privilege, speech and debate, and things of that variety.

THE COURT: That may be, but I am assuming that a good deal of what the plaintiffs might be interested in are going to be public documents, but

that's -- let's hold off on that for a moment. So you're going to, by -- so two weeks from today would be October 24th, okay? And that will be for your -- these -- and I'll call your clients the legislative defendants, the interveners/legislative defendants. And that's going to be a motion to dismiss, a motion to stay, and a motion to intervene. Do you anticipate plaintiffs objecting to a motion to intervene?

MR. GEOGHEGAN: Yes, we will --

THE COURT: You do?

MR. GEOGHEGAN: -- object to the motion. We believe that the Attorney General is an adequate representative of the state's interest and they don't have -- as individual legislators, they don't have any standing.

THE COURT: Well --

MR. GEOGHEGAN: That's up for the Court to resolve.

THE COURT: All right. Well, I'm -- as I sit here, I'm inclined to allow it because I think they have a right to be heard as parties here. Ms. Hangley, do you have a position on that or do you want to wait and see the paper?

MS. HANGLEY: Well, I'll point out the

Attorney General is not entered in this case, but we don't have any objection to --

THE COURT: Yes, well --

MS. HANGLEY: -- a motion to intervene.

THE COURT: You don't have an objection?

MS. HANGLEY: No objection.

THE COURT: All right. Well, is the Attorney General's Office going to participate in this or is --

MS. HANGLEY: No, Your Honor.

THE COURT: They are not?

MS. HANGLEY: The Office of General Counsel is --

THE COURT: Okay.

MS. HANGLEY: -- handling this matter.

THE COURT: All right. Okay. So that will be filed on 10-24, and I'll give the plaintiffs a week to respond. And that will be due November -- October 31st. And --

MR. PASZAMANT: Your Honor, will we be afforded a reply brief?

THE COURT: If you feel a -- yes, I'll give you a few days to reply, and I'm doing that -- and don't take this personally, but I have found that many reply briefs -- not all, but many reply briefs

are just repetition. So I'll give you a couple days and a short -- and a very short page limit because that's the only way I can control -- okay, that will be Friday, November 3rd, for a reply brief, limited to ten pages.

MR. PASZAMANT: Thank you, Your Honor.

THE COURT: Okay. Then I'm going to set a date for a hearing the following week.

(Pause in proceedings.)

THE COURT: How's Election Day sound, everybody? Tuesday, November 7th?

MS. HANGLEY: Sounds appropriate.

THE COURT: That's all right.

MR. PASZAMANT: Excuse me. May --

THE COURT: Okay.

MR. PASZAMANT: Excuse me, Your Honor.

THE COURT: Yes?

MR. PASZAMANT: I am from Virginia and my -- one of my partners is actually a candidate for Lieutenant Governor, and that's the day of the Virginia state-wide elections, so I would prefer not to have a hearing on --

THE COURT: All right.

MR. PASZAMANT: -- Virginia's Election Day.

THE COURT: Well, I can't do it -- Monday

is too soon after the reply brief. I could do it Monday. All right, I'll tell you what, I'm going to make the reply brief due on November 3rd at noon. All right, how about on Monday, November 6th? Any -- out-of-town counsel can appear by telephone. You don't have to be here for oral argument. Yes?

MR. PASZAMANT: May I consult my calendar, Your Honor?

THE COURT: Yes, sure.

MR. PASZAMANT: Thank you.

MS. HANGLEY: Your Honor, I am bound to be a hearing -- to be a hearing member for a disciplinary action on November 6th.

THE COURT: Is that all day or --

MS. HANGLEY: A committee member. That is all day.

THE COURT: The whole day?

MS. HANGLEY: Yes. I can -- Mr. Aronchick, I can check his schedule.

THE COURT: Well, how about the 7th? Is that all right?

MS. HANGLEY: The 7th is fine, Your Honor.

MR. PASZAMANT: We're -- I'm sorry, Your Honor, we're now back to Election Day on the 7th?

THE COURT: Yes.

MS. HANGLEY: In light of Mr. Torchinsky's issue --

THE COURT: Well, I -- he can -- he can be on the phone. I mean he can help you prepare. I mean it's just going to be an oral argument. I just can't delay this. I can't do it on the 8th, and on the 9th, I have a -- probably a full day. I have a Sanc -- I have the Philadelphia Sanctuary Cities case and that's scheduled for the 9th.

MR. PASZAMANT: Your Honor, we can accommodate the 7th.

THE COURT: The 7th. All right, we'll do the 7th at 10:00. Okay.

All right, now, I'm going to go through some discovery deadlines, and we're also -- so the 7th will also be a date for any discovery disputes. And I'll put this in writing, but this is what I have in mind. So I'm going to require the plaintiffs to serve their first discovery request for written discovery. By that, I mean documents -- any interrogatories and admissions subject to the -- to the rules as they exist. And that should be filed by this Friday, October 13th. Is that doable, Ms. Ballard, for your team? That's just -- that's just preparing requests and interrogatories, all right?

I want to say that in a case like this with a fast time schedule, I'm really not expecting to have a lot of interrogatories. I think that you're welcome to request documents and I think you should bear in mind the legislative privileges that may apply. And you can serve the discovery not only on the executive branch defendants, but on proposed interveners as well. So you'll be -- you'll know what they're looking for. And it may serve your purposes to produce some documents even before the due date on your motion, but you don't have to, okay? Okay. But at least you'll be aware of what they're looking at. But I do want the executive branch defendants to cooperate with the plaintiffs in making available certainly any public documents, giving them access to them, and things like that.

All right. Then any objections except -- any objections by the -- well, this is going to apply as well to the proposed interveners, which will be due a week later, by October 20th. That's just objections, okay? And I don't like burden -- I don't like boilerplate objections, you know, this is too burdensome and it's vague and it's not understandable and things like that. So -- and then I'd like there to be a meet and confer no later than October 27th,

and then any motion to compel will be filed by October 31st, responses by -- wait just a minute. I'm just changing that a little bit. Hold on.

(Pause in proceedings.)

THE COURT: Meet and confer by October 25th. And any motion to compel will be filed by October 30th. A response will be filed by November 3rd. And then the hearing -- if there is -- if there are discovery disputes, they would be heard at the same time as the argument on 11-7.

MR. PASZAMANT: Your Honor, may I ask a question?

THE COURT: Yes, sir.

MR. PASZAMANT: As proposed interveners, are we able to serve written discovery?

THE COURT: Oh, absolutely.

MR. PASZAMANT: Okay. In compliance with, I assume, the very --

THE COURT: Yes, the same schedule.

MR. PASZAMANT: -- same deadlines?

THE COURT: Same schedule.

MR. PASZAMANT: Thank you.

THE COURT: Yes. Yes, okay. All right, so in the absence of any other emergencies or anything like that, then our next hearing will be on Election

Day, on November 7th at 10:00 a.m. Okay. Now, anybody -- Ms. Ballard or your -- anything else you want to raise or no?

MS. HANGLEY: Yes, there's the matter of the executive defendants' deadline to answer or move.

THE COURT: Yes.

MS. HANGLEY: May we have -- we don't know yet whether we'll be filing any motions, but if we are, may we have the same date, which I think is October 24th?

THE COURT: Yes, October 24th.

MS. HANGLEY: And if we don't, can we extend the answer deadline --

THE COURT: No, I think --

MS. HANGLEY: -- too?

THE COURT: I think whatever you want to do I think you ought to file by October 24th. I think that's fair. That's two full weeks. I'm sure you're more than capable of meeting that deadline.

MS. HANGLEY: Thank you for --

THE COURT: All right.

MS. HANGLEY: -- the vote of confidence.

THE COURT: All right. Okay. Now, anybody else want to bring up anything else or say anything or object to anything I said? Ms. Ballard or your

colleague, Mr. --

MR. GEOGHEGAN: Geoghegan, yes.

THE COURT: Yes.

MR. GEOGHEGAN: No, Your Honor.

THE COURT: All right. Ms. Hangley, anything else?

MS. HANGLEY: Nothing else, Your Honor.

THE COURT: All right. Mr. Paszamant?

MR. PASZAMANT: Your Honor, thank you. I think I've said my piece for now.

THE COURT: All right. Okay. All right, so I'm going to enter just a scheduling order, and if I get any -- well, I presume that the appointment of the other two judges will be docketed in some fashion and you'll get notice of that, and we'll take it from there, okay? And -- but I'm also -- well, here's the other thing. I'm going to put a tentative trial date here of Tuesday, December 5th, but I'll make it tentative because I obviously would have to consult with my colleagues once they're appointed.

Now, experts, that's the point. I want to set deadlines for expert reports. Plaintiffs, do you intend to have experts? I --

MR. GEOGHEGAN: At the moment, we do, yes.

THE COURT: All right. Well, when is --

I'd like you to serve your expert report promptly sometime this month so -- I need to give the defendants 30 days to respond. So October 20th? Does that give you enough time? How about we make it also the 24th, two weeks from today?

MR. GEOGHEGAN: No, the 24th would be better.

THE COURT: All right. And then I will give to the defendants to November 22nd. That's the day before Thanksgiving.

MR. PASZAMANT: Your Honor, there's one more item that does come to mind before we --

THE COURT: Yes.

MR. PASZAMANT: -- before we adjourn.

THE COURT: Please.

MR. PASZAMANT: Discussion about written discovery I understand the deadlines Your Honor is inclined to utilize. How about depositions, expert depositions, things of that variety?

THE COURT: Good point. Good point. Does the plaintiff intend to take depositions?

MR. GEOGHEGAN: We don't have any intent at this time to take depositions. We really haven't given that a lot of thought, but, tentatively, our view is that we're not going to be taking oral

depositions.

THE COURT: All right. And do you think you want to if -- assuming you're staying the case?

MR. PASZAMANT: I think the answer is yes, Your Honor, we would intend to.

THE COURT: All right. And I presume the five plaintiffs would be --

MR. PASZAMANT: They would certainly be within those that we would seek to depose, yes, Your Honor. In terms of additional third parties, I haven't discussed that with my co-counsel at this point, but there might be some additional --

THE COURT: All right, well --

MR. PASZAMANT: -- depositions, plus the experts, Your Honor.

THE COURT: Well, you definitely have a right -- well, you ought to depose their expert before your due date comes.

MR. PASZAMANT: Correct.

THE COURT: Yes. So I'll leave you to work that out, okay, with plaintiffs' counsel?

MR. PASZAMANT: That's -- sure.

THE COURT: But you certainly have that right.

MR. GEOGHEGAN: That doesn't work --

THE COURT: And then they would have a right to depose your expert before the trial started. But, you see, here's the thing. And there may be a hiatus between the end of the plaintiffs' case and the beginning of the defendants' case because assuming you're still in the case, assuming there still is a case, I'm sure you're going to want to file a Rule 50 motion, right? And, you know, the Court may want to take some time to think of -- usually when I have jury trials I usually deny Rule 50 motions without prejudice, okay, unless the plaintiff has been somewhere in outer space, which doesn't happen very often, I'm happy to say. But here, you know, this is a more serious situation, so we may want some time, a hiatus, between the end of the plaintiffs' case and the beginning of the defendants' case.

I'm just thinking out loud. But you certainly would have a right to -- you would -- in fact, you ought to pick a date now. And I'm not going to do -- interfere with it. I think you just ought to get -- you ought to give a date when your expert or experts, whatever you have, will be deposed by the defendants. So that ought to be part of the schedule. I'll put that in the order, not a date,

but the opportunities there.

MR. PASZAMANT: Thank you, Your Honor.

THE COURT: Okay. All right. Mr. Torchinsky, did you want to say something?

MR. TORCHINSKY: Yes, Your Honor. I think you just made a comment about us deposing their experts before our -- before ours were due. You set the expert report date and the motion to intervene, dismiss, stay date also for the 24th. So we can't receive and -- receive a report, digest the report, depose their expert, and file those motions --

THE COURT: Well, I --

MR. TORCHINSKY: -- on the same day.

THE COURT: -- didn't intend that you were -- no, I didn't intend that you would -- your ex -- no, all I said is that you should have the right to depose their expert before you had to serve your expert report.

MR. TORCHINSKY: Okay.

THE COURT: That's all. Okay. All right. But I'm open to deposition taking place as long as they're reasonable. But my preference would be -- you've got a lot to do between now and our next hearing on November 7th, and it would seem to me that that ought to be confined to documents and things

like that, and if there are going to be depositions, if you can agree to them and you want to take them before November 7th, I have no objection, but then when we get together on November 7th and assuming the case is still proceeding, then we would have a deposition -- we would adopt a deposition schedule as part of the agenda on that day, all right? But that's -- that really means that there are then basically two weeks and two days between November 7th and Thanksgiving. I don't want to make anybody work over the Thanksgiving holiday.

We've got another week after Thanksgiving that could (indiscernible) the depositions there, but I think it would make more sense if we didn't get into disputes about depositions until we have to, which would be at the hearing on November 7th, okay? Does plaintiff have any problem with that?

MR. GEOGHEGAN: None, Your Honor.

THE COURT: Now, let me ask you another question. Are any of the plaintiffs residents of the Congressional districts that the plaintiff alleged are improperly gerrymandered?

MR. GEOGHEGAN: Yes, Your Honor, but the -- our position is that the whole scheme is a gerrymandering scheme and that we don't have to have

plaintiffs from every single Congressional district to --

THE COURT: All right.

MR. GEOGHEGAN: -- to get a redrawing of the map. And I note that in Whitford versus Gill, the objection was raised by the executive defendants. There was no legislative defendants in that case. The plaintiffs had to come from every legislative district, and the three-judge court ruled that that wasn't necessary, that they were challenging the scheme as a whole. And that's our position as well.

THE COURT: Okay. All right. Okay. All right, thank you very much for coming in. Have a nice day.

MR. PASZAMANT: Thank you, Your Honor.

(Pause in proceedings.)

THE COURT: Okay. Court is adjourned. Thank you.

(Proceedings adjourned, 10:53 p.m.)

* * *

CERTIFICATION

I, Michael Keating, do hereby certify that the foregoing is a true and correct transcript from the electronic sound recordings of the proceedings in the above-captioned matter.

10/15/17

Date

Michael Keating

EXHIBIT C

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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OTHER AUTHORITIES

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.

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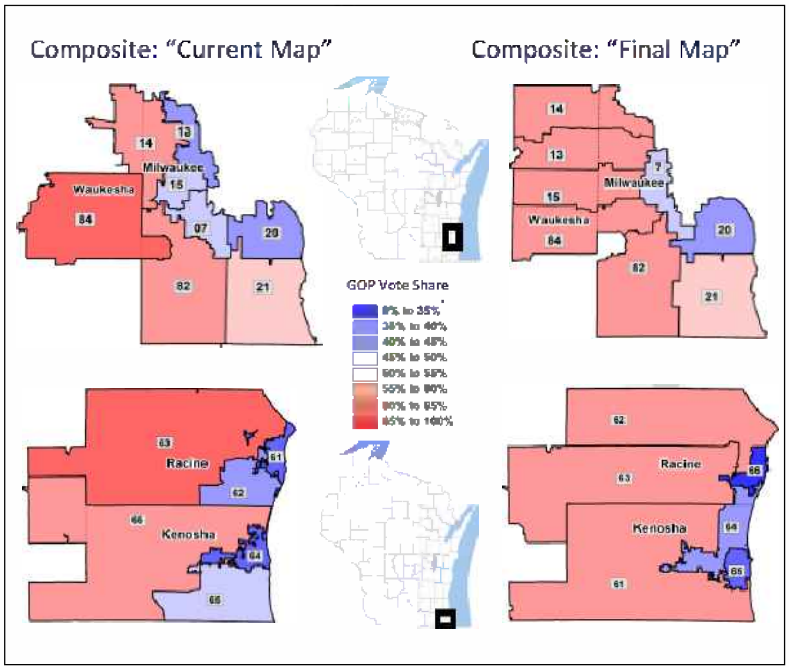
[2] The shading of these maps is based on the composite scores created by Act 43's drafters to predict electoral performance. SA325.



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

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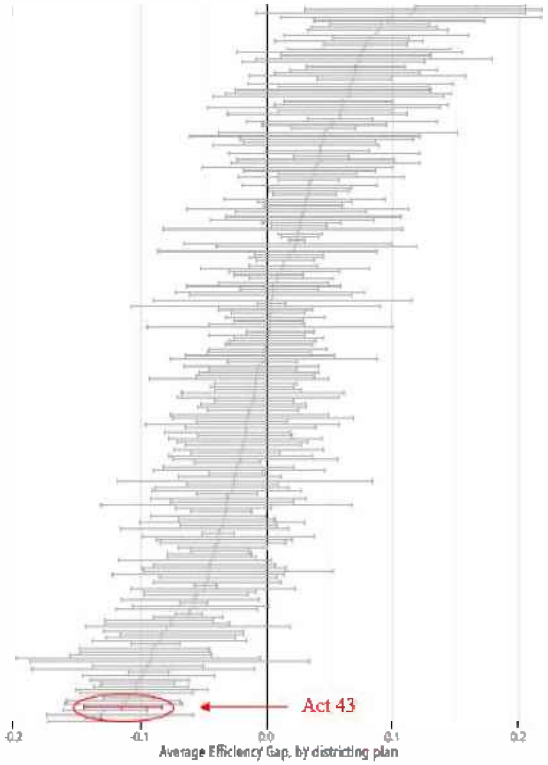
[6] Act 43's drafters expected Act 43 to yield *ten* more Republican seats than the 2000s map. JSA129a-130a; SA359.

[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

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[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

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[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

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[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

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[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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