No. 16-1161

In the Supreme Court of the United States

BEVERLY R. GILL, ET AL.,

Appellants,

v.

WILLIAM WHITFORD, ET AL.,

Respondents.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

BRIEF OF *AMICUS CURIAE* REPUBLICAN NATIONAL COMMITTEE IN SUPPORT OF APPELLANTS

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QUESTIONS PRESENTED

1. Did the district court violate *Vieth v. Jubelirer*, 541 U.S. 267 (2004), when it held that it had the authority to entertain a statewide challenge to Wisconsin's redistricting plan, instead of requiring a district-by-district analysis?

2. Did the district court violate *Vieth* when it held that Wisconsin's redistricting plan was an impermissible partisan gerrymander, even though it was undisputed that the plan complies with traditional redistricting principles?

3. Did the district court violate *Vieth* by adopting a watered-down version of the partisan-gerrymandering test employed by the plurality in *Davis v. Bandemer*, 478 U.S. 109 (1986)?

4. Are Defendants entitled, at a minimum, to present additional evidence showing that they would have prevailed under the district court's test, which the court announced only after the record had closed?

5. Are partisan-gerrymandering claims justiciable?

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INTERESTS OF *AMICUS CURIAE*[1]

The Republican National Committee ("RNC") is a national political party committee and the national political organization of the Republican Party of the United States. The RNC represents the interests of Republican voters and candidates at all levels throughout the nation and is dedicated to growing support for the party and its candidates through its data science and grassroots programs. It engages in a wide range of party-building activities including voter registration, persuasion, and turnout programs, and supports candidates at the local, state, and national levels. In short, the RNC has expertise in conducting political campaigns and how voters respond to them, and can offer a perspective it hopes will be helpful to the Court.

SUMMARY OF ARGUMENT

1. The district court erred in holding that Respondents had standing to challenge Wisconsin's statewide legislative map. A voter alleging an unconstitutional racial gerrymander has standing to challenge only the boundaries of his own district. *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265

[1] Counsel for all parties have consented to the filing of this brief. Letters evidencing consent are on file with the Clerk. Pursuant to S. Ct. R. 37.6, *amicus curiae* certifies that no counsel for a party authored the brief in whole or part, and no party, counsel for a party, or person other than *amicus*, its members, or its counsel made any monetary contributions to fund the preparation or submission of this brief.

(2015); *Sinkfield v. Kelley*, 531 U.S. 28, 30 (2000); *United States v. Hays*, 515 U.S. 737, 738 (1995). It follows that a voter lacks standing to challenge the boundaries of other districts in which she is not registered, even if they unavoidably affect the shape of her district. *Sinkfield*, 531 U.S. at 30.

This Court has rejected the notion that an individual voter can bring a statewide racial gerrymandering claim. *Ala. Legis. Black Caucus*, 135 S. Ct. at 1268. A challenge to a state's complete legislative map must be comprised of independent challenges to the shape of each district within the state. *Id.* at 1265, 1267. Accordingly, a plaintiff with standing is necessary to challenge each district.

Assuming political gerrymandering claims are justiciable, the same reasoning would apply to them. Because the right to vote is a "personal right," *Coleman v. Miller*, 307 U.S. 433, 469 (1939), a person lacks standing to challenge alleged dilution or undervaluation of votes in other districts, *Baker v. Carr*, 369 U.S. 186, 206 (1962). Thus, while each Respondent may challenge the shape of his or her own district, he or she may not challenge the boundaries of other districts or the legislative map as a whole.

2. The district court's proposed standard for political gerrymandering is flawed because it does not require the presence of an actual gerrymander. A gerrymander is a bizarrely shaped district drawn in defiance of traditional redistricting principles, including compactness, contiguity, adherence to natural boundaries, preservation of political subdivisions, and maintenance of communities of interest. *See, e.g.*, *Gomillion v. Lightfoot*, 364 U.S.

339, 340 (1960). Should this Court recognize a cause of action for political gerrymandering, an actual gerrymander should be an essential element of the claim. *See Bush v. Vera*, 517 U.S. 952, 963 (1996); *Vieth v. Jubilerer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring); *id.* at 348 (Souter, J., dissenting); *Davis v. Bandemer*, 478 U.S. 109, 165 (1986) (Powell, J., concurring in part and dissenting in part).

In *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017), this Court held that a plaintiff may challenge racial discrimination in redistricting without showing that traditional redistricting principles were violated. Because race is a suspect classification, however, *see Shaw v. Reno*, 509 U.S. 630, 642-43 (1993), governmental action taken for race-based reasons is subject to strict scrutiny and generally unconstitutional, *see Washington v. Davis*, 426 U.S. 229, 244-45 (1976), regardless of whether it amounts to gerrymandering.

Our nation's "long and persistent history of racial discrimination in voting," as well as the Fourteenth Amendment's application of strict scrutiny to racial classifications, "seem[s] to compel" the conclusion "that racial and political gerrymanders are [not] subject to precisely the same constitutional scrutiny." *Shaw*, 509 U.S. at 650. Political gerrymandering claims do not implicate suspect classifications, and consideration of party affiliation does not trigger strict scrutiny. App. 113a (citing cases); *Miller v. Johnson*, 515 U.S. 900, 914 (1995).

Accordingly, while a voter may challenge racially discriminatory redistricting regardless of whether it amounts to gerrymandering, an actual gerrymander

involving one or more districts drawn in violation of traditional redistricting principles should be required for any political gerrymandering claim. Indeed, far from facilitating political gerrymanders, traditional redistricting principles help mitigate against them. *Connor v. Finch*, 431 U.S. 407, 425-26 (1977); *Reynolds v. Sims*, 377 U.S. 533, 581 (1964).

3. The district court's conception of political gerrymandering claims is also flawed because it relies heavily on the novel concept of the "efficiency gap." App. 159a, 176a-77a; *cf. id.* 234a (Griesbach, J., dissenting). The efficiency gap is effectively a measure of whether a political party has received proportional representation in the legislature. *See id.* 270a (Griesbach, J., dissenting). This Court repeatedly has held that the Constitution does not require states to afford proportional representation, "however phrased," *Mobile v. Bolden*, 446 U.S. 55, 79 (1980), to political, social, or other interest groups, *id.* at 75-76; *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 419 (2006) ("*LULAC*") (plurality op.). The district court's reasoning is simply a variation of the plea for proportional representation this Court rejected in *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971).

Moreover, the model of voters and the electoral process upon which the efficiency gap is based contrasts sharply with this Court's First Amendment jurisprudence. The efficiency gap amalgamates all voters statewide, assuming they would consistently vote for candidates from a particular political party regardless of the district to which they are assigned, the candidates running, the party's platform, the

salient issues, and other election-specific considerations. This Court's jurisprudence concerning political speech, *see, e.g.*, *Buckley v. Valeo*, 424 U.S. 1 14-15, 51 (1976) (per curiam); political parties' associational rights, *see, e.g.*, *N.Y. State Board of Elections v. Lopez Torres*, 552 U.S. 196, 202 (2008); and minor party rights, *see, e.g.*, *Williams v. Rhodes*, 393 U.S. 23, 31 (1968), in contrast, is premised on the fundamental belief that voters are *not* fungible deterministic party automatons. Rather, political debate, each party's platform, and the candidates nominated to run in each election are the primary determinants of how an election will turn out. The efficiency gap's assumptions about, and treatment of, voters is flatly contrary to these lines of authority.

4. Finally, if this Court recognizes a cause of action for political gerrymandering, it should define its scope cautiously, because Congress could assert power to enforce any such right under § 5 of the Fourteenth Amendment. Section 5 allows Congress to prohibit not only actual constitutional violations, but also other state action that is "not itself unconstitutional," as a prophylactic measure. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997); *cf. Katzenbach v. Morgan*, 384 U.S. 641, 649-50 (1966). A broad cause of action for political gerrymandering would upend the balance between the federal government and states by opening the door to congressional efforts to oversee, dictate, or even manipulate the partisan outcomes of state and local elections.

Furthermore, § 2 of the Fourteenth Amendment specifies that when a state violates the right to vote, it may be stripped of its representation in the U.S. House of Representatives and, by extension, the Electoral College. The extreme severity of this constitutional sanction suggests this Court should adopt a high threshold for what constitutes a violation of the Fourteenth Amendment right to vote. It should be reluctant to conclude that such an extreme remedy is authorized for the adoption of legislative maps that accord with traditional redistricting criteria.

ARGUMENT

A sharply divided three-judge panel of the U.S. District Court for the Western District of Wisconsin contends it has achieved a feat that has stymied this Court for decades: crafting a judicially manageable standard for partisan gerrymandering. *Cf. Vieth v. Jubilerer*, 541 U.S. 267, 281 (2004) (plurality op.). Its proposal, however, is a calamitous amalgamation of elements that each run contrary to this Court's redistricting jurisprudence.

The district court held that plaintiffs must first show that "one purpose" behind a challenged legislative map "was to entrench a political party in power." Appendix to Appellants' Jurisdictional Statement (hereinafter, "App.") 109a-10a. Yet this Court repeatedly has held that the Constitution, in assigning primary responsibility for redistricting to legislatures, *see* U.S. CONST. art. I, § 4, cl. 1, contemplates that legislators may seek to gain

partisan advantage in redistricting, *Vieth*, 541 U.S. at 285; *Miller v. Johnson*, 515 U.S. 900, 914 (1995).

Second, plaintiffs must establish that, as a result of district boundaries, political parties that receive "roughly equivalent statewide vote shares" would nevertheless win differing numbers of seats in the legislature. App. 153a-54a. Yet this Court has rejected the notion that a political party is entitled to representation in the legislature proportional to its share of the vote, *see, e.g.*, *Mobile v. Bolden*, 446 U.S. 55, 78-79 (1980); *see also Davis v. Bandemer*, 478 U.S. 109, 130-31 (1986), and recognized that statewide vote aggregates are virtually irrelevant, since each legislative election is held in a different district between different candidates who may appeal to voters for different reasons, *see Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971).

Finally, plaintiffs must demonstrate that any such effects are not "justified by the legitimate state concerns and neutral factors that traditionally bear on the reapportionment process." App. 180a. However, the district court flatly rejected the notion that a state could defeat a political gerrymandering claim by showing that it created regularly shaped districts consistent with traditional, generally accepted redistricting criteria. *Id.* 122a.

The Framers of the Constitution recognized it is "essential" that a republican government "be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it." THE FEDERALIST NO. 39, at 194 (Madison) (George W. Carey & James McClellan, eds. 2001). It has been argued that a cause of action for political

gerrymandering can protect "the aggregate minority of people in a state" from being "wholly overpowered by the combined action of the numerical majority" and left with a greatly diminished voice in Congress, a state legislature, or other legislative body. 1 CHANCELLOR JAMES KENT, COMMENTARIES 231 n.(c) (12th ed. 1873).

Even if this Court embraces such sentiments, it should reject the district court's deeply flawed attempt to implement them. Part I explains that a voter has standing to challenge political gerrymandering only of her own district, not the state as a whole. Part II goes on to demonstrate that, should the Court hold that political gerrymandering claims are justiciable, the existence of an actual gerrymander—a bizarrely-shaped district not drawn in accordance with traditional redistricting principles—should be an essential element. Part III outlines the numerous problems with the district court's heavily reliance on the concept of "efficiency gaps" to determine whether political gerrymandering exists. Finally, Part IV concludes by emphasizing why caution is warranted in defining the scope of what may constitute a political gerrymandering claim, further calling into question the district court's particularly aggressive holding.

I. RESPONDENTS LACK STANDING TO CHALLENGE WISCONSIN'S ENTIRE LEGISLATIVE MAP

Most basically, the district court exceeded Article III's justiciability limits by allowing Respondents to

challenge the composition of Wisconsin's entire statewide legislative map, rather than solely the districts in which they each live. *See* App. 57a, 221a-22a.

This Court repeatedly has rejected voters' attempts to challenge alleged gerrymandering of districts in which they do not reside. *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015); *Sinkfield v. Kelley*, 531 U.S. 28, 30 (2000); *United States v. Hays*, 515 U.S. 737, 739 (1995). In the context of racial gerrymandering, this Court has held that a plaintiff has standing to challenge his own district's boundaries because the harms caused by gerrymandering "are personal" to that district's voters. *Ala. Legis. Black Caucus*, 135 S. Ct. at 1265. Voters in racially gerrymandered districts have "been denied equal treatment because of the legislature's reliance on racial criteria" and "may suffer the special representational harms racial classifications can cause in the voting context." *Hays*, 515 U.S. at 745; *see also Ala. Legis. Black Caucus*, 135 S. Ct. at 1265 (noting that voters in a racially gerrymandered district have standing to challenge it because they may be "represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group") (quotation marks and citations omitted).

A voter, however, can neither "suffer those special harms" nor "personally be[] subjected to a racial classification" based on the composition of other districts in which he does not reside. *Hays*, 515 U.S. at 745; *see also Ala. Legis. Black Caucus*, 135 S. Ct. at 1265 (reiterating that the harms of gerrymandering

"do not so keenly threaten a voter who lives elsewhere in the State"). Thus, a voter's standing to challenge his own district does not grant him license to challenge others. *Shaw v. Hunt*, 517 U.S. 899, 904 (1996); *Ala. Legis. Black Caucus*, 135 S. Ct. at 1265. A voter even lacks standing to challenge alleged gerrymandering of adjacent districts on the grounds they unavoidably affect the shape of his own. *Sinkfield*, 531 U.S. at 30 (rejecting argument that "an unconstitutional use of race in drawing the boundaries of majority-minority districts necessarily involves an unconstitutional use of race in drawing boundaries of neighboring majority-white districts"). A plaintiff's complaints about allegedly unconstitutional gerrymandering in districts in which he does not reside constitutes, at most, a nonjusticiable generalized grievance. *Hays*, 515 U.S. at 745.

The district court held that these justiciability doctrines are inapplicable because Respondents complain about "the effect of [the] statewide districting map on the ability of Democrats to translate their votes into seats." App. 224a-25a. The court added that, because "[t]he harm is the result of the entire map" rather than the configuration of a particular district," any "individual Democrat has standing to assert a challenge to the statewide map." *Id.* 225a.

The district court's standing analysis is flatly contrary to this Court's precedents and would have pernicious consequences. First, in *Alabama Legislative Black Caucus*, 135 S. Ct. at 1268, this Court specifically rejected the concept of statewide

gerrymandering challenges. It recognized that plaintiffs may allege that "every individual district in a State" suffers from unconstitutional racial gerrymandering. *Id*. at 1265 (emphasis omitted). In such cases, "neither the use of statewide evidence nor the effort to show widespread effect can transform a racial gerrymandering claim about a set of individual districts"—even a "set" that includes all districts in the state—"into a separate, general claim that the legislature racially gerrymandered the State 'as' an undifferentiated 'whole.'" *Id*. at 1267; *cf*. *League of United Latin Am*. *Citizens v*. *Perry*, 548 U.S. 399, 418 (2006) ("*LULAC*") (plurality op.) (rejecting attempt to mount statewide political gerrymandering claim, in part because "partisan aims did not guide every line [the legislature] drew"). In other words, a claim that a state's entire legislative map has been unconstitutionally gerrymandered is really a series of independent challenges to the constitutionality of each legislative district within that map. Each such challenge must therefore be brought by a plaintiff with standing to assert it. Though *Alabama Legislative Black Caucus* arose in the context of racial gerrymandering, this reasoning—as well as this Court's other precedents concerning standing to challenge alleged gerrymanders—applies with equal force in the context of political gerrymandering.

Second, Respondents' First Amendment and Equal Protection claims concern the legal effect accorded their votes as a result of Wisconsin's legislative district map. *See* App. 35a, 220a. "[A] voter's franchise is a personal right." *Coleman v*. *Miller*, 307 U.S. 433, 469 (1939); *see also Bd*. *of*

Estimate v. Morris, 489 U.S. 688, 698 (1989). Each Respondent has standing to challenge the under-valuation or dilution of his or her own vote, *see Baker v. Carr*, 369 U.S. 186, 206 (1962), but not of someone else's vote (*i.e.*, voters registered in other districts), *see Cal. Bankers Ass'n v. Schultz*, 416 U.S. 21, 51 (1974) ("[O]ne has standing only to vindicate his own rights."). The fact that each person's vote plays a role in determining the partisan composition of a legislative body does not give a plaintiff standing to assert other voters' rights. While the ability of Respondents' preferred political party to exercise power in the Wisconsin legislature depends on the results of elections in districts other than their own, Respondents lack a particularized and concrete interest in the conduct and outcome of those other elections. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

Finally, from a practical perspective, granting plaintiffs standing would lead to unpredictable and deleterious consequences. At a minimum, a plaintiff who does not live in a politically gerrymandered legislative district would be able to challenge the composition of other districts in which he is not registered. Taken to its logical extreme, Respondents' theory would allow voters in states where political gerrymandering had not occurred to challenge congressional redistricting in other states. Plaintiffs could claim that another state's redistricting scheme "entrench[ed]" an opposing political party in power in the U.S. House of Representatives and "diminish[ed] the value of the plaintiffs' votes" by "erecting a barrier that prevents the plaintiffs' party of choice from

commanding a legislative majority" in the House. App. 220a. Such facially untenable interstate voter standing is a direct implication of the district court's holding.

Thus, while Respondents have standing to challenge the constitutionality of the boundaries of the legislative districts in which they reside, they may not go further and challenge the constitutionality of either other districts, or the legislative map as a whole.

II. AN ACTUAL GERRYMANDER SHOULD BE AN ESSENTIAL ELEMENT OF ANY POLITICAL GERRYMANDERING CLAIM

Perhaps the most fundamental flaw with the district court's analysis is that it purports to find political gerrymandering in the absence of any gerrymandering at all. As the district court dissent explains, Wisconsin's redistricting plan "does not violate any of the redistricting principles that traditionally govern the districting process." App. 250a (Griesbach J., dissenting). "Without gerrymandered districts," the dissent rightly concludes, "there is no unconstitutional gerrymander." *Id*. at 258a.

The district court majority, however, held that "compliance with traditional districting principles" does not "create[] a constitutional 'safe harbor' for state legislatures." *Id*. at 120a. It insisted, "A map that appears congruent and compact to the naked eye may in fact be an intentional and highly effective partisan gerrymander." *Id*. at 122a.

Redistricting is the result of "a complex blend of political, economic, regional, and historical considerations." *Wells v. Rockefeller*, 394 U.S. 542, 554-55 (1969) (White, J., dissenting). The essence of a gerrymander is an unnecessarily bizarrely shaped district drawn without regard to traditional redistricting criteria. These traditional criteria include promoting compactness of districts, ensuring their physical contiguity, following natural boundaries, preserving the integrity of political subdivisions, and protecting communities of interest. *See Vieth*, 541 U.S. at 348 (Souter, J., dissenting) (identifying "contiguity, compactness, respect for political subdivisions, and conformity with geographic features like rivers and mountains" as "traditional redistricting principles"); *Miller*, 515 U.S. at 916 (recognizing the need for legislatures to follow "traditional race-neutral districting principles, including but not limited to compactness, contiguity, [and] respect for political subdivisions or communities defined by actual shared interests").[2]

The "gerrymander" derives its name from "an amalgam of the names of Massachusetts Governor Elbridge Gerry and the creature ('salamander') which

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[2] *See also Brown v. Thomson*, 462 U.S. 835, 843 (1983) (recognizing a state's interest in "using counties as representative districts" is "substantial"); *Karcher v. Daggett*, 462 U.S. 725, 784 (1983) (Powell, J., dissenting) (citing preservation of "geographic and political boundaries" as "plainly . . . relevant to rational reapportionment decisions"); *Reynolds v. Sims*, 377 U.S. 533, 578 (1964) (recognizing that "provid[ing] for compact districts of contiguous territory" and "maintain[ing] the integrity of various political subdivisions," are "valid considerations").

the outline of an election district he was credited with forming was thought to resemble." *Vieth*, 541 U.S. at 274. The State of Alabama's reconfiguration of the City of Tuskegee "from a square to an uncouth twenty-eight-sided-figure" for the sole purpose of excluding African-American voters is perhaps the quintessential example of gerrymandering. *Gomillion v. Lightfoot*, 364 U.S. 339, 340 (1960); *see also Bandemer*, 478 U.S. at 179 (Powell, J., concurring in part and dissenting in part) (concluding legislative map was politically gerrymandered in large part because it resembled a "crazy quilt").

A regularly shaped district drawn according to traditional, time-honored, judicially approved, substantively defensible redistricting criteria, by definition, is not a gerrymander. *See Bush v. Vera*, 517 U.S. 952, 963 (1996) ("[T]he neglect of traditional redistricting criteria is . . . necessary" for a gerrymandering claim). In *Vieth*, Justices Souter and Ginsburg agreed that a plaintiff pursuing a political gerrymandering claim must begin by "show[ing] that the district of his residence paid little or no heed to . . . those traditional redistricting principles whose disregard can be shown straightforwardly . . . ." 541 U.S. at 348 (Souter, J., dissenting). Justice Kennedy's *Vieth* concurrence similarly suggested that a cause of action for political gerrymandering should be available when district lines were drawn for reasons "unrelated to any legitimate legislative objective." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring);[3] *see*

[3] A legislative map drawn according to traditional redistricting principles is necessarily related to "'legitimate legislative objectives,'" regardless of whether it happens to favor a

also Bandemer, 478 U.S. at 165 (Powell, J., concurring in part and dissenting in part) (emphasizing that a political gerrymandering claim must be resolved "by reference to the configurations of the districts," the "observance of political subdivision lines," and other similar criteria).

In *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017), this Court held that a plaintiff is not required to demonstrate that a redistricting plan "conflicts with traditional redistricting criteria" to challenge it under the Equal Protection Clause as impermissibly race-based. The Court acknowledged that departures from such traditional criteria often will accompany, and be important circumstantial evidence of, racially discriminatory redistricting schemes. *Id*. But it left open the possibility that a voter may "establish racial predominance in the absence of an actual conflict [with traditional redistricting criteria] by presenting direct evidence of the legislative purpose and intent." *Id*.; *see also Miller*, 515 U.S. at 913 (rejecting "suggest[ion] that a district must be bizarre on its face before there is a constitutional violation").

Despite their label, such "racial gerrymandering" cases are simply applications of the century-old principle that the Fourteenth Amendment generally prohibits states from enacting laws or taking other actions for racially discriminatory purposes. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-67 (1977); *see also Miller*, 515 U.S. at 913.

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particular political party or less politically advantageous alternatives existed. App. 256a (quoting *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring)).

Because race is a suspect classification, *see Shaw v. Reno*, 509 U.S. 630, 642-43 (1993), facially neutral laws enacted for race-based reasons are subject to strict scrutiny, *see Washington v. Davis*, 426 U.S. 229, 244-45 (1976). Even governmental action that would be wholly unobjectionable if performed for race-neutral purposes generally is unconstitutional if performed for racially discriminatory reasons. *Compare Richardson v. Ramirez*, 418 U.S. 24, 53-55 (1974) (upholding felon disenfranchisement provisions enacted without racially discriminatory purpose), *with Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (invalidating felon disenfranchisement provision "motivated by a desire to discriminate against blacks on account of race").

In the context of redistricting, the Equal Protection Clause prohibits a state from using race as the "predominant factor" that motivates its decision "to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916; *see also Cooper v. Harris*, 137 S. Ct. 1455, 1480 (2017) ("The Equal Protection Clause prohibits the unjustified drawing of district lines based on race."). Such race-based redistricting "threaten[s] to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Shaw*, 509 U.S. at 643. It also "reinforces the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls." *Id.* at 647. Thus, plaintiffs who challenge redistricting plans on race-based grounds are not necessarily alleging racial gerrymandering *per se*, but rather invidious racial

discrimination, which is unconstitutional regardless of the form it takes—and regardless of whether it amounts to gerrymandering. *Cf. id.* at 649-50 ("Classifying citizens by race . . . threatens special harms that are *not present in our vote-dilution* cases") (emphasis added).

Plaintiffs in political gerrymandering cases are very differently situated. They do not bring their claims as members of a suspect class or "discrete and insular minorit[y]." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Their party affiliation is not an "immutable characteristic." *Vieth*, 541 U.S. at 287. The gravamen of the harm such plaintiffs claim to suffer is not stigmatization, reinforcement of negative stereotypes, or a dignitary offense, but rather diluted influence in the state legislature. *See* App. 220a.

Unlike race, mere consideration of party membership does not trigger heightened constitutional scrutiny. Many federal statutes expressly classify based on party membership in a way that would be constitutionally and morally intolerable along racial lines. *See, e.g.*, 52 U.S.C. § 20923(c)(1) (specifying "the chair and vice chair" of the Election Assistance Commission "may not be affiliated with the same political party"); *id.* § 30106(a)(1) ("No more than 3 members of the [Federal Election] Commission . . . may be affiliated with the same political party.").

And this Court repeatedly has recognized that states may properly consider partisan concerns, at least to some extent, when redistricting. *See, e.g.*, App. 113a (citing cases); *Miller*, 515 U.S. at 914

(noting that redistricting typically "implicates a political calculus," requiring numerous balances and tradeoffs among "various interests"); *Bandemer*, 478 U.S. at 128 (rejecting proposition that taking "any political consideration[] . . . into account in fashioning a reapportionment plan is sufficient to invalidate it," because "[p]olitics and political considerations are inseparable from districting and apportionment") (quotation marks omitted); *cf. N.Y. State Board of Elections v. Lopez Torres*, 552 U.S. 196, 205 (2008) (stating that "'smoke-filled rooms' . . . have long been an accepted manner of selecting party candidates").

In short, this Court's precedents do not "compel[] the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny." *Shaw*, 509 U.S. at 650. To the contrary, our nation's "long and persistent history of racial discrimination in voting," as well as "Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race . . . would seem to compel the opposite conclusion." *Id.*; *see also Bandemer*, 478 U.S. at 125 ("That the characteristics of the complaining group are not immutable or that the group has not been subject to the same historical stigma may be relevant to the manner in which the case is adjudicated . . . .").

While actual gerrymandering is not a necessary element of a racial discrimination claim under the Equal Protection Clause, *Bethune-Hill*, 137 S. Ct. at 799, it should be an essential component of a political gerrymandering claim, to the extent this Court chooses to fashion one, *cf. Bush*, 517 U.S. at 980-81

(recognizing that "the bizarre shaping of [d]istricts" and indifference to "natural or traditional divisions" is not merely evidence of a gerrymander, but itself is "part of the constitutional problem"). Accordingly, districts drawn in accord with traditional redistricting principles should not be susceptible to political gerrymandering challenges.

This Court has repeatedly recognized the importance and legitimacy of these traditional districting principles. *Easley v. Cromartie*, 532 U.S. 234, 258 (2001); *see also Miller*, 515 U.S. at 916. Geographic compactness, for example, facilitates "political organization, electoral campaigning, and constituent representation." *Karcher*, 462 U.S. at 756 (Stevens, J., concurring). Maintaining pre-existing political boundaries is similarly important, especially for state legislative redistricting, because "[l]ocal governmental entities are frequently charged with various responsibilities incident to the operation of state government." *Reynolds*, 377 U.S. at 580; *see also Brown*, 462 U.S. at 843 (recognizing the state's "substantial and legitimate . . . concern[]" in preserving county boundaries"). Moreover, many state laws constitute "local legislation, directed only to the concerns of particular political subdivisions." *Reynolds*, 377 U.S. at 580-81. Additionally, "[r]esidents of political units such as townships, cities, and counties often develop a community of interest, particularly when the subdivision plays an important role in the provision of governmental services." *Karcher*, 462 U.S. at 758 (Stevens, J., concurring); *see also Abate v. Mundt*, 403 U.S. 182, 185 (1971). In *Mahan v. Howell*, 410 U.S. 315, 325, 329 (1973), this

Court held that "maintaining the integrity of political subdivision lines" for counties and cities was sufficiently important to allow population deviations among districts exceeding 15%.

Far from contributing to political gerrymandering, traditional redistricting criteria mitigate against it. *See Reynolds*, 377 U.S. at 578-59 ("Indiscriminate districting, without regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering."); *see also id.* at 581 (reiterating that "construct[ing] districts along political subdivision lines . . . deter[s] the possibilities of gerrymandering"); *Karcher*, 462 U.S. at 758 (Stevens, J., concurring) ("Extensive deviation from established political boundaries is another possible basis for a prima facie showing of gerrymandering."). Indeed, in *Connor v. Finch*, 431 U.S. 407, 425-26 (1977), this Court ordered the district court to "draw legislative districts that are reasonably contiguous and compact, so as to put to rest suspicions" about potential gerrymandering. The district court's approach below, in contrast, leads to the bizarre conclusion that a state may be forced to draw or adopt an *actually* gerrymandered map featuring convoluted districts that split apart towns or connect distant regions in order to secure the "correct" number of seats in the legislature for each political party and eliminate purported constitutional problems with a map, such as Wisconsin's, that accords with traditional redistricting criteria.

In light of this Court's longstanding recognition of traditional redistricting principles as bulwarks

against political gerrymandering, this Court should require a substantial violation or abandonment of such principles before entertaining such claims. *See Vieth*, 541 U.S. at 348 (Souter, J., dissenting); *see also id.* at 307 (Kennedy, J., concurring); *Bandemer*, 478 U.S. at 165 (Powell, J., concurring in part and dissenting in part).

III. THE DISTRICT COURT'S PROPOSED STANDARD FOR POLITICAL GERRYMANDERING CLAIMS IS IMPROPER DUE TO ITS HEAVY RELIANCE ON THE "EFFICIENCY GAP"

This Court should also reject the district court's proposed formulation of a political gerrymandering standard due to its heavy reliance on the concept of the "efficiency gap" to demonstrate that Respondents' "representational rights have been burdened." App. 159a, *see also id.* at 176a-77a; *cf. id.* 234a (Griesbach, J., dissenting) (labeling the efficiency gap "the center piece" of Respondents' case).

Nearly a half-century ago, this Court declared, "Neither courts nor legislatures are furnished any specialized calipers that enable them to extract from the general language of the Equal Protection Clause of the Fourteenth Amendment the mathematical formula that establishes what range of possible deviations is permissible, and what is not." *Mahan*, 410 U.S. at 329. The efficiency gap is Respondents' flawed retort.

To calculate an efficiency gap, a court begins by separately tallying the total number of purportedly

"wasted votes" each political party received in legislative races throughout the state in the previous election. App. 160a. A vote is deemed "wasted" if it was cast for either a losing candidate, or a winning candidate but was unnecessary because it exceeded the "50% plus one votes necessary to secure the candidate's victory." *Id.* The efficiency gap is "the difference between the wasted votes cast for each party, divided by the overall number of votes cast in the election." *Id.*

Thus, the efficiency gap is a comparative measure of votes the court chooses to designate as "wasted," in the sense they neither led to, nor were necessary for, an electoral success. App. 160a n.274. A party with a favorable efficiency gap can "translate, with greater ease, its share of the total votes cast in an election into legislative seats." App. 161a. The district court added that the efficiency gap is also "a measure of the proportion of 'excess' seats that a party secured in an election beyond what the party would be expected to obtain with a given share of the vote." *Id.*

The district court concluded that a substantial efficiency gap is persuasive evidence of political gerrymandering. App. 159a, 165a. The fact that Wisconsin's legislative map resulted in a pro-Republican efficiency gap of approximately 10% or more bolstered Respondents' political gerrymandering claim. App. 162a-64a.

As demonstrated below, the efficiency gap is simply a mechanism for compelling proportional representation for political parties, which this Court repeatedly has held is not constitutionally required.

Furthermore, the conception of voters and elections upon which the efficiency gap is based flies in the face of this Court's First Amendment jurisprudence across a wide range of areas. U.S. CONST. amend. I.

A. The District Court's Proposed Standard Effectively Requires Proportional Representation

Perhaps the most fatal flaw in the concept of the efficiency gap is that it is simply a measure of proportional representation. *See* App. 236a (Griesbach J., dissenting). As the district court dissent explains, a large efficiency gap means that the number of seats won by a political party's candidates was "disproportionately small compared to their statewide vote totals." *Id.* at 270a (Griesbach, J., dissenting).

This Court repeatedly has emphasized that the Constitution does not require states or other political subdivisions to afford proportional representation in legislative bodies, "however phrased," *Mobile*, 446 U.S. at 79, to political, social, or other interest groups. *See id.* at 75-76, 78 ("The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization. . . . [P]olitical groups [do not] themselves have an independent constitutional claim to representation . . . ."); *LULAC*, 548 U.S. at 419 (plurality op.) ("[T]here is no constitutional requirement of proportional representation . . . .");

Chapman v. Meier, 420 U.S. 1, 17 (1975).[4] A group is not constitutionally entitled to a districting scheme that will afford it "legislative seats in proportion to its voting potential." *White v. Regester*, 412 U.S. 755, 765-66 (1973).

Bandemer emphasized that the Constitution requires neither "proportional representation [nor] that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." 478 U.S. at 130 (plurality op.). And, despite *Vieth*'s repudiation of *Bandemer*, it nevertheless reaffirmed that the Constitution "nowhere says that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers." *Vieth*, 541 U.S. at 288 (plurality op.).

In *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973), this Court affirmed a state's power to voluntarily choose to "allocate political power to [its political]

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[4] This principle parallels the Court's recognition that it would be affirmatively unconstitutional to attempt to manufacture proportional representation of racial, ethnic, or other social groups in the other main representative body the Constitution requires both states and the federal Government to convene: juries. *See* U.S. CONST. amend. VI; *Cassell v. Texas*, 339 U.S. 282, 287 (1950) (holding that, because the Equal Protection Clause prohibits racial discrimination, "proportional limitation" of grand jurors based on race "is not permissible"); *cf. Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) (holding that, while petit juries must be drawn from a source fairly representative of the community," the Constitution does not require that each jury "mirror the community and reflect the various distinctive groups in the population").

parties in accordance with their voting strength." Despite its endorsement of state discretion to pursue proportionality, however, this Court never suggested such a goal is constitutionally required.

The district court itself inadvertently demonstrated that an efficiency gap is simply a stylized measure of a state's deviation from proportional representation. The court explained that the efficiency gap "measures the magnitude of a [redistricting] plan's deviation from the relationship *we would expect to observe*" between the aggregate number of votes a party's candidates for legislature receive across all legislative elections in the state, and the number of "seats" in the legislature that party's candidates win. App. 169a (emphasis added). Thus, the court expressly established proportional representation as the "expect[ed]" constitutional baseline, and deviations from that constitutional ideal as requiring ever-greater justification. *Id.*; *see also id.* at 273a (Griesbach, J., dissenting) ("[T]he notion that we would 'expect' a given number of seats required imputing the normative judgment that a party's seats won must be proportional to the party's statewide vote totals."). Despite the district court's protestations to the contrary, *see* App. 167a, the efficiency gap is essentially a measure of proportionality, which this Court held is not constitutionally required.

Indeed, the district court's efficiency gap analysis is a variation on the argument this Court rejected in *Whitcomb*, 403 U.S. at 153. In that case, inner-city residents complained that Marion County's multi-member state legislative district systematically

precluded them from electing ideologically sympathetic representatives to the state legislature. Rejecting their claim, this Court explained that, in a typical legislative election:

> [a]rguably the losing candidates' supporters are without representation since the men they voted for have been defeated; arguably they have been denied equal protection of the laws since they have no legislative voice of their own. . . . But we have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates, *even in those so-called "safe" districts where the same party wins year after year*.

Id. at 153 (emphasis added); *see also id*. at 154-55 (declining to recognize a constitutional claim where a certain group "has found itself outvoted and without legislative seats of its own," so long as its members are not "being denied access to the political system"). The Court rejected the notion "that any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single-member district." *Id*. at 156.

Likewise, in *Connor*, 431 U.S. at 428 (Blackmun, J., concurring), Justice Blackmun reiterated that our system of "direct territorial representation by single-member districts . . . . does not normally provide electoral minorities with proportional representation in the legislature." A group's ability to win seats

depends on "a number of factors," including not only its size, but "its geographic dispersion" and "the size of legislative districts." *Id.*; *see also Bandemer*, 478 U.S. at 130.

In short, the efficiency gap's designation of plaintiffs' votes as wasted "seems a mere euphemism for political defeat at the polls." *Whitcomb*, 403 U.S. at 153. Because the district court's strong reliance on the efficiency gap makes lack of proportionality a key component of a political gerrymandering claim, this Court should jettison its entire approach.

B. The Statewide Efficiency Gap Concept Is Inconsistent With This Court's First Amendment Jurisprudence

Another fundamental problem with the efficiency gap is that the model of voters and voting behavior upon which it is based runs directly contrary to this Court's First Amendment jurisprudence across a variety of areas. The efficiency gap purports to measure statewide political gerrymandering by aggregating supposedly "wasted" votes from all legislative elections throughout the state. The implicit assumption behind this calculation is that most voters are fungible party automatons who would continue to vote for candidates from a particular party in election after election, regardless of the district in which they are placed, the identities of the candidates running, the parties' platforms, the major issues in the election, or any other such circumstances. *See* App. 242a (Griesbach, J., dissenting). Without this

dubious assumption, the efficiency gap's statewide aggregates have virtually no relevance. *See id.* at 236a (Griesbach, J., dissenting) (pointing out that the efficiency gap "presupposes that voters are voting for a statewide party rather than simply for an individual candidate").

The Constitution does not require courts or states to treat voters as deterministic interchangeable commodities in this manner. To the contrary, this Court's First Amendment jurisprudence is based on the fundamental principles that voters are capable of engaging in, and being persuaded by, political discourse; political parties' candidates and messages are crucial determinants of electoral outcomes; and a vote cast for a voter's preferred candidate is not "wasted," regardless of whether it contributes to electoral success.

1. Political communications cases—"[P]olitical speech in the course of elections" is "the speech upon which democracy depends." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 405 (2000) (Kennedy, J., dissenting). This Court repeatedly has held that "a major purpose" of the First Amendment is to "protect the free discussion of government affairs," including "discussions of candidates." *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *see also N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open," even if it includes "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

Political debate is so important that this Court has struck down virtually all restrictions on independent expenditures that fund political communications. *See Buckley v. Valeo*, 424 U.S. 1, 51 (1976) (per curiam) (invalidating expenditure limits for individuals); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 614 (1996) (same for political parties); *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496 (1985) (same for PACs); *Citizens United v. FEC*, 558 U.S. 310, 365 (2010) (same for corporations). This Court has repeatedly afforded such robust protection to political speech and debate precisely because "the ability of the citizenry to make *informed choices* among candidates for office is essential." *Buckley*, 424 U.S. at 14-15; *accord Citizens United*, 558 U.S. at 339. In short, this Court's political speech jurisprudence is based on the bedrock premise that political debate—candidates' communications with voters and voters' interactions with each other—plays a critical role in shaping electoral outcomes. The efficiency gap's reductionist view of voters, in contrast, assumes that public debate of the candidates and issues pales before the true determinant of voter behavior: party preference.

2. Party nomination cases—Another line of First Amendment cases protects political parties' fundamental right of association in the selection of nominees for office. *See Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989). Political parties have a First Amendment right to "choose a candidate-selection process that will in its view produce the nominee who

best represents its political platform." *Lopez-Torres*, 552 U.S. at 202. Courts are greatly circumscribed in their ability to intervene in a party's candidate selection process. *O'Brien v. Brown*, 409 U.S. 1, 4 (1972) (per curiam); *accord Cousins v. Wigoda*, 419 U.S. 477, 491 (1975); *see also Democratic Party of the United States v. Wisconsin* ex rel. *LaFollette*, 450 U.S. 107, 124 (1981).

One of the main reasons why the Constitution affords such stringent protection to political parties' associational rights is the Court's recognition that each political party's choice of candidates and platform is a key determinant of electoral outcomes. *See Cal. Democratic Party v. Jones*, 530 U.S. 567, 579 (2000) ("[B]eing saddled with an unwanted, and possibly antithetical, nominee would . . . severely transform [the party]."); *see also Eu*, 489 U.S. at 231 n.21. A party's nominee is its "ambassador to the general electorate in winning it over to the party's views" on "the most significant public policy issues of the day." *Jones*, 530 U.S. at 575; *see also Eu*, 489 U.S. at 224 (recognizing the importance of a party's decision to "select[] a standard bearer who best represents the party's ideologies and preferences" (quotation marks omitted)); *Cousins*, 419 U.S. at 489 (recognizing that selection of a party's presidential nominee is "a task of supreme importance to every citizen in the Nation").

The efficiency gap, in contrast, treats a party's nominees and platform as largely irrelevant. Based on past votes, a person is expected to mechanically vote for the same party in the future, regardless of these intra-party processes that the Court regards as

integral to electoral outcomes. *Cf. Tashjian v. Republican Party*, 479 U.S. 208, 216 (1986) (recognizing the candidate nomination process as the "crucial juncture at which the [party's] appeal to common principles may be translated into concerted action, and hence to political power in the community"). Yet again, the assumptions underlying the efficiency gap are inconsistent with this Court's precedents.

3. Minor party rights cases—Finally, the efficiency gap's conception of "wasted votes," which are to be minimized or avoided, is inconsistent with this Court's caselaw concerning the rights of minor parties. Though a state's interests, such as conducting orderly elections and preventing ballots from becoming unwieldy, are often sufficient to justify restrictions that burden minor parties' rights, *see Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367, 369-70 (1997), this Court has subjected laws that impose especially burdensome or unjustifiably discriminatory ballot-access requirements on minor parties to strict scrutiny. *See Anderson v. Celebrezze*, 460 U.S. 780, 793-94 (1983); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968). Under the efficiency gap's conception of voting, however, far from protecting the right to vote, this line of cases undermines it by creating new opportunities for people to "waste" their votes on minor parties that are unlikely to seize control of a legislative chamber.

Thus, the efficiency gap model which lies at the heart of Respondents' case, and which formed a substantial component of the district court's

reasoning, is an impermissible proxy for proportional representation and runs directly contrary to this Court's First Amendment jurisprudence throughout the rest of election law. This Court should therefore reject the district court's approach to identifying impermissible political gerrymandering.

IV. CAUTION IS WARRANTED IN DEFINING THE SCOPE OF A POLITICAL GERRYMANDERING CAUSE OF ACTION

A final deficiency in the district court's conception of political gerrymandering is that it is simply too sweeping and aggressive. It places primary weight on proportional representation of political parties, substantially undervalues the importance of traditional redistricting criteria, and invites constant inquiries into legislators' subjective intentions to root out a desire for partisan advantage.

Creating such a broad cause of action for political gerrymandering would allow Congress to assert far greater authority to regulate state and local elections under § 5 of the Fourteenth Amendment, fundamentally changing the balance of power between the federal government and states. It would open the door to congressional attempts to manipulate the outcomes of state and local elections, ostensibly as a prophylactic measure to protect against potential political gerrymandering by preventing such elections from reaching the "wrong" partisan results.

Additionally, the severe remedies for violations of the right to vote set forth in § 2 of the Fourteenth

Amendment strongly suggest the Court should be reluctant to recognize the broad right against political gerrymandering advocated by Respondents and adopted by the district court.

A. Congress Would Have Power Under § 5 of the Fourteenth Amendment to Enforce Any Rights Against Political Gerrymandering

Any cause of action for political gerrymandering this Court creates will be subject to congressional enforcement under § 5 of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 5. Section 5 allows Congress to enact laws to "deter[] or remed[y] constitutional violations . . . even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the states.'" *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)). Congress has "wide latitude" in exercising this power, so long as there is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520.; *cf. Katzenbach v. Morgan*, 384 U.S. 641, 649-50 (1966) (holding that § 5 grants Congress "the same broad powers expressed in the Necessary and Proper Clause" to enact any legislation it deems "appropriate" to protect the right to vote).[5]

[5] This Court has yet to expressly resolve the tension between *Boerne*, 521 U.S. at 518, and *Katzenbach*, 384 U.S. at 649-50,

While the Constitution grants Congress virtually plenary power over federal elections, its authority over elections for state and local offices is limited to the Spending Clause and § 5 of the Fourteenth Amendment. *See* Michael T. Morley, *Dismantling the Unitary Electoral System? Uncooperative Federalism in State and Local Elections*, 111 NW. U. L. REV. ONLINE 103, 105-10 (2017). The broader the scope of a right against political gerrymandering this Court recognizes, the more power Congress will claim to "enforce" that right for federal, state, and local elections under § 5. For example, if this Court adopts an intent requirement as part of a political gerrymandering claim, *see, e.g. Mobile*, 446 U.S. at 62-64 (construing § 2 of the Voting Rights Act to prohibit intentional racial discrimination that violates the Constitution), Congress may assert authority to enact a statute dispensing with it under § 5, *see* Voting Rights Amendments Act of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (June 29, 1982) (codified at 52 U.S.C. § 10301) (amending Voting Rights Act to eliminate intent requirement and prohibit certain disparate racial impacts that do not necessarily violate the Constitution). Likewise, even if this Court continues to reject the need for proportionality between vote totals and legislative seats, Congress may assert power to require it for elections at all levels as a "preventive" measure. *Boerne*, 521 U.S. at 526.

This Court should refrain from defining a right against political gerrymandering in a way that would

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concerning the scope of Congress' remedial authority over voting rights.

substantially disturb the delicate balance between the federal government and the states by allowing Congress to claim broad power to reshape state and local electoral districts in the name of partisan balancing, fairness, proportionality, or other such asserted goals. *See Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign. . . . Congressional interference . . . would upset the usual constitutional balance of federal and state powers."). One way of reasonably cabining Congress' § 5 power is to clarify that an actual gerrymander—the creation of one or more bizarrely shaped districts crafted in disregard of traditional redistricting criteria—is an unalterable perquisite of a political gerrymandering claim. *See supra* Part II. A broad or ill-defined standard for political gerrymandering, in contrast, would leave the door open to partisan congressional manipulation of state and local races in the guise of political equity.

B. Section 2 of the Fourteenth Amendment Suggests a High Threshold for Denials of the Right to Vote Due to Political Gerrymandering

Finally, as the district court acknowledged, Respondents' First Amendment claim is inextricably intertwined with the Fourteenth Amendment right to vote. *See* App. 101a-06a (discussing the close relationship between the First Amendment and

voting rights in this Court's seminal cases) (citing, *inter alia*, *Anderson*, 460 U.S. at 786-87 n.7, 789; *Williams*, 393 U.S. at 30-31). Section 2 of the Fourteenth Amendment, which contains the Constitution's only express mention of an affirmative right to vote, counsels against a broad conception of a right against political gerrymandering.

Section 2 (as modified by the Nineteenth and Twenty-Sixth Amendments) provides that, when a state "denie[s] . . . or in any way abridge[s]" the "right to vote" in elections for specified federal or state offices to any U.S. citizens who are at least 18 and have not been disenfranchised for committing a felony, that state's basis of representation in the U.S. House of Representatives (and, by extension, the Electoral College) "shall be" proportionately reduced. U.S. CONST. amend. XIV, § 2. If a legislative map is a political gerrymander that violates the right to vote of some fraction of a state's population, § 2 of the Fourteenth Amendment authorizes Congress to reduce the size of that state's congressional delegation.

The "extraordinary magnitude" of this penalty "provide[s] important insight into the scope of the constitutional right to vote." Michael T. Morley, *Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment*, 2015 U. CHI. LEGAL F. 279, 291, 295. While reduction in representation may not be the only recourse available for violations of the right to vote, it is illuminating to consider as "the only remedy mentioned in the [Fourteenth Amendment's] text or discussed in the debates over [its] framing. . . . The fact that reduction

in representation was authorized as a remedy . . . should guide courts in determining the contours and scope" of the underlying right. *Id*. at 296, 298. Its severity "strongly implies" that the right to vote protects against "acts that are sufficiently serious to warrant" such "extreme relief." *Id*. at 297; *see also* Daryl Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 885 (1999). Accordingly, should this Court recognize a cause of action for political gerrymandering, it should require—at the very least—an abandonment of traditional redistricting criteria for the purpose of disenfranchising or dramatically diluting the voting power of certain voters.

CONCLUSION

For these reasons, this Court should reverse the judgment of the U.S. District Court for the Western District of Wisconsin.

Respectfully submitted,

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