No. 16-1161

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

BRIEF OF THE WISCONSIN INSTITUTE FOR LAW & LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

Page

Table of Authorities iii

Interest of *Amicus Curiae* 1

Summary of Argument 2

Argument 3

I. PARTISAN GERRYMANDERING CLAIMS ARE NOT JUSTICIABLE 4

A. This Court's Attempts To Wrestle With Political Gerrymandering Claims Provide Conflicting Precedents And Inadequate Guidance To District Courts 5

B. The Thirteen Years Of Confusion Following This Court's Decision In *Vieth* v. *Jubelirer* Demonstrate That No Manageable Standard Will Emerge 8

C. Repeated Litigation Over Redistricting Damages The Political Process And The Courts 14

D. Centuries Of Historical Practice Confirm That Political Forces Temper Excesses In Partisan Redistricting And That The Constitution Does Not Empower Federal Courts To Police Partisanship 17

E. Holding Partisan Gerrymandering Claims Nonjusticiable Reaffirms The Outcome Of *Vieth* And Would Not Disturb Settled Precedent 21

II. A PLAN THAT COMPLIES WITH TRADITIONAL REDISTRICTING CRITERIA IS NOT AN UNCONSTITUTIONAL POLITICAL GERRYMANDER 22

Conclusion 28

TABLE OF AUTHORITIES

Cases **Page(s)**

Ala. Legislative Black Caucus v. *Alabama*,
No. 2:12-cv-691, 2017 WL 378674
(M.D. Ala. Jan. 20, 2017) 15, 16

Ala. Legislative Black Caucus v. *Alabama*,
135 S. Ct. 1257 (2015) 26, 27

Ala. Legislative Black Caucus v. *Alabama*,
988 F. Supp. 2d 1285
(M.D. Ala. 2013) 3, 9

Ariz. State Legislature v. *Ariz. Indep. Redistricting Comm'n*,
135 S. Ct. 2652 (2015) 15

Baker v. *Carr*,
369 U.S. 186 (1962) 4, 5

Burns v. *Richardson*,
384 U.S. 73 (1966) 6

City of Cleburne v. *Cleburne Living Ctr.*,
473 U.S. 432 (1985) 10

Cooper v. *Harris*,
137 S. Ct. 1455 (2017) 10

Cox v. *Larios*,
542 U.S. 947 (2004) 10

Davis v. *Bandemer*,
478 U.S. 109 (1986).....6, 11

Ferrell v. *Hall*,
406 U.S. 939 (1972).....5

Ferrell v. *Hall*,
339 F. Supp. 73 (W.D. Okla. 1972).....5

Fortson v. *Dorsey*,
379 U.S. 433 (1965).....5, 26

Gaffney v. *Cummings*,
412 U.S. 735 (1973).....26

Gomillion v. *Lightfoot*,
364 U.S. 339 (1960).....5

INS v. *Chadha*,
462 U.S. 919 (1983).....4

Jimenez v. *Hidalgo Cty. Water Improvement Dist. No. 2*,
424 U.S. 950 (1976).....5

Jimenez v. *Hidalgo Cty. Water Improvement Dist. No. 2*,
68 F.R.D. 668 (S.D. Tex. 1975) 5

Kerr v. *Hickenlooper*,
759 F.3d 1186 (10th Cir. 2014).....17

League of United Latin Am. Citizens v. *Perry*,
548 U.S. 399 (2006).....7, 8, 11, 16, 26, 27

McIntyre v. *Ohio Elections Comm'n*,
514 U.S. 334 (1995) 10

Miller v. *Johnson*,
515 U.S. 900 (1995) 2, 25, 27

Montejo v. *Louisiana*,
556 U.S. 778 (2009) 21, 22

Myers v. *United States*,
272 U.S. 52 (1926) 18

Nixon v. *United States*,
506 U.S. 224 (1993) 4

NLRB v. *Noel Canning*,
134 S. Ct. 2550 (2014) 17

Pearson v. *Callahan*,
555 U.S. 223 (2009) 21, 22

Perez v. *Texas*,
No. 11-CA-360, 2011 WL 9160142
(W.D. Tex. Sept. 2, 2011) 9

Printz v. *United States*,
521 U.S. 898 (1997) 18

Radogno v. *Ill. State Bd. of Elections*,
No. 1:11-cv-4884, 2011 WL 5868225
(N.D. Ill. Nov. 22, 2011) 3, 9

Radogno v. *Ill. State Bd. of Elections*,
No. 1:11-cv-4884, 2011 WL 5025251
(N.D. Ill. Oct. 21, 2011) 5, 8, 16

Raleigh Wake Citizens Ass'n v. *Wake Cty. Bd. of Elections*,
827 F.3d 333 (4th Cir. 2016).....9

Raleigh Wake Citizens Ass'n v. *Wake Cty. Bd. of Elections*,
166 F. Supp. 3d 553 (E.D.N.C. 2016).....9

Republican Party of N.C. v. *Hunt*,
No. 94-2410, 1996 WL 60439
(4th Cir. Feb. 12, 1996).....16

Reynolds v. *Sims*,
377 U.S. 533 (1964).....2, 5

Schlesinger v. *Reservists Comm. to Stop the War*,
418 U.S. 208 (1974).....4

Seminole Tribe of Fla. v. *Florida*,
517 U.S. 44 (1996).....22

Shapiro v. *McManus*,
203 F. Supp. 3d 579 (D. Md. 2016).....8

Shaw v. *Reno*,
509 U.S. 630 (1993).....24, 25, 27

United States v. *Curtiss-Wright Export Corp.*,
299 U.S. 304 (1936).....18

Vieth v. *Jubelirer*,
541 U.S. 267 (2004).....2, 3, 7, 8, 10, 14, 15, 16, 17, 21, 22, 24, 25, 26, 27, 28

Wells v. *Rockefeller*,
398 U.S. 901 (1970).....5

Wells v. *Rockefeller*,
311 F. Supp. 48 (S.D.N.Y. 1970).....5

Wesberry v. *Sanders*,
376 U.S. 1 (1964).....5

Whitcomb v. *Chavis*,
403 U.S. 124 (1971).....6

WMCA, Inc. v. *Lomenzo*,
382 U.S. 4 (1965).....5

WMCA, Inc. v. *Lomenzo*,
238 F. Supp. 916 (S.D.N.Y. 1965).....5

Zivotofsky v. *Clinton*,
566 U.S. 189 (2012).....3, 4

Zivotofsky v. *Kerry*,
135 S. Ct. 2076 (2015).....17

Federal Constitutional Provisions

U.S. Const. art. I, § 4.....15

State Constitutional Provisions

Alaska Const. art. VI, § 8.....15

Cal. Const. art. XXI, §§ 1–3 15

Wash. Const. art. II, § 43 15

Wis. Const. art. IV, § 3 3

Wis. Const. art. IV, § 4 23

Statutes

2 U.S.C. § 2c.....15

Apportionment Act of 1842, 5 Stat. 491 15

Apportionment Act of 1872, 17 Stat. 28 15

Idaho Code Ann. §§ 72-1501 *et seq*. 15

Wis. Stat. Ann. § 120.02(2) 3

Proposed Legislation

H.R. 145, 115th Cong., 1st Sess. (2017) 15

H.R. 151, 115th Cong., 1st Sess. (2017) 15

H.R. 711, 115th Cong., 1st Sess. (2017) 15

H.R. 712, 115th Cong., 1st Sess. (2017) 15

H.R. 713, 115th Cong., 1st Sess. (2017) 15

H.R. 1102, 115th Cong., 1st Sess. (2017) 15

H.R. 3057, 115th Cong., 1st Sess. (2017) 15

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Peter Argersinger, *All Politics Are Local: Another Look at the 1890s*, 8 J. Gilded Age & Progressive Era 7 (2009).....20

Peter Argersinger, *Representation and Inequality in Late Nineteenth-Century America* (2012) 19, 20

Peter Argersinger, *The Value of the Vote: Political Representation in the Gilded Age*, 76 J. Am. Hist. 59 (1989) 19

Michael Barone, *Straight-Ticket Voting in Divided Government*, *in The Almanac of American Politics 2016* (Richard E. Cohen & James A. Barnes eds., 2015) 12

Jacob Eisler, *Partisan Gerrymandering and the Illusion of Unfairness*, 67 Cath. U.L. Rev. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2993876 15

Elmer Cummings Griffith, *The Rise and Development of the Gerrymander* (1907) 18

Hearing on Wisconsin Redistricting Plan Before the Wisconsin Legislature, 100th Leg., Extraordinary Sess. (Wis. 2011) 14

Michael Klarman, *The Framers' Coup: The Making of the United States Constitution* (2016) 19

Philip Lampi, *The Federalist Party Resurgence, 1808–1816: Evidence from the New Nation Votes Database*, 33 J. Early Am. Republic 255 (2013).....18

Thomas Rogers Hunter, *Hastening the Demise of Federalism in the Low Country: South Carolina's Congressional Gerrymander of 1802*, 113 S.C. Hist. Mag. 221 (2012).....19

Nicholas R. Seabrook, *Drawing the Lines: Constraints on Partisan Gerrymandering in U.S. Politics* (2017).....12

Jesse Sussell & James A. Thomson, *Are Changing Constituencies Driving Rising Polarization in the U.S. House of Representatives?* (Rand 2015).....12

David Wasserman, *Purple America Has All But Disappeared*, FiveThirtyEight (Mar. 8, 2017), https://fivethirtyeight.com/features/purple-america-has-all-but-disappeared.....13

INTEREST OF *AMICUS CURIAE*[1]

The Wisconsin Institute for Law & Liberty ("WILL") is a nonprofit organization that supports and promotes the public interest in the rule of law, individual liberty, constitutional government, and a robust civil society.

WILL is an active participant in issues of public concern to the State of Wisconsin. WILL has represented plaintiffs in election law and free speech cases. Among other matters, it successfully challenged Wisconsin laws limiting aggregate campaign contributions and donations from political committees. It also obtained a favorable settlement in a challenge to a local sign ordinance. In addition, WILL's president and general counsel testified at a joint public hearing on redistricting before the Wisconsin Legislature in 2011. WILL strives to advance the debate concerning law and public policy in these and other areas.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution to fund the preparation or submission of this brief. A contribution to fund the submission of this brief was made by the Freedom Partners Institute. Both Appellants and Appellees have entered consent to the filing of *amicus curiae* briefs on the docket.

SUMMARY OF ARGUMENT

"[L]egislative reapportionment is primarily a matter for legislative consideration and determination," *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964), because "federalism and the slim judicial competence to draw district lines weigh heavily against judicial intervention in apportionment decisions," *Miller* v. *Johnson*, 515 U.S. 900, 934–35 (1995) (Ginsburg, J., dissenting).

Despite this "slim judicial competence," federal courts in Wisconsin have governed the State's redistricting process since the 1980s, imposing court-ordered plans in 1982, 1992, and 2002. *See* J.S. App. 9a–11a. The district court in this case struck down Wisconsin's legislatively enacted redistricting plan without articulating a manageable standard for deciding claims of political gerrymandering. It found no departure from traditional redistricting principles, but it nevertheless invalidated the plan because the election results were not proportional to the statewide vote—a purely hypothetical election that Wisconsin does not hold.

As this case and others like it demonstrate, there is no law-based, workable standard for separating permissible maps from impermissible maps. Therefore, federal courts have no jurisdiction. This Court should remove any lingering uncertainty and hold that "political gerrymandering claims are nonjusticiable." *Vieth* v. *Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion).

Even if a judicially manageable standard could be devised for political gerrymandering claims, redistricting plans that adhere to traditional redistricting criteria are constitutionally permitted.

These traditional-criteria districts are not impermissible partisan gerrymanders, and a majority of the Justices in *Vieth* would have upheld such districts. *See, e.g.*, *Vieth*, 541 U.S. at 306 (plurality opinion); *id.* at 307 (Kennedy, J., concurring in the judgment); *id.* at 318 (Stevens, J., dissenting); *id.* at 347 (Souter, J., dissenting). Striking down districts that comply with traditional redistricting criteria "would commit federal and state courts to unprecedented intervention in the American political process," *id.* at 306 (Kennedy, J., concurring in the judgment), and require those courts to draw district lines for everything from Congress to the State Senate to the local school board. *See, e.g.*, Wis. Const. art. IV, § 3 (providing for political apportionment of State Senate districts); Wis. Stat. Ann. § 120.02(2) (providing for political apportionment of school boards). This would be both unwise and unworkable.

ARGUMENT

This case provides an opportunity for this Court to clarify an area of law that has harmed the political institutions of the States and left district courts struggling to answer "unsolvable" questions, *Radogno* v. *Ill. State Bd. of Elections*, No. 1:11-cv-4884, 2011 WL 5868225, at *2 (N.D. Ill. Nov. 22, 2011) (*Radogno II*), by employing "unknowable" standards, *Ala. Legislative Black Caucus* v. *Alabama*, 988 F. Supp. 2d 1285, 1296 (M.D. Ala. 2013) (*ALBC I*).

This Court can restore the appropriate primacy of States in redistricting and spare district courts from these "unsolvable" questions by holding claims of partisan redistricting nonjusticiable. Such claims raise a political question that federal courts "lack[ ] the authority to decide." *Zivotofsky* v. *Clinton*, 566 U.S. 189, 195 (2012). A dispute asks a political

question when there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Id*.

The limit on the judicial power imposed by the political question doctrine is jurisdictional—a court has no power to render judgment in a dispute if there is no standard. *See Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974) ("The concept of justiciability . . . expresses the jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement of Article III."). The political question doctrine does not prevent courts from asserting jurisdiction merely "because the issues have political implications," *INS* v. *Chadha*, 462 U.S. 919, 943 (1983), but it does prevent a court from usurping the prerogatives of the political branches when the constitutional basis for the claim "lacks sufficient precision to afford any judicially manageable standard of review." *Nixon* v. *United States*, 506 U.S. 224, 230 (1993).

After more than fifty years of contending with these challenges, this Court should confirm that there is no determinable legal standard by which a court can consistently and impartially determine whether a redistricting plan is too partisan. These challenges are nonjusticiable.

I. PARTISAN GERRYMANDERING CLAIMS ARE NOT JUSTICIABLE

Since this Court entered the redistricting fray in *Baker* v. *Carr*, 369 U.S. 186 (1962), district courts have come to anticipate apportionment litigation "[l]ike a periodic comet, once every ten years."

Radogno v. *Ill. State Bd. of Elections*, No. 1:11-cv-4884, 2011 WL 5025251, at *1 (N.D. Ill. Oct. 21, 2011) (*Radogno I*). Despite decades of effort, courts are still unable to devise a workable standard for claims of partisan gerrymandering.

A. This Court's Attempts To Wrestle With Political Gerrymandering Claims Provide Conflicting Precedents And Inadequate Guidance To District Courts

This Court first held that apportionment plans were susceptible to constitutional challenges in *Baker* v. *Carr*. 369 U.S. at 187. The Court also held that apportionment plans must distribute the population in roughly equivalent districts, *Reynolds* v. *Sims*, 377 U.S. 533, 568 (1964); *Wesberry* v. *Sanders*, 376 U.S. 1, 7–8 (1964), and must not divide racial groups to "depriv[e members of one race] of the municipal franchise," *Gomillion* v. *Lightfoot*, 364 U.S. 339, 347 (1960).

Soon thereafter, the Court was called on to decide whether the Constitution permitted politically motivated redistricting plans. Its early decisions were inconsistent. *Compare WMCA, Inc.* v. *Lomenzo*, 382 U.S. 4 (1965), *summarily aff'g* 238 F. Supp. 916 (S.D.N.Y. 1965) (political redistricting claim is not justiciable); *Jimenez* v. *Hidalgo Cty. Water Improvement Dist. No. 2*, 424 U.S. 950 (1976), *summarily aff'g* 68 F.R.D. 668 (S.D. Tex. 1975) (same); *Ferrell* v. *Hall*, 406 U.S. 939 (1972), *summarily aff'g* 339 F. Supp. 73 (W.D. Okla. 1972) (same); *Wells* v. *Rockefeller*, 398 U.S. 901 (1970), *summarily aff'g* 311 F. Supp. 48 (S.D.N.Y. 1970) (same), *with Gaffney* v. *Cummings*, 412 U.S. 735, 751 (1973) (adjudicating claim of political apportionment without assessing justiciability); *Fortson* v. *Dorsey*, 379 U.S. 433, 439

(1965) (plans that "cancel out the voting strength of . . . political elements of the voting population" are invalid); *Burns* v. *Richardson*, 384 U.S. 73, 88 (1966) (quoting *Fortson*); *Whitcomb* v. *Chavis*, 403 U.S. 124, 143 (1971) (same).

After years of conflicting decisions, a fractured majority of this Court held that assertions of partisan apportionment presented a justiciable question in *Davis* v. *Bandemer*, 478 U.S. 109 (1986), but neither the *Bandemer* Court nor any subsequent Court has been able to devise a standard for such cases.

Bandemer's plurality opinion suggested a two-part test, with plaintiffs "required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." 478 U.S. at 127 (White, J., concurring). For the plurality, that a redistricting plan emerged from a political process was almost *per se* proof of discriminatory intent. *Id.* The plurality's proposed test for discriminatory effect was more demanding than its intent test but less precise—the "mere lack of proportional representation" was not sufficient to prove discriminatory effect: Rather, plaintiffs had to show that the plan "consistently degrade[d] a voter's or a group of voters' influence on the political process as a whole." *Id.* at 131–32. Justice Powell proposed an alternative standard that considered "a number of other relevant neutral factors," including "the configurations of the districts, the observance of political subdivision lines, and other criteria that have independent relevance to the fairness of districting"—in short, traditional redistricting criteria. *Id.* at 162, 165 (Powell, J., concurring in part and dissenting in part).

Bandemer proved difficult in application. *See Vieth*, 541 U.S. at 283 (cataloging confusion in courts caused by *Bandemer* and widespread critical commentary by legal scholars).

This Court once again considered the justiciability of partisan redistricting in *Vieth*. The Court explicitly retreated from *Bandemer*, and a majority of the Justices agreed that partisan gerrymandering claims could be considered only rarely, if at all. A plurality concluded "that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided." *Id.* at 281. The concurrence stopped short of that conclusion. While it was not ready to "foreclose all possibility of judicial relief," it agreed that, after nearly twenty years, no manageable standard had been identified, which "make[s] our intervention improper." *Id.* at 306, 317 (Kennedy, J., concurring in the judgment). The four dissenting Justices authored three opinions, each proposing a different standard, none of which replicated the *Bandemer* plurality's test.

Two years after *Vieth*, this Court returned to the question of political apportionment and once again failed to provide any standard. *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399 (2006) (*LULAC*). The Court observed that "disagreement persists" regarding the justiciability of political gerrymandering claims but declined to revisit *Vieth*. *Id.* at 414. None of the Court's six opinions garnered a majority. Nevertheless, a majority of the Court agreed that the plaintiffs had not identified constitutionally flawed partisanship in the mid-decade redistricting plan even though the Texas legislature did "seem to have decided to redistrict with the sole purpose of achieving a Republican

congressional majority." *Id.* at 417; *see id.* at 423 (plurality opinion); *id.* at 483 (Souter, J., concurring in part); *id.* at 511 (Scalia, J., concurring in the judgment in part).

B. The Thirteen Years Of Confusion Following This Court's Decision In *Vieth* v. *Jubelirer* Demonstrate That No Manageable Standard Will Emerge

Bandemer's legacy proved to be "one long record of puzzlement and consternation." *Vieth*, 541 U.S. at 282; *see also id.* at 283. The plurality in *Vieth* took this puzzlement as proof that these cases have no workable standard, while the concurrence suggested that district courts might yet devise a workable standard once freed from *Bandemer*. *Id.* They have not done so. Instead, they struggle to apply case law that is "foggy at best," and consists mainly of "cobbled-together plurality opinions that place district courts in the untenable position of evaluating political gerrymandering claims without any definitive standards." *Radogno I*, 2011 WL 5025251, at *4.

When last this Court considered the justiciability of partisan gerrymandering in *Vieth*, the plurality concluded that "[e]ighteen years of essentially pointless litigation have persuaded us that *Bandemer* is incapable of principled application." *Vieth*, 541 U.S. at 306. "Essentially pointless litigation" has now continued for thirteen more years. The nine opinions in *Vieth* and *Bandemer* could not identify a rule of decision with support from a majority of the Justices. Nor, as noted above, did any standard obtain a majority across the six opinions authored in *LULAC*.

The predictable outcome is confusion and disquiet in the lower courts. *See, e.g.*, *Shapiro* v.

McManus, 203 F. Supp. 3d 579, 594 (D. Md. 2016) ("while political gerrymandering claims premised on the Equal Protection Clause remain justiciable in theory, it is presently unclear whether an adequate standard to assess such claims will emerge"); *Raleigh Wake Citizens Ass'n* v. *Wake Cty. Bd. of Elections*, 166 F. Supp. 3d 553, 591 n.15 (E.D.N.C.) (observing the "extraordinary tension" among this Court's partisan gerrymandering decisions), *aff'd in part*, 827 F.3d 333, 348 (4th Cir. 2016) ("the Supreme Court has not yet clarified when exactly partisan considerations cross the line from legitimate to unlawful"); *ALBC I*, 988 F. Supp. 2d at 1296 ("the standard of adjudication for [plaintiffs'] claim of partisan gerrymandering is 'unknowable'"); *Radogno II*, 2011 WL 5868225, at *2 ("political gerrymandering claims . . . are currently 'unsolvable' based on the absence of any workable standard for addressing them"); *Perez* v. *Texas*, No. 11-CA-360, 2011 WL 9160142, at *11 (W.D. Tex. Sept. 2, 2011) (dismissing political gerrymandering claims due to the absence of "a reliable standard by which to measure the redistricting plan's alleged burden on . . . representational rights").

Before *Vieth*, "the results from one gerrymandering case to the next" proved "disparate and inconsistent." *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring in the judgment). *Vieth*'s fractured outcome has itself left lower courts "ask[ing] . . . how we could 'allow a claim to go forward that no one understands,'" *ALBC I*, 988 F. Supp. 2d at 1296, and the results in these cases remain "disparate and inconsistent."

In their search for a constitutionally cognizable standard, appellees grounded their arguments below on the First Amendment and the Equal Protection

Clause. Neither provides a clear or appropriate standard for courts to evaluate their claims. Appellees' First Amendment claim is unworkable because it would subject all apportionment plans to strict scrutiny as restrictions on core political speech or associational interests, *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995), which would preclude all political considerations. That is hard to square with the rule that "'politics as usual' is . . . *itself* a 'traditional' redistricting criterion." *Cox* v. *Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting) (citing *Vieth*, 541 U.S. at 285 (plurality opinion); *id.* at 307 (Kennedy, J., concurring in the judgment); *id.* at 344 (Souter, J., dissenting); *id.* at 355 (Breyer, J., dissenting)); *see also Cooper* v. *Harris*, 137 S. Ct. 1455, 1464 (2017) (listing "partisan advantage" as a traditional redistricting criterion).

An equal protection claim similarly provides no workable standard because partisanship is neither an immutable characteristic nor a protected classification. *See City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (classifications by race, alienage or national origin are subject to strict scrutiny). Nothing in the Equal Protection Clause requires State governments to act in a way that minimizes the political consequences of the geographic concentration of voters by party.

Appellees propose their "efficiency gap" metric in an effort to provide a purportedly neutral metric for their constitutional claims. But the "efficiency gap" is not novel and does not remedy a constitutional injury. It is based on a series of unsupported and indefensible presumptions. Judge Griesbach's dissent detailed several of these flaws: The efficiency gap naively assumes that each marginal seat is of equal political

importance; it ignores the fact that "votes are meaningful, even if 'inefficient'"; and it is based on an unsupported presumption that whenever "one party won a lot of close elections," an unconstitutional map was to blame. J.S. App. 282a, 285a, 295a. Even setting these flaws aside, the efficiency gap cannot distinguish between election results caused by a gerrymander and election results caused by historic and unusual changes in turnout, as Wisconsin saw in 2012. J.S. App. 303a–06a.

Ultimately, the efficiency gap measure is merely a dressed-up form of the proportionality analysis that has been rejected by this Court. The efficiency gap assumes that the cumulative results of district elections ought to "track" to some unspecified degree the aggregate totals of votes for Democrat and Republican candidates statewide. Because there is no reason to presume that this will be so—voters who prefer Democrats and Republicans will not necessarily be distributed evenly across a State—the efficiency gap presupposes a new right to proportional representation. That it is proportionality in disguise is suggested by the contrived nature of its name; a lack of statewide proportionality is constitutionally "inefficient" and votes are "wasted" only if statewide proportionality is a constitutional goal.

Far from demanding proportionality, this Court has repeatedly rejected such a standard. Even the *Bandemer* plurality agreed that "the mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination." 478 U.S. at 132 (White, J., concurring); *see also LULAC*, 548 U.S. at 419 (Kennedy, J., concurring in the judgment) ("there is no constitutional requirement of proportional representation, and equating a party's

statewide share of the vote with its portion of the congressional delegation is a rough measure at best").

Furthermore, the "efficiency gap" identified by the district court is attributable not to nefarious political gerrymandering but to changing political geography. Parties suffer large numbers of "wasted" votes because like-minded voters increasingly live in close proximity to each other. J.S. App. 307a–11a (discussing Wisconsin's political geography); *see also* Michael Barone, *Straight-Ticket Voting in Divided Government*, *in The Almanac of American Politics 2016*, at 19 (Richard E. Cohen & James A. Barnes eds., 2015) (Electoral outcomes are "largely the result of demographic clustering, the fact that heavily Democratic voting groups—blacks, Hispanics (in many states) and gentry liberals—tend to be clustered in most central cities, many sympathetic suburbs and most university towns, while Republican voters are spread more evenly around the rest of the country. . . . [C]lustering helps Republicans in elections held in equal-population districts, since Democratic votes are clustered in relatively few districts and Republican votes are more evenly spread around in the rest."); Jesse Sussell & James A. Thomson, *Are Changing Constituencies Driving Rising Polarization in the U.S. House of Representatives?*, at 5–8 (Rand 2015); Nicholas R. Seabrook, *Drawing the Lines: Constraints on Partisan Gerrymandering in U.S. Politics* 3 (2017) ("Effects attributed to partisan gerrymandering have been consistently demonstrated in the published political science literature to have mostly emanated not from deliberate manipulation of district boundaries, but instead from the natural impact of demographics and geography.").

Nationwide, in the 2016 election, 61% of voters cast ballots in counties that went at least 60-40 to one presidential candidate, up from 50% of voters living in such counties in 2012 and 39% of voters in 1992. David Wasserman, *Purple America Has All But Disappeared*, FiveThirtyEight (Mar. 8, 2017), https://fivethirtyeight.com/features/purple-america-has-all-but-disappeared/. In 2016, only 303 of America's 3,113 counties were decided by a single-digit margin, while in 1992, 1,096 counties were decided by single-digit margins. *Id.* Over the same period, the number of counties decided by margins greater than 50 percentage points increased from 96 to 1,196. *Id.* Minimizing the "efficiency gap" in this rapidly changing political landscape would require legislatures to draw tortured districts in a fruitless, open-ended quest for some notion of proportional representation. Nor is there any neutral way for courts to superintend such a process or to impartially redraw districts after invalidating a politically drafted plan.

Although the district court recognized that the "efficiency gap" was a product of the geographic concentration of voters who have historically preferred Democrats, it nonetheless found that the gap was just too big. But the district court offered no standard to measure how much is too much. At most, it concluded that, even though the Wisconsin legislature respected traditional redistricting principles, it could have drawn a set of maps with a lower efficiency gap. In other words, the district court imposed on the legislature a constitutional obligation to gerrymander for competitiveness.

As technology advances, mapmakers will be able to generate, with a few keystrokes, an infinite variety

of potential maps that have different efficiency—or proportionality—gaps and that balance traditional redistricting principles in marginally different ways. By requiring district courts to decide how much partisan proportionality is required, the judgment below will force courts to put political considerations at the center of their decisions. But district courts are not authorized or equipped to draw sharp lines separating the constitutionally permissible from the impermissible among huge numbers of computer-generated plans. They are particularly ill-equipped to employ an "efficiency gap" standard that compels them to evaluate the extent to which a redistricting plan must ensure—or is permitted to deviate from—partisan proportionality.

C. Repeated Litigation Over Redistricting Damages The Political Process And The Courts

Judicial micromanagement of the redistricting process destabilizes the political branches. By imposing a *de facto* proportionality requirement, the district court's "efficiency gap" test would undermine single-member districts. J.S. App. 276a–79a. If legislative representation must match statewide voter preferences, courts will eventually require a proportional representation system, particularly as minor-party or special-interest plaintiffs bring claims. *See Joint Public Hearing on Wisconsin Redistricting Plan Before the Wisconsin Legislature*, 100th Leg., Extraordinary Sess. 61 (Wis. 2011) (statement of Professor Richard Esenberg). That system will diminish electoral accountability and increase legislative gridlock as shifting coalitions transition in and out of power. *See Vieth*, 541 U.S. at 357–58 (Breyer, J., dissenting).

There is no justification for this. Voters can use the political process to restrain partisan apportionment. *Vieth*, 541 U.S. at 362–63 (Breyer, J., dissenting). In States where the political branches conduct apportionment, state law and electoral accountability provide a check on partisan gerrymanders. Or, if voters prefer, they can limit the legislature's role in drawing legislative districts. *See Ariz. State Legislature* v. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015) (upholding redistricting commission adopted through initiative process); Cal. Const. art. XXI, §§ 1–3 (establishing redistricting commission); Alaska Const. art. VI, § 8 (same); Wash. Const. art. II, § 43 (same); Idaho Code Ann. §§ 72-1501 *et seq*. (same). At the federal level, Congress has the authority to police apportionment of congressional districts. U.S. Const. art. I, § 4; *see also* 2 U.S.C. § 2c; Apportionment Act of 1842, 5 Stat. 491 (requiring the use of single-member districts); Apportionment Act of 1872, 17 Stat. 28 (requiring contiguous single-member districts of equal population). There are seven bills currently pending in Congress that propose to regulate apportionment. H.R. 3057, H.R. 1102, H.R. 713, H.R. 712, H.R. 711, H.R. 151, H.R. 145, 115th Cong., 1st Sess. (2017). And, at every level of government, elections themselves can check partisan redistricting. An overly partisan map risks spreading the dominant party's voters too thinly, and the perception of undue partisanship may provoke an electoral backlash. *See, e.g.*, *Ala. Legislative Black Caucus* v. *Alabama*, No. 2:12-cv-691, 2017 WL 378674, at *4 (M.D. Ala. Jan. 20, 2017) ("The 2001 partisan gerrymander [by Democrats] failed to save the Democrats in 2010, when Republicans won supermajorities in both houses.") (*ALBC III*); *see also* Jacob Eisler, *Partisan*

Gerrymandering and the Illusion of Unfairness, 67 Cath. U.L. Rev. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2993876 (arguing that "political adaptation" by voters and parties "undermines the case for litigating partisan gerrymandering").

Political apportionment challenges also impose serious burdens on judicial resources. Redistricting litigation bursts into the federal courts at the conclusion of each Census cycle. *Radogno I*, 2011 WL 5025251, at *1. Mid-cycle redistricting generates further litigation. *LULAC*, 548 U.S. at 409–10. Nor is litigation limited to only a handful of States—apportionment lawsuits are filed across the nation. Because these lawsuits are heard by three-judge district courts and require exhaustive judicial fact-finding, they impose unusually high demands on judges. *See, e.g.*, *ALBC III*, 2017 WL 378674 (457-page slip opinion); J.S. App. 1a–315a (116-page slip opinion).[2] Apportionment challenges drag on for

[2] The *Vieth* plurality identified a perfect example of the futile burdens these cases place on district courts. One district court in North Carolina considered 311 stipulations, 132 witness statements, and 300 exhibits, and heard two days of oral argument, before concluding that the State's system of statewide election of superior court judges "resulted in Republican candidates experiencing a consistent and pervasive lack of success and exclusion from the electoral process as a whole" and that "these effects were likely to continue unabated into the future." *Republican Party of N.C.* v. *Hunt*, No. 94-2410, 1996 WL 60439, at *1 (4th Cir. Feb. 12, 1996). Five days after the district court's ruling, every Republican candidate running for superior court under that same electoral system prevailed. *Vieth*, 541 U.S. at 287 n.8. The circuit court remanded for reconsideration. *Id.*

years, often reaching resolution only as the next Census approaches.

A fractured result, as in *Bandemer* and *Vieth*, affirming the decision below would continue to place district courts in "litigation limbo," condemning them to "many more years wrestling with [these cases] all without a wisp of an idea what rule of law might govern [their] disposition." *Kerr* v. *Hickenlooper*, 759 F.3d 1186, 1195 (10th Cir. 2014) (Gorsuch, J., dissenting from denial of rehearing en banc). Recognizing that these questions are nonjusticiable would acknowledge the reality of redistricting and relieve the courts and the political branches of these harms.

D. Centuries Of Historical Practice Confirm That Political Forces Temper Excesses In Partisan Redistricting And That The Constitution Does Not Empower Federal Courts To Police Partisanship

Partisan considerations have influenced redistricting throughout American history. And, as noted above, Americans have traditionally understood that elections, not courts, provide the most effective check on partisan apportionment. Because the political branches conduct redistricting, the process has always reflected political interests. *See Vieth*, 541 U.S. at 275 (plurality opinion).

When this Court considers questions of federalism and the separation of powers, it places "significant weight upon historical practice." *NLRB* v. *Noel Canning*, 134 S. Ct. 2550, 2559 (2014); *see also Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2091 (2015) ("In separation-of-powers cases this Court has often 'put

significant weight upon historical practice.'" (quoting *Noel Canning*, 134 S. Ct. at 2559)); *Printz* v. *United States*, 521 U.S. 898, 905 (1997) ("contemporaneous legislative exposition of the Constitution . . . , acquiesced in for a long term of years, fixes the construction to be given its provisions" (quoting *Myers* v. *United States*, 272 U.S. 52, 175 (1926))); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 327–28 (1936) ("A legislative practice such as we have here, evidenced not by only occasional instances, but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice.").

America's most famous instance of partisan redistricting took place in 1812, when Massachusetts Republicans devised a map so aggressive that it led critics to coin a new term—"Gerrymandering"—a portmanteau of Governor Elbridge Gerry's name and the stylized salamander that one of his districts was said to resemble. Philip Lampi, *The Federalist Party Resurgence, 1808–1816: Evidence from the New Nation Votes Database*, 33 J. Early Am. Republic 255, 262 (2013). The Republican map left Federalists with only eleven of forty senate seats (27%) despite winning 51% of the statewide vote. *Id.*

Although memorable, Governor Gerry's salamander was far from alone. Legislatures have drawn districts influenced by partisan considerations throughout American history. District boundaries drawn by the Founding generation often displayed partisan influence. *See, e.g.*, Elmer Cummings Griffith, *The Rise and Development of the Gerrymander* 61 (1907) (observing that "the principles of the gerrymander were well known and used" in the

Founding era); *id.* at 24–30, 42–118 (describing pre-revolutionary gerrymanders in Pennsylvania, New York, and Virginia); Thomas Rogers Hunter, *Hastening the Demise of Federalism in the Low Country: South Carolina's Congressional Gerrymander of 1802*, 113 S.C. Hist. Mag. 221, 222, 241–55 (2012) (describing gerrymandering of colonial assembly districts in 1690 and of congressional districts in the early republic); Lampi, *supra*, at 258. In fact, ratification of the Constitution itself may have occurred only because of gerrymandering in favor of low country planters in South Carolina's Assembly and ratifying convention. Michael Klarman, *The Framers' Coup: The Making of the United States Constitution* 451 (2016). The history of post-Civil War politics belies any suggestion that the Fourteenth Amendment forbids partisan considerations in redistricting. *See, e.g.*, Peter Argersinger, *The Value of the Vote: Political Representation in the Gilded Age*, 76 J. Am. Hist. 59, 66 (1989) (recounting that Democrats designed Ohio's 1890 congressional districts to secure a majority of seats with a minority of the statewide vote); Peter Argersinger, *Representation and Inequality in Late Nineteenth-Century America* 310–16 (2012) (noting similar tactics employed by both parties in Michigan, Illinois, Iowa, Indiana and Wisconsin in the 1880s and 1890s).

Centuries of history also show that political forces themselves impose the most effective restraints on partisan redistricting. *See* Seabrook, *supra*, at 9, 12–20, 25–32 (detailing the significant political constraints that discourage partisan gerrymandering and dampen its effects over time). First, a party that seeks to maximize the number of seats it holds also necessarily diminishes its expected margin of victory in each race. A slight change in the political temper

can produce dramatic changes when the formerly dominant party has traded comfortable margins of victory for the chance to win more seats. Second, a party perceived as seeking power through redistricting may alienate voters and mobilize the opposition party.

The risk of setting the margins too thin was demonstrated after the 1891 reapportionment. In power after victories in the early 1890s, Democrats drew districts they expected to win narrowly. But they diluted their votes too much. When the party's popularity waned in 1894, more than 110 congressional seats switched from Democrat to Republican control. Peter Argersinger, *All Politics Are Local: Another Look at the 1890s*, 8 J. Gilded Age & Progressive Era 7, 21–22 (2009). In Indiana, Illinois, Michigan, and Wisconsin, not a single Democrat was elected to Congress, even though Democrat majorities in all but Indiana had drawn maps to favor their party. Argersinger, *Representation and Inequality*, *supra*, at 270–72. As one Michigan reporter observed, "[t]he Democratic gerrymander of '91 has given the Republicans every district in the state." Argersinger, *All Politics Are Local*, *supra*, at 21 (quoting Detroit Evening News, Apr. 10, 1895). The political hazards of the gerrymander were also made clear by Elbridge Gerry himself, whose infamous redistricting caused such an uproar that he lost reelection to the governorship even as his party won 73% of the seats in the state senate. Lampi, *supra*, at 262.

The uninterrupted history of partisan considerations in redistricting—including shortly after ratification of the First and Fourteenth Amendments—strongly suggests that the

Constitution does not authorize federal courts to police partisan redistricting. These centuries of historical practice instead suggest that effective supervision of partisanship comes through the ballot box, not the courtroom.

E. Holding Partisan Gerrymandering Claims Nonjusticiable Reaffirms The Outcome Of *Vieth* And Would Not Disturb Settled Precedent

In *Vieth*, the entire Court declined to follow the plurality's standard in *Bandemer*. A plurality of four Justices concluded "that *Bandemer* was wrongly decided," *Vieth*, 541 U.S. at 281, while Justice Kennedy joined the judgment, noting "the shortcomings" of *Bandemer* and observing that the Court's inability to describe a standard "make[s] our intervention improper," *id.* at 308, 316 (Kennedy, J., concurring in the judgment).

To the extent that *Vieth* arguably left open the slender possibility that some partisan gerrymandering cases may be justiciable, *stare decisis* is no barrier to this Court's holding that they are nonjusticiable. "Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Montejo* v. *Louisiana*, 556 U.S. 778, 792–93 (2009). This Court also considers whether "experience has pointed up the precedent's shortcomings." *Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009).

None of these factors counsels in favor of the justiciability of partisan gerrymandering claims, for substantially the same reasons that the Court

abrogated *Bandemer* in *Vieth*. First, there is no workable test to disturb. *See supra* Section I.B. This Court has not hesitated to overturn fractured decisions that "creat[e] confusion among the lower courts," *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 64 (1996), or that contain no test at all, *see Vieth*, 541 U.S. at 305–06 (plurality opinion) (noting the *Bandemer* "majority's inability to enunciate the judicially discernible and manageable standard that it thought existed"). Second, the decision in *Vieth* is only thirteen years old, which is younger than other decisions that this Court has overturned. *See, e.g.*, *Montejo*, 556 U.S. at 793 (overturning a decision that was "only two decades old"). Third, the reliance interests are "weak because it is hard to imagine how any action taken in reliance upon [the decision] could conceivably be frustrated—except the bringing of lawsuits, which is not the sort of primary conduct that is relevant." *Vieth*, 541 U.S. at 306 (plurality opinion). Fourth, the fractured nature of the decision means that there is no concern with overturning a well-reasoned majority opinion. *Cf. Seminole Tribe*, 517 U.S. at 66 (calling a decision "of questionable precedential value, largely because a majority of this Court expressly disagreed with the rationale of the plurality"). Finally, thirteen years of confusion in the district courts have "pointed up the precedent's shortcomings." *Pearson*, 555 U.S. at 233; *see supra* Section I.B. The Court should hold that assertions of partisan gerrymandering are not justiciable.

II. A PLAN THAT COMPLIES WITH TRADITIONAL REDISTRICTING CRITERIA IS NOT AN UNCONSTITUTIONAL POLITICAL GERRYMANDER

If the Court holds that political gerrymandering claims are justiciable, it should also impose a

commonsense limitation on such claims: A district is not an unconstitutional partisan gerrymander when it complies with traditional redistricting criteria. For example, the majority party in the legislature might draw a district that it hopes will favor its constituency in the next election, but the map also might include only compact, contiguous districts that respect political subdivisions and communities of interest. *See* Wis. Const. art. IV, § 4 ("such districts [are] to be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable").

The district court reached the opposite conclusion, holding that an unconstitutional gerrymander occurred even though, as the dissent observed, "the plaintiffs did not argue that Act 43 created any districts with unusual shapes or lines" and did not show any "appreciable problems with contiguity, compactness, or regard for political boundaries." J.S. App. 251a. The district court's reasoning ignores the consensus on this issue in *Vieth* and the logic of this Court's other gerrymandering cases.

Even though the Court agreed on little in *Vieth*, all but one Justice endorsed an approach that upholds districts that comply with traditional redistricting criteria. The plurality would not have allowed any political gerrymandering challenges, which means that they would not have struck down a district that complied with traditional redistricting criteria. Three of the four dissenters—who agreed on little else—made clear that they would uphold districts that complied with traditional redistricting criteria. Justice Stevens would have held a district unconstitutional only "when any pretense of neutrality is forsaken unabashedly and all traditional

districting criteria are subverted for partisan advantage." *Vieth*, 541 U.S. at 318 (Stevens, J., dissenting); *see also id.* at 335 ("We have explained that 'traditional principles[ ]' . . . 'may serve to defeat a claim that a district has been gerrymandered on racial lines.'" (quoting *Shaw* v. *Reno*, 509 U.S. 630, 647 (1993))); *id.* at 339 ("[I]f no neutral criterion can be identified to justify the lines drawn . . . then no rational basis exists to save the district from an equal protection challenge.").

Justice Souter, joined by Justice Ginsburg, proposed a five-part prima facie case that a plaintiff must make, including that "the district of his residence paid little or no heed to . . . traditional districting principles." *Vieth*, 541 U.S. at 347–48 (Souter, J., dissenting) (citation omitted); *see also id.* at 349 (plaintiffs must "establish specific correlations between the district's deviations from traditional districting principles and the distribution of the population" and "present the court with a hypothetical district" that "deviate[s] less from traditional districting principles than the actual district").

Justice Kennedy's concurring opinion also suggests that a district that complies with traditional redistricting criteria is constitutional. He stated that "[a] determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective." *Id.* at 307. Under this test, a district that complies with traditional redistricting criteria would pass muster because it would be "[r]elated to [ ] legitimate legislative

objective[s]." Thus, as the dissent noted below, all but one of the opinions in *Vieth* would have agreed that a district that complies with traditional redistricting criteria is not an unconstitutional political gerrymander. J.S. App. 252a–258a.

This consensus accords with the Court's reasoning in racial gerrymandering cases, in which there is a presumption of validity when districts comply with traditional redistricting criteria. Three factors "requir[e] courts to exercise extraordinary caution," *Miller*, 515 U.S. at 916, in gerrymandering cases that turn on indirect proof of alleged discriminatory effect. First, "[e]lectoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests." *Id.* at 915; *see also id.* at 916 (referring to "the sensitive nature of redistricting"). Second, this Court has recognized a "presumption of good faith that must be accorded legislative enactments." *Id*. at 916. Third, there is an "evidentiary difficulty" in establishing whether a legislature was motivated by impermissible considerations or was merely aware of them. *Id.*; *see also Shaw*, 509 U.S. at 646 (referring to the "difficulty of proof"). These same factors favor "extraordinary caution" in partisan gerrymandering cases. *See Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment) (affording "judicial relief" in political gerrymandering cases only "if some *limited and precise* rationale were found to correct an established violation of the Constitution in some redistricting cases" (emphasis added)).

The district court in this case abandoned the restraint counseled by this Court. The majority concluded that "[i]t is entirely possible to conform to

legitimate redistricting purposes but still violate the Fourteenth Amendment because the discriminatory action is an operative factor in choosing the plan." J.S. App. 120a. In reaching this conclusion, it relied primarily on inapposite dicta from *Fortson* v. *Dorsey*, 379 U.S. 433 (1965), and *Gaffney* v. *Cummings*, 412 U.S. 735 (1973), which were one-person, one-vote cases. But holdings in one-person, one-vote cases provide no guidance on the significance of traditional redistricting criteria because "an equal population goal . . . is part of the redistricting background," not a traditional redistricting principle. *Ala. Legislative Black Caucus* v. *Alabama*, 135 S. Ct. 1257, 1270 (2015) (*ALBC II*). As a result, these cases do not resolve whether compliance with traditional redistricting principles is sufficient to defeat a claim of political gerrymandering.

If compliance with traditional redistricting criteria is not a limit on political gerrymandering claims, then courts will be propelled deep into the political process. As noted above, passing upon the constitutionality of district maps when confronted with thousands of options that all comply with traditional redistricting criteria will force courts to decide how much partisanship is too much—a subjective political judgment. And a legislature that was impermissibly partisan—however that is defined—when it drew the initial map likely will remain impermissibly partisan when a court orders it to draw a new one. If so, courts will end up drawing more plans themselves and shouldering "the difficulties . . . in drawing a map that is fair and rational." *LULAC*, 548 U.S. at 415. These tasks will further burden the district courts in an area where this Court has already expressed doubts about manageability. *See, e.g.*, *Vieth*, 541 U.S. at 307–08

(Kennedy, J., concurring in the judgment) (noting the risk for the courts of "assuming political, not legal, responsibility for a process that often produces ill will and distrust"); *see also supra* Section I.C.

Redistricting *by a legislature* has always been an unavoidably political process. *Vieth*, 541 U.S. at 274 (plurality opinion); *see also ALBC II*, 135 S. Ct. at 1270 (listing "political affiliation" as a traditional redistricting criterion); *Vieth*, 541 U.S. at 360 (Breyer, J., dissenting) ("[T]raditional or historically based boundaries are not, and should not be, 'politics free.'"); *Shaw*, 509 U.S. at 646 (noting that the legislature "is aware of . . . political persuasion" when it redistricts). What history has sanctioned, modern thought has ratified. "[D]rawing lines for congressional districts is one of the most significant acts a State can perform to ensure citizen participation in republican self-governance." *LULAC*, 548 U.S. at 416. And "purely political boundary-drawing, even where harmful to the members of one party, will often nonetheless find justification in other desirable democratic ends, such as maintaining relatively stable legislatures in which a minority party retains significant representation." *Vieth*, 541 U.S. at 360 (Breyer, J., dissenting).

Because of the political nature of redistricting and the limited role of our federal judiciary, courts cannot plausibly require the legislature to redraw every politically motivated district. "A decision ordering the correction of all election district lines drawn for partisan reasons would commit federal and state courts to an unprecedented intervention in the American political process." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment); *see also Miller*, 515 U.S. at 916 (recognizing "the intrusive potential of judicial intervention into the legislative

realm"). The task of the courts—if these claims are deemed somehow justiciable, *see supra* Section I—is to regulate political gerrymanders in which "legislative restraint was abandoned." *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring in the judgment). Restraint has not been abandoned when traditional redistricting principles are observed.

CONCLUSION

The Court should put an end to the confusion in the district courts by vacating the judgment and holding that political gerrymandering claims are nonjusticiable. At the very least, the Court should make clear that a district that complies with traditional redistricting criteria cannot be an unconstitutional partisan gerrymander.

Respectfully submitted,

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August 4, 2017