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 REPUBLICAN STATE LEADERSHIP COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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Table of Contents

Table of Authorities

CASES

CONSTITUTION

RULES

OTHER AUTHORITIES

Interest of the *Amicus Curiae*[1]

The Republican State Leadership Committee ("RSLC") is the Nation's largest organization representing Republican elected state officials. RSLC is the parent organization of the Republican Legislative Campaign Committee, the only national organization exclusively dedicated to electing Republicans to state legislatures. RSLC's state-legislator members are key stakeholders in the redistricting process in their respective states. Other organizations within RSLC include the Republican Lieutenant Governors Association and the Republican Secretaries of State Committee. Secretaries of State are the principal election officials in most states. Accordingly, RSLC members are, or have been, active participants in the crafting of representational districts in their states. RSLC submits this brief because affirming the decision below would undermine state officials' role in redistricting and unravel this Court's longstanding tradition of reviewing redistricting only to enforce clear legal standards, rather than freewheeling views on public policy, social science, and political philosophy.

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[1] Pursuant to Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of *amicus* briefs in support of either or no party are filed with the clerk.

Introduction and Summary of Argument

Virtually every federal-court redistricting decision issued since this Court first announced the one-person, one-vote standard confirms that "legislative reapportionment is primarily a matter for legislative consideration and determination," *Reynolds v. Sims*, 377 U.S. 533, 586 (1964), and that the judiciary should review redistricting only "with extraordinary caution," *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Plaintiffs ask this Court to reject this time-honored approach of caution and restraint and to revolutionize the relationship between the federal courts and state governments. A holding in their favor would politicize the courts and would go far beyond intervention in the "political thicket"[2]; it would impale the judiciary on its thorns.

RSLC opposes this request and Plaintiffs' theories of relief. It agrees with the State Defendants that Plaintiffs' various social-science standards are "the opposite of limited and precise" and that their claim is non-justiciable. State Br. at 23. Additionally, RSLC believes Plaintiffs' case has no basis in "well developed and familiar" equal-protection and free-speech standards that must provide the framework for judicial review. *Baker v. Carr*, 369 U.S. 224, 227 (1962). The concurring opinion in *Vieth v. Jubelirer* that left open the possibility of a justiciable political-gerrymandering cause of action identified a violation of these standards as the *sine qua non* of any viable claim. 541 U.S. 267, 314 (2004) (Kennedy, J., concurring). Yet the district

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[2] *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

court's test was not grounded in those standards, and Plaintiffs have not satisfied them.

Justiciability concerns aside, no equal-protection, free-speech, or free-association standards are violated here, and they may never be violated in cases between major political parties in a healthy two-party system. That is first and foremost because "political classifications" are not "unrelated to the [legitimate] aims of apportionment" and are thus "*permissible*" classifications. *Id.* (emphasis added). The district court's creation of an "intent" element founded on racial-discrimination doctrine ignored this crucial distinction between racial classifications, which are inherently suspect, and political ones, which are not. It erroneously established a standard whereby the Democratic and Republican Parties—which are comprised of millions of members, obtain millions of dollars in funding each year, and are fully capable of protecting their interests in the political process—enjoy the same standing in the equal-protection matrix as "discrete and insular minorities," *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938), or individuals with "an immutable characteristic which its possessors are powerless to escape or set aside." *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 360 (1978). Far from "familiar," the district court's standard is unheard of.

Secondly, "political gerrymandering" of the genre alleged here does not place a meaningful burden on any fundamental right or liberty interest. The Court has held that partisan intent does not invalidate a voting restriction that does not otherwise place a severe burden on the right to vote, *Crawford v. Marion Cty.*

Election Bd., 553 U.S. 181, 203–04 (2008), and partisan intent also does not itself amount to vote dilution, *Gaffney v. Cummings*, 412 U.S. 735, 750 (1973). But, apart from claims of partisanship, there is no cognizable burden here because nothing stands between any voter, candidate, or political party and the state's ballot. Nor is there cognizable vote dilution because all votes are counted equally and all residents are equally represented. Existing standards presume neither that political parties are entitled to elect their preferred candidates nor that the representatives elected in each district will fail to represent the interests of individuals who did not vote for them.

In concluding otherwise, the district court applied a more lenient standard than exists for racial minorities under the Voting Rights Act as set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986). Under that test, a minority group comprising approximately 50% of the population and holding approximately 40% of the seats would not have a viable claim of vote dilution, especially where there is substantial crossover voting each election. That a major political party has been deemed to have greater rights to representation under the Constitution than a racial minority has under a civil-rights statute is nothing short of absurd.

Third, there is no cognizable burden on speech or association because no speech is restrained and no reasonable person would choose to forego speech or association for fear of gerrymandering. *Contrast Elrod v. Burns*, 427 U.S. 347, 357 (1976). There is also no burden on association rights such as compelled association, *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572–82 (2000), or non-association, *Tashjian v.*

Republican Party of Conn., 479 U.S. 208, 214–17 (1986). Plaintiffs are not claiming that government regulation is restricting their speech, chilling their speech, or regulating their internal affairs. They are asserting a right for their candidates to be elected and for government control. The First Amendment does not confer that right.

In short, no "well developed and familiar" standard supports Plaintiffs' claims. *Baker*, 369 U.S. at 227. Indeed, in the war between two well-matched foes like the Republican and Democratic Parties, which are more than capable of defending their interests in the political process, it is doubtful that a violation of "well developed and familiar" constitutional standards will ever occur. If the Court chooses to leave open the possibility of future political-gerrymandering claims, it should at least make clear that this possibility is reserved for a *different political paradigm*, such as one involving the fencing out of a discrete and insular minority party, or the seizure of complete control of government power by one party, such that a vote for the opposing party literally does not count. That is not this case. Instead, this case should be viewed as raising, if anything, questions under the Guarantee Clause, which is the proper conceptual framework by which to view arguments that the electoral process is not sufficiently responsive to popular will.

Finally, even if the Court were inclined to innovate in this area, the purported social harm to be remedied, political polarization, has little to do with "partisan gerrymandering." Politics in the United States are polarized and have been for decades for a variety of reasons, and it is highly unlikely that partisan

redistricting contributes to this polarization. If it did, one would expect the U.S. Senate to be less polarized than the House of Representatives, and that is manifestly not the case. Even if the Court views gerrymandering as a "disease," there is no cure available from the judiciary, and the purported cure posed here carries far graver consequences to the redistricting process than judicial abstention.

Accordingly, Plaintiffs' challenge should be rejected, and the decision below should be reversed.

Argument

I. There Is No Cognizable Claim Here Under Familiar and Well-Developed Constitutional Standards

When this Court first waded into the "political thicket," it intended neither to usurp redistricting from state control nor to expunge the typical political concerns that play into that process, but rather to correct actual inequality either involving an impermissible classification or an undue burden on the fundamental right to vote. That is evidenced in virtually every federal redistricting case since 1964, which all assert that redistricting is a political process to be carried out by political actors in all but extraordinary circumstances. *Reynolds v. Sims*, 377 U.S. 533, 586 (1964); *Miller v. Johnson*, 515 U.S. 900, 916 (1995); *Chapman v. Meier*, 420 U.S. 1, 27 (1975) ("[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court[.]"); *Connor v. Finch,* 431 U.S. 407, 414–15 (1977) ("[A] state legislature is the institution that is by far the best

situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality[.]"); *Growe v. Emison,* 507 U.S. 25, 34 (1993) ("Today we renew our adherence to the principle[]…that the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts[.]"); *Voinovich v. Quilter,* 507 U.S. 146, 156 (1993) ("Time and again we have emphasized that reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.") (quotation marks omitted); *Easley v. Cromartie*, 532 U.S. 234, 242 (2001); *Perry v. Perez*, 565 U.S. 388, 392 (2012) ("Redistricting is primarily the duty and responsibility of the State.") (quotation marks omitted); *League of United Latin Am. Citizens v. Perry,* 548 U.S. 399, 414–415 (2006) ("*LULAC*") (explaining that the Constitution "leaves with the States primary responsibility for the apportionment of their federal congressional…districts") (quotation marks omitted). *See also*, *e.g., Montes v. City of Yakima*, No. 12-cv-3108, 2015 WL 11120964, *4 (E.D. Wa. Feb. 17, 2015); *Evenwel v. Perry,* No. A-14-CV-335, 2014 WL 5780507, *4 n.5 (W.D. Tex. Nov. 5, 2014); *Harris v. McCrory,* No. 1:13-cv-949, 2014 WL 12600710, *2 (M.D.N.C. May 22, 2014); *Ariz. State Legislature v. Ariz. Independent Redistricting Comm'n,* 997 F. Supp. 2d 1047, 1054 (D. Ariz. 2014); *Kostick v. Nago*, 960 F. Supp. 2d 1074, 1102 n. 17 (D. Hawaii 2013); *Essex v. Kobach*, 874 F. Supp. 2d 1069, 1075 (D. Kan. 2012); *Corbett v. Sullivan,* 202 F. Supp. 2d 972, 981 (E.D. Mo. 2002); *Johnson v. Mortham,* 926 F. Supp. 1460, 1504 (N.D. Fla. 1996); *NAACP v. Austin,* 857 F. Supp. 560, 567 (E.D. Mich. 1994); *Dye v. McKeithen*, 856 F. Supp. 303,

313 (W.D. La. 1994); *Gorin v. Karpan,* 775 F. Supp. 1430, 1445 (D. Wyo. 1991); *LaComb v. Growe,* 541 F. Supp. 160, 162 (D. Minn. 1982); *O'Sullivan v. Brier,* 540 F. Supp. 1200, 1202 (D. Kan. 1982); *Terrazas v. Clements,* 537 F. Supp. 514, 527 (N.D. Tex. 1982); *Graves v. Barnes,* 446 F. Supp. 560, 564 (W.D. Tex. 1977); *Paige v. Gray*, 437 F. Supp. 137, 163 (M.D. Ga. 1977).

Accordingly, the Court's redistricting case law is predicated on neutral rules of decision founded in "well developed and familiar" equal-protection standards, *Baker v. Carr*, 369 U.S. 224, 227 (1962), and the Court has never claimed responsibility to enforce vague notions of what is and is not compatible with "democratic principles." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) (quotation marks omitted).

But there are no "well developed and familiar" constitutional standards that would support a claim for relief in this case or any case like it. Accordingly, in *Vieth v. Jubelirer*, 541 U.S. 267, 271–306 (2004), four Justices of this Court rejected on justiciability grounds Fourteenth and First Amendment "partisan gerrymandering" claims against Pennsylvania's 2001 congressional plan. The *Vieth* plurality opinion speaks for itself and is as compelling today as in 2004. It goes without saying that Plaintiffs here have no claim under that opinion.

Additionally, the concurring opinion of Justice Kennedy, *see Vieth*, 541 U.S. at 306–17, does not support relief in this case or even in this political paradigm. Even while acknowledging the "weighty arguments for holding cases like these to be

nonjusticiable" and conceding that "those arguments may prevail in the long run," 541 U.S. at 309, the Kennedy opinion observed that "[i]t is not in our tradition to foreclose the judicial process from the attempt to define standards and remedies where it is alleged that a constitutional right is burdened or denied," *id.* at 309–10, and that "the impossibility of full analytical satisfaction is reason to err on the side of caution," *id.* at 311.

But this was a position of judicial restraint, not an invitation for judicial activism. The concurring opinion expressly identified a sufficient basis to dispose of the case at hand "under the governing Fourteenth Amendment standard": because the challengers failed to show a "burden" on "their representational rights," their allegation "that the legislature adopted political classifications" stated "no constitutional flaw." *Id.* at 313. Thus, like *Baker v. Carr*, the Kennedy opinion directs the analysis to "the more abstract standards that guide analysis of all Fourteenth Amendment claims," and, because political classifications are not inherently suspect, a plaintiff must identify "a subsidiary standard" to "show how an otherwise permissible classification, as applied, burdens representational rights." *Id.* at 310, 313. Failing at that, justiciability concerns aside, a plaintiff "states no valid claim on which relief may be granted." *Id.* at 313. *See also LULAC*, 548 U.S. at 418 (opinion of Kennedy, J.) ("[A] successful claim attempting to identify unconstitutional acts of partisan gerrymandering must…: show a burden, as measured by a reliable standard, on the complainants' representational rights.").

The decision below did not apply the familiar standards necessary to show a burden on representational rights, and Plaintiffs cannot meet them. The district court could only rule for Plaintiffs by a sleight of hand in citing and summarizing literally dozens of Equal Protection and First Amendment precedents, while ignoring that none of those decisions, nor the legal doctrines they developed, would support a claim for relief. *Whitford v. Gill*, 218 F. Supp. 3d 837, 864–891 (W.D. Wis. 2016). As a result, its three-part test is a cross-breed of half-articulated doctrines that the district court applied only up until the point where each given doctrine would refute Plaintiffs' claim; on reaching that point, the court selected a new doctrine to continue the analysis. Whatever may be said for this approach in terms of creativity, it has nothing to do with familiar and well-developed standards.

A. No Familiar and Well-Developed Equal-Protection Standard Has Been Violated

The court first relied on causes of action providing relief against legislation passed with an impermissible motive, such as *Washington v. Davis*, 426 U.S. 229, 240 (1976), and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977). *Whitford*, 218 F. Supp. 3d at 884. But in citing these for the generic proposition that "[t]he Supreme Court has stressed the basic equal protection principle that invidious quality of law must ultimately be traced to a discriminatory purpose," *id.*, the court bypassed what "invidious" means: a classification bearing no "reasonable and just relation to the act in respect to which the classification is proposed." *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U.S. 150, 155 (1897). The court

neglected the *other side* of the equal-protection coin, which is that if a state's classification is *not* suspect, it does *not* warrant heightened scrutiny, and federal oversight is limited to rational-basis review. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

The racial-classification standards therefore do not apply to "political classifications," because they are "*permissible*." *Vieth*, 541 U.S. at 314 (Kennedy, J.) (emphasis added). The district court's "intent" element ignored this distinction and thereby did not address the "obstacles" that Justice Kennedy's *Vieth* opinion identified as requiring resolution. 541 U.S. at 306. For instance, the court was obliged to "rest" its holding on "something more than the conclusion that political classifications were applied" and to identify how they were applied in "an invidious manner or in a way unrelated to any legitimate legislative objective." *Id.* at 307. That analysis does not appear in the decision below, which instead assumed that racial-intent standards "appl[y] with equal force to cases involving political gerrymanders." *Whitford*, 218 F. Supp. 3d at 884. That is simply not true.

Remarkably, the district court's decision *conceded* that this Court's racial-gerrymandering intent standard "does not speak directly to the political gerrymandering case before us" because those cases, such as *Shaw v. Reno*, 509 U.S. 630 (1993), and *Miller v. Johnson*, 515 U.S. 900 (1995), involve "racial stereotypes." *Whitford*, 218 F. Supp. 3d at 887 n.171. Yet the district court applied a *lower* intent standard than applies in those cases, finding it sufficient for a political-gerrymandering plaintiff to show "that the

intent to entrench the Republican Party in power was 'a motivating factor in the decision.'" *Id.* at 887 (quoting *Arlington Heights*, 429 U.S. at 265–66). In borrowing the test from *Arlington Heights*, the Court ignored that it also was a racial-discrimination case and, in fact, supplied the doctrinal groundwork for the *Shaw* cases, at least as far as intent is concerned. *See Shaw*, 509 U.S. at 643 (quoting *Arlington Heights*, 429 U.S. at 266); *Miller*, 515 U.S. at 913 (quoting *Arlington Heights*, 429 U.S. at 266).

The only difference between the *Shaw* intent standard and the *Arlington Heights* intent standard is that the *Shaw* intent standard is *more stringent*, "predominance," where the *Arlington Heights* framework shifts the burden to the state where race is even a "motivating factor in the decision." *Arlington Heights*, 429 U.S. at 265–66. It is mystifying that the court would reject the more demanding "predominance" test, admitting that "the [Supreme] Court has rejected" it "in the context of political gerrymandering claims," *Whitford*, 218 F. Supp. 3d at 887 n.171, only to apply the more lenient standard of *Arlington Heights*. If the higher predominance standard has been rejected (it has), then a lower standard cannot be its substitute.

Because the district court did not identify an inherently suspect classification, it should have examined the plan under the highly deferential rational-basis standard typically applied to non-suspect classifications. *See City of Cleburne*, 473 U.S. at 440. Members of a major political party do not bear an immutable characteristic, they are not a discrete and insular minority, they do not have a history of unequal treatment, and they are well-represented in the

legislative process—even when they do not constitute a majority. *See id.* Members or supporters of a major political party cannot seriously expect, as a class, to receive enhanced scrutiny where discrimination claims by the mentally disabled and elderly fall under rational-basis review. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313–14 (1976); *City of Cleburne*, 473 U.S. at 440.

The rational-basis standard is met "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). "Perfection in making the necessary classifications is neither possible nor necessary." *Mass. Bd. of Ret.*, 427 U.S. at 314. But that is not the standard the district court applied. In assessing whether the plan was "justified," the district court *assumed* that political considerations were illegitimate and assessed only whether *other* "legitimate state concerns" explained the partisan results. *See Whitford*, 218 F. Supp. 3d at 910–12. Because rational-basis review proceeds from the opposite presumption, that the state's criteria are legitimate until proven otherwise, the court should have assumed that the legislature's political classifications were legitimate as well. It should have required Plaintiffs to show that there is no "reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach Commcn's*, 508 U.S. at 313.

But the basis for the use of partisan classifications and political data is rational and supported by this Court's precedent. Because it is "absolutely unavoidable" that "the location and shape of districts

may well determine the political complexion of the area," state legislatures have very little choice other than to consider political data. *Gaffney*, 412 U.S. at 753. Legislative bodies use election data for many reasons other than simple partisan advance. Legislators are necessarily tasked with allocating the benefits and burdens of reapportionment on competing political interests, and a "politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results." *Id.* As the Court observed in *Gaffney*:

> [d]istrict lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences.

Id. Political data provide an effective proxy for identifying those interests, given that voting patterns tend to correspond with societal similarities and differences, thereby allowing redistricting to respect and preserve communities of interest. Moreover, partisan advance itself is a legitimate criterion insofar as political classifications may be used to obtain the political support for necessary passage of a redistricting plan. Rational-basis review requires no further scrutiny than this.

Furthermore, the legislative process of protecting incumbents, both by avoiding pairing incumbents and by preserving their core constituencies, may "preserve[]

the seniority the members of the State's [congressional] delegation have achieved in the United States House of Representatives," *White v. Weiser*, 412 U.S. 783, 792 (1973), or the experience of state legislators whose incumbency serves institutional interests. This allows the representative body, whose members have personal knowledge of the effectiveness of other members, to have a say in its composition, thereby providing an added check in the complex system of republican government.

The Court saw an example of how "political blindness" can adversely affect voters in *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016). In that litigation, the 2012 Virginia Congressional reapportionment plan was enjoined in district court on racial-gerrymandering grounds, and while the appeal was pending before this Court, the district court appointed a special master to draw a new plan. *Id.* at 1735–36. That plan, which ignored political considerations, drew incumbent member Randy Forbes out of Congressional District 4, which included Norfolk and Hampton Roads. Notwithstanding his effort to run under the newly constructed district, Mr. Forbes was not reelected, thereby eliminating this senior member, and presumed future chair of the House Armed Services Committee, from the Virginia delegation. The result of this non-partisan, politically blind cartography seems unlikely to have advanced the interests of residents in what is among the most military-dependent congressional districts in the Nation.

B. No Familiar and Well-Developed Fundamental-Right or Liberty-Interest Standard Has Been Violated

The district court also relied on cases addressing partisan intent in the one-person, one-vote context, *Whitford*, 218 F. Supp. 3d at 885 (citing *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1310 (2016)), and in the context of the *Anderson*/*Burdick* framework for adjudicating alleged burdens on voting rights. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). These doctrines, which provide judicial review for alleged burdens on the fundamental right to vote, defeat Plaintiffs' claims because they hold that partisan intent does not amount to a burden on the right to vote. Under these principles, Plaintiffs were required to show a burden *independent* from partisan intent, and they have not.

In discussing the *Anderson*/*Burdick* framework, the district court ignored *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 203–04 (2008), which held that, if a voting restriction or qualification is otherwise justified, partisan intent does not invalidate the state's "valid neutral justifications" for the voting requirement. To be sure, *Crawford* stated that partisan intent cannot justify a voting requirement if that requirement places an otherwise unjustified burden on the right to vote. *Id.* But this means only that partisanship is a nullity: it neither saves an otherwise impermissible burden on the right to vote nor establishes an independent basis for striking down a law. *Id.*

That also appears to be the rule under the one-person, one-vote framework. The district court cited the one-person-one-vote cases for the underwhelming proposition that "the constitutionality of partisan favoritism in redistricting is an open question," *Whitford*, 218 F. Supp. 3d at 885, but that is not accurate. The Court's decisions in *Harris v. Ariz. Indep. Redistricting Comm'n* and *Gaffney v. Cummings* and its summary affirmance of *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *see Cox v. Larios*, 542 U.S. 947 (2004), addressed whether partisan favoritism can justify inequality of population in voting districts, *not* whether partisan favoritism amounts to a basis *independent* of population inequality to invalidate a plan. In fact, the Court in *Harris* went so far as to warn potential challengers that "we believe attacks on deviations under 10%," the presumptive threshold for when deviations from equality become *de minimis*, "will succeed only rarely, in unusual cases." 136 S. Ct. at 1307. That is hardly a compelling basis to conclude that one out of every three legislative maps over the past 45 years is unconstitutionally partisan. *See* State Br. at 3, 24, 58.

Thus, under either set of equal-protection principles, the crux of any claim is not an alleged partisan intent, but rather the degree of burden, if any, on the right to vote. *See Vieth*, 541 U.S. at 314 (Kennedy, J., concurring) (observing that a plaintiff must show a plan "burdens representational rights"); *LULAC*, 548 U.S. at 418 (opinion of Kennedy, J.) (same). Here, there is no burden on the right to vote and no vote dilution that resembles what the Court has previously recognized as actionable. The purported "discriminatory effect" the district court identified was that "the number of

Republican seats would not drop below 50%" under the challenged plan, *Whitford*, 218 F. Supp. 3d at 898, and that the legislature accomplished this by "cracking" and "packing" perceived Democratic voters resulting in more "wasted" votes for the Democratic Party than for the Republican Party, *id.* at 903–04.

That is not similar to the burdens on the right to vote at issue under the *Anderson / Burdick* line of cases, which involve barriers to participation in the voting process, such as restrictions on ballot access for political parties and candidates, *Anderson*, 460 U.S. at 787, bars on write-in voting, *Burdick*, 504 U.S. at 434–35, and voter qualifications that may limit access to the polls, *Crawford*, 553 U.S. at 211–18. Unlike in those cases, Wisconsin's redistricting plan places no obstacle between a voter and a polling place or a political party or candidate and a ballot. Here, there is *no* burden on the right to vote, much less a "severe" one requiring state justification. *Burdick*, 504 U.S. at 434.

Likewise, the "discriminatory effect" identified here is not analogous to the vote dilution present in the Court's one-person, one-vote cases. Those decisions prohibit "[w]eighting the votes of citizens differently." *Reynolds v. Sims*, 377 U.S. 533, 563 (1964). But, in this case, all districts have approximately equal population, and residents have approximately equal representation in the legislature.

The difference between this case and both the voting-restriction and vote-dilution cases is not merely technical, but rather goes to fundamental differences as to the theories' respective "model[s] of fair and effective representation." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring). This Court's familiar and well-established

standards seek to protect the right to *participation* in the electoral process, through fair and congruent voting requirements and relative equality of representation, as measured by the number of representatives assigned to a given number of residents. The district court's "wasted vote" theory is not predicated on participation, but on partisan *success*: it proposes that a voter who is allowed to vote and has equal representation on a representative-to-resident basis nevertheless experiences an injury to his or her representational rights if his or her vote is "cast for losing candidates" or is "cast for winning candidates in excess of 50% plus one." *Whitford*, 218 F. Supp. 3d at 903 n.274. In other words, a voter's participation is only meaningful, and representation is only secured, if that voter's vote was for a winning candidate and was essential to that candidate's victory. But this theory ignores the usual assumption that a representative for whom the individual voter did not vote nevertheless will represent that voter's interest. *See Davis v. Bandemer*, 478 U.S. 109, 132 (1986); *Whitcomb v. Chavis*, 403 U.S. 124, 149–153 (1971). It also ignores the legitimate reasons why a state, or its voters, may prefer districts with much higher numbers of voters who support a common candidate than are needed to put that candidate in office, given that "the closer the representative is to the voter ideologically, the more satisfied is the voter." Thomas L. Brunell, Redistricting and Representation: Why Competitive Elections are Bad for America 30 (2008); *see also id.* at 11 ("Voters are more satisfied" in non-competitive districts "because they are better represented" where the representative "receives clear, noncontradictory signals from his district as to how to vote on the issues of the day"). Most fundamentally, it ignores that there may be

other considerations for creating districts than where specific partisan votes would have maximum "effect." *Whitford*, 218 F. Supp. 3d at 903 n.274.

Whatever may be said for the district court's political theory, the view that a political party's ability to elect its preferred candidates is the equivalent of constitutionally protected participatory rights is completely novel. It bears no support in familiar standards, and the Court should think twice before constitutionalizing it—or any similar standard. *See Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics.").

Indeed, there is only one context where the Court has been willing to equate a group's failure "to elect candidates of [its] choice" with its "opportunity to participate in the political process," and that is under Section 2 of the Voting Rights Act. That cause of action differs from this one in that (1) it is based on a statute, not in the federal constitution, and (2) depends yet again on the existence of a group with an immutable characteristic: race or color. *Thornburg v. Gingles*, 478 U.S. 30, 48–80 (1986). It would, of course, be untenable for Plaintiffs to invoke this standard where these elements are not met.[3]

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[3] The Court has applied a different standard in assessing constitutional claims by racial minorities for vote-dilution. *See, e.g.*, *White v. Regester*, 412 U.S. 755, 769 (1973); *Whitcomb*, 403 U.S. at 149. But this standard turns on a showing of racial discrimination, and is inapplicable for the reasons stated above, Section I.A. The *Gingles* factors provide the only standard that has been successfully applied to identify vote dilution *absent* the finding that a state intentionally utilized a suspect classification.

But, setting that aside, it is telling that Plaintiffs' purported vote-dilution claim would fail the *Gingles* standard. *Gingles* requires a showing that "a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group." 478 U.S. at 48–49. Plaintiffs would be unable to claim that their candidates are *usually* defeated at the polls when they control approximately 40% of the legislature. *Whitford*, 218 F. Supp. 3d at 902. Plaintiffs' Section 2 claim would also fail for lack of a "politically cohesive unit." *Gingles*, 478 U.S. at 56. The group they claim has been disproportionally burdened is comprised of anyone who has cast a vote for Democratic candidates in recent memory, but membership in and support for the Democratic Party (and the Republican Party) is fluid. For the same reason, Plaintiffs would be unable to show polarized voting. *Gingles*, 478 U.S. at 52. In their own telling, Wisconsin is a "closely divided swing state" whose voters "backed the Democratic candidate for President in 2012 and the Republican candidate in 2016." Motion to Affirm at 1. Clearly, Democratic and Republican voters cross party lines regularly in given elections, and there is no doubt a healthy contingency of independent voters who will back the candidates of either party depending on those candidates' respective merits. Additionally, Plaintiffs' "wasted vote" theory does not turn on whether such a community is "geographically compact," *Gingles*, 478 U.S. at 50, and would allow—indeed, it may often *require*—states to draw bizarre districts.

Thus, Plaintiffs' claims fail the most *generous* vote-dilution standard ever applied in a federal court (until the decision below), and the only legal standard in

existence (until the decision below) where failure to elect a preferred candidate has been equated with a burden on participation, independent of an inherently suspect classification. That supporters of the Democratic Party are asking this Court to afford the Party more lenient vote-dilution standard than exists for racial minorities demonstrates just how far afield Plaintiffs' case is from "familiar" standards.

It also demonstrates just how disruptive a holding in their favor is likely to be. Will racial minorities begin bringing claims under the more favorable "wasted vote" theory rather than Section 2 claims? How will that standard apply in the various other contexts where challengers will no doubt be eager to use it? What will happen when the dictates of Section 2 and the Plaintiffs' wasted-vote theory come into conflict because, say, a state's effort to preserve partisan vote efficiency results in splitting a cohesive minority community? Will the constitutional "wasted vote" rule trump the statutory Section 2 framework? And is this all not really a disguised right to proportional representation? *Compare Whitford*, 218 F. Supp. 3d at 904 ("[T]he EG 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[.]") *with Bandemer*, 478 U.S. at 132 (rejecting constitutional right of proportional representation). There is nothing "familiar" or "well developed" in this brave new world.

C. No Familiar and Well-Developed First Amendment Standard Has Been Violated

The district court also purported to rely on cases concerning deprivation of First Amendment rights. *See Whitford*, 218 F. Supp. 3d at 884 (citing, *inter alia*, *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009)). The district court correctly observed that "discriminatory intent also factors into a First Amendment analysis," *id.*, but it ignored all the other factors that analysis entails—including the required showing of a restraint, or its equivalent, on speech.

First Amendment standards condemn classification on grounds of expression or association only to "the extent [they] compel[] or restrain[] belief and association…." *Elrod v. Burns*, 427 U.S. 347, 357 (1976); *see also Vieth*, 541 U.S. at 314–15 (Kennedy, J.) ("The [First Amendment] inquiry…is whether political classifications were used to burden a group's representational rights."). That is, the First Amendment condemns "restraints" on expressive and associational rights, *e.g.*, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963), and more subversive forms of retaliation that "would deter a person of ordinary firmness from exercising his First Amendment rights," *see, e.g.*, *Bridges v. Gilbert*, 557 F.3d 541, 552 (7th Cir. 2009). For political parties, this involves a threshold showing of a burden on associational rights, such as compelled association, *Cal. Democratic Party v. Jones*, 530 U.S. 567, 573 (2000), or non-association, *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214–17 (1986).

Nothing like that is present here. There is no serious contention that Wisconsin has placed any restraint on the speech of the Democratic Party or its members or supporters. No speech or association is even "arguably prohibited." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 303 (1979).

Nor would a person of "ordinary firmness" be deterred from engaging in political speech or association out of fear that the Wisconsin legislature would retaliate by means of a political gerrymander. "Political gerrymanders are not new to the American scene," *Vieth*, 541 U.S. at 274 (Plurality Op.), so if they had a deterrent effect on speech or association, someone would have noticed that by now. Political gerrymandering is not similar to a "prolonged and organized campaign of harassment" by law enforcement officers, *see, e.g.*, *Bennett v. Hendrix*, 423 F.3d 1247, 1254 (11th Cir. 2005), police "intimidation tactics," *see, e.g.*, *Keenan v. Tejeda*, 290 F.3d 252, 259 (5th Cir. 2002), criminal prosecution, *see Bruner v. Baker*, 506 F.3d 1021, 1030 (10th Cir. 2007), or adverse employment action, *see, e.g.*, *Hill v. City of Pine Bluff, Ark.*, 696 F.3d 709, 715 (8th Cir. 2012). The target of these deprivations knows when they occur and has good reason to fear them. The effect, if any, of political gerrymandering is *de minimis* and does not arise to the level of a First Amendment deprivation. *See Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217, 227 (2d Cir. 2006) (finding no deprivation of First Amendment rights where university professor was denied "emeritus" status because the "benefits of such status…carry little or no value and their deprivation therefore may be classified as de minimis"); *Mezibov v. Allen*, 411 F.3d 712, 721–23 (6th Cir. 2005) (finding no First

Amendment deprivation where allegedly defamatory statements by prosecutor would not deter a "defense attorney of ordinary firmness" from continuing to defend his client).

Likewise, this case involves no burden on associational rights in the form of regulation on "parties' internal processes." *Jones*, 530 U.S. at 573. The Wisconsin redistricting scheme has no effect on "the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *Id.* at 574. There is neither forced association of any party with individuals or candidates with whom the party would prefer not to associate, *id.* at 577, nor prevented association of any party with individuals or candidates with whom the party wishes to associate, *Tashjian*, 479 U.S. at 214.

In relying on these precedents, the district court ignored that this Court has denied relief where no such burden on association is present, including where a primary ballot contained no party information, did not "choose parties' nominees," and therefore did not affect the process by which "parties may…nominate candidates." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 453 (2008). There being no impact on the internal affairs of private organizations, no First Amendment burden was imposed.[4] Similarly, the Court denied relief in a

[4] The Court left open the possibility that, on an as-applied basis, the non-partisan primary system may confuse voters into believing that the primary winners were the party-endorsed candidates. *Wash. State Grange*, 552 U.S. at 454. But that sort of confusion also has no analogue here.

challenge to a closed-caucus system where plaintiffs were not political parties, but potential candidates asserting the right to be endorsed by political parties; the Court observed "[n]one of our cases establishes an individual's constitutional right to have a 'fair shot' at winning the party's nomination." *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 205–06 (2008). Indeed, "[w]hat constitutes a 'fair shot'" is "hardly a manageable constitutional question for judges," especially where "traditional electoral practice gives no hint of even the existence, much less the content, of a constitutional requirement for a 'fair shot' at party nomination." *Id.* at 206.

So too here, Plaintiffs are claiming a right that does not exist, under standards that are not remotely manageable, for an alleged harm that does not in any way impact the internal affairs of any political party. They are not claiming the right to associate with like-minded individuals for the purpose of espousing shared views, but the right to control the government by electing their preferred candidates. That right finds no basis in familiar First Amendment standards, much less manageable ones.

D. Familiar and Well-Developed Standards Do Not Support Relief for Alleged Political-Gerrymandering Claims in the Current Political Paradigm

Plaintiffs' failure to meet any "well developed and familiar" constitutional standard, *Baker*, 369 U.S. at 227, is not a matter of mere legal formalism. Constitutional standards exist to provide a neutral method of distinguishing cases that merit judicial intervention from societal challenges best resolved by

other means. *See City of Cleburne*, 473 U.S. at 442–43. Overexpansion and abstraction of these principles results in judicial overreach into matters that should be left to the political branches of government or other means of resolution. Courts do not exist to take political decisions from political actors—or to throw in with one side or the other in big-money politics. They exist to enforce legal standards.

The fundamental problem with Plaintiffs' case is that partisan "gerrymandering" of the degree alleged here neither amounts to inequality, nor a restraint on expression or association, nor a burden on the right to vote. First and Fourteenth Amendment standards—at least bearing any resemblance to those neutral standards typically employed—will not be met in a situation anything like the current political paradigm, with two major parties with millions of members and millions of dollars in funding and which are capable of defending their interests in the trenches of day-to-day political tug-of-war. The First and Fourteenth Amendments were not ratified to empower the judiciary to take sides in political jostle between such well-matched foes.

In this regard, the Court's initial instinct in addressing alleged partisan gerrymandering, expressed in the *Davis v. Bandemer*, 478 U.S. 109 (1986) plurality, was to limit the judiciary's role in political-gerrymandering cases to correcting cognizable representational burdens and otherwise to avoid "embroil[ing] the judiciary in second-guessing what has consistently been referred to as a political task for the legislature." *Id.* at 133. The Court, for instance, imposed a presumption that voters "for a losing

candidate [are] 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"; it therefore declined to assume, "without actual proof to the contrary, the candidate elected" from a given district "will entirely ignore the interests" of voters who did not vote for him. *Id.* at 132. The Court also required political-gerrymandering plaintiffs to show much more than that "an apportionment scheme…makes winning elections more difficult"; it also required a plaintiff to show a denial of a "chance to influence the political process." *Id.* at 133; *see also Gaffney*, 412 U.S. at 754 (stating that constitutional standards would be violated if "political groups have been fenced out of the political process"). Accordingly, *Bandemer* rejected a claim based on election numbers mirroring those at issue here: Republican candidates won 57 percent of the seats with 48 percent of the vote. *Bandemer*, 478 U.S. at 134–35.

In the 18 years after *Bandemer*, the federal judiciary rejected relief under this standard in a long line of cases. *See Vieth*, 541 U.S. at 179–80 & n.6 (Plurality Op.). The *Vieth* plurality viewed this evidence as "[e]ighteen years of judicial effort with virtually nothing to show for it." *Id.* at 281. But these decisions could also be viewed as showing that the *Bandemer* standard was correctly construed in a strict and narrow fashion to avoid judicial intervention in run-of-the-mill politics between the Democratic and

Republican Parties, which do not need judicial help to maintain their status in American society and politics.[5]

Even if the Court decides to leave open the possibility of future political-gerrymandering claims, it should not allow the courts to become politicized for the benefit of major parties. Instead, it should make clear that the courthouse doors are only open for another day and another paradigm. One might imagine, for instance, the emergence of one or more "discrete and insular" minority groups, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938), deprived of any representation for an elongated period. Such a group may be able to show that its lack of representation amounts to a bar on political participation, both because the redistricting scheme prevents *any* representation and because the representatives elected by others are hostile to the group's interests. One might also imagine a scenario involving a party that, through advanced technology and data, managed to divide the populace so thoroughly and precisely as to obtain *complete* or near complete control of the government. That standard would not be met where a party with 48% of the vote obtained 65% of the seats, but rather where it obtained 100% or, perhaps, 96% of the seats. In that instance, the other party would be "fenced out" of participation,

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[5] To be clear, RSLC agrees with the State Defendants that the *Bandemer* test is no longer in force and does not advocate reviving it. RSLC observes, however, that, if the Court declines to find all political-gerrymandering claims non-justiciable, it should impose a standard at least as, if not more, rigorous than the *Bandemer* standard. The district court's application of a *less* stringent standard was inexplicable.

Gaffney, 412 U.S. at 754, not merely placed in the minority.

Whether that would ever occur and the precise contours of relief are a matter of speculation and need not be resolved in this case. But it is towards this question—under what *different scenario* a political gerrymandering claim may arise—that any continued open door for relief should be oriented. The Court should not encourage, as Plaintiffs here and in other cases appear to believe it has, a race to identify a magic social-science technique whereby alleged gerrymanders of the degree and kind already held to be non-actionable are somehow rendered actionable. The Court should not incentivize a race to see which major Party can first arrive at a "manageable" political-science standard that favors its interests, thereby baking a partisan tilt into the U.S. constitution and warping the judicial process into a political one.

What's more, the social-science techniques Plaintiffs have utilized here, and those that are foreseeable in future cases if the Court incentivizes further innovation, address, not equal-protection and free-speech concerns, but the constitutional "guarantee" to a "Republican Form of Government." U.S. Const. art. IV § 4. At base, Plaintiffs are alleging that one political party has the right to translate votes for its candidates into seats as easily as another. As already stated, this has little if anything to do with First or Fourteenth Amendment standards, but rather seeks to impose "standards for fairness for a representative system," which is the province of the Guarantee Clause. *Colegrove v. Green*, 328 U.S. 549, 553 (1946). While in "most of the cases" addressing Guarantee

Clause claims this Court "has found the claims presented to be nonjusticiable," *New York v. United States*, 505 U.S. 144, 184 (1992), plaintiffs should not be allowed to circumvent the problems raised under that Clause merely by re-styling a Guarantee Clause claim as an equal-protection or free-speech claim. If a bird quacks like a duck and waddles like a duck, it's a duck, and if a claim alleges that a system of government is not "accountable to the local electorate," *id.* at 186, it's a Guarantee Clause claim.

II. Departure from Familiar and Well-Developed Standards Is Not Warranted Because the Alleged Harms of Gerrymandering Are Not Substantiated

For reasons stated above, the district court's decision is not defensible under "familiar and well developed" constitutional standards. But, even if the Court were willing to innovate new standards, there would be no public-policy purpose in doing so, because the purported policy basis for restricting gerrymandering—that gerrymandered districts produce polarized government—is unfounded.

The Court should not be fooled by a canard common to partisan-redistricting rhetoric: apportionment plans, even if they are gerrymandered for political reasons, do not cause political polarization. Though "elegant in description and prescription," this theory has been debunked. Nolan McCarty, Keith T. Poole & Howard Rosenthal, Does Gerrymandering Cause Polarization?, 53 Am. J. of Pol. Sci. 666, 667 (2009); *see also*, James E. Campbell, Polarized: Making Sense of a Divided America (2016); Nolan McCarty, Keith T. Poole & Howard Rosenthal, Polarized America: The Dance of

Ideology and Unequal Riches (2016); Thomas E. Mann & Bruce E. Cain, Party Lines: Competition, Partisanship, and Congressional Redistricting (2005). A powerful illustration of this theory's failure is that it does not account for the increased polarization of the United States Senate or among partisans in the electorate. McCarty, *supra*, at 61–62 ("The strongest argument against overemphasizing the politics of apportionment is the fact that the U.S. Senate (which of course is never redistricted) has endured an almost identical history of polarization.").

Simply put, other things—a lot of other things—are at play. Campbell, *supra*, at 147 ("Party polarization is a much broader phenomenon than gerrymandered redistricting could possibly explain."). First, "[t]he evidence indicates that Americans are highly polarized, that they have been so since the late 1960s, and that they have become significantly more so in recent decades," and, in fact, the "increased polarization of the parties in government lagged behind the greater polarization in the public." Campbell, *supra*, at 222. Second, "[p]arty polarization in Congress and many state legislatures has been on the rise since the 1980s, and it has reached levels comparable to those in the late nineteenth and early twentieth centuries. No serious academic analyses attribute that polarization solely or even primarily to redistricting. There are many other plausible causes…." Mann, *supra*, at 20.

A host of other geographic and historic shifts have been found to generate political polarization in the United States. These include the demise of the one-party South, increased geographical self-sorting on political and social attitudes, differences in how

Republican and Democratic legislative members would represent the same district, and resulting shifts in legislative agendas, strategies of party leadership, and ideological and organizational orientations. McCarty, *supra*, at 678–79. Political scientists have run the numbers, and they do not support the notion that partisan redistricting causes political polarization.

Plaintiffs claim redistricting has stripped Wisconsin politics of competition and created an "exceptionally large and durable" advantage for Republicans and that this "sharp decline in the number of competitive seats demonstrates that Act 43 was *intended* to give Republicans a durable" advantage. Mot. to Affirm at 1, 8 (emphasis added). But a decline in the number of competitive seats cannot be blamed on reapportionment, let alone demonstrate the direct intent of any map drawer. Besides, predictions of durability are not always correct. For example, the supposed permanent majority of the Indiana plan adjudicated in *Bandemer* did not turn out to be permanent because, by the end of the decade, Democrats took a majority of the House and only failed to take a majority of the Senate by two seats. *See* Council of State Governments, The Legislators: Number, Terms and Party Affiliations, 1937-2003, in The Book of the States Volumes 2-35 (2004); *see also Vieth*, 541 U.S. at 287 n.8 (describing how, five days after court held judicial system to be unconstitutionally partisan, all the supposedly favored judicial candidates were defeated).

In fact, a gerrymandered plan does not necessarily generate safe seats for the party that drew it because maximizing that party's voting strength typically

requires spreading its perceived supporters as thin as possible across districts. That strategy can backfire. In an effort to maximize the number of seats it will win in future elections, a party in charge of redistricting will often choose to create as many districts as possible where those voters it perceives to be its supporters constitute the majority and to "pack" the perceived supporters of the minority party into as few districts as possible. But this process can lead to more electoral security for the minority party than for the majority party because members of the majority party are spread thin and may fail to elect their preferred candidates, whereas representation for members of the minority party is secured. *See* McCarty, supra, at 667 (discussing the "'dummymander'" which describes "those situations when the majority spreads its voters so thin that it actually loses seats"). Whether or not the majority party is successful in "entrenching" its power, the minority party is guaranteed to have an embedded voice in the government. Federal courts should not assume that this voice counts for nothing.

In other words, the *effects* of partisan motives in redistricting are as complicated and unpredictable as the redistricting process itself, and the Court should not enmesh itself in the process based on a simplistic notion that there is some readily identifiable "harm" to the democratic process that is easy to remedy. Instead, the federal courts should become involved in redistricting only to exercise their competency in enforcing "familiar" constitutional and statutory standards.

Conclusion

For these reasons, and those stated in the State Defendants' briefing, the Court should reverse the decision below.

Respectfully submitted,

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