No. 16-1161

In The Supreme Court of the United States

BEVERLY R. GILL, ET AL., APPELLANTS,

v.

WILLIAM WHITFORD, ET AL., APPELLEES

APPLICATION FOR STAY PENDING RESOLUTION OF DIRECT APPEAL

To the Honorable Elena Kagan
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Seventh Circuit

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TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT:

A divided three-judge district court invalidated Wisconsin's redistricting plan, Act 43, as a partisan gerrymander. The court also ordered Defendants[1] to submit a new redistricting plan that had been passed by the Wisconsin Legislature and signed by the Governor by November 1, 2017. The district court is the first court in decades to find an unlawful partisan gerrymander; indeed, the last court to condemn a redistricting plan on that basis was promptly reversed by this Court in *Davis v. Bandemer*, 478 U.S. 109 (1986). As detailed in the Jurisdictional Statement, the district court's decision is fundamentally flawed in numerous respects and should be reversed. Indeed, that decision is so inconsistent with this Court's controlling caselaw that this Court may wish to consider the possibility of summary reversal. JS 3–4.[2]

Defendants file this Application in the alternative to their suggestion of summary reversal and respectfully ask this Court to consider this Application contemporaneously with the Jurisdictional Statement. The lion's share of the work necessary to create a new plan, in order to comply with the district court's November 1 deadline, cannot begin until the summer. Accordingly, if this Court were to reverse summarily by the end of this Term, no stay would be needed.

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[1] Defendants are Beverly R. Gill, Julie M. Glancey, Ann S. Jacobs, Steve King, Don Millis, and Mark L. Thomsen, all sued in their official capacities as Wisconsin state officials.

[2] Citations to Defendants' Jurisdictional Statement appear as "JS __." Citations to Plaintiffs' Motion to Affirm appear as "Mot. __."

If, however, this Court does not summarily reverse before the end of this Term, a stay would become necessary to avoid Wisconsin wasting substantial sovereign resources to draw a map that, in all likelihood, will never become law. There is a strong chance that this Court will find that Act 43 is lawful, given the flaws in the district court's opinion and the fact that no other plan has been successfully invalidated on similar grounds by any court. If that likelihood came to pass, the Legislature's efforts to create a new map would have been needless. And even in the unlikely event that this Court decides that Act 43 is illegal (or could be illegal if Plaintiffs[3] make some further showing on a remand), this Court's opinion is likely to provide significant guidance, which would then inform the map redrafting process. Indeed, additional guidance would be nearly inevitable in such circumstances, given that Plaintiffs do not even defend the district court's test. It would be a serious intrusion upon the State of Wisconsin's sovereign resources to force it to redraw a map half-blind, guided only by an indisputably flawed district-court opinion.

OPINIONS BELOW

The opinion and order of the three-judge panel of the United States District Court for the Western District of Wisconsin, entered on November 21, 2016, App. 1–159, and holding Wisconsin's redistricting plan unconstitutional, is not yet reported, but is available at 2016 WL 6837229. The district court's remedial opinion and order

[3] Plaintiffs are William Whitford, Roger Anclam, Emily Bunting, Mary Lynne Donohue, Helen Harris, Wayne Jensen, Wendy Sue Johnson, Janet Mitchell, Allison Seaton, James Seaton, Jerome Wallace, and Donald Winter, all Democratic Wisconsin voters living in various electoral districts.

permanently enjoining the use of Act 43 and requiring Defendants to submit a new redistricting map, entered on January 27, 2017, App. 160–67, is unreported, but is available at 2017 WL 383360. The district court's judgment, entered on January 27, 2017, App. 168, amended judgment, entered on February 22, 2017, App. 169–70, and corrected amended judgment, entered on March 15, 2017, App. 173–74, are unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1253. This Court, or an individual Justice, has the power to stay a lower court's mandate pending resolution of a direct appeal. *See Tennant v. Jefferson Cnty. Comm'n*, 132 S. Ct. 1140 (2012); Sup. Ct. R. 23.1; *see also* 28 U.S.C. § 2101(f).

CONSTITUTIONAL PROVISIONS INVOLVED

This appeal involves the First Amendment and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, reproduced in the Appendix to this application at App. 186–88.

STATEMENT

A. After the 1990 census, a federal district court completed Wisconsin's redistricting process. *Prosser v. Elections Bd.*, 793 F. Supp. 859 (W.D. Wis. 1992) (per curiam). Wisconsin held five elections under this plan and, by the end of the decade, Republicans had achieved significant electoral gains with both a majority and a slight minority of the statewide two-party vote: in 1992, Republicans earned 47.75% of the vote for 47 seats in the Assembly; in 1994, 51.75% for 51 seats; in 1996, 51.25% of the

vote for 52 seats; in 1998, 49.00% of the vote for 55 seats; and in 2000, 50.25% of the vote for 56 seats. Dkt. 125 ¶¶ 233, 247–51.

Following the 2000 census, a federal district court again completed Wisconsin's redistricting plan. *Baumgart v. Wendelberger*, No. 01-C-121, 2002 WL 34127471 (E.D. Wis. May 30, 2002) (per curiam). In the first two elections under this court-drawn plan, Republicans again increased their majority, peaking at 60 of 99 seats, while winning 50% of the vote. Democrats then won a majority of the vote in 2006 and 2008, but a majority of seats only in 2008. The full election results under this plan were as follows: in 2002, Republicans earned 50.50% of the vote for 58 seats; in 2004, 50.00% for 60 seats; in 2006, 45.25% for 52 seats; in 2008, 46.00% for 46 seats; and in 2010, 53.50% for 60 seats. Dkt. 125 ¶¶ 233, 252–56.

B. In 2010, Republicans swept both houses of the Legislature and the Governor's office. Dkt. 125 ¶ 283–84; Tr. Ex. 538. The Legislature drew Wisconsin's map after the 2010 census.

The Legislature entrusted Adam Foltz and Tad Ottman, aides to two members of the legislative leadership, with the primary drafting responsibility, along with Joe Handrick, a former legislator, providing additional support. Dkt. 125 ¶¶ 17–19; Dkt. 147:46; Dkt. 119-8. They drafted proposed maps with the following criteria in mind: (1) traditional redistricting principles, like compactness, contiguity, and maintenance of communities of interest, App. 10, 29; (2) federal requirements, such as the Constitution's one person, one vote rule and the Voting Rights Act, *see* App. 10; and (3) political considerations, such as the requests of incumbents for their districts,

incumbents' desire not to be in districts where other incumbents already resided, and partisan scores based upon past election results, Dkt. 148:80–81, 85–88. After presenting portions of their draft maps to Republican legislative leadership and receiving leadership's requests, Dkt. 147:162–65; 148:94–98, the drafters created a single map, Act 43, Dkt. 148:101–02, 110–16. The Legislature then enacted it. Dkt. 148:101–02, 110–16.

Act 43 compares favorably to Wisconsin's prior court-drawn redistricting plans in terms of compliance with traditional redistricting principles. Act 43's compactness scores were consistent with the 2002 court-drawn plan.[4] Act 43 split 62 municipalities; in-between the 50 splits for the 2002 plan and the 72 splits for the 1992 plan. Dkt. 125 ¶ 221. Further, Act 43 has a population deviation of 0.76%, comparable to deviations found in court-drawn plans (0.91% in 1992 and 1.59% in 2002). Dkt. 125 ¶¶ 200–02.

In the 2012 elections, Republicans won 60 out of 99 seats in the State Assembly with, according to Plaintiffs' estimate, 48.6% of the statewide two-party vote. Dkt. 125 ¶¶ 233, 257. In the 2014 elections, the Republicans won 63 of 99 seats with, again according to Plaintiffs' estimate, 52% of the statewide vote. Dkt. 125 ¶¶ 233, 258.

C. In July 2015, Plaintiffs, 12 individual voters from 11 (out of Wisconsin's 99) legislative districts, Dkt. 125 ¶¶ 3–13, filed a complaint in the Western District of

[4] The 2002 court-drawn plan had a smallest-circle score of 0.41 and a perimeter-to-area score of 0.29, Dkt. 125 ¶¶ 214–21; Act 43 had a smallest-circle score of 0.39 and a perimeter-to-area score of 0.28, Dkt. 125 ¶¶ 214–221.

Wisconsin, claiming that Act 43 was a statewide partisan gerrymander, in violation of the First and Fourteenth Amendments, Dkt. 1. Plaintiffs proposed a novel legal test that reduces the inquiry's most important element—partisan "effect"—to an analysis of "the efficiency gap." Dkt. 1 ¶ 5. This metric compares parties' allegedly "wasted" votes; that is, votes candidates receive that are nonessential to winning an election. App. 81. The comparison ostensibly yields a measure of a party's "efficiency" in translating votes to election victories, as compared to the other party. Plaintiffs proposed that courts declare a map's partisan effect unconstitutional whenever the efficiency gap exceeds 7% in the first election under the plan, Dkt. 149:208–13—a test that one third of all plans would fail, *see* Dkt. 125 ¶¶ 116, 154.

The trial took place in May 2016, focusing largely on Plaintiffs' efficiency-gap theory. Plaintiffs' expert witnesses analyzed the efficiency gap observed in the 2012 election under Act 43 and offered a demonstration plan that would have had a lower efficiency gap in that year. *See* App. 18. Defendants' experts described the problems with using the efficiency-gap metric and the weaknesses in Plaintiffs' demonstration plan. Dkt. 150:48–86, 144–201, 248–52. They also testified about how the Wisconsin electoral geography is trending more Republican over time, due in part to Democratic voters naturally packing themselves in urban areas. Dkt. 150:17–45, 133–35.

D. On November 21, 2016, a divided district court invalidated Act 43. The court majority developed and applied a test that it announced for the first time in this opinion. App. 2–3, 55–56. The district court defined its test as follows: "a redistricting scheme" is an unconstitutional partisan gerrymander if it: (1) "intended

to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation"; (2) "ha[d] that effect"; and (3) "cannot be justified on other, legitimate legislative grounds." App. 56. The court based both the intent and the effects prongs of this test around the concept of "entrenchment"; that is, the notion that "entrenchment of the [map-drawing party is] likely to endure for the entire decennial period." App. 54–55.

The district court defined the first prong, impermissible partisan intent, as the "intent to entrench a political party in power." App. 59. This intent need only be a "motivating factor" in the Legislature's decision to adopt the plan. App. 60 (citations omitted). Given that Act 43 was drawn by a Republican legislature, the majority found this test easily met. App. 63–74.

The majority defined the second (and most critical) prong—partisan effect—as the "burden[ing] [of] the representational rights of Democratic voters . . . by impeding their ability to translate their votes into legislative seats, not simply for one election but throughout the life of Act 43." App. 90. The court found that this element was satisfied based upon entrenchment. By looking at certain social-science testimony and the first two elections under Act 43, the district court found that the Republicans' "legislative power remains secure" "even when [they] are in an electoral minority." App. 78. Notably, although the court invalidated Act 43, its entrenchment methodology was significantly different from what Plaintiffs had urged as the controlling-effects test. The court declined to adopt Plaintiffs' core argument that the efficiency gap should be the determinative measure of partisan effect, treating this

measure instead as merely "corroborative evidence." App. 89. The court agreed with some of Defendants' critiques of the theory, namely, that it is "overly sensitive to small changes in voter preferences" and that "assessing a given plan based on the results of the first observed election under the plan . . . may yield problematic results if that first election happens to be a national wave election." App. 87–88.

The court defined the third prong, "justification," as "whether [a plan's effect] can be explained by the legitimate state prerogatives and neutral factors that are implicated in the districting process." App. 91. If any alternative map could possibly be drawn with comparable compliance with the traditional redistricting principles and less partisan effect, then the plan the legislature adopted would not be justified. *See* App. 91. Applying this formulation of the "justification" prong to Act 43, the court concluded that Defendants could not justify Act 43. App. 111. The court determined instead that, since it is "*possible* to draw a map with much less of a partisan bent than Act 43," the map was unjustified. App. 111 (emphasis added).

Finally, the court held that Plaintiffs could launch a statewide, as opposed to district-by-district, challenge to Act 43. *See* App. 111–15. The court rejected Defendants' argument that "a majority of Justices in [*Vieth v. Jubelirer*, 541 U.S. 267 (2004)] properly recognized that a statewide challenge to a redistricting plan was not justiciable," because—in the district court's view—"[s]tanding is just one aspect of justiciability." App. 113 (citation omitted) (emphasis removed).

Judge Griesbach dissented, explaining that the evidence presented here matched the evidence that this Court found insufficient in *Bandemer*. App. 119–20.

Act 43 "has the same partisan impact as the plan upheld in *Bandemer*," yet, unlike that plan, Act 43 did not "g[i]ve short shrift to traditional districting principles." App. 119. But despite this "Court's clear reluctance [in *Bandemer*] to intervene in what are essentially political cases," the majority "f[ou]nd that Wisconsin's Act 43 is an unconstitutional partisan gerrymander." App. 119.

Judge Griesbach further criticized the majority's entrenchment-based standard. "The Supreme Court has long acknowledged partisan considerations are inevitable when partisan politicians draw maps," App. 121–22, and the majority's standard "does not help" separate impermissible partisan considerations from permissible ones, App. 123. That is, "[r]edistricting plans, by their very nature, affect future elections for the life of the plan," App. 123, so the prohibited intent to "entrench" is no "different from" the permitted intent "to benefit the party," App. 123. Furthermore, the majority changed the definition of "entrenchment," which had formerly involved *minority* parties entrenching themselves in power against the majority. App. 124–45. But "the Republican Party is *not* a minority party in Wisconsin": "In 2010 GOP members of the assembly received 53.5% of the statewide popular vote, while they obtained 52% of the vote in 2014." App. 125.

The dissent also objected to the majority's invalidation of Act 43 even though "Act 43 does not violate any of the redistricting principles that traditionally govern the districting process." App. 128. This compliance should have defeated Plaintiffs' gerrymandering claim because, "of the Justices who would even entertain a partisan-

gerrymandering claim, a majority would require adherence to traditional redistricting principles as part of any test." App. 130 (emphasis removed).

E. On January 27, 2017, the district court enjoined Defendants from "using the districting plan embodied in Act 43 in all future elections" and ordered that "a remedial redistricting plan for the November 2018 election, enacted by the Wisconsin Legislature and signed by the Governor," be in place by November 1, 2017. App. 166. The court rejected Defendants' request for a stay, Dkt. 169:1–2, stating that it "d[id] not believe that [it] ought to stay [its] judgment pending appeal." App. 165. As for the "probability of the success on the merits" of Defendants' appeal, the court recognized that "the absence of a well-trodden path" on the merits question counseled in favor of a stay. App. 165–66 (citations omitted). "Nevertheless," the court did not think Defendants demonstrated "irreparable injury absent a stay." App. 166. The court believed that by making the new map "*contingent* on the Supreme Court's affirming [the court's] judgment, the defendants will retain easily [Act 43] if the Supreme Court does not agree with [the court's] disposition." App. 166.

F. Defendants timely appealed to this Court. App. 171–72; App. 176–77. Defendants filed their Jurisdictional Statement on March 24, 2017, and argued, among other things, that summary reversal may be appropriate given the district court's disregard for this Court's caselaw. JS 3–4. Plaintiffs filed their Motion to Affirm on May 8, 2017. While Plaintiffs made a half-hearted gesture toward summary affirmance, they seemed to concede that full merits briefing and argument is the most appropriate course. Mot. 5.

REASONS FOR GRANTING THE APPLICATION

To obtain a stay pending resolution of a direct appeal, the requesting party must show "a reasonable probability" that the Court will note probable jurisdiction, "a fair prospect that a majority of the Court will vote to reverse the judgment below," and "a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.* In this case, Defendants prevail on all of these considerations, and thus this Court should issue a stay.

I. There Is A Reasonable Probability That This Court Will Note Probable Jurisdiction, As Well As A Fair Prospect That This Court Will Reverse The District Court's Judgment

Given that this case arises under this Court's appellate jurisdiction, 28 U.S.C. § 1253, this Court need only conclude that Defendants' appeal presents a "substantial question" to note probable jurisdiction. *See In re Primus*, 436 U.S. 412, 414 (1978). There is no plausible argument that the district court's unprecedented decision is so obviously correct that this case fails to present a "substantial question." Indeed, the last court to have found a partisan gerrymander was a district court, *thirty years ago*, which this Court reversed in *Bandemer*.

There is also far more than a "fair prospect" that this Court will reverse the district court's judgment on the merits. Specifically, the district court entertained a statewide partisan-gerrymandering claim, even though the court lacked authority to consider such a claim. The court also wrongly concluded that Act 43 was a partisan

gerrymander despite the plan's compliance with the traditional redistricting principles. Finally, neither the district court nor Plaintiffs have identified a "limited and precise rationale," which is mandatory for any partisan-gerrymandering test. *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment).[5]

A. The District Court Lacked Authority To Consider Plaintiffs' Statewide Partisan-Gerrymandering Challenge To Act 43

In *Vieth*, a majority of the Justices of this Court concluded that federal courts lack authority to entertain statewide partisan-gerrymandering claims (while, at the same time, a majority of Justices were not ready to reach this result for single-district claims). Plaintiffs have brought *only* a statewide claim, never claiming that any specific district was gerrymandered. App. 111–15. Since it is likely that this Court will adhere to the conclusion of the majority of the Justices in *Vieth* regarding the nonjusticiability of statewide partisan-gerrymandering claims, Defendants have shown a reasonable probability of success on the merits.

1. When at least five Justices would reach a particular result in a case, lower courts must reach that result as well in future cases, regardless of whether one or more of the five Justices joined the plurality, concurred, or dissented. *See, e.g.*, *United States v. Jacobsen*, 466 U.S. 109, 115–18 & n.12 (1984); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 17 (1983). Justice Kennedy in *LULAC* correctly

[5] Defendants provided two additional reasons for reversal in their Jurisdictional Statement: the district court's failure to announce its controlling standard until after the close of trial and the prospect that all partisan-gerrymandering claims are nonjusticiable. JS 38–40. While the three errors detailed here are sufficient to warrant a stay, these two additional errors provide further support.

explained the application of this principle to this Court's divided decision in *Vieth*: a "successful claim attempting to identify unconstitutional acts of partisan gerrymandering" requires looking to the common ground among the plurality, the concurrence, and the dissenting opinion(s). *League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399, 419 (2006) (plurality op.).

Under this proper understanding of how lower courts must treat this Court's divided opinions, the district court had no authority to adjudicate Plaintiffs' statewide claim. The four-Justice *Vieth* plurality rejected the statewide partisan-gerrymandering challenge in that case as nonjusticiable because the plurality believed that *all* partisan-gerrymandering claims are nonjusticiable. *Vieth*, 541 U.S. at 281. Justice Stevens' opinion, although styled as a dissent, was a partial "concur[rence] in the judgment" as to the statewide-claim issue. *Id.* at 292 (plurality op.). That is because Justice Stevens agreed with the plurality that this Court lacked authority to consider the plaintiffs' statewide partisan-gerrymander claim, but believed that the plaintiffs' single-district claim was justiciable. *Id.* at 328–29 (Stevens, J., dissenting). Justice Stevens "reache[d] that result via standing analysis, while [the plurality] reach[ed] it through political-question analysis, [but the] conclusions are the same: [ ] statewide claims are nonjusticiable." *Id.* at 292 (plurality op.); *accord Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974) ("either the absence of standing or the presence of a political question suffices to prevent the power of the federal judiciary from being invoked"). Justice Souter's dissenting opinion, joined by Justice Ginsburg, further reinforces the point.

That opinion "would limit consideration of a statewide claim to one *built upon* a number of district-specific ones." *Vieth*, 541 U.S. at 353 (emphasis added). Only "[a]t a certain point," when challenging districts individually "no longer make[s] any sense" due to the sheer number of districts challenged, would these Justices entertain a statewide challenge. *Id.*

2. This Court is likely to reaffirm the rule, adopted by a majority of the Justices in *Vieth*, that federal courts cannot consider statewide partisan-gerrymandering claims. This is especially likely given that this Court recently reaffirmed that it does not permit statewide gerrymandering claims even in the *racial*-gerrymandering context.

For claims of racial gerrymandering, plaintiffs must show that "race was improperly used in the drawing of the boundaries of one or more *specific electoral districts*." *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015). Such a claim "applies to the boundaries of individual districts"—"district-by-district"—"not [ ] to a State considered as an undifferentiated 'whole.'" *Id.* This doctrine "makes sense in light of the nature of the harms that underlie a racial-gerrymandering claim." *Id.* Those injuries, which "are personal," include "[1] being personally subjected to a racial classification, as well as [2] being represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group." *Id.* (citations and alterations omitted). Since these harms affect only a "voter who lives in the *district* attacked"—not a "voter who lives elsewhere"—only the in-district citizen has standing to challenge the drawing of those

particular boundary lines as an unconstitutional racial gerrymander. *Id.* (citing *United States v. Hays*, 515 U.S. 737, 744–45 (1995)).

The same considerations apply to the partisan-gerrymandering context. First, only voters personally living in an allegedly partisan-gerrymandered district could arguably be "denied equal treatment because of the legislature's reliance" on partisan "criteria." *Hays*, 515 U.S. at 744–45. Second, only the "[v]oters in such districts may suffer the special representational harms" partisan gerrymandering is alleged to "cause in the voting context," *id.* at 745; that is, the "representational harm[ ]" that results when a "winner of an election in a [partisan]-gerrymandered district" regards the "object of her fealty" as the political "architect of the district" and not the district's constituents, *Vieth*, 541 U.S. at 328–30 (Stevens, J., dissenting). Because those "harm[s] fall[ ] squarely on the voters in the district . . . , the injury is cognizable only when stated by voters who reside in that particular district." *Id.*

More generally, the district court's contrary approach to partisanship claims would inject incongruity into this Court's gerrymandering jurisprudence. Racial-gerrymandering claims allege a more serious violation of the Constitution than do partisanship claims. "Race is an impermissible classification[;] [p]olitics is quite a different matter." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment). Therefore, it would be entirely anomalous to permit more broad-based challenges to a redistricting plan based upon allegations of undue partisan considerations, as opposed to undue racial considerations. Given that this Court reaffirmed the district-specific rule for racial-gerrymandering claims just this Term, *see Bethune-Hill v. Va.*

State Bd. of Elections, 137 S. Ct. 788, 800 (2017), it is likely that it will also retain the same rule for partisan-gerrymandering claims.

B. Act 43 Is Lawful Because It Complies With Traditional Redistricting Criteria

In *Vieth*, a majority of the Justices concluded that a legislature does not engage in unlawful partisan gerrymandering where it complies with traditional redistricting principles. Given that it was undisputed before the district court that Act 43 complies with principles like compactness, contiguity, and respect for political-subdivision lines, *see supra* pp. 9–10, this Court is likely to uphold Act 43 as lawful on this basis.

A majority of the Justices in *Vieth* made clear that a plan that complies with traditional redistricting principles cannot be an unconstitutional partisan gerrymander. The four-Justice *Vieth* plurality would not recognize any plans as unconstitutional partisan gerrymanders, and thus necessarily would not condemn a plan that complies with these principles. *Vieth*, 541 U.S. at 305–06. Justice Kennedy concluded that "[a] determination that a gerrymander violates the law must rest on . . . a conclusion that the classifications . . . were applied in an invidious manner or in a way unrelated to any legitimate legislative objective." *Id.* at 308 (Kennedy, J., concurring in the judgment). And three dissenting Justices incorporated the failure to comply with the traditional redistricting principles as an element of their partisan-gerrymandering standards. *See id.* at 318 (Stevens, J., dissenting); *id.* at 347–48 (Souter, J., joined by Ginsburg, J., dissenting).

This Court is likely to retain *Vieth*'s rule that a plan that complies with traditional redistricting principles is simply not an unlawful partisan gerrymander. "The Constitution clearly contemplates districting by political entities and unsurprisingly that turns out to be root-and-branch a matter of politics." *Vieth*, 541 U.S. at 285 (plurality op.) (citation omitted); *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) (redistricting is "inevitably" political). Plans that comply with traditional redistricting principles are not unlawful partisan gerrymanders because the map's district lines are not "*unrelated* to any legitimate legislative objective." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment) (emphasis added). They have not, by definition, "subverted" "all traditional districting criteria . . . for partisan advantage." *Id.* at 318 (Stevens, J., dissenting). Nor do the districts in such plans have "specific correlations between . . . deviations from traditional districting principles and the population of [a political] group." *Id.* at 349 (Souter, J., joined by Ginsburg, J., dissenting).

C. Neither The District Court Nor Plaintiffs Have Offered A "Limited And Precise" Test For Partisan Gerrymandering

Even putting aside the two limitations on partisan-gerrymandering claims discussed above, only a "limited and precise rationale" could justify finding an unlawful partisan gerrymander. *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment). This Court has never identified such a "limited and precise" rationale in any case; and unless such a test is uncovered, defendants facing partisan-gerrymandering claims are entitled to judgment as a matter of law. *See id.* at 308

(Kennedy, J., concurring in the judgment). The district court's entrenchment-based test does not come close to meeting the "limited and precise" threshold this Court has required. Indeed, that test is merely a watered-down version of the test adopted by the *Bandemer* plurality, which every Justice in *Vieth* rejected as insufficient. In their Motion to Affirm, Plaintiffs did not even defend the district court's critical effects prong. Instead, Plaintiffs offered a vague, social-science grab-bag, which differs significantly even from the approach they offered below. *See* Mot. 19–21. This belatedly raised, unguided approach likewise fails to qualify as a "limited and precise" rationale.

1. In *Bandemer*, this Court rejected a partisan-gerrymandering claim against a plan under which "Democratic candidates received 51.9% of the vote" in races for State House seats, but won only 43 out of 100 available seats. 478 U.S. at 113–15 (plurality op.). In reaching this result, the four-Justice plurality determined that a partisan-gerrymandering claim required the plaintiffs to "[1] prove [ ] intentional discrimination against an identifiable political group and [2] an actual discriminatory effect on that group." *Id.* at 127. For intent, "[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." *Id.* at 129. The plurality's effect element was more demanding. The plaintiffs could not merely argue "that their proportionate voting influence has been adversely affected" by a plan. *Id.* at 130. "Rather, unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or group of voters'

influence on the political process as a whole." *Bandemer*, 478 U.S. at 132 (plurality op.). "If there were a discriminatory effect and a discriminatory intent, then the legislation would be examined for valid underpinnings." *Id.* at 141.[6] In *Vieth*, this Court unanimously agreed that the *Bandemer* plurality's test was inadequate. 541 U.S. at 283–84 (plurality op.); *id.* at 308 (Kennedy, J., concurring in the judgment); *see id.* at 317 (Stevens, J., dissenting); *id.* at 346 (Souter, J., joined by Ginsburg, J., dissenting); *id.* at 355–56 (Breyer, J., dissenting).

Despite this Court's clear rejection of the *Bandemer* plurality's test, the district court adopted a materially identical, three-prong partisan-gerrymandering test—intent, effect, and justification—based upon the *Bandemer* plurality's concept of "entrenchment." *Compare* App. 56, 59, *with Bandemer*, 478 U.S. at 132–33, 141 (plurality op.) ("the question is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process"). Indeed, if there is *any* difference between the district court's and the *Bandemer* plurality's tests, it is that the district court's test is simply easier to satisfy in practice. The fact that there is no constitutionally relevant distinction between the district court's and the *Bandemer* plurality's tests becomes clear after comparing those tests' three prongs.

[6] There were two separate opinions. Justice Powell, joined by Justice Stevens, concurred in part and dissented in part, and urged a multifactor test with a particular focus on whether the plan abandoned traditional redistricting principles. *Bandemer*, 478 U.S. at 173. Justice O'Connor, joined by Chief Justice Burger and then-Justice Rehnquist, concurred in the judgment and would have held that "the partisan gerrymandering claims of major political parties raise a nonjusticiable political question." *Id.* at 144.

First, the two tests' intent prongs are the same. The district court defined "intent" as "an intent to entrench a political party in power," App. 59, while the *Bandemer* plurality looked to the map drawers' intent to discriminate against "an identifiable political group," *Bandemer*, 478 U.S. at 127—that is, the map drawers must intend for their actions to have "substantial political consequences," *id.* at 129. Nothing separates a map drawer with the intent to have "*substantial* political consequences" and one merely with the "intent to *entrench* a political party in power." *Compare Bandemer*, 478 U.S. at 127, 129 (plurality op.) (emphasis added), *with* App. 59 (emphasis added). Both map drawers would intend to give a favored party a lasting advantage over another party for the life of the plan.

Second, the tests' effect prongs are similarly indistinguishable, at least in articulation. The district court's impermissible "effect" was the "burden[ing] [of] the representational rights of Democratic voters . . . by impeding their ability to translate their votes into legislative seats, not simply for one election, but throughout the life of Act 43." App. 90. It is Republicans "secur[ing] . . . a lasting [ ] majority" by "allocating votes . . . in such a way that, in any likely electoral scenario," they maintain a majority. App. 74. The *Bandemer* plurality declared that "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." 478 U.S. at 132. Both effects tests require "burden[ing] the representational rights of [a defined group]" (i.e., "degrad[ing] a voter's or group of voters' influence") "over the life of [the plan]" (i.e., "consistently").

And both focus their inquiry on the concept of entrenchment. *Compare* App. 90, *with Bandemer*, 478 U.S. at 132.

Notably, the district court here applied the *Bandemer* plurality's effects prong in a far more lax manner than did the *Bandemer* plurality. Under the Indiana plan that the *Bandemer* plurality held had insufficient partisan effect, Democrats won 51.9% of the vote but won only 43 out of 100 seats available. 478 U.S. at 113–15. In the present case, under Act 43, Democrats won 51.4% of the vote, and 39 out of 99 seats available, JS 13—yet the district court declared Act 43 unlawful.

The results under Act 43 are not only starkly similar to those that obtained under the lawful *Bandemer* plan, they are also similar to those under Wisconsin's indisputably nonpartisan *court-drawn plan* that directly preceded Act 43. Under that 2002 court-drawn plan, Republicans won 58 seats on 50.50% of the vote, and 60 seats on 53.50% of the vote. Dkt. 125 ¶¶ 233, 252, 256. When Republicans achieved roughly the same vote share in 2014 under Act 43 at 52%, they won 63 seats in the Assembly. Dkt. 125 ¶¶ 233, 258. Similarly, under Act 43 in 2012—a presidential election year—Republicans won 60 seats with 48.6% of the vote. This is not much different from the result under the 2002 court-drawn map in 2004—another presidential election year—when Republicans won 60 seats on 50% of the vote. Dkt. 125 ¶¶ 233, 253, 257.

Third, the district court's justification prong is a simple rewording of the *Bandemer* plurality's proviso that "[i]f there were a discriminatory effect and a discriminatory intent [under its first two prongs], then the legislation would be

examined for valid underpinnings." 478 U.S. at 141. As explained in the Jurisdiction Statement, the district court here applied this inquiry to Act 43 in an improperly watered-down manner. JS 32–33.

2. In their Motion to Affirm, Plaintiffs understandably declined to defend the district court's entrenchment-based test, given that test's similarity to the *Bandemer* plurality's approach. More surprisingly, Plaintiffs did not advocate for the position that they urged before the district court: that the efficiency gap should be the definitive measure of "effect." "To be clear," Plaintiffs explained, they do not "ask this Court to endorse any *particular* measure of partisan asymmetry or any *particular* technique for demonstrating durability." Mot. 22. The only guidance Plaintiffs were willing to offer is a non-exhaustive menu of social-science metrics: "Measures of partisan asymmetry like partisan bias and the efficiency gap, as well as analytical techniques like sensitivity testing," drawn from "recent conceptual and methodological advances in the social sciences." Mot. 21.

There is no plausible argument that Plaintiffs' social-science stew is the elusive "limited and precise rationale" that this Court has required in this area of law. *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment). The social-science metric that Plaintiffs favored below, the efficiency gap, would imperil *one third of all redistricting plans* and is thus clearly a nonstarter. *See* Dkt. 125 ¶¶ 116, 154; *accord* States Amicus Br. 8–10. Adding still more metrics—which Plaintiffs now belatedly propose—could endanger even more plans, depending on what those metrics turn out to be and how any particular district court would weigh the various competing social-

science approaches. Indeed, under Plaintiffs' new test, it would be impossible for any legislature to know how a future district court would adjudicate the inevitable partisan-gerrymandering lawsuit. After all, any district court would be free to adopt whichever metric—now in existence or discovered in the future—and to weigh that metric more or less than any other.

Plaintiffs seek to excuse their failure to offer any "limited and precise rationale," *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment), by analogizing to the one person, one vote cases, where this Court "articulat[ed] [ ] a standard" and then "filled in" the "precise contours . . . through subsequent litigation," Mot. 22–23. But this approach worked for one person, one vote only because the "population equality" standard was "easily administrable" and dependent on only three facts: "where the plaintiff lives, how many voters are in his district, and how many voters are in other districts." *Vieth*, 541 U.S. at 290 (plurality op.). The challenge in the partisan-gerrymandering context is that politics is a permissible and inevitable consideration in the legislative redistricting process, thus "a workable standard" that is "limited and precise" to isolate impermissible levels of partisanship is necessary at the outset. *Id.* at 306, 311 (Kennedy, J., concurring in the judgment). Because Plaintiffs have not come close to identifying such a standard, this Court is likely to hold that Defendants are entitled to judgment on the merits.

II. Defendants Will Suffer Irreparable Harm Absent A Stay Because They Will Be Forced To Expend Resources Designing A New Map That, In All Likelihood, Will Never Become The Law

If this Court does not enter a stay, the State of Wisconsin will be forced to expend substantial sovereign resources in order to meet the district court's November 1, 2017, deadline for the creation and adoption of a new map. The time, money, and other sovereign resources that Wisconsin will need to devote to this enterprise will be noncompensable and thus irreparable. *See Ledbetter v. Baldwin*, 479 U.S. 1309, 1310 (1986); *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 134 S. Ct. 1621 (2014) (Roberts, C.J., in chambers); *Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013).

During the Act 43 map-drafting process, Foltz and other staffers spent time gathering resources like computers, computer software, printers, and office space. App. 183 ¶ 15a. The staffers then spent significant time "drafting, revising, and finalizing map alternatives." App. 179 ¶ 5. Foltz and another staffer then worked "nearly full time on redistricting matters," with Foltz "work[ing] well in excess of forty hours a week on redistricting" for "many weeks during this period." App. 179 ¶ 6. "In addition to considerable member-time and staff-time devoted to legislative redistricting, legislative bodies also made significant expenditures for redistricting services provided by lawyers or consultants." App. 182 ¶ 13.

The Legislature anticipates that it will need to repeat a significant portion of this work during the redrafting process. The lion's share of this work cannot begin until after early June, when Wisconsin's Legislative Technology Services Bureau

completes assembling essential data. App. 182–83 ¶ 15. The body of work created in the Act 43 process cannot be cut and pasted into the remedial map drawing process: "The computers that were used in [the Act 43] redistricting [process] have been decommissioned." App. 184 ¶ 16. Moreover, "well over half of the State Assembly has turned over since 2011," and the districting priorities of the legislators remaining have likely shifted since 2011, thus the legitimate preferences embodied in Act 43 may no longer exist. App. 184–85 ¶ 19. And compliance with the district court's erroneous decision will necessarily require the Legislature to change some districts, which will then cause "rippling effects" in other districts. App. 184 ¶ 18. In short, "[t]he map drawing process cannot simply be picked up where it was left off in 2011." App. 184 ¶ 16. This significant investment will have deleterious consequences for Wisconsin's citizens: the Legislature has important sovereign priorities commanding its time and resources. Requiring it to redo a completed task from 2011 would impair its ability to focus its attention fully upon those priorities.

All of this effort is likely to be of no use to anyone. By the terms of the district court's order, the new map that the Legislature must necessarily draft and the Governor sign, does not become effective unless this Court affirms the district court's decision. App. 166–67. As explained above, there is a strong likelihood that this Court will ultimately hold that Act 43 is entirely lawful, *see supra* pp. 16–23, meaning that this map-drawing exercise, and the unavoidable loss of sovereign resources, will have been futile. Indeed, even in the unlikely circumstance that this Court issues an opinion holding that Act 43 is unlawful (or could potentially be unlawful based upon

some further showing by Plaintiffs on a remand), any prior map-drawing efforts will also be wasted. Given that even Plaintiffs do not defend the district court's approach, *see supra* pp. 18, 22, this Court's decision—in the unlikely circumstance that it does not uphold Act 43—will almost certainly provide the Legislature with important guidance, which will be critical in shaping the Legislature's remedial plan. It would be an inefficient drain on sovereign resources to force the Legislature to do redrafting work now, without knowing what standard, if any, this Court will adopt.

Finally, the very existence of the district court's currently unstayed injunction, prohibiting Defendants from "using the districting plan embodied in Act 43 in all future elections," App. 166, causes irreparable harm to the State. After all, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (citation omitted).

III. The Balance Of The Harms Weighs Strongly In Favor Of This Court Issuing A Stay

This Court's declining to grant a stay of the district court's order will undermine the public interest by harming Wisconsin voters and candidates. Again, under the terms of the district court's remedial order, the Legislature must adopt a plan by November 1, 2017, but that plan will not become effective unless this Court affirms the district court. *See supra* p. 10. Assuming this Court does not issue its decision by November 1, there may well be a significant period of time where Wisconsin voters and candidates will not know what district they will be placed in for

the upcoming election: the Act 43 districts (if this Court ultimately agrees with Defendants that Act 43 is lawful), the remedial map districts (if this Court ultimately affirms the district court's conclusion), or the districts drawn in some other map (if this Court remands to the district court under a new standard). So, without a stay, compliance with the district court's order will inevitably make the upcoming election *more* burdensome and confusing for citizens and candidates.

Nor will anyone suffer harm if this Court issues a stay. Plaintiffs' alleged harm is experiencing an election under a map that is too partisan. *See* App. 164–65. As explained extensively above, the district court erred in concluding that Act 43 is a partisan gerrymander; accordingly, forcing the Legislature to draw a new map will not alleviate any cognizable harm. *See supra* pp. 11–23. But even indulging Plaintiffs' erroneous claim that Act 43 is unlawfully partisan, forcing the Legislature to craft a map now, under the district court's indefensible standard, would not forestall any harm to anyone. As noted above, any map that the Legislature draws to meet the November 1 deadline will only become effective if this Court affirms the district court. *See supra* p. 10. But affirmance is extraordinarily improbable, given the indefensibility of the district court's test. *See supra* pp. 17–23. Accordingly, in the unlikely event that this Court identifies and then adopts a standard for adjudicating claims of unlawful partisan gerrymandering, that standard will likely differ in significant respects from the district court's test. If Act 43 is adjudicated to be unlawful under that hypothetical standard, the Legislature, as a matter of basic

fairness, would need to be permitted to craft a new map with the benefit of this Court's guidance.

CONCLUSION

Assuming this Court does not grant Defendants' respectful request for summary reversal before the end of this Term, this Court should issue a stay pending resolution of this direct appeal.

Respectfully submitted,

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May 19, 2017

CERTIFICATE OF SERVICE

I, Misha Tseytlin, a member of the bar of this Court, certify that on May 19, 2017, I served a paper copy of the Application for Stay Pending Resolution of Direct Appeal on the listed counsel of record by Federal Express Priority Overnight, and a courtesy PDF copy via email, and that all persons required to be served have been served.

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Dated: May 19, 2017

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