No. 16-1161

In the Supreme Court of the United States

BEVERLY R. GILL, et al., APPELLANTS

v.

WILLIAM WHITFORD, et al., APPELLEES

UNOPPOSED MOTION OF *AMICI CURIAE* WISCONSIN STATE SENATE AND WISCONSIN STATE ASSEMBLY FOR DIVIDED ARGUMENT

Pursuant to Rules 21 and 28 of this Court, *Amici Curiae* the Wisconsin State Senate and Wisconsin State Assembly respectfully move to divide argument with Appellants such that Appellants would have 20 minutes and *Amici* would have 10 minutes. Appellants consent to this request, and Appellees do not oppose it.

1. This case marks the first time in decades that a lower court has held that a duly enacted state legislative districting plan is an unconstitutional partisan gerrymander. By doing so, the district court has forced this Court to confront the extraordinarily important questions of whether partisan gerrymandering claims are justiciable and, if so, under what standards courts should adjudicate them.

2. Those questions are uniquely important to state legislatures, as "primary responsibility" for redistricting "rests with the legislature." *Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 676 (1964). Indeed, this Court has long emphasized the primacy of the legislature in redistricting—not just because the legislature is the body to which that task is constitutionally committed, but because

"a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework." *Connor v. Finch*, 431 U.S. 407, 414-15 (1977); *see also, e.g.*, *McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981) ("[R]edistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt."); *Gaffney v. Cummings*, 412 U.S. 735, 749, 753 (1973) (observing that redistricting is "primarily a political and legislative process").

3. As the two bodies that compose the Wisconsin State Legislature, *Amici* have a distinct interest not just in preserving the particular maps at issue in this case, but in preserving for state legislatures—whether in Wisconsin or elsewhere—the ability to make the distinctly legislative policy judgments that redistricting necessarily entails. *Amici* also have a strong interest in ensuring that the constitutional constraints under which state legislatures must operate are not so unduly onerous and litigation-inviting as to inevitably result (as has often been Wisconsin's experience) in redistricting being "recurringly removed from legislative hands and performed by federal courts." *Gaffney*, 412 U.S. at 749; *see Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 843 (E.D. Wis. 2012).

4. To that end, *Amici*'s brief in this case focuses principally on the broader and more fundamental theoretical and practical problems with partisan gerrymandering claims. To be sure, *Amici* certainly agree that the claims in this case, and the test the district court adopted, are so distinctly problematic that they cannot survive no matter what this Court ultimately concludes about the

justiciability of partisan gerrymandering claims. But *Amici* believe the Court would benefit from hearing oral argument from an institution uniquely well-positioned to discuss the more fundamental problems with the very notion of allowing courts to try to divine the point at which a legislature's consideration of the politics purportedly crosses a constitutional line, as well as the various ways in which partisan gerrymandering claims misunderstand how electoral politics actually operate within individual States.

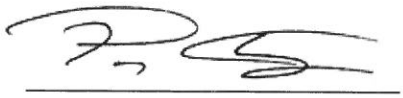
5. This Court has frequently granted legislators and legislatures leave to participate in argument in cases presenting important constitutional questions, particularly on issues as to which legislatures and their members have distinct institutional interests. *See, e.g.*, *Texas v. United States*, 136 S. Ct. 1539 (2016) (mem.) (granting motion of U.S. House of Representatives in separation of powers case); *McCutcheon v. FEC*, 134 S. Ct. 41 (2013) (mem.) (granting motion of Senator McConnell in campaign finance case); *NLRB v. Canning*, 134 S. Ct. 811 (2013) (mem.) (granting motion of Senator McConnell and 44 other members of U.S. Senate in separation of powers case); *Citizens United v. FEC*, 130 S. Ct. 31 (2010) (mem.) (granting motions of two senators in campaign finance case); *Morrison v. Olson*, 485 U.S. 985 (1988) (mem.) (granting motion of U.S. Senate in separation of powers case).

6. The Court has granted such requests, moreover, when the legislator or legislature was supporting the federal government or the State party, but offering a distinctly legislative perspective. For instance, the Court granted Senator McCain leave to participate as an *amicus* in support of the FEC in *Citizens United*, even

though their positions were aligned. *See* 130 S. Ct. 31. And, of course, the Court routinely permits the Solicitor General to argue as *amicus* in support of state parties, even when the positions of the State and the United States are aligned.

For the foregoing reasons, *Amici* respectfully request that the Court divide argument between Appellants and *Amici*, such that Appellants have 20 minutes and *Amici* have 10 minutes. Appellants consent to this request, and Appellees take no position.

Respectfully submitted,



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August 30, 2017

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 29.5, I, Paul D. Clement, a member of the Supreme Court Bar, hereby certify that three copies of the attached Unopposed Motion to Divide Argument were served on the following via electronic mail and First Class U.S. Mail on August 30, 2017:

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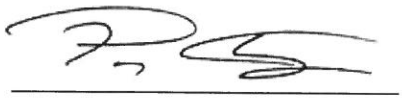

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