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

MOTION TO AFFIRM

Paul M. Smith
Counsel of Record
CAMPAIGN LEGAL CENTER
1411 K Street NW, Ste. 1400
Washington, DC 20005
(202) 736-2200
psmith@campaignlegalcenter.org

Nicholas O. Stephanopoulos
UNIVERSITY OF CHICAGO LAW SCHOOL
1111 E 60th St., Ste. 510
Chicago, IL 60637
(773) 702-4226
nsteph@uchicago.edu

Attorneys for Appellees

Jessica Ring Amunson
JENNER & BLOCK LLP
1099 New York Ave. NW,
Ste. 900
Washington, DC 20001
(202) 639-6000
jamunson@jenner.com

Michele Odorizzi
MAYER BROWN, LLP
71 S. Wacker Dr.
Chicago, IL 60606
(312) 782-0600
modorizzi@mayerbrown.com

Additional counsel listed on inside cover

J. Gerald Hebert
Ruth M. Greenwood
Danielle M. Lang
Annabelle E. Harless
CAMPAIGN LEGAL CENTER
1411 K Street NW, Ste. 1400
Washington, DC 20005

Douglas M. Poland
RATHJE & WOODWARD, LLC
10 E. Doty St., Ste. 507
Madison, WI 53703

Peter G. Earle
LAW OFFICE OF PETER G. EARLE
839 N. Jefferson St., Ste. 300
Milwaukee, WI 53202

QUESTIONS PRESENTED

1. Whether the test for partisan gerrymandering claims set forth by the three-judge panel—requiring discriminatory intent, a large and durable discriminatory effect, and a lack of a legitimate justification—is judicially discernible and manageable?

2. Whether the three-judge panel correctly found that the district plan for Wisconsin's State Assembly is an unconstitutional partisan gerrymander under this test?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTRODUCTION

Wisconsin is a closely divided swing state. Its voters backed the Democratic candidate for President in 2012 and the Republican candidate in 2016. It has one Democratic and one Republican Senator. And in the State Assembly elections at issue in this case, both parties' statewide votes have hovered very close to fifty percent. Democrats won a narrow statewide majority in 2012, while Republicans won equally slim majorities in 2014 and 2016.

Wisconsin's Assembly, however, bears no resemblance to its evenly split electorate. In 2012, Republicans won a supermajority of sixty seats (out of ninety-nine) while *losing* the statewide vote. In 2014 and 2016, Republicans extended their advantage to sixty-three and sixty-four seats, respectively, even though the statewide vote remained nearly tied. Republicans thus wield legislative power unearned by their actual appeal to Wisconsin's voters.

This pro-Republican skew is no accident. The three-judge court below (the "Panel") found that the district plan for the Assembly, Act 43, "was intended to burden the representational rights of Democratic voters." App. 3a. The skew is also exceptionally large and durable. "It is undisputed that, from 1972 to 2010, not a single legislative map in the country was as asymmetric in its first two elections" as Act 43. Dkt. 94:12. It is clear as well that "Act 43's partisan effects will survive all likely electoral scenarios, throughout the decennial period." App. 157a n.269. Nor is there a neutral justification for Act 43's startling imbalance. Indeed, the map's own authors "produced multiple alternative plans that

would have achieved the legislature's valid redistricting goals while generating a substantially smaller partisan advantage." App. 180a.

This Court has recognized that partisan gerrymanders—district maps that intentionally, severely, durably, and unjustifiably benefit one party while handicapping its opponent—"'are incompatible with democratic principles.'" *Ariz. State Legis. v. Ariz. Indep. Redist. Comm'n*, 135 S. Ct. 2652, 2658 (2015) (citation and alteration omitted). This is because gerrymanders "burden[] rights of fair and effective representation," *Vieth v. Jubelirer*, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring in the judgment), and so prevent legislatures from being "collectively responsive to the popular will," *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). Justices have also observed that gerrymanders disrupt "'those political processes ordinarily to be relied upon to protect minorities,'" *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment), and that "[t]he party that controls the [redistricting] process has no incentive to change it," *id.* at 363 (Breyer, J., dissenting). That is precisely why judicial intervention was necessary here—to correct a serious democratic malfunction that would otherwise have gone unremedied.

Acknowledging the threat posed by partisan gerrymandering, the Panel endorsed the three-part test proposed by Appellees for determining when the practice crosses the constitutional line. This test's first prong is discriminatory intent: whether a district plan "is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the

basis of their political affiliation." App. 109a-110a. This element has deep roots in—indeed, is required by—foundational First and Fourteenth Amendment precedents. The Court's case law also demonstrates that the presence (or absence) of discriminatory intent can be established straightforwardly in redistricting litigation.

The test's second prong is discriminatory effect: whether a plan exhibits a partisan imbalance that is "sizeable," App. 173a, and likely to "persist throughout the decennial period," App. 166a. In *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006) ("*LULAC*"), five Justices expressed interest in a gerrymandering standard based in part on the concept of partisan asymmetry. The Panel heeded these Justices' comments, while also explaining that there exist multiple measures of asymmetry and that these metrics are helpful tools for gauging the severity and durability of a party's disadvantage. As the Panel put it, the metrics provide "corroborative evidence of an aggressive partisan gerrymander that was both intended *and likely* to persist for the life of the plan." App. 176a.

The test's final prong is justification: whether a plan's "partisan effect . . . can be explained by the legitimate state prerogatives and neutral factors that are implicated in the districting process." App. 178a. This prong is drawn nearly verbatim from the Court's one person, one vote cases, which hold that some degree of population inequality among districts can be justified by other valid objectives. The element plays the same role here: ensuring that asymmetric plans will

not be struck down if their skew stems from a state's political geography or compliance with traditional redistricting criteria.

Oddly, Appellants barely try to argue that this test is not "judicially discernible and manageable"—even though that is the dispositive issue in this case. *Vieth*, 541 U.S. at 281 (plurality opinion) (quotation marks omitted). Instead, they contend that the test is somehow precluded by the Court's fractured decisions in *Vieth* and *Davis v. Bandemer*, 478 U.S. 109 (1986). As to *Vieth*, Appellants assert that any restriction on partisan gerrymandering claims suggested by a *dissenting* Justice—like requiring them to proceed district by district or including noncompliance with traditional criteria as an element—represents a holding of *the Court*. Appellants' logic is that four Justices concluded that such claims are nonjusticiable, and so, allegedly, would have favored any limit on their use.

This is a theory of precedent that has yet to occur to this Court or to any other. In *LULAC*, not a single Justice objected to the appellants' claim on the grounds that it was statewide in nature or did not allege noncompliance with traditional criteria. Nor has even one lower court since *Vieth* rebuffed a challenge for these reasons. On the merits too, partisan gerrymandering is *inherently* a statewide activity, so it makes sense to adjudicate it on a statewide basis. Likewise, "intentional vote dilution" is "quite consistent with adherence to compactness and respect for political subdivision lines"—meaning there can be no safe harbor for satisfying these criteria. *Vieth*, 541 U.S. at 298 (plurality opinion).

As to *Bandemer*, Appellants maintain that the Panel's test is identical to the one adopted by the plurality in that case (and rejected by the Court in *Vieth*). This is a baffling claim since the concept at the heart of this litigation—partisan asymmetry—was not even mentioned in *Bandemer*. Indeed, it was not until *LULAC* that the Court discussed for the first time the methods that social scientists use to measure gerrymandering. The *Bandemer* plurality's standard also notoriously required plaintiffs to show that "their efforts to deliberate, register, and vote had been impeded." *Id.* at 345 (Souter, J., dissenting). Needless to say, there is no such obligation under the Panel's approach.

The Court should therefore affirm the decision below, which correctly articulated and applied a test for evaluating partisan gerrymandering claims that is judicially discernible and manageable. The Court could do so summarily; however, Appellees acknowledge that the importance of the issue may warrant full briefing and argument.

STATEMENT OF THE CASE

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

Two federal courts have concluded after trials that Act 43 was enacted with discriminatory intent. The Panel found that one of the law's aims was "to entrench the Republican Party in power." App. 140a. Previously, another three-judge court ruled that "partisan motivation . . . clearly lay behind Act 43," adding that any argument to the contrary was "almost laughable." *Baldus v. Members of Wis. Gov't Accountability Bd.*,

849 F. Supp. 2d 840, 851-52 (E.D. Wis. 2012). Overwhelming evidence supports these determinations.

In 2010, as part of a coordinated national strategy to "win Republican control of state legislatures with the largest impact on . . . redistricting," the Republican State Leadership Committee "spent $1.1 million to successfully flip both chambers of the Wisconsin legislature." Ex. 472. In 2011, now in full command of the state government, Republican legislative leaders authorized a secretive and exclusionary mapmaking process aimed at securing for their party a large advantage that would persist no matter what happened in future elections.

Act 43 was thus drafted behind closed doors in a "map room" at a private law firm that only a handful of attorneys and aides were allowed to enter. App. 12a; Ex. 463. Ordinary rules of legislative transparency were waived by outsourcing the work to that firm. App. 12a; Ex. 355. Each Republican incumbent had to sign a secrecy agreement before being shown a draft of his or her new district (and an accompanying memo). Exs. 243-44. And *only* Republican legislators had a chance to see the districts; Act 43's authors declined to meet with, or send a memo to, even a single Democrat prior to the bill's unveiling. Dkt. 147:95-99; Ex. 341:8.

The individuals responsible for designing Act 43—Adam Foltz, Joseph Handrick, and Tad Ottman—created composites of Republican candidates' vote shares in selected statewide races between 2004 and 2010. App. 17a-18a. These composites were tailored to correlate nearly perfectly with a more sophisticated "partisan score" generated by the Legislature's

consultant, Professor Keith Gaddie. *Id.* Using the composites, the drafters crafted a series of provisional plans whose names betrayed their partisan agendas: "Adam Assertive," "Joe Aggressive," and the like. App. 19a-20a. All of these plans assumed that Republicans would win about 49% of the statewide Assembly vote. Ex. 467. For this *minority* of the vote, the plans steadily ratcheted upward the expected number of Republican seats: from forty-nine under the court-drawn 2000s map to a supermajority of *fifty-nine* under the "Final Map." App. 129a-130a; Ex. 487.

The drafters painstakingly analyzed the likely partisan performances of their provisional plans. Their "Tale of the Tape" spreadsheet, for instance, tracked the numbers of "GOP" and "DEM" seats, "statistical pickups" and "statistical losses," and "Good outcomes" and "Bad outcomes." App. 133a-135a; Exs. 283-84. For each plan, the drafters also created a table indicating how each district's partisan composition changed from the court-drawn 2000s map. App. 128a-129a. Remarkably, the table for the Final Map showed the number of "Strong GOP" and "Lean GOP" seats rising by *twelve*, even as the number of "Swing" seats plummeted by nine. Ex. 172.[1]

---

[1] The drafters' analyses belie the argument, made by several amici, that voters lack any consistent partisan affiliation because they can change their minds from election to election. The drafters made no adjustments for incumbency, candidate quality, or any other factor, and treated past election results as a reliable guide to future ones.

The drafters' predictions were also uncannily accurate. They forecast that the Final Map would convert a Republican vote share of 48.6% into fifty-nine Republican Assembly seats. Ex. 172. In

The sharp decline in the number of competitive seats demonstrates that Act 43 was intended to give Republicans a *durable*—not just a *large*—advantage. With fewer competitive seats, of course, a chamber's composition varies only slightly even when the electorate's preferences shift significantly. To analyze durability more rigorously, the Legislature's consultant, Professor Gaddie, employed a technique known as "sensitivity testing." That is, he swung the expected *statewide* vote by up to ten percentage points in each party's direction, and then calculated what each party's performance would be in each *district* if it swung by the same margin as the statewide vote. App. 131a. This analysis revealed that Democrats would have to secure at least *54%* of the statewide vote—a feat achieved just once by either party over the last generation—before they would have a chance to gain control of the Assembly. App. 135a; Ex. 282.

In contrast to their obsessive focus on partisan advantage, Act 43's drafters paid little attention to traditional redistricting criteria. App. 130a n.195. They failed to produce a single analysis of their districts' contiguity, compactness, or splits of political subdivisions. Dkts. 147:154, 148:84. Nor did their

---

2012, Republicans indeed won 48.6% of the vote along with sixty Assembly seats. App. 148a.

The overwhelming influence of partisanship in Wisconsin elections is confirmed by Professor Kenneth Mayer's analysis. He showed that a model including the *presidential* vote explains about 99% of the variance in the *Assembly* vote. Dkt. 54:22. In other words, Wisconsin's voters behave virtually identically in presidential and state house races.

memos to Republican legislators even mention these criteria, instead presenting likely electoral outcomes. App. 136a. Act 43 divided more counties than any other plan in Wisconsin's history, Dkt. 125 ¶ 221, even though "[c]ounty lines are held inviolable" under the Wisconsin Constitution, *State ex rel. Reynolds v. Zimmerman*, 128 N.W.2d 16, 17 (Wis. 1964) (per curiam). And Act 43's treatment of minority voters was so deficient that portions of the plan were ruled unlawful under Section 2 of the Voting Rights Act. *See Baldus*, 849 F. Supp. 2d at 854-58.

After Act 43 was fine-tuned in secret for four months, it was introduced, debated, and passed in *nine days* in July 2011. App. 29a. "[U]pending more than a century of practice," new ward lines were also drawn after Act 43 was enacted. *Baldus*, 849 F. Supp. 2d at 846. In every previous Wisconsin redistricting, wards were designed first, and districts then faithfully followed the wards' boundaries.

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

According to the Panel, "[i]t is clear that the drafters got what they intended to get." App. 146a. Act 43 "secured for Republicans a lasting Assembly majority" by "allocating votes among the newly created districts in such a way that, in any likely electoral scenario, the number of Republican seats would not drop below 50%." App. 145a. This is evident from the results of the elections held under Act 43. In 2012 and 2014, Republicans won 48.6% and 52.0% of the two-party Assembly vote, respectively. But in these nearly tied elections, Republicans won supermajorities of

60.6% and 63.6% of the seats in the Assembly. App. 148a.[2]

These seat and vote tallies are corroborated by measures of partisan asymmetry that social scientists have developed to assess the severity of partisan gerrymandering. One such metric, *partisan bias*, was discussed extensively by the Court in *LULAC*. *See* 548 U.S. at 420 (opinion of Kennedy, J.); *id.* at 466 (Stevens, J., concurring in part and dissenting in part). Partisan bias is the difference between the shares of *seats* that the major parties would win if they each received the same share (typically 50%) of the statewide *vote*. For example, if Democrats would win 55% of a plan's districts if they received 50% of the statewide vote (leaving 45% of the districts to be won by Republicans), then the plan would have a pro-Democratic bias of 5%.

Another metric, the *efficiency gap*, is rooted in the insight that partisan gerrymandering is always carried out in one of two ways: the *cracking* of a party's supporters among many districts, in which their preferred candidates lose by relatively narrow margins; or the *packing* of a party's backers in a few districts, in which their preferred candidates win by overwhelming margins. *See Vieth*, 541 U.S. at 286 n.7 (plurality opinion). Both cracking and packing produce what social scientists call "wasted votes" because they do not contribute to a candidate's victory. In the case of cracking, all votes cast for the losing candidate are wasted; in the case of packing, all votes cast for the

[2] In 2016, a year in which the Republican presidential candidate won in Wisconsin by a whisker, Republicans increased their Assembly supermajority to 64.6%.

winning candidate, above the 50% (plus one) threshold needed for victory, are wasted. The efficiency gap is simply one party's total wasted votes in an election, minus the other party's total wasted votes, divided by the total number of votes cast. It captures in a single number the extent to which one party's voters are more cracked and packed than the other party's voters. App. 159a-162a.[3]

Notably, neither partisan bias nor the efficiency gap requires proportional representation—that is, "equal representation in government [for] equivalently sized groups." *Vieth*, 541 U.S. at 288 (plurality opinion). A partisan bias of zero is consistent with a party's seat share rising faster than its vote share, as long as if the parties' fortunes reversed, the other party would enjoy an equivalent advantage. Ex. 333:8. Similarly, as the Panel correctly observed, "the efficiency gap is about comparing the wasted votes of each party, not determining whether the party's percentage of the statewide vote share is reflected in the number of representatives that party elects." Dkt. 43:20.

Act 43 exhibited pro-Republican partisan biases of 12.6% and 11.6%, respectively, in 2012 and 2014. In other words, had these elections been perfectly tied,

---

[3] Appellants' complaints about the efficiency gap—that it may vary from election to election, and that it does not take into account political geography, J.S. 17, 33-34—apply equally to *all* measures of partisan asymmetry. The Panel also rebutted these points by finding that Act 43's pro-Republican skew is extremely durable, App. 157a-166a, and not attributable to the spatial patterns of Wisconsin's voters, App. 203a-218a. Appellants do not claim these findings are clearly erroneous.

Republicans would have won between 61.6% and 62.6% of the seats in the Assembly. Ex. 329. Act 43 also exhibited pro-Republican efficiency gaps of 13.3% and 9.6% in 2012 and 2014. That is, votes for Democratic Assembly candidates were wasted at a rate from 9.6 to 13.3 percentage points higher than the rate at which Republican votes were wasted. App. 173a.[4]

These partisan asymmetries are more severe than any that Wisconsin has experienced over the last half-century. Indeed, between 1972 and 2010, the average partisan bias in Assembly elections was just -1% and the average efficiency gap was just -3%. Ex. 329.[5] Compared to the country as a whole, the asymmetries are also extreme outliers. Appellees' expert, Professor Simon Jackman, calculated the average efficiency gap of almost every state house plan in America from 1972 to 2014. Ex. 35. Act 43's skew has been exceeded by only a handful of plans, and as noted earlier, it is undisputed that prior to the current redistricting cycle, "not a single legislative map in the country was as

---

[4] Social scientists also assess partisan gerrymandering by calculating the difference between a party's *mean* vote share and *median* vote share across all of the districts in a plan. Ex. 405. When the mean and the median diverge significantly, the district distribution is skewed in favor of one party and against its opponent. *Id.* Here, Act 43 exhibited large, pro-Republican mean-median differences of 5.6% and 6.9% in 2012 and 2014. Dkt. 134:33.

[5] Even the 2000s plan that Appellants emphasize, J.S. 10-11, had an average partisan bias about 50% smaller than Act 43, and an average efficiency gap about 33% smaller. Ex. 329. This superior record was no accident: Act 43's authors expected that their map would yield *ten* more Republican seats than the 2000s plan. App. 21a-22a; Ex. 487.

asymmetric in its first two elections" as Act 43. Dkt. 94:12; App. 50a.

The magnitude of the Republican advantage under Act 43 is matched by its durability. Professor Jackman examined how plans' *initial* efficiency gaps are linked to the *average* efficiency gaps they exhibit over their lifetimes. Based on this analysis, he concluded that Act 43's average efficiency gap will be a near-record 9.5% in a Republican direction over the decade the map is in effect. App. 173a-174a. Professor Jackman also conducted sensitivity testing identical to Professor Gaddie's, except using actual election results (from 2012) rather than predicted ones. According to this testing, even if the statewide Assembly vote swung by five points in a Democratic direction—a shift that would represent the largest Democratic wave in over forty years—Act 43 would *still* exhibit a double-digit pro-Republican efficiency gap. Act 43's skew is thus essentially impervious to electoral tides. Ex. 495; App. 165a-66a.

III. Act 43's Large and Durable Partisan Asymmetry Cannot Be Justified.

Act 43's skew also cannot be justified by Wisconsin's political geography or efforts to comply with traditional redistricting criteria. As the Panel determined, these factors "simply do[] not explain adequately the sizeable disparate effect seen in 2012 and 2014." App. 180a. The evidence fully supports this finding.

First, all of the maps used in previous decades (from the 1970s onward) exhibited much smaller partisan biases and efficiency gaps than Act 43. Ex. 329. They

did so, moreover, while splitting significantly *fewer* counties than Act 43, *not* violating the Voting Rights Act, and performing equally well in terms of contiguity, compactness, municipality splits, and compliance with the one person, one vote requirement. Dkt. 125 ¶ 221.

Second, Act 43's own authors "produced several statewide draft plans that performed satisfactorily on legitimate redistricting criteria without attaining the drastic partisan advantage demonstrated . . . in Act 43." App. 218a. This means that Wisconsin's *current* political geography is perfectly compatible with much more balanced maps. If it were not, Act 43's drafters would not have been able to design them.

And third, Appellees' expert, Professor Kenneth Mayer, created a demonstration plan that matched or exceeded Act 43 on every federal and state criterion. It had a total population deviation below 1%, the same number of majority-minority districts, somewhat more compact districts, and somewhat fewer political subdivision splits. App. 212a. The demonstration plan's efficiency gap, however, was fully *ten* percentage points lower than that of Act 43. *Id.*[6]

Notwithstanding these findings by the Panel—none of which is alleged to be clearly erroneous—Appellants and several amici contend that Wisconsin's political

---

[6] Appellants' criticism of the demonstration plan for *unintentionally* pairing incumbents, J.S. 15-16, 33, is ironic given Act 43's *deliberate* pairing of ten incumbents in heavily Republican districts where the paired Democrats were all expected to lose, Ex. 284. Moreover, unlike in several other states, incumbency protection is not a redistricting criterion in Wisconsin. Wis. Const. art. IV, §§ 4-5.

geography inherently favors Republicans. In advancing this claim, amici rely heavily on the work of Professor Jowei Chen, who has found that in *other* states, randomly generated district plans often (but far from always) benefit Republicans. Amici fail to mention, however, that Professor Chen has also applied his simulation technique to Wisconsin, creating 200 separate Assembly maps. *Every one* of these maps exhibits a much smaller efficiency gap than Act 43, while featuring more compact districts and splitting fewer political subdivisions. In fact, fully three-fourths of the simulated plans have efficiency gaps of less than 3%, and one-fourth have efficiency gaps below *1%*, thus disproving any assertion that Wisconsin voters' spatial patterns are responsible for Act 43's skew. Jowei Chen, *The Impact of Political Geography on Wisconsin Redistricting*, 16 Election L.J. (forthcoming 2017), *available at* http://www.umich.edu/~jowei/Political_Geography_Wisconsin_Redistricting.pdf.

* * *

In sum, the factual record here is unlike that in any earlier partisan gerrymandering case. The documents disclosed by Appellants illustrate in arresting detail exactly how Act 43—an archetype of modern gerrymanders—was constructed. Professor Jackman analyzed the partisan asymmetry of not just Act 43, but also nearly every other state house plan over the last half-century. Four separate experts converged on a single method, sensitivity testing, for assessing the durability of Act 43's asymmetry. And political geography and compliance with traditional redistricting criteria were ruled out as justifications for Act 43's skew by an array of alternative Assembly maps. It is

for these reasons that the Panel concluded that "[t]he record here is not plagued by the infirmities that have [concerned] the Court in previous cases." App. 155a.

This record was generated over the course of a four-day trial featuring eight witnesses. In addition to the parties' experts and one plaintiff, two of Act 43's drafters (Foltz and Ottman) and the Legislature's consultant (Professor Gaddie) provided testimony. Foltz and Ottman confirmed that they had gone to extraordinary lengths to analyze—and augment—the Republican advantage under Act 43. App. 126a-140a. Professor Gaddie shed further light on the methods of Act 43's drafters, while also explaining how he had verified the durability of the Republican edge. App. 126a-131a. The record on which the Panel based its judgment was thus unprecedented in both substance and scope.

ARGUMENT

The critical question in this case is whether the partisan gerrymandering test adopted by the Panel is "judicially discernible and manageable." *Vieth*, 541 U.S. at 281 (plurality opinion) (quotation marks omitted).[7] Appellants hardly mention this issue, straining instead to argue that the test is barred by the Court's precedents. Appellees, in contrast, first show that each of the test's prongs is indeed discernible and manageable. Appellees next respond to Appellants' flawed readings of the Court's case law.

---

[7] There is no dispute that Act 43 is unlawful under this test. As Appellants conceded below, "defendants do not deny that plaintiffs could prove their claim under their proposed standard." Dkt. 94:11.

I. The Panel's Partisan Gerrymandering Test Is Judicially Discernible and Manageable.

The Panel's test has three elements: (1) discriminatory intent; (2) a large and durable discriminatory effect; and (3) a lack of a legitimate justification. Each of these elements is deeply rooted in the Court's jurisprudence and highly workable.

A. The Panel's Discriminatory Intent Prong Is Grounded in the Court's First and Fourteenth Amendment Precedents.

The Panel's discriminatory intent prong—whether a district plan "is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation," App. 109a-110a—follows from basic First and Fourteenth Amendment principles. Under the First Amendment, "political belief and association constitute the core of those activities protected," *Elrod v. Burns*, 427 U.S. 347, 356 (1976), meaning that heightened scrutiny applies when the government disadvantages people "on account of their political association," *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 717 (1996). Under the Fourteenth Amendment, likewise, "[p]roof of . . . discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

Consistent with these tenets, the Court has confirmed in each of its partisan gerrymandering decisions that discriminatory intent must be shown. The *Bandemer* plurality declared that "plaintiffs were required to prove . . . intentional discrimination against

an identifiable political group." 478 U.S. at 127 (plurality opinion). In *Vieth*, Justice Kennedy elaborated that the mere *use* of "political classifications" by mapmakers is not prohibited; rather, "a gerrymander violates the law" if "the classifications . . . were applied in an *invidious* manner." 541 U.S. at 307 (Kennedy, J., concurring in the judgment) (emphasis added). And in *LULAC*, Justice Kennedy further explained that while an "unlawful motive" must be established, a plan only violates the Constitution if it also has a sufficient discriminatory effect. 548 U.S. at 418 (opinion of Kennedy, J.); *see also Harris v. Ariz. Indep. Redist. Comm'n*, 136 S. Ct. 1301, 1310 (2016) (suggesting that "partisanship is an illegitimate redistricting factor").

Not only has the Court spoken with a clear voice about the necessity of proving discriminatory intent, it has also demonstrated that this inquiry is judicially manageable. The *Bandemer* plurality was "confident that . . . th[e] record would support a finding that the discrimination was intentional" where voluminous material "evidenced an intentional effort to favor Republican incumbents and candidates and to disadvantage Democratic voters." 478 U.S. at 116, 127 (plurality opinion). In *LULAC*, similarly, Justice Kennedy had little trouble concluding that "[t]he legislature does seem to have decided to redistrict with the sole purpose of achieving a Republican congressional majority." 548 U.S. at 417 (opinion of Kennedy, J.); *see also Cox v. Larios*, 542 U.S. 947, 947 (2004) (Stevens, J., concurring) (finding that a Georgia state house map reflected "'an intentional effort to

allow incumbent Democrats to maintain or increase their delegation'" (citation omitted)).

Conversely, in *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973), the Court properly rejected a claim that Connecticut state legislative maps were "invidiously discriminatory." These maps had been designed by "a three-man bipartisan Board"—rather than a legislature under a single party's control—that "followed a policy of 'political fairness.'" *Id.* at 736, 738. In *Harris* too, the Court unanimously disagreed that "illegitimate considerations were the predominant motivation" behind an Arizona state legislative plan. 136 S. Ct. at 1309. This plan had been crafted by an "independent redistricting commission" that had made "'good-faith efforts to comply with the Voting Rights Act.'" *Id.* at 1305, 1309 (citation omitted).

These holdings are a model of judicial consistency. They show that the Panel's discriminatory intent prong not only stems from core constitutional values, but also is capable of reliable and non-arbitrary application.

B. The Panel's Discriminatory Effect Prong Is Based on Partisan Symmetry, the Concept Identified as Promising by the *LULAC* Court.

Turning to discriminatory effect, the Panel required that a plan exhibit a partisan imbalance that is "sizeable," App. 173a, and likely to "persist throughout the decennial period," App. 166a. According to the Panel, the *magnitude* of a plan's partisan skew may be demonstrated through election results as well as social scientific measures like partisan bias and the efficiency gap. In turn, the *durability* of a plan's tilt may be established through sensitivity testing like that

conducted by several experts in the case. App. 145a-146a, 149a.

At least five Justices contemplated a discriminatory effect prong of this sort in *LULAC*. Justice Stevens defined *partisan symmetry* as a "'require[ment] that the electoral system treat similarly-situated parties equally'" in terms of the translation of their popular support into legislative representation. 548 U.S. at 466 (Stevens, J., concurring in part and dissenting in part). He then observed that symmetry is "widely accepted by scholars as providing a measure of partisan fairness in electoral systems," calling it a "helpful (though certainly not talismanic) tool." *Id.* at 466, 468 n.9. Justice Souter (joined by Justice Ginsburg) stressed the "utility of a criterion of symmetry as a test," and urged "further attention [to] be devoted to the administrability of such a criterion at all levels of redistricting and its review." *Id.* at 483-84 (Souter, J., concurring in part and dissenting in part). Justice Breyer remarked that asymmetry may cause a plan to "produce a majority of congressional representatives even if the favored party receives only a minority of popular votes." *Id.* at 492 (Breyer, J., concurring in part and dissenting in part).

And Justice Kennedy wrote with respect to partisan symmetry that he did not "discount[] its utility in redistricting planning and litigation." *Id.* at 420 (opinion of Kennedy, J.); *see also id.* at 468 n.9 (Stevens, J., concurring in part and dissenting in part) ("appreciat[ing] Justice Kennedy's leaving the door open to the use of the standard in future cases"). Justice Kennedy added that "asymmetry *alone* is not a

reliable measure of unconstitutional partisanship." *Id.* at 420 (opinion of Kennedy, J.) (emphasis added). Under the Panel's test, of course, asymmetry is far from dispositive. Indeed, it is only one half (the other being durability) of one of the test's three prongs.[8]

Two further themes in the Court's cases support the Panel's discriminatory effect prong. First, Justice Kennedy has emphasized the need for "a workable standard for *measuring* a gerrymander's burden on representational rights." *Vieth*, 541 U.S. at 311 (Kennedy, J., concurring in the judgment) (emphasis added). He has also expressed hope that "new technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose." *Id.* at 312-13. Measures of partisan asymmetry like partisan bias and the efficiency gap, as well as analytical techniques like sensitivity testing, respond directly to these points. They capture quantitatively the ways in which gerrymanders distort the translation of the electorate's preferences into legislative representation. They also exploit recent conceptual and methodological advances in the social sciences. Ex. 34:11-32.[9]

---

[8] Justice Kennedy also observed that the particular *measure* of partisan asymmetry before the Court in *LULAC*, partisan bias, examines the "results that would occur in a hypothetical state of affairs." *Id.* at 420 (opinion of Kennedy, J.). In closely divided states like Wisconsin, a counterfactual, perfectly tied election is highly plausible. Moreover, *other* measures of partisan asymmetry, like the efficiency gap and the mean-median difference, rely only on actual election results.

[9] Justice Kennedy has also noted the need for a "substantive definition of fairness in districting" that "command[s] general

Second, the Court has repeatedly sought to limit judicial intervention to *durable* gerrymanders—plans with partisan imbalances that are unlikely to fade over the course of a decade. *See LULAC*, 548 U.S. at 419 (opinion of Kennedy, J.) (criticizing a plan that "entrenched a party on the verge of minority status"); *Vieth*, 541 U.S. at 360 (Breyer, J., dissenting) (advocating a test based on the "use of political factors to entrench a minority in power"); *Bandemer*, 478 U.S. at 132-33 (plurality opinion) (requiring that a plan "consistently degrade . . . a group of voters' influence," resulting in the "continued frustration of the will . . . of the voters"). The Panel's approach is consistent with these comments. It would permit a plan to be invalidated only if plaintiffs first proved, using an "accepted method of testing how a particular map would fare under different electoral conditions," that any skew is enduring rather than ephemeral. App. 149a n.255.

To be clear, Appellees do not ask the Court to endorse any *particular* measure of partisan asymmetry or any *particular* technique for demonstrating durability. The Panel did not do so, nor need the Court in order to affirm. Rather, Appellees advocate the same course of action the Court has followed in other redistricting contexts involving discriminatory effects: namely, the articulation of a standard whose precise

---

assent." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment). In the academic community, "[s]ocial scientists have long recognized partisan symmetry as the appropriate way to define partisan fairness . . . and for many years such a view has been virtually a consensus position." Ex. 333:6.

contours are filled in through subsequent litigation. This was the Court's strategy in *Reynolds*, where it condemned "egregious" population deviations without trying to identify the point at which population inequality becomes unlawful. 377 U.S. at 569. This was also how the Court proceeded in *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), recognizing concepts such as geographic compactness and racial polarization without prescribing how they should be measured. An analogous approach would work equally well here.[10]

C. The Panel's Justification Prong Is Drawn from the Court's One Person, One Vote Cases.

The final prong of the Panel's test is justification: whether a partisan imbalance that is intentional, large, and durable nevertheless "can be explained by the legitimate state prerogatives and neutral factors that are implicated in the districting process." App. 178a. This prong is drawn directly from the Court's one person, one vote cases. In these cases, even a total population deviation above ten percent for a state legislative plan is not automatically fatal. Rather, the deviation can be "justified by the State" based on the State's political geography or legitimate redistricting objectives. *Brown v. Thomson*, 462 U.S. 835, 843 (1983);

---

[10] Appellants contend that a discriminatory effect prong along these lines would imperil one-third of all plans. J.S. 14-15, 33-34. This claim ignores (1) the Panel's requirement that discriminatory intent be separately established; (2) the Panel's insistence that a large *and durable* partisan asymmetry be shown; and (3) the possibility that a state could justify its plan's skew. Moreover, as the Panel pointed out, "[i]f plaintiffs' proposed formulation is not sufficiently demanding," it is obviously possible to "rais[e] the threshold necessary to support a claim." Dkt. 94:26.

see also, e.g., *Voinovich v. Quilter*, 507 U.S. 146, 161 (1993) ("appellants were required to justify the deviation"); *Mahan v. Howell*, 410 U.S. 315, 326 (1973).

In the partisan gerrymandering context too, several Justices have recommended a distinct inquiry into justification. Justice Kennedy, for instance, has written that mapmakers' use of "political classifications" is only prohibited when it is "unrelated to any legitimate legislative objective." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment). Justice Souter, similarly, would "shift the burden to the defendants to justify their decision by reference to objectives other than naked partisan advantage" if the rest of his test was satisfied. *Id.* at 351 (Souter, J., dissenting); *see also Bandemer*, 478 U.S. at 141 (plurality opinion) (if plaintiffs set forth a prima facie case, "then the legislation would be examined for valid underpinnings").

The justification prong plays the same role in both of these areas: allowing population equality and partisan symmetry, respectively, to be *balanced* against other valid considerations. If there were no such prong, then states might have trouble pursuing goals such as compactness, respect for political subdivisions, and compliance with the Voting Rights Act, to the extent these aims resulted in excessive population inequality or partisan asymmetry. States could also be put in a difficult position if their political geography hampered them from enacting a sufficiently equipopulous or symmetric plan. The justification prong avoids both of these scenarios.

The prong's workability is shown by the half century in which it has been used in one person, one vote cases. Over this period, the Court has reliably distinguished between plans whose large population deviations are justified by legitimate factors and plans whose malapportionment cannot be properly explained. *Compare*, *e.g.*, *Brown*, 462 U.S. at 844 (upholding a map whose "population deviations [were] no greater than necessary to preserve counties as representative districts"), *and Mahan*, 410 U.S. at 323 (same where the state "consistently sought to avoid the fragmentation of [political] subdivisions"), *with Chapman v. Meier*, 420 U.S. 1, 25 (1975) (invalidating a map where the state's interests did not "prevent[] attaining a significantly lower population variance"), *and Kilgarlin v. Hill*, 386 U.S. 120, 124 (1967) (same where alternative plans "respected county lines" but "produced substantially smaller deviations"). Under the Panel's approach, the same time-tested inquiry would apply to partisan (as opposed to population) imbalances.

II. Appellants' Complaints About the Panel's Test Are Meritless.

Appellants do not engage with any of the above analysis. Instead, they hang their hats on a series of unpersuasive arguments about *Vieth* and *Bandemer* as well as the farfetched assertion that they were caught unaware by the Panel's test. The Court should reject these claims.

A. The Court Has Not Precluded Statewide Partisan Gerrymandering Claims.

Appellants' first contention is that *Vieth* somehow precludes partisan gerrymandering claims that are statewide rather than district-specific in nature. J.S. 20-25. To defend this stance, Appellants invent a novel theory of precedent: that when certain Justices conclude that a cause of action is nonjusticiable, they necessarily believe that if the claim *were* justiciable, it should be limited in the ways suggested by other Justices' opinions. There is no support for this theory, and for good reason. When certain Justices conclude that a cause of action is nonjusticiable, that is *all* they conclude. They simply express no opinion on how the claim should operate if it were, in fact, capable of being adjudicated.

It is thus unsurprising that when there is no majority opinion in a case, the Court does not employ Appellants' theory but rather treats as "'the holding of the Court . . . that position taken by those Members who concurred in the judgment[] on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (citation omitted). In *Vieth*, Justice Kennedy was the only Justice who concurred in the plurality's judgment but did not join the plurality's opinion. And it could not be clearer from his concurrence that he contemplated partisan gerrymandering claims proceeding on a statewide basis. He commented that "[i]f a State passed an enactment" explicitly burdening a party's "rights to fair and effective representation," "we would surely conclude the Constitution had been violated." 541 U.S. at 312 (Kennedy, J., concurring in

the judgment). He also offered two examples of "culpable" gerrymanders, both statewide in nature. *Id.* at 316. "In one State, Party X controls the apportionment process and draws the lines so it captures every congressional seat." *Id.* "In three other States, Party Y controls the apportionment process . . . . capturing less than all the seats in each State." *Id.*

That *Vieth* did not preclude statewide partisan gerrymandering claims is also evident from developments since that case. In *LULAC*, the appellants challenged Texas's congressional plan in its entirety. *See* 548 U.S. at 416 (opinion of Kennedy, J.). Yet not a single Justice hinted that the suit was foreclosed for this reason. Indeed, the concept of partisan symmetry discussed in *LULAC* is only coherent with respect to a statewide map as a whole. In the lower courts too, there have been more than a dozen partisan gerrymandering cases since *Vieth*. Not one has adopted Appellants' idiosyncratic view; rather, as the Panel pointed out, "courts considering partisan gerrymandering consistently have assumed that standing exists to challenge a statewide plan." Dkt. 43:15.

Appellants further err in focusing on a few snippets in Justice Stevens's *Vieth* dissent. J.S. 21. Justice Stevens himself did not consider those comments binding in *LULAC*, where he would have struck down Texas's *entire* congressional plan because it "impose[d] a severe *statewide* burden on the ability of Democratic voters and politicians to influence the political process." 548 U.S. at 464 (Stevens, J., concurring in part and dissenting in part) (emphasis added). The comments

are also attributable to Justice Stevens's belief that "racial and political gerrymanders are species of the same constitutional concern." *Vieth*, 541 U.S. at 327 (Stevens, J., dissenting). Because of this belief, he thought that partisan gerrymandering plaintiffs should be bound by the same standing rules as racial gerrymandering plaintiffs.

No other member of the Court, however, has ever endorsed Justice Stevens's position on the equivalence of racial and partisan gerrymandering claims. Indeed, the *Vieth* plurality refused to extend the "predominant intent" test of the racial gerrymandering cases to the partisan gerrymandering context. *See id.* at 285 (plurality opinion). Justice Kennedy also observed in *Vieth* that racial gerrymandering "implicate[s] a different inquiry" than partisan gerrymandering since "[r]ace is an impermissible classification" while "[p]olitics is quite a different matter." *Id.* at 307 (Kennedy, J., concurring in the judgment).

Because racial gerrymandering and partisan gerrymandering are distinct causes of action, underpinned by distinct harms, Appellants are wrong to conflate them. The crux of a racial gerrymandering claim is that *a particular district* was created for a predominantly racial reason, *Miller v. Johnson*, 515 U.S. 900, 916 (1995), thus "classifying [that district's] citizens by race" and causing the district's representative to "believe that [her] primary obligation is to represent only the members of that [racial] group," *Shaw v. Reno*, 509 U.S. 630, 646-47 (1993). The theory of a partisan gerrymandering claim, in contrast, is completely different. It is that a district plan *as a*

whole deliberately, severely, durably, and unjustifiably benefits one party and disadvantages its opponent. That is why, as the Panel held, "[t]he rationale and holding of [*United States v. Hays*, 515 U.S. 737 (1995)] have no application here." App. 224a. This is a case about the partisan manipulation of an entire district map—not the racial distortion of an individual constituency.

B. The Court Has Not Made Noncompliance with Traditional Criteria an Element.

Appellants' next argument has the same structure as their first one: A *Vieth* dissenter (here, Justice Souter) recommended making noncompliance with traditional redistricting criteria an element of a partisan gerrymandering claim. If the four Justices in the *Vieth* plurality are combined with him, that supposedly adds up to five votes for his position. J.S. 26-28.

This argument fails for the reasons outlined above. *First*, Appellants have to put words in the mouth of the *Vieth* plurality because it never actually said that *if* partisan gerrymandering were justiciable, it *should* include as an element noncompliance with traditional criteria. J.S. 26. *Second*, Justice Kennedy's controlling concurrence in *Vieth* explained why traditional criteria are not "sound as independent judicial standards for measuring a burden on representational rights." 541 U.S. at 308 (Kennedy, J., concurring in the judgment). Their defect is that "[t]hey cannot promise political neutrality when used as the basis for relief," but rather "unavoidably have significant political effect." *Id.* at 308-09. *Third*, the appellants in *LULAC* did not assert

noncompliance with traditional criteria in their challenge to Texas's congressional plan. But not a single Justice thought their claim should fail for this reason. And *fourth*, in the thirteen years since *Vieth*, not one lower court has adopted Appellants' position. Indeed, a three-judge panel recently (and unanimously) denied a state's motion to dismiss even though the plaintiffs did "'not allege that the [plan] fails to follow traditional redistricting principles.'" *Common Cause v. Rucho*, No. 16-cv-1026, 2017 WL 876307, at *10 (M.D.N.C. Mar. 3, 2017) (citation omitted; bracket in original).

Beyond these points, the proposition that a partisan gerrymandering claim must include as an element noncompliance with traditional criteria was *explicitly* rejected by *five* Justices in *Vieth*. The plurality stressed the unmanageability of this criterion, asking "*How much* disregard of traditional districting principles?" and "What is a lower court to do when . . . the district adheres to some traditional criteria but not others?" 541 U.S. at 296 (plurality opinion). The plurality also observed that aesthetically pleasing districts nevertheless can be grossly gerrymandered: "it certainly cannot be that adherence to traditional districting factors negates any possibility of intentional vote dilution." *Id.* at 298. Justice Kennedy agreed with this portion of the plurality's opinion. *See id.* at 308 (Kennedy, J., concurring in the judgment).

Vieth was not the first time that Appellants' argument was raised—or rebuffed. In *Bandemer*, Justice Powell opined that the "most important" factor should be "the shapes of voting districts and adherence

to established political subdivision boundaries." 478 U.S. at 173 (Powell, J., concurring in part and dissenting in part). The plurality specifically "disagree[d] . . . with [his] conception of a constitutional violation" because noncompliance with traditional criteria does "not show any actual disadvantage beyond that shown by the election results." *Id.* at 138-40 (plurality opinion). In *Gaffney*, likewise, a unanimous Court was unmoved by evidence that "irregularly shaped districts" "'wiggle[d] and joggle[d]' boundary lines." 412 U.S. at 752 n.18. "[C]ompactness or attractiveness," declared the Court, "has never been held to constitute an independent federal constitutional requirement." *Id.*

As the Panel explained, these holdings make a great deal of sense. Traditional criteria can be disregarded for many reasons other than partisanship: a predominant racial motivation, an effort to comply with the Voting Rights Act, the presence of irregular geographic boundaries, and so on. App. 121a. At the same time, "[h]ighly sophisticated mapping software now allows lawmakers to pursue partisan advantage without sacrificing compliance with traditional criteria." *Id.* at 121a-122a. "A map that appears congruent and compact to the naked eye may in fact be an intentional and highly effective partisan gerrymander." *Id.* at 122a.

None of this is to say that traditional criteria are *irrelevant* under the Panel's test. As in the racial gerrymandering context, a failure to abide by them may be probative evidence of discriminatory intent. *See, e.g.*, *Bethune-Hill v. Va. State Bd. of Elections*, 137

S. Ct. 788, 799 (2017) ("[A] conflict or inconsistency" between districts and traditional criteria "may be persuasive circumstantial evidence tending to show racial predomination."). And as in the one person, one vote context, respect for traditional criteria may provide a justification for a plan's discriminatory effect. *See, e.g.*, *Brown*, 462 U.S. at 844 (permitting a large population deviation that was "entirely the result of the consistent . . . application of a legitimate state policy").

Lastly, there is indeed a "dispute that Act 43 complies with traditional districting principles." J.S. 27. Appellees did not emphasize the plan's noncompliance at trial because they were able to present even more damning evidence of discriminatory intent. But the plan is certainly noncompliant. As documented above, it splits more counties than any other map in Wisconsin's history, Dkt. 125 ¶ 221, and was found to violate Section 2 of the Voting Rights Act, *see Baldus*, 849 F. Supp. 2d at 854-58. Act 43's districts are also less compact, on average, than those of any other Wisconsin map for which data is available. Dkt. 125 ¶ 221.

C. The Panel's Test Is Not the Same as the *Bandemer* Plurality's.

Shifting their focus from *Vieth* to *Bandemer*, Appellants further contend—for the first time on appeal—that the Panel's test is identical to the one endorsed by the *Bandemer* plurality and rejected by the Court in *Vieth*. Appellants' reasoning, in essence, is that both the Panel and the *Bandemer* plurality took into account discriminatory intent, discriminatory effect, and justification. Ergo, the two tests are the same. J.S. 28-34.

Bandemer, however, has no monopoly on these concepts. To the contrary, they both predate and postdate that decision, and feature in the Court's case law on both partisan gerrymandering and many other issues. The Panel's discriminatory intent prong, for instance, is grounded not in *Bandemer* but rather in myriad precedents making clear that without an invidious purpose, neither the First nor the Fourteenth Amendment is typically violated. App. 110a-125a. Similarly, the Panel's discriminatory effect prong draws primarily from *LULAC*, the only Court decision to date that has discussed partisan asymmetry. App. 159a-177a. And the Panel's justification prong is taken almost verbatim from the Court's one person, one vote cases. App. 177a-179a.

Turning to the details of the two tests, it is indisputable that they are different. The most famous aspect of the *Bandemer* plurality's test was its insistence that plaintiffs not only prove the manipulation of district lines for partisan gain, but also show that they had been denied "the opportunity . . . to participate in party deliberations in the slating and nomination of candidates, their opportunity to register and vote, and hence their chance to directly influence the election returns." 478 U.S. at 133 (plurality opinion); *see also Vieth*, 541 U.S. at 345 (Souter, J., dissenting) (noting that this requirement "raise[d] real doubt that a case could ever be made out"). The Panel's test, of course, includes no such criterion of participatory exclusion.

What the Panel's test *does* include is a significant role for measures of partisan asymmetry like partisan

bias and the efficiency gap. App. 159a-177a. These metrics, though, are nowhere to be found in the *Bandemer* plurality's opinion. And for good reason. The canonical social scientific articles developing the concept of partisan asymmetry were not published until several years *after Bandemer* was decided. Exs. 100, 148, 414. And it was not until *LULAC* that partisan asymmetry first came to the attention of the Court.

The Panel's intent prong is also significantly more rigorous than the *Bandemer* plurality's. The *Bandemer* plurality thought that "[a]s long as redistricting is done by a legislature" under a single party's control, "it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." 478 U.S. at 129 (plurality opinion). In contrast, the Panel required "an intent *to entrench* a political party in power," that is, "to make the political system *systematically unresponsive* to a particular segment of the voters." App. 117a (emphasis added). An intent to achieve a *durable* partisan advantage is plainly different from a garden-variety partisan motivation.

The Panel's justification prong, too, bears little resemblance to the *Bandemer* plurality's. In its brief remarks on the topic, the *Bandemer* plurality suggested that it was "the legislation"—not the legislation's discriminatory effect—that "would be examined for valid underpinnings." 478 U.S. at 141 (plurality opinion). The Panel, however, made clear that it was "evaluat[ing] whether a plan's partisan effect is justifiable" given a state's "legitimate districting goals" and "natural political geography." App. 178a. The Panel

thus properly focused the justification inquiry on the asymmetry exhibited by a plan (as opposed to a plan's overall form, for which some seemingly neutral explanation can often be mustered).[11]

D. The Panel's Test Could Not Have Come as a Surprise to Appellants.

Appellants' final argument is that they were sandbagged by the Panel's test, which was supposedly sprung on them after the trial had concluded. J.S. 38-39. This claim is risible. In their pretrial brief, Appellees articulated their proposed approach as follows: "The test's first prong is whether a plan was enacted with *discriminatory intent* . . . . The second prong of plaintiffs' test is *discriminatory effect*, or whether a plan has exhibited a high and durable level of partisan asymmetry relative to historical norms. . . . The test's third and final prong is *justification*, or whether a plan's severe and durable asymmetry can be 'justified by the State' based on its political geography or legitimate redistricting objectives." Dkt. 134:1-3.

The Panel adopted exactly the same three-pronged approach. In its words, "the First Amendment and the Equal Protection Clause prohibit a redistricting scheme which (1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political

---

[11] Appellants assert, without any evidence, that states will never be able to justify their plans' asymmetries. J.S. 33. But in the analogous one person, one vote context, states have often succeeded in justifying their plans' population deviations. *See, e.g.*, *Brown*, 462 U.S. at 844; *Mahan*, 410 U.S. at 326.

affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds." App. 109a-110a. Plainly, there is no meaningful daylight between these formulations. Both of them set forth the same elements, defined in the same way. If Appellants "trained their fire" on an "academic efficiency-gap approach," they have only themselves to blame for overlooking Appellees' actual proposal. J.S. 38-39.

Nor can Appellants profess surprise at the Panel's emphasis on partisan entrenchment. In its summary judgment opinion, the Panel stated that "[f]ocusing on durability makes . . . sense" and that "durability is an appropriate measure of discriminatory effect." Dkt. 94:20. The Panel also foreshadowed the intent prong it eventually adopted: "the intent to prevent the minority party from regaining control throughout the life of the districting plan." Dkt. 94:30. Appellees noticed these not-so-subtle hints and planned their trial strategy accordingly. Appellants could have done the same.

CONCLUSION

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

Respectfully submitted,

Paul M. Smith
Counsel of Record
CAMPAIGN LEGAL CENTER
1411 K Street NW, Ste. 1400
Washington, DC 20005
(202) 736-2200
psmith@campaignlegalcenter.org

Nicholas O. Stephanopoulos
UNIVERSITY OF CHICAGO LAW SCHOOL
1111 E 60th St., Suite 510
Chicago, IL 60637
(773) 702-4226
nsteph@uchicago.edu

J. Gerald Hebert
Ruth M. Greenwood
Danielle M. Lang
Annabelle E. Harless
CAMPAIGN LEGAL CENTER
1411 K Street NW, Ste. 1400
Washington, DC 20005

Douglas M. Poland
RATHJE & WOODWARD, LLC
10 E. Doty St., Ste. 507
Madison, WI 53703

Jessica Ring Amunson
JENNER & BLOCK LLP
1099 New York Ave. NW,
Ste. 900
Washington, DC 20001
(202) 639-6000
jamunson@jenner.com

Michele Odorizzi
MAYER BROWN, LLP
71 S. Wacker Dr.
Chicago, IL 60606
(312) 782-0600
modorizzi@mayerbrown.com

Peter G. Earle
LAW OFFICE OF PETER G. EARLE
839 N. Jefferson St., Ste. 300
Milwaukee, WI 53202