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 OF *AMICUS CURIAE*
THE LEGACY FOUNDATION
IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Legacy Foundation is a non-profit corporation incorporated in Iowa and organized under Internal Revenue Code 501(c)(3).[1] The Legacy Foundation is a non-partisan organization that engages in independent research concerning, *inter alia*, civil rights policy and voting. The Legacy Foundation is also dedicated to promoting a limited and accountable government. These efforts include supporting redistricting litigation involving partisan gerrymandering claims. *See, e.g., Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), *sum. aff'd,* 567 U.S. 930 (2012). More recently, The Legacy Foundation providing funding for an amicus brief submitted by the National Black Chamber of Commerce and the Hispanic Leadership Fund. *See Bethune-Hill v. Virginia State Board of Elections*, No. 15-680, br. of *amici curiae* National Black

[1]No party's counsel authored any part of this brief. No person other than the *amicus curiae* made a monetary contribution intended to fund the preparation or submission of this brief. On July 13 and July 17, 2017, counsel for Appellants and Appellees, respectively, provided consent to all timely filed amicus briefs. The parties' letters consenting to the filing of amicus briefs have been filed with the Clerk.

Chamber of Commerce, et al. (*filed* Oct. 24, 2016).[2]

Furthermore, one of the Legacy Foundation's programs is the Military Voter Protection Project. This program "is dedicated to promoting and protecting our military members' right to vote and ensuring that their votes are counted on Election Day."[3]

SUMMARY OF THE ARGUMENT

The Legacy Foundation urges this Court to reverse the opinion of the United States District Court for the Western District of Wisconsin in this case.

Since this Court's decisions in *Davis v. Bandemer*, 478 U.S. 109 (1986), and *Vieth v. Jubelirer*, 541 U.S. 267 (2004), members of one faction or another – in this case the Democratic party – have advocated and advanced the notion that there is a "problem" of "partisanship" in how district maps are drawn across the country and that a constitutional remedy is required. In this case, lower court adopted the newly-created "efficiency gap" standard for assessing claims of partisan gerrymandering.

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[2] The decision in *Bethune-Hill* is reported at *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788 (2017).

[3] *See* Military Voter Protection Project, http://mvpproject.org/ (last visited July 31, 2017).

This Court should reject the so-called 'efficiency gap' standard for at least four reasons:

First, adopting the 'efficiency gap' as a justiciable standard to determine whether constitutional rights are violated due to an allegedly excessive partisan gerrymander will thrust the judiciary into the political thicket of nearly every redistricting exercise undertaken for federal, state, and local voting districts. *See Gaffney v. Cummings,* 412 U.S. 735, 753 (1973) ("The reality is that districting inevitably has and is intended to have substantial political consequences.").

Second, there is no constitutional right to proportional representation. The Framers, Congress, and this Court have all rejected a constitutional right to proportional representation.

Third, the 'efficiency gap' is premised on, and uses as a baseline for its quantitative analysis, what is effectively a claimed constitutional right to proportional representation based on political party affiliation. The District Court failed to adequately recognize that the Framers rejected the notion of proportionality as a basis of representation and that no such constitutional right or requirement exists. The District Court failed to adequately recognize that principles of proportionality underlie nearly all of Plaintiffs/Appellees' proposed "judicially manageable" standards in this.

Fourth, the measure relied on below by the Plaintiffs (the so-called "efficiency gap" or "EG") incorporates the concept of what that model terms a

"wasted vote." The notion of a "wasted" vote is a purely subjective one, and not one this Court should accept. In the United States, votes for losing candidates are still influential in guiding both policy discussion and public opinion and are therefore not "wasted." This Court should reject Appellees' invitation to adopt their 'efficiency gap' theory.

Adopting a one-size-fits-all approach utilizing unproven statistical theories would run afoul of Justice Kennedy's fear in *Vieth*, that "those criteria that might seem[] promising at the outset . . . are not altogether sound as independent judicial standards for measuring a burden on representational rights." *Vieth,* 541 U.S. at 308 (referring to, as examples, contiguity and compactness) (Kennedy, J., concurring). This Court should reject this attempt to usurp the power of state legislatures by imposing an extra-constitutional requirement on the process of drawing legislative districts boundaries.

ARGUMENT

I. Requiring A State Legislature To Adopt Any Proposed Statistical Model As A Method Of Measuring Partisanship Will Effectively Usurp State Legislatures' Ability To Redistrict And Impose Proportionality As A Constitutional Requirement.

With respect to elections for the United States House of Representatives, Article 1, Section 4 of the U.S. Constitution grants state legislatures the power to decide "[t]he Times, Places and Manner of holding

elections for . . . Representatives." U.S. Const. art. I, § 4. State constitutions are the primary driving force in this process, subject to certain limitations imposed by federal law and the U.S. Constitution that govern the drawing of districts for both federal and state offices. *See Growe v. Emison*, 507 U.S. 25, 34 (1993). In this case, the Wisconsin Constitution, Article IV, Section 4, provides that legislative districts "be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable." Wis. Const. art. IV, § 4; *see Whitford v. Gill*, 218 F. Supp. 3d 837, 844 (W.D. Wis. 2016).

This Court has permitted the federal courts oversight of the redistricting process in a few narrow areas. Specifically, federal courts may review a state legislature's sovereign function of redistricting when plaintiffs' allege federal congressional one person, one vote violations, *see, e.g.*, *Karcher v. Daggett*, 462 U.S. 725 (1983), state legislative one person, one vote violations, *see, e.g.*, *Roman v. Sincock*, 377 U.S. 695 (1964), racial gerrymandering claims, *see, e.g., Shaw v. Reno*, 509 U.S. 630 (1993), and Voting Rights Act claims, 52 U.S.C. § 10303.

Appellees now ask the Court to create another exception to the general rule of non-intervention: a partisan gerrymandering claim brought under the Equal Protection Clause of the Fourteenth Amendment, or the Free Speech and Association Clauses of the First Amendment, where Appellees demand proportional party representation in legislative bodies at federal, state, and local levels of government. Plaintiffs/Appellees' "efficiency gap"

measures the number of statewide votes cast for candidates of a party across all districts at a particular level of representation (local, state, or federal) and purports to determine whether a districting plan yields the "right" number of representatives from each political party – thereby imposing a constitutional right to proportional representation based on political party affiliation. The lower court opinion captured this demand well when it explained Plaintiffs' fundamental claim:

> In short, the complaint alleges that Act 43 purposely distributed the predicted *Republican vote share* with greater efficiency so that it translated into a greater number of seats, while purposely distributing the *Democratic vote share* with less efficiency so that it would translate into fewer seats.

Whitford, 218 F. Supp. 3d at 854 (emphasis added).

Proportionality as a federal constitutional requirement has been rejected repeatedly by this Court, which has recognized that the Constitution's vesting of the sovereign duty to draw district boundaries to a political branch of government will inevitably have political consequences. *See Bandemer*, 478 U.S. at 128-29 (emphasis added) (White, J., plurality opinion) (quoting *Gaffney*, 412 U.S. at 753 ("The reality is that districting inevitably has and is intended to have *substantial* political consequences.") (emphasis added)). Nor has Wisconsin adopted such a sweeping requirement.

See Wis. Const. art. IV, § 4 (declaring that Members of the Assembly are to be chosen by single member districts).

Courts should not enter the political thicket of partisan gerrymandering, as this Court acknowledged, because to do so would result in judicial involvement in nearly every redistricting map across the country. *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring) ("A decision ordering the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process.").

This Court should also be wary of adopting any statistical one-size-fits-all method that purports to assess the "discriminatory" effect of alleged political gerrymanders. *See, e.g.*, *Roman*, 377 U.S. at 710 ("[I]t is neither practicable nor desirable to establish rigid mathematical standards for evaluating the constitutional validity of a state legislative apportionment scheme under the Equal Protection Clause.").

This Court should reject any statistical model that purports to measure and identify a standard for assessing the "problem" of political gerrymandering for the simple reason that any proposed statistical model uses some version of proportionality as its baseline. A simple example illuminates this reality. If someone were to say that the game was highly competitive and my team scored 63, it provides the recipient of this information no indication about the winner or loser of the game. A listener would need

to know how the other team scored in order to know whether this score of 63 was a winner or loser. Every quantitative method introduced uses some measure as a baseline against which to compare the maps the evaluator is examining. In every method so far put forward to assess "partisanship," the baseline is some measure of the relative proportionality of legislative seats to the statewide vote count by political party. This measure is then used to determine how many legislative seats "should be held" statewide per party, which in fact generally feature district -by -district races between two leading individual candidates between whom voters make a choice. *See, e.g., League of United Latin Am. Citizens v. Perry,* ('LULAC') 548 U.S. 399, 419-20 (2006) (Kennedy, J., concurring in judgment) (rejecting partisan symmetry standard).

Appellees asked that the court below adopt the EG as a metric to determine a prima facie political gerrymander, and the court agreed. *See Whitford*, 218 F. Supp. at 854. The EG is the ultimate in partisanship because the metric wholly relies on measurements of proportionality based on the casting of a vote for a candidate affiliated with a political party on a district by district basis, then aggregated and applied on a statewide basis; it is grounded entirely on the measure of the political party affiliation of the numerous individual candidates for whom voters cast votes. Interestingly, Appellees appear to have retreated from sole reliance on the EG in their Motion to Dismiss or Affirm. *See* Appellees' Mot. to Dismiss or Affirm at 10, 21 (relying on the partisan bias test, sensitivity

testing, mean-median difference, and the 'efficiency gap').

If left intact, the ruling below will have the practical effect of requiring all state legislatures to draw distinct lines that comply with the EG, which is in essence a measure of proportionality and pure partisanship based on the statewide aggregation explained above. Requiring the EG, or any other specific method or methods with proportionality as a basis, will usurp the power the U.S. Constitution vests in state legislatures, and will likewise allow litigants to drag the federal courts into second guessing state mapping choices to enforce such extra-constitutional requirements

II. The Framers Of The Federal And Wisconsin Constitutions Rejected Proportional Representation In Favor Of Electing Representatives On A District Basis.

This Court has repeatedly repudiated proportional representation as the basis on which our electoral system is founded. The Constitution does not guarantee any such right. Nor does the Wisconsin Constitution. Indeed, from the writings of the Framers of the Constitution, to this Court's repeated, forceful rejections of the concept in its voting- and districting-related jurisprudence, and to the pronouncement by Congress that no such right to proportional representation exists, models of proportional representation—and the "wasted" vote concept—are altogether alien to our system of republican government.

A. Political Gerrymanders Have Existed Since The Time Of The Founding And The Framers Enacted A Mechanism To Correct Them.

"Political gerrymanders are not new to the American scene." *Vieth*, 541 U.S. at 274 (plurality opinion). Historical gerrymandering attempts date as far back as the beginning of the 18th century in the Colony of Pennsylvania and the Province of North Carolina. Shortly after the Constitution was ratified, there were. *Id.* For example, there were "allegations that Patrick Henry attempted (unsuccessfully) to gerrymander James Madison out of the First Congress." The," and then there is the 1812 districting in Massachusetts gave the gerrymander its name (a fusion of the name of then Governor Elbridge Gerry with "salamander" referring to the outline of an election district he was credited with forming). *Id.* (internal citations omitted). Of utmost importance is that "the Framers provided a remedy for such practices in the Constitution." *Id.* at 275. Article I, Section 4, provides that "Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Although there was significant opposition to the congressional oversight established by Section 4 in the course of the debates in the Constitutional Convention, "James Madison responded in defense . . . that Congress must be given the power to check partisan manipulation of the election process by the States." *Id.* Congress has exercised its power to regulate election districting many times. *Id.* at 276. In exerting that power, Congress has unequivocally provided support for the

single-member-district-requirement, which includes, for example, "Representatives *must be elected from single-member districts* composed of contiguous territory." *Id*. (internal quotation marks and citation omitted) (emphasis added); *see also* 2 U.S.C. § 2c ("there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established . . . "). The Framers expressly intended redistricting to be left to the state legislatures, and gave Congress the authority to "make or alter such Regulations."

B. The Framers Of The Federal And State Constitutions Contemplated A Winner-Take-All District-Based Electoral System.

The Framers intended a system by which representatives are elected on a districted basis. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1127 (2016) (quoting Federalist No. 54, stating "that as the aggregate number of representatives allotted to the several States is to be . . . founded on the aggregate number of inhabitants, so the right of choosing this allotted number in each State *is to be exercised by such part of the inhabitants as the State itself may designate*.") (emphasis added); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 591 n.2 (2000) (Stevens, J., dissenting) (citing Federalist No. 10 for the proposition that the Constitution's structure is designed to harness the excesses of partisanship). The Framers likewise rejected proportional representation as a basis for which to hold elections, and to undersigned counsel's knowledge, no court in

the United States has ever imposed such a system on our electoral structure. In Federalist No. 35, Alexander Hamilton characterized proportional representation of "each class" as neither feasible nor desirable, and explained, "[t]he idea of an actual representation of all classes of the people, by persons of each class, is altogether visionary. Unless it were expressly provided in the Constitution, that each different occupation should send one or more members, the thing would never take place in practice." The Federalist No. 35 (Alexander Hamilton); *Solomon v. Liberty County*, 899 F.2d 1012, 1036 n.13 (11th Cir. 1990) (en banc) (Tjoflat, J., concurring).

Hamilton further warned against such a form of electing representatives, saying, "[i]t is said to be necessary, that all classes of citizens should have some of their own number in the representative body, in order that their feelings and interests may be the better understood and attended to. But we have seen that this will never happen under any arrangement that leaves the votes of the people free." The Federalist No. 35 (Alexander Hamilton); *Solomon* 899 F.2d at 1036 n.13 (Tjoflat, J., concurring) (citing Federalist No. 35 for the proposition that proportional representation is not an appropriate means of enforcing the Fifteenth Amendment).

What Plaintiffs/Appellees demand here is a fundamental change to the very nature of how people are represented in their legislatures. Apportioning seats based upon a political parties' proportional share of the statewide vote at any given

time runs afoul of the most basic premises upon which our voting system is based.

The Framers intended for factions to counter factions on a continual basis. They did not intend for the type of judicial foray into the electoral realm as described in *Vieth*, and they did not intend for judicially-mandated systems of proportional representation that by their very nature replace the ongoing electoral contest between factions with a system that produces a sort of détente between those factions by proportionally allocating power among them. *See* The Federalist No. 10 (James Madison) (warning against such a system in that "[t]heoretic politicians, who have patronized [the republican form] of government, have erroneously supposed that by reducing mankind to a perfect equality in their *political* rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions . . . . A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking.") (emphasis added). *Brown v. Hartlage*, 456 U.S. 45, 56 (1982) ("[O]ur tradition of political pluralism is partly predicated on the expectation that voters will pursue their individual good through the political process, and that the summation of these individual pursuits will further the collective welfare.").

The Framers understood that "[n]othing can be more fallacious than to found our political calculations on arithmetical principles." The Federalist No. 55 (James Madison) (discussing the

proper number of representatives for Congress and for future reapportionment).

The Framers' thinking undoubtedly applies not only to the federal system but also to the structure of state electoral systems. Indeed, "[t]he roots of Anglo-American political representation lie in the representation of communities, not individuals . . . ." James A. Gardner, *One Person, One Vote and the Possibility of Political Community*, 80 N.C. L. Rev. 1237, 1243-45 (2002). Accordingly, our voting system is premised on the idea that individuals within a community (or district) freely elect their representative, without having their community adjusted by statisticians seeking to account for statewide partisan vote shares. This notion of representation was prevalent during the time of the Founding.

> By the time of the Revolution, the founding generation fully accepted this account of representation. The idea that the political interests of communal groups of individuals correlated strongly with territory served, for example, as an axiom in Madison's famous defense of the large republic in The Federalist No. 10. 'Factious combinations,' Madison argued, are 'less to be dreaded' in a large republic than in a small one because of the greater variety of interests found among a larger populace, a characteristic that is entirely an artifact of geographical scale: 'Extend

> the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens.

James A. Gardner, *Foreword: Representation Without Party: Lessons From State Constitutional Attempts To Control Gerrymandering*, 37 Rutgers L.J. 881, 935-36 (2006). "The idea that territorially defined local communities may reliably serve as proxies for the shared, collective interests of the individuals who inhabit them has remained a fixture in American political thought ever since." *Id*. at 936.

This was true even in Wisconsin. The "delegates to the Wisconsin constitutional convention . . . [understood] 'that each county was regarded in the nature of a small republic, or in the light of a family, and each organized county had a separate interest.'" *Id*. at 936 n.215 (citing and quoting *State ex rel. Attorney Gen. v. Cunningham*, 51 N.W. 724, 739 (Wis. 1892) (Pinney, J., concurring) (quoting Journal of Debates 219-24 (1851)) (also citing 2 Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana 1244 (1850) (remarks of Mr. Dobson) ("Each average county having a separate interest, ought to have a separate representation in the Legislature.")). Unmistakably, the understanding of the Framers, the founding generation, and the framers of Wisconsin's constitution all embraced the doctrine of representation based on single-districts.

An extensive republic would guard against any "local prejudices, or of sinister designs" of the representatives of the people. The Federalist No. 10 (James Madison). Madison concluded, "[i]n the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government." *Id*.

Similar to the Framers' understanding of the U.S. Constitution, the Wisconsin Constitution also embodies the principle that elections are contested at the district level. Wisconsin's Constitution provides that, "[t]he members of the assembly shall be chosen biennially, *by single districts* . . . by the qualified electors of the several districts, such districts to be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable." Wis. Const. art. IV, § 4 (emphasis added).

Like Congress acting in accordance with the Constitution in modifying districting rules, the Wisconsin legislature acted pursuant to its authority and the criteria as set forth in the Wisconsin Constitution when adopting its redistricting plan. *See* U.S. Const. art. I, § 4; Wis. Const. art. IV, §§ 3-4. Furthermore, similar to the U.S. Constitution, Wisconsin's Constitution also provides traditional, neutral redistricting criteria to guide the legislature when drawing legislative districts. Both constitutions envisage districts based on geographic principles, and it is quite clear neither Constitution provides for a right to proportional representation.

Shifting from this understanding of a republican, districted form of electing representatives to one based on mathematical models such as Appellees' 'efficiency gap' is precisely the type of error the Framers warned against.

C. Congressional Involvement In Redistricting Standards Indicates A Requirement For District By District Elections Rather Than Statewide Proportional Elections.

While this case involves a constitutional challenge to state legislative redistricting, it is clear that this Court's decision will likely have an impact on districting at all levels of government. Therefore, an examination of Congress' expressed views on the redistricting process is vital to the Court's consideration.

Redistricting at the congressional level is the product of judicial interpretation of constitutional rights and federal statutes. Congress robustly involved itself in the redistricting process throughout the nineteenth and twentieth centuries. Royce Crocker, Cong. Research Serv., R42831, Congressional Redistricting: An Overview 3-4 (2012) *available at* https://fas.org/sgp/crs/misc/R42831.pdf. In 1842, Congress added a contiguity requirement to the Apportionment Act of that year, and in the Apportionment Act of 1872, Congress added a requirement pertaining to equal numbers of inhabitants per district. With the Apportionment Act of 1901, Congress added a compactness requirement. *See id*. at 4. (citing Apportionment Act of 1842, 5

Stat. 491; Apportionment Act of 1872, 17 Stat. 492; Apportionment Act of 1901, 26 Stat. 736). In 1929, Congress passed the Permanent Apportionment Act, opting to not include districting standards. *Id*. (citing Reapportionment Act of 1929, 46 Stat. 21). For nearly forty years after the adoption of the Permanent Apportionment Act, no congressional districting standards were imposed. *Id*. Then, in 1967, Congress re-imposed geographic-based districting requirement. *Id*. (citing 81 Stat. 581 (1967) (codified at 2 U.S.C. § 2c)).

There can be no question that Congress intended for congressional elections to occur on a district by district basis, rather than a statewide basis.

III. This Court Has Confirmed That The Constitution's Language Adopted The Framers' Views Rejecting Proportional Representation.

It was with careful deliberation that the Framers accorded such power not to the judiciary, but to the people's representatives. *Baker v. Carr*, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting); *see also Vieth*, 541 U.S. at 275 ("Article 1, § 4, while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to 'make or alter' those districts if it wished.").

The United States system of legislative apportionment is "direct territorial representation by single-member districts." *Connor v. Finch*, 431 U.S.

407, 428 (1977); *see also* Wis. Const. art. IV, § 4 (providing that members of the Assembly be chosen by single districts). Intrinsic in such a districting system "is that voters cast votes for candidates in their districts, not for a statewide slate of legislative candidates put forward by the parties." *Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring). Accordingly, "efforts to determine party voting strength presuppose a norm that does not exist -- statewide elections for representatives along party lines." *Id.*[4]

It is inherent in our winner-take-all system that "[d]istrict-based elections hardly ever produce a perfect fit between votes and representation."

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[4] This system of majoritarian elections stands in stark contrast to the plurality methods and other electoral systems. According to at least one academic review, majoritarian systems are the primary election system used by democracies around the world. The vast majority of former British Colonies have clearly adopted a majoritarian system, while a significant number of countries have adopted and utilize explicitly proportional elections. *See* Pippa Norris, *Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems*, 18 Int. Pol. Sci. Rev. 297 (1997) *available at* https://sites.hks.harvard.edu/fs/pnorris/Acrobat/IPSR%20Choosing%20Electoral%20Systems.pdf). This article indicates that when governmental systems are intended to be structured with some method of a proportionality requirement, governments know how to make such structures expressly clear.

Bandemer, 478 U.S. at 133. As the Court rightly recognized, inviting an attack on "minor departures from some supposed norm" would be "so much at odds with our history and experience." *Id*. at 133-34. Simply put, in a districted, republican form of government, it is often the case that "the failure of the minority to have legislative seats in proportion to its population emerges more as a function of losing elections" than any other supposed factor. *Id*. at 137.

In the 2016 elections for State Senate in Wisconsin, there were five districts where the Republican Party did not nominate a general election candidate for the State Senate, and three districts where the Democratic Party did not nominate a general election candidate. Wis. Elections Comm., 2016 Fall General Election Results, Statewide Results All Offices (post-Presidential recount).pdf (2016), *available at* http://elections.wi.gov/elections-voting/results/2016/fall-general. Similarly, in the 2016 elections for the United States Congress there were 29 districts where either the Republican or Democratic Party did not nominate a candidate for Congress, including one district in Wisconsin. Election 2016, House Election Results, N.Y. Times (Aug. 1, 2017, 11:22 AM), https://www.nytimes.com/elections/results/house? mcubz=0.

Adopting a proportional system of representation would provide certain groups with an undeserved windfall of political influence despite the fact that there has been no denial, impairment, or restriction of any person's right to vote or to have his or her vote counted. *See Mobile v. Bolden*, 446 U.S.

55, 123-24 (Marshall, J., dissenting). Furthermore, our districted system is meant to shield against such debasing principles that would serve to clump individuals into calculated groups for arriving at a ratio of allotted seats. Rather, our republic is established to ensure that the people of each district are represented by the elected *individual* who receives the most votes, regardless of how voters in other districts may vote. Certainly "[l]egislators do not represent faceless numbers" but instead "represent people, or, more accurately, a majority of the voters in their districts." *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 750-51 (1964) (Stewart, J., dissenting) (also noting that "population factors must often to some degree be subordinated in devising a legislative apportionment plan which is to achieve the important goal of ensuring a fair, effective, and balanced representation of the regional, social, and economic interests within a State."). Appellees' attempt at convincing the Court to adopt a proportional system is not based in the Constitution but rather their own notion of how the Constitution needs to be twisted to achieve their partisan goals. Voters are not merely unchanging, faceless numbers who would vote for one particular party or the other no matter what candidate choices they face. Voters have preferences based on any number of wide-ranging factors – such preferences unavoidably being a mutable characteristic.

A. The Supreme Court's Jurisprudence Recognizes That There Is No Right To Proportional Representation For Political Parties.

The Framers understood the dangers of proportional representation to our system of government, and the Court "has sternly set its face against the claim, however phrased, that the Constitution somehow guarantees proportional representation." *Mobile*, 446 U.S. at 79; *see* The Federalist No. 55 (James Madison) ("Nothing can be more fallacious than to found our political calculations on arithmetical principles."); *see Lucas*, 377 U.S. at 750 n.12, (Stewart, J., dissenting) (noting that the system of proportional representation has not been adopted "because electoral systems are intended to serve functions other than satisfying mathematical theories"). When debate about the government implicates basic values, such as the structure of our electoral system, "[c]oncern for accommodation of factions has seldom been far away;" courts have routinely noted the difficulties that would be posed by a constitutional command of proportional representation, and have determined that "proportional representation as a measure of due strength will not do" because it is "itself a political alien, antithetical to our basic devotion to republican government." *League of United Latin Am. Citizens, Council No. 4386 v. Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1507 n.3 (5th Cir. 1987) (Higginbotham, J., dissenting) (citing *Katzenbach v. Morgan*, 384 U.S. 641 (1966); The Federalist No. 10 (James Madison); F. McDonald, Novas Ordo

Seclorum: The Intellectual Origins of the Constitution 162-64 (1985)).

The Court in *Bandemer* recognized these longstanding principles, noting that the Court's precedent "clearly foreclose[s] any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *Bandemer*, 478 U.S. at 130 (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 153, 156, 160 (1971); *White v. Regester*, 412 U.S. 755, 765-66 (1973).

Moreover, a popular majority in statewide races in no way establishes majority status for district contests. If it did, "one would have to believe that the only factor determining voting behavior at all levels is political affiliation," which "is assuredly not true." *Vieth*, 541 U.S. at 288-89. As the Court explained:

> There is no statewide vote in this country for the House of Representatives or the state legislature. Rather, there are separate elections between separate candidates in separate districts, and that is all there is. If the districts change, the candidates change, their strengths and weaknesses change, their campaigns change, their ability to raise money changes, the issues change--everything changes. Political parties do not

> compete for the highest statewide vote totals or the highest mean district vote percentages: They compete for specific seats.

Id. at 288-89 (citing and quoting Lowenstein & Steinberg, The Quest for Legislative Districting in the Public Interest: Elusive or Illusory, 33 UCLA L. Rev. 1, 59-60 (1985); Schuck, *Partisan Gerrymandering: A Political Problem Without Judicial Solution*, in Political Gerrymandering and the Courts 240, 241 (B. Grofman ed. 1990)). A forthcoming article observes that parties and candidates will adapt as district lines change. Jacob Eisler, *Partisan Gerrymandering and the Illusion of Unfairness,* 67 Cath. U. L. Rev (forthcoming 2018), *available at* https://ssrn.com/abstract=2993876.

Indeed, if proportional representation based on statewide vote were the foundation used to determine allocation of seats in a legislative body, districted elections become obsolete. This cannot be what the Constitution requires based on the history of its founding and the recent experiences enforcing the Voting Rights Act. A number of civil rights cases demonstrate that at-large elections for districts resulted in unconstitutional discrimination, and this Court and numerous other federal courts have ordered the creation of single member districts in order to ensure that rights of individuals were not submerged in at-large elections. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30 (1986).

A different three-judge panel of the United States District Court for the Western District of

Wisconsin, in an earlier decision, properly understood the issue as being one of "understand[ing] the difference between popular and legislative majorities that is inherent in a districted legislature as opposed to one in which legislators are elected at large . . . . [i]n a districted legislature, as distinct from one in which legislators are chosen by proportional representation, small differences in voting strength can translate into large differences in representation." *Prosser v. Elections Bd.*, 793 F. Supp. 859, 864, 868 (W.D. Wis. 1992).

Allowing district courts "to strike down apportionment plans on the basis of their prognostications as to the outcome of future elections or future apportionments invites 'findings' on matters as to which neither judges nor anyone else can have any confidence." *Bandemer*, 478 U.S. at 160. A striking example of this is found in *Vieth*. There, Justice Scalia discusses the case in which the U.S. District Court for the Eastern District of North Carolina ruled that Plaintiffs brought a successful partisan gerrymandering claim. In that case, it was shown that North Carolina's system of electing superior court judges resulted in a Republican never winning a court seat and that lack of success would likely continue. Five days after the district court ruling "'every Republican candidate standing for the office of superior court judge was victorious at the state level,' a result which the Fourth Circuit thought (with good reason) 'directly at odds with the recent prediction by the district court,' causing it to remand the case for reconsideration. *See Vieth*, 541 U.S. at 287 n.8 (citing *Republican Party v. Hunt*, No. 94-2410, 1996 U.S. App. LEXIS 2029 (4th Cir. Feb.

12, 1996)); *see also Bandemer*, 478 U.S. at 152 (O'Connor, J., concurring) (noting that there was no proof that partisan gerrymandering is an evil that the vast resources of the major political parties could not check and correct).

Justice O'Connor's prediction in *Bandemer* proved prescient. First, in 1988, two years after *Bandemer* was decided—and under the same map—control of the Indiana House was divided between two political parties each holding 50 seats. Two years later, in 1990, the Democrats gained a majority of the Indiana House and made substantial gains in the Senate. *See* Election History for INDIANA, Polidata.org, http://www.polidata.us/books/in/pub/inehcxc1.pdf (last visited July 22, 2017). Justice O'Connor's view of adaptation as a means of surviving and thriving as a political party proved to be accurate in Indiana. One recent article explored the notion that voters can switch parties in light to redistricting while others view partisanship as an immutable characteristic like race. *See* Eisler, *Partisan Gerrymandering and the Illusion of Unfairness* at 44-47. In judicial examples such as *Republican Party of N.C. v. Hunt*, 1996 U.S. App. LEXIS 2029 (4th Cir. 1996) and *Bandemer*, 478 U.S. at 152 (O'Connor, J., concurring), the notion of parties and candidates adapting to voters appears to have proven to more accurately reflect the reality of the modern American electorate.

B. Even In The Racial Gerrymandering And Voting Rights Act Contexts, Congress And This Court Do Not Recognize A Right To Proportional Representation By Race.

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, provides, in part, "that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." In other words, the "right to equal participation in the electoral process does not protect any 'political group,' however defined, from electoral defeat." *Mobile*, 446 U.S. at 77; *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994) ("[T]here are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground…."); *See McGhee v. Granville County, N.C.*, 860 F.2d 110, 117 (4th Cir. 1988) ("[T]he [*Gingles*] Court noted that the size and compactness requirement confines dilution claims to situations where diminution of voting power is proximately caused by the districting plan, and thus *would not assure racial minorities proportional representation*.") (quotation marks and citations omitted). This was an area of intense debate when the 1982 Amendments were passed and was added so that "it puts to rest any concerns that have been raised about racial quotas." S. Rep. No. 417, 97th Cong., 2d Sess. (1982), reprinted in 1982

U.S.C.C.A.N. 177. An individual's right to vote does not carry with it a right that the individual's political preferences be proportionally represented based on the overall voting strength of the political party he or she chooses to support. Recognizing such a right "would effectively collapse the 'fundamental distinction between state action that inhibits an individual's right to vote and state action that affects the political strength of various groups that compete for leadership in a democratically governed community.'" *Bandemer*, 478 U.S. at 150-51 (O'Connor, J., concurring) (citing *Mobile*, 446 U.S. at 83 (Stevens, J., concurring in judgment)).

This Court has refused to treat proportionality as either a "safe harbor" for jurisdictions or as a limit for plaintiffs, but does use proportionality as one of the factors in the totality of the circumstances so that it can be a practical, if not a per se, "safe harbor." *Johnson*, 512 U.S. at 1019. The court continued explaining that in the Voting Rights Act context, the probative value of proportionality in determining a violation is limited:

> It is enough to say that, while proportionality in the sense used here is obviously an indication that minority voters have an equal opportunity, in spite of racial polarization, 'to participate in the political process and to elect candidates of their choice,' 42 U.S.C. §1973(b) the degree of probative value assigned to proportionality may vary with other facts. No single statistic provides courts with a shortcut to

> determine whether a set of single member districts unlawfully dilutes minority voting strength.
>
> *Id* at 1020-21.

C. The Fourteenth Amendment Guarantees An Individual's Right To Equal Protection Of The Law, Not The Rights Of Any Political Party.

While it is true that the right of a person to vote on an equal basis with other voters may draw "much of its significance from the political associations that its exercise reflects," the Court's decisions hold squarely that political groups themselves have no independent constitutional claim to assured representation. *See Bandemer*, 478 U.S. at 150 (O'Connor, J. concurring) (stating that there is no constitutional entitlement to group representation and stating that "political groups themselves [do not] have an independent constitutional claim to representation.") (citing *Mobile*, 446 U.S. at 78-79). Simply put, "[w]hatever appeal [proportional representation] may have as a matter of political theory, it is not the law." *Mobile*, 446 U.S. at 75. Such "entitlement . . . simply is not to be found in the Constitution of the United States." *Id*. at 76.

Indeed, "the Constitution . . . guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups. It nowhere says that farmers or urban dwellers, Christian fundamentalists or Jews,

Republicans or Democrats, must be accorded political strength proportionate to their numbers." *Vieth*, 541 U.S. at 288. This electoral process structure is meant to ensure equality of opportunity, not equality of outcome. As Judge Easterbrook once questioned, "[i]f specified groups are entitled to 'their' members in the legislature, why bother with elections?" *Baird v. Indianapolis*, 976 F.2d 357, 359 (7th Cir. 1992) (Easterbrook, J.); *Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring) (noting that the constitutional basis for intervening is particularly tenuous when the group involved in such a challenge is a major political party, "while membership in a racial group is an immutable characteristic, voters can -- and often do -- move from one party to the other or support candidates from both parties.").

IV. The 'Efficiency Gap' Is Premised On A Constitutional Right To Proportional Representation And This Court Should Reject It.

As is demonstrated *supra*, there is no constitutional right to proportional representation. But the 'efficiency gap' is premised on a constitutional right to representation that is proportional to a political party's statewide vote share.

To demonstrate discriminatory effect, the two-judge majority opinion relies on comparing the Republican Assembly statewide vote share to the number of Republican Assembly members. *See Whitford*, 218 F. Supp. 3d at 899. The two-judge majority found the record in *Whitford* to be more

complete than in *Bandemer*, and noted that the record in *Whitford* illustrates that in 2012, Democrats received a statewide majority of Assembly votes but won less than half of the Assembly seats. *See id*. at 902. Similarly, in 2014, Democrats received less than half of the statewide Assembly votes and won even fewer Assembly seats. *See id*.

Using the 'efficiency gap', the two-judge majority explains that the test "requires totaling, for each party, statewide, the number of votes cast for the losing candidates in district races along with the number of votes cast for the winning candidates in excess of 50% plus one votes necessary to secure the candidate's victory. ..." *Id*. at 903. Stated differently, the 'efficiency gap' "can be viewed as a measure of the proportion of excess seats that a party secured in an election beyond what the party would be expected to obtain with a given share of the vote." *Id*. at 904; *see also id*. at 947 (Griesbach, J., dissenting) (stating that the 'efficiency gap' test is premised on "comparing legislative seats to statewide votes ….").

The results of this test show that in 2012, when Republicans won 61% of the Assembly seats with 48% of the statewide total, there was a 13% 'efficiency gap'. *See id*. at 906. Similarly, in 2014, Republicans won 52% of the statewide vote and won 64% of the Assembly seats, which yielded an 'efficiency gap' of 10%. *See id*. As a result, the two-judge majority concluded that the enacted plan burdens Democrats' representational rights by "impeding their ability to translate their votes into legislative seats." *Id*. at 910.

According to the two-judge majority, adopting the 'efficiency gap' does not constitutionally require proportional representation. Rather, the 'efficiency gap' simply compares the "ratio of votes to seats in assessing a plan's partisan effect." *Id*. at 907.

First, the two-judge majority's analysis is precisely what Justice O'Connor feared in her *Bandemer* concurrence, namely, that adopting the 'efficiency gap' will guarantee a constitutional right to *some* level of political party proportionality. *See Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring) ("It is predictable that the courts will respond by moving away from the nebulous standard a plurality of the Court fashions today and toward some form of rough proportional representation for all political groups."); *see also id*. at 159; *see also Vieth*, 541 U.S. at 282. The problem with comparing statewide vote totals to the number of seats won in a legislative body is that "voters cast votes for candidates in their districts, not for a statewide slate of legislative candidates put forward by the parties." *Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring). The comparison between statewide vote share and the number of Assembly districts won as a manner of gauging party strength "presuppose[s] a norm that does not exist." *Id*; *see Vieth*, 541 U.S. at 287-88 (plurality opinion) ("[A]ppellants' test would invalidate the districting only when it prevents a majority of the electorate from electing a majority of representatives....this standard rests upon the principle that groups (or at least political-action groups) have a right to proportional representation. But the Constitution contains no such principle."); *see also id*. at 308 (Kennedy, J., concurring) ("The

fairness principle appellants propose is that a majority of voters in the Commonwealth should be able to elect a majority of the Commonwealth's congressional delegation. There is no authority for this precept.").

Furthermore, as the two-judge majority makes clear, the "ratio of votes to seats" is used to determine unconstitutional partisan intent. *Whitford*, 218 F. Supp. 3d at 907. The 'efficiency gap' is therefore premised on "a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes." *Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring). The problem with adopting the 'efficiency gap' and comparing statewide vote totals to number of seats won is that it is in tension with our district based winner-take-all elections. *See id*. Adopting the 'efficiency gap' test delegitimizes district elections, trading voting for district specific candidates as opposed to a statewide slate of candidates put forward by the political party. *See id*. This form of elections does not exist in the United States. *See id*. Furthermore, comparing political party's statewide vote totals with the number of seats won "is a rough measure at best." *See LULAC*, 548 U.S. at 419 (Kennedy, J., concurring in judgment).

Second, political party affiliation is an inherently mutable characteristic as voters often vote for different parties in both different elections *and* in the same election. *See Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring); *Vieth*, 541 U.S. at 287 ("Political affiliation is not an immutable characteristic, but may shift from one election to the

next; and even within a given election, not all voters follow the party line."). This is aptly demonstrated in the amicus brief submitted by the NRCC showing how many voters in Wisconsin, Pennsylvania, and Michigan, changed their vote from President Obama in 2012 to President Trump in 2016. *See* Br. of NRCC as Amicus Curiae at 43-44. In fact, twenty-two Wisconsin counties that voted for President Obama in 2012 voted for President Trump in 2016. *See id*. at 44.

Third, the "efficiency gap" takes a myopic view of political power, viewing political power solely in terms of a political party's aggregated ability to win elections. But this Court has previously rejected that view stating that "the power to influence the political process is not limited to winning elections." *Bandemer*, 478 U.S. at 132. As is demonstrated *infra* at 33-36, those who vote for a losing candidate may still influence policy and legislation. *See id*. The "efficiency gap" is unable to account for this political influence and is therefore a deficient test for determining whether a state legislature has violated an individual's constitutional rights.

V. The "Efficiency Gap's" Concept Of A "Wasted Vote" Should Be Rejected By This Court.

The suggestion that voting for a losing candidate is somehow "wasted" is highly offensive to the very concept of democracy, and should be firmly rejected by the Court. An elected candidate represents all of the residents in a given electoral jurisdiction, not merely the individuals or factions

who voted for him or her. Indeed, "[a]n individual or a group of individuals who votes for a losing candidate" is nonetheless "adequately represented by the winning candidate" and has just "as much opportunity to influence that candidate as other voters in the district." *Bandemer*, 478 U.S. at 131-32 (citing *Mobile*, 446 U.S. at 111 n.7 (Marshall, J., dissenting)).

The Framers understood voters' influence on the policymaking of legislators, and likely would be appalled at the idea of a "wasted" vote. As Federalist No. 35 emphatically states:

> Is it not natural that a man who is a candidate for the favor of the people, and who is dependent on the suffrages of his fellow-citizens for the continuance of his public honors, should take care to inform himself of their dispositions and inclinations, and should be willing to allow them their proper degree of influence upon his conduct?

The Federalist No. 35 (Alexander Hamilton). This view has been recognized in American jurisprudence. *See, e.g., Gordon v. Holder,* 721 F.3d 638, 650 (D.C. Cir. 2013) ("Is it not natural that a man who is a candidate for the favor of the people, . . . should be willing to allow them their proper degree of influence upon his conduct? This dependence, and the necessity of being bound himself…are the strong chords of sympathy between the representative and the constituent.") (quoting The Federalist 35 (Alexander Hamilton))). The Federalist viewpoint

has also received empirical support. *See* William H. Page, *Interest Groups, Antitrust, and State Regulation: Parker v. Brown in the Economic Theory of Legislation*, 1987 Duke L.J. 618, 630 (The federalists "saw the need for individual legislators to represent a broad range of interests rather than a specific group . . . .").

A political party's failure at the polls does not entitle any political party to claim "that members of a political minority have suffered an impermissible dilution of political power." *Bandemer*, 478 U.S. at 131-32. Instead, this Court assumes that the political party has the power to still influence "governmental decision making." *Id*.

Undeniably, "[a]n individual or a group of individuals who votes for a losing candidate is usually 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. Deficient representation cannot be assumed even in a district where a group loses election after election because it cannot be presumed that the elected official will entirely ignore the interests of voters who did not vote for the official. The "simple fact of an apportionment scheme that makes winning elections more difficult" does not mean a group's electoral power is unconstitutionally diminished. *Bandemer*, 478 U.S. at 131-32 (citing *Mobile*, 446 U.S. at 111 n.7 (Marshall, J., dissenting)).

As this Court previously stated,

> As our system has it, one candidate wins, the others lose. Arguably the losing candidates' supporters are without representation since the men they voted for have been defeated; arguably they have been denied equal protection of the laws since they have no legislative voice of their own. This is true of both single-member *and* multi-member districts. But we have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates, even in those so-called "safe" districts where the same party wins year after year.

Whitcomb, 403 U.S. at 153.

Although a republican form of government necessarily limits direct public participation in government policymaking decisions, *see* Federalist No. 10, it is readily apparent and well documented that elected officials are responsive to public opinion. For example, in a research article considering the impact of public opinion on public policy, major findings included, *inter alia*, that the impact of public opinion is substantial, the impact of opinion remains strong even when the activities of political organizations and elites are taken into account, and responsiveness appears not to have changed significantly over time. *See* Paul Burstein, *The Impact of Public Opinion on Public Policy: A Review and an Agenda*, 56 Pol. Research Q. 29 (2003).

Furthermore, studies have demonstrated that a voter's policy preferences predict aggregate roll-call behavior of Senators. *See* John D. Griffin & Brian Newman, *Are Voters Better Represented?* 67 J. of Pol. 1206, 1215-18 (2005).

The fact that Appellees' standard is premised on the idea that votes are "wasted" is foreign to our constitutional government. This Court should reject it.

VI. Conclusion

For the foregoing reasons, along with the arguments advanced by the State of Wisconsin and the many arguments of other *amici* in support of the State, this Court should reverse the opinion of the court below.

Respectfully submitted,

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