No. 16-1161

IN THE

Supreme Court of the United States

BEVERLY R. GILL, ET AL.,

Appellants,

—v.—

WILLIAM WHITFORD, ET AL.,

Appellees.

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

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE NEW YORK CIVIL LIBERTIES UNION, AND THE ACLU OF WISCONSIN FOUNDATION AS *AMICI CURIAE*, IN SUPPORT OF APPELLEES

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, non-partisan organization with approximately 1.6 million members dedicated to the principles of liberty and equality enshrined in the Constitution. In support of those principles, the ACLU has appeared before this Court in numerous cases involving electoral democracy, including *Reynolds v. Sims*, 377 U.S. 533 (1964). The ACLU of Wisconsin is a statewide affiliate of the national ACLU and has approximately 23,000 members throughout Wisconsin.

SUMMARY OF ARGUMENT

If the Wisconsin Legislature waited until the votes had been cast, and then drew district lines to ensure that its majority retained power regardless of the choices of the voters, its conduct would be clearly unconstitutional. Instead, the Wisconsin Legislature acted before the election and, by using sophisticated technology and expert assistance, it achieved the same result. The Legislature ensured that the majority party would retain control under any likely electoral scenario, "freez[ing] the status quo . . . [against] the potential fluidity of American political life." *Jenness v. Fortson*, 403 U.S. 431, 439 (1971). Locking up the political process for the purpose of disabling competition among partisan viewpoints is

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[1] Pursuant to Rule 37, both parties have lodged blanket consents for the filing of *amicus* briefs on behalf of either party. No counsel for either party authored this brief in whole or in part. No persons or entities, other than *amici* themselves, made a monetary contribution to the preparation or submission of this brief.

at odds with the proper role of government in administering elections. It is inconsistent with democratic values and constitutional precedent holding that government must function as a neutral referee in administering elections. The state cannot regulate electoral competition with its thumb on the scales.

This constitutional obligation of government neutrality stems from the First Amendment and the Equal Protection Clause. It is the same principle that circumscribes government regulation of access to public fora and facilities. The neutrality principle acquires special force in circumstances involving government regulation of the electoral process.

When a state interferes with electoral competition to resist changes in voter preference in order to award its preferred political party a legislative monopoly, it impairs the integrity of the democratic process. In so curtailing voters' freedom of electoral choice, the state diminishes and debases their constitutional right to cast a meaningful ballot. The right to vote embraces more than a right of individual choice. It also involves associational and representational interests. When a redistricting plan intentionally and effectively entrenches the state's preferred party in office against voters' choices, the associational aspect of the right to vote is substantially burdened.

Not every limitation on the right to vote requires judicial intervention. Some administrative burdens on the franchise are unavoidable. But some so alter the nature of the franchise that they deny a citizen's "inalienable right to full and effective participation in the political process [ ] . . ." *Reynolds*

v. Sims, 377 U.S. 533, 565 (1964). Where an enactment substantially impairs the fundamental representational rights, the burden shifts to the state to demonstrate that the impairment is necessary to the advancement of legitimate state interests. Accordingly, a state's violation of its neutrality obligation in redistricting will shift the burden of justification only where the impairment is substantial.

To impose a burden of justification on the state, plaintiffs must establish two elements: first, improper legislative intent in fashioning a redistricting plan; and second, that the plan gives effect to the legislature's improper intent. A state acts with improper intent when it draws the apportionment plan to entrench a partisan composition to make the legislature unresponsive to changes in voter preferences. Trial courts can discern legislative intent from contemporaneous statements, political history, erratic legislative processes, and highly irregular district lines. A plan gives effect to the legislature's improper intent when a challenged map significantly deviates from the state's normal range of partisan balance in favor of the state's preferred party in a way that will endure any likely electoral outcome. Trial courts are capable of weighing evidence and drawing conclusions regarding the effect of a redistricting plan. Judging whether a state's conduct results in a sufficiently significant deviation from neutrality to require justification is a familiar and judicially manageable inquiry using techniques drawn from pattern-or-practice discrimination cases.

There may be instances where it is unclear whether legislation favoring the state's preferred political party constitutes a sufficiently substantial impairment of the integrity of the electoral process to warrant judicial intervention. This case is not one. In this case, the district court, as the trier of fact, concluded that there was ample evidence of both intent and effect. The district court further found that Wisconsin could not provide sufficient justification for its map and properly found the redistricting plan unconstitutional. This Court should affirm that result.

ARGUMENT

I. THE STATE IS PRESUMPTIVELY OBLIGATED TO FUNCTION AS A NEUTRAL REFEREE IN ITS ADMINISTRATION OF ELECTIONS.

Few principles are more fundamental to representative democracy than the state's obligation to regulate the electoral process in an even-handed manner. A legislature that selectively barred members of one party from voting in an election would violate this principle. So too would a state that ushered Republicans to voting machines that discounted their votes by one-third, while fully counting the votes of Democrats. Nor could a legislature wait until the ballots were cast and then draw district lines to achieve its preferred composition of the legislative body. In each instance, the legislature would be engaged in discrimination that substantially burdens the citizenry's rights to cast a meaningful ballot and to associate politically. What Wisconsin did here is not materially different.

It drew its district lines in advance, based on viewpoint, to entrench its preferred party against popular competition. If the First Amendment means anything, it means that government must act as a neutral referee in its administration of the political process.

The First Amendment protects meaningful political participation by citizens from viewpoint-based interference. The integrity of electoral competition undergirds the democratic process. Although the state may speak on its own behalf as a participant in the marketplace of ideas, it cannot fix marketplace rules to ensure its own viewpoints prevail. So, too, if the state were permitted to disable the competitive mechanism of the electoral process to ensure that its preferred viewpoints prevailed despite popular opposition, it would undermine the system of republican self-government. By freezing the political status quo and entrenching the state's preferred party in office, partisan gerrymandering debases the citizenry's right to cast a meaningful ballot and to associate for political purposes.

A. The Neutrality Principle Is Part of the Doctrinal Foundation of the "Marketplace of Ideas" Theory of the First Amendment.

The state must regulate and administer the electoral process in a neutral and even-handed fashion. This obligation of neutrality is rooted in the First Amendment commitment to robust ideological competition as a critical component of democratic self-government. The metaphor of a competition of ideas is often traced to John Milton's imagery of

"[Truth] and Fals[e]hood grappl[ing] . . . in a free and open encounter." *Areopagitica* (1644). Justice Holmes famously wrote "that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that . . . is the theory of our Constitution." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The marketplace of ideas metaphor has become a conceptual cornerstone of the First Amendment. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 583 (2011) (noting "the constitutional importance of a free marketplace of ideas" and observing that "[w]ithout such a marketplace, the public could not freely choose a government pledged to implement policies that reflect the people's informed will").

Government neutrality regarding the regulation of speech is the doctrinal prerequisite for ideological competition. In its early development and application, the principle—which often takes the form of a prohibition against content discrimination—was most commonly invoked where the state had either created a public forum or where a government entity was supervising expressive access to a public facility. *See Police Dep't v. Mosley*, 408 U.S. 92, 95-96 (1972); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *see also, e.g.*, *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015); *Boos v. Barry*, 485 U.S. 312 (1988).

In *Mosley*, for example, the Court invalidated a Chicago ordinance that selectively granted the right to picket on public sidewalks based upon the content of speech and the labor union affiliation of the speakers. In doing so, this Court announced that under the First Amendment and Equal Protection

Clause, the government may not "grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views" or "select which issues are worth discussing or debating in public [facilities]." *Id.* at 96. Noting that "[t]here is an 'equality of status in the field of ideas' and government must afford all points of view an equal opportunity to be heard[,]" the Court held: "Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say." *Id.*

The Court has firmly established that free ideological competition is critical to democratic self-government and that government neutrality when regulating speech is essential to that end. Public fora where individuals and associations engage in expressive activities are one such example. But the First Amendment demands no less neutrality when the government is regulating the mechanisms that comprise our electoral system.

There is a close connection between preserving robust discourse regarding public policies in public fora and protecting the fundamental right to vote in the electoral forum. More than simply the process of choosing candidates, elections are a focal point for the competition that occurs in the marketplace of ideas. As Professor Alexander Meiklejohn testified before Congress in 1955, elections provide voters a forum to "judge the wisdom or folly of suggested measures" and "it is these 'judging' activities of the governing people which the First Amendment protects by its guarantees of freedom from legislative

interference."[2] Because self-government is fundamentally predicated upon voters choosing winners and losers in the political marketplace, elections must reflect the voters' judgments and not the state's. *See Cal. Democratic Party v. Jones*, 530 U.S. 567, 590 (2000) (Kennedy, J. concurring) ("In a free society the State is directed by political doctrine, not the other way around.") State intervention to override voter preferences in the electoral process, no less than in the marketplace of ideas constitutes a form of "[c]ensorship over our thinking, duress over our voting" that is "forbidden by the First Amendment."[3].

Because the electoral process is inextricably intertwined with the marketplace of ideas, the state must maintain neutrality in both "to ensure citizen participation in republican self-governance." *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399, 415-16 (2006). "The First Amendment is designed and intended to remove governmental restraints from the arena of public discussion . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *McCutcheon v. Fed. Election Com'n*, 134 S.Ct. 1434, 1448 (2014) (citation and internal quotation marks omitted). This principle is "[p]remised on mistrust of governmental power [and] stands against attempts

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[2] S. Comm. on the Judiciary, Subcommittee on Constitutional Rights, Hearings, 84th Cong., 1st Sess. 1955, *reprinted as* Alexander Meiklejohn, Testimony on the Meaning of the First Amendment 4 (1955), http://rci.rutgers.edu/~tripmcc/phil/meiklejohn-testimony.pdf (Meiklejohn Testimony).

[3] Meiklejohn Testimony 4.

to disfavor certain subjects or viewpoints." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a *precondition* to enlightened self-government and a necessary means to protect it." *Id.* at 340 (emphasis added); *accord Burson v. Freeman*, 504 U.S. 191, 196 (1992) ("speech concerning public affairs is more than self-expression; it is the essence of self-government") (citation and internal quotation marks omitted). If "an open marketplace where ideas, most especially political ideas, may compete without government interference" is a necessary *precondition* to self-government, *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008), then an electoral proving ground that also observes political neutrality is necessary for public debate to yield "enlightened self-government."

B. The Neutrality Principle Acquires Special Force in Cases Involving Government Regulation of the Electoral Process.

"Competition in ideas and government policies is at the core of our electoral process and of the First Amendment freedoms." *Williams v. Rhodes*, 393 U.S. 23, 32 (1968). States have broad authority to regulate elections to ensure that they are "fair and honest" and that "some sort of order, rather than chaos . . . accompan[ies] the democratic processes." *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 227, 231 (1989) (internal quotation marks omitted); *see Burdick v. Takushi*, 504 U.S. 428, 433 (1992). But states also have a "responsibility to observe the limits established by the First

Amendment." *Eu*, 489 U.S. at 222. Therefore, states must exercise their electoral regulatory authority with "the aim of providing a just framework within which diverse political groups in our society may fairly compete . . . ." *Hunter v. Erickson*, 393 U.S. 385, 393 (1969) (Harlan, J., concurring).

Administration of the electoral process requires a constellation of laws, including voter qualifications, regulation of candidates' and parties' access to the ballot, campaign finance regulations, polling place rules, and apportionment plans. *See McCutcheon*, 134 S.Ct. at 1441-42; *LULAC*, 548 U.S. at 415-16; *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Each of these laws "inevitably affects—at least to some degree—the individual's right to vote and . . . to associate with others for political ends." *Anderson*, 460 U.S. at 788. To preserve these fundamental representational rights, this Court has struck down election administration schemes that violate the neutrality principle.

In *Carrington v. Rash*, for example, this Court invalidated a Texas constitutional provision that prohibited members of the armed forces who moved to Texas during their military duty from voting in that state so long as they remained in the military service. 380 U.S. 89, 96-97 (1965). The state argued the provision was necessary to prevent a political "takeover" of civilian communities near military bases by military personnel. *Id.* at 93. This Court found the provision violated neutrality principles, reasoning that "'[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." *Id.* at 94.

In *Williams v. Rhodes*, this Court reviewed Ohio's ballot access statutes, which made it extraordinarily difficult for any party other than the Republican and Democratic parties to appear on the ballot. 393 U.S. at 24-25. The State argued its restrictions advanced an interest in promoting the two-party system. The Court found that "the Ohio system does not merely favor a 'two-party system'; it favors two particular parties—the Republicans and the Democrats—and in effect tends to give them a complete monopoly on the right to have people vote for or against them." *Id.* at 32. Thus, the Court concluded that Ohio's attempt to "freeze the political status quo" violated the state's obligation of neutrality with respect to ballot access. *Jenness*, 403 U.S. at 438 (discussing *Williams*).

In *First National Bank of Boston v. Bellotti*, the Court invalidated a statute that prohibited banks and business corporations from engaging in certain campaign speech in connection with referendum elections. 435 U.S. 765 (1978). The Court regarded the law as "an impermissible legislative prohibition of [electoral] speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues . . . ." *Id.* at 784; *see also Citizens United*, 558 U.S. at 341 ("The Government may not . . . deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration").

Concern for the integrity of the electoral process has also guided this Court's review of apportionment plans. Since *Reynolds v. Sims*, states have been warned that the failure to define electoral boundaries in a neutral fashion may violate "[t]he

right to vote freely for the candidate of one's choice." 377 U.S. at 555. For at least as long, this Court has been concerned with giving states "an open invitation to partisan gerrymandering," *id.* at 578-79, and has been suspicious of redistricting plans designed "to minimize or cancel out the voting strength of racial *or political* elements of the voting population." *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965) (emphasis added); *see also Davis v. Bandemer*, 478 U.S. 109, 127 (1986); *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004); *id.* at 316 (Kennedy, J. concurring); *LULAC v. Perry*, 548 U.S. 399. 413-14 (2006). And in *Vieth*, all nine members of the Court concluded that "an *excessive* injection of politics [in districting] is *unlawful*." *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring in the judgment); *accord id.* at 293 (plurality), 324 (Stevens, J., dissenting), 354 (Souter, J., dissenting), 360 (Breyer, J., dissenting).

The reasons for this Court's insistence on neutrality are well-founded. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam); *see Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008) ("[P]ublic confidence in the integrity of the electoral process . . . encourages citizen participation in the democratic process"). Nothing could be more damaging to voter confidence or more discouraging to disfavored voters than having the state itself intentionally entrench its preferred candidates or parties in office against the will of "an 'informed, civically militant electorate' and 'an aroused popular conscience.'" *Baker v. Carr*, 369 U.S. 186, 259 (1962) (Clark, J., concurring); *see Benisek v. Lamone*, CIVIL NO. JKB-13-3233, Slip Op. 55 (D. Md. Aug. 24, 2017)

(Niemeyer, C.J., dissenting) ("it is not hard to see how [partisan gerrymandering] could deter reasonable voters from full participation in the political process"). "Representatives are not to follow constituent orders, but can be expected to be cognizant of and responsive to those concerns." *McCutcheon,* 134 S.Ct. at 1462. By ensconcing the preferred party in office and "freez[ing] the political status quo," *Jenness*, 403 U.S. at 438, partisan gerrymandering undermines the "responsiveness [that] is key to the very concept of self-government through elected officials," *McCutcheon*, 134 S.Ct. at 1462, and substantially burdens representational rights protected by the First Amendment.

State adherence to the neutrality principle in regulating elections is consistent with the intent of the framers. "A principal danger feared by our country's founders lay in the possibility that the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office." *Stanson v. Mott*, 17 Cal. 3d 206, 217 (1976) (citing The Federalist Papers, Nos. 52, 53; 10 J. Richardson, Messages and Papers of the Presidents 98-99 (1899) (President Jefferson)); *see also McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 263 (2003) ("The first instinct of power is the retention of power . . . .") (Scalia, J., concurring in part and dissenting in part), *overruled by Citizens United*, 558 U.S. 310. That possibility has become a practice. "Whether spoken with concern or pride, it is unfortunate that our legislators have reached the point of declaring that, when it comes to apportionment: 'We are in the business of rigging elections.'" *Vieth*, 541 U.S. at 317 (Kennedy, J., concurring in the judgment) (citation omitted).

Judicial intervention is essential to address this practice and restore the constitutional commitment to democratic self-government.

II. PARTISAN GERRYMANDERING THAT SUBSTANTIALLY BURDENS FUNDAMENTAL REPRESENTATIONAL RIGHTS TRIGGERS HEIGHTENED SCRUTINY.

The rights to vote and to associate are fundamental political rights. *See Williams*, 393 U.S. at 30–31. Before fundamental rights "can be restricted," the Court must engage in "close constitutional scrutiny" of the restriction. *Evans v. Corman*, 398 U.S. 419, 422 (1970). Laws regulating the electoral process "will invariably impose some burden upon individual voters." *Burdick*, 504 at 434. This Court has, therefore, provided a flexible standard whereby courts "must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." *Anderson*, 460 U.S. at 789. The injury (or burden) is then balanced against the state's justification, *id.*, which must be "sufficiently weighty to justify" the burden imposed. *Norman v. Reed*, 502 U.S. 279, 288-89 (1992).

In partisan gerrymandering, the state abuses its administrative responsibilities and compromises the integrity of the democratic process when it manipulates the electoral marketplace to award a legislative "monopoly" to its preferred party. *Williams*, 393 U.S. at 32. By entrenching the State's chosen party against meaningful accountability to the electorate, partisan gerrymandering

substantially burdens the fundamental rights (1) to "cast a meaningful vote," *Burdick*, 504 U.S. at 445 (Kennedy, J, dissenting); and (2) "to associate for the advancement of political beliefs," *Anderson*, 460 U.S. at 787 (quoting *Williams*, 393 U.S. at 30–31). Where, as here, there is a threshold showing that these fundamental rights are substantially burdened on the basis of viewpoint, precedent requires that courts apply heightened scrutiny. *See, e.g.*, *Cal. Dem. Party v. Jones*, 530 U.S. 567, 581-82 (2000); *Norman*, 502 U.S. at 288-89; *Anderson*, 460 U.S. at 789; *accord Benisek*, Slip Op. at 45-46 (Niemeyer, C.J., dissenting). The state's actions must, therefore, be necessary to meet legitimate interests. *Anderson*, 460 U.S. at 806.

An individual's vote is not meaningful if cast under circumstances where the government has compromised the integrity of the election process to entrench its preferred viewpoint. *See Burdick*, 504 U.S. at 447 (Kennedy, J, dissenting) (A voter is "deprive[d] of the opportunity to cast a meaningful ballot" when a legislature constrains voters' ability to "vote for the candidate of their choice"). When a voter enters the polls knowing the state has designed the electoral system to reach its preferred outcome, the voter would properly conclude that the state has compromised the integrity of the election. By so constricting freedom of electoral choice, the state debases the right to cast a meaningful ballot. "The right to vote *freely* for the candidate of one's choice is of the essence of a democratic society, and . . . the right of suffrage can be denied by a debasement . . . of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555.

The constitutional issue in partisan gerrymandering is whether the state has placed a heavy thumb on the scale to "freeze the political status quo," and entrench the state's preferred party. *Jenness*, 403 U.S. at 438. The doctrinal difficulty has been to identify when partisan gerrymandering is of sufficient magnitude to infringe the right to "freely" cast a ballot. The constitutionality of such conduct must be measured against the requirements of heightened scrutiny. *See Williams*, 393 U.S. at 30–31. In *Williams*, this Court found that electoral regulations effectively created a state-sanctioned monopoly on political contests where "a vote may be cast only for one of two parties." *Williams*, 393 U.S. at 30–31. Such a substantial burden on voting failed to meet the heightened scrutiny standard. Here, Wisconsin has similarly interfered with the electoral marketplace by ensuring that voters cannot upset its decision to give its preferred party a monopoly.

Partisan gerrymandering also burdens freedom of association. "'[T]he entrenchment of one or a few parties to the exclusion of others' . . . 'is a very effective impediment to the associational and speech freedoms which are essential to a meaningful system of democratic government.'" *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 70 (1990) (quoting *Elrod v. Burns*, 427 U.S. 347, 369–70 (1976)); *Benisek*, Slip Op. 28-29 (Niemeyer, C.J., dissenting) ("the conduct violates the First Amendment, effectively punishing voters for the content of their voting practices. . . . The harm is . . . found in . . . the intentional and targeted burdening of the effective exercise of a First Amendment representational right.") "Representative democracy in any populous unit of governance is unimaginable

without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *Jones*, 530 U.S. at 574. Voters have the right to associate with parties and with other voters. *Anderson*, 460 U.S. at 787–88. It is through association that the act of voting has resonance in the political system. *Id.* at 794 (Voters "associate in the electoral arena to enhance their political effectiveness as a group[.]"); *cf. Jones*, 530 U.S. at 587 (Kennedy, concurring) ("Political parties advance a shared political belief, but to do so they often must speak through their candidates.").

Partisan gerrymandering directly burdens associational rights by impeding the fluidity and mutability of the political process. *Cf. Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 135 S.Ct. 2652, 2658, 2672 (2015) (discussion of partisan gerrymandering). Political affiliation is mutable. *Vieth*, 541 U.S. at 287 (plurality opinion); *see also Bandemer*, 478 U.S. at 156, (O'Connor, J., concurring in judgment). Voters may identify as independents; they may change their party affiliations between elections; or they may vote for candidates from different parties within a single election. *Vieth*, 541 U.S. at 287 (plurality opinion). But a system that has been effectively gerrymandered freezes the political status quo, leaving the party entrenched in power despite potentially significant changes in voters' preferences. *See* Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 Yale L.J. 400, 409 (2015) (discussion of partisan gerrymandering).

This Court has found a substantial burden on freedom of association where the legislature

hampered voters' ability to band together with "like-minded voters to gather in pursuit of common political ends . . . [and] to express their . . . political preferences." *Norman*, 502 U.S. at 288-89. Partisan gerrymandering is pernicious because of the limitations placed on "independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group." *Anderson*, 460 U.S. at 794. Such burdens on associational rights are substantial because they "threaten to reduce diversity and competition in the marketplace of ideas." *Id.*

Unconstitutional partisan gerrymandering is distinct from the inevitable incidental political considerations and partisan effects that may occur under neutral conditions. Where "one-party rule is entrenched [because] voters approve of the positions and candidates that the party regularly puts forward," courts cannot and should not intervene in a neutrally-administered electoral system. *Lopez Torres*, 552 U.S. at 208. But when a state uses redistricting to grant its preferred party a durable monopoly, this deviation from neutrality disables the competitive mechanism that undergirds the democratic process, and substantially burdens voters' rights to participate in a fair election. *See Williams*, 393 U.S. 31-32. Thus, partisan gerrymandering that intentionally and effectively entrenches a state's preferred party in office discriminates on the basis of viewpoint and imposes a substantial burden on citizens' right to exercise a meaningful vote and to associate. *See Vieth*, 541 U.S. at 314 (Kennedy, J, concurring); *see also Ariz. Indep. Redistricting Comm'n*, 135 S.Ct. at 2658.

III. WISCONSIN'S APPORTIONMENT PLAN WAS ENACTED TO ENTRENCH THE STATE'S PREFERRED PARTY AND RESULTED IN AN ENTRENCHMENT EFFECT THAT CANNOT BE JUSTIFIED.

Consistent with its First Amendment and Equal Protection jurisprudence, the Court should adopt a burden shifting analysis to determine when a redistricting plan substantially burdens fundamental representational rights.

As an initial matter, plaintiffs must establish a prima facie case of improper partisan gerrymandering. To do so, here, they must show: (1) that the state acted with the intent to entrench the state's preferred political party; and (2) that the state's intent has in fact been accomplished. If plaintiffs establish a prima facie case, the burden shifts to the state to justify its actions. Because partisan gerrymandering substantially burdens fundamental representational rights, the state must meet heightened scrutiny. *See supra* Section II. The state must demonstrate that its map was necessary to accomplish legitimate interests.

District courts, as fact finders, are responsible for determining whether the parties have met their respective burdens. *See Hunt v. Cromartie*, 526 U.S. 541, 553-54 (1999) ("[T]he District Court is more familiar with the evidence than this Court, and is likewise better suited to assess the General Assembly's motivations"). The district court properly exercised its role as fact finder here and correctly concluded that the plaintiffs had met their burden and the defendants had failed to establish a justification for its map.

A. The Intent to Design a Redistricting Plan That Will Entrench the State's Preferred Political Party Can Be Inferred From the Totality of the Circumstances Surrounding Adoption of the Plan.

Plaintiffs must first establish that the state sought to entrench its preferred political party or candidates in office. A state acts with an intent to entrench when it draws an apportionment plan deliberately to ensure that the partisan composition of the legislature will not be responsive to changes in voter preferences under the likely range of electoral scenarios. An intent to entrench entails more than the mere *consideration* of politics. *See Vieth*, 541 U.S. at 315 (Kennedy, J., concurring in the judgment) ("The inquiry is not whether political classifications were used," but "whether political classifications were used to burden a group's representational rights."). Instead, an intent to *entrench* exists where lines are drawn for the purpose of *locking in* partisan advantage regardless of the voters' likely choices. *See Ariz. State Leg.*, 135 S.Ct. at 2658 ("[P]artisan gerrymandering [is] the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power"). Any redistricting plan drawn by a legislature will be created with knowledge of the political distribution of voters. However, a state legislature cannot draw lines with the purpose of shielding its current majority from changes in the associational choices of the citizenry.

As with other forms of intent, the intent to entrench can be established through direct and

circumstantial evidence. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995); *see also Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 488-89 (1997) (discussing the Court's use of *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) in racial gerrymandering cases). Inferences of improper intent can be drawn from contemporaneous statements, political history, and the procedures used to draw district lines. *See Vieth*, 541 U.S. at 321-323 (Stevens, J., dissenting).

Contemporaneous statements have been used in many of this Court's past cases as evidence of an improper purpose. *See Cooper v. Harris*, 137 S.Ct. 1455, 1468–69, 1475–75 (2017); *see also City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 196–97 (2003) ("[S]tatements made by decisionmakers or referendum sponsors during deliberation over a referendum may constitute relevant evidence of discriminatory intent in a challenge to an ultimately enacted initiative."). In *Cooper*, for example, the Court considered statements of members of the state legislature—in particular one senator and one representative—to draw conclusions regarding legislative motivation. 137 S.Ct. at 1468–69, 1475–76. The Court also considered legislators' instructions to their redistricting consultant as evidence of legislative intent. *Id.* at 1468.

A state's history can also provide evidence of improper purpose. For example, in *Miller*, the Court focused on the history of Georgia's interactions with the Department of Justice regarding the Department's preclearance demands, which made clear that race was the predominant factor in the state's redistricting. *Miller*, 515 U.S. at 918. In

states with a history of partisan entrenchment, that history can support a finding of intent to entrench the party favored by the current map, especially where decisionmakers are aware of the map's past performance and there is evidence that they seek to repeat that performance.

Procedural irregularities may also support a finding that "improper purposes are playing a role" in official decisionmaking. *Arlington Heights*, 429 U.S. at 267. With partisan gerrymandering, such procedures may include exclusion of the opposing party from deliberations and "excessive weight on data concerning party voting trends" during the process. *See Vieth*, 541 U.S. at 322 (Stevens, J., dissenting). In *Bush v. Vera*, the Court relied on the legislature's use of detailed racial data in the districting process to affirm a finding of discriminatory intent. *See* 517 U.S. 952, 970–71 (1996). In *Cooper*, the Court relied on evidence of procedural irregularities in affirming the district court's conclusion regarding the mapmaker's intent—specifically, that the mapmaker "deviated from the districting practices he otherwise would have followed" to carry out legislators' instructions. 137 S.Ct. at 1469.

The factual findings below unmistakably establish that the state acted with an impermissible intent to entrench the majority party in the state legislature. Contemporaneous statements of decisionmakers here belie any pretense of neutrality. One example was the majority party's communications with Professor Gaddie, an outside consultant and expert on redistricting. As in *Cooper*, the instructions to Professor Gaddie were explicit.

His marching orders were to "test the partisan make up and performance" of various maps to determine the relative durability of their partisan advantages over a wide range of election scenarios using, among other things, a composite score for partisanship developed by majority party aides that Professor Gaddie confirmed as accurate. *See* JA162–67. As Professor Gaddie testified, his analysis was "designed to tease out a potential estimated vote for the legislator in the district and then allow you to also look at that and say, okay, what if the Democrats have a good year? What if the Republicans have a good year? How does it shift?'" *Id*. at 164–65. Professor Gaddie gave each map an "S" curve – a visual aid that depicted the probable party outcome of each map. *Id.* at 174-75. The mapmakers wanted to know not only what the average partisan effect was but what the partisan effect would be if the choices of the electorate changed, *i.e.*, if a larger number of voters made the choice to associate with one party instead of the other. Using this information, the mapmakers selected the map that would offer the greatest statistical certainty that their majority would not be responsive to plausible changes in voters' associational choices.

Other statements in the record further support the district court's finding that the state did not merely consider politics, but sought to entrench its preferred party. The plan's drafters created a document comparing their prospective map to the existing map ("Current Map") and highlighted that under "the Current Map, 49 seats are 50% or better" for Republicans, but under the proposed legislative map, "59 Assembly seats are 50% or better.'" SA340.

Legislative intent to lock in the status quo is reflected in a presentation to members of the Senate Republican caucus, in which one of the mapmakers stated: "The maps we pass *will determine who's here 10 years from now*," and "[w]e have an opportunity and an obligation to draw these maps that Republicans haven't had in decades." *Id.* at 330 (emphasis added). The contemporaneous statements of those involved in drawing the Wisconsin map support a finding of legislative intent to entrench the majority.

The one-sided and exclusionary legislative process further supports the district court's finding of improper intent. The process was dominated by Republican legislators, without input from Democratic legislators. The map drawing process was controlled by staffers and consultants for members of the Republican legislative leadership. *See* JA158–59, JA182–83; *see also* J.S.App.12a-29a. These mapmakers used historical election data to create their composite partisanship score and then drew a number of different maps whose names reflected the level of partisan advantage achieved for the Republicans by the districting plan. *See, e.g.* SA335; SA337; SA338(listing map names); *see also* J.S.App.19a-20a. They then compared at least six different maps and hypothesized how many seats Republicans would win under each map. SA323-27; SA340-43; SA353-54; *see also* J.S.App.21a-22a. Republican legislators were provided memoranda comparing the percentage of voters in the old and new districts voted for Republican candidates, but not whether the new districts were contiguous or compact. *See, e.g.*, SA349–351. The process included only Republicans and focused almost exclusively on

the partisan outcomes of the maps and not on legitimate, neutral concerns.

This record substantially supports the district court's finding that the legislature acted with impermissible intent when drawing the district lines.

B. An Impermissibly Designed Redistricting Plan Will Only Support a Claim Where the Legislature's Entrenchment Motive Has Been Accomplished.

In addition to an intent to entrench, plaintiffs must also show that the legislature's actions had that desired effect. That effect is manifest where a challenged map significantly deviates from the state's normal range of partisan balance in favor of the state's preferred party in a way that will endure any likely electoral outcome. The constitutional inquiry is not whether a map results in one-party rule or fails to achieve proportional representation, but whether the state has substantially deviated from sound districting principles in order to render its electoral system non-responsive to changes in voter preferences, or to "freeze the political status quo." *Jenness*, 403 U.S. at 438. This standard is manageable, especially given new and improved methods of measuring partisan gerrymandering that have received the imprimatur of "consensus among social scientists," including Professor Gaddie, the redistricting consultant to the Wisconsin Legislature's Republican leadership.[4] It is also

[4] *See* Brief of Bernard Grofman and Ronald Keith Gaddie as Amici Curiae in Support of Neither Party, at 10-12 ("Political Scientists Br.").

consistent with the approach taken by the district court below. J.S.App.145a-46a.

1. A Map Demonstrates a Suspect Entrenchment Effect When It Produces a Significant Deviation from a State's Normal Partisan Balance That Will Endure Any Likely Electoral Scenario.

The requirement of a significant deviation from the normal range of partisan balance focuses on whether and to what extent the state's map exhibits a violation of the neutrality principle in favor of the state's preferred party. This inquiry "asks whether the map treats similarly situated parties equally: whether both parties receive like opportunity to capture a given number of legislative seats if they receive a comparable share of the statewide vote." Political Scientists Br. at 12. A state adhering to the neutrality principle would design an apportionment plan based on neutral criteria, including equipopulation principles, nondiscrimination laws, compactness, contiguity, respect for political and geographic features, and preserving communities of interest. *See, e.g.*, Ariz. Const. Art. 4, Pt. 2, § 1(14) (specifying neutral apportionment criteria for independent redistricting commission).

This is not a requirement of proportionality in terms of a party's vote share and its share of seats in a legislature. Because residential patterns naturally cluster and disperse voters of different viewpoints, a neutral redistricting process will not necessarily result in proportional representation. A neutral process will generally produce a range of

redistricting outcomes that reasonably reflect a state's normal range of partisan balance.[5]

One way of identifying suspect departures from neutrality is to (1) generate a large set of hypothetical maps based on established neutral criteria; (2) identify the median in the distribution of hypothetical maps; and (3) determine whether the challenged map produces a partisan balance that deviates significantly from that median to the advantage of the state's preferred party.[6] This method is an "extremely sophisticated and accurate" means of measuring partisan asymmetry, Political Scientists Br. at 21, but there are other reliable and accurate methods comparing a challenged plan's partisan balance to a neutral baseline. *Id.* at 26-31. As Justice Kennedy has recognized, measurements of partisan asymmetry will become even more sophisticated and accurate as "new technologies . . . produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties." *Vieth*, 541 U.S. at 312-3 (Kennedy, J., concurring in the judgment).

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[5] *See* Jowei Chen & Jonathan Rodden, *Cutting Through the Thicket: Redistricting Simulations and the Detection of Partisan Gerrymanders*, 14 Election L.J. 312, 335, 338-339 (2015).

[6] *Id.*; *see id*. at 332 ("If the partisanship of a proposed plan lies in the extreme tail of the distribution of simulated plans or outside the distribution altogether, courts can make relatively strong inferences about the plan's partisan effect and intent."); *see also* Wendy K. Tam Cho & Yan Y. Liu, *Toward a Talismanic Redistricting Tool: A Computational Method for Identifying Extreme Redistricting Plans*, 15 Election L.J. 351, 360, 362-64 (2016) (positing comparison of challenged map against distribution of millions of alternative maps).

A showing of an entrenchment effect requires evidence that the partisan effect of a challenged plan will endure any likely electoral outcome. This inquiry assesses whether the deviation from neutrality in the challenged plan "compromise[s] the political responsiveness at the heart of democratic process" and to what extent the plan is attributable to the legislature's intent to entrench. *McCutcheon*, 134 S.Ct. at 1461. A neutral plan might produce a legislature that is imbalanced in partisan terms, but if a state experiences significant swings in voter preferences, such a neutral plan would be expected to expose legislators to those swings, and thus keep them responsive to the voters. However, if a map preserves a partisan imbalance throughout the normal range of voter behavior based on contemporaneous and historical voting data, the state's preferred party will remain in power absent extraordinary circumstances and will be unresponsive to changing voter choice. This "lack of responsiveness" has long been held to be a critical element of unconstitutional denial of a meaningful right to vote. *See Thornburg v. Gingles,* 478 U.S. 30, 36-37 & n.4 (1986) (citing *White v. Regester*, 412 U.S. 755 (1973)).

2. The Proposed Effect Standard Is Similar to the Standard Applied in Pattern-or-Practice Cases Under the Civil Rights Laws.

The standard for calculating discriminatory effect in partisan gerrymanders outlined above mirrors the well-established standard courts apply to pattern-or-practice discrimination claims under the civil rights laws. *See Hazelwood Sch. Dist. v. United*

States, 433 U.S. 299, 307 (1977); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977). For example, in Title VII cases, courts use the racial and ethnic population of the relevant workforce in the relevant geographic market as a neutral baseline against which to measure the composition of a particular employer's workforce. *See Hazelwood*, 433 U.S. at 307 ("[A]bsent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." (quoting *Teamsters*, 431 U.S. at 340 n.20)); *see also id.* at 311-12. Identifying a neutral baseline in a partisan gerrymandering case can proceed in the same manner. Courts in Title VII pattern-or-practice claims assess whether the statistical evidence demonstrates a "long-lasting and gross disparity" between the composition of an employer's work force and the relevant labor market. *Hazelwood*, 433 U.S. at 308. Similarly, in partisan gerrymandering cases, courts inquire whether partisan imbalance in a challenged map is both "large" and "durable," J.S.App.172a.

In both partisan gerrymandering and pattern-or-practice cases, courts understand that the law does not guarantee proportionality. *See LULAC*, 548 U.S. at 419; *Hazelwood*, 433 U.S. at 307; *see also Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2523 (2015) (discussing importance of "[a] robust causality requirement" to "ensure[] that racial imbalance . . . does not, without more, establish a prima facie case of disparate impact" to avoid implementation of "numerical quotas"). But in both

types of cases, evidence of "gross statistical disparities" between the challenged conduct and neutral conditions can constitute prima facie evidence of intent and effect. *Hazelwood*, 433 U.S. at 307-08; *cf. Gomillion v. Lightfoot*, 364 U.S. 339, 348 (1960) (evidence of stark impact of facially neutral law may be determinative of intent and effect). Whether a disparity, partisan or racial, is a sufficiently substantial departure from the baseline to support a finding of liability may be determined by "traditional tests of statistical significance." Political Scientists Br. 30; *see also Hazelwood*, 433 U.S. at 308-09 & n. 14 (discussing application of "[a] precise method of measuring the significance of such statistical disparities . . . involv[ing] calculation of the 'standard deviation' as a measure of predicted fluctuation from the expected value of a sample"). In addition, technological advances continue to make possible increasingly sophisticated and accurate methods of comparing challenged maps to a neutral baseline to isolate the extent of effect resulting from invidious intent. Political Scientists Br. 30; *see also Vieth*, 541 U.S. at 312-13 (Kennedy, J., concurring in the judgment).

After-the-fact evidence of multiple elections outcomes is not necessary to establish that improper entrenchment has occurred. Plaintiffs can and must be able to challenge immediately a state's use of sophisticated technology to generate maps that lock out opponents of the state's preferred party from meaningful participation in the democratic process. A state's intentional entrenchment of its majority party on viewpoint-based grounds violates the First Amendment whether it has effect in a single election, or continues over time. If voters whose

representational rights have been violated are required to wait until multiple elections have been run before bringing a challenge, officials elected under an unconstitutional map gain illegitimate "advantages of incumbency." *Shelby County v. Holder*, 133 S.Ct. 2612, 2640 (2013) (Ginsburg, J., dissenting). Even worse, those officials would have an incentive to drag out already protracted litigation to prolong their tenures. With the precise metrics now available, courts have a constitutional obligation to permit voters to act quickly to preserve the integrity of elections and their representational rights.

3. Substantial Evidence Supports the District Court's Finding of an Entrenchment Effect.

The record includes substantial evidence that Wisconsin's map accomplishes the legislature's intent to entrench the Republican Party in power. That evidence led to express findings by the court below of impermissible entrenchment "throughout the decennial period." J.S.App.166a. The district court's finding is supported by the results of two actual elections and four separate expert opinions using three different modes of analysis credited by both sides' experts. *See Id.* at 145a-177a; Mot. to Affirm at 11-12 & n.4; Political Scientists Br. at 22, 25-28. This factual determination is entitled to substantial deference on appeal.

First, the results of two actual elections held under Act 43 confirm that the state achieved its goal of entrenching an outsized Republican majority in the legislature. "In 2012, Republicans garnered 48.6% of the vote, but secured 60 [of 99] seats in the

Assembly" and "in 2014, Republicans increased their vote percentage to 52 and secured 63 Assembly seats." J.S.App.148a; JA249. The result is that the challenged map permitted Republicans' to maintain an approximate 60% supermajority in the Assembly, regardless of whether they received a minority or narrow majority of the statewide vote. In two elections, Wisconsin's apportionment plan demonstrated an actual substantial partisan imbalance that showed little responsiveness to voters' choices.

Second, the district court found that the sensitivity testing performed by both plaintiffs' *and* defendants' experts demonstrated that Act 43 would produce a significant and durable partisan imbalance in favor of the Republican Party under any likely election outcome. J.S.App.148a. These analyses examined the results of elections dating back over 20 years and placed the distribution of likely outcomes between the highest and lowest vote share for each party over that time. J.S.App.148a-154a. Both Professors Gaddie's and Mayer's analyses were calibrated around a neutral baseline of partisan distribution around the state and then tested how changes in each party's vote share would affect their seat share. *Id.* at 148a. Their results were mutually confirming, with both experts showing that Act 43 would yield a large advantage to Republicans that was unresponsive to changes in Democratic vote share—even changes that were extreme by historical standards. *Id.* at 148a-154a.

Third, this entrenchment effect finding was also supported by two more expert analyses employing the Efficiency Gap (EG) method. *Id.* at

159a (noting that the EG "further bolstered" the evidence undergirding the district court's finding of discriminatory effect). The EG measures the relative difference in the parties' "wasted votes," i.e., votes that do not contribute to a candidate winning more than 50% of the vote, to determine whether and to what extent the "cracking" and "packing" of voters gives one party an advantage in translating votes into seats. *See* Brief of Eric McGhee as Amicus Curiae in Support of Neither Party, Section I.A. The lower court found that, under the facts presented, the EG provided a means of confirming the extent to which a challenged map's partisan imbalance and responsiveness reflected a "deviation from the relationship we would expect to observe between votes and seats" under neutral conditions. J.S.App.168a-69a. Professor Jackman's and Mayer's EG analyses were consistent with the actual election results as well as the results obtained by Professors Gaddie and Mayer using a different statistical inquiry. Given the consistency of results, the district court accepted the conclusions of both Professor Jackman and Professor Mayer and found that Wisconsin's map exceeded the entrenchment threshold by a significant margin. J.S.App.162a-166a (observing that under four separate calculations Act 43's EG ranged from 9.5% to 13%).

Finally, a fourth metric, average-median analysis, also confirms that Act 43 achieved an extreme partisan imbalance. Mot. to Affirm at 12 n. 4; *see* Political Scientists Br. at 27. This simple measure compares a party's average vote share across all districts to the vote share it obtained in the median district. *Id.* The average, which is independent of a particular plan, provides yet

another statistical measure in which a neutral baseline is used to measure the distortion evident in a particular plan's apportionment. Where a party's "median vote share is significantly lower than its average vote share, partisan asymmetry is at work." *Id*. An average-median analysis of the actual results of the 2012 and 2014 elections is consistent with and confirmatory of the other evidence identified by the district court to support its finding of Act 43's unconstitutional effects. Mot. to Affirm at 12 & n.4.

The quantity, variety, and consistency of the evidence supporting the district court's finding of discriminatory effect is sufficient to satisfy any standard.

C. Wisconsin Failed to Demonstrate That Its Plan Was Necessary to the Advancement of a Legitimate State Interest.

Once plaintiffs have established a prima facie case of partisan entrenchment, the burden shifts to the state to establish that the redistricting plan was necessary to meet legitimate state interests. *See Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979) ("[A] State may not choose means that unnecessarily restrict constitutionally protected liberty.") (quoting *Kusper v. Pontikes,* 414 U.S. 51, 58–59 (1973)); *see also Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment) (partisan gerrymandering may violate the Constitution when political classifications are "applied in an invidious manner or in a way unrelated to any legitimate legislative objective"). The Court has identified a set of legitimate interests in the redistricting context, including "traditional districting principles such as

compactness and contiguity," "maintaining the integrity of political subdivisions," or maintaining "the competitive balance among political parties." *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S.Ct. 1301, 1306 (2016) (citations and internal quotation marks omitted).

The inquiry does not stop at establishing that the state pursued legitimate interests when drawing the map. "[E]ven when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty." *Anderson*, 460 U.S. at 806, (quoting *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972)); *Lubin v. Panish*, 415 U.S. 709, 716 (1974) ("[T]he legitimate state interest . . . must be achieved by a means that does not unfairly or unnecessarily burden" the fundamental rights at issue). The state must prove that the map drawn was necessary to satisfy these legitimate interests. "[I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference." *Dunn*, 405 U.S. at 343. A legislature cannot select a map that freezes the political status quo and burdens fundamental First Amendment rights, when it could have selected other maps that would have met its legitimate interests without viewpoint-based entrenchment.

At trial, Wisconsin offered two reasons for the current map: (1) "political geography" and (2) traditional districting principles. The district court correctly found that the map was not necessary to accomplish these asserted justifications, which therefore could not adequately explain the map

selected by the Legislature. The record makes clear that many other maps would both reflect Wisconsin's political geography and satisfy traditional districting principles. Legislators considered six maps, each of which had been tested to see if they met traditional districting principles, including the then-current map, which had been drawn by a court. *See, e.g.,* SA323–37; SA340-343; SA353; SA354; *see also* J.S.App.18a-20a (discussion of maps considered). But the Legislature intentionally implemented a map that would maximize Republican entrenchment, even where it had options that would have equally furthered all its legitimate interests and without locking up the electoral process. *See* J.S.App.18a-29a.

Wisconsin contends that complying with traditional districting principles alone is sufficient to make its map unobjectionable. *See* Appellants Br. § III. This Court has specifically rejected this argument, holding that "[s]hape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence [of] . . . the legislature's dominant and controlling rationale in drawing its district lines." *Miller*, 515 U.S. at 913. Standing alone, "[t]raditional redistricting principles . . . are numerous and malleable" and could be used to give effect to a legislature's impermissible intent. *Bethune-Hill v. Va. State Bd. of Elections*, 137 S.Ct. 788, 799 (2017). Because many other maps met those principles, Wisconsin's argument that traditional districting principles alone are sufficient to defeat any claim is unavailing. The enacted map was not *necessary* to meet those principles.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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