No. 16-1161

IN THE

Supreme Court of the United States

BEVERLEY R. GILL, *et al.*,

Appellants,

—v.—

WILLIAM WHITFORD, *et al.*,

Appellees.

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

BRIEF OF COLLEAGUES OF PROFESSOR NORMAN DORSEN AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether a massive partisan gerrymander that entrenches the transient majority's political control of the Wisconsin legislature for the foreseeable future, and virtually eliminates genuinely contestable legislative elections from Wisconsin political life, violates the First and Fourteenth Amendments?

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INTEREST OF *AMICI*[1]

Amici were close colleagues of Professor Norman Dorsen during his tenure from 1969-1991 as General Counsel, and then President of the American Civil Liberties Union; and during his tenure from 1961-

[1] Blanket consents to the filing of briefs *amici curiae* have been filed with the Clerk of the Court by all parties. Counsel represent, pursuant to Rule 37.6, that no party, or counsel for a party, has played a role in the drafting or preparation of this brief *amici curiae*; nor did any person or entity other than *amici* contribute financially to the drafting, preparation, or filing of this brief. This brief reflects the personal views of *amici*, and does not purport to express the views of New York University School of Law, or of any other entity or institution.

2017 as Frederick I. and Grace A. Stokes Professor, Co-Director of the Arthur Garfield Hays Civil Liberties Program at New York University School of Law, and Counsellor to the President of New York University. Aryeh Neier served as Executive Director of the ACLU from 1970-1978, and worked closely with Professor Dorsen on issues of international human rights as Vice Chair and Executive Director of Human Rights Watch from 1978-1993, and as President, and President Emeritus of the Open Society Foundations from 1993- 2017. John Shattuck served as Legislative Director of the ACLU from 1976-1984, and worked closely with Professor Dorsen on issues of democratic governance as President and Rector of Central European University in Budapest from 2009-2016, as Assistant Secretary of State for Democracy, Human Rights, and Labor from 1993-1998, and Ambassador to the Czech Republic from 1998-2000. John Sexton is the Benjamin Butler Professor of Law, Dean Emeritus of NYU School of Law, and President Emeritus of New York University, and worked closely with Professor Dorsen, who served from 1988-2002 as his Counsellor as Dean, and from 2002-2015 as his Counsellor as University President. Burt Neuborne, who served as Assistant Legal Director of the ACLU from 1972-1974, and as National Legal Director of the ACLU, from 1981-1986, worked closely with Professor Dorsen in defense of civil liberties at both the ACLU and NYU for 50 years, and serves as the inaugural Norman Dorsen Professor in Civil Liberties at New York University School of Law. Helen Hershkoff is the Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties at NYU, and served with Professor Dorsen as Co-Director of the Arthur Garfield Hays Civil Liberties Program, and as Associate Legal Director of the ACLU from 1988-

1995. Sylvia Law is the Elizabeth K. Dollard Professor of Law, Medicine, and Psychiatry at NYU, and served with Professor Dorsen as Co-Director of the Arthur Garfield Hays Program, and worked closely with him in his role as a founder of the Society of American Law Teachers. Stephen Gillers is the Elihu Root Professor of Law at NYU, and worked closely with Professor Dorsen for many years on issues related to Professional Responsibility and legal ethics. Gara LaMarche served as Associate Director of the New York Civil Liberties Union from 1979-1984, and as Executive Director of the Texas Civil Liberties Union from 1984-1988, worked closely with Professor Dorsen on democracy-related issues during his years at the Open Society Institute, and as President of Atlantic Philanthropies. Nadine Strossen is the John Marshall Harlan II Professor of Law at New York Law School. She succeeded Professor Dorsen as President of the ACLU, serving from 1991-2008. Martin Guggenheim is the Fiorello LaGuardia Professor of Clinical Law at NYU, and worked closely with Professor Dorsen since 1973 on the development of clinical legal education and the rights of children.

Professor Dorsen died peacefully on July 1, 2017, during the preparation of this brief. *Amici* seek to honor his life-long commitment to the defense of American democracy by completing the unfinished work on this brief, and filing it *amici curiae* to advance Professor Dorsen's strongly held view that excessive political gerrymandering endangers American democracy, and violates the First, Fifth, and Fourteenth Amendments.

Amici do not hold themselves out to the Court as possessing specialized knowledge or expertise not readily available to the parties. They are, however,

united by many years of deep affection and respect for Professor Norman Dorsen as a colleague and friend. In this brief *amici curiae*, they seek to complete his unfinished project, and present his voice to the Court one final time.

Summary of Argument

Where, as here, a transient political majority abuses its power by systematically manipulating electoral district lines to rig the outcome in its favor of as many legislative elections as possible, the transient majority acts in violation of the First and Fourteenth Amendments. Viewed from the perspective of political equality, such a massive partisan gerrymander unconstitutionally debases the equal right of the transient minority to elect representatives of choice, and unconstitutionally entrenches the ability of the transient majority to exercise political control over the Wisconsin legislature for the foreseeable future. Accordingly, *amici* urge the Court to affirm the thoughtful opinion below articulating a manageable standard for identifying such an unconstitutional political entrenchment.

In one unfortunate sense, however, the Wisconsin gerrymander before the Court treats virtually all voters equally by systematically depriving voters of every political stripe of an opportunity to participate in a genuinely contestable legislative election, even when such an election is eminently feasible. Under the legislative apportionment before the Court, a combination of natural factors and the systematic manipulative drawing of district lines is so effective in suppressing genuinely contestable elections that, in 2016, 49 of the 99 seats in the lower house of the

Wisconsin legislature were "elected" without opposition because it was deemed futile to mount any opposition. In the remaining 50 nominally contested districts, the district lines were also carefully drawn to rig the outcomes in all but a very few "swing" districts, leaving fewer than 10% of Wisconsin's legislative election as even mildly contestable.[2] Indeed, under the criteria generally utilized in assessing contestability, only 2 of 99 districts were genuinely contestable.

Such a systematic effort to suppress the ability to participate in a genuinely contestable election denies all voters—Republicans, Democrats, and Independents alike—a meaningful choice over who will represent them, in violation of the First Amendment. Justice Black said it most eloquently in *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964):

> No right is more precious in a free country than that of having a choice in the election of those who make the laws under which, as good citizens, they must live.Other rights, even the most basic, are illusory if the right to vote is undermined.

Wisconsin's political gerrymander "undermines" the right to vote by rigging the outcome of virtually every legislative election. The quality and intensity of a voter's First Amendment participation in the electoral process—listening to the candidates;

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[2] While the record below contains the raw data from which it is possible to assess the contestability of the elections in question, for purposes of clarity, *amici* have utilized data compiled in Ballotpedia—The Encyclopedia of American Politics, available at https//ballotpedia.org/Wisconsin_State_Assembly_Districts, 2016 (most recently accessed on August 25, 2017).

choosing a preferred candidate; working with others in support of that candidate; and casting a ballot for a candidate of choice - is deeply dependent on the belief that voters are capable of exercising a genuine choice over who wins an election. When massive political gerrymandering is used systematically, as here, to deprive independents and adherents of both major political parties of a fair opportunity to participate in genuinely contestable elections, it eliminates genuine choice from the electoral process, and drains the First Amendment activities of listening, choosing, supporting and voting of practical effect. It is the First Amendment equivalent of formally permitting a speaker to speak, but denying her an audience.

In his dissent in *Burdick v. Takushi*, 504 U.S. 428, 442 (1992), Justice Kennedy recognized that voter choice is the essence of democracy. 504 U.S. at 446-449. Justice White, writing for the Court in *Burdick*, also viewed voter choice as the central tenet of democracy. *Id.* at 437-441. Indeed, their only disagreement was whether, given the unique two-stage structure of Hawaii's electoral process, write-in voting was genuinely necessary to the exercise of robust voter choice. The massive and systematic Wisconsin political gerrymander before the Court ruthlessly suppresses voter choice by rigging the outcome of as many elections as possible, virtually eliminating the idea of genuine voter choice from Wisconsin's legislative electoral process. While *amici* recognize that geography and social sorting may render it impossible to afford every voter with an opportunity to participate in a genuinely contestable election, when, as here, a transient political majority acts affirmatively and systematically to suppress the

emergence of genuinely contestable elections even when they are eminently feasible, it violates the First Amendment rights of every voter to be free from state interference with voter choice.

ARGUMENT

SYSTEMATIC POLITICAL GERRYMANDERING THAT DEPRIVES VOTERS OF A FAIR OPPORTUNITY TO PARTICIPATE IN GENUINELY CONTESTABLE LEGISLATIVE ELECTIONS VIOLATES THE FIRST AMENDMENT

In the more than half-century since this Court's seminal decision in *Baker v. Carr*, 369 U.S. 186 (1962),[3] the Court has invoked the concept of equality embedded in the 5th and 14th Amendments as the linchpin of a constitutional jurisprudence that guaranties an equal right to participate in the

[3] Prior to *Baker v. Carr*, the Court's role in protecting the democratic process was largely confined to efforts to enforce the 14th and 15th Amendments' ban on racial discrimination in access to the ballot. See, eg., *Ex parte Yarbrough*, 110 U.S. 651 (1884); *Guinn v. United States*, 238 U.S. 347 (1915); *Lane v. Wilson*, 307 U.S. 268 (1939); *Terry v. Adams,* 345 U.S. 461 (1953); *Gomillion v. Lightfoot,* 364 U.S. 339 (1960). Apart from the important race cases, the combined impact of the political question doctrine, and then-current views of state action and federalism, hampered any serious attempt to provide general protection of the right to vote, and to fair political representation. See *Minor v. Happersett*, 88 U.S. 162 (1875) (upholding denial of the vote to women); *Giles v. Harris*, 189 U.S. 475 (1903) (denying equitable relief against enforcement of Alabama laws aimed at disenfranchising black voters); *Breedlove v. Suttles*, 302 U.S. 277 (1937) (unanimously dismissing challenge to Georgia poll tax); *Colegrove v. Green,* 328 U.S. 549 (1946) (dismissing apportionment challenge under political question doctrine).

democratic process.[4] The resulting equality-driven constitutional law of democracy has succeeded in eliminating many of the most egregious barriers that had unfairly hampered participation in the democratic process, especially by the weak and poor.[5] Time has taught, however, that a constitutional law of democracy tied exclusively to the shifting sands of Equal Protection jurisprudence, especially the need to identify a reasonably objective baseline from which to measure an allegedly unconstitutional deviation;[6] and the difficulties associated with applying differing standards of judicial review based on the motivation of would-be regulators,[7] fails to provide fully-effective

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[4] Five cases illustrate the Court's equality-driven jurisprudence in action. *Carrington v. Rash*, 380 U.S. 89 (1965) (invalidating Texas' disenfranchisement of soldiers stationed in Texas who viewed their military assignment as their principal place of residence). *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (invalidating the poll tax, and sweeping away property qualifications for voting and holding office). *Williams v. Rhodes*, 393 U.S. 23 (1968) (recognizing equality-based right to run for office as a third-party candidate); *Kramer v. Union School District*, 395 U.S. 621 (1969) (holding that all residents affected by an election enjoy an equal right to vote in it). *Dunn v, Blumstein*, 405 U.S. 330 (1972) (ending durational residence requirements for voting).

[5] See, eg., *Reynolds v. Sims,* 377 U.S. 533 (1964) (establishing one person-one vote requirement); *Cipriano v. Houma*, 395 U.S. 701 (1969) (invalidating limitation of franchise to property owners in municipal utility bond election); *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970) (invalidating property ownership requirement to vote in general obligation bond elections).

[6] *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (declining to review equality-based challenge to partisan gerrymandering).

[7] *Washington v. Davis,* 426 U.S. 229 (1976) (requiring proof of racial animus); *Crawford v. Marion County Election Bd.,* 553

constitutional protection to the right to participate in the democratic process. This case is the Court's fifth plenary effort to grapple with a nationwide epidemic of political and partisan gerrymandering that erodes representational fairness, and threatens to render genuinely contestable legislative elections all but extinct.[8] *Gaffney v Cummings*, 412 U.S. 735 (1973) (upholding bi-partisan political gerrymander); *Davis v. Bandemer*, 478 U.S. 109 (1986) (recognizing the unconstitutionality of excessive partisan gerry-mandering); *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (modifying *Davis*; declining to review constitutionality of alleged excessive gerrymandering in absence of objective baseline); *LULAC v. Perry,* 548 U.S. 299 (2006) (same).

The thoughtful majority opinion below grapples effectively with both the purpose and baseline issues that have complicated the Court's effort to place limits on the national epidemic of partisan gerrymandering. The systematic drawing of district lines with both the purpose and effect of assuring a transient majority's continued political control of the state legislature into the foreseeable future crosses any reasonable line from "just politics," to unconstitutional entrenching in violation of the Equal Protection Clause. See *Ohio Life Ins. & Trust Co. v. Debolt*, 57 U.S. (How) 416, 431 (1853) (state

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U.S. 181 (2008) (upholding voter identification requirements; declining to find discriminatory purpose).

[8] A massive political science literature discusses the relationship between political gerrymandering and competitive elections. For a useful summary, see Heather K. Evans, Competitive Elections and Democracy in America: The Good, the Bad, and the Ugly (2014). See also Keena Lipsitz, Competitive Elections and the American Voter (U. Pa. Press 2011).

legislature may not seek to control future legislatures); *Newton v. Comm'rs*, 100 U.S. 548, 561 (1879) (same); *United States v. Winstar Corp.,* 518 U.S. 839, 872 (1996) (plurality opinion).

Systemic statewide political gerrymanders on the scale of the Wisconsin political gerrymander before this Court should not, however, be reviewed solely as a matter of equality. Where, as here, a ruthlessly partisan state-wide gerrymander virtually destroys the ability of more than four million Wisconsin voters of both parties to participate in genuinely contestable legislative elections, it violates the First, as well as the Fourteenth Amendment.

A. The Impact of the Wisconsin Gerrymander on Genuinely Contestable Legislative Elections

The Wisconsin gerrymander before the Court virtually eliminates the concept of genuinely contestable state legislative elections from Wisconsin political life. Although the political science literature contains numerous measures of the competitiveness of an election, a consensus appears to exist defining a genuinely contestable election as one where, based on party registration (predicting future voting), and/or past electoral deviation from national or statewide results (historical voting patterns), the electorate is sufficiently closely-divided to permit the supporters of more than one candidate to harbor a realistic hope, as opposed to merely a theoretical opportunity, of winning the election.

Many political observers, applying one or both measures, divide legislative districts into "landslide" districts where, based on party registration and/or past electoral performance, more than 60% of the electorate is highly likely to vote for a particular

candidate; "safe" districts where, based on the same criteria, more than 55% percent of the electorate is highly likely to support a given candidate; "contestable" districts of varying degrees of competitiveness, where between 52%-55% of the electorate is highly likely to support a given candidate; and "swing" districts where no candidate has a significant predictive edge. The architects of the Wisconsin plan before the Court appear to have used a similar four-part terminology adapted from the widely-respected Cook Political Report (cookpolitical.com) that labels each Wisconsin legislative district as "landslide," "safe," "leaning," or "toss-up." Districts labeled "leaning" or "swing," allow both candidates and their supporters to hold a plausible hope of victory. "Landslide" and "safe" districts are not considered genuinely contestable.[9] Although it is theoretically possible for genuinely contestable elections to occur in "safe" or even "landslide" districts, the overwhelming likelihood of victory for the favored candidate almost always reduces the election in such districts to a formality, with the winners a foregone conclusion. When the

[9] See David R. Mayhew, Congressional Elections: The Case of the Vanishing Marginals, 6 Polity 295, 304 (1974) (defining as "reasonably safe" elections in which the winning candidate captures 55% or 60% of the vote); see also Gary C. Jacobson, The Electoral Origins of Divided Government: Competition in U.S. House Elections, 1946-1988, at 26 ("The two thresholds of marginality commonly found in the literature are 55% and 60% of the vote. Winning candidates who fall short of the threshold are considered to hold marginal seats; those who exceed it are considered safe from electoral threats."). A popular practical measure, the Cook PVI, compares "how each district performs at the presidential level compared to the nation as a whole." http://cookpolitical.com/introducing-2017-cook-political-report-partisan-voter-index.

reapportionment dust settles in Wisconsin, only a very few members of the lower house, out of a total of 99, will represent either a "swing district," or a genuinely competitive "leaning" district in the next legislative election. In those relatively few, genuinely contestable swing districts, supporters of both major parties will listen to the candidates, choose a preferred candidate, support that preferred candidate, and cast a ballot on Election Day in the belief that what they are doing really matters.

Unfortunately, such a belief will not be widely shared. The vast bulk of Wisconsin legislators of both parties will represent "safe" or "landslide" legislative districts, with the winners known in advance with degrees of certainty ranging from 100%, to somewhat lesser, but, nevertheless, overwhelming measures of confidence. Indeed, Wisconsin has managed to draw an apportionment where, in 2016, 49 of 99 seats were uncontested because, given the confluence of natural geographical sorting, and ruthlessly gerrymandered district lines, it was deemed futile to mount any opposition. In the remaining 50 nominally contested districts, the district lines were also carefully drawn to rig the outcomes in all but a very few "swing" districts, leaving fewer than 10% of Wisconsin's legislative election as even mildly contestable.[10] Indeed, under the criteria generally utilized in assessing contestability, only 2 of 99 districts were genuinely contestable.

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[10] While the record below contains the raw data from which it is possible to assess the contestability of the elections in question, for purposes of clarity, *amici* have utilized data compiled in Ballotpedia—The Encyclopedia of American Politics, available at https//ballotpedia.org/Wisconsin_State_Assembly_Districts, 2016 (most recently accessed on August 25, 2017).

In the 97 "safe, or "landslide" districts (and those "contestable" districts at or near 55%,), the election campaign culminating on Election Day was experienced by most voters as a mere formality, where listening to the candidates, choosing a favorite, working on the candidate's behalf, and casting a vote can have no impact on the election's outcome. For members of the electoral minority in such districts, participation in such a non-contestable election is an existential exercise in frustration and protest. For members of the electoral majority, participation in a rigged election is less frustrating, but equally hollow from the perspective of free choice.

Given the certainty about who will win most legislative elections in Wisconsin, indeed throughout the United States, it should come as no surprise that, most of the time, fewer than half the eligible electorate bothers to participate in such a sham exercise in voter "choice."[11] In fact, the real question is why so many Americans continue to vote in legislative elections when the outcome has already been decided by political bosses. It is a tribute to their commitment to democracy that so many believe so deeply in the democratic process that they are prepared to continue performing the rituals of democracy, even after a cynical political gerrymander has stripped those rituals of substantive importance by all but eliminating contestable legislative elections from American political life.

Sadly, the demise of genuinely contestable legislative elections is not limited to Wisconsin.

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[11] A useful compendium of voter turnout statistics is collected at www.electproject.org/home/voter-turnout/voterturnout-data (The Election Project).

Throughout the United States, technological advances in apportionment software, and unremitting worship by politicians of both major parties at the church of Our Lady of Perpetual Reapportionment has enabled incumbents of both major parties to cement themselves into office, and has encouraged political bosses to seek to entrench the hegemonic status of the political party enjoying a transient majority. Mirroring the Wisconsin experience, of the 435 seats in the House of Representatives, fewer than ten percent will be filled in 2018 in a genuinely contestable election. In Pennsylvania and North Carolina, both relatively evenly-balanced swing- states in Presidential, Senatorial, and Gubernatorial elections, not a single member of the House of Representatives will be elected in 2018 in a contestable election. In Texas, under the existing apportionment, the City of Austin, with an overwhelmingly Democratic population of approximately one million people, will elect two Republican members of the House in 2018 because likely-Democratic urban voters have been "cracked" into smaller blocs, where they will be overwhelmingly outweighed by likely-Republican voters in the rural areas surrounding Austin.

As the lower court correctly held, such an unfair political phenomenon can—and should—be condemned as unconstitutionally unequal. But, more fundamentally, in 2018, approximately 100 million adherents of both major parties residing in more than 400 "safe" or "landslide" Congressional Districts throughout the United States, and many millions of voters in rigged state legislative elections, will be denied the ability to participate in a genuinely contestable legislative election where the exercise of

their First Amendment freedoms is energized by a plausible belief that electoral participation can make a real difference. In other settings, when government has acted to "chill" the full throated exercise of First Amendment freedoms, thus Court has not hesitated to condemn the government action as violative of the First Amendment. See *McCutcheon v. FCC*, 572 U.S. (2014) (government disincentives that deter full throated First Amendment participation in electoral politics violate the First Amendment).

B. The Scope of the First Amendment Right to Participate in a Genuinely Contestable Legislative Election

Amici do not argue that American voters enjoy an unlimited First Amendment right to participate in a genuinely contestable legislative election. Under our first-past-the-post system of representative democracy, factors beyond the control of government may often render it virtually impossible to assure every voter the opportunity to enjoy such an optimal democratic experience. The geographical phenomenon of social "sorting," reinforced by zoning, mortgage discrimination, housing discrimination, economic want, and other factors determining where people live, will often result in the natural "packing" of a mass of politically like-minded voters into a given election district, rendering it impossible to provide for a contestable election in that district without adopting a system of proportional representation, and/or at large, or multi-member districts.

While the democratic experience of such naturally "packed" voters may be diminished, their First Amendment rights have not been violated, any more than the state's failure to act affirmatively to provide

every speaker with ownership of a printing press violates the First Amendment. As this Court has conceived it, in the vast bulk of settings, the First Amendment is not an affirmative guaranty; it is a negative bulwark that is violated only when the state acts to prevent its exercise. Thus, a First Amendment right to participate in a contestable election would, necessarily, be limited to a ban on systematically drawing electoral lines to rig the outcome of as many "contests" as possible, even when it would have been eminently feasible to provide for genuinely contestable elections in large numbers of districts.[12]

Participating in a genuinely contestable election by listening to the candidates, choosing a favorite, supporting the candidate of choice, and casting a ballot on Election Day in an election contest that matters is the quintessential exercise of political speech and association. It is, of course, possible to listen, support, and vote in an election when only one candidate is on the ballot, or where the winner is known in advance; but the difference between going through the motions of democracy with the knowledge that all the speech in the world cannot make a difference in an election's outcome, and participating in an election campaign in the plausible hope that

[12] Since the three-judge court below understandably concentrated on the partisan nature of the Wisconsin gerrymander, it did not explore in depth the degree to which the legislature had systematically suppressed contestability. It is, however, highly unlikely that a natural process of geographical sorting has progressed in Wisconsin to the point where only 2% of its assembly district can be rendered genuinely contestable. Were the Court to recognize a right not to be systematically excluded from participating in otherwise feasible contestable elections, the precise number of eminently feasible contestable districts in Wisconsin would remain for exploration on remand.

your exercise of choice, speech, and association will affect the outcome, is enormous. If the state permitted a speaker to speak, but eliminated the audience, the existential, self-affirming act of speech would not be meaningless; but it would fall far short of full participation in the marketplace of ideas. Similarly, formally going through the motions of participating in a rigged election campaign is not meaningless. It is an act of faith in democracy, and an important assertion of individual dignity. But it falls far short of the individual and collective intensity that exists when a speaker believes that her speech can actually change things.

Despite the Court's unfortunate dictum in *Burdick v. Takushi*, 504 U.S. 428 (1992), denying voters a constitutional right to cast a write-in ballot, *amici* believe that the act of voting, as the culmination of participation in an election campaign, is far more than a mere instrumental device designed to pick a winner.[13] Parents do not take their children to observe the operation of mere instrumental devices.

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[13] In *Burdick,* Hawaii declined to permit write-in candidates on the general election ballot. The ban was challenged by a voter wishing to cast a write-in ballot for Donald Duck. This Court ruled that Hawaii was not constitutionally obliged to expend its election resources on authorizing or processing such a frivolous vote. Justice White was careful to note how easy it was under Hawaii's law to place a genuine protest candidate on the ballot of Hawaii's two-step election process. 504 U.S. at 432-437. Justice Kennedy, in dissent, agreed that voting is not in itself an act of pure speech directed to the general public, but disagreed over the burden imposed on a voter's ability to exercise free choice by Hawaii's refusal to permit write-in voting. Justice Kennedy found the write-in ban unconstitutional because it constituted a significant burden on voter choice protected under both the First and Fourteenth Amendments. Id at 447-449.

Millions of Americans did not fight, and too many die, to preserve a mere instrumental device. As Justice Kennedy recognized in his dissent in *Burdick* (504 U.S. at 442), voting, even if not viewed as a form of pure speech directed to the general public, is, nevertheless, imbued with a degree of First Amendment protection as the communicative act by which a voter expresses his or her choice to the government. Id at 443-445. In effect, Justice Kennedy's dissent in *Burdick* anticipated the necessary obverse of the government speech doctrine.[14] If government is constitutionally entitled to speak freely to the people, surely the people must be provided with a First Amendment right to talk back. Voting is the core of the right to talk back. Thus, Justice Kennedy was surely right in *Burdick* in arguing that any state rule placing a significant burden on a voter's ability to express a meaningful choice violates the First and Fourteenth Amendments. This case asks whether the government can systematically and unjustifiably drain such a crucial expression of choice of any real meaning by the adroit manipulation of district lines.

Viewing the vote as the declaration of a voter's choice to the government, and to the general public, is deeply rooted in our national heritage. For much of the nation's early history, voting was a public act by which an adherent openly declared himself to the

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[14] See *Walker v. Sons of Confederate Veterans*, 135 S. Ct. 2239 (20015) (license plates are a form of government speech); *Pleasant Grove City v. Sumuum*, 555 U.S. 460 (2009) (decision to display permanent monuments a form of government speech). For the limits of the government speech doctrine, see *Matal v. Tam*, 137 S. Ct. 1744 (2017) (grant of trademark is not government speech).

government election clerk as a supporter of one or another of the candidates. George Washington, Thomas Jefferson, James Madison, James Monroe, and Abraham Lincoln—the Founders who built our nation—all cast their ballots publicly *viva voce.*[15] The adoption of the secret Australian ballot during the late 19th century shifted the declaration of support from a public setting to a private voting booth, but the expressive nature of the voter's declaration of support remained unchanged, except that it was now anonymous. Whether public or anonymous, though, the act of voting is the declarative culmination of a quintessential First Amendment process that cries out for First Amendment protection.

Surely, a fair chance to support and to vote for a candidate with a chance to win is as entitled to a degree of First Amendment protection against systematic state attack as is nude dancing,[16] flag

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[15] In v*iva voce* voting, the prevalent form of voting throughout the first half of the 19th century, a clerk calls the name of a voter who answers orally with the name of the preferred candidate. The clerk then enters the response in a poll book that constitutes a publicly available record of the vote of every citizen. Voting in Congress remains *viva voce* today. A widely used variant form of public voting called for each party to print its own ballot, or "ticket," in characteristic colors, and to encourage voters to brandish the identifiably colored ticket before placing it into the ballot box. Public voting remained widespread throughout until the adoption of the secret Australian ballot in the late 19th century. See Donald A. Debats, *How America Voted*: *By Voice*, available at sociallogic.iath.virginia.edu (University of Virginia); Donald A. Debats, *How the Other Half Voted: The Party Ticket States,* available at sociallogic.iath.virginia.edu (University of Virginia).

[16] *Barnes v. Glen Theater, Inc.,* 501 U.S. 560 (1991).

burning,[17] cross burning,[18] unlimited campaign spending,[19] hate-mongering;[20] lying;[21] selling violent video games to children,[22] depicting the violent death of small animals,[23] advertising toothpaste,[24] threatening an ex-spouse on the Internet;[25] and trademarking racist epithets.[26] *Amici* have no quarrel with the vigor and intensity of the Court's protection of First Amendment freedoms in such settings. Indeed, *amici* applaud the Court's energetic protection of First Amendment freedoms. It is, however, time to deploy the Court's abundant First Amendment energy to protect the right to participate in a genuinely contestable election. On numerous occasions, the Court has recognized that voting, running for office, participating in electoral campaigns, and interacting with a democratically-elected representative are quintessential exercises of free speech, association, and redress of grievances, at the core of the First Amendment, eg., *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Reynolds v. Sims,* 377 U.S. 533, 554-56 (1964). Justice Black said it most eloquently in *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964):

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[17] *Texas v. Johnson*, 491 U.S. 397 (1989)

[18] *Virginia v. Black*, 538 U.S. 343 (2003)

[19] *Buckley v. Valeo*, 424 U.S. 1 (1976)

[20] *Snyder v. Phelps*, 562 U.S. 443 (2011)

[21] *United States v. Alvarez*, 132 S. Ct. 2537 (2012)

[22] *Brown v. Ent. Merchs. Ass'n,* 564 U.S. 786 (2011)

[23] *United States v. Stevens,* 559 U.S. 460 (2010)

[24] *Expressive Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017)

[25] *Elonis v. United States*, 135 S. Ct. 2001 (2015)

[26] *Matal v. Tam*, 137 S. Ct. 1744 (2017)

> No right is more precious in a free country than that of having a choice in the election of those who make the laws under which, as good citizens, they must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

It is, *amici* suggest, long past time to convert the Court's often-eloquent observations about the intimate relationship between participating in the democratic process and the First Amendment into a First Amendment-based law of democracy. This Court has already deployed the First Amendment effectively to protect members of political parties from dilution of their associational interests,[27] and to guaranty wealthy individuals and powerful entities the right to raise and spend unlimited sums in an effort to influence the outcome of the democratic process.[28] It is now time to deploy the First Amendment to protect the right to vote in, and to enjoy fair representation through, genuinely contestable legislative elections, whenever such a contestable election is feasible.

C. The Advantages of Recognizing a First Amendment Right to Participate, When Possible, in a Genuinely Contestable Election

Viewing massive political gerrymandering through a First Amendment lens avoids the twin pitfalls of "purpose" and "baseline" that have, thus far, prevented this Court from providing an effective check on an out-of-control partisan gerrymandering process that virtually all agree is destructive of

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[27] *California Democratic Party* v. *Jones*, 530 U.S. 567 (2000)

[28] *Citizens United v. FEC*, 558 U.S. 310 (2010)

American democracy. Since this Court usually measures the existence of a violation of free speech or free association by a regulation's effect, and not by the purpose or intent of the person or persons who promulgated it,[29] viewing massive political gerrymandering through a First Amendment lens would obviate the need to define a level of subjective dysfunction, and free the courts from the complex and time-consuming task of exploring the subjective state of mind of the principal actors. Instead, a reviewing court would ask, simply, whether the gerrymander's demonstrable effect is to rig the outcomes of as many elections as possible, despite the feasible opportunity for significant numbers of genuinely contestable elections.

Equally important, as in the Court's one-person one vote cases, a clear baseline would exist in most cases to determine whether a state had violated the First Amendment by systematically suppressing the emergence of contestable elections. Given modern technology, it is a relatively easy matter to demonstrate the potential number of genuinely contestable election districts in any jurisdiction by tentatively drawing a series of potential district lines that create the maximum number of "swing" (no significant electoral advantage) or "contestable" (electoral advantages of not more than 55%-45%) that conform to traditional criteria of contiguity and respect for existing political sub-divisions, while satisfying the constitutional requirement of one-person one-vote. Applying such an objective standard of potential contestability, many, perhaps most legislative races in Wisconsin could be made

[29] *O'Brien v. United States*, 391 U.S. 367 (1968)

genuinely competitive. It is also relatively easy to calculate the probable electoral contestability of each district in a given reapportionment plan by consulting widely-available voter records providing both party affiliation, and past election performance. Once such data is known, the number of "landslide" and "safe" seats where the winner is a foregone conclusion may be readily calculated.

When, as here, a transient majority confronts a Wisconsin electoral map where millions of voters could enjoy the First Amendment rights of speech, association and voting incident to participating in a contested legislative election, and unjustifiably reduces the number of voters who can actually enjoy such First Amendment rights to a minimum, it has systematically deprived its electorate of its most important First Amendment right.

Finally, existing First Amendment doctrine would provide a reviewing court with a flexible menu of options with which to approach unjustifiable incursions on the right to vote. In *Burdick*, both Justice White, writing for the Court, and Justice Kennedy in dissent, shied from recognizing the act of casting a ballot as a form of pure speech, fearing that assertive First Amendment review would deprive election officials of power to regulate effectively. 504 U.S. at 438-439 (White, J.); 445 (Kennedy, J.). A decision to apply current First Amendment doctrine to systematic restrictions on voter choice would not, however, doom regulations designed to allow efficient and orderly voting. See *Burson v. Freeman*, 504 U.S. 191 (1992) (applying strict scrutiny to uphold ban on electioneering too close to the polls). Moreover, the Court could elect to view the formal act of voting as a form of expressive conduct, triggering intermediate

levels of scrutiny similar to the test deployed in *O'Brien v. United States, supra.* See *Turner Broadcasting System, Inc. v FCC,* 512 U.S. 622 (1994); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997). See also *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017) (discussing First Amendment tests applied in commercial speech settings). Whatever standard of review the Court choose to invoke would avoid the technical roadblocks associated with Equal Protection analysis, while shifting the playing field to a jurisprudence made to order for the protection of our most cherished political right.

Difficult issues will remain to be considered in future cases. For example, to what extent can a desire to respect incumbency justify a modest deviation from the number of otherwise contestable districts, analogous to the 10% population deviation permitted under the one-person one-vote doctrine?[30] Can other factors, such as economic interest, race, or class ever justify such a deviation? Should the concept of contestability remain anchored at 55%-45%? On this record, however, no doubt exists that Wisconsin has unconstitutionally suppressed the First Amendment rights of its voters to enjoy a reasonable opportunity to exercise a meaningful choice in a legislative election that really matters.

[30] See *Cox v. Larios*, 542 U.S. 947 (2004) (summarily affirming three-judge court rejection of Democratic political gerrymander at the margin of a 10% population deviation).

CONCLUSION

Athenian democracy selected many of its representatives by lot.[31] No one would, today, confuse such a random selection process with a genuine exercise in democracy, precisely because it lacks the one crucial attribute of a modern democracy—the constituent's ability to exercise a free, genuine choice over who his or her representative will be. The massive Wisconsin partisan gerrymander before this Court would not even satisfy Athenian democracy, which, at least, sought to generate a legislature roughly reflective of the people it purported to represent. In its blind search for unfair partisan advantage, the transient majority controlling Wisconsin's legislature has managed to eliminate both the idea of a meaningful choice in a contestable election, and the goal of fair and accurate representation, from its vision of rabidly partisan government. The decision of the three-judge court below should be affirmed.

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[31] Bernard Mann, The Principles of Representative Government, 79-94 (1997) (describing Athenian process).

* Professor Norman Dorsen died on July 1, 2017, during the preparation of this brief.