

1 gerrymandering, and in the face of the legislative  
2 passivity and inaction that we're observing, the only way  
3 that this problem is going to be solved is through  
4 judicial intervention.

5 And so with that, I'll turn the table over to  
6 Mr. Hebert.

7 JUDGE RIPPLE: Thank you, Professor.

8 MR. HEBERT: Your Honors, I think I have about  
9 12 minutes left and I will apologize in advance, Lynette,  
10 that I may -- I'll try to pace myself.

11 Plaintiffs' three-part test: Intent, effects, and  
12 justification or the lack thereof. That's our Fourteenth  
13 Amendment theory.

14 On the intent issue quickly, during the oral  
15 argument on summary judgment in response to a question  
16 from Judge Crabb, counsel for the defendants was asked:  
17 "Do you contest partisan intent for purposes of summary  
18 judgment?" The answer was "No." And he added "And we  
19 will not dispute intent at trial either" he didn't  
20 envision. So it's essentially been uncontested. And  
21 rightfully, so I might add. You have the Ottman memo,  
22 Exhibit 241, where he says we have the opportunity and  
23 the obligation to determine who's going to be here in ten  
24 years. But that goes to intentional durability of a  
25 gerrymander.

1           On the intent issue we have the secrecy policy. We  
2 had the rush to nine day legislative process, the very  
3 "aggressive legislative agenda," the hiring of the  
4 Michael Best law firm and replacing the Democratic  
5 counsel and leaving them without funding. You have the  
6 incredible testimony of Joe Handrick, who testified in  
7 *Baldus* that he didn't even use partisan data. And you  
8 heard two witnesses from the state come in and contradict  
9 that testimony. I mean that's just unbelievable when  
10 somebody testifies under oath that they were in the map  
11 room using partisan intent with Professor Gaddie and data  
12 to draw a map and then testifies under oath that they did  
13 not? And we're going to take action on that after this  
14 hearing, Your Honor, with the United States Attorney.

15           And that's why the *Baldus* court decided that it was  
16 laughable when people came in, like the witnesses that  
17 came into this court and talked about intent. They  
18 deviated from the normal process. This is a typical  
19 standard in intent cases. First time in a century that  
20 they actually didn't draw the wards first and then do the  
21 districts. And you know why they didn't? Because they  
22 needed to rush it through because of the recall election  
23 and they were afraid they were going to lose power.

24           They hired Professor Gaddie to run S curves. Why do  
25 you run S curves? The only reason you do that is to see

1 the durability of the partisan gerrymander. And they  
2 printed out the S curves. They showed them to the  
3 legislative leadership. For heaven's sake, we had the  
4 Tale of the Tape which shows they were targeting  
5 Democrats. That was Exhibit 283 and 284.

6 Each plan they drew along the way increased the  
7 partisan advantage for Republicans and disadvantaged  
8 Democrats. And even their equal population data, when  
9 they gave it to the legislators individually, it didn't  
10 just contain the number of people in your district or how  
11 many you lost, how many you have to pick up, it had the  
12 partisan scores on it. So even their equal population,  
13 so-called one-person one-vote data was looked at through  
14 a partisan lens.

15 Look at the effects. They're extreme and they're  
16 durable. Efficient scores, you've heard those. Worst  
17 gerrymander in modern history from 1972 to 2010. Exhibit  
18 35, the original report of Simon Jackman, Figure 1.  
19 Exhibit 90, the lifetime average versus the efficiency  
20 gap scores. Exhibit 158, worst on the efficiency gap and  
21 preservation of county boundaries.

22 Then even if you look at Exhibit 172, you can  
23 compare the number of swing districts in the old plan to  
24 the number of swing districts in the new plan and they  
25 drop down from 19 to 10. And they increase the number of

1 strong GOP districts from 27 to 38. I mean I'm going to  
2 -- in a minute I'm going to show the Court how you  
3 gerrymander. As somebody who has represented state and  
4 local governments throughout my entire career as a lawyer  
5 and having done hundreds, if not thousands of  
6 redistricting plans, I'm going to show you in an  
7 illustration right here in the courtroom how they did  
8 what they did.

9 And even Professor Gaddie's detailed definition of  
10 durability, as he said, it's virtually certain to bias  
11 Republicans throughout the entire cycle.

12 And the justification. I mean really, the state's  
13 trial brief concession at page 26 was that the  
14 Demonstration Plan performs just as well as the Act 43  
15 with traditional redistricting principles. Well, if  
16 that's the case, then that's a concession that they  
17 really can't justify their plan because we have a plan  
18 that has less partisan bias than theirs and follows the  
19 traditional redistricting criteria. That's on page 26 of  
20 their trial brief.

21 Then they have the series of draft maps that  
22 increasingly showed partisanship. Well, if you've got  
23 other plans you've drawn along the way that doesn't have  
24 that partisan bias and you've been following the  
25 so-called redistricting principles, well then for

1 heaven's sake when you final adopt the worst plan, you've  
2 already created four or five demonstration plans that  
3 meet the same requirement.

4 And then you finally have the Professor Chen's  
5 hundreds of simulated plans that do the same thing.

6 The First Amendment injury here -- and the  
7 plaintiffs have been in this courtroom every day. Their  
8 right to vote is fundamental. It's our voice in the  
9 government. It's the only voice many of us have. It's  
10 at its pinnacle, the First Amendment, when it involves  
11 political speech in voting. The past voting history,  
12 when you go to the polls and you record your political  
13 vote, you're recording your political value, as Professor  
14 Whitford said. It's not right to target people and harm  
15 them because of their voting history. Burdening and  
16 penalizing people for the fact that what did they do?  
17 They had the nerve to participate in the political  
18 process and go to the polls, so we're going to use their  
19 voting history to minimize and cancel out their vote as a  
20 group?

21 Our test is grounded. The gerrymander test we  
22 proposed is grounded in five decades of constitutional  
23 law principally arising out of the one-person one-vote  
24 cases. We would only capture extreme and enduring  
25 gerrymanders. In *Vieth*, one of the cases I worked on,

1 *Vieth v. Jubelier*, all nine justices agreed that  
2 excessive partisan gerrymanders were unconstitutional.  
3 We think they meant it.

4 We have a record that is complete for this Court.  
5 We have a record, as Judge Griesbach noted, that is even  
6 going to be complete for eight or nine justices thousands  
7 of miles away. We have a case that fits the elusive test  
8 we think that the Court has been looking for. Decisions  
9 in *LULAC* and *Vieth*, you know what they did to partisan  
10 gerrymanderers? *LULAC* in 2006, *Vieth* in 2003, both of my  
11 cases. What they did is they gave the green light to  
12 partisan gerrymanderers to say this is an opportunity for  
13 you. Sky's the limit because we have no standard. And  
14 they took advantage of that.

15 Now, how many legislative leaders came before the  
16 court in Wisconsin and justified or defended what they  
17 did? As many as are sitting in that witness chair.  
18 None. State's theory of this case is that no  
19 constitutional limits to partisan gerrymandering really  
20 exist because they say there's no test. Well, what that  
21 would mean is it's not justiciable and we already know  
22 that five justices think it is and I guess we think this  
23 is a case where the Court ought to just dish it finally  
24 and once and for all.

25 Partisan gerrymandering cases today masquerade as

1 racial cases. And why? Because we lack a robust  
2 partisan gerrymandering juris prudence and so everybody  
3 has to take their challenges and awkwardly fit them into  
4 a racial sphere, creating a doctrinal mess frankly in the  
5 racial gerrymandering field and perversely encouraging  
6 legislators to boast about their partial gerrymandering  
7 so that they don't have to get caught up in a racial  
8 gerrymander.

9       Representatives and their parties today are armed  
10 with more sophisticated computers and fine-grained voting  
11 data than ever before. And what do they use it for?  
12 Eliminating political competition, predetermining who's  
13 going to win and lose, and wresting unjustified political  
14 power from those voters who oppose them and opposing them  
15 by packing them and cracking them.

16       And what does all this have to do with the public?  
17 The public's opinion today, they've lost faith. They've  
18 lost faith in the integrity of our elections and our  
19 elected officials. Public confidence -- this is the  
20 Supreme Court just a couple terms ago in *Crawford v.*  
21 *Marion County*. Public confidence in the integrity of the  
22 electoral process has independent significance because it  
23 encourages citizen participation in the electoral  
24 process. And just last term in another one of the cases  
25 I was involved in, the Arizona State legislative case,

1 the Supreme Court reaffirmed the view that "partisan  
2 gerrymanders are incompatible with democratic  
3 principles." That's got to be a hint. That's got to be  
4 a signal that we've got to do something about this, and  
5 the court is looking for a case.

6 Now, I said finally that I would demonstrate what a  
7 partisan gerrymander -- how you accomplish that. And I'm  
8 going to use water as an example. So when I tell my  
9 clients we want to draw districts, we can draw the  
10 districts so that the water is down to here so that in a  
11 big rainstorm when the water comes up, it won't go over  
12 your head. But if we draw it down there where the water  
13 is low, are we really creating a safe district for your  
14 political party and we're not maximizing the use of our  
15 voters because we've got too many of them? So what we  
16 really need to do is not draw districts up to here where  
17 the water is up to here because in that vote swing we  
18 heard about, if it goes up, all of you are going to  
19 drown. You're all going to drown in a big swing or even  
20 a small swing.

21 So here's what you do. We're going to draw it to  
22 here so that it -- and we're going to measure how high it  
23 can go up historically so that it always stays below your  
24 chin. That is exactly what Wisconsin did in this case.  
25 They drew it right at chest deep.



1 Now, since the Supreme Court hasn't settled on a  
2 standard, the task falls to this three-judge court to  
3 develop them, we believe, and the plaintiffs have tried  
4 to shoulder this obligation. A decision here that this  
5 gerrymander, this partisan intent, this extreme, this  
6 unjustified, if you can't find a partisan gerrymander in  
7 this case, then it's tantamount to saying it lacks  
8 justiciability. We just can't get there. So this case  
9 is not at the margins and we ask the Court to declare it  
10 unconstitutional.

11 Finally, I'm reminded of my home state of Virginia,  
12 James Madison and Federalist No. 37 who said "the genius  
13 of Republican liberty seems to demand not only that all  
14 power should be derived from the people, but that those  
15 entrusted with it should be kept in dependence on the  
16 people." And even Alexander Hamilton, quoted by the  
17 Supreme Court in 1969 in *Powell v. McCormick* said "the  
18 true principal of a republic is that the people should  
19 choose whom they please to govern them." Don't we wish  
20 that was the case.

21 The United States of America continues to be the  
22 leading democracy in the world. But if we're going to be  
23 able to spread democracy throughout the world, we have  
24 the duty to first correct the remaining imperfections of  
25 our democracy here at home. As we get ready this weekend

1 to celebrate Memorial Day, remembering those brave women  
2 and men who fought for our country's ideals of freedom,  
3 justice, equality, let us honor their memory by holding  
4 our government accountable to those worthy and lofty  
5 ideals. What the evidence shows is we now know the way,  
6 we need only the will.

7 Thank you, Your Honors, for your courtesies  
8 throughout this trial. (4:40 p.m.)

9 JUDGE RIPPLE: Thank you, Counsel. Mr. Keenan.

10 MR. KEENAN: I'll try to be brief. The Court  
11 unfortunately scheduled the first day of trial on my  
12 wife's birthday, obviously unbeknownst to you, so I've  
13 got to get home and take care of the kids because she's  
14 going to Door County with a friend this weekend. And  
15 this case has consumed so much of my life, the sad thing  
16 is that all I think of is Door County is in Assembly  
17 District 1.

18 I do want to say that the plaintiffs and  
19 Mr. Stephanopoulos and the efficiency gap, they do raise  
20 an interesting issue of political science and I think  
21 Mr. Trende and Mr. Goedert testified to that. And I  
22 follow politics, I was a poly-sci undergrad and I think  
23 it's interesting. But at the same time, anyone who has  
24 followed politics since the 1990's, has seen that the  
25 Republican Party has had a great advantage of winning the