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

REPLY BRIEF FOR APPELLANTS

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Plaintiffs' brief makes clear that they "would commit federal . . . courts to unprecedented intervention in the American political process." *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring in the judgment). The scope and consequences of the new cause of action that Plaintiffs ask this Court to create are breathtaking. This new claim could be brought by any voter who favors one of this country's two major parties and would permit statewide invalidation of redistricting maps. And this cause of action would be far more powerful than racial-gerrymandering claims, which are limited to district-specific standing and relief. Especially in States where "racial identification is highly correlated with political affiliation," *Cooper v. Harris*, 137 S. Ct. 1455, 1473 (2017) (citation omitted), courts would face the perverse spectacle of plaintiffs who have been subjected to racially motivated districting being incentivized to argue that politics, not race, was at play, so that they could gain access to Plaintiffs' novel statewide theory of standing and invalidation.

Plaintiffs' test is the antithesis of "limited and precise." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment). As Plaintiffs' brief makes clear, two of the three prongs of their test—political intent and impossibility of creating a map with less partisan asymmetry—would be mere formalities in most cases. A legislature's scrupulous compliance with traditional redistricting principles would be irrelevant. As

for the outcome-determinative effects prong, Plaintiffs are willing to say only that each court can choose from any number of metrics related to the ahistoric partisan-symmetry concept.

Although the inadequacies of Plaintiffs' test require dismissal of their claims, Plaintiffs' failure underscores a broader point: this Court should definitively hold that federal courts lack jurisdiction over statewide political-gerrymandering claims. Every statewide theory that has been proposed for three decades has boiled down to "some form of rough proportional representation for all political groups," *Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring in the judgment), and this Court has already held that plaintiffs lack standing to bring statewide claims even in the racial-gerrymandering context. A holding that federal courts similarly lack jurisdiction to adjudicate statewide partisanship claims would bring clarity and consistency to the law.

ARGUMENT

I. Plaintiffs' Statewide Standing Theory Contravenes This Court's Precedents

Plaintiffs lack standing to bring their statewide claims. That conclusion follows from this Court's caselaw, which makes clear that gerrymandering harms occur only at the district-specific level, *United States v. Hays*, 515 U.S. 737, 745 (1995); *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265

(2015), and from the general understanding that voters do not vote for a "slate of legislative candidates," but for individual legislators, *Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring in the judgment); Appellants' Br. 28–29.

Plaintiffs fail to answer many of the standing arguments that Defendants made in their opening brief. Plaintiffs do not dispute that they never argued below "that *any* of their districts were unlawfully gerrymandered,"[1] and do not even attempt to explain how, for example, Act 43 harmed lead plaintiff Whitford, given that he would live in a Democrat-dominated district under virtually any map. Appellants' Br. 31. While

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[1] The only part of Plaintiffs' brief that even discusses specific districts is a two-page portion in their fact section, which deals with only a few districts and relies upon charts and objections never mentioned before the district court. Appellees' Br. 7–8. For example, while Plaintiffs now claim that Act 43 "packed" Democrats into eight districts with more than 80% of the vote, yet contained no such Republican-packed districts, Appellees' Br. 7, Plaintiffs neglect to mention that their own Demonstration Plan had *nine* districts greater than 80% Democrat and none for Republicans, Dkt. 149:125–27, 132–34; Defs. Ex. 561. Plaintiffs' reliance on Professor Chen's alternative "Assembly maps," Appellees' Br. 19, 55, is similarly inappropriate, as the district court specifically refused to give any weight to those alternative maps because Chen "was not deposed and did not testify at trial" and therefore the court was "unable to examine properly the reliability of [his] methodologies," J.S. App. 197a n.350.

Plaintiffs vaguely assert that Act 43 "dilutes Democratic votes throughout Wisconsin," Appellees' Br. 29–30, they have no answer for the point that Whitford does not vote "throughout Wisconsin," but only in his own district. Plaintiffs also do not answer Defendants' argument that their standing theory would necessarily permit interstate lawsuits in the House of Representatives context, Appellants' Br. 30–31, brushing this point aside in a conclusory footnote, Appellees' Br. 32 n.10.

And Plaintiffs do not contest Defendants' explanation that Plaintiffs' theory would privilege their new politics-based cause of action over traditional racial-gerrymandering claims by permitting statewide claims in the political context, where such broad claims are not available in the racial context. Appellants' Br. 29–30. Plaintiffs tout this unthinkable consequence as a feature, asserting that systematically favoring allegations of political gerrymandering would somehow "improve" the law. Appellees' Br. 30–31. Notably, not one of Plaintiffs' numerous *amici* even attempted to offer a response to this serious deficiency in Plaintiffs' unprecedented statewide theory of standing.

The remaining standing arguments that Plaintiffs make do not support their position.

Plaintiffs cite to this Court's political-gerrymandering caselaw, Appellees' Br. 28, but those cases require dismissal on jurisdictional grounds. In *Vieth*,

five Justices concluded that federal courts lack jurisdiction to consider statewide partisan-gerrymandering claims. Justice Stevens found that plaintiffs lacked standing to bring statewide claims. *Vieth*, 541 U.S. at 327–28. Combining Justice Stevens' conclusion with the four-Justice plurality's holding that federal courts lack jurisdiction to consider *any* partisan-gerrymandering claims, *id.* at 281—as required by *United States v. Jacobsen*, 466 U.S. 109, 115–18 & n.12 (1984), and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 17 (1983)—yields the controlling rule that federal courts lack jurisdiction over statewide claims. This is now the sixth brief that Defendants have filed in this Court that relies upon the principles in *Jacobsen* and *Moses H. Cone*, Appellants' Br. 26–27; J.S. 20; Opp. to Mot. to Affirm 2; Stay Appl. 12; Reply in Support of Stay Appl. 3, and yet Plaintiffs have not even attempted to address those cases. As for *Bandemer* and *League of United Latin American Citizens v. Perry* (*LULAC*), 548 U.S. 399 (2006), those decisions did not discuss standing, let alone decide the issue, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). And Plaintiffs do not dispute that counsel in *LULAC* specifically assured this Court at oral argument, in response to standing concerns, that the claim was district-specific. Appellants' Br. 33.

Plaintiffs' argument that they have standing because of the way they have pleaded their case, Appellees' Br. 28–30, is circular *ipse dixit*. While Plaintiffs have insisted that their allegations are "statewide in

nature," Appellees' Br. 29, so did plaintiffs in this Court's racial-gerrymandering cases. As *Hays* explained, "Appellees insist that they challenged Act 1 in its entirety, not District 4 in isolation. That is true. It is also irrelevant" because "[o]nly those citizens able to allege injury as a direct result of having personally been denied equal treatment may bring such a challenge." 515 U.S. at 746 (citations and emphasis omitted). For the same reasons, Plaintiffs' assertions cannot create the legal basis for a statewide claim, based upon statewide injuries. Or, as this Court put it in *Alabama Legislative Black Caucus*, allegations of statewide gerrymandering are "legal unicorn[s]," to be found "only in the legal imagination." 135 S. Ct. at 1265.

Contrary to Plaintiffs' claims, Appellees' Br. 28–30, this Court's one-person, one-vote and minority-vote-dilution cases only further undermine their argument for an unprecedented statewide standing theory. *Baker v. Carr*, 369 U.S. 186 (1962), held that the plaintiffs had standing because they lived in overpopulated districts as compared to other districts in the State, and thus suffered the personal, district-specific harm of having less than one vote. *Id.* at 206–08. Plaintiffs here do not argue that they have less than one vote when compared to voters in other districts; rather, they rest upon a purely statewide theory. This Court's minority-vote-dilution cases similarly do not recognize statewide claims based upon statewide injury. *See Shaw v. Hunt*, 517 U.S. 899, 916–17 (1996) (finding "singularly unpersuasive" the argument that

"draw[ing] a majority-minority district *anywhere* [in the State]" could remedy a vote-dilution injury suffered in another part of the State (emphasis added)). To the contrary, courts have held, after citing racial-gerrymandering caselaw, that plaintiffs lack standing to bring vote-dilution claims for districts where they do not live. *See Hall v. Virginia*, 276 F. Supp. 2d 528, 531–32 (E.D. Va. 2003); *Old Person v. Brown*, 182 F. Supp. 2d 1002, 1006 (D. Mont. 2002); *Broward Citizens for Fair Dists. v. Broward Cnty.*, No. 12-60317-CIV, 2012 WL 1110053, at *3 (S.D. Fla. Apr. 3, 2012); *Radogno v. Ill. State Bd. of Elections*, No. 1:11-cv-04884, 2011 WL 5025251, at *2 (N.D. Ill. Oct. 21, 2011).[2]

Finally, Plaintiffs' argument that partisan-gerrymandering claims "cannot be justiciable yet incapable of being advanced statewide," Appellees' Br. 30, is demonstrably false. Justice Stevens explained that, because of this Court's standing doctrine, he would entertain *only* district-specific claims, *Vieth*, 541 U.S. at 327–28; Justice Souter, joined by Justice Ginsburg, believed that all political-gerrymandering claims must be "built upon" district-specific claims, *id.* at

[2] *Pope v. County of Albany*, No. 11-cv-0736, 2014 WL 316703 (N.D.N.Y. Jan. 28, 2014), the *only* vote-dilution standing case that Plaintiffs cite, Appellees' Br. 29, merely held that plaintiffs had standing to ask for one more majority-minority district in the City of Albany because they were "challeng[ing] the drawing of the district lines . . . *within the City . . . where they reside*," *Pope*, 2014 WL 316703, at *6 (emphasis added).

353; and scholars have advocated a single-district-only cause of action, *see, e.g.*, 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). Judge Niemeyer's dissenting opinion in *Benisek v. Lamone*, No. JKB-13-3233, 2017 WL 3642928 (D. Md. Aug. 24, 2017), which Plaintiffs quote on the very first page of their brief, Appellees' Br. 1, arises from a single-district case, Maryland Pls. Amicus Br. 3.

II. Plaintiffs' Reliance On The Ahistoric "Partisan Symmetry" Concept Underscores That Statewide Partisan-Gerrymandering Claims Are Nonjusticiable

Statewide partisan-gerrymandering claims are nonjusticiable because no litigant has identified "comprehensive and neutral principles for drawing electoral boundaries," such as those derived from "the annals of parliamentary or legislative bodies." *Vieth*, 541 U.S. at 306–08 (Kennedy, J., concurring in the judgment). The lack of such historically based principles is fatal to the justiciability of statewide claims because, without these principles, courts cannot even begin constructing a doctrine. No such "comprehensive and neutral principles" have been uncovered because all proposals for statewide tests in this area have boiled down to "some form of rough proportional representation for all political groups." *Bandemer*,

478 U.S. at 145 (O'Connor, J., concurring in the judgment). These points, combined with the insuperable standing problems inherent in statewide gerrymandering claims, militate strongly in favor of definitively holding that such claims are nonjusticiable. Appellants' Br. 34–40.

Plaintiffs do not dispute that partisan-gerrymandering claims are nonjusticiable unless litigants can identify historically based districting principles, but instead assert that they have uncovered such principles in so-called "partisan symmetry." Appellees' Br. 37–41. But there is simply "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), and Plaintiffs do not cite even one historical source endorsing (or even suggesting) partisan symmetry as a "comprehensive and neutral principle[] for drawing electoral boundaries," *Vieth*, 541 U.S. at 306–07 (Kennedy, J., concurring in the judgment). This complete lack of historical support contrasts sharply with the overwhelming historical record in favor of the one-person, one-vote principle. *See Reynolds v. Sims*, 377 U.S. 533, 558 (1964) ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." (citation omitted)); *Wesberry v. Sanders*, 376 U.S. 1, 13–14 (1964) (citing

debates from the Constitutional Convention as historical support); *The Federalist No. 54*, at 304 (James Madison) (George Stade ed., 2006) ("It is a fundamental principle of the proposed constitution, that [ ] the aggregate number of representatives allotted to the several States is to be . . . founded on the aggregate number of inhabitants."); John Locke, *Two Treatises of Government* 195–96 (Mark Goldie ed., 1993) ("To what gross absurdities . . . we see the bare name of a town . . . where scarce . . . more inhabitants than a shepherd is to be found, sends as many representatives to the grand assembly of law-makers, as a whole county numerous in people, and powerful in riches."). Even in more modern times, a 50-State survey found that not a single State uses partisan symmetry as a redistricting principle. Appellants' Br. 38.

One important reason for the lack of historical support for partisan symmetry is that "symmetry" is just some social scientists' label for metrics calculating how far a map deviates from another ahistoric concept: proportional representation. Plaintiffs are wrong when they assert that because symmetry metrics do not require strict 1:1 vote-to-seat proportionality, they are not based upon proportional-representation principles. Appellees' Br. 39–41. Symmetry metrics analyze plans based upon a party's seats won compared to its statewide vote share, seeking to identify the number of seats a party "should" win after obtaining a certain statewide vote percentage. Partisan symmetry is thus no more removed from proportionality than was the standard this

Court rejected in *Vieth*: a majority of votes should win a majority of seats. Whether a symmetry metric uses a baseline of 1:1 proportionality, 2:1 hyper-proportionality, a majority-of-seats-with-majority-of-votes rule, or another ratio-based criterion, it is just "rough proportional[ity]." *Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring in the judgment).

Plaintiffs' reliance on "[c]omputer simulations" that permit social scientists to compare how a map "performs" against possible alternative maps in terms of deviation from the "benchmark of neutral treatment" of some partisan-symmetry metric, Appellees' Br. 47–48, misunderstands the fundamental challenge in this area. It was easy at the time of *Vieth* (and, indeed, well before that) to use computing power to create a series of alternative maps and then to measure how the challenged map "performs" in terms of its deviation from the "benchmark of neutral treatment" of any proportionality-based metric, be it 1:1 proportionality or any other ratio-based criterion. *See Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment) ("Computer assisted districting has become so routine and sophisticated that legislatures, experts, and courts can use databases to map electoral districts in a matter of hours, not months."). A fatal problem with any test built around such an approach remains that—unlike with the foundational one-person, one-vote principle—the Constitution does not embody a partisan-symmetry benchmark, deviation from which courts must minimize.

Plaintiffs are incorrect when they claim that a "majority" of this Court in *LULAC* "expressed interest" in building a doctrine around partisan symmetry. Appellees' Br. 37. Justice Kennedy explained that symmetry alone cannot serve as the baseline for adjudicating "how much partisan dominance is too much," specifically rejecting an approach proposed by an amicus brief that is extremely similar to Plaintiffs' proposal, *LULAC*, 548 U.S. at 420, and Justices Scalia and Thomas agreed with that analysis, *id.* at 511. Justice Souter took no position as to "the administrability" of symmetry. *Id.* at 483–84. And Justice Breyer relied upon minority party entrenchment. *Id.* at 491–92. While Justice Stevens noted that a symmetry standard could be "manageable," *id.* at 468 n.9, he did not disclaim his prior position that this Court's Article III caselaw permits courts to consider only district-specific claims, *supra* p. 7.

Finally, Plaintiffs' citation to First and Fourteenth Amendment caselaw, Appellees' Br. 34–36, does nothing to relieve them of the responsibility of identifying historically based "comprehensive and neutral principles" from which to construct a judicially manageable doctrine. *Vieth*, 541 U.S. at 306, 308 (Kennedy, J., concurring in the judgment). While Plaintiffs correctly point out that the First Amendment prohibits the government from "punish[ing] or suppress[ing] speech" based on viewpoint, *Matal v. Tam*, 137 S. Ct. 1744, 1765–66 (2017) (Kennedy, J., concurring in part and concurring in the judgment),

that precept does nothing to salvage Plaintiffs' lawsuit, *see* Republican State Leadership Committee Amicus Br. 23–26, including because it does not help courts identify neutral, historically based districting principles from which a political-gerrymandering doctrine can be constructed.[3] As to the Fourteenth Amendment, Plaintiffs claim that partisan gerrymandering involves "deliberate dilution of a group of voters' electoral influence." Appellees' Br. 34. Even if vote-dilution concepts could coherently apply to the two major parties' political power—which they cannot, *Bandemer*, 478 U.S. at 147 (O'Connor, J., concurring in the judgment); Republican State Leadership Committee Amicus Br. 18–22—a vote-dilution-based partisanship cause of action would still be nonjusticiable without a neutral, historically grounded baseline.

III. Plaintiffs' Test Is Overbroad, Difficult To Comply With, And Biased In Favor Of Democrat-Controlled Legislatures

Plaintiffs' lawsuit must also be dismissed because they have not proposed a "limited and precise" legal test. *See Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment). Given the shifting tests that

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[3] The First Amendment argument raised by one of Plaintiffs' *amici*—that partisan intent, standing alone, renders a plan presumptively unconstitutional, Common Cause Amicus Br. 23—is foreclosed by *LULAC*'s holding that even a showing of *sole* partisan intent is insufficient to invalidate a plan.

Plaintiffs and the district court have articulated, Defendants' opening brief explained why each of three tests—social-science hodgepodge, efficiency gap, and entrenchment—failed the "limited and precise" criteria. Appellants' Br. 45–59. In their brief on the merits, Plaintiffs articulate a test with three prongs, which asks three questions: (1) did the legislature have partisan intent?; (2) does the map score poorly on partisan-symmetry metric(s) and durability analyses?; and (3) was it impossible for the Legislature to draw a map that scored better, while still complying with other requirements? Appellees' Br. 33. This test is wildly overbroad, difficult for any legislature to comply with, and severely biased in favor of Democrat-controlled legislatures.

The first and third prongs of Plaintiffs' test would be mere formalities in most cases. Plaintiffs define their first prong as partisan intent, and do not dispute Defendants' argument that this is the same intent test that the *Bandemer* plurality articulated. Appellants' Br. 44–45. As the *Bandemer* plurality explained, however, "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." 478 U.S. at 129. All Plaintiffs' first element would do is make legislatively drawn maps presumptively suspect, an illogical inversion of the Elections Clause argument that this Court rejected in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015). Plaintiffs define their third element as

whether "alternative district maps" could have been drafted that have less partisan asymmetry on some metric, while still complying with traditional redistricting principles and other requirements. Appellees' Br. 33. But as Plaintiffs concede elsewhere, this prong will be impossible for any legislature to prevail under because, "[d]ue to the near-infinite number of possible district configurations, it is generally possible for plans both to be symmetric and to satisfy all other criteria." Appellees' Br. 55. A legislature's compliance with these principles would thus be irrelevant. *See also infra* pp. 23–24.

The real action under Plaintiffs' test would take place under the partisan-effects prong: how the map scores on social-science metrics and durability analyses. As Defendants explained in their opening brief, Plaintiffs' effects approach would be indeterminate and deeply disruptive, as every map would be challenged in court, with each side putting forward its own favored social-science metric(s), leading to an expensive, uncertain discovery period and trial. Appellants' Br. 46–47. Plaintiffs' preferred symmetry metric below was the efficiency gap, and their favored durability analysis was based upon Professor Jackman's conclusion that any plan with a gap over 7% in its first election is unlikely to become asymmetrical in the other party's favor. *See* JA60; Dkt. 149:209. Other plaintiffs could select other metrics and durability analyses. Appellants' Br. 46–47. Plaintiffs offer no more specificity, resting on vague assurances that

a plan must have a "sizable asymmetry" and "persistence." Appellees' Br. 33, 46. Notably, the only metric that the parties subjected to adversarial scrutiny below—the efficiency gap—proved to be so problematic, Appellants' Br. 48–53, that Plaintiffs no longer defend it as the controlling effects test, Appellees' Br. 33.[4]

The number of plans that Plaintiffs' test would threaten is staggering. Texas Amicus Br. 26. One third of plans drawn in the last 45 years fail Plaintiffs' asymmetry/durability approach, having a greater than 7% efficiency gap in the first election. JA193–94, 201. Plaintiffs point out that the number of plans invalidated could be somewhat lower only because some of the plans that Plaintiffs' approach tags as too durably partisan were not drawn by a party in full control of the legislature. Appellees' Br. 52–53. Plaintiffs are wrong to argue that this represents the

[4] Plaintiffs also do not defend the district court's entrenchment test, which was never fairly litigated below. Appellants' Br. 53–59. Plaintiffs assert that they emphasized the "durability" of Act 43's "pro-Republican skew," while citing to Jackman's durability analysis (which the district court did not rely upon). Appellees' Br. 60. But what both Plaintiffs and Jackman were arguing was that an efficiency gap of 7% is "durable," in that it would be unlikely that such a gap would "sign flip" to being asymmetrical in Democrats' favor. JA60; Dkt. 149:209. Neither Plaintiffs nor Jackman ever sought to establish that Act 43, in the district court's words, "secured for Republicans a lasting Assembly majority." J.S. App. 145a–46a. That is the language of minority-party entrenchment, which *Vieth* forecloses.

"upper limit of the test's potential reach." Appellees' Br. 52. If challengers would lose under Plaintiffs' 7%-gap-in-the-first-election test, they would simply advocate a different asymmetry/durability combination. Some challengers could, for example, argue that the first election was an outlier and should therefore be discounted. Notably, *53%* of all plans in the last 45 years had a 7% or greater efficiency gap in at least one election. *See* JA201.[5]

The facts of this case well demonstrate the indeterminacy of Plaintiffs' effects approach. Plaintiffs explain that trial courts can rely upon swing analyses to conduct a durability inquiry. *See* Appellees' Br. 47. Plaintiffs also repeat their false assertion that, under Dr. Gaddie's swing analysis, "Democrats . . . would need 54% of the statewide vote to capture a simple majority of Assembly seats—a feat achieved just once by either party over the last generation." Appellees'

[5] Adding further uncertainty, States will likely argue that some of Plaintiffs' essential premises—such as the purported consistency of voter behavior or the claimed polarization of political parties, Appellees' Br. 49—do not apply in their State. Appellants' Br. 13, 17 (explaining that Wisconsin Democrats won 54% of the two-party statewide Assembly vote in 2008, and then only 48% of the statewide Assembly vote just six years later in 2014); New York Senate Majority Leader Amicus Br. 4 ("New York State Senate is governed by a multiparty, multi-member coalition"). How a future district court could adjudicate such disputes, including how it may choose to weigh those considerations against the ambiguities created by competing social-science metrics, would be anyone's guess.

Br. 9 (citation omitted). In fact, Gaddie projected that Democrats would win an Assembly majority under Act 43 with just over 53% of the vote, and Democrats won 54% in 2006 and 2008. Appellants' Br. 57–58. Dr. Gaddie further estimated that *if Democrats won 54% of the vote, they would win 53 out of 99 Assembly seats under Act 43*, almost perfect proportionality. SA339. In 2006, Democrats won more than 54% of the two-party vote, which netted them just 47 seats under the immediately prior *court-drawn* map; in 2008, they won 54% of the vote, this time obtaining 53 seats under that same map (the exact number of seats that Gaddie's swing analysis projected them to win under Act 43). Appellants' Br. 13; SA339. Plaintiffs offer no explanation why these facts and Gaddie's swing analysis could not reasonably have led a different court to uphold Act 43 as lawful.

In light of the indeterminacy of Plaintiffs' test, it would be exceedingly difficult for legislatures to protect against inevitable, costly, and uncertain lawsuits.[6] Take, for example, the task facing the Wisconsin Legislature in 2011. The prior court-drawn map had efficiency gaps of 7%, 10%, and 12% favoring Republicans in its first three elections. JA223–24. If the Legislature drew its map in "the

[6] That is, unless the legislature accepted Plaintiffs' not-so-subtle suggestion of delegating its sovereign responsibility of drawing district maps to a nonpartisan commission. Appellees' Br. 54–55. Even then, plaintiffs would argue that the commission had been captured by partisans. Texas Amicus Br. 15.

most neutral way [a federal court] could conceive"—"adjusting" the prior map for "population deviations," *Baumgart v. Wendelberger*, Nos. 01-C-121, 02-C-366, 2002 WL 34127471, at *7 (E.D. Wis. May 30, 2002)—this new map would almost certainly have been unlawful under Plaintiffs' test. Appellants' Br. 38. Plaintiffs point out that the Legislature could have used symmetry metrics to draft a map more Democrat-friendly than the prior court-drawn map. Appellees' Br. 54. This "nonpartisan statesmanship" mandate, J.S. App. 245a, is something that no State's laws require and for which the Constitution offers no support. But even such unprecedented efforts would not necessarily protect the map from a costly lawsuit. It is undisputed that under a uniform swing analysis, Plaintiffs' Demonstration Plan would have yielded Republicans 63 seats on 52% of the vote in 2014, a result identical to the one that obtained in 2014 under Act 43. Appellants' Br. 65–66. Such an asymmetrical election result would surely have led to an immediate, uncertain lawsuit by Democrat partisans.

Finally, Plaintiffs' test systematically favors Democrat-controlled legislatures, Appellants' Br. 50–51, a fact that is obvious from the uniform partisan breakdown of the States in this case, *compare* Texas Amicus Br. (16 Republican Attorneys General speaking for their States and supporting Defendants), *with* Oregon Amicus Br. (16 Democrat Attorneys General

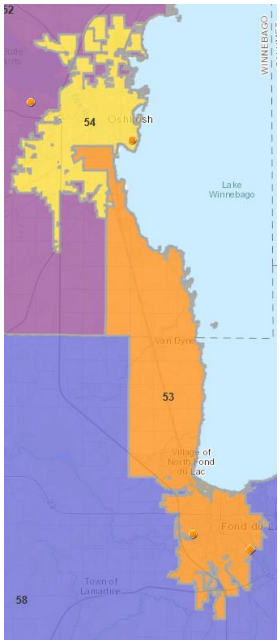
and one Independent Attorney General speaking for their States and supporting Plaintiffs).[7]

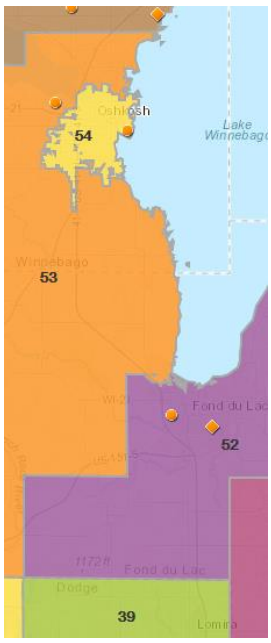
A principal reason for the severe political bias of Plaintiffs' test is that many Democrats today have chosen to cluster in cities. The district court, J.S. App. 203a, and *amici* from both sides, *see* Wisconsin State Senate and Assembly Amicus Br. 31–37; Professor Best Amicus Br. 12, agree than political geography favors Republicans, creating natural asymmetry. So when Republican-controlled legislatures move district lines for partisan ends, their symmetry scores will be far worse than those generated by Democrat-controlled legislatures engaging in the same activity for the same ends; Republicans' plans will score as nefariously increasing natural asymmetries, whereas Democrats' plans will score as benignly cancelling them out. SA131–41. That is presumably why Illinois could join Oregon's brief without much concern. Although Plaintiffs' *amici* criticize Illinois' frequent pro-Democrat redistricting, Represent.Us Amicus Br. 8–10; Current and Former State Legislators Amicus Br. 1; McCain and Whitehouse Amicus Br. 10–11, the State's political geography ensures that its legislature's partisan maps will score well on symmetry metrics, SA253; SA137–38; *see generally* National Republican Congressional Committee Amicus Br. 10–

[7] Notably, individual politicians nominally supporting Plaintiffs declined to grapple with the specifics of Plaintiffs' test. *See, e.g.*, Bipartisan Group of Current and Former Members of Congress Amicus Br. 34 n.58 ("no position" on Plaintiffs' test).

14 (discussion and charts of Illinois Democrats' districting).

That is also why Plaintiffs' Demonstration Plan—an obviously partisan plan designed to reverse-engineer 13 pro-Democrat Assembly districts under 2012 conditions, Appellants' Br. 65–66—still had an efficiency gap favoring Republicans in 2012. SA71–72, 308–09. Plaintiffs' expert, for example, divided up the cities of Fond du Lac and Oshkosh in a manner far more problematic than any of the belated Act 43 examples that Plaintiffs can muster. *Supra* p. 3 n.1. The Demonstration Plan's approach to this area is reproduced on the left; Act 43's is reproduced on the right:





Dkt. 149:103–106; Defs. Ex. 520 (interactive map; also available at http://arcg.is/0TTPeS); SA361 (interactive map).

Plaintiffs are thus simply wrong when they assert that pro-Republican gaps are "entirely attributable to more plans being enacted by state governments under unified Republican control." Appellees' Br. 52. According to Jackman, Plaintiffs' own expert, the shift in efficiency gaps towards Republicans started in the mid-1990s, when Republicans controlled only two of the 41 States in the dataset. Dkt. 149:251–53; SA225. And the average gap in Republicans' favor was virtually unchanged from 2000 to 2014, a period during which Republicans took control over legislatures in many States. Dkt. 149:253–55; SA225. Jackman also found that since the 1990s, efficiency gaps favor Republicans and that, conversely, "few plans" today "generat[e] large, pro-Democratic" gaps. SA238. Surely, a legal test so obviously politically one-sided "cannot promise political neutrality." *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring in the judgment).

IV. Act 43 Is Lawful Because It Complies With Traditional Redistricting Principles

Act 43 complies with traditional redistricting principles, which means that the plan is not a partisan gerrymander according to both the historical understanding of that term and the views of the majority of Justices in *Vieth* who would recognize such claims. Appellants' Br. 59–61. Definitively holding that a

plan that complies with these principles is not an unlawful political gerrymander would be a sensible approach. Appellants' Br. 59–62. At the very minimum, Act 43 is lawful because it complies with these crucial principles and is similar on these principles, district shapes, and results to the immediately prior court-drawn map. Appellants' Br. 63–66.

In their response brief, Plaintiffs do not meaningfully dispute that Act 43 is consistent with the prior court-drawn map on traditional redistricting principles, district shapes, or results. And while Plaintiffs assert that Act 43 departs from some traditional principles, Appellees' Br. 59, those arguments are waived and meritless. At trial, Plaintiffs offered no evidence that even a single district failed to comply with these principles. J.S. App. 250a–51a. And Act 43 has better population deviation than the two most recent court-drawn plans, contains a number of municipal splits falling between those two plans, and has a miniscule variance in compactness from the immediately prior court-drawn plan. JA214–15. While Plaintiffs now complain about Act 43's pairings of incumbents and core retention, their own Demonstration Plan fared significantly worse on these same criteria. *See* Dkt. 149:112–17; Defs. Ex. 520 (interactive map).[8]

[8] Act 43 has also survived all previous legal challenges, except for one under the Voting Rights Act, in which the district

Given that they have no serious argument that Act 43 fails to comply with traditional redistricting principles, Plaintiffs' position is that such principles should, in effect, be irrelevant in this context.

Plaintiffs misrepresent this Court's precedent by claiming that this Court has already rejected Defendants' argument regarding traditional redistricting principles. Appellees' Br. 56. In fact, of the Justices who would have entertained partisan-gerrymandering claims in *Vieth*, a majority unambiguously explained that a plan that complies with such principles is not unlawful. Appellants' Br. 59–60. Nor has this Court "repeatedly rebuffed" Defendants' arguments in light of its racial-gerrymandering caselaw. Appellees' Br. 58. A plan that complies with traditional redistricting principles and yet is still predominantly motivated by race raises the most serious constitutional concerns, *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017), whereas politics are "inevitabl[e]" in the redistricting process, *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973).

Importantly, while this Court has recognized that compliance with traditional redistricting principles typically plays an important role in racial-gerrymandering litigation, compliance with these principles

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court held that Latino voters would be better served by "one majority-minority district than with two influence districts." *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 856 (E.D. Wis. 2012).

would never matter under Plaintiffs' test, at least when the map was drawn by a legislature controlled by one party. In the racial-gerrymandering context, "this Court to date has not affirmed a predominance finding, or remanded a case for a determination of predominance, without evidence that some district lines deviated from traditional principles." *Bethune-Hill*, 137 S. Ct. at 799. Under the first prong of Plaintiffs' political-gerrymandering test, however, partisan intent will generally be present whenever the map is drawn by a legislature. *Supra* p. 14. The second prong deals only with a grab bag of social-science metrics. *Supra* p. 15. And the legislature would not be able to rely upon its compliance with traditional redistricting principles to justify its plan under Plaintiffs' third prong, because it will always be possible to draw a different map that complies with traditional redistricting principles just as well. *Supra* pp. 14–15.

While Plaintiffs worry that Defendants' approach will lead to "false positives" or "false negatives," Appellees' Br. 58, that concern is unwarranted. There will be no false positives because Defendants are not suggesting that noncompliance with these principles should be "the basis for relief." *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring in the judgment). As for false negatives, Defendants' position is that compliance with these principles negates the notion of a partisan gerrymander, as that term has been historically understood. Appellants' Br. 59–62. But to the extent that this Court were to disagree with that proposition as a bright-line rule, it should at least require that

any legal test give traditional redistricting principles a central role, whereas Plaintiffs' approach makes compliance with these principles immaterial.

* * *

More generally, Plaintiffs and their *amici* are wrong when they argue that the existence of computing power and the nature of modern politics justify this Court creating an unprecedented statewide political-gerrymandering cause of action. Four decades ago, this Court observed that because "voting records are available precinct by precinct, ward by ward," "it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another." *Gaffney*, 412 U.S. at 753. Justice Powell in *Bandemer* discussed how the legislature there used a "private computer firm" with "information fed into the computer [that] primarily concerned the political complexion of the State's precincts." 478 U.S. at 162. And Justice Kennedy in *Vieth* noted the ability of legislative staffers to use "[c]omputer assisted districting" to quickly draw maps. 541 U.S. at 312. While using computers to forward partisan ends is nothing new, political gerrymandering is much older still. Appellants' Br. 5–10.

Plaintiffs' own evidence at trial refutes their claims that redistricting maps have become more asymmetrical in recent times. Appellees' Br. 21–23. The only record evidence that Plaintiffs cite shows that the 50th quantile efficiency gap barely changed

between 1972 and 2014, while the 75th quantile was *higher* (more assymetrical) in 1972 than in 2014. SA227. The oft-repeated falsehood that principles of prudence and restraint must be cast aside because today's practices are somehow worse than those of the past is a sure prescription for a "remedy[ ] that [ ] is worse than the disease." *The Federalist No. 10*, at 53 (James Madison) (George Stade ed., 2006).

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

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