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 FOR *AMICUS CURIAE* WISCONSIN MANUFACTURERS & COMMERCE IN SUPPORT OF APPELLANTS

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August 4, 2017

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INTEREST OF THE *AMICUS CURIAE*[1]

Wisconsin Manufacturers & Commerce ("WMC") is Wisconsin's state chamber of commerce, state manufacturers' association, and state safety council. Founded in 1911, WMC now has nearly 3,800 members, including large and small manufacturers, service companies, local chambers of commerce, and specialized trade associations. WMC is a nonpartisan organization dedicated to making Wisconsin the most competitive state in the nation. To that end, WMC regularly participates in public policy debates and seeks to advance its members' interests through the legislative process. WMC thus has an interest in ensuring that enactments of the state legislature are given due respect under the Constitution without improper interference from the other co-equal branches of government.

SUMMARY OF THE ARGUMENT

This case involves the Plaintiffs' claim that 2011 Wisconsin Act 43 is an unconstitutional partisan gerrymander that cracks and packs Democrats across State Assembly districts. To evaluate such a claim, one must know how many Democrats reside in each district. Plaintiffs seek to show this by relying on election results and statistical analyses interpreting them. But in doing so, Plaintiffs lose sight of basic truths regarding the decisions made by actual voters.

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1. Counsel for all parties have consented to this filing. No counsel for a party authored this brief in whole or in part. In addition to Wisconsin Manufacturers & Commerce, its members, and its counsel, the State Government Leadership Foundation made a monetary contribution intended to fund the preparation and submission of this brief.

We return to those basic truths. Every person is unique—and so is every individual voter. Come election time, individual voters make purposeful choices about who to vote for and whether to vote at all. Individual electoral choices, in turn, are influenced by innumerable and ever-changing factors, perhaps the most obvious of which is political-party affiliation. While some individuals routinely and exclusively vote for either Democratic or Republican candidates, others pay little attention to "R" and "D" designations. In fact, public-opinion polls show that ever more Americans identify as independent, often splitting their tickets or swinging from election to election.

Party affiliation is but one factor of many. Another is the particular candidates running, who differ in strength based on incumbency, fundraising, campaigning, personal background, and other factors affecting a candidate's appeal. Regardless of the strength of a given candidate, moreover, other candidates on the same ballot can sway voters' choices. Individuals also choose who to vote for based on pressing issues of the day, their personal social networks, and any number of other factors. Importantly, hefty sums of individuals often choose not to vote at all. Keenly aware of these factors, campaigns spend significant amounts of time and money trying to persuade voters and to increase voter turnout.

Whereas individuals choose whether to vote and who to vote for based on innumerable, interrelated factors, Plaintiffs' theory of the case considers only one: party affiliation. Within that myopic focus, Plaintiffs' arguments erroneously presume that individual voters and candidates never change their party affiliation and that individuals who identify with a particular party

are fungible. Plaintiffs' evidence, too, displays the same presumptions: election results from 2012 and 2014, as well as statistical analyses built upon them, do not reflect changes in party platforms, candidates, issues, or any of the other numerous factors individuals consider when making electoral choices.

Plaintiffs' disregard of individual choice and change over time exposes conceptual and legal shortcomings in their theory of the case. To begin, Plaintiffs' evidence does not measure how many Democrats voted, which candidates they voted for, or in what numbers. Rather, Plaintiffs' evidence shows only how many votes were cast for Democratic candidates; it fails to differentiate Republican defectors and independent voters, and it wholly ignores nonvoters. As a result, Plaintiffs do not—indeed, cannot—explain how a discriminatory intent to harm Democrats necessarily relates to a discriminatory effect against individuals who may chose, or have chosen, to vote for Democratic candidates. Nor can they explain how looking at votes for a Democratic candidate proves that Democrats were cracked and packed. Hypothetical scenarios and repeated examples in Wisconsin's recent political history clarify and underscore these points. Plaintiffs, in the end, fail to show how many Democrats reside in particular districts; and without that, it is impossible to know whether Democrats were gerrymandered.

Further, Plaintiffs' theory of the case conflicts with representation-rights precedent. When this Court has struck down redistricting plans under the Equal Protection Clause, it has generally sniffed out unconstitutionality by measuring, across districts, total population or voting-eligible population. Plaintiffs and the district court, by

contrast, measure the alleged unconstitutionality here by using numbers of actual votes in past elections—that is, actual-voter population. Doing so, however, treats individuals who choose to vote differently from those who choose not to. Absent exceptional circumstances, of which Plaintiffs offered no proof below, using actual-voter population is constitutionally problematic and finds no support in controlling caselaw.

In its opinion and judgment below, the district court accepted Plaintiffs' theory of the case essentially in its entirety. Because Plaintiffs' theory is conceptually and legally untenable, this Court should reverse.

ARGUMENT

I. Elections are decided by individuals making purposeful choices based on innumerable factors that change over time.

Election results are reported in the aggregate: Jones received 2,200 votes to Smith's 1,800, while another 4,000 eligible voters cast no ballot at all. What do these numbers represent? Votes of course, but something more: every number reflects conscious decisions made by individual human beings. Each election, individuals consider countless factors and ultimately decide who to vote for—and whether to vote at all. *See* J.S. App. 311a (Griesbach, J., dissenting). Trying to create a comprehensive list of all these factors betrays its infinite nature. We discuss just a few of the most significant.

1. Political-party affiliation is obviously one of these factors. To be sure, many individuals choose who to vote

for based on their party affiliation; voters who identify as Republicans most often vote for Republican candidates, just as voters who identify as Democrats most often vote for Democratic candidates. But party affiliation, neither "set in stone [n]or in a voter's genes," "is not an immutable characteristic." J.S. App. 242a–43a (Griesbach, J., dissenting) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 287 (2004) (plurality opinion)). Rather, over the long term (several years) and even in the short term (one election cycle), partisanship is "malleable." Dee Allsop & Herbert F. Weisberg, *Measuring Change in Party Identification in an Election Campaign*, 32 Am. J. of Pol. Sci. 996, 997, 1013–14 (1988). "[V]oters can—and often do—move from one party to the other or support candidates from both parties." *Davis v. Bandemer*, 478 U.S. 109 (1986) (O'Connor, J., concurring in the judgment). Indeed, "[i]n every election cycle a substantial portion of partisan voters defect and cast their ballots for candidates from the other party." Paul S. Herrnson & James M. Curry, *Issue Voting and Partisan Defections in Congressional Elections*, 36 Legis. Stud. Q. 281, 282–83 (2011). Sometimes a partisan switch endures; other times it reverts. Switching, moreover, is not reserved for voters—candidates change, too. One of the most iconic Republicans of the past century, Ronald Reagan, spent much of his adult life campaigning for Democratic candidates, including Harry Truman and Helen Gahagan Douglas. *The Life of Ronald Reagan: A Timeline*, NPR, http://www.npr.org/news/specials/obits/reagan/timeline.html (last visited August 2, 2017).

Even within a political party, individual voters weigh party affiliation differently. Depending on the person, the time, and the place, party affiliation may be decisive or it may matter very little. Because "[t]he two major

political parties are both big tents that contain within them people of significantly different viewpoints," some individuals make electoral choices based on the intraparty groups with which they identify. *Baldus v. Members of Wisconsin Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 851 (E.D. Wis. 2012); *see also* J.S. App. 287a (Griesbach, J., dissenting). Any casual observer can list several Republican sub-groups: moderates, conservatives, country clubbers, religious-values voters, and so on. So, too, are there Democratic moderates, progressives, Millenial urban liberals, union members, etc. Members of these intraparty groups may be more or less likely to vote consistently with their big-tent party. All in all, voters adhere to party affiliation in varying degrees, across a spectrum from staunch partisan to flip-flopper.

Of course, some individuals do not base their decision on party affiliation at all. On any given ballot, a voter may "split," choosing a Republican presidential candidate and a Democratic State Assembly candidate. Individuals also may "swing" over time: for reasons other than party affiliation, they vote for a Democrat in 2012 and, in 2016, a Republican. Numerous examples from recent Wisconsin elections illustrate this point. In the 2014 statewide election, Wisconsin voters re-elected Governor Scott Walker, a conservative Republican.[2] That same day, Democrat Doug LaFollette won another term as Secretary of State. Obviously some voters chose to split their ticket or to abstain from voting for one of the offices. Eight years earlier on a single statewide ballot, incumbent Democratic

2. Wisconsin election results are available at the Wisconsin Elections Commission website, http://elections.wi.gov/elections-voting/results (last visited August 2, 2017).

Governor Jim Doyle carried the statewide vote, while Republican J.B. Van Hollen, who had previously not run for elective office, won the race for State Attorney General. *See also infra* pp. 24-28.

Though it remains a major factor for many, party affiliation is generally waning in the aggregate. Political scientists have observed a half century of declining loyalty for both major parties. Paul Allen Beck et al., *The Social Calculus of Voting: Interpersonal, Media, and Organizational Influences on Presidential Choices*, 96 The Am. Pol. Sci. Rev. 57, 58 (2002). In the 2016 presidential election, third-party candidates amassed nearly 5% of the nationwide popular vote. Fed. Election Comm'n, *Official 2016 Presidential General Election Results*, Jan. 30, 2017, *available at* https://www.fec.gov/pubrec/fe2016/2016presgeresults.pdf. And contemporary opinion polls show that 42% of Americans—a record number—"eschew[] party labels" altogether, choosing instead to identify as "independents." Jeffrey M. Jones, *Record-High 42% of Americans Identify as Independents*, Gallup (Jan. 8, 2014); *see also* Gallup Party Affiliation Historical Trends, http://www.gallup.com/poll/15370/party-affiliation.aspx (last visited August 2, 2017).

2. Another factor influencing a voter's choice is the particular candidates running for office.[3] *See* J.S. App. 243a (Griesbach, J., dissenting). As human beings, candidates are not fungible. Each Republican candidate is different from every other Republican candidate,

3. After all, if particular candidates did not matter, why would parties hold primary elections and nominating conventions? And why would candidates bother running a campaign at all?

not to mention every other Democratic candidate. "[A] Republican in Massachusetts will be different from one in Utah," just like candidates "from Milwaukee Democratic districts or suburban Waukesha County Republican districts" likely will hold "viewpoints further from the center" than candidates in other parts of the state. *Id.* at 287a (Griesbach, J., dissenting). Better candidates tend to attract more partisan *and* independent votes, and "particularly attractive candidate[s]" can even "lure voters across partisan lines." Herrnson & Curry, *supra*, at 283. On the other hand, members of this Court have "dare sa[id] (and hope[d]) that the political party which puts forward an utterly incompetent candidate will lose even in its registration stronghold." *Vieth*, 541 U.S. at 287.

Like a voter's choice, a candidate's strength depends on any number of interrelated factors. Perhaps the most significant factor is incumbency. Incumbents at all levels of government can "use the perks of office to build visibility among voters" and leverage "fundraising and organizational advantages" to win elections and discourage viable challengers in the first instance. *See* Herrnson & Curry, *supra*, at 283. Other influential factors, to name a few, include a candidate's (1) available funds and ability to raise more, (2) campaign staff effectiveness, (3) ability to communicate and market, (4) stances on high-profile issues, and (5) personal and professional background. *See, e.g.*, *Vieth*, 541 U.S. at 289. For the scandal-plagued politician or the adored athlete-turned-statesman, that last factor may dwarf the others. Consider, for example, former college-basketball star and Republican legislator Brett Davis, who first won Wisconsin's 80th Assembly District in 2004 with nearly 49% of the district's total vote. Then in 2008, when Barack Obama handily won Assembly

District 80 in a historically successful Democratic year, Davis managed to retain his seat and actually increase his margin of victory to 56%. In fact, Davis outperformed Republican presidential candidate John McCain in that district by a wide margin.

Whatever the strengths and weaknesses of the candidates in a given race, other candidates on the same ballot can also impact a voter's decision. The popularity of candidates in the ballot's top races—in Wisconsin, either for President or Governor, depending on the year—can "influence whether voters support or oppose down-ballot candidates" belonging to a top-of-the-ballot candidate's party.[4] *See* Herrnson & Curry, *supra*, at 283. Because they happen to like the Democratic presidential candidate, for example, individuals may choose to vote for Democratic state legislative candidates. Further, the popularity or unpopularity of a party or top-of-the-ticket candidate may encourage higher overall voter turnout, resulting in a wave election carrying more of one party's candidates to victory. On the flip side, researchers have found that some individuals prefer divided government and, to that end, intentionally split their ticket. *Id.* In short, individuals make choices in a given race based on the candidates in that race, as well as all the candidates running on the ballot.

3. When choosing who to vote for, individuals also take issues into account. Indeed, both aggregate and

4. Ballot initiatives have a similar effect by "prim[ing] voters to use their positions on specific issues as guidance in candidate choice." Jeremiah J. Garretson, *Changing with the Times: The Spillover Effects of Same-Sex Marriage Ballot Measures on Presidential Elections*, 67 Pol. Res. Q. 280, 281–82 (2014) (citations omitted).

individual-level studies "have demonstrated that issues salient to an individual voter are likely to influence his or her vote choice." Herrnson & Curry, *supra*, at 284 (citations omitted). Although individuals may be misinformed or underinformed, they cast votes for candidates with stances on issues that (at least ostensibly) align with their own personal stances. To assume otherwise would contradict the Court's "faith in the ability of individual voters to inform themselves about campaign issues." *Anderson v. Celebrezze*, 460 U.S. 780, 797 (1983). One of the most contentious issues in recent Wisconsin history involved public-sector collective-bargaining rights and Republican-led efforts to limit them in 2011. Two Republican members of the Assembly—Lee Nerison and Travis Tranel—voted against the so-called Budget Repair Bill. Likely because of their willingness to cross party lines on this issue, they both held onto their seats in the next election in 2012, despite representing districts that overwhelmingly favored Barack Obama that same year.

Individual voters and candidates change their views on particular issues over time.[5] So too do political parties change the issues they emphasize and their stances on them. Any high school history student knows how the American two-party system emerged shortly after the Revolution and has since evolved into our modern paradigm. And any astute adult observes how the Republican and Democratic parties shift their policy positions from election to election, sometimes trading sides completely. Herrnson and Curry relay how issue "ownership"—one party's perceived ability to handle a

5. Even Plaintiff Whitford testified that his own views change over time. Dkt. 147 at 39.

certain issue better—and "salience[]" can both "change quite dramatically" over both the short term and long term because of new events, the parties' positions, and the parties' performance. Herrnson & Curry, *supra*, at 284. "In the 1930s," for instance, "the Democrats owned issues related to the economy. Yet during the 1980s these issues were more strongly associated with the Republicans. By 2008, they were once again more favorably associated with the Democrats." *Id.* (citations omitted).

4. Personal social networks influence electoral choices, too. These networks—family, friends, coworkers, and so on—have a "powerful effect" on who an individual chooses to vote for. Beck et al., *supra*, at 58. In fact, personal social networks appear to exert greater influence on individual electoral choice than either political parties or the mass media. *Id.* Yet an individual's personal social network and party affiliation may be intertwined: a politically diverse network tends to reduce the significance of party affiliation, and vice versa. Herrnson & Curry, *supra*, at 283.

5. Importantly, the choice *not to vote* also affects election results. Regardless of party affiliation, individuals eligible to vote often choose not to. This choice manifests in two ways: individuals may cast votes in some of—but not all—the races on a ballot, or they may forego voting on that election day altogether. Either way, their nonvotes are effectively "votes" for nobody. In midterm election years, turnout in many states and districts struggles to eclipse 50%. For example, in Wisconsin in 2014, 54.84% of eligible voters cast a ballot (over 45% did not),[6] meaning

6. Wisconsin turnout statistics are available at the Wisconsin Elections Commission website, http://elections.wi.gov/elections-voting/statistics/turnout (last visited August 2, 2017).

that in every district where both parties' candidates received at least 9.7% of the vote, the winner was neither the Republican nor the Democrat—it was really the "nobody."[7] Even in presidential-election years when turnout is higher, about one-third of Wisconsin voters typically stay home, and many more vote in some races but not all of them. Compared to Wisconsin, moreover, most states have substantially lower turnout rates.[8] And this is true despite how political campaigns expend substantial efforts and resources trying to boost voter turnout. *E.g.*, John W. Schoen, *Here's What Clinton, Trump Spent to Turn Out Votes*, CNBC (Nov. 7, 2016), https://www.cnbc.com/2016/11/07/heres-where-clinton-trump-spent-on-their-ground-games.html.

* * *

As mentioned at the outset, choosing whether to vote and who to vote for involves weighing an infinite number of factors both consciously and intuitively. Beyond just the number and variety of factors that go into making an electoral choice, though, another complicating issue looms.

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7. Indeed, the winner is the "nobody" wherever the nonvoter total—45.16%—exceeds the total for any single candidate. The eligible-voter total (54.84%) less the nonvoter total (45.16%) equals 9.68%. If a Republican candidate receives 9.68%-plus-one (say, 9.7%), then the most a Democratic candidate could amass is 45.14%—too little to beat the "nobody."

8. National turnout statistics are available at the United States Elections Project website, http://www.electproject.org/home/voter-turnout/voter-turnout-data (last visited August 2, 2017).

At any given time, only particular individuals are aware of their respective preferences and how they will act on them. Put differently, "knowledge"—that particular personal knowledge of time and place—is distributed among individuals. *See* F.A. Hayek, *The Use of Knowledge in Society*, 35 The Am. Econ. Rev. 519, 519–20 (1945).[9] Thus, particular individuals' knowledge about the electoral-choice-influencing factors discussed above—whether they plan to vote, their current party affiliation, how warmly or coolly they feel about the parties, which candidates they prefer, which issues are most important to them, their stances on those issues, the unique aspects of their social networks, and so on—is, at any given time, necessarily distributed among those respective individuals. The qualifier "at any given time" matters, because regardless of whether knowledge may be discerned after the fact, individual preferences and external influences constantly change; for example, not only do the candidates (usually) change from election to election, but also an individual's perception of those candidates may change from moment to moment. With knowledge being distributed and ever-changing, no one can ever completely and timely aggregate it; in Hayek's words, "knowledge of the circumstances of which we must make use never exists in concentrated or integrated form, but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess." *Id.* at 519. This scholarly conclusion jives with common sense, because at bottom, deciding whether to vote and who to vote for involves judgment and choice—not mere computation.

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9. Although Hayek was an economist by trade, the idea of distributed knowledge "arises in connection with nearly all truly social phenomena." Hayek, *supra*, at 520, 528.

II. Because it ignores how choice and change affect elections, Plaintiffs' theory of the case fails conceptually and legally.

Plaintiffs' arguments and evidence, largely accepted by the district court, lose sight of how choice and change affect elections. Instead, Plaintiffs focus exclusively on party affiliation, imprecisely extrapolated from election results. But treating voting behavior as a function of a single variable not only belies how human beings make decisions, it also leads to discord in Plaintiffs' arguments that cannot be harmonized. Ultimately, Plaintiffs' theory of the case falls on conceptual grounds, because it does not show that Democrats as such were gerrymandered; and on legal grounds, because the evidence presented begets an argument inconsistent with Equal Protection jurisprudence.

A. Plaintiffs' theory of the case disregards the role of individual choice and change over time, rendering it conceptually untenable.

1. Plaintiffs' arguments—and the evidence offered to support them—ignore how individual choice and change over time play a critical role in deciding election outcomes. Whereas individuals in reality make electoral choices for innumerable, interrelated reasons that vary by time and place, voters in the Plaintiffs' world are the sum total of one trait: party affiliation. Indeed, Plaintiffs presume that "party affiliation is a readily discernable characteristic in voters and that it matters above all else in an election." J.S. App. 242a (Griesbach, J., dissenting).

Not only do Plaintiffs weigh party affiliation to the exclusion of all else, they also presume things about partisan voters that defy common sense and documented evidence. For one, Plaintiffs presume that individual voters and candidates never change their party affiliation, instead placing them "either in one party or the other based on their last vote." J.S. App. 242a (Griesbach, J., dissenting). As discussed earlier, however, partisan voters change their party affiliation, both over the short term and long term; some vacillate regularly between party affiliations, and some shun party affiliation altogether. *See supra* pp. 4–7.

Plaintiffs further presume that individuals who identify with a particular party—both voters and candidates—are fungible. Presuming as much, though, ignores the diversity and nuance of a party's adherents. If a (D) is a (D) is a (D), then there could be no difference in treatment between a Democrat who votes in every election and one who only votes sometimes, no difference between a hard-line Democrat and one who crosses the line for a Republican every few elections, and no difference between a Democratic candidate in a safe urban district and one in a swing district. Even so, Plaintiffs assume that all Democratic Assembly candidates—even the ones they do not personally vote for—are interchangeable, and that if a certain number of them are elected, then Plaintiffs will see their policy objectives enacted into law. But recent experience mocks such fantasies: if party adherents were truly fungible, then Republicans would have repealed and replaced the Affordable Care Act months ago. In reality, "the (R) next to a candidate's name does not mean he will vote the same as the Republican candidate in the next district" or in the way a particular Republican voter would prefer. J.S. App. 286a–87a (Griesbach, J., dissenting).

Making Plaintiffs' assumptions about party affiliation is like assuming that every person who cheers for the Green Bay Packers is from Wisconsin. While it is true that most Wisconsinites support the Packers and that many Packers fans are from Wisconsin, Packer-backers in fact hail from across the country and around the world. Even those who typically despise the Pack—Chicago Bears fans, for instance—might realign when the Packers face a common rival—say, the Minnesota Vikings. Of course, as soon as Green Bay routs the Vikings, those Chicago defectors immediately resume their exclusive adoration for the Bears. It might also be the case that a particular player (like Aaron Rodgers) temporarily attracts more non-Wisconsin fans due to his performance on the field or his charm off of it. And a Chicago mechanical engineer who moves north to take a job at Mercury Marine in Fond du Lac—in Assembly District 52—might eventually back a new team. An NFL fan's support for one franchise is not immutable, nor are all a team's fans fungible. When choosing which team to root for in a particular game, fans take a variety of factors into account and might even choose fleetingly or forever to pick a team they once cheered against. Looking only at which team a fan chose in the last game she watched—like placing an individual "either in one party or the other based on their last vote," J.S. App. 242a (Griesbach, J., dissenting)—often shines little or no light on her past and future preferences.

By fixating solely on party affiliation, moreover, Plaintiffs discount all the other innumerable factors that individuals balance when making electoral choices. For one, Plaintiffs neglect how individuals consider the particular candidates running. This neglect not only ignores an important aspect of electoral decisionmaking,

it also leads to unwarranted assumptions about a voter's motives and future behavior: because he voted for a Democrat in this election, he therefore *is* a Democrat; and because party affiliation is immutable, he must therefore prefer Democrats in all elections. But it is both unfair and factually suspect to assume that an individual who votes for a candidate supports that candidate's party or all that party's candidates:

> In fact, it is not difficult to imagine some voters preferring a result opposite of [this] assumption. Although there are thousands of die-hard party members like Plaintiff Whitford in both parties, many voters are not quite so committed. A given voter might like an incumbent Republican in his own district, even if that voter leans Democratic in other respects, and so such a voter will vote for the Republican assembly candidate even while preferring that his vote does not translate into additional Republican seats in the assembly.

J.S. App. 292a (Griesbach, J., dissenting). Plaintiffs also ignore how individuals make choices based, at least in part, on the issues of the day, the influence of personal social networks, and any number of other factors. Perhaps more than anything, Plaintiffs disregard the choice not to vote: at no point below did Plaintiffs or the district court examine voter turnout or its potential effect on partisan-gerrymandering claims. Ignoring the choice not to vote hardly seems excusable when one-quarter to one-half of Wisconsinites routinely forgo the franchise.

2. Plaintiffs' disregard of choice and change is reflected in the evidence they presented. To show that Act 43 unconstitutionally "burden[ed]" their "representational rights," *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 418 (2006) (Kennedy, J.) ("*LULAC*"), Plaintiffs below relied heavily on election results from 2012 and 2014. *See* J.S. App. 145a–54a. These results formed Plaintiffs' primary evidentiary basis both by themselves and as input for statistical analyses performed by expert witnesses. Among other things, Plaintiffs compared the number of votes for Republican Assembly candidates (and Democratic candidates) to the number of Republican Assembly seats (and Democratic seats). *Id.* Through expert witnesses, they introduced S-curves, swing analyses, and the efficiency gap.

S-curves and swing analyses "depend on a hypothetical state of affairs" and "assume a uniform increase or decrease in vote share across all districts," something the district court readily admitted "does not occur in actual elections." *Id.* at 158a. A swing analysis, for example, looks at "what might happen under different electoral conditions." J.S. App. 148a (internal quotation omitted). To that end, it estimates the number of Assembly seats gained or lost given a "pro-Democratic swing or a pro-Republican swing" in the statewide vote total. *Id.* Yet whatever its ability to forecast relationships between statewide votes and Assembly seats, it offers no insight into why more or fewer individuals chose to vote for Democrats or Republicans. Nor could it ever capture changes in party platforms, candidates, issues, or any of the other numerous factors individuals consider when choosing to vote for one party's candidate over the other. Further, S-curves, swing analyses, and the efficiency gap deal only with one

office at a time, such as the Assembly. Yet except in special elections, individuals do not vote for Assembly members in a vacuum; they vote for them on ballots that include races for many other offices. As discussed above, those other races—especially high-profile ones—often impact the entire ballot. *See supra* pp. 7–9.

The efficiency gap—Plaintiffs' hallmark piece of evidence—actually scoffs at an individual's role in a representative democracy. *See* J.S. App. 160a–61a. Foremost, by declaring certain votes to be "wasted," the efficiency gap relegates votes to the status of mere refuse. Yet, as Judge Griesbach pointed out below, all these "wasted" votes will likely have a tremendous impact on how legislators govern and future candidates campaign. *Id.* at 287a–88a (Griesbach, J., dissenting). The efficiency gap, moreover, treats all individuals who voted for a Democratic (or Republican) candidate the same, regardless of their reason for doing so or their propensity to do so again in the future. So too does it fail to capture partisan defectors, swing and split-ticket voters, third-party voters, and all other species of independent voters. And, of course, it completely ignores the many, many individuals who choose not to vote.

In general, statistical measures purporting to measure human behavior fail to capture just how much of a role choice and change play in that behavior. Because such measures are constructed entirely from manifestations of conscious choices (here, votes), every datum is infected with the innumerable variables discussed above. In other words, each input is complex, uncertain, and (to use the terms from before) individual knowledge. But this kind of knowledge "by its nature cannot enter into statistics"

and therefore cannot "exist[] in concentrated or integrated form." Hayek, *supra*, at 519, 524. Applied here, the knowledge of individual preferences informing electoral choices always remains distributed, and statistical tools attempting to measure those choices writ large will always jettison nuance and hide crucial insights.[10] These "[s]tatistical aggregates . . . show a very much greater stability than the movements" and changes of the individual inputs making up those aggregates. *Id.* at 523–24. That is, by failing to account for individual choice and change over time, measures of partisan symmetry like the efficiency gap, partisan bias, and others appear more stable and reliable than the individual voters making up those aggregated measures actually are.

3. Plaintiffs' disregard of individual choice and change over time upends their theory of the case. Plaintiffs pressed, and the district court adopted, a three-element test for partisan-gerrymandering claims: a redistricting plan is unconstitutional if it "(1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds." J.S. App. 109a–10a. Restated, a plaintiff must prove discriminatory intent, discriminatory effect, and lack of justification. Whatever the legal validity of these elements, Plaintiffs' arguments and evidence do not satisfy them.

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10. Taken to its logical conclusion, then, this means that partisan-gerrymandering cases are nonjusticiable: trying to find a "limited and precise" standard, *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment), presents a "problem of the utilization of the knowledge not given to anyone in its totality," Hayek, *supra*, at 520. At the very least, the reality of distributed knowledge counsels judicial restraint.

For the discriminatory-intent element, Plaintiffs focus on how Republicans in the state legislature set out to draw a map that would maintain for them a "comfortable majority" in the Assembly. *See* J.S. App. 126a–40a. They intentionally drew a map that would favor Republicans and prevent Democrats from achieving or even approaching a majority of Assembly members. *See id.* In other words, so Plaintiffs' theory goes, the Republicans' map attempted to stymie the ability of Democratic candidates to win Assembly seats; it was intended to discriminate against Democratic Assembly members and candidates.

To prove discriminatory effect, Plaintiffs use after-the-fact election results. *See id.* at 145a–66a; *see supra* pp. 18-20. On their own and as part of statistical analyses, these results supposedly show how the maps accomplished the Republicans' goal of minimizing the number of Democratic seats (at least as compared to statewide vote totals) by diluting the voting strength of Democrats. Put differently, they showed that Democrats were gerrymandered. But not so fast. Election results do not reflect how many Democrats voted, or which candidates Democrats voted for, or in what numbers. Rather, they only show how many votes were cast for the Democratic candidate. Plaintiffs' evidence thus at best shows a discriminatory effect against individuals who voted for Democratic candidates. Yet such an effect rings dissonantly with the discriminatory-intent prong, under which Plaintiffs argue that the map's intent was to discriminate against Democratic Assembly members and candidates. Of course, Democratic Assembly members and candidates are not the same as individuals who voted for Democratic candidates; assuming otherwise, as Plaintiffs do, spurns individual choice entirely. Showing a discriminatory intent to harm *Democratic candidates*

and Assembly members does not inherently relate to a discriminatory effect against *individuals who chose to vote for Democratic candidates*—nor have Plaintiffs or the district court adequately explained how the two are connected.

This disconnect is evident from another angle. Plaintiffs frame their case as one of discriminatory intent and effect against "Democrats." *See, e.g.*, JA36, 42. Logically, then, Plaintiffs would have to identify the number and location of Democrats across different districts, both before and after Act 43. But Plaintiffs do not do so. They presented no evidence below of party identification or membership in Wisconsin, likely in part because Wisconsin has open primaries and does not require voters or nonvoters to record their party affiliation. J.S. App. 242a n.3 (Griesbach, J., dissenting); *see Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 110–11 (1981). Plaintiffs instead rely on the number and location of votes for Democratic candidates. As explained above, however, vote totals do not account for (1) non-Democrats (including Republicans, third-party voters, and independents) who voted for the Democratic candidate, or (2) Democrats who did not vote for the Democratic candidate (either because they voted for a non-Democratic candidate or did not vote at all).[11] By focusing on only the macro level and overlooking

11. Plaintiffs' use of two sets of election results (2012 and 2014) does not salvage their case: if each set of vote totals presents uncertainty on its own, putting them together cannot remedy that uncertainty. Further, that the two sets are somewhat different—both in raw numbers and when statistically analyzed—in fact undermines Plaintiffs' theory. Adhering to Plaintiffs' theory, under which the only possible variables are party affiliation and the map, would require (indeed, demand) *only* one set of election results.

individual-level choice, Plaintiffs erroneously equate Democrats (who they say are harmed) with individuals who once chose to vote for a Democratic candidate in one election (who are used as evidence to prove the alleged harm).[12]

Imagine a hypothetical District A, the 100,000 voting-eligible residents of which vote in one assembly election as follows: 29,000 (R); 25,000 (D); 1,000 (other); 45,000 (no vote cast). According to Plaintiffs' theory, the 25,000 votes for the Democratic candidate all factor identically into the calculus of assessing a partisan-gerrymandering claim. Yet suppose, as is entirely possible in reality, that only 20,000 of those votes were cast by "Democrats" in any meaningful sense of that word. The other 5,000 were the votes of defecting Republicans or true independents. Through that lens, things change: regardless of whether those 5,000 voters suffered harm, they did not suffer harm *as Democrats*.

The District A results also do not show that 25,000

12. Indeed, that reflection is limited to one particular election, even where the results of multiple elections are available. We may know that, in a given district, 10,000 individuals voted for the Democratic candidate in 2012, and that 10,000 individuals voted for the Democratic candidate two years later. While likely true that a sizeable majority of those 10,000 votes in 2014 were cast by the same individuals as in 2012, we cannot be sure. There is no evidence one way or another. And it is nearly impossible that all those 10,000 individuals are the same, especially when we factor in those who, in between election years, moved out of the district and into the district, those who died, and those who became eligible to vote. All this, of course, does not even begin to address the role of individual choice and change over time.

Democrats voted in the election; instead they merely show that 25,000 individuals voted for the Democratic candidate. Anywhere from 0 to 55,000 Democrats may have voted. And this does not even touch the number of Democrats who stayed at home that day; as mentioned, Plaintiffs especially disregard the choice not to vote. For Plaintiffs' theory to carry the day, we must assume that even if the other 45,000 nonvoters had showed up, the same candidate would still have been elected—a highly conjectural proposition by any standard. Finally, suppose that 30,000 of the 45,000 nonvoters were Democrats, meaning that the district was drawn with 50,000 Democrats in it—half the population. It would be absurd, then, to say that the way the district was drawn harmed Democrats.

4. Importantly, Badger State political history buttresses the above hypothetical demonstration with real-world experience, further revealing the fundamental flaws in Plaintiffs' theory. To start, take Tommy Thompson, a Republican first elected Governor of Wisconsin in 1986. Widely popular, Thompson went on to win the governorship three more times in 1990, 1994, and 1998 by wide margins. Then in 2001, Thompson went to Washington in the middle of his term to become George W. Bush's Health and Human Services Secretary, leaving in his place Lieutenant Governor Scott McCallum. Democratic State Attorney General Jim Doyle—who had crushed his Republican opponent in 1998, the same year and on the same ballot that Thompson easily beat Democratic challenger Ed Garvey—defeated McCallum in 2002 and won a second term as Governor in 2006. Later, fourteen years after his last electoral victory (when he had secured nearly 60% of the statewide vote), Thompson vied for a U.S. Senate seat. Despite having won four

consecutive statewide elections in the late 1980s and the 1990s, Thompson lost. Instead, Democratic candidate Tammy Baldwin, a progressive from Madison, won the 2012 Senatorial election by almost six points.

Another left-leaning U.S. Senator from Wisconsin was Russ Feingold. After defeating a Republican incumbent in 1992, Feingold ran for reelection and won in 1998—again, the same year Tommy Thompson trounced a Democratic opponent in the statewide race for Governor. After winning a third term in 2004, Feingold was eventually unseated in 2010 by Republican businessman Ron Johnson. In a rematch six years later, Johnson edged Feingold once again.

Drilling down further, in the 2012, 2014, and 2016 general elections, a total of 15 separate legislative districts chose a top-of-the-ticket candidate (for President or Governor) from one party and a legislative candidate from the other. Also in 2016, three Republican and two Democratic Assembly candidates prevailed in districts where the other party's presidential candidate won the day. Republicans Dale Kooyenga, Jim Ott, and Todd Novak won the 14th, 23rd, and 51st Assembly Districts, respectively, even though Hillary Clinton defeated Donald Trump in each. Going the other direction, Democrats Beth Meyers and Steve Doyle won seats in districts carried by Trump (the 74th and 94th). In the 30th Senate District, Democrat Dave Hansen prevailed, while Donald Trump defeated Hillary Clinton by a margin of 52.1% to 41.6%.

Similar results occurred in 2014, when three Assembly districts and one Senate district picked legislative and gubernatorial candidates from opposite parties, and in

2012, when eight Assembly districts split their legislative and presidential outcomes. For a particularly striking example, consider how in 2012, Republican candidate Howard Marklein won the 51st Assembly District—in the same place and on same day that Barack Obama outcompeted Mitt Romney by a margin of 19.4%. Finally, individual Assembly seats have switched parties, too. Take the 70th Assembly District: in 2012, incumbent Democrat Amy Vruwink beat Republican challenger Nancy VanderMeer. Just two years later—with the same Act 43 map in place—those candidates faced off again. This time, however, VanderMeer emerged victorious.

Under Plaintiffs' theory of the case, none of these electoral results should have happened—they are all anomalies. Yet the disconnect between reality and Plaintiffs' imagined world comes as no surprise given how Plaintiffs build their theory on after-the-fact election results. Looking at only election results and statistical analyses derived from them, it is impossible to know how many Democrats or Republicans reside in particular geographical areas. Assuming otherwise, as Plaintiffs do, logically defies these numerous Wisconsin electoral outcomes.

For example, we know that Republican gubernatorial candidate Tommy Thompson received more votes than the Democratic candidates in 1986, 1990, 1994, and 1998. Plaintiffs' theory of the case—under which immutable, fungible party adherents vote for immutable, fungible candidates—would dictate that all those who once voted for a Republican candidate will always vote and will always vote for the Republican. Yet we know that when Thompson sought to win a statewide race again in 2012,

the Democratic candidate won. Election results—mere vote totals—do not explain why this happened. Beyond political speculation, we do not know why Thompson failed to generate the same enthusiasm in 2012 as he did in the 1980s and 1990s. Likewise, we do not know how many voters crossed party lines to vote for Thompson (R)—or for Doyle (D) or Feingold (D)—on the same ballot in 1998. We do not know if Thompson's and Feingold's victories resulted from party unity, candidate strength, dissatisfaction with the opposition, or any number of other reasons. Nor do we know if their subsequent defeats reflected changes in party affiliation, evolution of public opinion, effects of voter turnout, or some other confluence of factors. To be sure, innumerable explanations could account for these outcomes.

Election results similarly fail to explain why Assembly districts won by Barack Obama in 2012 also elected Republican legislators that year and in subsequent years. Maybe some traditionally Republican voters stayed at home in 2012 because the Republican presidential candidate did not excite them. Maybe more independents approved of Barack Obama's first-term performance than those who disapproved. Or maybe traditionally Democratic voters chose to defect in 2016 because Republican candidates emphasized issues important to them. Election results, moreover, do not illuminate the choices made by those individuals in districts that selected one party's candidate at the top of the ticket but the other party's candidate in the Assembly race.

Finally, Plaintiffs' theory of the case cannot explain why Donald Trump won 22 Wisconsin counties in 2016 that Barack Obama won four years earlier. What is more,

in the span of just eight years, "13 counties in Wisconsin . . . voted for Obama twice [in 2008 and 2012], Gov. Scott Walker three times [in 2010, 2012 (recall), and 2014], Trump [in 2016], Senate Democrat Tammy Baldwin in 2012 and Senate Republican Ron Johnson in 2016." Craig Gilbert, *Difference-Makers in Trump's Wisconsin Win*, Milwaukee Journal Sentinel (Nov. 15, 2016, 11:14 AM), http://www.jsonline.com/story/news/blogs/wisconsin-voter/2016/11/12/difference-makers-trumps-wisconsin-win/93720426/. These results, again, defy Plaintiffs' implicit assumption that only party affiliation determines electoral outcomes.

All in all, Plaintiffs' reliance on election results and statistical measures conceals partisan defectors, independent voters and, critically, nonvoters. Although Plaintiffs, witnesses, and the district court speak of "Democrats" and "Republicans," those descriptors are far from accurate. What election results—and all statistical analyses built from them—actually reflect are individuals who chose to vote for a Democratic candidate in that particular election. This common-sense distinction gets lost if not reinforced: Democrats, Democratic candidates, and individuals who choose to vote for Democratic candidates are not synonymous. Plaintiffs' failure to recognize this distinction—a symptom of their disregard for individual choice and change over time—exposes conceptual cracks in their theory of the case.

B. Neglecting the role of choice—particularly the choice not to vote—runs counter to this Court's Equal Protection jurisprudence.

The Equal Protection Clause guarantees "equal representation for equal numbers of people." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1129 (2016) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964)) (italics removed). To that end, this Court requires states to draw legislative districts that satisfy two requirements. First, under what is known as the "one-person, one-vote" requirement, populations of the districts must be as close as practicable. *See, e.g.*, *Evenwel*, 136 S. Ct. at 1123–24. Second, a state must also ensure that its districting plan does not "minimize or cancel out the voting strength" of minority individuals. *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965).

When the Court has found that a redistricting plan deviates from Equal Protection parameters, it has generally measured deviation by total population or voting-eligible population. In the one-person, one-vote cases, this Court has "consistently looked to total-population figures when evaluating whether districting maps violate the Equal Protection Clause by deviating impermissibly from perfect population equality." *Evenwel*, 136 S. Ct. at 1131. When challengers in *Evenwel* urged a standard requiring states to base their redistricting plans on voting-eligible population, the Court examined constitutional history and prior precedent. *Id.* at 1123, 1126–32. Finding no "*voter*-equality mandate in the Equal Protection Clause," the Court upheld all fifty states' use of total population figures. *Id.* at 1126, 1130 (emphasis added). Slightly differently in the minority-gerrymandering cases, the Court has typically scrutinized districting plans based

on voting-eligible population. *E.g.*, *Cooper v. Harris,* 137 S. Ct. 1455, 1463, 1465 (2017) (black voting-age population); *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 795 (2017) (same). These two lines of cases, which make use of total population or voting-eligible population, show that measuring conformity with Equal Protection standards does not depend on whether individuals in a district actually choose to vote or who they vote for.

Only under exceptional circumstances has this Court sanctioned a state's use of registered-voter or actual-voter population to draw districts. *Burns v. Richardson*, 384 U.S. 73, 92–96 (1966). In *Burns*, Hawaii drew its districts based on registered-voter numbers. *Id.* at 90. Reviewing the plan, this Court found using a "registered voter or actual voter basis . . . problem[atic]," because it "depends not only upon criteria such as govern state citizenship, but also upon the extent of political activity of those eligible to register and vote." *Id.* at 92. Both bases are thus "susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate a ghost of prior malapportionment." *Id.* at 92–93 (internal quotation omitted). Despite its concerns, however, the *Burns* Court upheld Hawaii's redistricting plan "only because on this record it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis." *Id.* at 93. Indeed, Hawaii had introduced evidence proving that, given its unique population characteristics, registered-voter population was an adequate proxy for total population. *Id.* at 93, 95–96. The Court cautioned that it was "not to be understood as deciding that the validity of the registered voters basis as a measure has been established for all time or

circumstances, in Hawaii or elsewhere." *Id.* at 96. Only where unique population characteristics are present and it is proven to be an adequate proxy will registered-voter population or actual-voter population be a permissible basis.

Using total population or voting-eligible population—and generally rejecting registered-voter and actual-voter population—finds theoretical support in the nature of the representation right. As mentioned, this Court has interpreted the Equal Protection Clause as protecting "equal representation for equal numbers of people." *Wesberry*, 376 U.S. at 18. Gleaning from constitutional history, the Court recently noted that the drafters of both the original Constitution and the Fourteenth Amendment understood that population—not the ability to vote—formed the "basis of *representation*." *Evenwel*, 136 S. Ct. at 1127. Thus, all individuals enjoy the right of representation—not just those who choose to vote.

By ignoring the choice not to vote, however, Plaintiffs—and the district court—have mischaracterized the representation right and adopted an impermissible population measure. As discussed above, Plaintiffs' case revolves around vote totals in past (and forecast) elections. *See supra* pp. 18-20. In other words, Plaintiffs focus on actual-voter population to prove their claim that a certain group (Democrats), the actual size of which is unknown in any particular district, was impermissibly cracked and packed. When discussing partisan intent, the district court relayed how Republican staffers took partisan past performance into account when drawing their maps; the staffers and the district court both referred to actual votes in past elections. *See* J.S. App. 126a–29a. Later, when assessing discriminatory effect, the district court relied

on "the combination of the actual election results for 2012 and 2014," (i.e., actual votes), the experts' swing analyses, and the efficiency gap. *Id.* at 145a–46a. The efficiency gap, in turn, is a calculation based on actual votes cast. *Id.* at 160a–61a. Importantly, the district court did not merely reflect upon actual voters; actual-voter data was the only evidence presented and considered. Accordingly, the district court assessed the constitutionality of the Act 43 districting plan using an actual-voter population measure.

But as stated earlier in this subsection, caselaw rejects this approach. Neither the total population measure (used in the one-person, one-vote context) nor the voting-eligible population measure (used in minority-gerrymandering cases) treats individuals differently based on any choices they make. Actual-voter population, by contrast, excludes all individuals who chose not to vote. Thus, Plaintiffs' selected measure—unlike any measure endorsed by the Court under normal circumstances—treats individuals who choose to vote differently from those who choose not to. In effect, the actual-voter population measure assumes that only those who choose to vote have any representation rights. Yet that cannot be so, because "[a]s the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible or registered to vote." *Evenwel*, 136 S. Ct. at 1132. Those who choose not to vote should not be expressly or implicitly assigned lesser value in a representative democracy; just like voters, they too "have an important stake in many policy debates—children, their parents, even their grandparents, for example, have a stake in a strong public-education system—and in receiving constituent services, such as help navigating public-benefits bureaucracies." *Id.* Nor can Plaintiffs find any salvation in *Burns*, for unlike in that case, Plaintiffs here put forth no evidence showing exceptional

circumstances or how actual-voting population serves as an adequate proxy for voting-eligible or total population.[13]

CONCLUSION

As shown above and as a matter of common sense, an individual's vote in an election—for a particular candidate or for nobody—is an expression of choice. But Plaintiffs' theory of the case suggests otherwise: it assumes that party affiliation is the only factor influencing election results, that party affiliation is immutable, and that voters and candidates are fungible.

By overlooking individual choice and change over time, and by relying solely on election results and statistical measures interpreting them, Plaintiffs fail to account for electoral results that repeatedly buck their assumptions. According to Plaintiffs' arguments and evidence, Assembly members Todd Novak, Travis Tranel, Lee Nerison, Steve Doyle, and others should not now be serving in the state legislature. Indeed, in 2012, Republican Lee Nerison won the 96th Assembly District with 59.5% of the vote despite the fact that Barack Obama carried that district with 55.5% of the vote. That same day, Republican Travis Tranel earned 54.2% to carry the 49th Assembly District; Obama won there with 56.2%. These outcomes—not to mention the experiences of Tommy Thompson, Russ Feingold, Nancy VanderMeer, and so many more—torpedo Plaintiffs' theory of the case.

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13. One might counter that Plaintiffs and the district court had no choice but to use actual-voter population, because it is the only available measure of party affiliation. That counter fails. Actual-voter population does not actually measure party affiliation; it measures who voted for Democratic or Republican candidates, not who *is* a Democrat or a Republican.

Beyond fixating on party affiliation in an unrealistic way, Plaintiffs' theory also assigns zero value to individuals who choose not to vote. But voting is not the sine qua non of personhood: the decision not to vote—out of apathy, dissatisfaction, or active rejection of the candidates or the system—is just as important as choosing which candidate to vote for. Perhaps ironically, many of the tossed-aside nonvoters may be Democrats. Yet to determine whether Democrats have been gerrymandered, it would be conceptually and legally necessary to consider all Democrats—not just those who have voted. Likewise, it would be imperative to differentiate between Democrats (if we could determine who they are) and individuals who voted for Democratic candidates. Plaintiffs' theory, however, does neither.

This Court should thus reverse the judgment below.

Respectfully submitted,

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August 4, 2017