No. 16-1161

In the Supreme Court of the United States

BEVERLY R. GILL, ET AL., APPELLANTS,

v.

WILLIAM WHITFORD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

BRIEF FOR APPELLANTS

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QUESTIONS PRESENTED

1. Did the district court lack jurisdiction over this case because Plaintiffs have no standing to bring their statewide partisan-gerrymandering claims?

2. Did the district court lack jurisdiction over this case because statewide partisan-gerrymandering claims are nonjusticiable?

3. Did Plaintiffs fail to state a claim on which relief can be granted because they failed to articulate a "limited and precise" standard, *Vieth v. Jubelirer*, 541 U.S. 267, 306, 311 (2004) (Kennedy, J., concurring in the judgment)?

4. Are Defendants entitled to judgment because Act 43 complies with traditional redistricting principles and is otherwise unobjectionable?

5. Are Defendants entitled, at the very minimum, to a remand so that they can present evidence under a fairly noticed legal standard?

PARTIES TO THE PROCEEDING

The following were parties in the court below:

Plaintiffs:

William Whitford, Roger Anclam, Emily Bunting, Mary Lynn Donohue, Helen Harris, Wayne Jensen, Wendy Sue Johnson, Janet Mitchell, Allison Seaton, James Seaton, Jerome Wallace, and Donald Winter;

Defendants:

Beverly R. Gill, Julie M. Glancey, Ann S. Jacobs, Steve King, Jodi Jensen (substituted for her predecessor, Don Millis), and Mark L. Thomsen, in their official capacities.

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INTRODUCTION

A divided three-judge district court became the first court in decades to invalidate a redistricting plan on partisan-gerrymandering grounds. The plan that the court struck down—Act 43—complies with traditional redistricting principles and does not meaningfully differ from the immediately prior, court-drawn map in terms of election outcomes. As the dissent below explained, the only way that Wisconsin Republicans could have achieved Plaintiffs' desired partisan results would have been to "engage in heroic levels of nonpartisan statesmanship," purposefully abandoning their advantage under the court-drawn plan. J.S. App. 245a.

While Plaintiffs in their Motion to Affirm before this Court did not defend the district court's core reasoning, they continued to argue that Act 43 is unlawful because the Legislature engaged in too much partisanship. But "[p]artisan gerrymandering dates back to the founding." *Cooper v. Harris*, 137 S. Ct. 1455, 1488 (2017) (Alito, J., concurring in the judgment in part and dissenting in part). Although "some might find [this practice] distasteful, [this Court's] prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering." *Id.* (citation omitted). Plaintiffs seek to overturn this centuries-old status quo, thereby "commit[ting] federal and state courts to unprecedented intervention in the American political process." *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J.,

concurring in the judgment). Plaintiffs seek to impose this change without identifying any historically grounded "comprehensive and neutral principles," *id.* at 306–08, and while simply repeating arguments that this Court has already rejected.

The massive "intervention" that Plaintiffs urge this Court to authorize is "unprecedented." *Id.* at 306. Under the approach they advocated in their Motion to Affirm, whenever a politically minded body draws electoral boundaries—whether for House of Representatives seats, the state legislature, or a local water district—any displeased voter in the State (even one living in a district not altered by the new map) can file a lawsuit in federal court, seeking invalidation of the entire map. In that lawsuit, the plaintiff would need only rely upon one or more of any number of developing "social science" metrics, ranging from the "efficiency gap" to "mean-median difference" calculations to "sensitivity testing" to as-yet unidentified theorems. *See* Mot. to Affirm 10, 12 n.4, 21 n.8. The district court would then compare the outputs of these cherry-picked metric(s) with the outputs of whatever metric(s) the defendants favored and then (somehow) decide, in the name of the Constitution, whether there has been "too much" partisanship. *See League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399, 420 (2006) (plurality op.). This Court was not impressed with a virtually identical multi-metric argument in *LULAC*, when that argument was presented by certain law professors in an *amicus* brief. *Id.*

Notably, under the metric that Plaintiffs favored below, *one out of every three* legislative maps over the last 45 years would have had too much partisan effect. And this actually understates the breadth of what Plaintiffs urge this Court to adopt, as other plaintiffs could attack the remaining maps simply by relying upon other academic formulas thought to "exploit recent conceptual and methodological advances in the social sciences." Mot. to Affirm 21.

Plaintiffs' approach is thus not "limited and precise" under any reasonable understanding of that standard, meaning that Defendants are entitled to judgment. *See Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment). More generally, that Plaintiffs can offer nothing better than their social-science hodgepodge aptly shows that the "weighty arguments for holding cases like these to be nonjusticiable" have now "prevail[ed]." *Id.* at 309 (Kennedy, J., concurring in the judgment). It has been more than three decades since *Davis v. Bandemer*, 478 U.S. 109 (1986), and yet no party or court has identified any "comprehensive and neutral principles for drawing electoral boundaries," let alone a limited and precise test to enforce those principles, *see Vieth*, 541 U.S. at 306–08 (Kennedy, J., concurring in the judgment).

Plaintiffs would also create an unthinkable imbalance in this Court's standing doctrine, making allegations of partisan gerrymandering more legally powerful than claims even of racial gerrymandering. Plaintiffs based their standing on the assertion that a

voter living in any district in a State can challenge a map on a statewide basis. That is contrary to this Court's racial-gerrymandering caselaw, which holds that a voter can challenge only that voter's own district and cannot attack a map "as an undifferentiated whole." *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015) (citation omitted). The result of Plaintiffs' rejection of that principle in the political context would be to favor partisanship-based claims over race-based claims.

This Court should reverse the district court and hold that Plaintiffs' lawsuit must be dismissed.

OPINIONS BELOW

The opinion and order of the panel of the United States District Court for the Western District of Wisconsin, entered on November 21, 2016 (J.S. Appendix A), are reported at 218 F. Supp. 3d 837. The district court's opinion and order permanently enjoining the use of Act 43, entered on January 27, 2017 (J.S. Appendix B), are unreported, but are available at 2017 WL 383360. The district court's judgment, entered on January 27, 2017 (J.S. Appendix C), amended judgment, entered on February 22, 2017 (J.S. Appendix D), and corrected amended judgment, entered on March 15, 2017 (J.S. Appendix E), are unreported.

JURISDICTION

Defendants filed their notice of appeal on February 24, 2017 (J.S. Appendix F), and their amended notice of appeal on March 20, 2017 (J.S. Appendix H). This Court has statutory jurisdiction to consider this appeal under 28 U.S.C. § 1253. However, as explained below, the federal courts lack jurisdiction over Plaintiffs' lawsuit. *See infra* Argument Part I.

CONSTITUTIONAL PROVISIONS INVOLVED

This appeal involves the First Amendment and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, reproduced at J.S. App. 345a–47a.

STATEMENT

A. Political Gerrymandering In Early American History

As historically understood, a partisan gerrymander is a map drawn "without any apparent regard to [the] convenience or propriety" of the districts, John Russell Bartlett, *Dictionary of Americanisms* 248 (4th ed. 1877), creating "irregularly shaped election district[s]" for partisan advantage, William A. Craigie and James R. Hulbert, 2 *A Dictionary of American English* 1114–15 (1940) (citing 1816 source material); *accord The Gerry-Mander, or Essex South District Formed Into A Monster!*, Salem Gazette (April 2,

1813) (first public use of "gerrymander");[1] *see generally* Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. Chi. L. Rev. 655, 710–21 (2017). This practice "dates back to the founding." *Cooper*, 137 S. Ct. at 1488 (Alito, J., concurring in the judgment in part and dissenting in part); *accord* Elmer C. Griffith, *The Rise And Development Of The Gerrymander* 26 (1907); Erik J. Engstrom, *Partisan Gerrymandering and the Construction of American Democracy* 21–22 (2013).

In the 1789 redistricting of the New York Legislature, for example, the Federalist Party "unnecessarily divided a county by lopping off [ ] towns" into different districts to "secur[e] to their party the control of the new government [ ] provided for" in the federal Constitution. Griffith, *supra*, at 42–43. The Legislature also engaged in similar tactics in 1801, 1802, 1804, 1808 (with some districts that year not even connected), and again in 1812. *Id.* at 56–61, 77–79.

In 1812, Massachusetts Democratic-Republicans completed the "notoriously outrageous political districting" from which gerrymandering received its name. *Vieth*, 541 U.S. at 274–75 (plurality op.). This plan created districts of "fantastic shapes," "separat[ing]" some towns and "isolat[ing]" others from

[1] Available at https://digital.library.cornell.edu/catalog/ss:3293783.

"their proper counties" to boost Democratic-Republican political fortunes. Griffith, *supra*, at 16–17; Engstrom, *supra*, at 39. The "most distorted contour" was "[t]he outer district of Essex county." Griffith, *supra*, at 17. Someone "proposed the term salamander" for the figure, which was then combined with the last name of Massachusetts Governor Elbridge Gerry, who "had allowed the [redistricting] bill to become a law," to create the portmanteau "gerrymander." Griffith, *supra*, 17.[2]

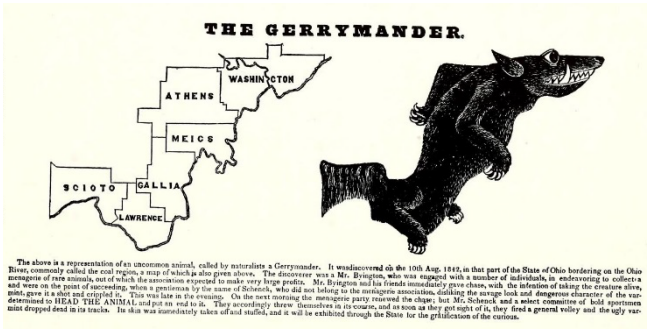
[2] Images available at: Library of Congress, *Essex County; Worcester County*, https://www.loc.gov/item/95683218; Mass. Historical Soc'y, *The Gerry-Mander. A new species of Monster which appeared in Essex South District in Jan. 1812*, http://www.masshist.org/database/1765.

After the enactment of this map, the "Federalists [still] won 80 percent of the House seats in the 1812 election and recaptured control of the state legislature." Engstrom, *supra*, at 39; Jerrold G. Rusk, *A Statistical History of the American Electorate* 235 (2001). After Governor Gerry himself lost, James T. Austin, *The Life of Elbridge Gerry* 377–78 (1829), "the new Federalist majority [then] set about remapping [Massachusetts's] congressional districts to further enhance the prospects of Federalist congressional candidates in the 1814 election." Engstrom, *supra*, at 39.

In 1842, Ohio Democrats introduced a gerrymandered redistricting plan in a special legislative session. Griffith, *supra*, at 118; Jenni Salamon, *Ohio's 1842 Election: Absquatulators vs. Gerrymanderers*, Ohio Memory, Sept. 6, 2013.[3] The plan "grouped counties along the Ohio river in the coal region in a partisan manner," which became known to the public

[3] Available at http://www.ohiohistoryhost.org/ohiomemory/archives/1333.

through a local paper publishing cartoons in the spirit of the "original" gerrymander, Griffith, *supra*, at 118:[4]



Whig representatives absconded to defeat a quorum and published a defense of their actions in their party newspaper, along with a critique of the gerrymander: "It needs only a glance at the map to see how far contiguity of territory has been regarded in the formation of this bill. It has not only not been regarded; it has been most grossly disregarded." Daily Ohio St. J. (Columbus, August 12, 1842);[5] Salamon, *supra*. While they prevented enactment of the plan, the Whigs lost at the polls. Salamon, *supra*. Ohio "has since been very frequently and effectively gerrymandered." Griffith, *supra*, at 118.

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[4] Image available at: 37 Ohio Archaeological and Historical Publications 528 (1928) (reproduction of a newspaper), https://archive.org/stream/ohioarchologic37ohio#page/n547/mode/2up.

[5] Available at http://www.ohiomemory.org/cdm/fullbrowser/collection/p16007coll22/id/17513/rv/compoundobject/cpd/17516.

In 1852, the Democratic Party of Indiana "carved the state into a remarkable 10 (out of 11) Democratic districts despite only garnering 53 [or 54] percent of the statewide vote." Engstrom, *supra*, at 9, 105. The following election, however, Democrats' vote share dropped to 46%, resulting in a win of only two districts due to the thin margins built into the gerrymandered map. *See id.* at 120–21.

Similar practices continued in the post–Civil War era. *See generally* Engstrom, *supra*, at 9, 89. Pennsylvania Republicans gerrymandered in 1866. *How the Radical Majority in Congress is Manufactured*, Rockingham Reg. & Va. Advertiser, Nov. 1, 1866. Indiana Radical Republicans engaged in an "unblushing gerrymander" in 1868. *Five Democratic Congressmen*, New Harmony Reg., Oct. 24, 1868; *Democratic Gains in Indiana*, The Age: Philadelphia (May 22, 1868). And prior to the 1870 elections, Ohio Republicans engaged in "a scheme to gerrymander the state." *A Horrible Democratic Plot*, Daily Milwaukee News, March 17, 1869.

B. Wisconsin's General Assembly, From Wisconsin's Founding To Act 43

1. Wisconsin assigns to the Legislature the responsibility for creating the State's voting districts, subject to certain controlling principles. Wis. Const. art. IV, §§ 3–5; *accord Chapman v. Meier*, 420 U.S. 1, 27 (1975) ("reapportionment is primarily the duty and responsibility of the State through its legislature or

other body, rather than of a federal court"). The Act creating the Wisconsin Territory provided for the election to both houses of the territorial legislature from multi-member districts. *See* Act of April 20, 1836, ch. 54, 5 Stat. 10, § 4. The Wisconsin Constitution jettisoned the multi-member regime, requiring single-district elections. Wis. Const. art. IV, § 4. Each district must "be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be as compact in form as practicable." *Id.* The districts of the upper house, the State Senate (not at issue here), must be "composed of 3 assembly districts," Wis. Stat. § 4.001, and "no assembly district shall be divided in the formation of a senate district," Wis. Const. art. IV, § 5. Assembly districts must also be equal in population. *See* Wis. Const. art. IV, § 3.

The Wisconsin Legislature engaged in partisan gerrymandering early in the State's history. *See A Horrible Democratic Plot*, *supra*; *Wisconsin*, Waukesha Plaindealer (Nov. 26, 1867). In 1868, the "[R]epublican legislature" "gerrymandered" the congressional districts to ensure that 5 of 6 Wisconsin House of Representative members were Republicans. *Id*. When Democrats gained control of the Assembly, they employed similar measures. In the early 1890s, after Wisconsinites elected a Democratic Governor and Democratic majorities in the Assembly and Senate, Democrats used their newly won power to fracture 15 Assembly districts and split 20 counties for partisan gain. Michael Keane, *Redistricting in Wisconsin* 7 (April 1, 2016). The Wisconsin Supreme

Court invalidated the plans on state-law grounds. *See generally Wis. ex rel. Attorney Gen. v. Cunningham*, 51 N.W. 724 (Wis. 1892); *Wis. ex rel. Lamb v. Cunningham*, 53 N.W. 35 (Wis. 1892). The Legislature then rushed a redistricting plan into effect 12 days before the election, under which Republicans soon retook the Legislature. Keane, *supra*, at 7.

From the 1960s through the 1990s, Wisconsin's political branches often failed to agree on districting maps, thereby forcing federal courts to draw Assembly maps. Following this Court's decision in *Baker v. Carr*, 369 U.S. 186 (1962), the Wisconsin Supreme Court drew the State's legislative districts after the Legislature and Governor were unable to agree on a plan. *Wis. ex rel. Reynolds v. Zimmerman*, 128 N.W.2d 16 (Wis. 1964). After the 1970 census, Wisconsin's political branches reapportioned the Assembly districts. *Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 631 (E.D. Wis. 1982). Following the 1980 census, a federal district court drafted its own redistricting plan after the Governor vetoed the Legislature's proposed plan. *Id.* at 632, 638–39. When Democrats won the Governor's office in the 1982 election, the Democratic Legislature and Governor passed new Assembly districts, which were in force through the end of the decade after temporarily being stayed by the courts. *See Republican Party of Wis. v. Elections Bd.*, 585 F. Supp. 603, 604 (E.D. Wis. 1984), *vacated sub nom. Wis. Elections Bd. v. Republican Party of Wis.*, 469 U.S. 1081 (1984); JA209–10. Federal courts again drew Wisconsin's Assembly districts for

the 1990s, after the Republican governor vetoed the Democratic Legislature's plan. *Prosser v. Elections Bd.*, 793 F. Supp. 859, 862, 871 (W.D. Wis. 1992).

Following the 2000 census, a federal court again drew Assembly districts due to split control of the two houses of the Legislature. *See Baumgart v. Wendelberger*, Nos. 01-C-121, 02-C-366, 2002 WL 34127471, at *1 (E.D. Wis. May 30, 2002). The court drew its plan "in the most neutral way it could conceive—by taking the 1992 plan as a template and adjusting it for population deviations." *Id.* at *7. The two-party election results under the 2002 plan were as follows:

Election Year	**Republican Vote Share**	**Republican Seats**
2002	50.50%	58
2004	50.00%	60
2006	45.25%	52
2008	46.00%	46
2010	53.50%	60

See JA219–20, 223–24.

2. The Legislature drew the map at issue here—2011 Wisconsin Act 43 ("Act 43")—after Republicans won control of the Legislature and Governorship in the 2010 election. JA248.

The Legislature assigned primary drafting responsibility to two legislative staffers and a former legislator. Dkt. 125 ¶¶ 17–20; Dkt. 119-8; Dkt. 147:46. Professor Ronald Keith Gaddie and retained

lawyers assisted in this process. Dkt. 125 ¶¶ 19–20; Dkt. 147:152–53. The staffers focused on creating various draft maps that complied with the Voting Rights Act (VRA), equal-population requirements, and traditional districting principles, while also taking politics into account. Dkt. 147:152–62; Dkt. 148:83–86. The goal was to create proposed *regional* alternatives for the Legislative leadership to consider. Dkt. 147:162–65; Dkt. 148:94–98.

To comply with the VRA, the staffers paid special attention to Milwaukee's Assembly districts. Dkt. 147:152–53; Dkt. 148:75–76. After Professor Gaddie and the lawyers had signed off on the Milwaukee districts, the staffers "locked these districts" and then worked on maps of other areas of the State. Dkt. 148:77–78.[6]

Having locked in the Milwaukee-area districts, the staffers then drew various draft maps that complied with equal-population requirements, traditional redistricting principles, and state laws. Dkt. 147:153–57; Dkt. 148:83–86. The staffers drafted maps that were compact and contiguous by drawing "reasonably configured" districts, sought to avoid pairing incumbents, and tried to minimize delayed voting, also called "disenfranchisement," of voters

[6] A district court later rejected most challenges to Act 43, except for one under the VRA. *See Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840 (E.D. Wis. 2012) (per curiam).

shifted between Senate districts. Dkt. 148:83–86; Dkt. 147:155–59.

The staffers also considered the political implications of their various draft maps, using a tool they called the "composite score." This score is a snapshot of the partisan preferences of Assembly district voters, derived from averaging statewide races from 2004 through 2010 (President, U.S. Senate, Governor, Attorney General, Treasurer, and Secretary of State). Dkt. 147:121–29. This score did not purport to project, with any degree of precision, future Assembly elections; as an average of *statewide* races, it took no account of incumbency, candidate strength, or other Assembly-district-specific factors.

After completing their VRA, population-equality, traditional-redistricting-principles, and political analyses for their draft maps, the staffers presented portions of their various draft maps, by region, to legislative leadership, who then selected the preferred approach for each region. Dkt. 147:162–65; Dkt. 148:94–99. The drafters combined these regions into a single map, and then legislative leadership and one of the staffers met with each Republican member of the Assembly to discuss their district. Dkt. 147:165–68; Dkt. 148:101–02. The Legislature then adopted the map, after some minor adjustments, as Act 43. *See* Dkt. 148:110–17. As discussed in more detail below, *see infra* pp. 56–58, the district court drew a significant negative inference from the fact that, under Dr. Gaddie's swing analysis of Act 43, Democrats

were projected to win a majority of seats only after they managed to win more than 53% of the statewide Assembly vote (a vote total that they had achieved in two of the three elections leading up to Act 43). *See* J.S. App. 149a–50a & n.257; JA223–24.

Act 43 is generally consistent with the 2002 court-drawn map in terms of compactness, municipal splits, and population equality. Act 43's compactness scores are comparable to the 2002 court-drawn plan: Act 43 had a smallest-circle score of 0.39 and a perimeter-to-area score of 0.28, whereas the 2002 court-drawn plan had a smallest-circle score of 0.41 and a perimeter-to-area score of 0.29.[7] JA214–15. Act 43 split 62 municipalities, compared to 50 splits in the 2002 plan. JA215–16. Act 43 had better population equality than the 2002 court-drawn map, with a deviation of 0.76% under Act 43, compared to 1.59% under the 2002 plan. JA212–13. Further, Act 43 avoided incumbent pairings where possible, with 22 total legislators paired, split evenly between Republicans and Democrats. Dkt. 148:87.

[7] The "perimeter-to-area score, which compares the relative length of the perimeter of a district to its area, and the smallest circle score, which compares the ratio of space in the district to the space in the smallest circle that could encompass the district," are the "two standard measures of compactness." *LULAC*, 548 U.S. at 455 n.2 (2006) (Stevens, J., concurring in part, dissenting in part).

Two elections occurred under Act 43 before Plaintiffs filed their lawsuit. In the 2012 elections, Republicans won 60 out of 99 seats in the Assembly with 48.6% of the statewide two-party vote. *See* JA219–20, 224. In the 2014 elections, the Republicans won 63 of 99 seats in the State Assembly with 52% of the statewide two-party vote. *See* JA219–20, 224.

C. Procedural Background

1. In July 2015, Plaintiffs filed a complaint in the Western District of Wisconsin, alleging that Act 43 violated the First and Fourteenth Amendments. JA25–65. Plaintiffs are 12 individual voters from 11 of the State's 99 Assembly districts. JA153–55. Their complaint rested upon "a new test," the so-called "efficiency gap." JA28–29 (emphasis omitted). This is a concept recently developed by a professor (co-counsel for Plaintiffs) and a research fellow in a law-review article. *See* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering And The Efficiency Gap*, 82 U. Chi. L. Rev. 831 (2015). The theory assumes all votes cast for a winning candidate above those needed for victory are "wasted" votes that show "packing," while all votes cast for losing candidates are wasted votes that show "cracking." JA28–29. Plaintiffs contended that a plan that exceeded a 7% gap was unlawful unless the State could justify this gap. JA58–60. The district court denied Defendants' motion to dismiss this complaint, holding that "current law does not foreclose plaintiffs' claims," but did

not set out the legal standard to which discovery and expert reports in the case should be tailored. JA102.

The district court thereafter rejected Defendants' motion for summary judgment. In their motion, Defendants had argued, among other things, that the efficiency gap was not a lawful standard. Dkt. 46. In response, Plaintiffs focused on how the efficiency gap should form the basis of a legal test. Dkt. 68. Plaintiffs, however, obliquely suggested that "the Court could require a different measure of partisan symmetry, such as partisan bias, to be used instead of or in addition to the efficiency gap." Dkt. 68:48. Notably, Plaintiffs disclaimed reliance on "minority party entrenchment" as foreclosed by this Court's precedent. Dkt. 68:56. In their reply, Defendants strenuously objected to Plaintiffs' request that the district court "develop a standard not put forward by the plaintiffs to date" because Defendants would have no opportunity to contest that yet-to-be developed standard. Dkt. 73:23. In denying Defendants' summary judgment motion, the district court concluded that "there is a genuine dispute on the question whether a large efficiency gap is a strong indicator of a discriminatory effect," but refused to explain whether Plaintiffs' proposed efficiency-gap test would govern. Dkt. 94:15.

2. The trial took place in May 2016, with the focus of the evidence and argument regarding Act 43's allegedly partisan effects being on the efficiency gap.

Four fact witnesses testified first. William Whitford, the lead plaintiff, admitted that Act 43 had not affected his ability to elect a Democratic representative, but complained that Act 43 harmed his "ability to engage in campaign activity to achieve a majority." Dkt. 147:36–37. The two legislative staffers and Gaddie (via videotaped deposition) testified about creating Act 43. Dkt. 147:40–203; Dkt. 148:5–133.

Plaintiffs offered two expert witnesses, Professors Kenneth Mayer and Simon Jackman, who focused their testimony largely on the efficiency gap. Dkt. 148:136–295; Dkt. 149:5–141, 143–291. Mayer calculated an efficiency gap of 11.69% for Act 43 in 2012, but did not calculate a gap for 2014. *See* Pls. Ex. 2, at 45, 54, Dkt. 147:7–8, Dkt. 148:136–37. Mayer also testified about his Demonstration Plan, an alternative plan specifically designed to produce a lesser efficiency gap. *See* Dkt. 148:143. Mayer briefly testified about his "uniform swing analysis," Dkt. 149:92–93, discussed in more detail below, *see infra* p. 58. Professor Jackman, in turn, testified about his analysis of the efficiency gaps seen in 41 States' legislative elections from 1972 to the present. *See* J.S. App. 48a, 163a; Dkt. 149:149–52. In Jackman's analysis, 34% of plans had an efficiency gap over 7% in their first election and 16% had an initial efficiency gap over 10%. JA193. Jackman's analysis showed a sharp turn in the efficiency gap in Republicans' favor starting in the 1990s, including in Wisconsin. Dkt. 149:250–54; Pls. Ex. 34, at 45, Dkt. 147:7–8, Dkt. 149:148.

Defendants offered Sean Trende and Professor Nicholas Goedert as expert witnesses, who also focused largely on the efficiency gap. Dkt. 150:5–143, 144–252. Trende testified that the efficiency gap was flawed for numerous reasons, including because it fails to account for Wisconsin's political geography favoring Republicans. *See* Dkt. 150:66–70, 74–86. Professor Goedert explained that the efficiency gap would improperly codify a hyper-proportional relationship between seats and votes. Dkt. 150:144, 169–70.

3. On November 21, 2016, a divided three-judge district court invalidated Act 43. J.S. App. 1a–315a. The majority adopted a three-part legal standard based upon a discriminatory intent, discriminatory effects, and justification inquiry, built around the concept of entrenchment. J.S. App. 3a–4a, 109a–10a. The court also held that Plaintiffs had standing to challenge Act 43 on a statewide basis. J.S. App. 219a–22a.

The majority ultimately held that Act 43 was unlawful under its newly announced test. On discriminatory intent, the court concluded that "an *intent to entrench* a political party in power signals an excessive injection of politics into the redistricting process," J.S. App. 117a (emphasis added). Given that Act 43 was drawn by a Republican legislature, this test was easily satisfied. J.S. App. 126a–45a. As to partisan effect, the Court held that Act 43 was unlawful because "it secured for Republicans a lasting Assembly

majority"; that is, the district court found impermissible effect based upon entrenchment. J.S. App. 145a. The district court reached this conclusion by looking primarily to "the swing analyses performed by Professors Gaddie and Mayer." J.S. App. 145a–46a. As to the efficiency gap, the district court rejected Plaintiffs' core request to make this the definitive effects test, but held that Act 43's efficiency gaps "bolstered" the court's partisan effect holding. J.S. App. 159a. Finally, having found the first two elements of its test met, the court held that Act 43's political results could not be "justified" based on its compliance with traditional redistricting principles or by Wisconsin's political geography. J.S. App. 177a–218a.

Judge Griesbach dissented, explaining that, among many other defects, the majority's approach required Republicans "to engage in heroic levels of nonpartisan statesmanship," drawing the new map to neutralize their advantage under the 2002 court-drawn plan. J.S. App. 245a–46a. The dissent further objected to invalidating Act 43 because, as all the parties and the court agreed, "Act 43 does not violate any of the redistricting principles that traditionally govern the districting process." J.S. App. 250a–51a.

4. On January 27, 2017, the district court enjoined Defendants from using Act 43 and ordered that a new plan be adopted by November 1, 2017. App. 323a. On June 19, 2017, this Court granted Defendants' application for a stay, and agreed to hear the case on the merits, while postponing consideration of jurisdiction.

SUMMARY OF ARGUMENT

I. As a majority of the Justices of this Court concluded in *Vieth*, federal courts lack jurisdiction to adjudicate statewide political-gerrymandering claims. *See* 541 U.S. at 305–06 (plurality op.); *id.* at 327–28 (Stevens, J., dissenting). These Justices were correct on both standing and justiciability grounds.

A. Plaintiffs, individual voters in 11 of Wisconsin's Assembly districts, lack standing to challenge Act 43 on a statewide basis because they could only possibly suffer concrete, particularized harm in their specific districts. Even in a racial-gerrymandering case, a plaintiff only has standing to challenge the plaintiff's own district, not the entire map "as an undifferentiated whole." *Ala. Legislative Black Caucus*, 135 S. Ct. at 1265–66. This rationale applies directly to political-gerrymandering claims. A Wisconsin voter like the lead plaintiff in this case only has a concrete and particularized interest in the district where he lives and votes. He has no standing to challenge other Wisconsin Assembly districts or other House of Representatives districts (including districts in other States), on the theory that he wants more Democrats for his Assembly or House member to caucus with.

A contrary conclusion would lead to an unthinkable and perverse loophole in this Court's standing doctrine. Given that plaintiffs may not bring statewide racial-gerrymandering claims, *see Ala. Legislative Black Caucus*, 135 S. Ct. at 1265–66, permitting such

claims in the political-gerrymandering context would favor politics-based claims over allegations that the legislature acted with improper racial motives.

B. Plaintiffs' statewide claims also present a nonjusticiable political question. In *Vieth*, a majority of this Court either definitively concluded that such claims were nonjusticiable, 541 U.S. at 305–06 (plurality op.), or could eventually prove to be so, *id.* at 309 (Kennedy, J., concurring in the judgment). The last three decades of fruitless litigation demonstrate that there are no judicially discernible standards in this area of law. The *only* theory that Plaintiffs presented below—so-called partisan symmetry—is not a "comprehensive and neutral principle[ ]" of districting, derived from "the annals of parliamentary or legislative bodies." *Id.* at 306–08 (Kennedy, J., concurring in the judgment). Partisan symmetry is simply a species of proportional representation, for which there is "no [constitutional] authority," *id.* at 308, and which has no historical or even present-day support in districting practice.

II. Even if this Court concludes that the district court had jurisdiction to consider Plaintiffs' claims, Plaintiffs have not stated a claim on which relief can be granted because they have not articulated a "limited and precise" standard. *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment).

The theory that Plaintiffs proposed in their Motion to Affirm is the opposite of limited and precise.

That theory identifies partisan effect based upon a brew of "partisan asymmetry" and "partisan bias," the efficiency gap, "mean-median difference" calculations, "sensitivity testing," and more. Mot. to Affirm 10, 12 n.4, 21 & n.8. Plaintiffs borrowed this approach from an *amicus* brief filed by law professors before this Court in *LULAC*, even though a plurality of this Court explained that this approach failed to articulate a "reliable measure of fairness." 548 U.S. at 419–20.

The test that Plaintiffs proposed before the district court, but have now abandoned on appeal, is no more defensible. Under that proposal, a map would have an impermissible partisan effect if it had an efficiency gap of more than 7% in its first election. This boils down to yet another baseless request for proportional representation; indeed, *hyper*proportionalism, as the efficiency gap metric assumes that "for every percentage point increasing in vote, you'll get a 2 percentage point increase in seat share." Dkt. 149:188. The efficiency gap also suffers from additional fatal flaws, including that it would find that one out of every three legislative maps drawn in the last 45 years has impermissible partisan effect (while, at the same time, systematically overlooking partisanship-driven plans drawn by Democrats).

The district court took a different tact, finding that Act 43 had an impermissible partisan effect because it allegedly "secured for Republicans a lasting Assembly majority" throughout the decade. J.S. App. 145a. As Plaintiffs conceded below, *see* Dkt. 68:56,

this approach is foreclosed by *Vieth*. Given Plaintiffs' concession below, the entrenchment issue was not fairly litigated at trial. Accordingly, if this Court were to hold that entrenchment plays any part in a partisan-gerrymandering test, Defendants respectfully submit that a remand to permit the parties to litigate this issue would be appropriate.

III. Plaintiffs' lawsuit also fails because Act 43 complies with traditional redistricting principles and is otherwise unremarkable. A majority of Justices in *Vieth* who would even permit adjudication of partisan-gerrymandering claims would require the plaintiff to show as an *element* of the claim that the legislature did not comply with these neutral principles. *See* 541 U.S. at 318 (Stevens, J., dissenting); *id.* at 347–48 (Souter, J., joined by Ginsburg, J., dissenting). Here, it was undisputed below that Act 43 complies with these principles, meaning that Plaintiffs' lawsuit fails for this reason alone. At the very minimum, Act 43 is lawful because the Legislature considered political implications as only one of many legitimate factors, including traditional redistricting principles, and because Act 43's results are generally comparable to those that obtained under the immediately prior court-drawn map.

ARGUMENT

I. The District Court Lacked Jurisdiction

A majority of this Court in *Vieth* concluded that federal courts lack jurisdiction to adjudicate statewide political-gerrymandering claims. A four-Justice plurality determined that all political-gerrymandering claims were nonjusticiable. 541 U.S. at 305–06 (plurality op.). Justice Stevens, in turn, concluded that the plaintiffs in the case had no standing to bring their statewide partisan-gerrymandering claims because they would not have standing to bring a statewide racial-gerrymandering claim. *See id.* at 327–28 (Stevens, J., dissenting). As the plurality correctly explained, Justice Stevens "concur[red] in the judgment that [the Court] should not address plaintiffs' statewide political gerrymandering challenges." *Id.* at 292 (plurality op.). Although Justice Stevens "reache[d] that result via standing analysis, while [the plurality] reach[ed] it through political-question analysis, [the] conclusions are the same: [ ] statewide claims are nonjusticiable." *Id.* (plurality op.); *see also id.* at 353 (Souter, J., dissenting) ("I would limit consideration of a statewide claim to one built upon a number of district-specific ones.").

Given that a majority of this Court has already concluded that federal courts have no jurisdiction to adjudicate statewide partisanship-based claims, and given that Plaintiffs here brought only statewide claims, a straightforward application of this Court's

precedent is sufficient to dispatch Plaintiffs' lawsuit in whole. *See United States v. Jacobsen*, 466 U.S. 109, 115–18 & n.12 (1984) (controlling holding derived from a two-Justice plurality and four-Justice dissent); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 17 (1983) (similar). After all, "either the absence of standing or the presence of a political question suffices to prevent the power of the federal judiciary from being invoked." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974).

Even if this Court wishes to consider these issues anew, both Justice Stevens and the *Vieth* plurality were correct in their respective conclusions: a plaintiff lacks standing to bring a statewide partisan-gerrymandering claim, *and* partisan-gerrymandering claims are nonjusticiable (at least when dealing with statewide claims like those in *Bandemer*, *Vieth*, and in the present case). Either conclusion requires dismissal of Plaintiffs' lawsuit for lack of jurisdiction.

A. Plaintiffs Have No Standing To Bring Their Statewide Claims

1. Federal courts have subject matter jurisdiction only over cases where plaintiffs have standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992). For plaintiffs to have standing, each must show: (1) an "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized," in that it "affect[s] the plaintiff in a personal and individual way" and "(b) actual or imminent"; (2)

a "causal connection between the injury and the conduct complained of"; and (3) a likelihood that "the injury will be redressed by a favorable decision" from the court. *Id.* at 560–61 & n.1 (citations omitted).

Under these controlling principles, plaintiffs in a political-gerrymandering case lack standing to bring a statewide challenge. They could only possibly have standing to challenge their own districts, based upon an allegation that their legislature's treatment of that district's lines caused them individualized harm. This follows directly from this Court's racial-gerrymandering caselaw, and would obtain even absent this controlling, on-point precedent.

a. In the racial-gerrymandering context, this Court has identified two kinds of cognizable, personal harms that plaintiffs could suffer: (1) "being personally . . . subjected to a racial classification," and (2) "being represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group" in whose favor the district was gerrymandered, rather than the district's entire electorate. *Ala. Legislative Black Caucus*, 135 S. Ct. at 1265 (alterations omitted) (citing *Bush v. Vera*, 517 U.S. 952, 957 (1996) (principal opinion of O'Connor, J.); *Shaw v. Reno*, 509 U.S. 630, 648 (1993)). Because these harms "directly threaten [only] voter[s] who live[ ] in the *district* attacked," plaintiffs could only have standing to challenge their own "specific" districts alone, not the plan "considered as an undifferentiated 'whole.'" *Id.* That is, voters who live in other

districts have not been "personally [ ] subjected to a[n] [impermissible] classification," and thus generally lack standing. *United States v. Hays*, 515 U.S. 737, 745 (1995).

These controlling principles apply directly to the political-gerrymandering context, meaning that a political-gerrymandering plaintiff could only possibly have standing to challenge "the boundaries of [the plaintiff's] individual district[ ]," not the State redistricting plan "considered as an undifferentiated 'whole,'" *Ala. Legislative Black Caucus*, 135 S. Ct. at 1265; *accord Vieth*, 541 U.S. at 327–28 (Stevens, J., dissenting). Only voters living in an allegedly partisan-gerrymandered district could even arguably be "denied equal treatment because of the legislature's reliance on" partisan "criteria." *Hays*, 515 U.S. at 744–45. And only the "[v]oters in [such] districts may suffer [ ] special representational harms," such as the "winner of an election in a [partisan]-gerrymandered district" regarding the "object of her fealty" as the "architect of the district." *Vieth*, 541 U.S. at 328 n.18, 330 (Stevens, J., dissenting) (first brackets in original, citation omitted).

A contrary conclusion would create an intolerable loophole in this Court's jurisprudence, perversely favoring politics-based claims over race-based claims. As this Court has explained, "racial identification is highly correlated with political affiliation" in certain parts of this country. *Cooper*, 137 S. Ct. at 1473 (citation omitted). If this Court were now to hold that

plaintiffs have standing to bring statewide partisanship claims, whereas they lack standing to bring statewide racial claims under controlling caselaw, *see Hays*, 515 U.S. at 745, the obvious solution for them would be to frame their lawsuits as partisanship cases.

b. Even without the benefit of this Court's racial-gerrymandering caselaw, voters suffer no particularized injury to a cognizable legal interest from alleged partisan gerrymanders outside of their own district. *Lujan*, 504 U.S. at 560–61 & n.1. Under a single-member district system, electors vote for individual Assembly members to represent them, "not for a statewide slate of legislative candidates put forward by the parties," who then represent all of the voters in the State. *Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring in the judgment). Accordingly, individual voters, living in individual districts, suffer no concrete injury resulting from maps impacting districts in other parts of the State.

Notably, a voter stands in the same attenuated relationship to assembly members from other districts in a state legislature as that voter stands to Representatives from other House of Representatives districts (including from other States). While a Wisconsin Democrat might prefer that Democrats in Ohio elect a majority-Democrat House delegation (and may even donate to Ohio Democrat candidates to forward that cause), that Wisconsin Democrat voter certainly suffers no individualized, concrete harm from a pro-

Republican gerrymander or some other voting measure (such as a stringent residency requirement, *see, e.g.*, *Marston v. Lewis*, 410 U.S. 679 (1973) (per curiam)) that leaves Ohio Democrats with fewer House members to send to Washington D.C. The same logic applies, to the same degree, if that Wisconsin Democrat wants more Democrats, from other districts, elected to the Assembly and believes that Act 43 frustrated this desire.

2. Plaintiffs in this case are voters who reside in 11 of Wisconsin's 99 assembly districts. JA153–55. They objected to Act 43 only "as an undifferentiated whole," *Ala. Legislative Black Caucus*, 135 S. Ct. at 1265–66 (emphasis removed), and did not argue that *any* of their districts were unlawfully gerrymandered. Plaintiffs thus lack standing, as they never even sought to establish that Act 43 causes them injury "in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1; *see Hays*, 515 U.S. at 745.

The example of lead plaintiff William Whitford demonstrates how clearly Plaintiffs have failed to establish their own standing. Whitford lives in a heavily Democratic, Madison-based Assembly district. Both before and after Act 43, Democrats ran unopposed, or won by extremely large margins, in Whitford's district. Dkt. 147:37; Defs. Ex. 538, at 28, Dkt. 147:27–28; Defs. Ex. 539, at 26–27, Dkt. 147:27–28. Act 43 is even further afield from Whitford's district because the map-drawers presented their draft maps to legislative leaders *by region*. *See supra* p. 15. So

even if Plaintiffs could plausibly allege that some district(s) in some other region of Wisconsin were subjected to an unlawful district-specific gerrymander, that alleged violation could not relate in any "concrete and particularized" or "causal" way to Whitford's district. *Lujan*, 504 U.S. at 560. As Whitford testified, the injury that he believes that he suffered was a diminishment of his "ability to engage in campaign activity to achieve a majority in the Assembly." Dkt. 147:37. That is not a concrete, particularized injury; instead, it is a subjective preference that any person could assert, so long as that person is interested in the election of more Wisconsin Democrats.

3. The district court and Plaintiffs offered several reasons as to why they believe Plaintiffs have standing. None of those arguments are convincing.

First, the district court held that because the Legislature utilizes a "caucus system," which often passes legislation by the majority party only rather than through bipartisan coalitions, Act 43 "diminishes the value of the plaintiffs' votes in a very significant way." J.S. App. 220a. But Plaintiffs do not vote for a party in Assembly elections; they vote in single-member district elections. *See supra* pp. 11, 31. So even if one assumes that Act 43 would yield fewer Democrats in the Legislature as an aggregate whole, this does not "diminish[ ]" Plaintiffs' votes any more than if some action by the Ohio legislature reduced the number of Democrats in the House for Wisconsin Democrat House members to caucus with.

Second, the district court sought to analogize to *Baker v. Carr*, 369 U.S. 186 (1962). J.S. App. 221a–22a. But *Baker* held that plaintiffs who live in overpopulated, and thus underrepresented, districts have standing to bring one-person, one-vote claims. *See Baker*, 369 U.S. at 207–08. Plaintiffs have not argued that they suffered any individual injury of the type alleged by plaintiffs who live in overpopulated districts. Unlike in *Baker*, each of Plaintiffs' votes has the same weight as the votes of their fellow citizens. Plaintiffs have, instead, rested entirely on a statewide injury theory that finds no grounding in *Baker*.

Third, Plaintiffs point out that "not a single Justice objected" to the allegedly "statewide [ ] nature" of the claim in *LULAC*. Mot. to Affirm 4, 27. But when standing is "assumed by the parties" and "assumed without discussion by the Court," a merits decision has "no precedential effect" on the standing issue. *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 91 (1998). And there is good reason why *LULAC* did not discuss the statewide standing issue. At oral argument, counsel for the *LULAC* plaintiffs explained that the claimed political gerrymander involved only the districts of "six Democratic Congressmen who had managed to be elected in Republican leaning districts." Tr. of Oral Argument at 5, *LULAC*, 548 U.S 399 (No. 05-204); *see also LULAC*, 548 U.S. at 412–13. And, counsel explained, at least one plaintiff resided in each of these districts, so "there [was] standing." Tr. of Oral Argument at 35, *LULAC*, 548 U.S 399 (No. 05-204). The defendants did not dispute that

those plaintiffs had district-specific standing, sufficient to bring their six-district-specific claim.

Finally, Plaintiffs invoked the *ipse dixit* that "partisan gerrymandering is *inherently* a statewide activity" and thus they *must* have standing to challenge Act 43 on a statewide basis. Mot. to Affirm 4 (emphasis added). But it is clearly possible for a plaintiff to bring a district-specific partisanship claim, as did one of the *Vieth* plaintiffs. *See Vieth*, 541 U.S. at 318–19 (Stevens, J., dissenting); *accord Shapiro v. McManus*, 203 F. Supp. 3d 579 (D. Md. 2016) (currently pending single-district partisan-gerrymandering claim); Edward B. Foley, *The Gerrymander and the Constitution: Two Avenues of Analysis and the Quest for a Durable Precedent*, Ohio St. U. Moritz C. L. Pub. L. & Legal Theory Working Paper Series No. 401, at 13–15 (July 10, 2017) (urging a district-specific political-gerrymandering test).[8]

B. Plaintiffs' Challenge To Act 43 As An Unlawful Statewide Gerrymander Presents A Nonjusticiable Controversy

1. Federal courts lack jurisdiction to decide political questions. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012). This Court has "set forth six independent tests for the existence of a political question." *Vieth*, 541 U.S. at 277–78 (plurality op.).

[8] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2999738.

Particularly relevant here is one of the most "importan[t]" and "certai[n]" of those tests, *id.*: a claim is nonjusticiable if there is "a lack of judicially discoverable and manageable standards for resolving it." *Id.* (citation omitted).

In *Bandemer*, Justice O'Connor, joined by Chief Justice Burger and then-Justice Rehnquist, concluded that "partisan gerrymandering claims of major political parties raise a nonjusticiable political question." 478 U.S. at 144 (O'Connor, J., concurring in the judgment). Adjudicating such claims would propel courts "toward some form of rough proportional representation," inconsistent "with our history, our traditions, [and] our political institutions." *Id.* at 145. Authorizing these claims is particularly inappropriate in a "*statewide*" context because "[n]one of the elections for the [ ] Legislature are statewide." *Id.* at 153 (O'Connor, J., concurring in the judgment).

Revisiting these concerns in *Vieth*, in the wake of "[e]ighteen years of essentially pointless litigation," five Justices concluded that political-gerrymandering claims either were nonjusticiable, or could prove nonjusticiable after further experience. Writing for a four-Justice plurality, Justice Scalia concluded that partisan-gerrymandering claims are not justiciable, after discussing the standards offered in *Bandemer*, by the *Vieth* plaintiffs, and by the dissenting Justices, and finding each wanting. *Id.* at 281–301. Justice Kennedy, while not joining the *Vieth* plurality, agreed that none of the proposed standards was adequate,

while adding two additional important considerations. *Id.* at 306 (Kennedy, J., concurring in the judgment). First, no party had presented "comprehensive and neutral principles for drawing electoral boundaries," or "helpful discussions on the principles of fair districting discussed in the annals of parliamentary or legislative bodies." *Id.* at 306–08. Second, given this "dearth of helpful historical guidance," "intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Id.* at 307, 309. Although Justice Kennedy allowed for the "possibility" of judicial involvement "if some limited and precise rationale were found," *id.* at 306, he recognized that there were "weighty arguments for holding cases like these to be nonjusticiable; and those arguments may prevail in the long run," *id.* at 309.

2. Political-gerrymandering claims could only be justiciable if litigants successfully identify "comprehensive and neutral principles for drawing electoral boundaries," such as those derived from "the annals of parliamentary or legislative bodies." 541 U.S. at 306, 308 (Kennedy, J., concurring in the judgment). It has been now 13 years since *Vieth,* and over three decades since *Bandemer*. Yet no litigant has identified such principles and historical sources. This Court should thus hold that political-gerrymandering claims are nonjusticiable, at least for statewide claims like those in *Bandemer*, *Vieth,* and this case. That statewide claims like those at issue in this case are

most clearly outside of courts' jurisdiction is further reinforced by the standing discussion above, *supra* pp. 27–34, including because "[n]one of the elections for the [ ] Legislature are statewide," *Bandemer*, 478 U.S. at 144 (O'Connor, J., concurring in the judgment).[9]

The lack of historically derived "comprehensive and neutral principles" for redistricting illustrates the futility of continued litigation on this question. As Plaintiffs conceded below, given that this Court has held that "proportional representation," "predominant or exclusive partisan intent," "district noncompactness," and "minority party entrenchment" each do not qualify as sufficiently neutral principles, the "*only* theory" that Plaintiffs can imagine still remaining is "partisan symmetry." Dkt. 68:56 (emphasis in original). Partisan symmetry, Plaintiffs have explained, is "the idea that a district plan should treat the major parties symmetrically with respect to the conversion of votes to seats." JA28.

But partisan symmetry is simply not a "comprehensive and neutral principle[ ] for drawing electoral boundaries." *Vieth*, 541 U.S. at 306–07 (Kennedy, J.,

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[9] Given that this case involves only such statewide claims, this Court need not decide here whether partisanship-based claims brought on an entirely different theory are justiciable. *See, e.g.*, Edward B. Foley, *supra*, at 13–15, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2999738 (proposing a district-specific test based upon comparing a district to the Elbridge Gerry gerrymander).

concurring in the judgment), as the *LULAC* plurality correctly explained when an *amicus* brief suggested this principle, 548 U.S. at 419–20 (plurality op.); *see also infra* pp. 43, 47–48 (extended discussion of this *amicus* brief). While partisan symmetry is some social scientists' currently favored idea of redistricting fairness, it lacks any support in the "annals of parliamentary or legislative bodies," *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring in the judgment), or even modern-day practice by legislatures or courts. "There is," after all, "no basis in the historical record for saying that the Constitution embodies a standard of partisan symmetry." Edward B. Foley, *Due Process, Fair Play, And Excessive Partisanship: A New Principle For Judicial Review Of Election Laws*, 84 U. Chi. L. Rev. 655, 727 (2017). Even today, no State uses partisan symmetry as a redistricting principle. *See generally* Nat'l Conference of State Legislatures, *Redistricting Law 2010*, November 2009, at 172–217 (50-State survey).[10] And where neutral courts must draw district lines, they do not generally seek to forward partisan symmetry. To the contrary, courts can proceed "by taking the [prior] plan as a template and adjusting it for population deviations," *Baumgart*, 2002 WL 34127471, at *7, even where this "leave[s] . . . largely in place" a partisan asymmetry enacted by a prior legislature, *LULAC*, 548 U.S. at 412 (citation omitted).

[10] Available at http://www.ncsl.org/Portals/1/Documents/Redistricting/Redistricting_2010.pdf.

Partisan symmetry is also not a "comprehensive and neutral principle[ ]," *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment), for an additional reason, one which has plagued every statewide test that has been proposed to this Court: it is inexorably based upon proportional-representation principles. Partisan symmetry relies upon the premise that the ideal system is one in which voters' statewide preferences are reflected in a proportionate statewide share of seats, by means of all major parties "conver[ting] votes to seats" with equal efficiency. JA28. But this proportionality assumption is inconsistent "with our history, our traditions, [and] our political institutions," *Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring in the judgment), and is supported by "no authority," *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring in the judgment). That every statewide test so far suggested boils down to a "proportional representation standard" convincingly highlights that it is very likely "impossible" to adopt a statewide test that does not rely upon this inapposite, ahistoric precept. *See* Peter Schuck, *Partisan Gerrymandering: A Political Problem Without Judicial Solution*, in *Political Gerrymandering and the Courts* 240, 240 (B. Grofman ed., 1990).

Failing to declare such statewide partisanship claims nonjusticiable, when no test has emerged in over three decades, "risk[s]" courts' "assuming political, not legal, responsibility for a process that often produces ill will and distrust," *Vieth*, 541 U.S. at 307

(Kennedy, J., concurring in the judgment), and is "primarily the duty and responsibility of the State," *Chapman*, 420 U.S. at 27. That is what occurred below, as the district court invalidated Act 43 on a theory that no party had suggested, after subjecting Defendants to a time-consuming trial. *See supra* pp. 17–21.

Statewide political-gerrymandering claims are nonjusticiable regardless of whether plaintiffs style those claims as arising under the First or Fourteenth Amendments. In *Vieth*, Justice Kennedy observed that "[t]he First Amendment may be the more relevant constitutional provision in future cases [of] partisan gerrymandering." 541 U.S. at 314 (Kennedy, J., concurring in the judgment). Plaintiffs brought their claims under both the First and Fourteenth Amendments, but neither Plaintiffs nor the district court distinguished between the claims in litigating and adjudicating this case. *See* J.S. App. 55a, 109a–10a. The unanswered (and unanswerable) challenge under either Amendment remains the same on the issue of justiciability: identifying historically based, "comprehensive and neutral principles for drawing electoral boundaries." *Vieth*, 541 U.S. at 306, 308 (Kennedy, J., concurring in the judgment).

Finally, as discussed in detail immediately below, *see infra* pp. 41–59, that Plaintiffs failed to propose any limited and precise *test* for adjudicating statewide partisan-gerrymandering claims further supports the conclusion that such claims are nonjusticiable. *See*

541 U.S. at 292–301 (plurality op.) (finding nonjusticiability in large part because the proposed tests proved inadequate). Indeed, that the district court adopted a recycled version of the *Bandemer* plurality's test, while Plaintiffs have now turned to a test rejected by the *LULAC* plurality, *see infra* pp. 47–48, highlights that no judicially manageable test is available.

II. Plaintiffs Failed To State A Claim Because They Did Not Offer A "Limited And Precise" Test For Adjudicating Their Allegations

Plaintiffs failed to state a claim on which relief can be granted because they did not articulate a "limited and precise" legal standard. *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment). That is, even if this Court concludes that there could potentially be historically based "comprehensive and neutral principles" that help mediate whether there has been "too much" partisanship for justiciability purposes, *LULAC*, 548 U.S. at 420 (plurality op.); *but see supra* pp. 34–41, Plaintiffs' failure to propose a "limited and precise" test for adjudicating their partisan-based allegations requires dismissal of their claims under "Fed. Rule Civ. Proc. 12(b)(6)," *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment).

A. This Court's caselaw provides the framework for deciding whether Plaintiffs have met their burden of identifying a "limited and precise" standard.

In *Bandemer*, this Court faced a statewide partisan-gerrymandering claim under which "Democratic candidates received 51.9% of the votes," but won only 43 out of 100 seats available. 478 U.S. at 113–15 (plurality op.). As relevant to the present case, the *Bandemer* plurality rejected the plaintiffs' challenge under a three-part standard based upon discriminatory intent, discriminatory effect, and inadequate justification. Regarding intent, "[a]s long as redistricting is done by a legislature, [partisan intent] should not be very difficult to prove." *Id.* at 129. As for effect, "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or group of voters' influence on the political process as a whole." *Id.* at 132. "[A] finding of unconstitutionality must be supported by evidence of *continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process*." *Id.* at 133 (emphasis added). As to the third part of the test, "[i]f there were a discriminatory effect and a discriminatory intent," a court's job was to evaluate the plan for "valid underpinnings." *Id.* at 141.

Eighteen years later, in *Vieth*, this Court rejected the *Bandemer* plurality's test, as well as every other test proposed in that case. *Bandemer*'s entrenchment-based effects test led to "puzzlement and consternation," while giving no "real guidance to lower courts." *Vieth*, 541 U.S. at 282–83 (plurality op.) (citation omitted); *accord id.* at 308 (Kennedy, J., concurring in the judgment). As for the other proposed

tests, the plurality and Justice Kennedy rejected each as "either unmanageable or inconsistent with precedent, or both." *Id.* at 308 (Kennedy, J., concurring in the judgment). Most relevant for purposes of this case, the plurality and Justice Kennedy rejected Justice Breyer's test—somewhat similar to the *Bandemer* plurality's—that a plan is impermissible if it involves "unjustified use of political factors to *entrench* a minority in power," *id.* at 360 (Breyer, J., dissenting) (emphasis altered); *see id.* at 299 (plurality op.); *id.* at 308 (Kennedy, J., concurring in the judgment). In all, the controlling principle from *Vieth* is the one that Justice Kennedy announced in his concurring opinion: a partisan-gerrymandering claim fails unless the plaintiff carries a burden that the plaintiffs in *Vieth* and *Bandemer* had failed to: articulate a "limited and precise" legal standard. *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment).

Two years after *Vieth*, a plurality of this Court in *LULAC* rejected a test for detecting impermissible partisan effect proposed by group of *amici* professors led by Professor Gary King. 548 U.S. at 420–21 (plurality op.). Professor King *et al.* based this proposed approach on the concept of "partisan symmetry," which "compar[ed] how both parties would fare hypothetically if they each (in turn) had received a given percentage of the vote." Br. of *Amici Curiae* Profs. Gary King et al., *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (Nos. 05-204, 05-254, 05-276, 05-439), 2006 WL 53994, at *5, *7. The professors offered no single means of measuring partisan

asymmetry, instead referring this Court to "a sequence of closely related, and steadily improving, statistical methods" in social-science texts. *Id.* at *9. And they took "no position on how this Court could best implement a [partisan-symmetry based] test," *id. at* *12, arguing that "future" litigation would "flesh out the particulars" of their proposed standard, *id.* at *16. A plurality of this Court rejected the professors' suggestion for failing to furnish a "reliable measure of fairness," *LULAC*, 548 U.S. at 419–20 (plurality op.), explaining that, among its other faults, this proposal does not answer the key question of "how much partisan dominance is too much," *id.* at 420.[11]

B. Plaintiffs and the district court have proposed three different three-part tests, but none satisfies the "limited and precise" requirement.

Before discussing the proposed tests' critical effects prongs, it is important to understand that these tests' other two prongs—partisan intent and lack of justification—add nothing to the *Bandemer* plurality's inadequate test. The first element of the three proposed tests and the *Bandemer* plurality's test is partisan intent. The district court's intent element,

[11] Several other Justices took no position on the professors' proposed standard. *See, e.g.*, *LULAC*, 548 U.S. at 483–84 (Souter, J., concurring in part, dissenting in part) (expressing no opinion on "the administrability" of this approach); *id*. at 491–92 (Breyer, J., concurring in part, dissenting in part) (relying on entrenchment criterion, with no mention of symmetry test).

for example, requires a demonstration of "an intent to entrench a political party in power," J.S. App. 117a, which is not meaningfully different from the *Bandemer* plurality requiring an intent to discriminate against "an identifiable political group," 478 U.S. at 127, or intending the map to have "substantial political consequences," *id.* at 129. Similarly, the proposed tests and the *Bandemer* plurality's test include matching "justification" prongs, which permit upholding a map if its partisan effect can be sufficiently justified. *Compare* J.S. App. 109a–10a, *with* 478 U.S. at 141.

It follows that if there is anything in the district court's or Plaintiffs' proposals capable of offering a "limited and precise" standard, it is not located in the *Bandemer*-plurality-derived "intent" and "justification" tests. Instead, the principle must be found—if at all—in the proposals' effects tests. Those three approaches to measuring partisan effect are:

1. *Social Science Hodgepodge*. In their Motion to Affirm, Plaintiffs abandoned their prior reliance on the efficiency gap as the definitive test for partisan effect, *see infra* pp. 48–49, and argued that this effect should be adjudicated based upon an unspecified combination of "partisan asymmetry" and "partisan bias" measures, *see* Mot. to Affirm 10, the efficiency gap, "mean-median difference" calculations, and "analytical techniques like sensitivity testing," all of which are said to "exploit recent conceptual and methodological advances in the social sciences." Mot. to Affirm

10–12 & n.4, 21 & n.8. Sorting out the "precise contours" of which of these (or other) social-science metrics would apply, when, and how, would be left for "subsequent litigation" in the lower courts. Mot. to Affirm 22–23.

It would be difficult to conceive of a standard *less* "limited" and *less* "precise" than Plaintiffs' social-science stew. Touting "recent conceptual and methodological advances in the social sciences," Plaintiffs would have this Court instruct district courts to evaluate the effects of alleged partisan gerrymanders by applying an unbounded variety of metrics. Mot. to Affirm 10–12 & n.4, 21 & n.8. As for which metric or metrics would govern any case, Plaintiffs provide no answer or even rough guidance. Instead, they urge this Court *not* "to endorse any particular measure of partisan asymmetry or any particular technique for demonstrating durability." Mot. to Affirm 22 (emphasis omitted). Better to leave it to lower courts to figure it out in "subsequent litigation"; presumably only after having subscribed to *Political Research Quarterly*, *American Political Science Review*, and other essential journals. Mot. to Affirm 22–23.

Whereas "*Bandemer* begot only confusion," *Vieth*, 541 U.S. at 283 (plurality op.) (citation omitted), Plaintiffs' social-science approach would sow chaos. Each legislatively drawn plan would be immediately challenged in federal court. A trial would follow, where each side would present dueling "social science" expert(s), and then the district court would need

to pick a winner. There would be no way for any legislature to know, *ex ante*, what metric would guide the inevitable future trial. Notably, whereas Plaintiffs' favored social-science metric below (efficiency gap) found an impermissible partisan effect in one of every three plans, *see infra* p. 52, Plaintiffs' multi-metric approach threatens even more plans, since the plaintiffs in each case could choose their own favored metric.

Plaintiffs' reliance on *Reynolds v. Sims*, 377 U.S. 533 (1964), to deflect these administrability problems, Mot. to Affirm 23, is unpersuasive. In *Reynolds*, this Court identified the constitutional violation and standard—one person, one vote—and then sought to develop a way to enforce that constitutional mandate. *See Reynolds*, 377 U.S. at 565–68, 577–78; *see also Vieth*, 541 U.S. at 290 (plurality op.). Here, in contrast, Plaintiffs have not articulated any "comprehensive and neutral principles" necessary to identify the constitutional violation and standard, *Vieth*, 541 U.S. at 306, 308 (Kennedy, J., concurring in the judgment), and thus there is no constitutional principle for district courts to seek to develop in future cases. And if Plaintiffs' *Reynolds*-based pitch sounds familiar, it is because the professors' *amicus* brief in *LULAC* urged that same approach. *See* King Br., 2006 WL 53994, at *16.

The similarities between Plaintiffs' Motion to Affirm and Professor King *et al.*'s submission in *LULAC* are, in fact, quite striking. Like Plaintiffs here, the professors invited this Court to adopt a social-science-

based analysis drawn from several developing metrics. *Compare* King Br., 2006 WL 53994, at *9–*11, *with* Mot. to Affirm 5, 10, 12 n.4, 21. Like Plaintiffs here, Professor King *et al.* declined to explain "how this Court could best implement" that test. *Compare* King Br., 2006 WL 53994, at *12, *with* Mot. to Affirm 22–23. And like Plaintiffs here, the professors offered assurance that "lower courts and this Court will flesh out the particulars of the rule in the future," citing *Reynolds*. *Compare* King Br., 2006 WL 53994, at *16, *with* Mot. to Affirm 22–23 (tracking this language). All this Court needs to do is to "set a general rule prohibiting partisan gerrymanders," and then lower courts could "decide the specifics of the issue as facts develop." *See* King Br., 2006 WL 53994, at *17; Mot. to Affirm 20–22. This Court found the professors' approach inadequate, *LULAC*, 548 U.S. at 419–20 (plurality op.), and Plaintiffs here have not cured that fatal defect.

2. *Efficiency Gap*. Plaintiffs took a different approach before the district court, arguing that the effects test should be based upon the so-called "efficiency gap." *See supra* pp. 17–19. This concept, recently proposed in a law-review article by one of Plaintiffs' attorneys, Stephanopoulos & McGhee, 82 U. Chi. L. Rev. 831, measures the major parties' relative percentage of "wasted" votes, defined as ballots cast "(1) for a losing candidate, or (2) for a winning candidate but in excess of what she needed to prevail." *Id.* at 834. The formula takes the difference between the parties' respective wasted votes in an election and

divides it by the total number of votes cast. J.S. App 32a. If the gap is zero, the "two parties waste votes at an identical rate"; if the gap favors one party, that party "wasted fewer votes than its opponent, [and] was able to translate, with greater ease, its share of the total votes cast in the election into legislative seats." J.S. App. 32a–33a. Plaintiffs contended below that if the gap for a given plan exceeds 7% in the first election, this establishes unconstitutional effect. J.S. App. 33a–34a. The district court did not adopt this approach, *see* J.S. App. 159a, 176a, and Plaintiffs no longer rely upon it, *see* Mot. to Affirm 10. And with good reason.

First, the efficiency gap is built upon the extra-constitutional assumption that proportionate representation is the baseline, *see supra* pp. 35–36, deviation from which is the touchstone of impermissible effect. The efficiency gap maintains as its core premise that, insofar as a districting plan renders Democrats or Republicans unable to translate their statewide vote totals into a proportionate number of legislative seats, they are constitutionally harmed. So "[i]f Party A has a large statewide total of votes, say 60%, but has only received 51% of the seats, there is a large efficiency gap reflecting . . . [that] the number of seats they won was *disproportionally small* compared to their statewide vote totals." J.S. App. 270a (Griesbach, J., dissenting). In fact, the efficiency gap requires *hyper*proportionality. The gap theory assumes that "for every percentage point increasing in vote, you'll get a 2 percentage point increase in seat

share." Dkt. 149:188. In other words, even "if a state successfully achieved proportional representation, the plan might fail an [efficiency gap] analysis because it fails to give a *hyper*proportional share to the party winning the majority of the statewide vote." J.S. App. 175a.

Second, the gap's reductionist view of voting—regarding ballots as economic transactions, valuable only when "efficiently" cast—distorts the role that votes play in our democracy. The premise of the gap's theory is that votes are "wasted" if cast (1) "for a losing candidate," or (2) "for a winning candidate but in excess of what he or she needed to prevail." JA28–29. But a Republican who wins 50.1% of the vote is not interchangeable with a Republican elected at a comfortable 75% margin. "It is exceptionally likely that legislators in swing districts will adopt more moderate, centrist positions than some of their colleagues, and they will of necessity be more responsive to the 49% of the electorate that did not vote for them." J.S. App. 287a (Griesbach, J., dissenting).

Third, the efficiency gap's zero-gap baseline is systematically biased against Republicans and in favor of Democrats, at least under modern political conditions. This is largely because Democratic voters concentrate in big cities and "smaller industrial agglomerations such that they can expect to win fewer than 50% of the seats when they win 50% of the votes." Jowei Chen & Jonathan Rodden, *Uninten-*

tional Gerrymandering: Political Geography and Electoral Bias in Legislatures, 8 Q.J. Pol. Sci. 239, 239–40 (2013); *Vieth*, 541 U.S. at 290 (plurality op.) (recognizing this phenomenon); *id.* at 359 (Breyer, J., dissenting) (same). In Wisconsin, "Republican-favoring efficiency gaps have been part of [the] political landscape for more than three decades," well before Republicans were drawing district lines, J.S. App. 309a (Griesbach, J., dissenting), including under *court*-drawn plans, JA222–24; Defs. Ex. 547, at ¶ 100, Dkt. 147:27–28. Wisconsin is hardly unusual in this respect. Professor Jackman, Plaintiffs' expert, conceded that efficiency gaps have trended in Republicans' favor since the mid-1990s, even though only two of the 41 States in Jackman's data set were Republican-controlled. Dkt. 149:252–67; Pls. Ex. 34, at 45, Dkt. 147:7–8. And because of its systemic anti-Republican bias, the efficiency gap metric is also incapable of catching what many generally understand as Democrat-enacted gerrymanders. *See* Defs. Ex. 547, at ¶¶ 117, 120, Dkt. 147:27–28; Dkt. 150:75–79.

Fourth, the efficiency-gap theory has numerous technical defects, which can only be briefly summarized here. Even maps that include "many competitive districts"—which can be a feature, not a bug, of a districting plan, *see Gaffney v. Cummings*, 412 U.S. 735, 752–53 (1973)—would be constitutionally suspect. J.S. App. 174a–75a. Under such plans, a "narrow statewide preference," *Bandemer*, 478 U.S. at 130 (plurality op.), would send efficiency-gap scores off the charts because in close races, the party that wins

"wastes" very few votes while the party that loses "wastes" all of its votes. This would cast a presumption of unconstitutionality on what many regard to be "a desirable and non-partisan policy choice." J.S. App. 174a–75a. As the dissent put it, "Plaintiffs would use the Republicans' own electoral success *against* them: . . . the more close races the Republicans win," the larger the efficiency gap, and the larger the gap, the more likely "the Republicans' wins must have been the result of an invidious gerrymander—a self-fulfilling prophecy." J.S. App. 294a (Griesbach, J., dissenting). More generally, the gap is overly sensitive to wave elections. "[W]inning close elections is the surest way to make sure the other side racks up lots of wasted votes—*every* losing vote is wasted, whereas only a few winning votes are wasted." J.S. App. 293a (Griesbach, J., dissenting). So it is possible that a high efficiency gap indicates nothing except that one party beat the other party in several close elections—a fact that says nothing about whether the map itself is "too" partisan.

Finally, the efficiency gap is overbroad, putting so many plans in jeopardy that it "would risk [federal courts] assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment). Plaintiffs' 7% gap first-election threshold would find an impermissible effect in *one of every three plans over nearly 45 years*. *See* JA193–94, 201. Even considering only elections held in 2012 or 2014, Plaintiffs' expert found an efficiency gap greater than

10% in Florida, Indiana, Kansas, Michigan, Missouri, North Carolina, New York, Ohio, Rhode Island, Virginia, Wisconsin, and Wyoming. SA253. Nor would this analysis be limited to state legislatures, as this metric would presumably be applied to plans ranging from congressional maps, *see Vieth*, 541 U.S. 267, to water districts, *see Jimenez v. Hidalgo Cty. Water Improvement Dist. No. 2*, 424 U.S. 950 (1976), *summarily aff'g* 68 F.R.D. 668 (S.D. Tex. 1975), *abrogated on other grounds by Bandemer*, 478 U.S. 109.

3. *Entrenchment*. The district court adopted an entrenchment-based partisan test; Act 43, the court concluded, had an unlawful partisan effect because "it secured for Republicans a lasting Assembly majority," J.S. App. 145a, by "impeding [Democrats'] ability to translate their votes into legislative seats . . . throughout the life of" the plan, J.S. App. 176a–77a. Plaintiffs did not urge the adoption of this test below and did not defend it in their Motion to Affirm. Indeed, Plaintiffs conceded that *Vieth* rejected "minority party entrenchment" as a test for impermissible partisan effect. *See* Dkt. 68:56. The district court's approach is thus foreclosed by binding precedent and waived by Plaintiffs' position on appeal. But to the extent this Court concludes that entrenchment should play any part in a partisan-effects analysis, and holds that Act 43 is not otherwise permissible as a matter of law, *see infra* pp. 56–57, Defendants respectfully submit that a remand would be necessary to permit Defendants to fairly litigate the entrenchment issue.

a. Plaintiffs' concession below that this Court's precedent foreclosed an entrenchment-based effects test was well warranted.

In *Bandemer*, the plurality proposed an effects test under which "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will *consistently* degrade a voter's or a group of voters' influence on the political process as a whole." 478 U.S. at 132 (emphasis added). "[A] finding of unconstitutionality must be supported by evidence of *continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process*." *Id.* at 133 (emphasis added). Every Justice in *Vieth* rejected this test, *see* 541 U.S. at 282–84 (plurality op.); *id.* at 308 (Kennedy, J., concurring in the judgment); *id.* at 317–18 (Stevens, J., dissenting); *id.* at 346 (Souter, J., joined by Ginsburg, J., dissenting); *id.* at 355–56 (Breyer, J., dissenting), although Justice Breyer proposed a somewhat similar entrenchment rationale where, for example, a majority party had "twice failed to obtain a majority of the relevant legislative seats," *see id.* at 366 (emphasis omitted).

The district court's entrenchment test, "secur[ing] for Republicans a lasting Assembly majority," J.S. App. 145a, based upon a degrading of the "ability to translate [ ] votes into legislative seats," J.S. App. 176a–77a, is indistinguishable from the approach urged by the *Bandemer* plurality (and, to a more limited extent, by Justice Breyer). Both the tests require

"burdening a defined group's representational rights" (i.e., "degrading a voter's influence") "over the life of the plan" (i.e., "consistently"). The claimed purpose of both inquiries is not to detect "disproportionality per se," *Bandemer*, 478 U.S. at 143 n.21 (plurality op.); *see* J.S. App. 167a–68a, but to ascertain "continued frustration of the will of a majority," *Bandemer*, 478 U.S. at 133 n.21 (plurality op.) (emphasis added), by entrenching a "lasting Assembly majority" over the following decade, J.S. App. 145a.

As this Court held in *Vieth*, entrenchment is not a relevant and reliable measure of unconstitutional partisan gerrymandering. For one thing, it rests upon the constitutionally baseless "principle that groups . . . have a right to proportional representation." *Vieth*, 541 U.S. at 287–98 (plurality op.); *id.* at 308 (Kennedy, J., concurring in the judgment). At the same time, it does not overcome "the difficulties of assessing partisan strength statewide," *Vieth*, 541 U.S. at 300 (plurality op.), including the problem of ascertaining "a person's politics, [which] is not an immutable characteristic" and the undeniable fact "that majority status in statewide races [does not always] establish[ ] majority status for district contests," *id.* at 287–88 (plurality op.). More practically, the record of *Bandemer*'s test proves that abstract entrenchment tests are unadministrable, producing only "puzzlement," "consternation," and "indeterminacy" in the lower courts. *Id.* at 282–83 (plurality op.).

The district court's gloss on entrenchment is, if anything, even less defensible than the *Bandemer* plurality's test. In 2012, Wisconsin Democrats received 51% of the vote and secured 39% of the Assembly seats. *See* JA224. In 1982, Indiana Democrats earned 51.9% of the vote and won 43% of the seats. *Bandemer*, 478 U.S. at 115. The district court attempted to distinguish *Bandemer* by pointing out that the record here contained the results of a second election under Act 43, the 2014 election. J.S. App. 155a–58a. But Republicans won *a majority* of the votes cast (52%) in 2014, *see* JA224, so they were not a political *minority* entrenching itself, *see Vieth*, 541 U.S. at 366 (Breyer, J., dissenting) (a majority party "twice failed to obtain a majority" of seats). In any event, if the district court was suggesting that the *Bandemer* plurality's test would have invalidated Act 43 because there is now a second election to show entrenchment, that would only further support Defendants' point that the district court's test and the *Bandemer* plurality's test are one and the same.

b. Given Plaintiffs' necessary concession below that an entrenchment-based inquiry is foreclosed by this Court's precedent, as well as Plaintiffs' single-minded focus on the efficiency gap, the parties did not fairly litigate this issue before the district court. To the extent that this Court were now to conclude that entrenchment plays any role in a partisan-effects analysis, but does not also conclude that Act 43 is lawful for other reasons, vacatur and remand would be

necessary. *See Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2131 (2014).

Without receiving any briefing on the issue of entrenchment, the district court found that Act 43 "secured for Republicans a lasting Assembly majority" based upon the uniform swing analyses conducted by Drs. Gaddie and Mayer. J.S. App. 145a–46a. But neither analysis is designed to test Republican party entrenchment throughout the decade under Act 43.

Gaddie's swing analysis does not support the district court's conclusion that Act 43 will "secure[ ] for Republicans a lasting Assembly majority." J.S. App. 145a. As the district court explained, a swing analysis "ask[s] the question . . . what *might* happen under different electoral conditions." J.S. App. 148a (citation omitted); *but see LULAC*, 548 U.S. at 420 (plurality op.) ("[W]e are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs."). To test this hypothetical, "the statewide vote percentage is altered by a fixed amount, typically in one-percentage-point increments, across all districts." J.S. App. 148a–49a (citation omitted); Dkt. 148:222–23. Gaddie's swing analysis predicted electoral change assuming that no incumbent would run for reelection, and making no prediction as to candidate strength or any other factor that could be expected under Act 43 in the real world. Dkt. 108:12, 50. Notably, even if one were to take Gaddie's swing analysis at face value, that analysis *entirely refutes* any notion

that Act 43 entrenches the Republican Party in the majority throughout the decade. Under that analysis, Democrats would win a *majority* of the Assembly if they obtained just over 53% of the vote, SA339; J.S. App. 230a, a vote share that Democrats exceeded in *two out of the three elections* (2006 and 2008) leading up to Act 43, JA223–24.

Mayer's swing analysis similarly does not support the district court's entrenchment finding. As Mayer conceded at trial, his swing analysis was not designed to predict what would occur under Act 43 throughout the entire decade. Dkt. 149:92–93. Understanding Mayer's methodology explains why that concession was unavoidable. Mayer conducted his analysis by taking the world after the 2012 election—in which Republicans secured a 60-39 majority, JA219–20—and then adding an "incumbent advantage," worth as much as 4% (depending on the district), on the assumption that every incumbent would run again. Dkt. 149:81–92. He then assumed that Democrats would gain 3% in every district in a swing election. Dkt. 149:89; Dkt. 95:29. Unsurprisingly, after shifting all 60 Republican-held seat upwards by as much as 4% (based upon incumbency), the swing of three points to Democrats did not gain the Democrats many seats. But in Wisconsin, incumbents do not run in every single election. Far from it. For example, of the 60 Republican members who won election to the Assembly in 2010, *fewer than half* were on the general

election ballot for the Assembly again in 2014. *Compare* Defs. Ex. 538:9–34, Dkt. 147:27–28, *with* Defs. Ex. 541:9–31, Dkt. 147:27–28.

III. Act 43 Is Lawful Because It Complies With Traditional Redistricting Principles And Is Otherwise Unobjectionable

While the district court's lack of jurisdiction, as well as Plaintiffs' failure to articulate a limited and precise test, are reason enough to reverse the district court, there are additional grounds why Plaintiffs' claims fail. The most obvious such reason comes both from *Vieth* and from the historical origins of the political-gerrymander concept itself: no unlawful political gerrymandering has occurred where, as in the case of Act 43, the legislature complied with traditional redistricting principles. At the very minimum, given that the Legislature that created Act 43 considered political implications only alongside traditional redistricting principles and other legitimate factors, and given that Act 43 did not depart drastically from the immediately prior court-drawn map, no further partisanship-based inquiry is necessary.

A. In *Vieth*, a majority of the Justices of this Court would not condemn as overly political a plan that complied with traditional redistricting principles. As Justice Kennedy explained, any "limited and precise" standard must establish that the legislature drew districts "in a way *unrelated* to any legitimate legislative objective." *Vieth*, 541 U.S. at 306–07 (Kennedy, J.,

concurring in the judgment) (emphasis added); *accord Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204 (2008) (plurality op.) (partisan motivations do not establish a violation of the First and Fourteenth Amendments where the "law is supported by valid neutral justifications"). Drawing districting lines that comply with traditional redistricting principles is, of course, a legitimate legislative objective. *See generally Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1306 (2016). Justices Stevens and Souter (joined by Justice Ginsburg) were even more specific in their *Vieth* opinions, making noncompliance with traditional redistricting principles a necessary *element* of their respective tests. *See* 541 U.S. at 318 (Stevens, J., dissenting); *id.* at 347–48 (Souter, J., dissenting). Combining these Justices' conclusions with the plurality's holding that the federal courts cannot condemn any plan on partisanship grounds, *id*. at 281 (plurality op.), yields the controlling principle that a plan that complies with traditional redistricting principles is not an unlawful partisan gerrymander, *see Jacobsen*, 466 U.S. at 115–18 & n.12; *Moses H. Cone,* 460 U.S. at 17.

The rule that map-drawers have not engaged in unlawful partisan gerrymandering when they have complied with these neutral principles derives from early American history. From the coinage of the term in 1812, complaints against the original gerrymander focused on the "fantastic shapes" of the districts and the "most distorted contour" of the "[t]he outer district of Essex county" in particular. *See* Griffith, *supra*, at

17–19. In arguing against Ohio's 1842 attempted gerrymander, the Whigs lamented that one "need[ ] only a glance at the map to see how far contiguity of territory has been regarded in the formation of this bill. It has not only not been regarded; it has been most grossly disregarded." Daily Ohio St. J. (Columbus, August 12, 1842), *supra* pp. 8–9. In all, "[i]t is impossible to overstate the importance of the district's grotesque shape as an essential element of its impropriety to those that condemned it in the nineteenth century." Foley, 84 U. Chi. L. Rev. at 712. Traditional redistricting principles, such as compactness, operate to prevent such distorted district shapes. *See* Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & Pol'y Rev. 301, 326–51 (1991).

A rule safeguarding against politics-based attacks on redistricting plans that comply with traditional redistricting principles would be sensible. Even in the context of racial gerrymandering, this Court previously explained that "appearances do matter," including because compliance with these principles is an "objective factor[ ]" with which a court may evaluate a map. *See Shaw v. Reno*, 509 U.S. 630, 647 (1993). Given that political considerations are "inevitabl[e]" in the redistricting process, *Gaffney*, 412 U.S. at 753, it would be reasonable to hold that, as a matter of law, there has not been "too much" partisanship, *LULAC*, 548 U.S. at 420 (plurality op.), when the map-drawers have complied with traditional principles.

That this Court ultimately decided to permit *racial*-gerrymandering challenges against districts that comply with traditional redistricting principles, *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017), does not suggest that a different approach is inappropriate in politics-based cases (especially if this Court permits statewide partisan-gerrymandering claims, whereas such claims are not permitted in the racial-gerrymandering context, *see supra* pp. 28–30). "Race is an impermissible classification"; "[p]olitics is quite a different matter." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment) (citations omitted). A plan that complies with traditional redistricting principles and yet is still predominantly motivated by race would be deeply constitutionally flawed, *Bethune-Hill*, 137 S. Ct. at 799, including because of the sordid history of racial discrimination in our country, *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017). No such special consideration applies in the partisanship context, given the centrality of traditional redistricting principles to the historical conception of a partisan gerrymander.

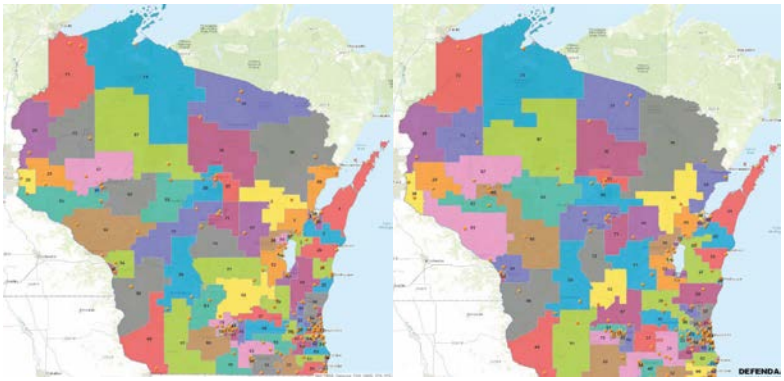
In the present case, Plaintiffs did not argue below that Act 43 failed to comply with traditional redistricting principles. J.S. App. 250a–51a (Griesbach, J., dissenting). To the contrary, it was undisputed that Act 43 generally matched the immediately prior court-drawn map on these principles. *See supra* pp. 16, 21. That is reason enough to hold that Act 43 is lawful.

B. Even if this Court concludes that Act 43's compliance with traditional redistricting principles does not bar Plaintiffs' lawsuit, the fact that Act 43 does comply with these principles, that the Wisconsin Legislature took politics into account as one of many legitimate factors, and that Act 43's results have proven so similar to those that obtained under the 2002 court-drawn map, all demonstrate Act 43's legality.

The record reveals that the Legislature's map-drawers took politics into account as one of many factors. The map-drawers first drew and then "locked" in the Milwaukee districts to comply with the VRA. *See supra* p. 14. Then, they carefully designed their draft maps to comply with equal-population requirements, as well as traditional redistricting principles such as compactness, contiguity, and respect for political-subdivision lines. *See supra* pp. 14–15. Although the map-drawers took political implications into account, that is unsurprising and unremarkable. "The reality is that districting inevitably has *and is intended to have* substantial political consequences," *Gaffney*, 412 U.S. at 753 (emphasis added), and has since the Founding, *see supra* pp. 5–10. At the same time, politics did not dominate the district lines that the Legislature adopted as much as in the early American history examples discussed above, *supra* pp. 5–10, in *Bandemer*, where the legislature adopted districts with "irregular shape[s]" and a "peculiar mix of single-member and multimember districts," 478 U.S. at 116 (plurality op.), or in *Vieth*, which included a

district that looked "like a dragon descending on Philadelphia," 541 U.S. at 339 (Stevens, J., dissenting) (citation omitted).

The map the Legislature ultimately adopted is strikingly similar to the 2002 court-drawn map, in terms of compliance with traditional redistricting principles, district shapes, and results.



(Left, SA361 (Act 43); Right, SA363 (2002 court-drawn map)).

The election results under these plans are also comparable. Under the 2002 court-drawn map, Republicans won 58 seats with 50.50% of the vote in 2002, 60 seats with 50% in 2004, 52 seats with 45.25% in 2006, 46 seats with 46% in 2008, and 60 seats with 53.50% in 2010. JA219–20, 223–24. Under Act 43, they won 60 seats with 48.6% of the vote in 2012, and 63 seats with 52% of the vote in 2014. JA219–20, 224.

The similarities between the results under the 2002 court-drawn map and the results under Act 43 illustrate that the dissent below was correct when it explained that, to achieve the proportional representation that Plaintiffs desire, Republicans would have needed to "engage in heroic levels of nonpartisan statesmanship" by abandoning their advantage under the 2002 court-drawn map. J.S. App. 245a–46a. Indeed, had Republicans intended only to retain their advantage under the 2002 court-drawn map and thus redistricted in the "most neutral way [a federal court] could conceive," *Baumgart*, 2002 WL 34127471, at *7—sticking as closely as possible to the prior, court-drawn map, while "adjusting it for population deviations," *id.*—Plaintiffs would almost certainly condemn that map as too partisan.

The lengths that Republicans would have had to go in order to satisfy Plaintiffs' proportional representation preferences are further illustrated by Professor Mayer's Demonstration Plan. Mayer created his Plan to drive down the efficiency gap, Dkt. 148:143, including placing *37* incumbents (of which 26 were Republicans) into districts with other incumbents, *see* Dkt. 149:112–18; Ex. 520 (interactive map).[12] Mayer was only able to achieve his roughly proportional representation results for the 2012 election by drawing, with the benefit of hindsight, 13 districts that he modeled as narrow Democrat wins under the 2012 statewide vote totals. Dkt. 149:93–101; *see* Defs. Ex.

[12] Interactive map available at http://arcg.is/0TTPeS.

568, Dkt. 147:27–28. With those narrowly Democrat districts assumed, Mayer projected that Democrats would have won 49 seats if they obtained 51.2% of the vote in 2012, *see* SA309 (center column), a percentage of the vote that, according to Professor Jackman's calculations, the Democrats did in fact approximate in 2012, JA224 (estimating that Democrats won 51.4% of the vote in 2012). But the long-term consequences of Mayer's results-driven approach show how difficult it is for Democrats to achieve proportional representation in Wisconsin given today's political conditions. If one removes from Mayer's swing analysis the unrealistic assumption that every 2012 incumbent would run in 2014, *see supra* pp. 58–59, *then Republicans would have been projected to win 63 seats with around 52% of the vote under Mayer's Plan in 2014.* This is because, under a uniform swing analysis of the type that Gaddie employed (and that the district court relied upon, *see supra* p. 21), Mayer's 13 reverse-engineered, narrowly Democrat districts from 2012 would flip to Republican control in 2014 when Republicans increased their statewide Assembly vote by 3.4%. Dkt. 149:94–101. Sixty-three seats is the same number that Republicans actually won in 2014 under Act 43, with an estimated 52% of the vote. *See* JA219–20, 224.

* * *

This Court has never found that a state legislature engaged in unlawful partisan gerrymandering.

Plaintiffs have presented this Court with no new, historical-based redistricting principles and no new, administrable test. They have, instead, recycled arguments that this Court has already rejected, while attacking a plan that complies with traditional redistricting principles and is strikingly similar to the immediately prior, court-drawn plan. Given the jurisdictional and merits-based deficiencies in Plaintiffs' claims, their lawsuit must be dismissed.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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