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

BRIEF FOR *AMICI CURIAE* WISCONSIN STATE SENATE AND WISCONSIN STATE ASSEMBLY IN SUPPORT OF APPELLANTS

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STATEMENT OF INTEREST[1]

Amici are the legislative bodies to which the Wisconsin Constitution assigns the task of drawing state and federal legislative districts. Wis. Const. art. IV, §3. As a result, *amici* have an obvious interest in defending the constitutionality of their districting map. *Amici* likewise have an acute interest in ensuring that the task of redistricting remains, as the people of Wisconsin intended, with the legislature, not the judiciary. Finally, as the body responsible for representing constituents throughout the State, the legislature is uniquely well-positioned to explain the State's history, geography, and politics, as well as the myriad ways in which the decision below distorts the nature of representative democracy in Wisconsin.

SUMMARY OF ARGUMENT

Drawing legislative districts is no mean feat. Not only does it entail sensitive policy judgments and political compromises, but it also is subject to a host of complex and often competing federal and state law demands, failure to adhere to any one of which is likely to prompt a lawsuit. Unsurprisingly, then, for decades, the decennial task of redistricting in Wisconsin has devolved into a decennial chore of litigation. In the 1980s, 1990s, and 2000s, plaintiffs from one party or another sued in federal court, and in the face of divided government, partisan gridlock, and

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[1] Counsel for all parties have consented to this filing. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

the competing demands of redistricting law, federal judges were forced to impose districting plans for use in state legislative elections.

In 2011, the Wisconsin legislature finally was able to overcome those obstacles and enact a politically accountable districting plan that, after a tweak to a single line separating two assembly districts, satisfied all then-extant state and federal legal requirements. Once again, however, a federal court has intervened, becoming the first court in decades to purport to divine a legal basis to invalidate a districting plan as an unconstitutional partisan gerrymander.

That decision is not just wrong, but dangerously so. First, it imposes on state legislatures a constitutional requirement so amorphous as to threaten their ability to carry out their constitutionally assigned task of drawing districts. It is already hard enough to draw districts that simultaneously satisfy the myriad state and federal constraints on districting. Adding partisan gerrymandering claims to the mix will all but guarantee that every legislature, in every redistricting cycle, will be forced to defend against costly, time-consuming, and intrusive litigation—even litigation brought, as here, years after maps were enacted. That result would serve only to increase the federal judiciary's already-outsized role in the redistricting process, a result that this Court has repeatedly discouraged and that inevitably transfers to federal judges and private litigants a power that the people assigned to elected and accountable legislators.

Making matters worse, the district court allowed plaintiffs to bring partisan gerrymandering claims on

a statewide basis, instead of requiring them to proceed district-by-district. That is no mere foot fault. A majority of this Court has already rejected the statewide approach—and for good reason, as it is premised on a supposed right to proportional representation that neither the U.S. Constitution nor the Wisconsin Constitution embraces, and that this Court has repeatedly rejected. Moreover, plaintiffs' statewide approach reflects a fundamentally mistaken view of how representative democracy works. It treats partisan preference as a determinative and immutable characteristic that has nothing to do with the attractiveness of candidates or the attentiveness of legislators. Election results in Wisconsin show that the exact opposite is true. Voters select candidates based on their personalities, their campaigns, their policies, and their performance once elected. By assuming otherwise, plaintiffs conveniently ignore the reality that Republican gains over the past decade are attributable to effective campaigning and governing, not to partisan gerrymandering.

Plaintiffs' claim to have found a workable standard for statewide partisan gerrymandering claims is particularly dubious because they have embraced a theory that (perhaps not coincidentally) systematically advantages their preferred political party. As in most States, Democratic voters in Wisconsin are concentrated in urban areas like Madison and Milwaukee, while Republican voters are dispersed more widely throughout the State—a trend that is only intensifying over time. As a result, *any* districting map based on traditional principles like compactness, contiguity, and municipal lines (which this map concededly was) will appear to have a built-

in pro-Republican bias that "wastes" Democratic votes in urban areas. In fact, even the *court-drawn* plans over the past three decades produced the same type of pro-Republican "bias" as the plan challenged here.

If there really is a standard by which courts can adjudicate partisan gerrymandering claims, surely it is not one that flunks the test of partisan neutrality (by systematically advantaging one party) and treats the natural consequences of political geography and compliance with traditional districting principles as evidence of a plan's unconstitutionality. The district court's contrary conclusion is profoundly out of step with this Court's jurisprudence, with decades of lower court decisions rejecting comparable claims, and with basic norms of representative democracy.

ARGUMENT

I. Partisan Gerrymandering Claims Subvert The State Redistricting Process.

Nearly half a century ago, this Court expressed concern about standards so demanding and litigation-inviting that the decennial task of redistricting would be "recurringly removed from legislative hands and performed by federal courts." *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973). The decision below makes that fear a reality, adding an amorphous prohibition on partisan gerrymandering to the ever-growing list of legal constraints on the state redistricting process. As the recent history of redistricting in Wisconsin reflects, such a novel limitation inevitably will produce additional litigation, additional intrusions into the legislative process, and additional federal supervision of state elections.

Indeed, partisan gerrymandering claims pose a uniquely potent threat to state autonomy: They are so easy to allege that they will be filed after almost every election; every standard that has ever been proposed for adjudicating them is so indeterminate that the inevitable litigation will be utterly unpredictable; and they provide plaintiffs with such an easy way to pierce the legislative privilege that the potential for abuse will be ever-present. Allowing claims like plaintiffs' to proceed would therefore wrest control over the districting process away from the state legislators to whom state constitutions assign the task, and hand it to federal judges, opportunistic plaintiffs, and social scientists seeking to convert academic theories into constraints on the democratic process. This Court should not permit such an unwarranted and unproductive interference in the core sovereign function of redistricting.

A. Wisconsin's Redistricting History Vividly Illustrates the Difficulties of Enacting a Map That Complies With All Federal and State Law Requirements.

The Wisconsin Constitution, like that of almost every State, assigns the task of redistricting to the legislative branch. *See* Wis. Const. art. IV, §3. That is no accident: Redistricting is not just some formulaic line-drawing exercise; it is a substantive act of policymaking. Assigning citizens to electoral districts requires "tough value-laden decisions" about "how communities should be represented" and how to foster "service relationships between representatives and constituents that fit into larger public policy programs." Nathaniel Persily, *In Defense of Foxes*

Guarding Henhouses, 116 Harv. L. Rev. 649, 679 (2002). Those tough decisions, like all other policy choices, are best made as part of the "give-and-take of the legislative process," *Jensen v. Wis. Elections Bd.*, 639 N.W.2d 537, 540 (Wis. 2002), by legislators who can undertake a "careful assessment of local conditions." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 801 (2017).

Even before the decision below, however, state legislatures had been forced to surrender a substantial portion of their constitutionally conferred policymaking discretion to the courts. In recent years, courts have taken up "seemingly permanent residency" in the state redistricting process, *Jensen*, 639 N.W.2d at 540, enforcing at least five federal-law limitations on state redistricting.

Specifically, under this Court's precedents interpreting the Equal Protection Clause and the Voting Rights Act ("VRA"), a state legislature *must* (1) draw districts with nearly perfect population equality, *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016), and must *not* (2) dilute the voting strength of sufficiently large and politically cohesive minority groups, *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986); (3) cause retrogression in minority voting strength in jurisdictions covered by Section 5 of the VRA, *Ala. Legislative Black Caucus v. Alabama* ("*ALBC*"), 135 S. Ct. 1257, 1273 (2015); (4) allow racial considerations to predominate over traditional districting principles absent a compelling interest (notwithstanding the VRA's command to consider the impact of district lines on minority voters), *Bethune-Hill*, 137 S. Ct. at 797; or (5) purposefully discriminate

against minority voters, *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960). Creative plaintiffs inevitably try to impose even more federal restrictions. *See, e.g.*, *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 847-49 (E.D. Wis. 2012) (describing nine separate federal causes of action asserted in prior districting litigation).

Those not-always-harmonious federal districting requirements exist alongside still more restrictions imposed by state law. In Wisconsin, for example, the state constitution requires the legislature to draw districts that are "bounded by county, precinct, town or ward lines"; are "in as compact form as practicable"; and "consist of contiguous territory." Wis. Const. art. IV, §4. The legislature also must not split any assembly districts while drawing senate districts, *id.* §5, and it must comply with a substantial body of case law imposing additional constraints on the redistricting process, *see generally Jensen*, 639 N.W.2d at 543.

The overlap and interplay among and between those rules has contributed to the unfortunate reality that redistricting in Wisconsin is "almost always resolved through litigation rather than legislation." *Id.* at 540. In fact, every districting cycle since 1972 has included trips to federal court. *Baldus*, 849 F. Supp. 2d at 843. In the 1980 cycle, the governor vetoed the legislature's plan; in the 1990 cycle, another veto threat prevented the legislature from passing a plan; and in the 2000 cycle, no plan materialized because a divided legislature could not overcome partisan gridlock. JS.App.9-11; *see Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630 (E.D. Wis. 1982);

Prosser v. Elections Bd., 793 F. Supp. 859 (W.D. Wis. 1992); *Baumgart v. Wendelberger*, Nos. 01-C-0121 & 02-C-0366, 2002 WL 34127471 (E.D. Wis. May 30, 2002). All three times, plaintiffs filed lawsuits alleging that the prior decade's plan had become unconstitutional, and all three times, federal courts imposed plans of their own design. JS.App.9-11.

As that history reflects, the decennial task of redistricting has already become less of a legislative affair than a judicial task, with the state legislature frequently prevented from bringing its policy expertise to bear on the redistricting process. But in 2011, after three decades of litigation and court-drawn plans, the legistature finally broke through: After months of full-time work by legislative aides meeting with caucus members and drafting maps that complied with traditional criteria,[2] the Wisconsin legislature passed a districting plan ("Act 43") that obtained the governor's approval and, after minor tweaks, survived challenges under state law, the VRA, and this Court's racial gerrymandering precedents. That plan, moreover, scrupulously complied with traditional districting criteria and—because of the legislature's concerted effort to improve upon the prior court-drawn plans—compared favorably to those plans on measures of compactness, municipal splits, and population deviations. Appellant.Br.62. Indeed, the plaintiffs in this case have not claimed that *a single*

[2] For a summary of the extensive legislative efforts that led to Act 43, *see* Appellant.Br.13-16; JA156-86; and the Declaration of Adam R. Foltz in Support of Application For Stay Pending Appeal.

district violated traditional districting criteria. JS.App.235.

Yet not even that once-in-a-generation feat was enough to keep redistricting under state control. Four years and two election cycles after Act 43's enactment, a group of plaintiffs filed this partisan gerrymandering challenge in federal court. And after trial (and the third of only five anticipated elections under Act 43), a divided three-judge district court declared that it had divined a workable standard for partisan gerrymandering claim. Without advance warning, the court then applied its newly announced standard to invalidate the State's first legislatively drawn map in decades as an unconstitutional partisan gerrymander.

B. Partisan Gerrymandering Claims Will Cause Unprecedented Levels of Federal Intrusion Into the State Redistricting Process.

The decision below, if allowed to stand, would extinguish any last hope for a redistricting cycle without a lawsuit. As difficult as it already is to keep redistricting out of the courts, allowing partisan gerrymandering claims like plaintiffs' to proceed (much less prevail) will make federal-court litigation unavoidable. That result will inevitably increase the influence of unaccountable actors on the state redistricting process, which would do far more to undermine than to advance the "fair and effective representation" that redistricting is intended to promote. *Reynolds v. Sims,* 377 U.S. 533, 565-66 (1964).

Unlike drawing districts on the basis of race, which has no place in redistricting absent a compelling state interest, *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017), the use of partisan considerations in districting is a "lawful and common practice." *Vieth v. Jubelirer*, 541 U.S. 267, 286 (2004) (plurality op.). As a result, "there is almost *always* room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation." *Id.* at 286. And just as nature abhors a vacuum, "court action that is available tends to be sought." *Id.* at 300. The decision below thus stands an open invitation for disgruntled voters to ask courts to second-guess the sensitive policy judgments that underlie redistricting legislation.

Worse still, the decision below would make partisan gerrymandering claims available to a virtually limitless universe of plaintiffs. In the racial gerrymandering context, plaintiffs have standing only if they actually live in a gerrymandered district. *ALBC*, 135 S. Ct. at 1265. Here, however, the district court permitted plaintiffs to proceed even though they did not allege any harm from gerrymandering in their own districts. Lead plaintiff William Whitford, for example, admitted that Act 43 has not affected his ability to elect a Democratic representative because his Madison-based district was heavily Democratic under both Act 43 and the prior plan (and virtually any plan that comports with traditional districting principles). Appellant.Br.19. The district court's expansion of standing not only is wrong as a legal matter, *see* Appellant.Br.27-34, but also magnifies the already-strong temptation to bring lawsuits, as it grants every voter in the state the power to ask the

courts to intervene in the redistricting process, even if his candidate of choice was elected under the challenged plan.

Moreover, because of the indeterminacy of the district court's partisan-effects test—and indeed of any test seeking to discern whether an inherently partisan body has been "too partisan"—the outcome of litigation will be uncertain enough that no claim will be too speculative to file (or to dismiss on the pleadings). As this Court recognized in *Vieth*, "the vaguer the test for availability, the more frequently interest rather than necessity will produce litigation." 541 U.S. at 300-01 (plurality op.). As a result, "factions that foresee ultimate defeat in the political process" inevitably will obstruct redistricting or file lawsuits "in the hope of throwing the enterprise into courts where they may fare better." Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 Stan. L. Rev. 731, 735 (1998). Proving the point, plaintiffs here turned to the courts for assistance only after losing three consecutive statewide races for governor and failing to earn a majority of statewide votes in three of the past four Assembly elections. *See* JS.App.244-45 ("[T]he Republican Party is *not* a minority party in Wisconsin.").

Because partisan gerrymandering claims will be easy to file and difficult to dismiss on the pleadings, they provide plaintiffs with an ancillary benefit too good to pass up: the ability to pierce the legislative privilege and force members of the other political party to open their deliberative process to public view. In the normal course, state legislators enjoy absolute

immunity in federal court for their legislative acts. *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998). That immunity, which derives from federal common law, reflects the reality that legislators "acting collectively to pursue a view of the public good" must remain "free to represent their constituents without fear of outside interference that would result in private lawsuits." *Biblia Abierta v. Banks*, 129 F.3d 899, 903 (7th Cir. 1997).

As a corollary to legislative immunity, state legislators enjoy a testimonial privilege, which protects them and their aides "from compelled disclosure of documentary and testimonial evidence" about the legislative process. *Favors v. Cuomo*, 285 F.R.D. 187, 209 (E.D.N.Y. 2012); *see also Gravel v. United States*, 408 U.S. 606, 616-17 (1972) ("[T]he day-to-day work of ... aides is so critical to the Members' performance that they must be treated as the latter's alter egos"). This legislative "privilege applies whether or not the legislators themselves have been sued." *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011).

In recent years, however, courts have concluded with alarming frequency that the testimonial privilege evaporates in redistricting cases. Rather than holding plaintiffs to the traditional methods for proving legislative intent, *see Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977), courts have been increasingly willing to pierce the legislative privilege and allow plaintiffs to depose or subpoena legislators about the details of the process leading to the enactment of challenged districting plans. These courts, usually applying a five-factor test

developed in *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003), balance away the legislative privilege on the specious ground that "conversations between and among legislators" are "the most probative evidence of intent." *Benisek v. Lamone*, No. 1:13-cv-03233-JKB, 2017 WL 959641, at *8 (D. Md. Mar. 13, 2017); *see also, e.g.*, *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 339-45 (E.D. Va. 2015); *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11-C-5065, 2011 WL 4837508, at *6 (N.D. Ill. Oct. 12, 2011). As long as "partisan intent" is an element of the cause of action, district courts will continue to strike the same balance, turning a narrow exception to legislative privilege into the rule in partisan gerrymandering cases.

Redistricting litigation in Wisconsin has been no exception. In a prior dispute over Act 43, plaintiffs issued a third-party subpoena to a legislative aide for the Wisconsin State Senate Majority Leader, seeking to depose him and acquire all documents that were used during the redistricting process. *Baldus v. Brennan*, Nos. 11-cv-562 & 11-cv-1011, 2011 WL 6122542, at *1 (E.D. Wis. Dec. 8, 2011). The State asserted legislative privilege and moved to quash the subpoena, but the district court denied the motion. Although the court acknowledged that piercing the legislative privilege could have a "future 'chilling effect' on the Legislature," it believed that harm was "outweighed by the highly relevant and potentially unique nature of the evidence." *Id.* at *2.

The combined effect of decisions devaluing legislative privilege and the temptations provided by partisan gerrymandering claims offers plaintiffs easy

access to their political rivals' otherwise confidential communications. That is no small concern, as legislative communications about redistricting are even more sensitive (and more valuable to the opposing party) than typical legislative deliberations. They can reveal how legislators think about particular political races, which incumbents they might view as vulnerable, which incumbents they considered pairing, and how they engage in intra-caucus decision-making. And on top of all that, there is at least some political value in subjecting a legislator from the other party to the "cost and inconvenience" of compulsory process. *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

Partisan gerrymandering claims also increase the influence of unaccountable actors at the expense of officials ultimately accountable to the voters. Federal courts, as already discussed, are omnipresent in state redistricting, bringing "delay and uncertainty … to the political process" and "partisan enmity … upon the courts." *Vieth*, 541 U.S. at 301 (plurality op.). And that federal-court involvement is by no means guaranteed (or even particularly likely) to lead to better districting maps: While legislators know every detail of their own districts and have unfettered access to their colleagues' collective knowledge, federal courts must draw district lines from a "cold record" of maps and charts rather than personal knowledge of on-the-ground facts. Accordingly, courts are more likely than legislators to disrupt cooperative projects or split communities of interest that may not be apparent from maps alone. *See* Persily, *supra*, at 678 n.95 (recounting author's experience as court-

appointed mapdrawer, during which he unwittingly disrupted an ongoing environmental project).

Just as problematic, partisan gerrymandering claims give redistricting litigants (and the organizations that fund or control their conduct) immense influence over the districting process. A court cannot adjudicate a gerrymandering claim until someone files a lawsuit, and even then, the court's analysis is limited to the challenged aspects of the plan. While legislators must consider the competing input and concerns of all voters when redistricting, redistricting litigants can elevate their own particular concerns and make them the focus of the analysis. Yet despite this far-reaching power—and despite the fact that successful redistricting litigation will impact every voter in the state—there is no mechanism in place to ensure that litigants are representative of the general electorate or that they adequately protect the rights of non-litigants. *See* Lisa Marshall Manheim, *Redistricting Litigation and the Delegation of Democratic Design*, 93 B.U. L. Rev. 563, 609-10 (2013).

Functionally speaking, redistricting litigants are bringing class-action claims without any of the procedural safeguards that apply in other types of aggregate litigation: There is no requirement that litigants' objections to the plan be typical, no requirement that legal representation be adequate, and no inquiry into potential conflicts between attorneys and non-litigants. *Id.* at 600. Nor is there any obvious mechanism for successful defendants to prevent relitigation when another voter files a similar claim. *Cf. Cooper*, 137 S. Ct. at 1467-68 (rejecting preclusion argument).

Finally, the threat of partisan gerrymandering claims would have the perverse effect of *increasing* the legislature's attention to partisan concerns. After drawing districts to comply with federal law and traditional principles, legislators would have to check whether the resulting map unduly "favored" one party, which is a real risk since traditional districting principles tend to concentrate voters with shared views, and Democratic voters tend to be concentrated in urban areas. *See infra* Part III. If this forced consideration of partisan affiliation yielded a yellow flag, legislators would then be required to adjust districts on explicitly partisan terms—*i.e.*, to engage in partisan gerrymandering—to undo the plan's naturally occurring "partisan slant."

Those adjustments not only would make plans more difficult to pass through the legislature, and not only would invite partisan gerrymandering claims from members of the *other* political party, but would come at great cost to traditional districting principles. For example, ensuring a satisfactory score on the "efficiency gap" test might require pairing an excessive number of incumbent legislators, as occurred in plaintiffs' expert's Demonstration Plan in this case. Appellant.Br.65-66. Likewise, a legislative judgment to separate urban areas from rural areas might become constitutionally suspect if urban voters vote primarily for one party and rural voters lean the other way. At a certain point, the legal restrictions placed on redistricting will simply occupy the field, crowding out traditional districting objectives and leaving little (if any) room for legislators to bring their local expertise to bear.

II. Statewide Partisan Gerrymandering Claims Rest On A Distorted View Of Electoral Politics And Representative Democracy.

The statewide claims plaintiffs were permitted to pursue in this case pose a particularly acute threat to state sovereignty and legislative prerogative. As explained, plaintiffs do not claim that the purported problems with Act 43 impeded their ability to elect their candidates of choice; to the contrary, the lead plaintiff concedes that his preferred candidate won election in his district. Instead, plaintiffs claim that they were injured by the failure of their preferred candidates in *other* districts to secure election. A majority of this Court in *Vieth* already rejected these kinds of statewide claims as nonjusticiable. And for good reason: They are premised on a legal theory that this Court has repeatedly rejected, and on factual assumptions that are inconsistent with how representative democracy works, both in Wisconsin and across the country.

A. The Constitution Does Not Guarantee Proportional Representation.

Partisan gerrymandering claims based on statewide, rather than district-specific, injury are inherently premised on a constitutional right to proportional representation that simply does not exist. This is a case in point. In holding Act 43 unconstitutional, the district court focused principally on two purported measures of partisan impact: "entrenchment" and the "efficiency gap." JS.App.145-77. While those theories may differ in their particulars, at bottom, each is designed to measure the extent to which statewide vote totals for candidates

from one party translated into seats for that party in the state legislature as a whole. In the district court's view, too large a discrepancy between statewide votes and statewide seats inflicts constitutional harm upon members of the "underrepresented" party. And, of course, the baseline against which discrepancy is measured is perfect proportionality. In effect, then, the district court concluded that "there is a right to *not* have *dis*proportional representation," which "is tantamount to saying there is a right *to* have proportional representation." JS.App.272 (Griesbach, J., dissenting).

That approach—which inheres in *any* theory based on statewide rather than district-specific injury—cannot be reconciled with this Court's precedents, which "clearly foreclose any claim that the Constitution requires proportional representation." *Davis v. Bandemer*, 478 U.S. 109, 130 (1986) (plurality op.); *see also LULAC v. Perry*, 548 U.S. 399, 419 (2006) (opinion of Kennedy, J.) ("[T]here is no constitutional requirement of proportional representation."); *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring) (finding "no authority" for the proposition "that a majority of voters in the Commonwealth should be able to elect a majority of the Commonwealth's congressional delegation").

The Constitution requires States to implement a "Republican Form of Government," U.S. Const. art. IV, §4, but it otherwise affords States "significant leeway" in deciding how votes cast by their citizens should translate into representation in the state legislature. *Evenwel*, 136 S. Ct. at 1133 (Thomas, J., concurring). States are equally free to adopt a district-

based scheme, one of proportional representation, or any other apportionment method consistent with a Republican form of government. The differences between those alternative systems simply "reflect different conclusions about the proper balance of different elements of a workable democratic government." *Vieth*, 541 U.S. at 358 (Breyer, J., dissenting). The Constitution takes no sides in that debate, and the various compromises reflected concerning representation in the House of Representatives and Senate demonstrate that the Framers were not unalloyedly committed to proportional representation. By granting plaintiffs relief based on purported disproportionality between votes cast and statewide representation, the decision below enshrines a political theory that the Framers allowed the States to reject.

B. Voters Elect Individual Candidates, Not Statewide Delegations.

The problems with partisan gerrymandering claims, especially statewide claims, are not just theoretical. The assumptions built into such claims do not accord with the realities of representative democracy, in Wisconsin or elsewhere. First, equating a vote for an individual candidate to a vote for a statewide political party misguidedly assumes that the only factor determining voting behavior is political affiliation. That is "assuredly not true." *Vieth*, 541 U.S. at 288 (plurality op.). In reality, there are "separate elections between separate candidates in separate districts, and that is all there is." *Id.* at 289. The district court's contrary assumption is especially out of place in Wisconsin, a quintessential "purple

state," where primaries are open and voters "regularly elect comparable numbers of Democrats and Republicans." *Baldus*, 849 F. Supp. 2d at 843; *see Democratic Party v. Wisconsin*, 450 U.S. 107, 110-11 (1981).

Sure enough, election results in Wisconsin reveal an electorate that chooses candidates based on their records and positions, not just their political parties. Examples abound of state legislative candidates substantially outperforming (or underperforming) the Presidential candidate in their districts. In Assembly District 96, for instance, Republican Lee Nerison has held his seat since 2005 even though his constituents overwhelmingly supported President Obama in 2008 and 2012.[3] In those two elections, Nerison earned 51.7% and 59.5% of the two-party vote, while John McCain and Mitt Romney received just 38.2% and 43.6% of the Presidential two-party tally. Likewise, Republican Travis Tranel defeated a Democratic incumbent in District 49 in 2010 and then held his seat in 2012, outperforming Romney by 11 points. Not coincidentally, both legislators have crossed party lines on occasion, including by opposing the highly contentious Budget Repair Bill of 2011.[4]

The same dynamic is evident in districts that have changed hands within the same districting cycle. For

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[3] Election results are available at http://elections.wi.gov/elections-voting/results.

[4] The Wisconsin Assembly's roll call vote on the Budget Repair Bill is available at http://docs.legis.wisconsin.gov/2011/related/votes/assembly/av0184. For discussion of the controversy surrounding the bill, *see State v. Fitzgerald*, 798 N.W.2d 436, 442-443 (Wis. 2011) (Prosser, J., concurring).

example, in District 92—long considered a "safe" Democratic district—Democrat Chris Danou won the seat uncontested in 2012 and earned 56.6% of the two-party vote in 2014, but was then unseated by a Republican challenger in 2016. In District 75, incumbent Republican Roger Rivard was unseated by a Democratic challenger in 2012, who himself was unseated two years later by Republican Romaine Quinn, who earned 54.9% of the vote in 2014 and 62% in 2016. In District 70, Democrat Amy Sue Vruwink won in 2012, but was then narrowly defeated in 2014 by Republican Nancy VanderMeer. Two years later, VanderMeer defeated a new opponent by 25 points.

The previous decade was no different. In District 28, longtime Republican incumbent Mark Pettis was unseated by Democrat Ann Hraychuck in 2006, who herself was unseated by Republican Eric Severson in 2010. Voters in District 68 elected a Democrat in 2002, a Republican in 2004, a Democrat in 2008, and a Republican in 2010. And this phenomenon is not confined to traditional "swing" districts. The right candidate at the right time can prevail when an incumbent in even the "safest" seat adopts unpopular positions or loses the trust of his constituency. In 2010, for example, Joe Knilans defeated the embattled Speaker of the Assembly,[5] who in 2006 had earned 69.3% of his district's vote and ran unopposed in 2008.

None of these results—the changes in the party winning certain seats, the substantial deviations in support compared to other candidates of the same

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[5] *See* Jason Stein, *Assembly Speaker Mike Sheridan Acknowledges Dating Lobbyist*, Wis. State J. (Feb. 2, 2010), http://bit.ly/2oEwNyK.

party, or the substantially different vote percentages depending on the opposing candidate or performance in office—can be explained by partisan gerrymandering. To the contrary, they reflect the same political factors that have always decided elections: the issues that matter to the electorate, the quality of the candidates and their campaigns, the effectiveness of party organizations, the performance of a candidate once elected, and broader waves at the national level.

Wisconsin voters respond to what is happening in their districts and in Madison; they do not just blindly support one party or the other. By reducing elections to an "R" or "D" on the ballot, the district court undervalued the discernment of Wisconsin voters and oversimplified the nuances of Wisconsin politics. Perhaps the most obvious demonstration of this reality is the increase in Republican seats between the 2012 and 2016 elections. The map did not change, but the results did—because the voters evaluated the relative merits of the candidates and the performance of elected officials in Madison. *See infra* Part II.D.

Second, a statewide focus wrongly assumes that each voter's preference for the Democrat or Republican in her district reflects a preference for *every* Democrat or Republican across the State, and a desire for that party to achieve statewide gains. In reality, voters cast votes for individual candidates in individual districts, "not for a statewide slate of legislative candidates put forward by the parties." *Davis*, 478 U.S. at 159 (O'Connor, J., concurring). A voter who generally favors Republicans might vote for the Democratic candidate in her district if that

candidate prioritizes issues important to her, or if she finds the Republican candidate too extreme, or for any number of other reasons. And while that voter may prefer to see the Democratic candidate prevail in her district, she may prefer the Republican candidate prevail in other districts, and may prefer a majority-Republican legislature.

As that unremarkable example illustrates, political parties are "big tents" containing voters with widely divergent views about policy, governance, and representation. *Baldus*, 849 F. Supp. 2d at 851. And that does not even account for consistently independent voters and voters who fear concentrated power, both of whom might prioritize preserving a balance of power in the legislature above whichever candidate they find more attractive in a given election. It thus makes no sense to treat losses by a party's statewide slate of candidates as inflicting harm on every individual voter who voted for one of those candidates. An individual voter "cannot vote for such candidates," "is not represented by them in any direct sense," and might not support them at all. *Davis*, 478 U.S. at 153 (O'Connor, J., concurring).

C. Voters Who Support Losing Candidates Are Not Deprived of Representation or Access to the Political Process.

Partisan gerrymandering claims also incorrectly presume that voters who supported losing candidates are deprived of representation in the state legislature. That premise is "antithetical to our system of representative democracy." *Shaw v. Reno*, 509 U.S. 630, 648 (1993). In Wisconsin and across the country, legislators represent *all* of their constituents—not just

the ones who voted for them. While a losing candidate's supporters might be "without representation" by their candidate of choice, *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971), courts "cannot presume … that the candidate elected will entirely ignore the interests of those voters." *Davis*, 478 U.S. at 132 (plurality op.). Instead, those voters are "deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district." *Id.* at 132.

Because voters are represented even if they voted for the losing candidate, this Court has rejected equal protection claims that are based merely on the fact "that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice." *Id.* at 131-32. In *Whitcomb*, for instance, this Court rejected gerrymandering claims filed by minority voters who were submerged within a multi-member district. 403 U.S. at 149-53. While the Court acknowledged that those voters had been unable to elect their candidates of choice, it rejected their claims because they failed to show that they were unable to participate in and influence the political process. *Id.*; *see also City of Mobile v. Bolden*, 446 U.S. 55, 111 n.7 (1980) (Marshall, J., dissenting) ("When all that is proved is mere lack of success at the polls, the Court will not presume that members of a political minority have suffered an impermissible dilution of political power.").

Setting aside the problem that plaintiffs do not even claim that they were unable to elect their

candidates of choice in their *own* districts, this Court's repeated holdings make crystal clear that plaintiffs must show more than the failure to win elections to prevail on partisan gerrymandering claims. And plaintiffs' myopic focus on election results not only contravenes this Court's precedents, but also obscures how legislators serve their constituents and how constituents influence their legislators. Wisconsin voters cast their votes in private, with their choices protected by the sanctity of the ballot box. Those who voted for the losing candidate have as much access to sitting legislators as anyone else, whether they "seek help in dealing with a government agency, to express a view about pending legislation, or to request help in securing funds for repairing a local bridge or extending a state bike trail." JS.App.289 (Griesbach, J., dissenting). The name of the majority party has no bearing on a great many of the services that legislators provide their constituents on a day-to-day basis.

Moreover, voters can influence the political process in myriad ways beyond voting for state legislators. A minority party that entrenches itself and legislates in ways that are unpopular with the majority of voters is unlikely to maintain control of the legislature in a state like Wisconsin, no matter where district lines are drawn. But even if a minority party truly "entrenches" itself in a state legislature, "the majority should be able to elect officials in statewide races—particularly the Governor—who may help to undo the harm that districting has caused the majority's party," *Vieth*, 541 U.S. at 362 (Breyer, J., dissenting), whether by vetoing legislation or wielding influence in the next round of redistricting. That built-in structural check is far preferable to an

intrusive judicial check that rests on dubious premises and unadministrable tests. And even apart from elections for statewide office, voters are members of countless political, social, and economic groups that can "bind together into coalitions having enhanced influence, and have the respectability necessary to affect public policy." *Bolden*, 446 U.S. at 111 n.7 (Marshall, J., dissenting).

Furthermore, treating all votes cast for the losing candidate as "wasted" ignores the significant influence those votes have on legislative behavior. The premise of plaintiffs' "efficiency gap" theory is that any vote not essential to the election result is a "wasted" vote. Appellant.Br.48-49. But these so-called "wasted votes" often are determinative of how legislators govern. An unexpectedly close election often serves as a "wake-up call" for the incumbent. Votes for the losing candidate in such races can force the winning candidate to "adopt more moderate, centrist positions" and to be more responsive to independent and swing voters. JS.App.287 (Griesbach, J., dissenting). Similarly, "wasted" votes for the winning candidate in a landslide may allow that candidate to move further from the center, as he will likely be more concerned about a primary challenge from *within* the party than a threat from the other party. *Id.* None of these votes is truly "wasted," and any theory that claims otherwise is antithetical to the realities of representative democracy.

D. Party Affiliation Is Not an Immutable Characteristic.

Finally, statewide partisan gerrymandering ignore the reality that "voters can—and often do—

move from one party to the other." *Davis*, 478 U.S. at 156 (O'Connor, J., concurring). Each election cycle, "the candidates change, their strengths and weaknesses change, their campaigns change, their ability to raise money changes, the issues change—everything changes." *Vieth*, 541 U.S. at 289 (plurality op.). Unlike the racial gerrymandering context, where the classification at issue is based on an "immutable" characteristic, *see id.* at 287, courts cannot simply assume that how a voter voted in the past election—or even the past two or three elections—necessarily dictates what results that voter would prefer to see in the next election.

The subsequent history of the districts at issue in *Vieth* proves the point. The *Vieth* plaintiffs alleged that Pennsylvania's congressional plan was "rigged to guarantee that thirteen of Pennsylvania's nineteen congressional representatives will be Republican." *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 546 (M.D. Pa. 2002). But in elections held just two years after this Court found those claims nonjusticiable, a majority of Pennsylvania's congressional seats were won by *Democrats*, with Republicans retaining just eight of the 13 supposedly "guaranteed" seats. *See* JS.App.243. That result mirrored one that this Court discussed in *Vieth*: In elections held just *five days* after a district court ruled that North Carolina's system for electing judges disadvantaged Republican candidates, every single Republican candidate running for superior court judge was victorious. *Vieth*, 541 U.S. at 287 n.8 (plurality op.).

That lesson applies with extra force in Wisconsin, where winning elections frequently requires support

from independent voters and from members of the other party, and where yesterday's votes do not guarantee tomorrow's victories. The 2016 Presidential election is illustrative. In 2008, President Obama carried 59 of Wisconsin's 72 counties. In 2016, President Trump carried 60 of Wisconsin's 72 counties—capturing *47 counties* that President Obama had won. Thus, in the span of eight years—less than the lifespan of a decennial districting map—nearly two-thirds of Wisconsin's counties flipped their party preference as measured by their presidential candidate of choice. As that reflects, voters' party affiliation is simply not set in stone, and seats held by one party can (and do) change hands when effective candidates run effective campaigns.

State legislative election results in Wisconsin over the past two decades confirm the point, as they reveal significant intra-decade volatility in partisan balance—*i.e.*, the partisan balance changed even when the maps stayed the same. After the 2002 election, which was held under a districting plan imposed by a federal court, Republicans held majorities in both chambers of the state legislature. After three more elections—and with no intervening changes in district lines—Republicans had lost control of both chambers, losing three senate seats and 12 assembly seats. Then, in the final election held under that court-drawn plan, Republicans regained all they had lost (and then some). The same types of intra-decade changes have continued under Act 43. After the first election under Act 43, Republicans held 18 senate seats and 60 assembly seats. In the two subsequent elections under the same plan, Republicans have picked up two senate seats and added four assembly seats.

There is a simple explanation for those ever-shifting election results: Sometimes one party's candidates do a better job than their counterparts at earning votes. The election results under Act 43 show exactly that, even after controlling for the placement of district lines. During the 2010 redistricting process, legislative aides developed a "composite partisan score," which was an objective measure derived from statewide election results over the previous decade. JS.App.17; *see* SA325-26. If a new district had a composite score of 52%, for example, that meant that the residents of the new district cast 52% of their votes for Republican candidates in statewide elections between 2004 and 2010. *See* Appellant.Br.15.

Twenty-nine of the Assembly districts in Act 43 had composite scores between 45% and 55%. SA325-26. Those districts were expected to be the most competitive, and therefore made perfect test cases for whether individual candidates and campaigns really matter. Put differently, elections in those districts reveal whether Republican or Democratic candidates have had more success persuading voters since Act 43 was enacted. If candidates do not matter and party affiliation rarely changes (as the district court assumed), then the results of the 2012, 2014, and 2016 elections should have closely tracked the composite scores. But if voters respond to individual campaigns and are willing to cross party lines for better candidates, then those election results should diverge from the results predicted by the composite scores.

The results have been clear and consistent: Republican candidates outperformed the composite score in the vast majority of elections held in

competitive districts. In the 75 contested races held in competitive districts between 2012 and 2016, Republican candidates outperformed the composite score a whopping *62 times* (and by an average of six percentage points), while Democratic candidates outperformed the composite score only 13 times (and by an average of only three percentage points). Those results show that voters in competitive districts voted for Republican candidates far more often than they did in the previous decade. And because the composite scores incorporated Act 43's district lines, the increased support for Republicans cannot be attributed to gerrymandering; the only explanation is that, for any number of reasons, more voters found the Republican candidates more attractive.

That same data support another conclusion. In the 19 contested elections between 2012 and 2016 in competitive districts that were expected to lean toward the Democratic candidate—*i.e.*, in districts with composite scores between 45.0% and 49.9%—the Democratic candidate in fact prevailed only five times. But in the 56 contested elections that were expected to lean toward the Republican candidate—*i.e.*, in districts with composite scores between 50.1% and 55.0%—the Republican candidate prevailed 51 times. Put differently, Republican candidates won almost all of the close races they were expected to win *and* almost all of the close races they were expected to lose; had Democratic candidates achieved the same feat, the balance of power in the legislature would have shifted the other direction. That puts the lie to plaintiffs' claims that Act 43 somehow made it impossible for the Democratic Party to win a majority in the state legislature. In reality, all the party needed to do is

what a political party always must do to win a majority: run better campaigns and win more competitive races. That plaintiffs' political party of choice failed to do so does not entitle them to look to the courts for an enhanced result.

III. Any Viable Test For Partisan Gerrymandering Would Need To Be Neutral, Yet Plaintiffs' Proposed Test For Identifying Partisan Gerrymandering Systematically Favors Their Political Party Of Choice.

It is no accident that plaintiffs are fixated on establishing a theory that would allow them to bring statewide, rather than district-specific, partisan gerrymandering claims. Plaintiffs are acutely aware of the reality that the political landscape of Wisconsin—and of most States that feature both high-population cities and geographically large rural areas—means that Democratic voters are relatively concentrated in urban areas and Republican voters are relatively dispersed. It is unsurprising, then, that plaintiffs propose a test for identifying partisan gerrymandering that would make any effort by a Republican-controlled Legislature to take advantage of that political landscape automatically suspect, while treating any efforts by a Democratically-controlled legislature to divide and distribute concentrated Democratic voters as ameliorative.

That alone is reason enough to reject their theory as incompatible with the Constitution. The *sine qua non* for any viable test for impermissible partisan gerrymander should be partisan neutrality. To ensure that the public perceives the courts as neutral arbiters of constitutional principles, any test must equally

constrain Democratically-controlled state legislatures and Republican-controlled state legislatures alike. Whatever constraints the Equal Protection Clause may place on a legislature's consideration of partisan impact when drawing maps, surely those constraints cannot be designed to systematically favor one political party. Both plaintiffs' initial theory and the one applied by the district court fail this test.

In the district court, plaintiffs sought to prove partisan gerrymandering principally by relying on their so-called "efficiency gap" measurement—a measurement that the district court treated as "corroborative evidence" of partisan gerrymandering. The "efficiency gap" measurement is calculated by taking the difference between the "wasted" votes cast for each party statewide, and then dividing that figure by the total number of votes cast in the election. JS.App.160-61, 176. The party whose voters cast the fewest "wasted" votes is said to have translated votes into legislative seats more "efficiently" than the other party. JS.App.161. According to the plaintiffs, an efficiency gap of 7% or more should render a plan presumptively unconstitutional. JS.App.33-34.

Treating all votes for losing candidates and excess votes for winning candidates as "wasted" not only misunderstands how voting affects legislative behavior, *see supra* Part II; and not only draws a false equivalence between "excess" winning votes and "excess" losing votes, *see* Wendy K. Tam Cho, *Measuring Partisan Fairness*, 166 U. Pa. L. Rev. Online 17, 35-36 (2017); it also ignores how physical and political geography impact election results—particularly when districts must achieve population

parity (as the federal constitution requires) and comply with traditional districting criteria (as the state constitution requires).

While "Democratic voters are uniquely packed in urban centers like Milwaukee and Madison," JS.App.201, Republicans are more evenly dispersed throughout the State. Naturally occuring Republican-leaning areas thus tend to be more politically diverse than Democratic-leaning ones. For example, while "there are a substantial number of wards that are over eighty percent Democratic," there are "virtually no wards that are similarly Republican." JS.App.200. This concentration of Democratic voters in Madison and Milwaukee is only intensifying. In 2000, 2004, and 2016, Wisconsin's statewide Presidential election results were nearly identical: The Republican candidate's two-party vote shares were 49.88%, 49.81%, and 50.41%, respectively. The results in Wisconsin's 72 counties, however, were vastly different. In 2016, President Trump won 15 counties that President Bush lost at least once, and his vote share increased over President Bush's 2004 vote-share by at least *seven points* in 36 different counties—*i.e.*, in *half* of the counties statewide. The overall statewide results stayed the same only because of offsetting Democratic gains in just two populous counties: Dane County (home of Madison) and Milwaukee County.

As those results reflect, Republican voters are becoming more dispersed throughout Wisconsin, while Democratic voters are becoming more concentrated in urban centers. That phenomenon is hardly unique to Wisconsin; while Secretary Clinton won the

nationwide popular vote in the 2016 presidential election, she prevailed in only 487 of the Nation's approximately 3,100 counties. The clear reality is that "Democrats have often been concentrated in cities while Republicans have often been concentrated in suburbs and sometimes rural areas." *Vieth*, 541 U.S. at 359 (Breyer, J., dissenting). And because of those geographic realities, elections in Democratic-leaning districts are more likely to be landslides, while elections in Republican-leaning districts are more likely to be close calls.

Not so coincidentally, those two outcomes are precisely what result in the most "wasted" votes for Democratic candidates under plaintiffs' "efficiency gap" theory. When a party wins a seat by a large margin (as often happens for Democrats in districts encompassing large cities like Madison and Milwaukee), the thousands of votes above 50%-plus-one for the winning candidate all are marked as "wasted." For example, when Democratic Rep. Chris Taylor won District 76 (in Dane County) in an 83-17 landslide, more than 13,000 Democratic votes were "wasted." Likewise, when a party loses a close race (as often happens to Democrats in the rest of the State), the thousands of votes cast for the losing candidate all are marked as "wasted." For example, when Rep. Treig Pronschinske defeated a Democratic incumbent in District 92 by just four points, all 12,540 Democratic votes were "wasted."

As a result, it is nearly impossible to draw districting maps in Wisconsin that comply with one-person, one-vote and traditional districting principles but do not result in large numbers of "wasted"

Democratic votes. *See Baumgart*, 2002 WL 34127471, at *6 ("[T]he only way to assure that the number of seats in the Assembly corresponds roughly to the percentage of votes cast would be at-large election of the entire Assembly."). And any effort by a Republican-controlled legislature to tweak districts for partisan advantage will increase the number of "wasted" votes, while any effort by a Democrat-controlled legislature to deviate from traditional districting principles and disperse Democratic voters will reduce the number of wasted votes and be scored as "ameliorative."

The impossibility of the task is reflected in past court-drawn maps. Federal courts have drawn districting plans for Wisconsin over the past three decades, and even though those plans were drawn by federal judges and designed to be politically neutral, they consistently produced "efficiency gaps" favoring Republicans. JS.App.308-09. In the seven biennial Assembly elections held between 1998 and 2010, the resulting efficiency gap scores all revealed a Republican "bias," with scores ranging from 4% to 12%, averaging 7.5%, and—quite remarkably—exceeding the 7% that plaintiffs contend makes a plan presumptively unconstitutional *five times out of seven*. JA223-24. Needless to say, something is terribly wrong with a partisan gerrymandering test would invalidate even *court-drawn* plans.[6]

[6] To be sure, court-drawn plans might escape invalidation if they are drawn without partisan intent, JS.App.171-72, but it is difficult to see why the truism that partisan bodies are motivated at least in part by political considerations should convert an acceptable plan into an unconstitutional one.

Equally telling, plaintiffs' demonstration plan in this case—which their expert tried to design with "an efficiency gap as close to zero as possible" while complying with traditional districting principles—still resulted in a pro-Republican efficiency gap of 3.89% when adjusted for incumbency effects. JS.App.202-03 & nn.354-355. To repeat: Plaintiffs' own expert—"a political science professor, hired by the Democratic-voting Plaintiffs, whose entire goal was to try to produce the smallest efficiency gap possible," and operating without the time pressures that typically constrain the redistricting process, JS.App.267-68 (Griesbach, J., dissenting)—was unable to design a plan that did not result in "pro-Republican bias." JS.App.202.

As those illustrations reveal, because even neutral districting plans produce a pro-Republican efficiency gap above the 7% threshold, passing the efficiency gap test would require Republican legislators to engage in "heroic levels of nonpartisanship" and to draw district lines that *reduce* the naturally occurring Republican advantage. JS.App.245-46 (Griesbach, J., dissenting). Yet if Democrats controlled the state legislature, they could draw the most pro-Democratic plan possible—*e.g.*, the demonstration plan that plaintiffs' expert submitted in this case—without coming close to running afoul of the "efficiency gap" theory.

That alone is reason enough to reject the district court's reliance on that deeply flawed theory. If there really is a workable standard for partisan gerrymandering claims, surely it is not one with a built-in partisan bias, such that it operates as a

constraint on Republican-controlled legislatures but not Democratically-controlled ones. The minimum threshold for any viable test for identifying partisan gerrymandering is that it should be equally opposed by partisan legislative majorities of both parties, and equally welcomed by California Republicans and Utah Democrats. The fact that the district court had to resort to a theory with a built-in partisan bias is a sure sign that if a justiciable test for partisan gerrymandering is out there, no one in this case has identified it.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

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