No. 16-1161

In The Supreme Court of the United States

BEVERLY R. GILL, ET AL.,
Appellants,

v.

WILLIAM WHITFORD, ET AL.,
Appellees.

On Appeal from the United States District Court
for the Western District of Wisconsin

BRIEF OF *AMICI CURIAE* TENNESSEE STATE SENATORS IN SUPPORT OF APPELLANTS

John L. Ryder
Counsel of Record
Pablo Adrian Varela
Harris Shelton Hanover Walsh, PLLC
40 South Main Street, Suite 2700
Memphis, Tennessee 38103
901.545.1455
jryder@harrisshelton.com

Linda Carver Whitlow Knight
Gullett Sanford Robinson & Martin, PLLC
150 Third Avenue South, Suite 1700
Nashville, TN 37201
615.244.4994
lknight@gsrm.com

Counsel for Amici Curiae

Dated: August 3, 2017

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutions

Statutes

Other Authorities

STATEMENT OF INTEREST[1]

Amici are members of the Tennessee State Senate, appearing in their individual capacities: the Speaker of the Senate, Randy McNally, who represents the Fifth Senatorial District, and is also the Lieutenant Governor of Tennessee; Senator Mae Beavers, who represents the Seventeenth Senatorial District; Senator Mike Bell, who represents the Ninth Senatorial District; Senator Janice Bowling, who represents the Sixteenth Senatorial District; Senator Rusty Crowe, who represents the Third Senatorial District; Senator Dolores Gresham, who represents the Twenty-Sixth Senatorial District; Senator Ferrell Haile, who represents the Eighteenth Senatorial District; Senator Edward Jackson, who represents the Twenty-Seventh Senatorial District; Senator Jack Johnson, who represents the Twenty-Third Senatorial District; Senator Brian Kelsey, who represents the Thirty-First Senatorial District; Senator Bill Ketron, who represents the Thirteenth Senatorial District; Senator Jon Lundberg, who represents the Fourth Senatorial District; Senator Jim Tracy, who represents the Fourteenth Senatorial District; and Senator Ken Yager, who represents the Twelfth Senatorial District.

The Senate and House of Representatives will have primary responsibility for redistricting and

---

[1] Counsel for all parties have consented to this filing. No counsel for any party authored this brief in whole or in part, and not entity or person aside from *amici curiae*, their members, and their counsel made any monetary contribution toward the preparation or submission of this brief.

reapportionment following the next decennial census. This Court has "repeatedly held that redistricting and reapportioning legislative bodies is a legislative task …"[2]

Tennessee has experienced substantial litigation over its redistricting.[3] If this Court affirms the court below and validates Appellees' social science theory, this would lead to countless, and endless, lawsuits and appeals over minutiae.

The existing objective guidelines for redistricting, which the Wisconsin Legislature followed, provide sufficient standards for state and local legislative bodies to follow in drawing districts. It would be impossible and counterproductive for courts to interject themselves further into the myriad complex and nuanced considerations, and the balancing of numerous competing interests that go into the drawing of local, state, and federal districts.

---

[2] *Wise v Lipscomb*, 437 U.S. 535,539 (1978).

[3] *Baker v. Carr,* 369 U.S. 186 (1962); *Rural West Tenn. African-American Affairs Council v. Sundquist*, 209 F.3d 835 (6th Cir. 2000), *cert. denied*, 531 U.S. 944 (2000); *Crone v. Darnell,* 176 F. Supp. 2d 814 (W.D. Tenn. 2001); *Langsdon v. Millsaps,* 9 F. Supp. 2d 880 (W.D. Tenn. 1998); *Mader v. Crowell*, 506 F. Supp. 484 (M.D. Tenn. 1981); *Mader v. Crowell,* 498 F. Supp. 226 (M.D. Tenn. 1980); *Sullivan v Crowell,* 444 F. Supp. 606 (W.D. Tenn. 1978); *White v. Crowell,* 434 F. Supp. 1119 (W.D. Tenn. 1977); *Kopald v. Carr,* 343 F. Supp. 51 (M.D. Tenn. 1972); *Moore v. State*, 436 S.W.3d 775 (Tenn. 2014); *State ex rel. Lockert v. Crowell*, 631 S.W.2d 702 (Tenn. 1982).

SUMMARY OF ARGUMENT

Political gerrymanders are as old as representative government. Gerrymanders were known from the Colonial era, during the Constitutional Convention, through the early Republic, throughout the Nineteenth Century and up to the present day.

Even though gerrymandering was well-known and understood when the Constitution was written and ratified, it is silent as to *how* legislative and Congressional districts may be drawn. Certainly, the Constitution does not forbid political considerations in the drawing of districts. While it *does* expressly contain authority for Congressional oversight, it does not specify authority for judicial oversight of legislative political gerrymanders. The judiciary simply cannot effectively do so.

Since this Court's ruling in *Davis v Bandemer*,[4] courts have sought, but have failed to define, a judicially manageable standard by which to adjudicate political gerrymander claims. Beyond applying the existing, well-understood standards for constitutionally drawing districts, courts cannot perform the purely legislative function of drawing districts from the village level to the Congressional level, nor were they meant to.

In adopting *any* artificial standard, including the proposed efficiency gap standard, the Court would transform the basis of representation from district-based representation, to one of externally-dictated proportional representation, a result plainly

---

[4] 478 U.S. 109 (1986).

precluded by precedent, and a policy decision about the fundamental nature of representation that this Court should recognize as beyond its jurisdiction and beyond the bounds of the Constitution.

ARGUMENT

"Political gerrymanders are not new to the American scene."[5] In 1907, Elmer Cummings Griffith could say: "Aside from the one case of the gerrymander in Massachusetts which gave rise to the term itself, but little has been written collectively upon the general subject, at least prior to the famous decision of the courts in the state of Wisconsin."[6] This is, unfortunately, no longer the case. The political gerrymander has been discussed extensively in the courts, in academia, by the political pundits, and in the public square. That discussion arises from courts' entertaining novel arguments for additional standards, not from an increase in gerrymandering itself.

I. Colonial America through the Founding

The political gerrymander is probably as old as representative government itself and was well known by the time the Constitution was drafted. The basic principle of apportioning representatives among governmental entities, towns, or counties, as opposed to blocs of equal population took hold in the Colonies, even though to the Colonists, the English system of representation was a model of governance

---

[5] *Vieth v. Jubelirer*, 541 U.S. 267, 274 (2004).

[6] ELMER C. GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 3 (University of Chicago 1907) (hereinafter "GRIFFITH").

to be avoided rather than imitated.[7] In his plurality opinion in *Vieth v Jubilirer*, Justice Scalia noted:

> One scholar traces them back to the Colony of Pennsylvania at the beginning of the 18th century, where several counties conspired to minimize the political power of the city of Philadelphia by refusing to allow it to merge or expand into surrounding jurisdictions, and denying it additional representatives. In 1732, two members of His Majesty's Council and the attorney general and deputy inspector and comptroller general of affairs of the Province of North Carolina reported that the Governor had proceeded to "divide old Precincts established by Law, & to enact new Ones in Places, whereby his Arts he has endeavoured to prepossess People in a future election according to his desire, his Designs herein being either to endeavor by his means to get a Majority of his creatures in the Lower House" or to disrupt the assembly's proceedings.[8]

The practice originates from the British system of representation, upon which the colonial system was based. "In the British model, towns, or 'boroughs' were assigned representation in the House of Commons. As British citizens moved

---

[7] *Baker v. Carr,* 369 U.S. 186, 307 (1962) (Frankfurter, J. dissenting).

[8] *Vieth*, 541 U.S. at 274 (internal citations omitted).

around and once flourishing population centers declined, representation remained fixed and ultimately produced what was called a 'rotten borough.'"[9] In the Colonies, apportionment was a political tool in the struggles between the King of England and the Royal Governors, on the one hand, and the colonial Legislatures, on the other hand.[10] Later, it became a tool used in the tensions between the older "tidewater regions" and the newer interior areas of the country.[11]

Numerous early examples of political gerrymanders abound:

> In some, as in Massachusetts and Rhode Island, numbers of electors were taken into account, in a rough fashion, by allotting increasing fixed quotas or representatives to several towns or classes of towns graduated by population, but in most of the colonies delegates were allowed to the local units without respect to numbers. This resulted in grossly unequal electoral units. The representation ratio in one

---

[9] *Id.* at 331 n. 25; *see also* J. DOUGLASS SMITH, ON DEMOCRACY'S DOORSTEP: THE INSIDE STORY OF HOW THE SUPREME COURT BROUGHT ONE PERSON, ONE VOTE TO THE UNITED STATES 12 (Hill and Wang 2014).

[10] *Baker*, 369 U.S. at 307-08 (*citing* WILLIAM S. CARPENTER THE DEVELOPMENT OF AMERICAN POLITICAL THOUGHT 48-49, 54 (Princeton University Press 1930) (hereinafter "CARPENTER"); GRIFFITH at 26, 28-29).

[11] *Id.* (*citing* CARPENTER 87; Griffith 26-29, 31).

> North Carolina county was more than eight times that in another.[12]

Virginia originally assigned representation in the House of Burgesses by settlement or plantation in the British fashion.[13] Later assignments were made by towns or combinations of towns and then by counties.[14] The weakest bodies in colonial Virginia were the colonial Assemblies, composed of a House, popularly elected by the Colonists from election districts composed of towns, parishes or counties, and a Governor's Council, composed of his appointees.[15] As counties were created, the House of Burgesses grew from 22 in 1619 to 120 in 1775.[16]

By 1776, Virginia, was divided into twenty-four Senatorial Districts of one to three counties, resulting in the gerrymandering of the colony. The dominant faction combined large numbers of their opponents' supporters into a district ("packing"), and spread out their supporters into multiple other districts ("cracking").[17] The result was that as few as nineteen thousand (19,000) men from a few counties would elect half of the colony's forty Senators, while the remainder of the colony, with thirty thousand (30,000), would only elect twelve.[18]

---

12 *Id.*

13 Matthew S. Gottlieb, Encylopedia Virginia, *House of Burgesses* (Feb. 6, 2012), *available at* https://www.encyclopedia virginia. org/ House_of_Burgesses.

14 *Id.*

15 *Id.*

16 H.R. MCILWAINE, ED., JOURNALS OF THE HOUSE OF BURGESSES, 1619-1659 vi (Virginia State Library) (1915).

17 GRIFFITH at 30-31.

18 *Id.*

So notorious was the practice, that the Declaration of Independence included it as one of the list of grievances against the King of England: "He has refused to pass laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the Legislature, a right inestimable to them and formidable to tyrants only."[19]

II. Gerrymander and the Constitution

A. The Constitutional Convention

Having experienced political gerrymandering firsthand, the delegates to the Constitutional Convention considered whether congressional districts should be drawn by the states or by Congress and concluded that the districts should be drawn by the states. In the Convention, discussions of what would become known as gerrymandering centered around the proposed language of the Elections Clause found at Article I, § 4.[20] During the Convention, there was some appetite for federal control over the drawing of districts, purportedly to prevent unfair practices, but the majority of the Framers agreed that the cure of ceding to Congress the control over drawing districts would have been worse than the disease. Eventually, a balance was struck, whereby state Legislatures would draw

---

[19] THE DECLARATION OF INDEPENDENCE para. 5 (U.S. 1776).

[20] The Elections Clause states that "The Times Places and Manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; *but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators*." U.S. CONST. art. I, § 4, cl. 1 (emphasis added).

Congressional districts but Congress could intervene if deemed necessary.

The Convention made no effort to address the districting of the state legislative bodies, even though it was the state Legislatures that elected the Senators. Much of the spirited debate regarding whether to cede control of drawing districts to Congress focused on the proposed "make or alter" language of the Elections Clause.[21] During the debate, South Carolinians Charles Pinckney and John Rutledge attempted to strike the proposed language.[22] Some delegates were concerned that Congress would abuse its power and deprive the "rights of the people to a free and equal representation in Congress" by drawing uneven lines to favor a particular political faction. Conversely, others feared state election fraud,[23] centralized voting locations,[24] and various schemes that states might devise to "counteract the will of a majority of the people."[25] James Madison's reasoned response to his fellow delegates was that to give Congress the power to "check partisan manipulation of the [drawing of Congressional districts] by the states"

---

[21] *Vieth*, 541 U.S. at 275.

[22] *Id.* (*quoting* 2 RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787 240-41 (Max Farrand ed., rev. ed. 1966) (hereinafter "FARRAND'S RECORDS")).

[23] 5 DEBATES ON THE FEDERAL CONSTITUTION 401-402 (J. Elliott ed., 2d ed. 1876) (hereinafter "ELLIOTT'S DEBATES").

[24] 3 *Id.* at 60.

[25] 2 *Id.* at 49.

would prevent district inequities from infecting Congress, like it had "infected" state Legislatures.[26]

At the forefront of Madison's mind was likely the most egregious inequality at the time: the thirty (30) delegates allotted to Charleston in the Legislature of Pinckney's and Rutledge's home state, South Carolina.[27] Ultimately, Madison's rhetorical skills prevailed, as the Convention unanimously approved the Elections Clause.[28] During the state ratification debates, even Pinckney defended the federal check on state legislative power over drawing Congressional districts to his fellow South Carolinians.[29]

The Framers arrived at a balance of power and dispersal of competing interests (both laterally, by separation of powers, and vertically, by federalism, especially as enunciated shortly thereafter in the Ninth and Tenth Amendments), and established a framework for governing. As noted by the *Vieth* plurality, a Massachusetts delegate said at his state's ratifying convention that:

> Without these powers in Congress, the people can have no remedy; but the 4th section provides a remedy, a controlling power in a legislature, composed of senators and representatives of twelve states, without the influence of our commotions and factions, who will hear

---

[26] *Vieth*, 541 U.S. at 275 (*quoting* 2 FARRAND'S RECORDS at 240-241).

[27] 3 FARRAND'S RECORDS at 267.

[28] 4 ELLIOTT'S DEBATES at 303.

[29] *Id.*

> impartially, and preserve and restore to the people their equal and sacred rights of election.[30]

Conspicuously absent from any of the Constitutional Convention debates was any discussion of the judiciary as an appropriate check on the drawing of Congressional or Legislative districts that one faction or another thought was unfair, or any discussion that representation should be proportional based on relative sizes or strengths of different interests. In fact, the provision granting Congress oversight implicitly rejects the notion of judicial oversight or approval of proportional representation.

B. The State Ratifying Conventions

Debate on the issue continued during the ratifying conventions in the states. In 1788 at the Massachusetts ratifying convention, Virginia's redistricting practices were compared to other states:

> Hon. Mr. King rose to pursue the inquiry, why the place and manner of holding elections were omitted in the section under debate. It was to be observed, he said, that in the Constitution of Massachusetts, and other States, the manner and place of elections were provided for; the manner was by ballot, and the places towns; for, said he, we happened to settle originally in townships. But it was

---

[30] *Vieth*, 541 U.S. at 276 (*quoting* 2 ELLIOTT'S DEBATES at 27).

different in the southern States. He would mention an instance. In Virginia there are but fifteen or twenty towns, and seventy or eighty counties; therefore no rule could be adopted to apply to the whole. If it was practicable, he said, it would be necessary to have a district the fixed place. But this is liable to exceptions; as a district that may now be fully settled, may in time be scarcely inhabited; and the back country, now scarcely inhabited, may be fully settled. Suppose this State thrown into eight districts, and a member apportioned to each: if the numbers increase, the representatives and districts will be increased. The matter, therefore, must be left subject to the regulation of the State legislature, or the general government. Suppose the State legislature, the circumstance will be the same. It is truly said, that our representatives are but a part of the Union, and that they may be subject to the control of the rest; but our representatives make a ninth part of the whole, and if any authority is vested in Congress it must be in our favor. But to the subject: in Connect cut they do not choose by numbers, but by corporations. Hartford, one of their largest towns, sends no more delegates than one of their smallest corporations, each town sending two, except latterly,

> when a town was divided. The same rule is about to be adopted in Rhode Island. The inequality of such representation, where every corporation would have an equal right to send an equal number of representatives, was apparent. In the southern States, the inequality is greater. By the Constitution of South Carolina, the city of Charleston has a right to send thirty representatives to the General Assembly, the whole number of which amounts to two hundred. The back parts of Carolina have increased greatly since the adoption of their Constitution, and have frequently attempted an alteration of this unequal mode of representation; but the members from Charleston, having the balance so much in their favor, will not consent to an alteration; and we see that the delegates from Carolina in Congress have always been chosen from the delegates of that city. The representatives, therefore, from that State, will not be chosen by the people, but will be the representatives of a faction of that State. If the general government cannot control in this case, how are the people secure?[31]

---

[31] 3 FARRAND'S RECORDS at 267 (Rufus King in the Massachusetts Convention).

At the Virginia ratifying convention, Madison described the situation in South Carolina:

> With respect to the other point, it was thought that the regulation of time, place, and manner of electing the representatives, should be uniform throughout the continent. Some states might regulate the elections on the principles of equality, and others might regulate them otherwise. This diversity would be obviously unjust. Elections are regulated now unequally in some states, particularly South Carolina, with respect to Charleston, which is represented by 30 members. — Should the people of any state, by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the general government. It was found impossible to fix the time, place, and manner, of the election of representatives in the constitution. It was found necessary to leave the regulation of these, in the first place, to the state governments, as being best acquainted with the situation of the people, subject to the controul of the general government, in order to enable it to produce uniformity, and prevent its own dissolution. And considering the state governments and general government as distinct bodies, acting in different and independent capacities for the people, it was thought the particular regulations should be

> submitted to the former, and the general regulations to the latter. Were they exclusively under the controul of the state governments, the general government might easily be dissolved. But if they be regulated properly by the state legislatures, the congressional controul will very probably never be exercised. The power appears to me satisfactory, and as unlikely to be abused as any part of the constitution.[32]

Interestingly, the participants in the ratification debates were quick to condemn the flaws in other states' redistricting processes, while failing to acknowledge their own. Nonetheless, the debates, both in the Constitutional Convention and in the state ratifying conventions, make clear that the Founders were well aware of the issue of political gerrymanders. Even so, the state ratifying conventions did not propose that the Constitution include judicial oversight.

III. The Early Republic to 1842

A. Early State Approaches to Gerrymandering

1. Gerrymandering in the States

The growth of representative government and population invariably led to frequent adjustments of county boundaries and creation of new counties, a practice that was frequently abused during the colonial era for the purpose of securing political advantage.[33] The practice of political

---

[32] *Id.* at 311 (James Madison at the Virginia Convention).

[33] GRIFFITH at 24-25.

gerrymandering and the attempts to restrain it were common, well understood, and frequently practiced in numerous states before 1812.[34]

In 1789, early allegations of gerrymandered Congressional districts appeared in New York newspapers after the state was divided into districts. The New York Legislature, controlled by the Federalists, added several towns from the Second District of Westchester (a Federalist district) to the Third District of Dutchess (an Anti-Federalist district), converting Dutchess to a Federalist district.[35] Further, the statute originally creating the districts was later amended to allow each district to elect its representative from the state at large, suggesting that the Federalists sought a particular result from future elections.[36]

In Virginia, Thomas Jefferson recorded that some counties with disparities in populations of up to seventeen times those of other counties elected the same number of Representatives and that 19,000 men living east of the mountains elected half of the Senators and almost half of the Delegates.[37]

In 1780 in South Carolina, three southern districts with a population of fewer than 29,000 elected twenty Senators and seventy Assembly members, while other parts with a population of over

---

[34] *Id.* at 61.

[35] *Id.* at 42-43.

[36] *Id.*

[37] *Baker*, 369 U.S. at 308-09 (*citing* THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (Peden ed. 1955).

111,000 only elected seventeen Senators and fifty-four Assemblymen.[38]

In 1792, when Congressional districts were being established in Virginia, fears of continued gerrymandering led George Mason to proclaim that the districts should not be created with a view towards serving any particular party.[39]

The most famous gerrymander is undoubtedly that of the reconfiguring of the Essex County Senatorial district of Massachusetts in 1812, from which the term gerrymander arose. William Safire described how the term came to be:

> The term is derived from the name of Governor Gerry, of Massachusetts, who in 1811 signed a bill readjusting the representative districts so as to favor the Democrats and weaken the Federalists, although the last named party polled nearly two-thirds of the votes cast. A fancied resemblance of a map of the districts thus treated led Stuart, the painter to add a few lines with his pencil, and say to Mr. Russell, editor of the Boston Centinel, "That will do for a salamander." Russell glanced at it: 'Salamander! Said he, "Call it a Gerrymander."[40]

---

[38] *Id.* (*citing* CARPENTER at 139-40).

[39] GRIFFITH at 46.

[40] WILLIAM SAFIRE, SAFIRE'S POLITICAL DICTIONARY 289 (Oxford University Press 2008).

From 1812 through 1840, the gerrymander would continue to replicate itself in Massachusetts and elsewhere. In Massachusetts, there were gerrymanders of the commonwealth's state Senate or Congressional districts in 1814, 1816, 1820, 1822, 1824, 1932, and 1842. In New Hampshire, gerrymanders of the state Senate and Congressional districts took place in 1816 and 1824. Gerrymanders also occurred in 1816 and 1832 in Maryland; in Connecticut in 1835; and in Pennsylvania' legislative districts in 1836.[41]

2. States that Took Steps to Avoid Gerrymandering

Gerrymandering was so prevalent in the early Republic that attempts to legislate against it date back to at least 1790, in Pennsylvania. While drafting Pennsylvania's second Constitution, the Legislature divided the commonwealth into Senatorial districts. Where multiple counties formed a district, Pennsylvania's Constitution imposed requirements that the counties be adjoining and that counties and cities could not be divided between districts. These provisions would later be attributed to the attempt to prevent gerrymandering.[42]

Following Pennsylvania's lead, Tennessee in 1796 and Kentucky in 1799 adopted similar clauses in their Constitutions aimed at prohibiting or limiting gerrymandering.[43] Likewise, the 1819

---

41 GRIFFITH at 88-97, 99-102, 104-08; 111-12; and 114-15.

42 *Id.* at 44-45.

43 *Id.* at 45.

Alabama Constitution contained provisions tending to restrict the possibilities of gerrymandering.[44]

Early Nineteenth Century demands from the interior for more equal representation became more insistent. This period in our nation's history was replete with fierce sectarian and party strife regarding the geographic allocation of representation,[45] producing a variety of apportionment methods to address the growing population.[46] For example, the apportionment disparity in Virginia became a major factor in precipitating the call of a constitutional convention to address the issue in 1829;[47] however, in no case did the state remedy involve proportional representation.

B. Later Effects of State Gerrymandering

The importance and effect of gerrymandering at this stage in our nation's history were amplified, by the fact that state Legislatures could control their representatives to both branches of Congress. Since Senators were elected by state Legislatures, gerrymandering of state legislative districts could determine which faction picked the state's Senators, and the gerrymandering of United States House districts could yield the state Legislature control of that branch of Congress.

---

[44] *Id. at* 95.

[45] *Id.* (*citing* CARPENTER at 130-37; ROBERT LUCE, LEGISLATIVE PRINCIPLES: THE HISTORY AND THEORY OF LAWMAKING 364-65 (Houghton Mifflin Company 1930); GRIFFITH at 116-17).

[46] *Id.* at 310.

[47] *Id.* at 310 (*citing* GRIFFITH at 102-04).

"'By 1840, the gerrymander was a recognized force in party politics and was generally attempted in all legislation enacted for the formation of election districts. It was generally conceded that each party would attempt to gain power which was not proportionate to its numerical strength.'"[48] In 1842, Congress imposed districting ending the long-standing practice of electing United States Representatives via general ticket.[49] By that time, the two-party system had developed into "large-scale electoral machines focused on wining mass-based elections and capturing control of the national government."[50]

Legendary gerrymanders of Congressional districts occurred in Ohio beginning in the 1840's. Ohio followed the traditional policy of redistricting once every ten years, following the census until 1842, when the Democratic controlled Legislature apportioned Ohio's Congressional districts in a manner that the Whigs considered grossly unfair and partisan.[51] Subsequently, the Whigs regained control of the Legislature (despite running under a Democratic gerrymander) and remapped the state in 1844-1845. This was the first time a Legislature

---

[48] *Vieth*, 541 U.S. at 274-75 (*quoting* GRIFFITH at 123).

[49] ERIK J. ENGSTROM, PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY 43 (The University of Michigan Press 2013).

[50] *Id.*

[51] Jenni Salmon, *Ohio's 1842 Election: Absqatulators vs. Gerrymanderers*, Ohio Memory (Sep. 6, 2013), http://www.ohiohistoryhost.org/ohiomemory/archives/133.

exercised the implied power to redistrict a state mid-decade.[52]

Partisan gerrymandering had become a thoroughly ingrained aspect of our national two-party system; however, no egregious redistricting was the subject of action by Congress until Reconstruction.[53]

IV. Congressional and State Reapportionment 1842-1962

A. Congressional Oversight of Gerrymandering

Until Congress imposed Congressional districts in 1842, the manner in which states chose their Representatives was not uniform.[54] Thereafter, in the Nineteenth and Twentieth Centuries, Congress used its authority under Article I, § 4, to restrain gerrymandering of Congressional districts through a series of Apportionment Acts, culminating in the Reapportionment and Census Act of 1929.[55] Through the Apportionment Acts, Congress exercised its power in attempts to restrain gerrymandering by requiring district contiguity and compactness, and single-member districts. The Acts also required that each district contain as equal a number of persons as practicable. Even so, whatever the controlling Apportionment Act at the time,

---

[52] *Id.*

[53] Gabriel J. Chin, *Justifying A Revised Voting Rights Act: The Guarantee Clause and the Problem of Minority Rule*, 94 B.U. L. Rev. 1551, 1565 (2014).

[54] *Colegrove v. Green*, 328 U.S. 549, 555 (1946).

[55] *Vieth*, 541 U.S. at 276.

disparities in population of districts continued to prevail.[56]

The requirements of single-member districts[57] and districts "composed of contiguous territory"[58] were first imposed in the Apportionment Act of 1842. With that statute, the gerrymandering practice of switching between at-large and districted Congressional elections for political advantage by opportunistic majorities in state Legislatures was effectively stopped.[59] All Apportionment Acts passed after 1842, until 1872, reiterated the single-member and contiguity requirements.[60]

The Apportionment Act of 1872 added the requirement that the population of each district have, "as nearly as practicable," an equal number of inhabitants.[61] Finally, a compactness requirement for Congressional districts was adopted in the Apportionment Act of 1901.[62] The contiguity, compactness, and equality of population requirements were reiterated in each Apportionment Act from 1842 through the Apportionment Act of 1911. After 1911, they were intentionally

---

[56] *Colegrove*, 328 U.S. at 555.

[57] *Vieth*, 541 U.S. at 276.

[58] *Id.* (*citing* GRIFFITH at 12 (noting that the law was "an attempt to forbid the practice of the gerrymander")).

[59] James A. Gardner, Foreword: *Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 Rutgers L. J. 881, 913 (2006).

[60] The contiguity and equality of population requirements were repeated in the Apportionment Acts of 1862, 1872, 1882, 1892, and 1901.

[61] *Vieth*, 541 U.S. at 276.

[62] *Id.*

discontinued.[63] Only the single-member districts requirement remains today.[64]

None of the Apportionment Acts adopted proportional representation.

B. Legislation in the States

From 1846 to 1889, the New Jersey Legislature passed no less than eighteen (18) acts and supplemental acts regulating elections.[65] In 1871, the Legislature introduced a new system for constructing Assembly districts, "plainly for the furtherance of political purposes,"[66] leading to arbitrary, grotesquely shaped districts where qualified voters of one political party were amassed to secure their advantage against those of the other party.[67]

From 1879 to 1886, the Ohio Legislatures redistricted the states' Congressional districts four times achieving a partisan advantage in the House and Senate delegations.[68]

---

[63] *Wood v. Broom*, 287 U.S. 1, 7 (1932). ("It was manifestly the intention of the Congress not to re-enact the provision as to compactness, contiguity, and equality in population with respect to the districts to be created pursuant to the reapportionment under the Act of 1929.").

[64] *Vieth*, 541 U.S. at 276.

[65] *State ex rel. Morris v. Wrightson*, 56 N.J.L. 126, 186-87; 204-06 (1893).

[66] *Id.* at 204.

[67] *Id.*

[68] PETER H. ARGERSINGER, REPRESENTATION AND INEQUALITY IN LATE NINETEENTH-CENTURY AMERICA: THE POLITICS OF REAPPORTIONMENT (Cambridge University Press 2012).

In 1882, South Carolina adopted a Congressional redistricting plan described as "one of the most complete gerrymanders ever drawn by a legislative body.[69] While the backdrop of this gerrymander was the aftermath of Reconstruction, it is a prime example of the practice that would one day be called "packing." Democrats, in an attempt to dilute the power of the black, Republican majority in the state, drafted what has been termed the "boa constrictor" district, running from Columbia nearly to Savannah, splitting six counties, and at one point extending into the Atlantic Ocean to exclude Democrats from the district.[70]

In 1891, the Commission (including the lame duck Commissioners) of Murray County, Minnesota redrew the county's district map after the 1890 election, but before the newly elected Commissioners could take office. At the time of the election, each newly elected Commissioner lived within his respective district.[71] The effect of the redrawn map was that the Commissioners-Elect no longer resided in the districts in which they had run.[72] After the redistricting, the Commission met and determined the Commissioners-Elect were no longer qualified to take the offices they had won, and appointed the lame-duck Commissioners to succeed themselves.[73]

---

[69] Laughlin McDonald, Symposium: *Election Law: The Looming 2010 Census: A Proposed Judicially Manageable Standard and Other Reform Options for Partisan Gerrymandering*, 46 Harv. J. on Legis. 243, 246 (2009).

[70] *Id.*

[71] *Id.*

[72] *State ex rel. Norwood v. Holden*, 47 N.W. 971, 972 (1891).

[73] *Id.* at 315.

C. Later Congressional Action

The Reapportionment and Census Act of 1929 was a combination census and reapportionment statute establishing a permanent method for apportioning a constant 435 seats in the House of Representatives. In 1932, this Court, in *Wood v. Broom* held that the provisions of each Apportionment Act affected only the apportionment for which they were written, thereby eliminating the size and population requirements of previous Apportionment Acts, which were last required in the Apportionment Act of 1911.[74] The Reapportionment act of 1929 eliminated any mention of districts, allowing the political parties in control of state Legislatures to draw districts of various sizes or to abandon districts altogether.[75]

In 1941, Congress passed the last Apportionment Act. The statute did nothing further to address political gerrymanders. In the years that followed, courts began wading into the "political thicket" of political gerrymander cases.[76] Congress's decision not to regulate further in this area may well be based on judicial decisions to apply the Equal

---

[74] *Broom*, 287 U.S. at 8 (1932).

[75] Reapportionment Act of 1929, 2 U.S.C. § 2(a) (1929).

[76] *See Baker*, 369 U.S. at 270. (Frankfurter J. dissenting) (stating that Baker "is the latest in the series of cases in which the Equal Protection and Due Process Clauses of the Fourteenth Amendment have been invoked in federal courts as restrictions upon the power of the States to allocate electoral weight among the voting populations of their various geographical subdivisions.")

Protection and Due Process Clauses in their anti-gerrymandering attempts.[77]

Even before *Baker v. Carr*, decided in 1962, federal courts had considered political gerrymandering cases;[78] however, in cases raising issues regarding redistricting of state political subdivisions, courts consistently refused to exercise their powers to fashion equitable remedies.[79]

In 1916, in *Ohio ex rel. Davis v. Hildebrant*, this Court affirmed the lower court's refusal to dismiss a case for lack of subject-matter jurisdiction.[80] Ohio citizens had held a referendum in which they rejected the Legislature's then Congressional redistricting plan. The lower court dismissed the suit, which sought a writ of mandamus to order state election officials to ignore the referendum vote. The lower court denied the writ, holding that the referendum disapproving the law was part of the state's "legislative power" and that the disapproved law was not entitled to be enforced by mandamus.[81] In reviewing the case, this Court concluded that it could either dismiss the case for want of federal question subject-matter jurisdiction, or affirm the lower court on the merits of the case.[82] The Court determined that the controversy contained sufficient federal characteristics to reject dismissal for want of

---

77 *Baker*, 369 U.S. at 270.

78 *Id.* at 201.

79 *Id.* at 279.

80 *Id.*; *see also Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916).

81 *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 567 (1916).

82 *Id.* at 570.

jurisdiction and instead addressed the merits, affirming the lower court.[83]

In the 1916 case of *Smiley v. Holm*,[84] this Court reversed the Minnesota Supreme Court's dismissal of a suit seeking to enjoin the Secretary of State from implementing Minnesota Congressional redistricting legislation.[85] The state had been required to reapportion because of a decrease in population. The Legislature had passed reapportionment legislation which the Governor vetoed; however, pursuant to legislative resolution the bill was nevertheless sent to the Secretary of State. A citizen sued, seeking a declaratory judgment that the reapportionment legislation was unconstitutional because the Governor had vetoed it. The trial court dismissed the case, concluding that the drawing of Congressional districts was a discharge of a duty and did not amount to a law-making function. The Minnesota Supreme Court affirmed the dismissal.[86] This Court reviewed the constitutionality of the legislation and reversed the Minnesota Supreme Court.[87] It held that pursuant to Article I, § 4 of the United States Constitution, Congressional district legislation is a law-making function and that a Legislature did not have authority to pass laws beyond what it was allowed under its Constitution.[88]

---

[83] *Id.*

[84] 285 U.S. 355, (1932).

[85] *Baker*, 369 U.S. at 277-78; *see also Holm*, 285 U.S. 355 (1932).

[86] *Holm*, 285 U.S. at 361-62.

[87] *Id.* at 373.

[88] *Id.*

In 1932, in *Wood v. Broom*, this Court reversed a Mississippi District Court which had permanently enjoined state officials from proceeding with a Congressional election under the state's redistricting act.[89] The District Court determined that the districts were not composed of compact and contiguous territory having, as nearly as practicable, the same number of inhabitants, thus, violating the Apportionment Act of 1911. This Court reviewed the Apportionment Acts of 1911 and 1929 and held that the districting requirements contained in previous Apportionment Acts were intentionally excluded from the 1929 Act and therefore no longer in force and not applicable.[90] In *Mahan v. Hume*,[91] in a *per curiam* decision, this Court also reversed a similar ruling by a Kentucky District Court concerning a Kentucky redistricting act.

In *Colegrove v. Green*, decided in 1946, this Court reviewed the dismissal of the case by the District Court for the Northern District of Illinois. The District Court, pursuant to *Wood v. Broom,* had dismissed the complaint against state officials seeking to restrain them from holding the November 1946 election under the existing Illinois Congressional districting legislation.[92] Illinois had not passed a Congressional redistricting statute since 1901. Appellants argued that the statute was unconstitutional for violating the compactness and

---

89 *Baker*, 369 U.S. at 201.
90 *Broom*, 287 U.S. at 12.
91 287 U.S. 575 (1932).
92 *Colegrove*, 328 U.S. at 550-51.

equal population requirements of the Apportionment Act of 1911.[93]

This Court agreed that the case was properly dismissed pursuant to *Wood v. Broom*'s reasoning that such matters should be dismissed for "want of equity."[94] The Court concluded the Appellants were simply asking the Court to go beyond what it was competent to grant.[95] The Court stated, "the remedy for unfairness in [Congressional] districting is to secure State Legislatures that will apportion properly, or invoke the ample powers of Congress."[96]

In addition, the Court held that dismissal was appropriate for lack of a sufficient federal question in cases dealing with apportionment of districts of smaller subdivisions of states.[97] The Court determined that it lacked the power to fashion equitable remedies to address political gerrymandering of Congressional districts; however, it did not address whether partisan gerrymanders were *ever* justiciable, even though that was implied by the ruling.

V. The Modern Era

The tradition of dismissing political gerrymandering cases for lack of a substantial

---

93 *Id.*

94 *Id.* at 551-52.

95 *Id.* at 552.

96 *Id.* at 556.

97 *See e.g. Tedesco v. Orleans Par. Bd. of Supervisors*, 339 U.S. 940 (1950) (affirming lower court's dismissal for lack of substantial federal question on the claim that of the division of a municipality into voting districts of unequal population was unconstitutional).

federal question changed with this Court's landmark decision in *Baker v. Carr*.[98] In Tennessee, the state Constitution required the General Assembly to reapportion following each decennial census.[99] However, the General Assembly failed to follow the dictates of its own Constitution. In 1901, the General Assembly passed an Apportionment Act, and for the next sixty (60) years, it failed to pass any reapportionment legislation.

> Between 1901 and 1960, Tennessee experienced substantial growth and redistribution of her population. For example, in 1900, the First Senatorial district in upper east Tennessee had a population of 86,328. The 18th Senatorial district in rural Middle Tennessee had a population of 45,125. By 1950, the 1st District had grown to 171,615, while the 18th District was only 50,624.[100]

The urban districts were severely overpopulated and the rural districts significantly underpopulated. Moore County, home to the Jack Daniels Distillery, had in 1960 a population of 2,340 and was entitled to one representative. Rutherford County, suburban Nashville, had a population of 25,316, and was also only entitled to one representative.[101] By simple (but

---

98 389 U.S. 186 (1962).

99 TENN. CONST. art. II, § 4.

100 Michael W. Catalano, *Kidd v McCanless: The Genesis of Reapportionment Litigation In Tennessee*, 44 Tennessee Historical Quarterly No.1, 72, 74 (Spring 1985) (hereinafter "Catalano").

101 *Baker*, 382 U.S. at 255 (Clark, J. concurring).

intentional) inaction, the Tennessee General Assembly was able to preserve rural domination of the state House and Senate.

In 1955, Representative Maclin Davis of Nashville introduced House Bill 136 of the 84th General Assembly, to reapportion the state.[102] His bill was soundly rejected by the rural dominated Legislature. Davis filed suit in state court, arguing that the state Constitution required the Legislature to reapportion the state. While the trial court ruled in favor of the Plaintiff, the suit was ultimately rejected by the Tennessee Supreme Court under the "political question" doctrine.[103] This Court granted certiorari but subsequently dismissed the petition,[104] citing *Colegrove v. Green*[105] and *Anderson v. Jordan*.[106]

The cause was then taken up by Shelby County, Tennessee, the state's most populous county, and the one most aggrieved by the malapportionment. Charles Baker, the Chairman of the county legislative body, initiated suit in the United States District Court for the Middle District of Tennessee. That court rejected his challenge as non-justiciable, leading to an appeal to this Court. This Court held the issues to be justiciable and remanded to the District Court.[107]

---

[102] Catalano at 76.
[103] *Kidd v McCandless*. 292 S.W. 2d 40 (Tenn. 1956).
[104] 352 U.S. 920 (1956).
[105] 328 U.S. 549 (1946).
[106] 343 U.S. 912 (1952).
[107] *Baker*, 369 U.S. at 237.

Decades of litigation from almost every state followed the *Baker* decision. A Lexis-Nexis search for political gerrymander cases nationally at all levels reveals that from 1859 through 1962 (104 years), there are as many as 54 gerrymander cases. From *Baker* in 1962 to *Bandemer* in 1986 (24 years), there are as many as 137 cases. From *Bandemer* in 1986 through *Vieth* in 2004 (18 years), there are as many as 95 cases; and from *Vieth* in 2004 through today (13 years), there are as many as 104 cases.

VI. Fruitless search for manageable standards

By establishing in *Baker* that redistricting and reapportionment cases based on violations of the traditional standards *may* be justiciable, the Court invited a logical next step—cases asking whether partisan gerrymandering is justiciable. In 1986, this Court considered partisan gerrymandering in *Bandemer v. Davis*.[108] After the Republican-controlled Indiana Legislature reapportioned districts following the 1980 Census, Indiana Democrats sued arguing that the new map was a political gerrymander which disadvantaged Democrats and thus violated the Equal Protection Clause of the Fourteenth Amendment. While the majority held political gerrymandering claims were justiciable, the Court rejected the District Court's standard for determining an equal protection violation.

Justice White, writing for the plurality said: "[W]e are not persuaded that there are no judicially discernable and manageable standards" in partisan

---

[108] 478 U.S. 109 (1986).

gerrymandering cases.[109] Justice White proposed no discernable standard, but only posited that unconstitutional discrimination occurs when there is "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group."[110] These claims were justiciable, he said, but there was no standard to determine how much partisan gerrymandering is unconstitutional.

Bandemer, in the words of Justice Scalia, sent the lower courts "wandering in the wilderness" for nearly two decades.[111] Without a consensus in this Court on a manageable standard, the lower courts faced partisan gerrymandering cases on an *ad hoc* basis with little direction. Any fears that *Bandemer* would open the floodgates to litigation were unfounded, because the courts refused to address the issue in the absence of real guidance.[112]

This Court avoided the partisan gerrymandering issue during the 1990 redistricting cycle, and between *Bandemer* and *Vieth*, only one case of political gerrymandering arose in which a court granted relief: *Republican Party of North Carolina v. Hunt*.[113] *Hunt* addressed North Carolina's method of electing its Superior Court Judges. The Fourth Circuit concluded that Republican Superior Court judicial candidates—of

---

109 *Id.* at 123.
110 *Id.* at 127.
111 *Vieth*, 541 U.S. at 303.
112 *Id.* at 279.
113 *Republican Party of N.C. v. Hunt*, 1996 U.S. App. LEXIS 2029 (4th Cir. 1996).

which only one had been elected since 1900—experienced a "pervasive lack of success and exclusion from the electoral process as a whole."[114] Ironically, less than a week after the decision, all Republican Superior Court judicial candidates won their respective races under the very map that the Court had declared an unconstitutional partisan gerrymander.[115]

The 2000 redistricting cycle provided the Court's next opportunity to weigh in on political gerrymandering and the search for a manageable standard. The redistricting of Pennsylvania's Congressional districts by the Republican-controlled Legislature resulted in a challenge by Democrats. The District Court held that the redrawn districts were not an unconstitutional partisan gerrymander, and the Democrats appealed. In *Vieth v Jubilirer*, a plurality of this Court upheld the District Court's ruling.[116]

Three different standards were proposed in *Vieth*, all of which the plurality rejected for one reason or another:

Justice Stevens proposed using the racial gerrymandering standard from the *Shaw* line of cases, translating to the standard for unconstitutionality being that the only possible explanation for the district's shape was to advantage one party over another.[117] The plurality rejected this theory, noting that, while race receives strict

---

[114] *Vieth*, 541 U.S. at 287.
[115] *Id.* at 287, n.8.
[116] *Id.* at 306.
[117] *Id.* at 323.

scrutiny under the Equal Protection Clause, partisan affiliation does not require a heightened level of scrutiny.[118]

Justices Souter and Ginsburg proposed a five part test that would have shifted the burden to the state to justify the drawing of its districts.[119] The plurality found that test inadequate because it did nothing to help courts address *how much* partisan gerrymandering constitutes unconstitutional partisan gerrymandering.[120]

Justice Breyer proposed a "spectrum of indicia of abuse" standard, laying out examples of "indicia of abuse."[121] The plurality dismissed this proposal predicting, that the standard would produce future litigation without any discernable, applicable standard.[122]

In *LULAC v. Perry*,[123] Texas Democrats challenged a Republican-drawn, mid-decade redistricting map as unconstitutional partisan gerrymandering. The District Court rejected Plaintiff's claims. While the case was on appeal to this Court, the *Vieth* decision was issued. This Court vacated the District Court's order and remanded for consideration in light of *Vieth*.[124] On remand, the District Court again rejected Plaintiff's claims and Plaintiff again appealed to this Court.

---

118 *Id.* at 339.
119 *Id.* at 351-52.
120 *Id.* at 297.
121 *Id.* at 365.
122 *Id.* at 300-01.
123 548 U.S. 399 (2006).
124 *Id.* at 408.

The Court reviewed the District Court's second opinion to consider whether the proposed standard was a manageable standard for evaluating partisan gerrymandering,[125] and found the proposed standard lacking.

Building consensus around a standard with which to judge the constitutionality of partisan gerrymandering requires answering the question—how much partisan gerrymandering is too much—a daunting proposition no mathematical formula can address. Mathematical formulas and social science theories cannot determine what amount of partisan gerrymandering is unconstitutional because, as the Court has long recognized, some partisan motivations behind drawing districts are unavoidable and also constitutional.[126] After all, "statistical models are not a substitute for thinking."[127] It is an inherently qualitative question. It is an exercise in futility to attempt to gauge an American political climate which is ever-changing and anything but static.

None of the proposed standards in *Bandemer, Vieth* or *LULAC* mustered a majority opinion. The courts have wandered through the "political thicket" in search of an elusive manageable standard for 55 years since *Baker*, 31 years since *Bandemer*, 13 years since *Vieth*, and 11 years since *LULAC* —it has yet to emerge. No standard *can*, in fact, emerge,

---

[125] *Id.* at 399.

[126] *Vieth*, 541 U.S. at 281-83; 299.

[127] Bill Henderson, *Innovation in Organizations, Part II* (Jul. 23, 2017), *available at* http://www.legalevolution.org/2017/07/innovation-in-organizations-part-ii-016/.

because, ultimately, the search for a standard is the search for a quantitative answer to a qualitative question.

The Court recognized this, at least tacitly, in *Evenwel v. Abbott*,[128] which dealt with reapportionment in a somewhat different context: Whether the population of a district should be measured by all inhabitants, or those eligible to vote, so that the votes of persons in Texas Senate Districts would have approximately the same weight. In her opinion, Justice Ginsberg noted: "What constitutional history and our prior decisions strongly suggest, settled practice confirms. Adopting voter-eligible apportionment as constitutional command would upset a well-functioning approach to districting that all 50 States and countless local jurisdictions have followed for decades, even centuries."[129]

Justice Thomas elaborated in his concurrence:

> *The Constitution does not prescribe any one basis for apportionment within States. It instead leaves States significant leeway in apportioning their own districts to equalize total population, to equalize eligible voters, or to promote any other principle consistent with a republican form of government. The majority should recognize the futility of choosing only one of these options. The Constitution*

---

[128] ___ U.S. ___, 136 S. Ct. 1120 (2016).

[129] *Id.* at 1132.

> *leaves the choice to the people alone -- not to this Court.*[130]

A fortiori, the United States Constitution does not entitle any voter to be assigned to a legislative district that consists of some made up ideal number of like-minded voters, whether Democrat, Republican, Libertarian, Green, or any other party or interest group.

VII. Proportionality

Any standard other than the traditional and long-articulated standards of compactness, contiguity, equality of population, and communities of interest, engages the courts in making political determinations of the proper proportion of partisans in the legislative branch. As Justice O'Conner said in *Bandemer*: "It is predictable that the courts [would] respond by moving away from the nebulous standard a plurality of the Court fashions today and toward some form of rough proportional representation for all political groups."[131]

Any such standard fundamentally changes the nature of representation from a district-based system of representation, to an ideological- and partisan-based system. Rather than single-member districts represented by members accountable to voters therein, representation would be based on arbitrary assignment to a partisan or ideological numerator and a statewide denominator, with the elected officials receptive *only* to that interest group.

---

[130] *Id.* at 1133 (emphasis added).

[131] *Bandemer*, 478 U.S. at 145.

Furthermore, such an approach is precluded by this Court's prior rulings. As Justice White said in the plurality opinion in *Bandemer*: "Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be."[132] As noted by Justice Kennedy in *Vieth*: "There is no authority for this precept."[133]

The standard advanced by the law professors in the court below simply ignores reality. It requires a judge to assign individuals to legislative districts based on the judge's calculation of the number of like-minded voters in a geographic area, so that none of their votes are "wasted." It is naïve to assume that people's reasons for voting for a given candidate are all the same, and never vary from election to election. It ignores the fact that many voters split their tickets. It fails to take into account independent voters, voters loyal to smaller parties (such as the Libertarian Party or the Green Party), or voters who do not vote in every election, or in every race on a given ballot. It gives no consideration to intangible qualities possessed by candidates, or major issues and events that may sweep in and cause voters to vote against their custom. It simply fails to consider that political

---

[132] *Id.* at 130.

[133] *Vieth*, 541 U.S. at 308. (Kennedy, J. concurring).

winds shift and the pendulum swings back and forth.[134]

In short, the methodology advocated in the court below is unworkable in the real world, for either legislators or the courts. The best standards of constitutionality are the traditional, common standards, e.g., compactness, contiguity, preserving natural and local government boundaries, and equality of population. These already provide Legislatures and courts more than enough factors to balance, without additional nebulous and artificial hair-splitting.[135]

CONCLUSION

Gerrymandering has been with us from the founding of the Republic. For over two centuries, there have been complaints made and solutions proposed and tried, yet the creature remains with us. Some gerrymanders have worked, and others have failed. Some solutions have worked, some have failed. The challengers in this case are only disgruntled because they are not the ones holding the power of the majority at the moment.

In the 55 years since *Baker* and the 32 years since *Bandemer*, the courts have struggled to find a manageable standard and have failed to do so, because no standard exists. The so-called efficiency gap is only the latest mathematical fad championed in the cause of curing gerrymanders. It suffers from

---

[134] SEAN TRENDE, THE LOST MAJORITY (Palgrave McMillen 2012).

[135] *See, State ex rel. Lockert v. Crowell*, 631 S.W.2d 702 (Tenn. 1982).

the same fundamental defect as all others: It is an arithmetic fig leaf for proportional representation. This Court has noted that "representatives don't represent trees or cows, but people."[136] A proportionality approach relegates representation to an ideological construct, rather than the representation of actual people.

The Court should hold that the traditional standards, reflected in the Apportionment Acts, are a sufficient curb to gerrymandering, reverse the decision of the court below, and uphold Wisconsin's redistricting plan.

Respectfully Submitted,

John L. Ryder
Counsel of Record
Pablo Adrian Varela
Harris Shelton Hanover
Walsh, PLLC
40 South Main Street,
Suite 2700
Memphis, Tennessee 38103
901.545.1455
jryder@harrisshelton.com

Linda Carver Whitlow Knight
Gullett Sanford Robinson
& Martin, PLLC
150 Third Avenue South,
Suite 1700
Nashville, TN 37201
615.244.4994

---

[136] *Reynolds*, 377 U.S. at 562.

lknight@gsrm.com

Counsel for Amici Curiae

August 3, 2017