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 THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Brennan Center for Justice at N.Y.U. School of Law ("Brennan Center") is a not-for-profit, non-partisan think tank and public interest law institute that seeks to improve the systems of democracy and justice. The Brennan Center was founded in 1995 to honor the extraordinary contributions of Justice William J. Brennan, Jr. to American law and society. Through its Democracy Program, the Brennan Center seeks to bring the ideal of representative self-government closer to reality, including through work to protect the right to vote and ensure fair and constitutional redistricting practices. The Brennan Center conducts empirical, qualitative, historical, and legal research on electoral practices and redistricting and has participated in a number of voting rights cases before this Court.

The Brennan Center has a significant interest in this case because appellants ask this Court to rule on the constitutionality of extreme partisan gerrymandering, an especially rare but pernicious redistricting tactic that deeply offends the constitutional principles that form the foundation of our representative democracy. On the basis of its own research and studies undertaken by others, the Brennan Center can apprise the Court of readily discernible evidentiary signposts that can help it accurately

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel have made any monetary contribution intended to fund the preparation or submission of this brief. This brief does not purport to convey the position of the New York University School of Law. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

differentiate between lawful redistricting and the type of unlawful partisan gerrymandering that has almost certainly occurred in a handful of the congressional maps this redistricting cycle. The Brennan Center hopes that its perspective will help the Court define a partisan gerrymandering cause of action that reliably targets extremely biased and deeply constitutionally offensive maps, limits the range of plausible claims in ways easily understandable by courts and potential litigants, vindicates bedrock constitutional rights and values, and respects states' lawful political processes.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves an extreme and particularly harmful, but relatively rare, form of gerrymandering: a political party's intentional manipulation of the redistricting process to give itself a large legislative majority and to insulate that majority from future changes in voter preferences. This Court has already recognized that such extreme partisan gerrymanders are "incompatible with democratic principles." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) (decrying "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power"). Indeed, when this Court faced a partisan gerrymander challenge in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), every Justice agreed that "an *excessive* injection of politics is *un*lawful." *Id.* at 293 (plurality op.).

The problem in prior cases, however, was that the Court struggled to find a standard that would allow

courts to invalidate invidiously discriminatory maps, while at the same time avoiding judicial interference with the large number of maps drawn with ordinary and lawful political considerations in mind. The Brennan Center submits this brief to explain that the pernicious form of extreme gerrymandering at issue in this case is both rare—likely occurring in only a handful of the congressional maps this redistricting cycle—and easily distinguishable from the types of "ordinary" political considerations this Court has suggested are tolerable in the redistricting process, such as attempts to "achieve a rough approximation of the statewide political strengths" of each party, *Gaffney v. Cummings*, 412 U.S. 735, 752-53 (1973), or to "avoid[] contests between incumbent[s]," *Bush v. Vera*, 517 U.S. 952, 964 (1996) (quotation omitted) (second alteration in original).

The Court can construct a cause of action that reliably flags extreme partisan gerrymanders, while placing meaningful constraints on judicial intervention. Appellees' proposed standard for a partisan-gerrymandering cause of action—which one court has already embraced and the Brennan Center fully endorses—provides a sound model for the Court. Appellees' standard is trained at precisely the type of discriminatory and anti-democratic action the Constitution prohibits, and will compel courts to distinguish a party's impermissible effort to entrench itself in power from the more benign political considerations this Court has said are permissible.

The courts have at hand additional clear and objective criteria that they can use in conjunction with appellees' standard to draw those distinctions and further narrow the range of viable cases. This brief

highlights two readily observable criteria that—when they appear in a given state—are in fact highly correlated with extreme partisan gerrymanders: (a) single-party control of the redistricting process, and (b) a recent history of close statewide elections. The first factor is a prerequisite for a governing majority to entrench itself in power. And the second factor provides the motive to take advantage of that opportunity and engage in extreme partisan gerrymandering.

These intuitions are confirmed by the empirical evidence drawn from elections under this cycle's congressional maps: *Each* of the maps with statistically high levels of partisan bias were drawn in states that experienced single-party control over the redistricting process and, with one partial exception, that recently featured close statewide races. This is true in states controlled by either of the major parties. By contrast, maps drawn by commissions, courts, and split-control state governments exhibited much lower levels of partisan bias, and none had high levels of bias persisting across all three of the elections since the 2011 round of redistricting.

This result is unsurprising. When a single party takes control of the redistricting process in a state with a recent history of competitive statewide elections, the majority is more likely to intentionally seize the opportunity to entrench itself, that attempt is more likely to work, and any proffered justification for the state's actions is less likely to be plausible. The presence of these two factors is therefore strong evidence of an unconstitutional gerrymander, and their absence should usually lead a court to reject a partisan-gerrymandering challenge. Courts can use

these indicia—in conjunction with statistical evidence and other easily identified deviations from normal legislative processes, such as unusual secrecy or speed—to readily distinguish rare, invidious partisan gerrymanders from "normal politics." Prospective plaintiffs, in turn, will be able to use these indicia as *ex ante* guidance to the probable viability of their claims, thus limiting the likelihood of meritless litigation burdening the dockets of district courts moving forward.

The record in this case proves the point. Wisconsin is essentially evenly divided between Republicans and Democrats, as statewide elections have repeatedly demonstrated. Yet during the last redistricting cycle, following a wave election, Republicans happened to control both the Governorship and the Legislature. They therefore had the opportunity to manipulate Wisconsin's district lines to guarantee themselves large legislative majorities into the future, even if they were to lose a majority of the statewide vote. And they seized it. They shut Democrats, and even rank-and-file Republicans, out of the map-drawing process, and acted with unusual speed and secrecy to push through maps that were intentionally designed to, and effectively did, entrench Republicans in power. That conduct transgressed the boundaries of normal politics, and because it was carried out in a closely divided state by a party enjoying sole control over the redistricting process, this Court should be highly skeptical of appellants' attempted justifications of the resulting maps.

By following appellees' test—particularly when guided by the objective indicia mentioned above—

courts will be able to more easily identify and target those especially harmful redistricting practices that (a) contravene basic, clear, and time-honored constitutional values that should otherwise define and constrain democratic lawmaking and (b) necessarily warrant judicial intervention. Fundamental principles—reflected throughout the Constitution's text, structure, and history—require government to be accountable to the electorate, to represent the people through the legislature, and to safeguard the political equality of all citizens. Extreme partisan gerrymandering—which insulates a faction that happens to be a majority at the time of redistricting from removal by voters, renders the legislature unrepresentative of the polity as a whole, and discriminates against voters based on their partisan affiliation—violates each of these principles, placing it firmly outside of normal, acceptable politics. Moreover, precisely because extreme partisan gerrymandering subverts normal politics, it cannot be addressed *by* normal politics. Under these circumstances, the need for a judicial corrective to the enduring subversion of the political process is at its height.

Authorizing courts to police such extreme abuses of the redistricting process in the ways discussed will amount to a limited, constitutionally-mandated license for judicial intervention to protect our representative form of government. It will not permit courts to interfere in the mine run of redistricting processes. This Court should endorse appellees' standard and affirm the judgment below.

ARGUMENT

I. JUDICIALLY MANAGEABLE STANDARDS EXIST TO GUIDE AND CONSTRAIN COURTS IN IDENTIFYING UNCONSTITUTIONAL, EXTREME PARTISAN GERRYMANDERING

This case involves an extreme partisan gerrymander, meaning "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power." *Ariz. State Legislature*, 135 S. Ct. at 2658. "[T]his Court has recognized" that such severe "[p]artisan gerrymanders … [are incompatible] with democratic principles." *Id.* (quoting *Vieth*, 541 U.S. at 292 (plurality op.)) (second alteration in original).

Indeed, *every* Justice in *Vieth* agreed that "an *excessive* injection of politics is *un*lawful." 541 U.S. at 293 (plurality op.). Both this Court and individual Justices, moreover, have on several other occasions specifically identified actions that entrench a political party as constitutionally impermissible. *See, e.g.*, *League of United Latin Am. Citizens v. Perry* ("*LULAC*"), 548 U.S. 399, 419-20 (2006) (expressing concern with map "that entrenches an electoral minority" and seeking "a standard for deciding how much partisan dominance is too much"); *Vieth*, 541 U.S. at 365 (Breyer, J., dissenting) ("The bottom line is that courts should be able to identify the presence of one important gerrymandering evil, the unjustified entrenching in power of a political party that the voters have rejected."). Appellants do not even dispute that severe partisan gerrymanders violate the Constitution.

Judicially manageable standards exist that will permit courts to intervene in redistricting disputes in a focused and limited way to stamp out extreme partisan gerrymanders. Appellees have already offered one such standard, which is specifically defined to address the precise problem of entrenchment posed by these pernicious gerrymanders. Appellees' standard is compatible with certain basic, objective, empirically grounded indicia that can further structure limited judicial action in the redistricting space. Under these circumstances, the Court can move confidently, but surgically, to eliminate the worst partisan-gerrymandering abuses.

A. Appellees Have Provided A Discernible And Manageable Standard

Appellees' three-pronged test—which is rooted in longstanding constitutional precedents—targets extreme partisan gerrymandering and the constitutional harms that it inflicts.[2] First, challengers must show that a plan is intended "to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation." Appellees' Br. 2 (quotation omitted). That is, plaintiffs must demonstrate that the party in power sought to "make the political system systematically unresponsive to a particular segment of the voters based on their political preference." JSA117a.

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[2] In particular, it is designed to address this Court's concern with entrenchment, which is itself easily discernible, completely aligned as it is with the values of the Framers, the text and structure of the Constitution, and centuries of this Court's constitutional case law. *See* Section II, *infra*.

The second prong of appellees' standard is discriminatory effect: whether a plan exhibits a partisan imbalance that is both "sizable" and "likely to persist throughout the decennial period." Appellees' Br. 2 (quotation omitted). In other words, the effect prong helps courts determine whether the party controlling redistricting has actually succeeded in entrenching itself.

The third and final prong of appellees' standard is justification: whether the plan's partisan effect can be explained "by the legitimate state prerogatives and neutral factors that are implicated in the districting process." *Id.* at 2-3 (quotation omitted). The justification element of appellees' standard ensures that maps will "not be struck down if their partisan imbalances can be explained by neutral factors," rather than invidious motives. *Id.* at 43.

So defined and limited, appellees' standard will not permit courts to interfere in simply any redistricting processes. Rather, it allows judicial intervention only where there is credible direct and circumstantial evidence that the state intentionally, effectively, and without adequate justification entrenches a majority for one political party at the expense of other parties.

Appellees' standard is also judicially manageable. Indeed, each of the standard's three prongs can be adjudicated based on readily observable and measurable evidence that courts regularly consider in other contexts.

Discriminatory intent, this Court has recognized, can be established where, as here, "voluminous material 'evidenced an intentional effort … to disad-

vantage Democratic voters.'" *Id.* at 44 (quoting *Davis v. Bandemer*, 478 U.S. 109, 116, 127 (1986) (plurality op.)); *cf. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (finding of "invidious discriminatory purpose" can be based on "such circumstantial and direct evidence of intent as may be available"). In *LULAC*, for example, "Justice Kennedy had little trouble concluding that '[t]he legislature does seem to have decided to redistrict with the sole purpose of achieving a Republican congressional majority.'" Appellees' Br. 44 (quoting 548 U.S. at 417).

Nor will courts have difficulty analyzing the effect prong of appellees' standard. As appellees explain, "the magnitude of a plan's partisan skew may be demonstrated through election results as well as measures of partisan asymmetry like partisan bias and the efficiency gap," and the durability "of a plan's skew, in turn, may be shown through … sensitivity testing that both sides' experts endorsed" in this case. *Id.* at 33 (citing JSA149a, 176a).[3] These measures of partisan asymmetry are "widely accepted," and their results "are rarely contested." *Id.* at 46.

The standard's justification prong is likewise judicially manageable. Indeed, it "is drawn verbatim from the Court's one person, one vote cases," where

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[3] Social scientists have developed a variety of widely accepted tools to gauge partisan asymmetry in electoral maps. These tools include, but are not limited to, the efficiency gap metric that appellees deployed in the proceedings below. *See, e.g.*, Br. of Bernard Grofman & Ronald Keith Gaddie 26-31; Br. of Heather K. Gerken, *et al.*, 18-21.

it has been used "for more than five decades" to "separate plans where large population deviations are justified by legitimate factors from maps where malapportionment cannot be properly explained." *Id.* at 45 (citing *Brown v. Thomson*, 462 U.S. 835, 843 (1983)).

In short, appellees' proposed standard is easily administrable, and is no different in kind than legal standards courts routinely employ in other contexts. Moreover, as shown in the next section, two easily identified criteria can help supplement and guide courts' application of this standard, training their focus even more narrowly on a limited subset of cases involving the worst kinds of politically biased redistricting.

B. Two Straightforward Criteria—Single-Party Control Of Redistricting, And A Recent History Of Competitive Statewide Elections—Are Strongly Correlated With Intentional, Extreme, And Durable Partisan Bias, And Provide Useful Evidence For Assessing And Limiting Partisan-Gerrymandering Claims

There are two straightforward, objective criteria that are highly correlated with extreme, intentional, and durable partisan gerrymanders: (i) single-party control of the redistricting process, and (ii) a recent history of competitive statewide elections. *See* Anthony J. McGann, *et al.*, Gerrymandering in America 148, 150, 157-58, 173-74 (2016). These criteria are intuitive indicators that a party has the motive and opportunity to successfully engage in an extreme partisan gerrymander, and empirical data confirm

that they in fact correlate very strongly with unconstitutional state action. Using these indicia to help evaluate partisan-gerrymandering challenges will not only help courts more easily identify potentially problematic redistricting processes, however. It will also help both courts and prospective litigants narrow their focus to the most biased, constitutionally offensive maps, leaving the vast majority of redistricting processes untouched.

1. The first factor—single-party control—is a logical precondition for a party to engage in an extreme partisan gerrymander. The incentive to excessively gerrymander districts means little if a party lacks the means to actually do so. *See id.* at 147. Legislative majorities are more likely to attempt a severe seat-maximizing gerrymander, and more likely to succeed, when a single party controls the process. *See id.* at 147-48; *cf.* Michael P. McDonald, *A Comparative Analysis of Redistricting Institutions in the United States, 2001-02*, 4 State Pol. & Pol'y Q. 371, 377 (2004) (explaining that "[w]hen there is unified party control of state government, or when one party has a veto-proof majority in the state legislature, the process is streamlined and a plan is usually adopted quickly"). Similarly, when a single party completely controls the process, there is little or no opportunity for the minority party to influence the outcome.

The second criterion—a recent history of close statewide elections—also correlates with extreme gerrymanders. *See* McGann, *supra*, at 148-49. Close competition provides powerful incentive—and opportunity—for a party to undertake a severe, enduring gerrymander. *See id.* Absent gerrymandering, the normal ebb and flow of politics in a closely divided

state would likely see power shift between the parties over the course of a decade. This is because highly competitive states with closely fought elections also tend to have a fairly, if not perfectly, even geographic distribution of partisans across much of the state, making it unlikely—absent deliberate intervention—that one party or another would have a lopsided and durable majority. *See, e.g.*, *Presidential Election Results*, N.Y. Times (Aug. 9, 2017), https://www.nytimes.com/elections/results/president (displaying county-level returns for 2016 presidential election). This relatively even geographic spread of partisans produces many precincts that are closely split between the parties, and districts drawn without careful attention to how individual precincts perform would be susceptible to the same kind of competition seen at the statewide level. On the other hand, strategically joining precincts together can help a majority party engineer and entrench an advantage.

By contrast, in overwhelmingly Republican or Democratic states, there is no need for the dominant party to surgically draw districts in order to establish and entrench its majority: Districts in these states will naturally favor the dominant party regardless of whether the lines are drawn with the goal of entrenchment or any degree of care. *See, e.g.*, McGann, *supra*, at 147 (explaining that "[w]hen a party is overwhelmingly popular in terms of federal elections in a state, adopting a biased plan brings no benefit and may even be counterproductive"). Consequently, while it might be possible for the dominant party in states like these to contort maps to capture an additional seat or two, it will be geo-

graphically challenging and the added effort produces comparatively low marginal benefits. *Id.* at 147-50.

2. Empirical data confirm those intuitions. To identify the markers of extreme partisan gerrymandering and to determine its magnitude, the Brennan Center studied congressional election results from this decade's races to assess the extent and the durability of "partisan bias"—the degree of systematic advantage one party receives over another in turning votes into seats. Laura Royden & Michael Li, Brennan Ctr. for Justice, *Extreme Maps* 1, 3 (2017).[4] According to this analysis, just seven states account for almost all of the bias in this decade's congressional maps. *Id.* at 1, 2, 14. And, importantly here, the most biased districting maps of this decade, in both Republican- and Democrat-controlled states, share the two objective features discussed above. *Id.* at 1, 2, 6, 9, 15.

These findings confirm the intuition that single-party control is virtually a precondition for there to be extreme partisan bias. *See id.* at 15.[5] While this case involves a gerrymander by Republicans, partisan gerrymandering is not a one-party problem. *Id.* at 2, 6, 9, 25, 28. Indeed, the congressional maps in

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[4] https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16_0.pdf.

[5] To be sure, there may be instances where a political party has the power to block a map that is bad for the party but chooses not to do so for one political consideration or another. But those circumstances are, unsurprisingly, exceedingly rare. Whether they also are constitutionally problematic is not before the Court in this case.

Maryland and Massachusetts exhibited meaningful partisan bias under Democratic control. *Id.* at 6, 9. The existence of large levels of bias in states where either Republicans or Democrats had sole control of the congressional redistricting process strongly suggests that much of that bias stems from deliberate manipulation of maps. *Id.* at 8. By contrast, maps drawn by commissions, courts, and split-control state governments exhibited much lower levels of partisan bias. Indeed, such states had an efficiency gap skew of well under one seat in all three elections since 2012. *Id.* at 6-8. And none had high levels of bias persisting across all three of the elections since the 2011 round of redistricting under multiple measures of such bias. *Id.* at 2, 8, 23-24. This strongly suggests that the maps' partisan bias in sole-control states is not happenstance, but rather the result of deliberate effort. *Id.* at 8.

The data confirm that a state's recent history of competitiveness is also highly correlated with extreme partisan gerrymandering. All of the most biased maps are in states with a recent history of closely contested statewide elections, or—in the case of Texas—a closely divided state legislature as recently as 2010. *Id.* at 2, 14. Partisan bias was likewise more durable in such states across the three elections studied. *See id.* at 22, 25, 28.

These conclusions are supported by studies of the maps of the current redistricting cycle that were conducted with smaller data sets over a more limited time span. *See* McGann, *supra*, at 57, 158 (analyzing 2012 congressional electoral returns under one measure of partisan bias). They are also supported by prior studies examining the links between control

over redistricting and the partisan performance of the resulting maps. *Cf.* McDonald, *supra*, at 388 ("When one party controlled the 2001-02 redistricting process … that party usually produced a redistricting plan favoring itself."); Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 Am. Pol. Sci. Rev. 541, 543 (1994) (concluding based on an analysis of state-legislative election results from 1968 to 1988 that "on average, redistricting favors the party that draws the lines more than if the other party were to draw the lines," and that "the effect is substantial and fades only very gradually over the following 10 years").

3. The fact that these two factors correlate very strongly with extreme partisan gerrymandering alleviates lingering concerns that claims of unconstitutional partisan gerrymandering are simply too hard to adjudicate. These two criteria are easily measured and helpful guideposts for courts. The first factor is objective and readily identifiable—either a single party controls the districting process, or not. The second factor likewise can be demonstrated in a variety of straightforward ways, such as a recent string of closely contested races for statewide elected offices or close parity in registration throughout much of the state. *Cf. Vill. of Arlington Heights*, 429 U.S. at 267 ("The historical background of the decision is one evidentiary source [that might] reveal[] a series of official actions taken for invidious purposes."). Courts thus can and should use these two criteria to guide their assessment of the parties' evidence on the three prongs of appellees' standard—making that standard all the more judicially manageable. If

the factors are present, trial courts can confidently be skeptical of the defendants' evidence on all three prongs of the analysis. If one or both factors are absent, judicial intervention is far less likely to be appropriate. These two factors, in other words, offer precisely the type of additional, objective criteria this Court has sought to guide courts' partisan gerrymandering inquiries. *See, e.g.*, *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment) (seeking "rules to limit and confine judicial intervention"); *id.* at 343 (Souter, J., dissenting) ("the issue is one of how much is too much [partisanship] ... [and] the Court's job must be to identify clues, as objective as we can make them, indicating that partisan competition has reached an extremity of unfairness").

The criteria are likewise practically connected to the three-part analysis appellees propose. The intent prong is far more likely to be satisfied when these criteria exist because a governing majority is far more likely to have the motive to entrench itself to an excessive degree if it has complete control over the redistricting process and knows that it has an unusual opportunity to protect itself in future, otherwise-competitive elections. A governing majority in an otherwise competitive state is also significantly more likely to achieve this result, thus satisfying the effects part of the test. And when a state that should be competitive but happens to be controlled by one party at redistricting time draws a map that entrenches that party's control into the future, the state is significantly less likely to be able to establish a plausible neutral justification for that effort.

4. These two criteria will not only aid courts in applying the three parts of appellees' standard, but

they will also serve as an objective metric limiting judicial intervention to only those states where partisan gerrymandering causes the most serious anti-democratic problems. Indeed, contrary to the protestations from appellants and their *amici* that recognizing a partisan-gerrymandering cause of action would license "unprecedented levels of federal intrusion" into the country's maps by a "virtually limitless universe of plaintiffs," these indicia would train courts' focus on at most a small subset of all maps. *See, e.g.*, Br. of Wis. State Senate 9-10. In the current congressional redistricting cycle, sixteen maps were drawn under single-party control. Of those, fewer than ten are generally regarded as competitive states. An extreme partisan-gerrymandering challenge brought in the other forty states would likely be unmeritorious.

This is not to say that these are the only relevant metrics that courts should consider in determining whether an unconstitutional partisan gerrymander has occurred. Other types of activities that are both readily identifiable and easily distinguished from "normal politics" may also be helpful for flagging extreme gerrymanders meriting closer judicial scrutiny. For example, where redistricting is conducted by the majority party's leadership in secret, the maps are drawn quickly, the governing party changes redistricting rules (including by rolling back oversight mechanisms), and/or there is an unusually large amount of outside spending on the mapmaking process, courts' suspicions that there had been an unlawful partisan gerrymander would rightly be heightened. *Cf. Vill. of Arlington Heights*, 429 U.S. at 267-68 (recognizing that "[t]he specific sequence of

events leading up [to a] challenged decision," "[d]epartures from the normal procedural sequence," and "[t]he legislative or administrative history," among other things, could be relied upon to show improper purpose). These factors, too, are reliable indicators of foul play, and are all means of identifying deviations from the normal political processes.

5. In addition to helping courts, these factors also provide meaningful, *ex ante* guidance to prospective plaintiffs. Single-party control and statewide competitiveness refer to basic facts of the political life of a state, and they are no more difficult for plaintiffs to assess than for judges. By strongly signaling the facial validity of a claim, the indicia empower prospective plaintiffs to assess the viability of their claims realistically and thereby prevent potentially frivolous litigation.

In short, single-party control is a prerequisite for, and historical-competitiveness is at least very highly probative of, an unconstitutional partisan gerrymander. When these two criteria are satisfied, and especially when combined with the other types of evidence just described, a court need not be concerned that it is intruding into ordinary political processes by invalidating a biased plan. Likewise, reliance on these criteria can greatly reduce the number of maps that could be reasonably subject to constitutional challenge.

C. Wisconsin's Map Is Plainly Unconstitutional

The facts of this case confirm that appellees' standard—especially when considered in conjunction with the various criteria described above—is well-

suited to weed out unconstitutional partisan gerrymandering, without drawing courts into the ordinary political thicket. Wisconsin has long been a closely divided swing state. In 2010, for the first time in over forty years, the voters of Wisconsin elected a Republican majority in the Assembly, a Republican majority in the Senate, and a Republican Governor. Appellees' Br. 5; JSA12a. This unusual monopoly over state government happened to occur just prior to the decennial redistricting cycle, providing the Republican leadership a unique incentive, and rare opportunity, to maximize and lock in their control.

Rather than follow normal districting practices, the Republican leadership seized the opportunity to entrench itself, devising and carrying out a plan to win as many seats as possible and to extend their temporary majority control through at least the decennial period. Appellees' Br. 4-10; JSA12a-29a, 126a-140a. The leadership, moreover, executed that plan in secret—without the input of Democrats, or even that of rank-and-file Republican legislators. Appellees' Br. 5; JSA12a-29a. And, as the court below put it, "[i]t is clear that the drafters got what they intended to get," JSA146a—"secur[ing] for Republicans a lasting Assembly majority" by "allocating votes among the newly created districts in such a way that, in any likely electoral scenario, the number of Republican seats would not drop below 50%," *id.* at 145a; *see also* Appellees' Br. 10-17; JSA145a-166a. While the federal courts should be hesitant to interfere with ordinary inter-party politics, what is at issue here—and what is likely to be at issue in any case where a temporarily governing majority seeks to entrench itself in a perennially competitive

state—is not normal, but extraordinary and deeply anti-democratic.

II. EXTREME PARTISAN GERRYMANDERING OFFENDS FUNDAMENTAL CONSTITUTIONAL PRINCIPLES, PLACING IT OUTSIDE OF NORMAL AND ACCEPTABLE LEGISLATIVE CONDUCT AND WARRANTING JUDICIAL INTERVENTION

A partisan-gerrymandering cause of action as described above does not simply help courts target the limited set of extreme gerrymanders that may arise in a redistricting cycle. It also allows courts to target cases that offend key constitutional principles.

Extreme partisan gerrymanders, such as the one that occurred in Wisconsin, violate three related constitutional norms, all of which lie at the heart of our constitutional democracy: government accountability, legislative representativeness, and neutral treatment of political expression and association. As a result, extreme partisan gerrymandering stands far outside the bounds of legitimate democratic governance. These gerrymanders thus warrant judicial intervention to vindicate core constitutional principles and rights.

A. Extreme Partisan Gerrymandering Undermines Legislatures' Accountability To The People

As this Court explained in *Reynolds v. Sims*, 377 U.S. 533 (1964), the "right to vote freely for the candidate of one's choice is the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Id.* at 555. Our "[d]emocracy … is premised on responsiveness,"

McConnell v. FEC, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring), and the franchise is meant to ensure that representative government is comprised of "bodies which are collectively responsive to the popular will," *Reynolds*, 377 U.S. at 555. That responsiveness is why the Court has long placed faith in and been deferential to the "'pull, haul, and trade'" of politics as a means of ensuring electoral accountability. *See, e.g.*, *LULAC*, 548 U.S. at 507 (Roberts, C.J., concurring in part and dissenting in part) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)).

Extreme partisan gerrymandering, however, runs contrary to this Court's precedents and the underlying constitutional values they reflect. By locking in legislative majorities that can withstand even severe swings in public sentiment, extreme partisan gerrymanders undercut the mechanisms of accountability, rendering the "pull, haul, and trade" of politics futile and judicial intervention essential.

1. Numerous constitutional provisions reflect the foundational importance of government responsiveness to the electorate. For example, the Constitution requires reallocation of House seats every ten years, U.S. Const., art. I, § 2, cl. 3, because the House was meant to be a "numerous and changeable body" whose membership would reflect shifting popular will, Federalist No. 63 (James Madison). The Constitution also mandates that members of both the House and Senate be periodically re-elected by "the people," and imposes time limits on their terms in office. U.S. Const., art. I, §§ 2, 3; *see also id.*, art. I, § 2, cl. 3 (providing for decennial enumeration and establishing minimum population of House districts); *id.*, art. I, § 2, cl. 4 (requiring House vacan-

cies to be filled by elections, not appointments); Federalist No. 51 (James Madison) (to ensure dependence of government on the people, which is "the primary control on the government," the Constitution "divide[s] the legislature into different branches; and … render[s] them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit").

Further, the Constitution "denie[s] Congress the power to impose additional qualifications upon its members … for fear that congressmen would endeavor to entrench themselves in office." Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 Geo. L.J. 491, 498 n.45 (1997). It likewise disallows state-imposed qualifications on legislators, because that, too, would violate the "basic principle" that "the right to choose representatives belongs not to the States, but to the people." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 820 (1995). As Madison put it, "republican liberty seems to demand ... not only that all power should be derived from the people, but that those entrusted with it should be kept in dependence on the people." Federalist No. 37 (James Madison).[6]

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[6] *See also* Joel Francis Paschal, *The House of Representatives: 'Grand Depository of the Democratic Principle'?*, 17 L. & Contemp. Problems 276, 281 (1952) (describing 1842 statute mandating use of single-member districts that was intended to prevent states from, through the general-ticket system, "convert[ing] the House … to an assemblage of the states and not the people as originally intended"); G. Bingham Powell, Jr., Elections As Instruments of Democracy 47 (2000) ("The citi-

The Constitution, moreover, "guarantee[s] to every State in [the] Union a Republican Form of Government." U.S. Const., art. IV, § 4. As Hamilton put it: "The true principle of a republic is[] that the people should choose whom they please to govern them. Representation is imperfect in proportion as the current of popular favor is checked." *Powell v. McCormack*, 395 U.S. 486, 540-41 (1969) (quotation omitted). The guarantee of a republican form of government implies that elected officials must remain responsive to the people, and cannot be allowed to insulate themselves or their allies from electoral challenge. *Cf.* Federalist No. 10 (James Madison) ("To secure the public good and private rights against the danger of … a [majority] faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed.").

The Elections Clause likewise was "intended to act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate." *Ariz. State Legislature*, 135 S. Ct. at 2672. "As Madison urged, without the Elections Clause, '[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed.'" *Id.* (quoting II Records of the Federal Convention 241 (M. Farrand rev. 1966)) (alteration in original). South Carolina's delegates, in fact, sought "to strike out the federal [Elections

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zens' ability to throw the rascals out" is "fundamental to … representative democracy.").

Clause] power … because South Carolina's coastal elite had malapportioned their legislature, and wanted to retain the ability to do so." *Id.* In response, "Timothy Pickering of Massachusetts similarly urged that the Clause was necessary because the State governments may abuse their power, and regulate ... elections in such manner as would be highly inconvenient to the people." *Id.* (quotation omitted). He also aptly described the Clause as a way to "ensure to the people their rights of election." *Id.* (quotation omitted).

2. This Court's precedents similarly reflect the foundational importance of government's responsiveness to the people. The Court's equal protection jurisprudence has long recognized that judicial intervention into legislative action is particularly necessary when legislatures are likely to become unresponsive. As the Court explained in *United States v. Carolene Products, Co.*, 304 U.S. 144 (1938), for example, "more exacting judicial scrutiny" is fitting for "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *Id.* at 152 n.4. That is, judicial intervention is particularly justified when government action makes it difficult for voters to translate their desired outcomes into legislative results.

The value of government responsiveness also is reflected in this Court's one person, one vote jurisprudence. Before *Reynolds* held that "vote-diluting discrimination … accomplished through the device of districts containing widely varied numbers of inhabitants" is unconstitutional, 377 U.S. at 563, extreme disparities in ratios of voters to representatives

abounded. Now, however, the Court's one person, one vote jurisprudence ensures that people have a right not merely to vote, but to "an equally effective voice in" elections. *Id.* at 565; *see also* Gordon E. Baker, *The Unfinished Reapportionment Revolution*, in Political Gerrymandering and the Courts 11, 11 (Bernard Grofman ed., 1990); *cf. Rogers v. Lodge*, 458 U.S. 613, 625 (1993) (one constitutional harm of racial gerrymandering is that it allows legislators to be "unresponsive and insensitive to the needs of the black community").

3. By producing legislative entrenchment, extreme partisan gerrymanders restrict the electoral accountability that Madison and other Framers sought to create and that this Court's precedents aim to protect. Severe partisan gerrymanders call out for judicial intervention, because without judicial review, the serious accountability problems biased maps produce will endure. *Cf.* Federalist No. 10 (James Madison) (to prevent abuses by a majority faction, the majority "must be rendered … unable to concert and carry into effect schemes of oppression"). Extreme partisan gerrymanders create "locked-in" or "safe" seats, and legislators "elected from such safe districts need not worry much about the possibility of shifting majorities" and "have little reason to be responsive to the political minorities within their district." *LULAC*, 548 U.S. at 470-71 (Stevens, J., concurring in part and dissenting in part); *see also Reynolds*, 377 U.S. at 570, 576 (decrying "a minority strangle hold on the State Legislature" and "frustration of the majority will"); *Baker v. Carr*, 369 U.S. 186, 258-59 (1962) (Clark, J., concurring) (noting lack of "practical opportunities" for the "majority of

the people" to correct malapportionment at the polls). We have "a system of government that relies upon the ebbs and flows of politics to 'clean out the rascals.'" *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 45 (1977) (Brennan, J., dissenting); *see also* Daniel R. Ortiz, *Federalism, Reapportionment, and Incumbency: Leading the Legislature to Police Itself*, 4 J.L. & Pol. 653, 675 (1988) (representatives in gerrymandered districts can "pursue their self-interests at the expense of their constituents' interests with less fear of being unseated"). But a legislature essentially held hostage by one party or the other is not the responsive body the Constitution envisions. Judicial intervention is not merely warranted, but necessary to preclude that unconstitutional result.

B. Extreme Partisan Gerrymandering Creates Legislatures That Are Not Representative Of The Electorate

Extreme partisan gerrymandering also locks in a legislative delegation that comes nowhere close to reflecting the partisan diversity of the state's populace, thereby undermining another core value undergirding our democratic system of government: legislative representativeness. Representativeness is critically important not only in and of itself, but also because it guarantees that the legislature will be accountable to *all* of the people it purports to represent.

1. Since the time of the Revolution, it was understood that a proper legislative assembly should closely resemble the society from which it was drawn. *See* Eric Nelson, The Royalist Revolution: Monarchy and the American Founding 71-75 (2014). The

Framers' views on representation reflected their rejection of the political values of the British system of government, particularly the concept of "virtual representation." For the British, equality of actual representation was of no concern because, the theory went, "the English people … were essentially a unitary homogenous order with a fundamental common interest." Gordon S. Wood, The Creation of the American Republic, 1776-1787, at 174 (1969).

The American founding generation, by contrast, understood the necessity of actually representative government, and the corollary that government works best when it is closest to the people themselves. *See* Federalist Nos. 59, 61 (Alexander Hamilton). When it came time to draft the Nation's new Constitution, ensuring real representation was among the Framers' primary goals. *See* Robert B. McKay, Reapportionment: The Law and Politics of Equal Representation 16 (1965). For them, "[a] properly designed constitutional system would match representation and policymaking authority." Keith E. Whittington, *The Federalist Society's Article I Initiative: The Place of Congress in the Constitutional Order*, 40 Harv. J.L. & Pub. Pol'y 573, 579 (quoting James Madison, Notes of the Debate in the Federal Convention of 1787, at 39 (1987)); *see also* Federalist No. 55 (James Madison) (legislature should have sympathy "with the feelings of the mass of the people").

Based upon these principles, there was protracted debate over how to allocate congressional representation among states and, after that issue was resolved, over the proper size of congressional districts. James Madison called this question the most "wor-

thy of attention" in the entire Constitution. Federalist No. 55 (James Madison). In the end, with "full and equal" representation as the common goal, the Framers all came to the same conclusion: for the House of Representatives, "[n]umbers … 'are the only proper scale of representation.'" *Wesberry v. Sanders*, 376 U.S. 1, 15 (1964) (quoting Federalist No. 54 (James Madison)). The Framers thus sought to make the House not only accountable to, but also representative of, the people. *See, e.g.*, *U.S. Term Limits*, 514 U.S. at 821 ("the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly … by the people"); *see also Cook v. Gralike*, 531 U.S. 510, 528 (2001) (Kennedy, J., concurring) ("[F]reedom is most secure if the people themselves, not the States as intermediaries, hold their federal legislators to account for the conduct of their office.").[7]

Many of the Founders emphasized that state legislatures, too, should be representative of the people they governed. James Wilson, for example, wrote that "[i]n [state legislatures] there ought to be a representation sufficient to declare the situation of every county, town and district, and if of every individ-

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[7] These concerns were echoed when Congress passed the Apportionment Act of 1842, which ended the unrepresentative practice of at-large congressional elections. As Senator William Graham of North Carolina explained, the law's requirement of single-member districts would guarantee the "personal and intimate acquaintance between the representative and constituent which is the very essence of true representation." Cong. Globe, 36th Cong., 2d Sess. app. 749 (1842).

ual, so much the better, because their legislative powers extend to the particular interest and convenience of each[.]" III Records of the Federal Convention of 1787, at 160 (M. Farrand ed. 1911) (1937 revised ed.); *see also Evenwel v. Abbott*, 136 S. Ct. 1120, 1124, 1130 (2016) (explaining Court's jurisprudence requiring "jurisdictions [to] design … state-legislative districts with equal populations, and … regularly reapportion districts to prevent malapportionment," and that "the constitutional scheme for congressional apportionment rests in part on the same representational concerns that exist regarding state and local legislative districting"); *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 749 (1964) (Stewart, J., dissenting) (arguing for "effective representation in the State's legislature ... of the various groups and interests making up the electorate").

The Framers ultimately sought in multiple constitutional provisions to ensure government representativeness and keep government close to the people it represented. Article I, § 2, cl. 3 of the Constitution, for example, requires reallocation of House seats every ten years. Such periodic reallocation, as explained, helps ensure government responsiveness, *see supra* at 22-23—but it also fosters legislative representativeness by allowing maps to "take into account population shifts and growth," *Reynolds*, 377 U.S. at 583. Indeed, it especially would have done so in a fast-changing, highly mobile society like that of the early Republic.

Similarly, the Constitution mandates that legislators be regularly reelected. *See* U.S. Const., art. I, §§ 2, 3. This requirement, too, ensures not just responsiveness (*supra* at 23), but also representative-

ness: Frequent elections allow legislative bodies to reflect population changes, and thus remain representative of the electorate over time. *See, e.g.*, Neil Gorsuch & Michael Guzman, *Will the Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limitations*, 20 Hofstra L. Rev. 341, 348 (1991).

2. This Court has likewise repeatedly emphasized the constitutional value of ensuring legislative representativeness. For example, in *Reynolds*, 377 U.S. at 562, 565-66, the Court emphasized that "the basic aim of legislative apportionment" is "the achieving of fair and effective representation for all citizens." The Court explained that "[l]egislators represent people, not trees or acres. ... As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." *Id.* at 562.

In *Arizona State Legislature*, 135 S. Ct. at 2672 n.24 (quotation omitted), the Court reiterated that the "fundamental principle of our representative democracy" is "that *the people* should choose whom they please to govern them." As the Court explained, "Our Declaration of Independence … drew from Locke in stating: 'Governments are instituted among Men, deriving their just powers from the consent of the governed.' And our fundamental instrument of government derives its authority from 'We the People.'" *Id.* at 2675.

Likewise, in *Evenwel*, 136 S. Ct. at 1127-28, the Court recognized that the drafters of the Fourteenth Amendment settled on using total population for apportionment, because, for them, government was truly representative only if it accounted for—and was accountable to—*all* of its constituents. That is what Lincoln meant when he recommitted the reborn Nation to a "government of the people, by the people, for the people." *Reynolds*, 377 U.S. at 567-68. And, the Court has said, "the same representational concerns … exist regarding state and local legislative districting." *Evenwel*, 136 S. Ct. at 1130.

3. Severe partisan gerrymandering undermines government representativeness. When the governing majority of the day permanently entrenches itself in power, the legislature no longer "think[s], feel[s], reason[s], [or] act[s] like" the people at large. John Adams, Thoughts on Government: Applicable to the Present State of the American Colonies; In a Letter from a Gentleman to his Friend (Apr. 1776). States that may have vibrant political cultures with diverse perspectives are left with one-note legislatures. The debates held in the state house and the policies legislators enact into law bear little resemblance to the fuller conversations among voters in homes and public spaces throughout the state. Most importantly, these legislatures lack a sufficient volume of dissenting voices to act as a check on legislative caprice, further limiting the ability of the people to hold their representatives to account.

To be sure—as appellants and their *amici* unrelentingly, if misguidedly, reiterate—the Constitution does not require precise proportionality of the Nation's legislatures or that every voter be able to elect

the candidate of her choice. But that does not mean the opposite is true, that the legislature should bear little resemblance to the polity it represents. Simply put, the Constitution does not permit legislators to structure their maps and pick their voters in any way *they* choose. It demands at the very least that there not be a gross disconnect between a legislature and the people it purports to represent. That kind of gross disconnect is the product of entrenchment, and tolerating it ignores our Nation's foundational precept that "the voters should choose their representatives, not the other way around." *Ariz. State Legislature*, 135 S. Ct. at 2677 (quotation omitted).

C. Extreme Partisan Gerrymanders Violate The First Amendment Rights To Political Expression And Association That Are Vital To Representative Democracy

Extreme partisan gerrymandering also transgresses crucial First Amendment limits on legislative decision-making.

1. The First Amendment requires the government to remain neutral regarding its citizens' ideological affiliations. "[A]bove all else," the Court has held, "the First Amendment means that government has no power to restrict expression *because of* its message, its ideas, its subject matter or its content." *Police Dept. of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (emphasis added).

That neutrality principle has particular force in the context of elections, as the political acts of voting and associating to advance political candidates are quintessential exercises of First Amendment rights. *See, e.g.*, *Burdick v. Takushi*, 504 U.S. 428, 433-34

(1992) (noting regulation of voting burdens First Amendment rights); *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) (recognizing rights of voters "to cast their votes effectively" and "to associate for the advancement of political beliefs"). These two rights are related, allowing individuals to band together for purposes of advancing their candidates through the ballot. *See* Guy-Uriel Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 Calif. L. Rev. 1209, 1248-49 (2003) (citing *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 296 (1981); *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973)).

2. Extreme partisan gerrymandering—the government's intentional burdening of the efficacy of citizens' votes "*because of* their participation in the electoral process, their voting history, their association with a political party, or their expression of political views," *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring) (emphasis added)—is plainly irreconcilable with those First Amendment principles. It is governmental action to disadvantage people "on account of their political [expression or] association" which, this Court has recognized, contravenes the First Amendment. *O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 717 (1996); *see also, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (political patronage in public employment unlawful both because it burdens political belief and because it enlists government authority for partisan purposes, thereby "tip[ping] the electoral process in favor of the incumbent party"); *Carrington v. Rash*, 380 U.S. 89, 94 (1965) (holding Texas could not disqualify from voting in state elections members of the U.S.

military who moved to the state while in active service, because "[f]encing out from the franchise a sector of the population because of the way they may vote is constitutionally impermissible" (quotation omitted)).

The First Amendment harms caused by extreme partisan gerrymanders are even more damaging because they undercut legislative accountability and representativeness. By selectively impacting the expressive and associational rights of one group, severe partisan gerrymandering limits legislators' "responsive[ness] to the political minorities within their district," locking out of political processes the party that is in the minority when the maps are drawn (much like racial minorities are locked out as a result of a racial gerrymander). *LULAC*, 548 U.S. at 470-71 (Stevens, J., concurring in part and dissenting in part); *see also McCutcheon v. FEC*, 134 S. Ct. 1434, 1441-42 (2014) (plurality op.) ("those who govern should be the last people to help decide who should govern"); *id.* at 1462 ("responsiveness" to constituent views "is key to the very concept of self-governance through elected officials"). And by undermining voters' foundational right to associate to further their political beliefs through the "pull, haul, and trade" of ordinary politics, extreme partisan gerrymandering negates their ability to choose a government that represents their diverse needs and interests. *See, e.g.*, *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986); *Citizens Against Rent Control*, 454 U.S. at 296; *Kusper*, 414 U.S. at 57.

Taken together, the constitutional harms generated by "severe partisan gerrymanders" explain why such gerrymanders are "incompatib[le] … with dem-

ocratic principles" and must be held unlawful by this Court. *Vieth*, 541 U.S. at 292 (Kennedy, J., concurring). Severe partisan gerrymanders are intentional actions to reduce the responsiveness and representativeness of the legislature with respect to a large segment of constituents, specifically because of those constituents' chosen political affiliation. Such actions undermine principles of popular sovereignty, governmental accountability, and equal treatment that are embodied in the First and Fourteenth Amendments and lie at the heart of our Constitution and our system of democracy.

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Recognizing that extreme partisan gerrymanders are irreconcilable with the U.S. Constitution, this Court has long sought a standard courts could use to provide a reliable and limited answer to the question: "[h]ow much political motivation and effect is too much?" *Id.* at 297 (plurality op.). Appellees have put forth just such a standard. Appellees' standard—particularly when supplemented with the evidentiary indicia discussed herein—effectively identifies those rare maps that are intended to and actually do durably entrench a political party in power. The conditions that generate those maps are unusual and easily identified. Those maps cause the political system to become unresponsive to a particular segment of voters on the basis of their political affiliation. Those maps make the legislature grossly unrepresentative of the state's populace as a whole. And those maps impair voters' First Amendment rights to equal political expression and association. Those maps, in other words, subvert our democratic system of government, all while stripping voters of

their ability to protect themselves through the electoral process. The Court should adopt appellees' standard and hold Wisconsin's partisan gerrymandering unconstitutional here.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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September 5, 2017