No. 17-333

In the Supreme Court of the United States

O. JOHN BENISEK, ET AL., APPELLANTS,

v.

LINDA H. LAMONE, ADMINISTRATOR, MARYLAND STATE BOARD OF ELECTIONS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF THE STATE OF WISCONSIN AS *AMICUS CURIAE* SUPPORTING APPELLEES

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QUESTION PRESENTED

Have Appellants articulated a "limited and precise" standard, *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring in the judgment), for determining when the use of political considerations in drawing a specific district's lines violates the First Amendment?

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INTEREST OF *AMICUS CURIAE* AND SUMMARY OF ARGUMENT

The State of Wisconsin has a special interest in this case given that *Gill v. Whitford*, No. 16-1161 (U.S. 2017), is currently pending before this Court. The plaintiffs in *Gill* brought a statewide challenge to Wisconsin's Assembly map, built around the "partisan symmetry" concept. Appellants' brief in the present case discusses Wisconsin's briefing in *Gill*, both favorably, Br. of Appellants 44–45, and unfavorably, Br. of Appellants 49–50. In addition, the Campaign Legal Center, counsel for the *Gill* plaintiffs, filed an amicus brief in this case. In that brief, the Center expands upon the arguments it made in *Gill*, claims to apply the *Gill* plaintiffs' approach to the Maryland map, and argues that its approach is preferable to Appellants' test. *See* Br. of Campaign Legal Center & Southern Coalition for Social Justice 1, 4, 20–21 (hereinafter "Center's Br.").

Wisconsin submits this brief to assist this Court's consideration of two approaches to political-gerrymandering claims: the First Amendment–based test that Appellants advocate here and the partisan symmetry–based approach that the *Gill* plaintiffs urged (and that the Center advocates in its amicus brief). Wisconsin explains that while both tests are fatally flawed because they are not "limited and precise," *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring in the judgment), Appellants' approach

does have certain advantages over the *Gill* plaintiffs' approach.

The arguments that the Center's amicus brief makes in this case strongly support Wisconsin's core point that the *Gill* plaintiffs' test is impermissibly malleable and overbroad. In *Gill*, Wisconsin explained that accepting the plaintiffs' argument that each litigant could pick its own social-science metric to show partisan effect would lead to an unbounded approach. The Center's treatment of Maryland's map bears out these concerns. Less than a year ago, the Center's primary expert—Dr. Jackman—submitted a report on the Center's behalf, which found that the Maryland map here was *clearly lawful* under the *Gill* plaintiffs' approach. Yet, in its amicus brief before this Court, the Center now confidently argues that the Maryland map is "highly likely" to be unlawful under this same approach. The cavalier manner with which the Center discards its own expert's conclusion on the legality of Maryland's map confirms Wisconsin's warnings about the malleability of the *Gill* plaintiffs' approach.

Appellants' approach, in turn, is also impermissibly vague. Appellants would have the constitutionality of each district turn on whether the plaintiff can establish "more than de minimis" harm to voters in that district, in terms of concepts such as partisan-vote dilution and depressing voters' engagement. It will be trivially easy for plaintiffs to scrounge up an

expert or two to testify to a more-than-de-minimis impact on such open-ended inquiries, meaning that numerous districts drawn by legislatures will promptly spawn expensive and uncertain litigation.

Nevertheless, Appellants' focus on their own district and the First Amendment retaliation doctrine has advantages over the *Gill* plaintiffs' statewide, partisan symmetry–based approach. Appellants' test does not require this Court to adopt a novel theory of statewide standing. Appellants also do not ask this Court to constitutionalize the ahistorical "partisan symmetry" concept. The Center's brief shows the extra-constitutional value judgments inherent in that concept. To take just two examples, this approach would condemn a legislature for retaining a court-drawn map simply because that map scored poorly on certain metrics, while praising a legislature whose obviously partisan measures happen to score well on those metrics. Appellants also would not force courts to adjudicate the legality of maps based upon conjectural, statewide "hypothetical state[s] of affairs." *League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399, 420 (2006) (opinion of Kennedy, J.). Finally, Appellants' approach avoids the systematic bias in favor of the Democratic Party that is a core feature of a partisan symmetry–based test. According to Dr. Jackman's study that the Center repeatedly touts in its amicus brief, all but two of the House maps drawn in the last two decades that Jackman would declare unlawful were drawn by Republicans.

ARGUMENT

I. The Tests Proposed In This Case And In *Gill* Are Not "Limited And Precise"

Under this Court's political-gerrymandering jurisprudence, a plaintiff fails to state a claim under Federal Rule of Civil Procedure 12(b)(6) if the plaintiff does not articulate a "limited and precise" legal standard, *Vieth*, 541 U.S. at 306, 313 (Kennedy, J., concurring in the judgment), for determining whether there has been "too much" partisanship, *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.). Both the Center's amicus brief and Appellants' merits brief demonstrate that the *Gill* plaintiffs' test *and* Appellants' test fail this foundational requirement.

A. The *Gill* Test Is So Uncertain That Even Its Proponents Cannot Agree On How It Should Apply To Maryland's Map

In *Gill*, Wisconsin's primary non-jurisdictional argument was that the plaintiffs' test was not "limited and precise." Br. of Appellants 41–59, *Gill v. Whitford*, No. 16-1161 (U.S. 2017) (hereinafter "Wisconsin Gill Br."). Every case would boil down to a dispute over the *Gill* plaintiffs' "effects" test, which requires the map to score poorly, on a statewide basis, on *some* metric generally associated with the partisan-symmetry concept. *See* Wisconsin Gill Br. 45–48. For example, before the district court in *Gill*, the plaintiffs' expert—Dr. Jackman—argued for a constitutional

threshold of a 7% statewide efficiency gap ("EG") in the *first* election *for state legislative districts*, a test that would invalidate a staggering one-third of all state legislative maps over the last 45 years. Wisconsin Gill Br. 52. When the *Gill* plaintiffs responded that this one-third figure was the "upper limit of the test's potential reach," Br. of Appellees 52, *Gill v. Whitford*, No. 16-1161 (U.S. 2017) (hereinafter "Gill Plaintiffs' Br."), Wisconsin explained why this would not be true: "If challengers would lose under Plaintiffs' 7%-gap-in-the-first-election test, they would simply advocate a different asymmetry/durability combination. Some challengers could, for example, argue that the first election was an outlier and should therefore be discounted. Notably, *53%* of all plans in the last 45 years had a 7% or greater efficiency gap in at least one election." Reply Br. of Appellants 17, *Gill v. Whitford*, No. 16-1161 (U.S. 2017) (hereinafter "Gill Reply Br.").

The Center's amicus brief in the present case, especially its treatment of the statewide legality of Maryland's map, confirms Wisconsin's warnings. The Center repeatedly touts a report submitted on the Center's behalf by Dr. Jackman in *League of Women Voters of N.C. (LWVNC) v. Rucho*, No. 1:16-cv-1164 (M.D. N.C. 2016). *See* Center's Br. 11, 13 & n.6, 14 & n.7, 15–17 (citing Report of Dr. Simon Jackman, dated April 18, 2017, *LWVNC*, No. 1:16-cv-1164, ECF No. 72-4 (M.C. N.D. June 19, 2017) (hereinafter "Jackman Rep.")). In that report, Dr. Jackman explained that

for a *congressional* map of 7 to 15 districts to have sufficient partisan effect to be "actionable," the map must have a 12% or greater statewide EG in its *first* election. Jackman Rep. 8.[1] Applying this approach to Maryland's map here, its statewide EG in the first election is 6.7%, far below Dr. Jackman's 12% EG threshold.[2] Put another way, under the test that the

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[1] For larger States, Dr. Jackman recommended a threshold of a 7.5% EG in the first election. Jackman Rep. 8.

[2] The figures that Wisconsin cites here and below come from Dr. Jackman's dataset (hereinafter "Jackman Dataset"), produced in *LWVNC*, No. 16-cv-1164 (M.D. N.C. 2016), which the Center cites throughout its amicus brief. Center's Br. 6, 13, 14, 25. This Court can verify Wisconsin's (and the Center's) claims about the House of Representative maps in Jackman's dataset by applying the full method for calculating the EG to publicly available election results. The full method is calculated by dividing the net wasted votes (Republican wasted votes minus Democratic wasted votes) by the total number of votes. *See* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 851–52 (2015). Wasted votes are defined as all votes cast for a losing candidate and all surplus votes cast for a winning candidate. *Id*. In Maryland's 2012 congressional elections, the Republicans wasted 167,156 more votes than Democrats out of a total of 2,485,278 votes cast. *See* Maryland State Board of Elections, *2012 Presidential General Election Results* (Nov. 28, 2012), http://elections.state.md.us/elections/2012/results/general/gen_results_2012_4_008X.html. This yields an efficiency gap of 6.73% (167,156 / 2,485,278 = 0.0673). A similar calculation is possible for other maps using publicly available election results, although

Center's expert urged on the Center's behalf just one year ago, the Maryland map is clearly lawful.

The Center's amicus brief does a startling about-face, declaring that it is "highly likely" that Maryland's map is unlawful under the *Gill* plaintiffs' approach. Center's Br. 4. The Center does not mention Dr. Jackman's contrary conclusion, burying his 12%-EG-in-the-first election test in a footnote in a different part of its brief. Center's Br. 14 n.7.

The Center can argue that Maryland's map is unlawful only after resorting to the broadening stratagem that Wisconsin warned about in *Gill*. The Center does not discuss the map's EG in the *first* election—which would be the relevant number under Dr. Jackman's analysis—and instead focuses upon the map's *average* EG over its three elections. Center's Br. 6. But the Center neglects to mention that this average is skewed by a single year—2014—when Democrats won the Sixth Congressional District by only 1.5%, *Benisek v. Lamone*, 266 F. Supp. 3d 799, 809–10 (D. Md. 2017), driving the statewide EG through the roof, *see Whitford v. Gill*, 218 F. Supp. 3d 837, 956 (W.D. Wis. 2016) (Griesbach, J., dissenting) ("[W]inning close elections is the surest way to make sure the other side racks up lots of wasted votes—*every* losing vote is wasted, whereas only a few winning votes are

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this becomes significantly more complicated for States that—unlike Maryland here—have uncontested election races. Stephanopoulos & McGhee, *supra*, at 865–67.

wasted."). Indeed, 2014 is the *only* year where the 2012-Maryland-map's EG exceeded Dr. Jackman's 12% EG threshold for the *first* election. *See supra* p. 6; Maryland State Board of Elections, *Official 2014 Gubernatorial General Election results for Representative in Congress* (Dec. 2, 2014);[3] *Official 2016 Presidential General Election results for Representative in Congress* (Dec. 9, 2016).[4] The Center is thus doing just what Wisconsin warned plaintiffs would do when discussing the analogous 7%-EG-in-first-election rule that Dr. Jackman articulated for state legislative districts in *Gill*: "If challengers would lose under Plaintiffs' 7%-gap-in-the-*first*-election test, they would simply advocate a different asymmetry/durability combination. Some challengers could, for example, argue that the first election was an outlier and should therefore be discounted. *Notably, 53% of all plans in the last 45 years had a 7% or greater efficiency gap in at least one election*." Gill Reply Br. 17 (emphases added).

So when the Center's amicus brief discusses the maps that Dr. Jackman would condemn as the "upper bound" of the *Gill* plaintiffs' test's reach, the Center does not believe its own argument. Center's Br. 14. After all, the very map at issue here is *clearly* outside

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[3] http://elections.state.md.us/elections/2014/results/General/gen_results_2014_2_008X.html.

[4] http://elections.maryland.gov/elections/2016/results/general/gen_results_2016_4_008X.html.

of Dr. Jackman's illegality "bound"—and does not appear to be among the 29 plans the Center mentions at page 14 of its amicus brief—and yet the Center argues that this map is "highly likely" to be unlawful. Center's Br. 4. As the Center's attack on Maryland's map shows, the number of maps vulnerable under the *Gill* plaintiffs' approach is limited only by the willingness of plaintiffs to present *any* social-science metric on which that map scores poorly.

In the end, Wisconsin does not take any position as to whether a court would agree with Dr. Jackman or the Center as to the legality of Maryland's map under the *Gill* plaintiffs' approach because, frankly, there is no way for anyone to know. If a plaintiff wants to condemn a map (as the Center does with Maryland's map), that plaintiff will retain an expert who will articulate social-science test(s) that fit the plaintiffs' desired conclusion. *See* Center's Br. 5–7. The defendant will then pick its own preferred metric, bringing in its own expert. For example, if Maryland faced a *Gill*-style challenge to its map, it would be well-advised to inquire into the availability of Dr. Jackman's services. How a district court would settle such a dispute would be anyone's guess.

B. Appellants' "More Than De Minimis" Test Is Also Impermissibly Vague

Appellants' district-specific, partisan-gerrymandering theory rests on the First Amendment retaliation doctrine. *See* Br. of Appellants 30–31. That is, "the

First Amendment prohibits a State from subjecting individuals to disfavored treatment on the basis of their . . . politics." Br. of Appellants 30. But, of course, mere political motivation in *redistricting* cannot render a map unconstitutional. That is why in *LULAC* this Court rejected the "sole-intent standard," which "explicitly disavow[ed]" the need to look past partisan motivation. 548 U.S. at 418 (opinion of Kennedy, J.); *see also id.* at 493–94 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 511 (Scalia, J., concurring in the judgment in part and dissenting in part). Rather, "a successful claim" must also "show a burden . . . on the complainants' representational rights," *id.* at 418 (opinion of Kennedy, J.), measured by a "limited and precise" standard, *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment).

Appellants' articulation of their retaliation-based test is not "limited and precise." Under Appellants' test, a district is an impermissible partisan gerrymander if (1) the legislature drew the district's lines with a retaliatory political intent; (2) the district lines "burden[ed] [voters] in a practical, more-than-de-minimis way;" and (3) the State cannot provide an "acceptable" and "independent" "explanation for the map's" political effects. Br. of Appellants 35–36. Appellants' briefing here shows that both the first element (intent) and the third element (justification) are not meaningful constraints. "'[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.'" Br. of Appellants 36 (quoting *Davis v. Bandemer*, 478 U.S. 109, 129 (1986)). And Appellants provide no examples (or even a general discussion) of what a legislature could show to avoid liability under the third element. Accordingly, whether Appellants' test is "limited and precise" rests entirely upon the second element: "more-than-de-minimis" burden.

Appellants are wrong when they argue that more-than-de-minimis is "limited and precise" because it incorporates the burden-shifting framework from *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). Br. of Appellants 57–58. Under that framework, when a plaintiff shows that the State imposed an adverse burden on the basis of First Amendment activity, the State then bears the burden to show it would have taken that same action regardless of the protected conduct. *Mt. Healthy*, 429 U.S. at 286–87. This framework fails to provide definiteness to Appellants' test because it *presumes* what government action counts as a prohibited burden, *see Benisek*, 266 F. Supp. 3d at 811—for example, a school's "decision not to rehire" a teacher, *Mt. Healthy*, 429 U.S. at 286–87. The elusive question in the political-gerrymandering context is "*how much* partisan dominance is *too much*." *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.) (emphases added). A burden-shifting framework provides no guidance on that all-important question.

Appellants offer other supposedly limiting considerations, but each fails to provide a limited and precise standard for deciding when there has been too much politics.

Appellants claim that a more-than-de-minimis burden can include "vote dilution." Br. of Appellants 41–42. But what counts as vote dilution in the political-gerrymandering context is as vague as the *Gill* plaintiffs' social-science stew. Wisconsin Gill Br. 45–47. While Appellants in this case rely upon the federal DPI, the Cook Report, and other expert testimony as their preferred guides, *e.g.*, Br. of Appellants 17–19, 41, 56, they do not assert that the Constitution favors these sources, or that other plaintiffs could not rely upon other metrics or experts to establish dilution. Thus, under Appellants' more-than-de-minimis-vote-dilution approach, both sides of the case would each offer their own preferred metric(s), political report(s), or retained experts, while leaving it to the district court somehow to sort out which construct it finds most persuasive. Put another way, Appellants would duplicate the social-science hodgepodge problem that dooms the *Gill* plaintiffs' test. Wisconsin Gill Br. 45–47.

Appellants next assert that a more-than-de-minimis amount of "depressing voters' engagement," "reduc[ing] [ ] political engagement," or "depress[ing] media interest" would be sufficient. Br. of Appellants 43. But, again, they do not explain how these burdens would be measured in a limited and precise manner,

instead offering a couple of anecdotes and then citing data showing that fewer voters came to the polls in certain years. Br. of Appellants 19–20. Unsurprisingly, Appellees have their own anecdotes and data, urging the opposite conclusion. Br. of Appellees 10–11. Appellants do not identify any confined, reliable way to settle such disputes. Absent "clear, manageable, and politically neutral" standards, "the results from one gerrymandering case to the next would likely be disparate and inconsistent." *Vieth*, 541 U.S. at 307–08 (Kennedy, J., concurring in the judgment); *accord* J.S. App. 114a (Bredar, J., dissenting) ("standard [must] be viable and manageable . . . *beyond the facts* of this case").

Appellants also claim that a gerrymander causing a district to elect a representative from the opposite party is a sufficient burden. Br. of Appellants 40–41. Of course, a party-switching standard would be "manageable" in one sense; to determine whether this standard is met, the court would simply compare election results pre- and post-redistricting and see if a new party won the seat. But "[t]his Court may not willy-nilly apply standards—even manageable standards—having no relation to constitutional harms." *Vieth*, 541 U.S. at 295 (plurality op.); *LULAC*, 548 U.S. at 416–20 (opinion of Kennedy, J.) (rejecting the "sole-intent standard," despite its simplicity, because it did not capture the relevant constitutional harm). In any event, a party-switching standard fails to identify *when* an altered map, as opposed to an uninspir-

ing candidate or other factors, caused the all-important party flip. *See* J.S. App. 126a (Bredar, J., dissenting) ("Voter behavior is as unpredictable as the broader societal circumstances that may make one candidate . . . more appealing[.]"). And a single-minded focus on flipping districts risks bifurcating all races that unseat an incumbent into a two-step process: the challenger must first win at the ballot box and then must defend the victory against the incumbent in court.

Finally, it is worth emphasizing that Appellants do not limit their capacious more-than-de-minimis test to just vote dilution, lessening enthusiasm, and party flipping. Instead, they offer these as just three exemplars of what plaintiffs could show to prevail; other enterprising plaintiffs can be expected to pick their own "burdens." As Appellants themselves explain, they believe there are "many ways" that such a showing can be made. Br. of Appellants 40. With these "uncertain limits" as the only guidance, "intervening courts . . . would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment).

II. Nevertheless, Appellants' First Amendment-Based Approach Has Some Advantages Over The Symmetry-Based Test Urged In *Gill*

While the *Gill* plaintiffs' approach and Appellants' test both fail *Vieth*'s requirement that any political-

gerrymandering test be "limited and precise," *see supra* Part I, Appellants' district-specific, First Amendment–based test does have several advantages over the statewide, partisan symmetry–based theory urged by the *Gill* plaintiffs. Assuming this Court does not foreclose all political-gerrymandering challenges, recognizing these advantages may help this Court provide guidance to lower courts as to how to consider political-gerrymandering claims in future cases.

A. Appellants' Test Does Not Rest Upon An Unprecedented Statewide Standing Theory

As a threshold matter, the very existence of this lawsuit refutes the *Gill* plaintiffs' assertion that if this Court wishes to address the legality of political gerrymandering, it "must" discard the rule that redistricting harms occur only at the district-specific level. *See* Gill Plaintiffs' Br. 28–29. Appellants' briefing in this case well demonstrates that, just like this Court has held time and again in the racial-gerrymandering context, plaintiffs have standing only to challenge their *own* districts in the political context: "[L]ike an equal-protection challenge to a racial gerrymander," a political-gerrymandering claim "'applies to the boundaries of electoral districts'" only, not to the statewide map. Br. of Appellants 45 (quoting *Shaw v. Hunt*, 517 U.S. 899, 917 (1996)); *accord Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015). As Wisconsin explained in detail in *Gill*, dis-

carding the district-specific standing rule in the political-gerrymandering context not only contradicts the single-district nature of political representation in this country, but would perversely privilege political-gerrymandering claims over racial-gerrymandering claims. Wisconsin Gill Br. 27–34.

B. Appellants' Test Does Not Require Constitutionalizing The "Partisan Symmetry" Concept

In *Gill*, plaintiffs urged this Court to adopt "partisan symmetry" as the constitutional lodestar, akin to the one-person, one-vote standard. Gill Plaintiffs' Br. 33. They did not cite a single historical source identifying partisan symmetry as a "principle[ ] of fair districting." *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring in the judgment). As Wisconsin explained, although partisan symmetry currently enjoys a measure of support in the social-science academy, "'[t]here is' . . . 'no basis in the historical record for saying that the Constitution embodies a standard of partisan symmetry.'" Wisconsin Gill Br. 38 (quoting Edward B. Foley, *Due Process, Fair Play, And Excessive Partisanship: A New Principle For Judicial Review Of Election Laws*, 84 U. Chi. L. Rev. 655, 727 (2017)). Wisconsin conducted a review of districting from the Founding to the post–Civil War era, showing that partisan symmetry has no basis in this country's history. Wisconsin Gill Br. 5–10, 37–38.

Appellants here do not ask this Court to constitutionalize partisan symmetry, focusing instead on the First Amendment retaliation doctrine. Br. of Appellants 31–39. Nevertheless, Appellants go out of their way to criticize Wisconsin's use of history in its *Gill* briefing, erroneously believing that Wisconsin intended this history "to suggest that [political gerrymandering] . . . is entitled to a presumption of validity." Br. of Appellants 49 (citing Wisconsin Gill Br. 5–10). Wisconsin did not recount the historical record to support a categorical "presumption" against all partisanship-based redistricting challenges. Rather, the point of Wisconsin's historical discussion was much more case-specific: to demonstrate the lack of a "helpful discussion[ ]" of *partisan symmetry* as a "principle[ ] of fair districting discussed in the annals of parliamentary or legislative bodies." *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring in the judgment). Thus, Wisconsin explained that "[t]here is . . . no basis in the historical record for saying that the Constitution embodies a standard of partisan symmetry," Wisconsin Gill Br. 38 (citation omitted), and that the historical understanding of gerrymandering did not rest upon social science, but on the drawing of "fantastic[ally] shape[d]" districts for partisan gain, *see* Wisconsin Gill Br. 60–61 (citing historical material in Wisconsin Gill Br. 8–9).

The Center's amicus brief, in turn, only highlights why this Court should not constitutionalize partisan symmetry. Comparing two situations where the Cen-

ter praises its approach for reaching a different conclusion from what it believes Appellants' approach would require is especially instructive.

The Center first touts its symmetry-based test because, unlike the Center's understanding of Appellants' approach, the Center *would* condemn a plan where the State's "previous plan was asymmetric and [its] current plan is also asymmetric—but was implemented without flipping any districts." Center's Br. 23–24. The situation that the Center posits hews closely to a hypothetical that Judge Griesbach described in his dissenting opinion in *Whitford v. Gill*. *See Whitford*, 218 F. Supp. 3d at 938 (Griesbach, J., dissenting). Wisconsin's Assembly map for 2002 to 2010, which a federal district court drafted in 2002, *see* Wisconsin Gill Br. 13, scored poorly on partisan-symmetry metrics; indeed, Dr. Jackman identified that map as one of the 17 most durably asymmetric maps over a 45-year period. *See* Joint Appendix Vol. II SA233, SA235, *Gill v. Whitford*, No. 16-1161 (U.S. 2017) (hereinafter "Gill SA"). As Judge Griesbach pointed out, and as the Center's amicus brief here now confirms, a statewide, partisan symmetry–based test would have made it *unconstitutional* for the Wisconsin Legislature to re-adopt the immediately prior court-drawn map (after adjusting for population changes), at least if it could be shown that the Legislature did so because it liked that map's prior results. *See Whitford*, 218 F. Supp. 3d at 938 (Griesbach, J., dissenting). "[U]nder the [*Gill*] Plaintiffs' proposed test the Republicans were obligated . . .

to engage in heroic levels of nonpartisan statesmanship . . . [by] draw[ing] a map that was *less* favorable to them than even the court-drawn plan that governed the previous decade." *Id.* Notably, unlike with the prior court-drawn map that this Court discussed in *LULAC*, 548 U.S. at 446, the fact that Wisconsin's 2002 court-drawn map featured results that favored one party was not the product of "preexisting partisan" redistricting. Br. of Appellees 20. A federal court drew the 1992 Wisconsin map as well, and a Democrat-controlled government drew the one before that. *See* Wisconsin Gill Br. 12–13.

The Center also praises its own approach because, unlike the Center's understanding of Appellants' test, the Center *would not* condemn a legislature "whose previous plan was asymmetric and whose current plan is symmetric thanks to the flipping of one or more districts." Center's Br. 21–23. That is what happened in 2010 in Illinois, where the Democrat-controlled legislature engaged in such an obvious partisan redistricting that the *Gill* plaintiffs' own amici condemned it. *See* Amicus Br. of Represent.Us & Richard Painter 8–10, *Gill v. Whitford*, No. 16-1161 (U.S. 2017); Amicus Br. of Current & Former State Legislators 1, *Gill*, No. 16-1161; Amicus Br. of Senators McCain & Whitehouse 10–11, *Gill*, No. 16-1161. Illinois adopted a redistricting map that was—to echo Justice Sotomayor's words at the *Gill* oral argument—"the most extreme map they could make." Transcript of Oral Argument at 16, *Gill v. Whitford*,

No. 16-1161 (U.S. 2017). Yet because so many Democrats are naturally packed into Chicago to begin with, symmetry metrics bless these Democrats' obviously partisan efforts as offsetting geographical asymmetries. *See* Gill Reply Br. 20–21. And, of course, the Illinois Legislature was not merely "attempt[ing] to cure [a prior]" partisan redistricting. Br. of Appellees 20 (emphasis omitted). Illinois' prior map was a compromise map drawn by a divided government. *See Comm. for a Fair and Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 571 (N.D. Ill. 2011). The *Gill* plaintiffs' *amici* recounted the colorful language with which Illinois Democrats described their single-minded partisan purposes. *See* Amicus Br. of Current & Former State Legislators 6, *Gill*, No. 16-1161.

With these two examples, the Center has offered nothing but its own value judgments. Under the Center's views, the Wisconsin Legislature simply retaining the court-drawn map, as Judge Griesbach hypothesized, should be *more* blameworthy than the Illinois Legislature drawing "the most" pro-Democrat map it could conjure up. Wisconsin suspects that many voters would have exactly the opposite moral intuition: they would praise the retention of a court-drawn map, no matter its score on some social-science metric, while following the lead of the *Gill* plaintiffs' amici in condemning Illinois Democrats for reconfiguring their map for partisan gain. The Center has not identified anything in the Constitution's text or history requiring the adoption of its own peculiar moral intuitions.

While the Center attempts to justify its intuitions on these matters by reference to two quotes from Justice Kennedy's opinion in *LULAC*, those quotes offer the Center no support, especially when read in context. Center's Br. 22, 24. The Center first quotes Justice Kennedy's statement that "a congressional plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority." *LULAC*, 548 U.S. at 419; *compare* Center's Br. 22. But the Center omits the immediately preceding sentence, where Justice Kennedy provided the critical qualifier that "*there is no constitutional requirement* of proportional representation, and equating a party's statewide share of the vote with its portion of the congressional delegation is a rough measure at best." *LULAC*, 548 U.S. at 419 (emphasis added); *compare* Center's Br. 22.[5] The Center next quotes Justice Kennedy's statement that the "test" proposed by the challengers in *LULAC* was not "reliab[le]" because it "would leave untouched the 1991 Texas redistricting, which entrenched a party on the verge of minority status." 548 U.S. at 419; *compare* Center's Br. 24. Two paragraphs later, however, Jus-

[5] Similarly, this Court in *Gaffney v. Cummings*, 412 U.S. 735 (1973), also cited by the Center, Center's Br. 22, held only that a legislature could constitutionally seek the goal of proportional representation, not that proportional representation (even if articulated as "partisan symmetry") was a constitutional baseline, 412 U.S. at 754.

tice Kennedy explicitly rejected a "symmetry standard" like the Center's proposed test because it fails to "provid[e] a standard for deciding how much partisan dominance is too much." *LULAC*, 548 U.S. at 419–20. More generally, the Center's reliance on Justice Kennedy's opinion in *LULAC* is particularly ironic given that Justice Kennedy considered and rejected a challenge to the Texas map there based upon precisely the social-science metrics that the Center and the *Gill* plaintiffs have touted. *Compare LULAC*, 548 U.S. at 419–20 (opinion of Kennedy, J.), *with id.* at 466–67 (Stevens, J., concurring in part and dissenting in part).

C. Appellants' Test Avoids A Statewide "Hypothetical State Of Affairs" Inquiry

Appellants' approach is also preferable to the *Gill* plaintiffs' statewide test because it focuses on a single district, thereby avoiding the adoption of "a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs," requiring "conjecture about where possible vote-switchers will reside." *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.).

As the *Gill* plaintiffs explained, an essential element of a statewide partisan-symmetry-based claim is "durab[ility]." Gill Plaintiffs' Br. 33. Some Justices focused on this point at oral argument, suggesting that a durability analysis could be a mandatory part

of an administrable test. *See* Transcript of Oral Argument at 12–13, 14–15, *Gill*, No. 16-1161. The *Gill* plaintiffs argued that their preferred method for conducting this inquiry was a uniform swing analysis: assuming that each district will move in unison with the statewide vote share, *see* Gill Plaintiffs' Br. 47, with "the statewide vote percentage [being] altered by a fixed amount, typically in one-percentage-point increments, across all districts," *Whitford*, 218 F. Supp. 3d at 899 (citation omitted).

The statewide "hypothetical state of affairs" inquiry that the *Gill* plaintiffs' uniform swing analysis requires—and which Appellants' approach avoids—is not "reliable" and thus does not solve the problems of determining "where possible vote-switchers will reside." *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.). The core assumption underlying that analysis—that when a party's statewide vote-share changes, that change occurs uniformly throughout each of the State's districts—is demonstrably false. In the real world, "partisan swing varies in size across districts," such that "generalizing about national partisan swing from a central-tendency measure may camouflage substantial variation." Christian R. Grose & Bruce I. Oppenheimer, *The Iraq War, Partisanship, and Candidate Attributes: Variation in Partisan Swing in the 2006 U.S. House Elections*, 32 Leg. Stud. Q. 531, 533 (November 2007). As even some of the Center's strongest supporters have put it, the uniform swing is "quite restrictive and often unrealistic." Gary King,

Representation through Legislative Redistricting: A Stochastic Model, 33 Am. J. Pol. Sci. 787, 788 (1989).[6]

So while some Justices of this Court wondered during the *Gill* argument whether projecting how a map will perform in future elections is "pretty scientific by this point," Transcript of Oral Argument at 14–15, 18, *Gill*, No. 16-1161, that is simply not accurate. Both Wisconsin map-drawers and the *Gill* plaintiffs' experts used uniform swing to discuss how Wisconsin's map could perform under different statewide vote-share scenarios *not* because such an approach is scientific or reliable, but because predicting "where possible vote-switchers will reside" is *inherently "conjectur[al]*." *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.) (emphasis added). The uniform swing simply provides a rough-and-ready simplifying assumption, which, to be clear, no one seriously believes obtains in the real world.

Wisconsin election results since the oral argument in *Gill* show that the uniform swing's core assumption is false. On January 16, 2018, a Democratic candidate won Wisconsin's Tenth Senate District with 55% of

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[6] Professor King proposed a non-uniform swing model in his amicus brief in *LULAC*. *See* Br. of *Amici Curiae* Profs. Gary King et al., *LULAC v. Perry*, 548 U.S. 399 (2006) (Nos. 05-204, 05-254, 05-276, 05-439), 2006 WL 53994, at *9–*11. Justice Kennedy properly dismissed this as simply another "different model[ ] of shifting voter preferences." *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.).

the vote, compared to her Republican challenger's 44%. Wisconsin Elections Commission Canvass Reporting System, *Canvass Results for 2018 Special Election State Senate District* 10 (Jan. 25, 2018).[7] This election result contrasts sharply with the previous election in the same district, where a Republican won with 63% of the vote in 2016. Wisconsin Elections Commission Canvass Reporting System, *Canvass Results for 2016 General Election* 6 (Dec. 22, 2016).[8] If swings in elections were truly uniform, as the *Gill* plaintiffs urge this Court to assume, *then Wisconsin swung nineteen points in just over one year*. Under the assumptions of a uniform swing analysis—where voters switch their votes lock-step across all of a State's districts—if a statewide election had been held in January, the result would have been Democrats *winning 77 out of 99 seats in the Wisconsin Assembly, with a statewide popular vote advantage of 66%. See id.* (popular vote advantage based on a 19-point swing from the 2016 statewide vote for United States Senate, seat count based on adding 19 percentage points to each Democratic Assembly candidate's 2016 total). In the real world, Democrats have not won more than 55% of the statewide vote in over 25 years, with their best result being 54.75% in 2006 (which yielded them only 47 out of 99 Assembly seats

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[7] http://elections.wi.gov/sites/default/files/Percentage%20Results-Senate%2010%20Special%20Election.pdf.

[8] http://elections.wi.gov/sites/default/files/Statewide%20Results%20All%20Offices%20%28post-Presidential%20recount%29.pdf.

under a *court-drawn* map). Joint Appendix Vol. 1 JA220, 222–24, *Gill v. Whitford*, No. 16-1161 (U.S. 2017); Wisconsin Gill Br. 13. And, of course, if the uniform swing's assumptions *were* correct and Democrats are on track to win such a landslide in both the statewide popular vote and Assembly seats, the *Gill* plaintiffs' case for court intervention would evaporate entirely.

The Center's attempt to apply a uniform swing analysis to Maryland's map here further highlights the uniform swing's conjectural, unreliable nature. The Center claims that "[b]ased on the most recent election results, it would [ ] take a nine-point pro-Republican swing for Republicans to capture even one additional congressional seat," which the Center deems an impossibility. Center's Br. 7. Republicans, however, nearly won the Sixth District, losing by only a "razor's[ ]edge" in 2014. *Benisek*, 266 F. Supp. 3d at 808–09. And the swings in voting that have occurred vary wildly between districts. For example, in the Sixth district, the Democrats lost about 9% of the vote between 2012 and 2014 and then gained around 6% of the vote between 2014 and 2016. *See* Maryland 2016 Election Results, *supra*; Maryland 2014 Election Results, *supra*; Maryland 2012 Election Results, *supra*. The other districts saw very different swings: for example the Fifth District swung around -5% for Democrats in 2014 and +3% for Democrats in 2016, while the Seventh District swung about -7% for Democrats in 2014 and +5% for Democrats in 2016,

and the Eighth District swung nearly -3% for Democrats in 2014 and 0% in 2016. *See id.*

Finally, the fact that computer programs can draw hundreds or thousands of "alternative" maps—a methodology mentioned by some Justices of this Court at the *Gill* oral argument, Transcript of Oral Argument at 12–13, 55, *Gill*, No. 16-1161, but which the *Gill* district court held had not been subjected to adversarial scrutiny in that case, *Whitford*, 218 F. Supp. 3d at 918 n.350—does nothing to solve the problem in the uniform swing analysis. Applying the uniform swing across hundreds of alternative maps does not alleviate the foundational, false "uniformity" assumption or make reliance on that assumption any less conjectural. *Cf.* G.L. Squires, *Practical Physics* 8 (4th ed. 2001) ("Repeated measurements with the same [inaccurate] apparatus neither reveal nor . . . eliminate a systematic error.").

D. Appellants' Test Is Not Systematically Biased In Favor Of One Political Party

A standard that focused upon the First Amendment retaliation doctrine, like the one Appellants urge, would also avoid another critical failing of the *Gill* plaintiffs' test: it would not be systematically biased in favor of the modern Democratic Party.

In *Gill*, Wisconsin showed that, with respect to state legislative maps, partisan symmetry metrics are biased against Republican-drawn maps and favor

Democrat-drawn maps because Republicans today enjoy a natural symmetry advantage. Gill Reply Br. 19–22. When Republicans today draw maps to favor their party, those maps are coded as egregiously increasing asymmetries in their favor; whereas when Democrats act in just as partisan a manner, they are scored as benignly cancelling out natural asymmetries. Gill Reply Br. 20–21. Dr. Jackman's report in *Gill*, which surveyed the efficiency gap of state legislative districts, bore this out. Dr. Jackman showed a nationwide shift in efficiency gaps towards Republicans starting in the mid-1990s, when Republicans controlled only two of the 41 States in the *Gill* plaintiffs' dataset. *See* Gill SA225. Further, of the 17 state-legislative plans which Jackman identified as the worst performers on the efficiency gap, 16 favored Republicans. Gill SA235. In contrast, he found that "few plans" today "generat[e] large, pro-Democratic" gaps. Gill SA238.

In its brief here, the Center claims that Dr. Jackman's data for House of Representatives districts shows that the *Gill* plaintiffs' test "plays no favorites between the parties." Center's Br. 15. But the Center can only make this assertion by focusing upon maps from 40 years ago, when this country's political landscape was very different. Looking at a more modern time period, while Dr. Jackman's study shows numerous maps that he concludes were unlawful in the last 20 years, *only two* of those unlawful maps were Democratic plans. Jackman Dataset. Notably, neither Maryland's map in this case nor Illinois' infamous

2010 congressional map are among the two Democratic maps that Dr. Jackman would condemn. *See supra* p. 6 & n.2; Illinois State Board of Elections, *Election Results, General Election – 11/6/2012*.[9] As Dr. Jackman himself explained, EG "measures in recent decades show a pronounced shift in a negative direction, indicative of an increased prevalence of districting plans favoring Republicans." Jackman Rep. 7.

The Center's claim that Jackman's legislative dataset shows that the "severity" of gerrymandering is increasing, Center's Br. 13, is similarly false. As Wisconsin explained in *Gill*, Jackman's data in the state legislative context demonstrates that the efficiency gap was either the same or *more* asymmetrical in 1972 (the first year of Jackman's dataset) than it is today. Gill Reply Br. 26–27 (citing chart at Gill SA227). Jackman's House of Representatives study evinces the same phenomenon, with virtually identical asymmetries in 1972 as in 2016. Jackman Rep. 30 (chart).

What has changed since 1972 is not the severity of EG scores, but that Republicans now enjoy an asymmetry advantage due to political geography, meaning that Republican redistricting efforts are coded on the Center's metrics as *especially* partisan, while Democratic redistricting efforts are coded as cancelling out

[9] https://www.elections.il.gov/ElectionResults.aspx?ID=zYRQd0qcpCA%3d.

asymmetries. Gill Reply Br. 19–22. This Court should not adopt a methodology so obviously biased in favor of one of this country's two major political parties. *Compare* Texas Amicus Br., *Gill v. Whitford*, No. 16-1161 (16 Republican Attorneys General speaking for their States and opposing the *Gill* plaintiffs' approach), *with* Oregon Amicus Br., *Gill*, No. 16-1161 (16 Democratic Attorneys General and one Independent Attorney General speaking for their States and supporting the *Gill* plaintiffs' approach).

CONCLUSION

This Court should affirm the district court's order.

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February 2018