No. _____

In the Supreme Court of the United States

BEVERLY R. GILL, ET AL., APPELLANTS,

v.

WILLIAM WHITFORD, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

JURISDICTIONAL STATEMENT

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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?

PARTIES TO THE PROCEEDING

The following were parties in the court below:

Plaintiffs:

William Whitford, Roger Anclam, Emily Bunting, Mary Lynn Donohue, Helen Harris, Wayne Jensen, Wendy Sue Johnson, Janet Mitchell, Allison Seaton, James Seaton, Jerome Wallace, and Donald Winter;

Defendants:

Beverly R. Gill, Julie M. Glancey, Ann S. Jacobs, Steve King, Don Millis, and Mark L. Thomsen, in their official capacities.

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INTRODUCTION

The district court in this case became the first federal court in over 30 years to hold that a State had engaged in unlawful partisan gerrymandering. In a sharply divided decision, the majority of the three-judge panel below invalidated Wisconsin's redistricting plan for its Assembly on a statewide basis. Such a far-reaching approach would not have been permissible even in a racial-gerrymandering case. This unprecedented decision violates this Court's caselaw in several respects and should not be permitted to stand.

In 2011, the Wisconsin Legislature adopted a redistricting plan, Act 43, for state legislative districts. This was the first time in decades that Wisconsin's elected representatives were able to come together to draw the State's electoral districts; federal courts drew maps for Wisconsin in the 1990s and 2000s. Act 43 complies with traditional redistricting principles, such as contiguity, compactness, and respect for political subdivisions. And it comports with the Constitution's one-person, one-vote requirement.

So far, electoral results for the Assembly under Act 43 have proven remarkably similar to the most recent results that obtained under the court-drawn plans. This is a reflection of Wisconsin's political geography, where Democrats concentrate in urban areas like Madison and Milwaukee, as well as incumbency advantage. Indeed, the only way the Legislature could have attained Plaintiffs' desired election

results would have been to "engage in heroic levels of nonpartisan statesmanship" by abandoning Republicans' advantage under court-drawn plans, including by adopting a plan under which incumbents were more likely to lose their seats. App. 245a (Griesbach, J., dissenting). That is why Plaintiffs' expert was able to achieve his results only by redrawing Wisconsin's districts such that 26 (out of 60) Republican incumbents were placed into districts where other incumbents resided. Tr. Ex. 520; Dkt. 149:111–18.

A divided three-judge district court invalidated Act 43 on a statewide basis as a partisan gerrymander, after relying upon a test that no party had urged and which the court announced only when rendering its final decision. The district court's decision is erroneous in numerous respects.

As a threshold matter, Plaintiffs' lawsuit is entirely foreclosed by *Vieth v. Jubelirer*, 541 U.S. 367 (2004), for two independently sufficient reasons. First, Plaintiffs may not bring a statewide challenge to Act 43; they must proceed district by district. That was the conclusion of the majority of the Justices in *Vieth*, and the district court had no authority to depart from that conclusion. Strikingly, the district court entertained Plaintiffs' statewide challenge even though a comparable statewide challenge would not be permitted even in the racial-gerrymandering context. *See Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1264–68 (2015). Second, Plaintiffs

cannot establish a successful partisan-gerrymandering claim because the plan is in full compliance with traditional redistricting principles. The majority of the Justices in *Vieth* made clear that a partisan-gerrymandering claim could not succeed on the merits without a showing of noncompliance with traditional redistricting principles, so the district court had no authority to adopt a contrary approach.

Separately, Defendants are entitled to judgment under *Vieth* for the same reasons that Justice Kennedy offered in that decision: the test at issue here is not a "a *limited* and *precise* rationale." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment) (emphases added). In particular, the test that the district court adopted and applied is simply a watered-down version of the test that a plurality of this Court adopted in *Davis v. Bandemer*, 478 U.S. 109 (1986). Every single Justice of this Court in *Vieth* rejected that approach, so this test is not available, either in the muscular form the *Bandemer* plurality articulated, or in the watered-down form the district court employed here. That *Bandemer upheld* a redistricting plan in Indiana that yielded extremely similar electoral results to those that have obtained under Act 43 only highlights the erroneous nature of the district court's ruling below.

Given the numerous legal errors in the district court's decision, Defendants respectfully submit that this Court should note probable jurisdiction and then reverse. Indeed, given that several of the district

court's conclusions violate binding holdings from this Court, the Court may wish to consider the possibility of summary reversal.

OPINIONS BELOW

The opinion and order of the three-judge panel of the United States District Court for the Western District of Wisconsin, entered on November 21, 2016, (Appendix A), and holding Wisconsin's redistricting plan unconstitutional, is not yet reported, but is available at 2016 WL 6837229. The district court's opinion and order permanently enjoining the use of Act 43, entered on January 27, 2017, (Appendix B), is unreported, but is available at 2017 WL 383360. The district court's judgment, entered on January 27, 2017, (Appendix C), amended judgment, entered on February 22, 2017, (Appendix D), and corrected amended judgment, entered on March 15, 2017, (Appendix E), are unreported.

JURISDICTION

Defendants filed their notice of appeal on February 24, 2017, (Appendix F), and their amended notice of appeal on March 20, 2017, (Appendix H). This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED

This appeal involves the First Amendment and the Equal Protection Clause of the Fourteenth

Amendment to the United States Constitution, reproduced at Appendix I.

STATEMENT

A. Legal Background

1. Two cases from this Court provide the legal background for partisan-gerrymandering claims: *Davis v. Bandemer*, 478 U.S. 109 (1986), and *Vieth v. Jubelirer*, 541 U.S. 367 (2004).

a. In *Bandemer*, this Court considered a statewide partisan-gerrymandering claim against an Indiana redistricting map. After one election, "Democratic candidates received 51.9% of the vote" in races for State House seats, but won only 43 out of 100 seats available. 478 U.S. at 115. This Court rejected the claim that this plan was a partisan gerrymander. *Id.* at 113 (plurality op.).

A four-Justice plurality determined that a partisan-gerrymandering claim required the plaintiff to "[1] prove . . . intentional discrimination against an identifiable political group and [2] an actual discriminatory effect on that group." *Id.* at 127. Regarding intent, "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Id.* at 129. The effect element was more exacting. It was not enough to show merely "that [Plaintiffs'] proportionate voting influence has

been adversely affected" by a plan. *Id.* at 130. "Rather, unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or group of voters' influence on the political process as a whole." *Bandemer*, 478 U.S. at 132. "If there were a discriminatory effect and a discriminatory intent, then the legislation would be examined for valid underpinnings." *Id.* at 141. The plurality ultimately concluded that the challengers failed to establish the effects element. *Id.* at 134.

There were two separate opinions. Justice Powell, joined by Justice Stevens, concurred in part and dissented in part, urging a multifactor test that placed special emphasis on whether the plan abandoned traditional districting principles. *Id.* at 173. Justice O'Connor, joined by Chief Justice Burger and then-Justice Rehnquist, concurred in the judgment and would have held that "the partisan gerrymandering claims of major political parties raise a nonjusticiable political question." *Id.* at 144.

b. Eighteen years later, plaintiffs brought partisan-gerrymandering claims against both Pennsylvania's statewide redistricting plan and a specific district of that plan. *Vieth*, 541 U.S. at 271–73. This Court rejected both of those claims.

A four-Justice plurality concluded that all political-gerrymandering claims were not justiciable, *id.* at

284–306, while also specifically rejecting the *Bandemer* plurality's test, *id.* at 283–84.

Justice Kennedy concurred in the judgment. While he did not agree that partisan-gerrymandering claims were nonjusticiable, he left open the possibility that "[nonjusticiability] arguments may prevail in the long run." *Id.* at 309. Justice Kennedy believed that a "limited and precise rationale [may still be] found to correct an established violation of the Constitution in some [partisan] redistricting cases." *Id.* at 306. Any "violation" would involve a Legislature applying "[political] classifications . . . in an invidious manner or in a way unrelated to any legitimate legislative objective." *Id.* at 307.

Justice Stevens dissented, but his disposition was a dissent, in part, and a concurrence, in part. *See Vieth*, 541 U.S. at 292 (plurality op.) (explaining that Justice Stevens partly "concur[red] in the judgment"). Justice Stevens agreed that the Court lacked authority to adjudicate the statewide partisan-gerrymander claim, but disagreed with regard to the single-district claim. *Id.* at 327–28. Members of a political party do not suffer a standing-conferring injury when a plan leads to a "number of [that party's] representatives [ ] not commensurate with the number of [that party's] voters throughout [the state]." *Id.* at 328. Only a "challenge to a specific district"—brought by a voter in that district alleging that the *specific* district is politically gerrymandered—would be cognizable. *Id.* at 328–29. As to the proper test for a single-district

claim, Justice Stevens would have found liability only in the rare situation where "no neutral criterion can be identified to justify the lines drawn, and if the only possible explanation for a district's bizarre shape is a naked desire to increase partisan strength." *Id.* at 339.

Justice Souter, joined by Justice Ginsburg, dissented. He would have analyzed these claims under a five-element test, requiring the plaintiff to satisfy each element. *Vieth*, 541 U.S. at 347. Most relevant here, one of these necessary elements was that the plaintiff would have to "show that the district of his residence paid little or no heed to [ ] traditional districting principles." *Id.* at 347–48 (citations omitted). Justice Souter "would limit consideration of a statewide claim to one *built upon* a number of district-specific ones." *Id.* at 353 (emphasis added).

Justice Breyer also dissented separately, explaining that the "use of purely political boundary-drawing factors" may be impermissible when it amounts to "the unjustified use of political factors to entrench a minority in power." *Id.* at 360. This would be "a situation in which a party that enjoys only minority support among the populace has nonetheless contrived to take, and hold, legislative power." *Id.* He would analyze the effects on a "continuum," such that plaintiffs would need "[more] evidence" of entrenchment the less a plan "depart[ed] from traditional districting criteria." *Id.* at 365–66. In particular, where a plan re-

vealed "no radical departure from traditional districting criteria," "a majority party" must have "*twice* failed to obtain a majority of the relevant legislative seats in elections." *Id.* at 366.

B. Factual History

1. Following the 1990 census, Wisconsin's redistricting process was left to a federal district court. *Prosser v. Elections Bd.*, 793 F. Supp. 859 (W.D. Wis. 1992) (per curiam). In drawing its plan, the court sought to hew closely to the Wisconsin Constitution, which requires the Legislature to draw districts "to be bounded by [political subdivision] lines, consist of contiguous territory and be in as compact form as practicable." Wis. Const. art. IV § 4. Compactness and contiguity refer to the regularity of a district's shape—for example, whether the district shares a single perimeter line or juts erratically. *See Prosser*, 793 F. Supp. at 863–64. "Compactness and contiguity are desirable features in a redistricting plan" because communities in close geographic proximity are likely to have "a reasonable homogeneity of needs and interests," thus an elected representative from such an area "will [ ] represent the preferences of most of his constituents." *Id.* at 863. Additionally, "[c]ompactness and contiguity" of districts "reduce travel time and costs, and therefore make it easier for . . . elected [representatives] to maintain close and continuing contact with the people they represent." *Id.* Respect for existing political subdivision lines in redistricting furthers this laudable goal of creating districts with a

"homogeneity of political interests." *Id.* Accordingly, the court sought to achieve "population equality and contiguity and compactness." *Id.* at 870–71. The plan had a population deviation of 0.91% and split 72 municipalities. Dkt. 125 ¶¶ 200, 221.

In the five elections under this plan, Republicans steadily increased their seats in the Assembly. In those elections, Republicans achieved significant gains with both a small majority and a slight minority of the statewide two-party vote.[1]

Election Year	Republican Vote Share	Republican Seats
1992	47.75%	47
1994	51.75%	51
1996	51.25%	52
1998	49.00%	55
2000	50.25%	56

Dkt. 125 ¶¶ 233, 247–51.

2. Following the 2000 census, a federal court again drew Wisconsin's districts. *Baumgart v. Wendelberger*, No. 01-C-121, 2002 WL 34127471 (E.D. Wis. May 30, 2002). That court attempted to draw the plan "in the most neutral way it could conceive—by taking the 1992 [court-drawn] plan as a template and

[1] The two-party vote counts only votes cast for Republicans and Democrats, ignoring votes cast for third-party candidates.

adjusting it for population deviations." *Id.* at *7. The 2002 plan had a population deviation of 1.59% and split 50 municipalities. Dkt. 125 ¶¶ 201, 208.[2] In the first two elections under this plan, Republicans increased their majority in the Legislature while winning half of the statewide vote—reaching 60 of 99 Assembly seats with 50% of the two-party vote in 2004. The Democrats then won a majority of the vote in 2006 and 2008, but only a majority of the seats in 2008. The Democrats immediately lost that majority to the Republicans in 2010, who again won 60 seats.

Election Year	**Republican Vote Share**	**Republican Seats**
2002	50.50%	58
2004	50.00%	60
2006	45.25%	52
2008	46.00%	46
2010	53.50%	60

Dkt. 125 ¶¶ 233, 252–56.

[2] With respect to compactness, the court's plan had a 0.41 score on the smallest-circle test and a 0.29 score on the perimeter-to-area test. Dkt. 125 ¶ 221. The "perimeter-to-area score, which compares the relative length of the perimeter of a district to its area, and the smallest circle score, which compares the ratio of space in the district to the space in the smallest circle that could encompass the district," are the "two standard measures of compactness." *League of United Latin Am. Citizens v. Perry* (*LULAC*), 548 U.S. 399, 455 n.2 (2006) (Stevens, J., concurring in part, dissenting in part).

3. The Republicans also won the Governor's office and the State Senate in 2010, with Governor Scott Walker winning 52.3% of the total vote and Republican State Senators winning 19 of 33 seats. Dkt. 125 ¶ 284; Tr. Ex. 538. The Legislature was able to draw Wisconsin's map after the 2010 census.

The Legislature assigned primary drafting responsibility to Adam Foltz, an aide to the Speaker of the Assembly, and Tad Ottman, an aide to the Senate Majority Leader. Dkt. 125 ¶¶ 17–19. Joe Handrick, a former legislator, consulted in drawing maps. Dkt. 147:46. Foltz, Ottman, and Handrick drafted various maps according to the following criteria: (1) traditional redistricting principles, such as compactness, contiguity, and communities of interest, App. 18a–19a, 54a–55a; (2) federal requirements, such as the Constitution's one-person, one-vote rule and the Voting Rights Act, *see* App. 19a; and (3) political considerations, such as incumbents' requests for their districts, the desire of incumbents not to be put into districts where other incumbents resided, and partisan scores of proposed districts based upon past election results, Dkt. 148:80–81, 85–88. The drafters then presented portions of these statewide maps, by region, to Republican legislative leaders. Dkt. 147:162–65; 148:94–98. The drafters incorporated the legislative leadership's preferred regional approaches into a single, unified map, and then the Legislature introduced and adopted this map as Act 43. Dkt. 148:101–02, 110–16.

Act 43's districts are consistent with the prior court-drawn maps. Its compactness scores were comparable to the 2002 court-drawn plan,[3] and it split only 62 municipalities, a number in between the 50 splits in the 2002 plan and the 72 splits in the 1992 plan. Dkt. 125 ¶ 221. Act 43 also had a population deviation of 0.76%, better than both of the court-drawn plans (0.91% in 1992 and 1.59% in 2002). Dkt. 125 ¶¶ 200–204. Act 43 avoided incumbent pairings where possible, with 22 total legislators paired, split evenly between Republicans and Democrats. Dkt. 148:87.

Two elections occurred under Act 43 before Plaintiffs filed their lawsuit. In the 2012 elections, Republicans won 60 out of 99 seats in the State Assembly with 48.6% of the statewide two-party vote, according to Plaintiffs' estimate. Dkt. 125 ¶¶ 233, 257. In the 2014 elections, the Republicans won 63 of 99 seats in the State Assembly with 52% of the statewide vote, according to Plaintiffs' estimate. Dkt. 125 ¶¶ 233, 258.

C. Procedural History

1. In July 2015, Plaintiffs filed a complaint in the Western District of Wisconsin, alleging that Act 43

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

was a statewide partisan gerrymander in violation of the First and Fourteenth Amendments. Dkt. 1. Plaintiffs are 12 individual voters from 11 (out of Wisconsin's 99) legislative districts. Dkt. 125 ¶¶ 3–13.

To prove that a statewide partisan gerrymander occurred, Plaintiffs proposed the adoption of a novel legal test that would reduce the inquiry's most critical element—partisan "effect"—to an analysis of "the efficiency gap," Dkt. 1 ¶ 5, a concept recently developed by a professor and a research fellow in a law-review article, *see* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering And The Efficiency Gap*, 82 U. Chi. L. Rev. 831 (2015). The efficiency gap compares parties' "wasted" votes; that is, votes that candidates receive that are not essential to victory. App. 160a. The theory asserts that there are two types of "wasted" votes: for winning candidates (called "packing" votes), any vote above "50% plus one" is "wasted," and for a losing candidate (called "cracking" votes), all votes are "wasted." App. 159a–60a; Dkt. 1 ¶ 5. The efficiency gap is calculated by taking "the difference between the [total] wasted votes cast for each party, divided by the overall number of votes cast in the election." App. 160a & n.276. The resulting number is a measure of how "efficient" one party was in translating votes to election victories as compared to the other party. Plaintiffs proposed that courts find a forbidden partisan effect whenever the efficiency gap exceeds 7% in the first election under a district plan, Dkt. 149:208–14—*a test that one*

third of all redistricting plans would fail. *See* Dkt. 125 ¶¶ 116, 154.

2. Defendants moved to dismiss, arguing, *inter alia*, that Plaintiffs were impermissibly bringing a statewide challenge (as opposed to a district-by-district challenge) and had not articulated a valid test for partisan gerrymandering. Dkt. 25:15–24, 28–30; 39:4–8. The district court denied the motion, but did not set out the legal standard by which it would decide the case. Dkt. 43.

3. Defendants then moved for summary judgment, arguing, among other things, that Plaintiffs' proposed test was legally insufficient. The district court denied summary judgment, but again did not state what standard would govern Plaintiffs' claim. Dkt. 94:25–26, 30, 35.

4. The trial took place in May 2016, focusing largely upon Plaintiffs' efficiency-gap test for partisan effect. Plaintiffs offered Kenneth Mayer and Simon Jackman as experts. Mayer analyzed the efficiency gap seen in the 2012 election under Act 43 and offered an alternative plan that he claimed would have had a lower efficiency gap in 2012. This plan, however, did not even try to adhere to the contours of the prior districts and would have pitted 37 incumbent legislators against each other, including 26 Republicans. Dkt. 149:112–17; Tr. Ex. 520. Jackman testified about his analysis of the efficiency gaps seen in legislative plans from many different States from 1972 to

the present. *See* App. 50a, 163a; Dkt. 149:150. Defendants offered Nicholas Goedert and Sean Trende, who described the problems with using the efficiency gap and identified the weaknesses in Mayer's plan. Dkt. 150:46–86, 144–201, 248–52. Trende also testified about how Wisconsin is becoming more Republican over time, with Democratic voters naturally concentrating themselves in urban areas like Madison and Milwaukee. Dkt. 150:17–45, 133–35.

5. On November 21, 2016, a divided district court invalidated Act 43 statewide.

a. The majority developed and applied a test that the court announced for the first time in this opinion. App. 3a–4a, 109a–10a. The court modeled its approach on the test adopted by the *Bandemer* plurality, even as it correctly recognized that "the *specific test* for political gerrymandering set forth in *Bandemer* is no longer good law." App. 92a, 109a–10a. The district court defined its test as follows: "a redistricting scheme" is an unconstitutional partisan gerrymander if it (1) "intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation"; (2) "ha[d] that effect"; and (3) "cannot be justified on other, legitimate legislative grounds." App. 109a–10a.

The district court defined the first element, impermissible partisan intent, as "intent to entrench a political party in power." App. 117a. This need only be a "motivating factor" in the decision to enact the

plan. App. 117a (citations omitted). Given that the case involved a map drawn by a Republican legislature, this test was easily satisfied. App. 126a–45a.

The district court defined the second element—partisan effect—as the "burden[ing] [of] the representational rights of Democratic voters . . . by impeding their ability to translate their votes into legislative seats, not simply for one election but throughout the life of Act 43." App. 176a–77a. The required effect is "mak[ing] it more difficult for Democrats, compared to Republicans, to translate their votes into seats." App. 146a. The court found the effect element satisfied because, based on the two elections under Act 43, Republicans' "legislative power remains secure" "even when [they] are in an electoral minority." App. 154a.

The court explained that it was not accepting Plaintiffs' invitation to adopt the efficiency-gap concept as its effect standard. App. 176a. Instead, the court treated the efficiency gap as merely "corroborative evidence." App. 176a. The court agreed with some of Defendants' critiques of the theory—recognizing, for example, that this metric is "overly sensitive to small changes in voter preferences" and that "assessing a given plan based on the results of the first observed election under the plan . . . may yield problematic results if that first election happens to be a national wave election." App. 172a.

The court defined its third prong, "justification," as "whether [a plan] can be explained by the legitimate state prerogatives and neutral factors that are implicated in the districting process." App. 178a. But the court held that a plan that complies with traditional redistricting principles may still be unjustified under its test, so Defendants could not defend Act 43 by reference to its compliance with these principles. App. 178a. The court determined that, since it is "*possible* to draw a map with much less of a partisan bent than Act 43" that still complies with the neutral criteria, Act 43 was unjustified. App. 217a (emphasis added).

Finally, the court held that Plaintiffs could challenge Act 43 statewide, as opposed to district by district, because of the nature of the injury that Plaintiffs allegedly suffered. *See* App. 218a–26a. The court rejected Defendants' argument that "a majority of Justices in *Vieth* properly recognized that a statewide challenge to a redistricting plan was not justiciable," because—in the district court's view—"[s]tanding is just one aspect of justiciability." App. 222a (citation omitted) (emphasis removed).

b. Judge Griesbach dissented, explaining that the evidence presented here was essentially identical to the evidence that this Court found insufficient in *Bandemer*. App. 232a–33a. Judge Griesbach added that the majority's intent-to-entrench standard was meaningless because it is no "different from intending to benefit the party" when the nature of redistricting

plans is to "affect future elections for the life of the plan." App. 240a–41a. Further, the majority had changed the definition of "entrenchment," which had formerly involved *minority* parties entrenching themselves in power, not majority parties like Wisconsin Republicans. App. 244a–45a. The dissent further objected to the majority invalidating Act 43 even though all the parties and the court agreed that "Act 43 does not violate any of the redistricting principles that traditionally govern the districting process." App. 250a. This compliance was fatal to the gerrymandering claim here because, "of the Justices who would even entertain a partisan-gerrymandering claim, a majority would require adherence to traditional districting principles as part of any test." App. 255a (emphasis removed). Compliance with traditional criteria showed that the Legislature was concerned with "legitimate legislative objectives"—like respecting political subdivisions, compactness and contiguity—and thus passed muster under *Vieth*. App. 256a.

6. On January 27, 2017, the district court enjoined Defendants from "using the districting plan embodied in Act 43 in all future elections" and ordered that "a remedial redistricting plan for the November 2018 election, enacted by the Wisconsin Legislature and signed by the Governor," be in place by November 1, 2017. App. 323a. The court entered an amended final judgment on February 22, 2017. App. 331a–33a. Defendants timely filed a notice of appeal on February 24, 2017. App. 334a. The court entered a corrected amended final judgment on March 15, 2017.

App. 338a–40a. Defendants timely filed an amended notice of appeal on March 20, 2017. App. 341a–42a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. Plaintiffs' Lawsuit Is Categorically Barred Under *Vieth* For Two Independently Sufficient Reasons

While this Court's decision in *Vieth* produced no majority opinion, it contains two controlling principles that categorically bar Plaintiffs' lawsuit. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (citations omitted). More generally, when at least five Justices in the prior case would reach a particular result, then lower courts must reach that result as well, regardless of whether one or more of the five Justices had joined the plurality, concurred, or dissented. *See, e.g.*, *United States v. Jacobsen*, 466 U.S. 109, 115–18 & n.12 (1984); *Moses H. Cone Mem'l Hosp. v. Mercury Constr.,* 460 U.S. 1, 17 (1983). Justice Kennedy in *LULAC* thus correctly explained that understanding the holding of *Vieth* as to what a "successful claim attempting to identify unconstitutional acts of partisan gerrymandering" entails requires looking to the common ground among the plurality, Justice Kennedy's

concurrence, and the dissenting opinion(s). *LULAC*, 548 U.S. at 419 (plurality op.).

Under these principles, this Court's opinions in *Vieth* announce two controlling conclusions that each independently foreclose Plaintiffs' lawsuit.

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

1. Under *Vieth*, a district court lacks authority to consider statewide partisan-gerrymandering claims. The plaintiffs in *Vieth* brought both a statewide partisan-gerrymandering challenge and a challenge against a district. *Vieth*, 541 U.S. at 292. The four-Justice plurality rejected both of these challenges as nonjusticiable. Although Justice Stevens dissented from the *Vieth* plurality's disposition of the district-specific claim, as the plurality explained, he "concur[red] in the judgment that [the Court] should not address plaintiffs' *statewide* political gerrymandering challenges." *Id.* at 292 (plurality op.) (emphasis added). Justice Stevens "reache[d] that result via standing analysis, while [the plurality] reach[ed] it through political-question analysis, [but the] conclusions are the same: [ ] statewide claims are nonjusticiable." *Id.* (plurality op.); *see id.* at 327–28 (Stevens, J., dissenting). That is because "either the absence of standing or the presence of a political question suffices to prevent the power of the federal judiciary from being invoked." *Schlesinger v. Reservists Comm. to*

Stop the War, 418 U.S. 208, 215 (1974); *accord Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013) (federal courts lack "power" to decide claims without standing); *Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012) (federal courts "lack[ ] the authority to decide" political questions). So the rule from *Vieth* is that federal courts lack authority to entertain statewide challenges.[4]

That *Vieth* forecloses statewide partisan-gerrymandering challenges is further reinforced by Justice Souter's dissenting opinion, joined by Justice Ginsburg. That opinion "would limit consideration of a statewide claim to one *built upon* a number of district-specific ones." *Vieth*, 541 U.S. at 353 (emphasis added). Only "[a]t a certain point," when challenging districts individually "no longer make[s] any sense" due to the sheer number of districts challenged, would Justice Souter have entertained a statewide challenge. *Id.*

Since Plaintiffs here have unquestionably brought only a statewide claim, App. 218a–26a, the district court lacked authority to entertain this claim.

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[4] While Justice Stevens believed that this Court could reconsider the statewide issue in "future cases"—because he disagreed with this Court's cases holding that statewide racial-gerrymandering challenges were forbidden—his legal conclusion was that such a challenge is foreclosed under this Court's current caselaw. *See Vieth*, 541 U.S. at 327–28 & n.16 (Stevens, J., dissenting).

Plaintiffs made no allegations that Act 43 changed the representative in their 11 individual districts from a Democrat to a Republican. Indeed, they did not even allege—let alone attempt to prove—that Act 43 made it more difficult for them to elect the representative of their choice in their own districts. Instead, they asserted only a statewide claim, an approach that *Vieth* forbids.

2. The district court reached a contrary result because it misunderstood the law of justiciability. The court concluded that it could hear a statewide claim because the "*Vieth* plurality held that" all political-gerrymandering claims were "nonjusticiable political question[s]," while "only" Justice Stevens "opined that the plaintiffs lacked standing to bring a statewide political gerrymandering claim." App. 223a. In the district court's view, since five Justices did not agree on *why* a trial court had no authority to rule on a statewide partisan-gerrymandering claim, it could consider such a claim. App. 222a–23a. But that understanding of the interaction between standing and the political question doctrine is foreclosed by this Court's explanation in *Schlesinger* that "either the absence of standing or the presence of a political question suffices to prevent the power of the federal judiciary from being invoked. 418 U.S. at 215 (emphasis removed).

3. Notably, the rule from *Vieth* that courts cannot consider statewide partisan-gerrymandering challenges is strongly reinforced by this Court's approach

to racial-gerrymandering claims. *See Vieth*, 541 U.S. at 327–28 (Stevens, J., dissenting). Assertions that the legislature engaged in racial gerrymandering are of a more serious constitutional magnitude than a claim that the legislature engaged in partisan gerrymandering. As Justice Kennedy explained in *Vieth*, while "[r]ace is an impermissible classification[,] [p]olitics is quite a different matter." 541 U.S. at 307 (Kennedy, J., concurring in the judgment) (citation omitted).

Yet, even in the racial-gerrymandering context, this Court has held that a plaintiff must establish that "race was improperly used in the drawing of the boundaries of one or more *specific electoral districts*." *Alabama*, 135 S. Ct. at 1265; *see also Bethune-Hill v. Va. Bd. of Elections*, 137 S. Ct. 788, 800 (2017). This doctrine "makes sense in light of the nature of the harms that underlie a racial gerrymandering claim." *Alabama*, 135 S. Ct. at 1265. Those injuries, which "are personal," include "[1] being personally subjected to a racial classification, as well as [2] being represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group." *Id.* (citations and alterations omitted). Because both harms befall only a "voter who lives in the district attacked," not a "voter who lives elsewhere," only the in-district citizen has standing to challenge the drawing of those particular boundary lines as an unconstitutional racial gerrymander. *Id.* (citing *United States v. Hays*, 515 U.S. 737, 744–45 (1995)).

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

More generally, it would be entirely anomalous to permit partisan-gerrymandering claims to challenge statewide plans while at the same time requiring race-based gerrymandering claims to proceed district by district. Race-based claims allege a more serious violation of constitutional norms than do partisanship-based claims, *id.* at 307 (Kennedy, J., concurring in the judgment), so it follows that partisan-gerrymandering claims should be subject to a greater—not a lesser—standard for when broad-based application is appropriate.

B. Plaintiffs Cannot Establish An Unlawful Partisan Gerrymander Because Act 43 Complies With Traditional Redistricting Principles

1. *Vieth* also forbids courts from holding that a plan that complies with traditional redistricting principles is an unconstitutional partisan gerrymander. The four-Justice plurality would not recognize any plans as unconstitutional partisan gerrymanders, and thus certainly would never condemn a plan that satisfied these criteria. *Vieth*, 541 U.S. at 305–06. Justice Kennedy concluded that "[a] determination that a gerrymander violates the law must rest on . . . a conclusion that the classifications . . . were applied in an invidious manner or in a way unrelated to any legitimate legislative objective." *Id.* at 308 (Kennedy, J., concurring in the judgment). Additionally, three dissenting Justices made clear that noncompliance with traditional principles is a necessary *element* of any partisan-gerrymandering claim. Justice Stevens concluded that a successful partisan-gerrymandering claim requires that "all traditional districting criteria are subverted for partisan advantage." *See id.* at 318 (Stevens, J., dissenting). And Justice Souter, joined by Justice Ginsburg, explained that a necessary element of any partisan-gerrymandering claim is "that the district of [the plaintiff's] residence paid little or no heed to [ ] traditional districting principles." *Id.* at 347–48 (Souter, J., joined by Ginsburg, J., dissenting) (citations omitted).

Here, there is no dispute that Act 43 complies with traditional redistricting principles, like compactness, contiguity, and respect for political-subdivision lines. *Supra* pp. 12, 19. The district court thus violated *Vieth* when it permitted Plaintiffs to pursue their partisan-gerrymandering claim.

2. The district court's primary justification for reaching a contrary result—that this Court's racial-gerrymandering caselaw does not create a safe harbor for plans that comply with traditional districting principles—is inapt. *See* App. 120a–21a.

There is a good reason why the majority of Justices in *Vieth* recognized a safe harbor for plans that comply with traditional districting principles in partisanship cases, even where such a safe harbor is not available in racial-gerrymandering cases: "[r]ace is an impermissible classification[,] [p]olitics is quite a different matter." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment) (citations omitted). Although redistricting is "inevitably" political, *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973), "the purpose of segregating voters on the basis of race" is never "lawful," *Vieth*, 541 U.S. at 286 (plurality op.); *see also Shaw v. Reno*, 509 U.S. 630, 650 (1993) (because of a sordid history of racial discrimination, race-based claims merit "strict[er] scrutiny" than claims of "political gerrymanders"). A plan may comply with traditional redistricting principles and still be predominantly motivated by race. *Bethune-Hill*, 137 S. Ct. at 799. That would be a flaw of profound constitutional

import, given the inconsistency between racial considerations and our Nation's "commitment to the equal dignity of all persons." *Pena-Rodriguez v. Colorado*, No. 15-606, slip op. 13 (U.S. Mar. 6, 2017). On the other hand, a plan motivated by partisan considerations—but which complies with traditional redistricting principles—is not an unlawful partisan gerrymander because such considerations would not have been applied "in a way *unrelated* to any legitimate legislative objective." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment) (emphasis added).

II. Defendants Are Entitled To Judgment As A Matter Of Law Under *Vieth* Because The District Court's Test Is Not A "Limited And Precise Rationale"

In his *Vieth* concurrence, Justice Kennedy explained that, in order to prove an unlawful partisan gerrymander, there must first be a "*limited* and *precise* rationale . . . to correct an established violation of the Constitution in *some* [partisan] redistricting cases." 541 U.S. at 306 (Kennedy, J., concurring in the judgment) (emphases added). Because the test at issue in *Vieth* did not meet this demanding standard, defendants were entitled to judgment as a matter of law. *See id.* at 308 (Kennedy, J., concurring in the judgment). In the present case, the district court's test similarly does not meet this criteria because it is simply a watered-down version of the test adopted by the *Bandemer* plurality, which every Justice in *Vieth*

rejected. More generally, that the district court's test would condemn a plan such as Act 43—which plan would easily survive analysis under *any* approach that *any* Justice of this Court has proposed—further illustrates that this test cannot possibly be the "limited and precise" rationale that *Vieth* requires.

A. The District Court's Test Is Simply A Watered-Down Version Of The *Bandemer* Plurality's Approach, Which *Vieth* Already Rejected

The *Bandemer* plurality's test comprised two threshold elements: "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group," defined as "'den[ying] [a group] its chance to effectively influence the political process' as a whole." *Vieth*, 541 U.S. at 281 (plurality op.) (quoting *Bandemer*, 478 U.S. at 127 (plurality op.)). "If there were a discriminatory effect and a discriminatory intent, then the legislation would be examined for valid underpinnings." *Bandemer*, 478 U.S. at 141 (plurality op.). In *Vieth*, all nine Justices agreed that this test was inadequate. 541 U.S. at 283–84 (plurality op.); *id.* at 308 (Kennedy, J., concurring in the judgment); *see id.* at 317 (Stevens, J., dissenting); *id.* at 346 (Souter, J., joined by Ginsburg, J., dissenting); *id.* at 355–56 (Breyer, J., dissenting). Thus, the *Bandemer* plurality's test does not govern partisan-gerrymandering claims. *LULAC*, 548 U.S. at 419 (plurality op.).

In the present case, the district court adopted a three-part partisan-gerrymandering test—intent, effect, and justification—based upon the concept of "entrench[ment]" of a particular political party. App. 109a–10a, 117a. This test is nothing more than a recapitulation of the test that the plurality adopted in *Bandemer*, based upon the same "entrenchment" rationale. *Compare with Bandemer*, 478 U.S. at 127 (plurality op.) ("denied its chance to effectively influence the political process"). Indeed, to the extent there are any differences between the district court's and the *Bandemer* plurality's tests, it is only that the district court's test is easier to satisfy in application than what the *Bandemer* plurality envisioned.

First, the district court's intent element is indistinguishable from that adopted by the *Bandemer* plurality, both in articulation and application. The *Bandemer* plurality required map drawers to intend to discriminate against "an identifiable political group," *Bandemer*, 478 U.S. at 127; that is, the map drawers must intend their actions to have "substantial political consequences," *id.* at 129. The district court, for its part, defined its intent element as "an intent to entrench a political party in power." App. 117a. There is no discernible difference between an intent to have "*substantial* political consequences" and "an intent to *entrench* a political party in power." *Compare Bandemer*, 478 U.S. at 127, 129 (plurality op.) (emphasis added), *with* App. 117a (emphasis added). A map drawer possessing either intent would intend to give one party a multi-election advantage

over another party. Any advantage less than this would not be considered either "substantial" or "entrenching."

Second, the district court's effect element is indistinguishable in articulation from the *Bandemer* plurality's effect prong. The "effect" the district court required was the "burden[ing] [of] the representational rights of Democratic voters [ ] by impeding their ability to translate their votes into legislative seats, not simply for one election, but throughout the life of Act 43." App. 176a–77a. The *Bandemer* plurality's approach is no different: "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." 478 U.S. at 132. Both tests require "burdening a defined group's representational rights" (i.e., "degrading a voter's influence") "over the life of the plan" (i.e., "consistently").

While the district court's articulation of the effect element is indistinguishable from the *Bandamer* plurality's effect test, the district court applied a watered-down version of the analysis in practice. Even though the election results at issue in *Bandemer* were exceptionally similar to the election results under Act 43 here, *see supra* p. 18, the district court invalidated Act 43, while *Bandemer* upheld Indiana's plan. In particular, under Act 43, in 2012 Democrats earned 51% of the vote and won 39% of the seats in the Legislature. Under Indiana's plan, in 1982 Democrats

earned 51.9% of the vote and won 43% of the seats. *See* App. 232a–33a & n.1 (Griesbach, J., dissenting). The district court attempted to distinguish *Bandemer* because this case involved the results of a second election under Act 43—the 2014 election—whereas there had only been one election at the time of *Bandemer*. App. 155a–58a. But the 2014 election does not help Plaintiffs because Republicans earned *a majority* of the votes cast (52%), meaning they were in no sense a political *minority* entrenching itself.

Third, the district court's justification prong is simply a rewording of the *Bandemer* plurality's proviso that "[i]f there were a discriminatory effect and a discriminatory intent [under its first two prongs], then the legislation would be examined for valid underpinnings." 478 U.S. at 141.

Again, the district court's application of the justification prong is more lax than what the *Bandemer* plurality intended. The district court did not examine whether Act 43 had "valid underpinnings" based upon its compliance with traditional redistricting principles. *Id.* (plurality op.). Act 43, of course, would be upheld under any such analysis. *See supra* p. 19. Instead, the district court demanded that Defendants justify the plan's political results. According to the district court, a plan is "justified" if its partisan effect "can be explained by" something other than partisan intent, namely, the drafters' reliance on "legitimate state prerogatives and neutral factors that are implicated in the districting process." App. 178a–79a,

210a–11a. A plan fails to meet this test when other plans could have been drawn that score comparably well on the traditional redistricting principles, but have less of a partisan effect. App. 178a–79a, 210a–11a. But as a practical matter, it will *always* be possible to reverse engineer a plan with comparable compliance with traditional principles and have a lower partisan effect in practice, when one is free to remove all political considerations that are inevitably part of any partisan process. That is why, for example, Plaintiffs' expert's plan blithely placed 26 (out of 60) Republicans into districts with other incumbents. Tr. Ex. 520; Dkt. 149:111–18.

Finally, the district court's discussion of Plaintiffs' efficiency-gap theory is irrelevant to the legal adequacy of the district court's test. As the dissent properly explained, the district court only turned to the efficiency gap to "confirm[ ]," App. 234a (Griesbach, J., dissenting), what it had already concluded: that Act 43 had a discriminatory "effect," *see* App. 159a, 175a–76a. In short, the efficiency-gap theory played no meaningful role in the court's ultimate determination of constitutional inadequacy.

The district court's treatment of the efficiency gap as an add-on to an already completed constitutional analysis is understandable given this concept's fundamental flaws. To highlight just a few out of many problems, the efficiency gap is an extremely overinclusive measure: its mechanistic condemnation of any plan with a one-time "gap" of 7% *would cast a pall*

over one of every three plans, *supra* pp. 14–15, App. 171a–72a, including Wisconsin's prior, *court*-drawn plan, which produced "gaps" of 10% and 12%, Dkt. 25:26, Dkt. 125, App. 173a. Additionally, partisan "asymmetry"—which is all that the concept purportedly measures, *see* Stephanapolous & McGhee, *supra*, at 834—"is not [alone] a reliable measure of unconstitutional partisanship." *LULAC*, 548 U.S. at 420 (plurality op.). And the efficiency gap's formula does not control for—among many other critical variables—the facts of political geography: "Republican-favoring efficiency gaps have been part of Wisconsin's political landscape for more than three decades," well before Republicans were drawing district lines. App. 309a (Griesbach, J., dissenting).

B. That The District Court's Test Would Invalidate A Plan Such As Act 43—Which Would Survive Under Any Approach That Any Justice Has Articulated—Underscores The Test's Insufficiency

1. In enacting Act 43, the Wisconsin Legislature was able to fulfill its constitutional duty to draw and adopt a redistricting plan for the first time in decades. *See* App. 9a–11a. The prior two redistricting plans were constructed and implemented by federal district courts. App. 9a–11a. Act 43 complies with traditional redistricting principles, such as compactness, contiguity, and respect for political-subdivision lines. *Supra* pp. 12, 19. Act 43 created districts of communities

in close geographic proximity, likely to have "a reasonable homogeneity of needs and interests" and thus likely to elect representatives that "will [ ] represent the preferences of most of [the] constituen[cy]." *Prosser*, 793 F. Supp. at 863. It also complies with the Constitution's one-person, one-vote requirement. *See supra* p. 13.

Act 43 compares favorably to the previous plans drawn by the district courts. Act 43's compactness scores were comparable to the court-drawn plan in 2002, and the number of municipalities that it split fell between the numbers split by the court-drawn plans. *Supra* p. 13. Moreover, it scores better on population deviation than both court-drawn plans. *Supra* p. 13. It achieved these results while limiting the number of incumbent pairings—that is, forcing multiple incumbents under the prior plan into the same district. *Supra* p. 13.

While Act 43's results so far have not satisfied Plaintiffs' desired outcomes, those outcomes do not markedly differ from those under court-drawn plans. This seeming partisan disparity in Republicans' favor in recent Wisconsin election results—under both Act 43 and court-drawn plans—is a reflection of Wisconsin's natural political geography, with Democrats naturally packing in urban areas like Madison and Milwaukee, Dkt. 150:23–43, as well as natural incumbency advantage, Dkt. 149:66–71, 81–83.

Importantly, if the Legislature had simply redistricted in the "most neutral way [a federal court] could conceive," *Baumgart*, 2002 WL 34127471, at *7, there is no reason to believe that the partisan results of Wisconsin's elections would be meaningfully different. *See* App. 245a (Griesbach, J., dissenting). The district court in 2002 adopted just such an approach to redistricting: it looked to the map that the 1992 district court had drawn "as a template and adjust[ed] it for population deviations." *Baumgart*, 2002 WL 34127471, at *7. Republicans had won 55 seats in 1998, after winning 49% of the vote. Dkt. 125 ¶¶ 233, 250. Then, under the 2002 court-drawn map, their results in the very next mid-term election were largely consistent, winning 58 seats with 50.05% of the vote. Dkt. 125 ¶¶ 233, 252.

Had the Legislature in 2010 applied this "most neutral" approach to the 2002 court-drawn map—perhaps because Republican legislators subjectively liked the partisan results they achieved in 2010 under the court-drawn map—there is no reason to believe that the election results would have been much different than they were in 2010. In 2010—the last year under the 2002 map—Republicans won 60 seats after obtaining 53.50% of the vote. Dkt. 125 ¶¶ 233, 256. When Republicans achieved roughly the same popular vote share under Act 43 in 2014—in the very next mid-term election—they ended up with 63 seats in the Assembly. Dkt. 125 ¶¶ 233, 258. Similarly, the allegedly unconstitutional result under Act 43 in 2012—a

presidential election year—involved Republicans winning 60 seats on 48.6% of the vote. This is not much different from the result under the 2002 court-drawn map in 2004—another presidential election year—when Republicans won 60 seats on 50% of the vote. Dkt. 125 ¶¶ 233, 253, 257.

2. Given the attentiveness that Wisconsin mapdrawers paid to all legal and practical requirements, it is unsurprising that the plan would survive under any approach urged by any Justice of this Court.

For example, several Justices have proposed tests premised upon failure to comply with traditional redistricting principles. *See Vieth,* 541 U.S. at 347–48 (Souter, J., joined by Ginsburg, J., dissenting); *id.* at 339 (Stevens, J., dissenting); *Bandemer*, 478 U.S. at 173 (Powell, J., concurring in part, dissenting in part). Since Act 43 comports with these principles, it would be lawful under all of these tests. *See supra* p. 19.

Act 43 would also survive under the *Bandemer* plurality's test, had the test been properly applied. *Supra* p. 31. The *Bandemer* plurality defined "effect" as a "continued frustration of the will of the majority of the voters," 478 U.S. at 133, and it affirmed a map that resulted in Democrats winning 43 out of 100 House seats based on 51.9% of the vote, *id.* at 115. Since those election results are comparable to results under Act 43, *see supra* pp. 31–32, Act 43 would also pass this test, *see* App. 232a–34a (Griesbach, J., dissenting).

Finally, Act 43 would pass Justice Breyer's proposed test in *Vieth*. Justice Breyer would find a constitutional violation if a political gerrymander caused "entrenchment . . . [that] is purely the result of partisan manipulation and not other factors." *Vieth*, 541 U.S. at 360 (Breyer, J., dissenting). "Other" factors could include "sheer happenstance . . . or reliance on traditional . . . districting criteria." *Id.* at 360–61. Particularly relevant here, a district map that had been redrawn only once every ten years *and* that complied with neutral criteria would be unconstitutional *only if* a majority party had "*twice* failed to obtain a majority of the relevant legislative seats in elections," and those failures could not be explained in any neutral way. *Id.* at 366. Here, Republicans won a majority of the statewide vote in 2014, meaning that Democrats did not qualify as a majority party under two consecutive elections.

III. At Minimum, Defendants Are Entitled To Vacatur Of The District Court's Decision And Remand

A party is entitled to have its case adjudicated under a correctly articulated, "proper" legal standard. *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2131 (2014). Here, although the court denied Defendants' pretrial motion to dismiss and motion for summary judgment, it steadfastly refused to set forth what it regarded as the governing legal standard. *See supra* p. 15. Thus, at trial, Defendants sensibly trained their fire on the only known target: Plaintiffs'

efficiency-gap theory. *See supra* pp. 15–16. But then, after the record closed and the briefing was completed, the district court moved the target. In its final judgment, the district court declined to adopt Plaintiffs' theory and announced in its place a newly devised, three-part test, whose "effect" inquiry turns not on efficiency gaps but on the *Bandemer* plurality's "entrenchment" concept. *See supra* pp. 16–18.

Had Defendants known the governing legal standard would turn on *Bandemer*-style "entrenchment," they would have changed their discovery, trial, and briefing strategies to focus on whether the Republicans truly were "entrenched" under Act 43, rather than on Plaintiffs' academic efficiency-gap approach. For instance, Defendants would have developed evidence showing that Democrats could win a majority of seats under Act 43, that a uniform swing analysis does not show the outermost limit of a party's vote-winning capability, and that there is possibly a large range of deviation from partisan baseline scores.

Accordingly, Defendants should have at least a chance to develop a record tailored to the district court's test, should this Court approve that test (or under any other new standard, should this Court—or the district court on remand—adopt one).

IV. Partisan-Gerrymandering Claims Are Nonjusticiable

The four-Justice plurality in *Vieth* concluded that partisan-gerrymandering claims are not justiciable, after "[e]ighteen years of essentially pointless litigation" in the lower courts under the *Bandemer* plurality's test. 541 U.S. at 305–06. Justice Kennedy, while not joining the plurality, wrote that there are "weighty arguments for holding cases like these to be nonjusticiable; and those arguments may prevail in the long run." *Id.* at 309 (Kennedy, J., concurring in the judgment). It has been 13 years since *Vieth,* and over 30 years since *Bandemer*. As this case demonstrates, wasteful and fruitless litigation persists. Since this additional experience has failed to yield a "limited and precise" standard, *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment), this Court should hold that partisan-gerrymandering claims are nonjusticiable.

CONCLUSION

This Court should note probable jurisdiction. This Court may also wish to consider summary reversal.

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