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 *AMICI* CURIAE LAW PROFESSORS IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI* CURIAE[1]

Amici are law professors who study legal regulation of the political process. They are among the many scholars who have spent a considerable amount of time thinking, writing, and teaching issues related to redistricting and fair representation.

Based on this expertise, and on careful review of this Court's decisions, amici argue in this brief that the Court should hold that partisan gerrymandering claims are justiciable. Amici join this brief solely on their own behalf and not as representatives of their universities. *Amici* are:

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SUMMARY OF ARGUMENT

The question posed by this case is not whether excessively partisan redistricting maps violate core constitutional principles. They do, and this Court has already said as much. Rather, the question is what courts should do when faced with such maps.

Notwithstanding this Court's reluctance to impose a direct judicially enforceable constraint on

partisanship, partisan gerrymandering claims are being litigated all the time. They simply get litigated under other causes of action, whether it is one-vote, one-person doctrine; racial gerrymandering doctrine under the Equal Protection Clause; or vote dilution doctrine under the Voting Rights Act. In the course of adjudicating these claims, courts often cannot escape the need to evaluate the partisan intent and effect of a challenged plan.

Having litigants route their complaints about partisan gerrymandering through these adjacent doctrines inevitably distorts these other areas of law. Using minor population deviations to adjudicate partisan disputes wastes judicial resources and decreases public confidence. Forcing what are fundamentally partisan disputes to be litigated as claims about race discrimination inflicts the very harm (excessive race consciousness) the *Shaw* doctrine was designed to combat. And it can undermine effective enforcement of the Voting Rights Act. Worse yet, to the extent jurisdictions advance a politics-not-race defense to *Shaw* claims, the lack of a justiciable partisan gerrymandering claim puts courts in the unseemly position of affirmatively upholding unconstitutional activity. Recognizing a straightforward claim for unconstitutional partisan gerrymandering would serve interests in doctrinal coherence and integrity.

Finally, recognizing a claim for excessive partisan gerrymandering would not strip states of their proper role in drawing legislative districts. States will still have more than enough discretion in drawing districts. But excessive partisanship is not a

goal that states should be permitted, or encouraged, to embrace.

ARGUMENT

There has been "time enough" to consider whether districting plans that "operate to minimize or cancel out the voting strength" of "political elements of the voting population" justify judicial intervention. *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965). This Court has already "recognized" that excessive partisan gerrymanders "'[are incompatible] with democratic principles.'" *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion));[2] *see also Gaffney v. Cummings*,

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[2] All nine Members of the *Vieth* Court accepted the proposition that excessive partisan gerrymandering violates the Constitution. Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas formed the plurality whose opinion contained the statement quoted in *Arizona Independent Redistricting Commission*.

Justice Kennedy, concurring in the judgment, wrote that an apportionment statute drawn "so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles" would "surely" violate the Constitution. *Vieth*, 541 U.S. at 312.

The four dissenting Justices in *Vieth* not only took the position that excessive partisan gerrymanders can violate the Constitution and are justiciable, but concluded that the Pennsylvania congressional districting plan before the Court involved such a violation. Justice Stevens stated that when "the predominant motive of the legislators who designed" a district is "to discriminate against a political minority, that invidious purpose should invalidate the district." *Id.* at 336 (Stevens, J., dissenting). Justice Souter, joined by Justice Ginsburg, stated

412 U.S 735, 753-54 (1973) (what is done by "those who redistrict and reapportion" to "allocate political power" cannot be "wholly exempt from judicial scrutiny" if political groups have their voting strength "invidiously minimized").

The question posed by this case is what to do about a violation of core constitutional principles. The history of litigation, both before and after this Court's decisions in *Davis v. Bandemer*, 478 U.S. 109 (1986), and *Vieth*, shows that other doctrines governing redistricting make it impossible for courts to stay out of the process. In the absence of a decision from this Court setting out how to adjudicate claims of excessive partisan gerrymandering as such, litigants driven by partisan concerns have been channeling into other doctrinal pigeonholes their attacks on plans that disadvantage them. And it is abundantly clear that they will continue to do so. The incentives to litigate—given the gains to be had from obtaining a politically favorable map—are simply too great.

This Court's reluctance to articulate the contours of a justiciable partisan gerrymandering claim has distorted constraints on redistricting designed to protect other interests and to solve other problems. By

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that "[h]owever equal districts may be in population as a formal matter," if "unfairness" in how the votes of different groups are "minimized or maximized" is "sufficiently demonstrable, the guarantee of equal protection condemns it as a denial of substantial equality." *Id.* at 343 (Souter, J., dissenting). And Justice Breyer concluded that "political gerrymandering" that "entrenches a minority party in power violates basic democratic norms" and "gerrymandering that leads to entrenchment amounts to an abuse that violates the Constitution's Equal Protection Clause." *Id.* at 361-62 (Breyer, J., dissenting).

recognizing the justiciability of partisan gerrymandering claims, the Court can bring greater coherence and integrity to the law governing redistricting. Such a holding would neither increase the amount of litigation nor unjustifiably infringe on states' proper role in redistricting. Even if the number of cases does not change, a regime in which claims of excessive partisanship are litigated directly will allow courts to decide cases in a less arbitrary and more efficient way.

I. The absence of a judicially enforced constraint on partisan gerrymandering has not prevented, and will not prevent, federal courts from facing decades of redistricting litigation driven by partisan concerns.

In some areas of law, litigation would largely dry up if this Court were to hold a particular claim nonjusticiable. Redistricting is not one of them. Wholly apart from their ability to challenge a particular districting plan as unconstitutionally partisan, political actors have a panoply of other available claims, and "court action that is available tends to be sought." *Vieth v. Jubelirer*, 541 U.S. 267, 300 (2004) (plurality opinion). Litigants have used these already existing causes of action repeatedly in the face of this Court's reluctance to articulate a standard for directly adjudicating claims of excessive partisanship. This experience shows that any hope that holding partisan gerrymandering claims nonjusticiable will eliminate "years of essentially pointless litigation," Br. for Appellants 35 (quoting *Vieth*, 541 U.S. at 306), is a pipe dream.

1. Federal law imposes a series of constraints on redistricting that are widely available to litigants. This includes litigants whose real disagreement with a plan centers on the "substantial political consequences" that a district plan "inevitably has and is intended to have," *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). Much of the time, and without regard to whether they can challenge a plan directly for being unconstitutionally partisan, there is no shortage of "displeased voter[s]" who "can file a lawsuit in federal court" that, if they win, will require redrawing a substantial part of "the entire map," Br. for Appellants 2.

First, actors upset with the partisan consequences of a particular plan may be able to challenge the plan as violating constitutional principles of one-person, one-vote articulated in *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964) (required for congressional districts by Article I, section 2) and *Reynolds v. Sims*, 377 U.S. 533, 577 (1964) (required for state and local electoral districts by the Equal Protection Clause). Any voter who lives in an overpopulated district has standing to bring such a suit.

For congressional districts, it may be quite easy for a litigant to use one-person, one-vote to tie up a state's plan in litigation. This Court has held that, with respect to congressional districts, the Constitution requires that a state "justify population differences between districts that could have been avoided by 'a good-faith effort to achieve absolute equality.'" *Tennant v. Jefferson Cty. Comm'n*, 567 U.S. 758, 759 (2012) (per curiam) (quoting *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) and *Kirkpatrick v. Preisler,* 394 U.S. 526, 530-31 (1969)). Given modern

districting software, plaintiffs will find it easy to show that virtually any deviation of more than a dozen or so people *can* be avoided. *See, e.g., Vieth* v. *Pennsylvania*, 195 F. Supp. 2d 672, 675 (M.D. Pa. 2002) (three-judge court) (although the challenged map had a deviation of only 19 persons between the largest and smallest districts, the challengers were able to draw a map "which had a minimum possible deviation—districts that differ by only one person"), *appeal dismissed as moot*, 537 U.S. 801 (2002). If the deviation, however small, is avoidable, then "the burden shifts to the State to 'show with some specificity' that the population differences 'were necessary to achieve some legitimate state objective.'" *Tennant*, 567 U.S. at 760 (quoting *Karcher*, 462 U.S. at 741, 740). At this justification phase, reviewing courts have considerable leeway in deciding whether a particular deviation was in fact necessary or legitimate. *See infra* p.24.

With respect to state, county, and municipal elections, plaintiffs face a somewhat higher burden because jurisdictions have greater leeway in achieving numerical equality. Usually, jurisdictions need not justify their plan unless the plaintiffs show that the population deviation between the largest and the smallest district exceeds ten percent of the size of an ideal district. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016) (citing *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983)). But faced with claims of excessive partisanship, some courts have recently begun to demand justifications for, and strike down as malapportioned, plans whose deviations fell below ten percent. *See infra* pp. 22-24.

No one actually can feel their vote is "debased" when congressional districts deviate from the ideal by

19 people. But if that is the only hook those injured by partisan gerrymandering can use to try to invalidate a plan, they will use it. As a realistic matter, it is far more likely—given the relatively small population deviations in most contemporary redistricting plans—that a concern other than sheer mathematical equality in district populations drives the decision to file most twenty-first century one-person, one-vote lawsuits. Quite often, that concern involves the partisan consequences of a challenged plan.

Second, it may be possible for groups or individuals upset with the partisan consequences of a particular plan to challenge the plan as an unconstitutional racial gerrymander. Any individual who "resides in a racially gerrymandered district" can bring suit to challenge that district. *United States v. Hays*, 515 U.S. 737, 745 (1995).

Plaintiffs in such cases must show "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (quoting *Miller v. Johnson,* 515 U.S. 900, 916 (1995)). If plaintiffs show that "racial considerations predominated over others, the design of the district must withstand strict scrutiny." *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017). The only justification this Court has so far accepted as potentially satisfying this standard is that taking race into account to such a degree was necessary in order to comply with the Voting Rights Act. *See Bethune-Hill*, 137 S. Ct. at 801.

Because "racial identification is highly correlated with political affiliation" in some jurisdictions, *Cooper v. Harris*, 137 U.S. at 1473, when plaintiffs in those

jurisdictions have no way to bring a straightforward political gerrymandering claim, they face an incentive to bring racial gerrymandering claims instead. This demands they couch what are fundamentally partisan political conflicts as racial ones.

Third, it may be possible for groups or individuals upset with the partisan consequences of a particular plan to challenge the plan by claiming that the plan involves impermissible racial vote dilution. Any voter who is a member of the protected group and who lives in a part of the state where minority voting strength has allegedly been diluted may bring a racial vote dilution lawsuit.

Both the Equal Protection Clause and Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, prohibit jurisdictions from drawing districts that give minority citizens "less opportunity" than other citizens "to participate in the political processes and to elect legislators of their choice." *White v. Regester*, 412 U.S. 755, 766 (1973). Because plaintiffs are required to show that the jurisdiction acted with a discriminatory purpose to establish a violation of the Equal Protection Clause, *see Rogers v. Lodge*, 458 U.S. 613, 616-18 (1982), plaintiffs asserting claims of racial vote dilution have generally had their claims resolved under Section 2, which does not require proof of a discriminatory purpose. *See Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). Plaintiffs suing under Section 2 need show only that the challenged plan has a racially discriminatory "result[]" under the "totality of circumstances." 52 U.S.C. §10301(a), (b).

Given these various potential causes of action—not to mention state-law constraints in many jurisdictions—it is not surprising that most states find

themselves in some form of litigation or another over their congressional or state legislative districts. *See* Morgan Cullen & Michelle Davis, *5 Trends Shaping Redistricting*, State Legislatures Mag. (Oct./Nov. 2012), http://tinyurl.com/16-1161-tsacA (reporting that "[s]ince 2010, 193 court cases have been filed, and 68 are still active"; that this "is far more than the 149 cases (40 states) filed in the 2000s and the 150 cases (41 states) filed in the 1990s"; and that "[c]ourts have redrawn plans in Colorado, Connecticut, Kansas, Minnesota, Mississippi, New Mexico, Nevada, New York, Texas and Wisconsin"); Justin Levitt, *Litigation in the 2010 Cycle*, All About Redistricting, http://redistricting.lls.edu/cases.php (last visited Aug. 31, 2017) (providing an interactive map and links to the documents in post-2010 cases).

2. Recent history is replete with examples of political disputes being litigated not only as claims of unconstitutional partisan gerrymandering but also under one of these other rubrics. Indeed, the case now before this Court is typical of how, in many jurisdictions, "decennial litigation [has become] just as much a feature of the political scene as [is] decennial redistricting." *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 843 (E.D. Wis. 2012) (three-judge court).[3]

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[3] The case now before the Court is the second major challenge to the post-2010 Wisconsin state legislative apportionment. *Baldus* was the first. One of the plaintiff groups in *Baldus* originally brought a partisan gerrymandering claim, but abandoned that claim at trial. *See Baldus*, 849 F. Supp. 2d at 848. Another group, composed of legislator-intervenors, pursued the claim, but the court rejected it because the intervenors had

a. Georgia's post-2000 state legislative redistricting provides an example of how one-person, one-vote claims get deployed to address partisan gerrymanders.

In the Georgia Legislature, Democrats controlled the redistricting process. "The creators of the state plans did not consider such traditional redistricting criteria as district compactness, contiguity, protecting communities of interest, and keeping counties intact. Rather, they had two expressly enumerated objectives: the protection of rural Georgia and inner-city Atlanta against a relative decline in their populations compared with that of the rest of the state and the protection of Democratic incumbents." *Larios v. Cox*, 300 F. Supp. 2d 1320, 1325 (N.D. Ga. 2004) (three-judge court), *summarily aff'd*, 542 U.S. 947 (2004). To achieve these goals, the plan drawers deliberately underpopulated majority-Democratic districts while packing additional residents into majority-Republican ones (stopping just short of the 10% maximum deviation line). They also drew districts pairing a disproportionate number of Republican incumbents against one another. *Id.* at 1329-30.

Plaintiffs challenged the plan as an unconstitutional political and racial gerrymander. *See Larios*, 300 F. Supp.2d at 1357-58. The district court rejected the partisan gerrymandering claim, *id.*; *see also id.* at 1351 (stating that "[t]oday, we have no

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failed to offer a workable standard. *See id.* at 860. Ultimately, that court held that the configuration of state assembly districts in Milwaukee violated Section 2 of the Voting Rights Act because it diluted the voting strength of Latino citizens, *see id.* at 854-58, but rejected all of the plaintiffs' other claims, *see id.* at 859-60.

occasion to consider the limits of partisan gerrymandering"), and it denied the racial gerrymandering challenge as moot, "as the relief sought by the plaintiffs is granted for other reasons," *id.* at 1358. Instead, the court ruled for the Republican plaintiffs on their one-person, one-vote claim. *Id.* at 1357. It held that even though the State had stayed below a total population deviation of 10%, its plan violated principles of one-person, one-vote because the population deviations were "bound up inextricably," *id.* at 1352, with impermissible efforts "to allow rural and inner-city Atlanta regions of the state to hold on to their legislative influence (at the expense of suburban Atlanta)" despite population shifts and "to protect incumbents in a wholly inconsistent and discriminatory way," *id.* at 1342. The court expressly reserved the question "whether or when partisan advantage alone may justify deviations in population." *Id.* at 1352.

This Court affirmed summarily. *Cox v. Larios*, 542 U.S. 947 (2004). Justice Stevens, joined by Justice Breyer, concurred to note that the plan was evidence that "an impermissible partisan gerrymander is visible to the judicial eye and subject to judicially manageable standards." *Id.* at 950 (Stevens, J., concurring).[4]

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[4] This decade, Georgia is again facing litigation over its redistricting. Earlier this year, the Georgia Conference of the NAACP and five individual voters who identify themselves as both African Americans and registered Democrats brought suit alleging that two of Georgia's state house districts are both unconstitutional racial gerrymanders and unconstitutional partisan gerrymanders; they also allege that the plan violates the

b. The long-running saga of North Carolina's congressional map—only last Term one of its districts made "its fifth(!) appearance before this Court," *Cooper v. Harris*, 137 S. Ct. at 1472—shows how partisan disputes get litigated within the *Shaw* framework.

After the 1990 census, Democrats drew congressional districts with "very contorted" lines to protect their party's incumbents despite a declining share of the vote. *Pope v. Blue*, 809 F. Supp. 392, 394 (W.D.N.C. 1992) (three-judge court), *summarily aff'd*, 506 U.S. 801 (1992). Republicans initially brought a straightforward challenge to the plan as an impermissible partisan gerrymander. Despite recognizing that the plaintiffs had sufficiently alleged "anti-Republican bias" in the plan, *id.* at 397, the district court felt that its hands were tied by this Court's precedents. Thus, it dismissed the complaint for failure to state a claim, *id.* at 399, in light of this Court's requirement, in *Davis v. Bandemer*, 478 U.S. 109 (1986), that plaintiffs show that they had "essentially been shut out of the political process," *id.* at 139. Republicans could not make such a showing, the district court held, because the plan contained *some* Republican districts. *Pope v. Blue*, 809 F. Supp. at 397.

Shortly after this Court affirmed the decision shutting the doors to a partisan gerrymandering

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Equal Protection Clause's prohibition on intentional racial vote dilution and Section 2's results test. *See* Complaint for Injunctive and Declaratory Relief ¶¶ 1-4, *Ga. State Conference of the NAACP v. Georgia*, No. 1:17-cv-01427-TCB (N.D. Ga. Apr. 24, 2017), 2017 WL 1457270.

claim, it opened the doors to a round of litigation challenging the plan as an impermissible *racial* gerrymander. *See Shaw v. Reno*, 509 U.S. 630 (1993); *Shaw v. Hunt*, 517 U.S. 899 (1996). Although this Court held that two of the districts violated the prohibition on excessive use of race, it acknowledged that "partisan politicking was actively at work in the districting process." *Shaw v. Hunt*, 517 U.S. at 907. And not only in the districting process, but in the litigation itself: The plaintiffs from the partisan gerrymandering suit reappeared in the *Shaw* litigation, this time claiming the constitutional infirmity in the plan involved race, not politics. It was "plain that these intervenors [were] using their allegations of impermissibly race-based districting to achieve the same substantive result that their previous, less emotionally charged partisan gerrymandering challenge failed to secure." *Id.* at 920 (Stevens, J., dissenting).

After this Court's decision in *Shaw v. Hunt*, the State redrew its districts. This prompted yet a third round of litigation, also involving allegations that the State's plan was an unconstitutional racial gerrymander. In *Hunt v. Cromartie*, 526 U.S. 541 (1999), the Court reversed the district court's grant of summary judgment for the plaintiffs. In light of the "high correlation between race and party preference," *id.* at 552, and the State's claim that the challenged plan had been drawn to protect incumbents and maintain a partisan balance, the Court held that a trial was required to determine whether "race was the State's predominant motive" in crafting the plan, *id.* at 554. On appeal after the trial, the Court held that the plaintiffs had failed to show that "race, rather than

politics, predominantly account[ed]" for the configuration of the plan. *Easley v. Cromartie*, 532 U.S. 234, 257 (2001). Put differently, the plan this Court upheld "was the result of a *political* gerrymander—an effort to engineer, mostly 'without regard to race,' a safe Democratic seat." *Cooper v. Harris*, 137 S. Ct. at 1465 (quoting *Easley*, 532 U.S. at 245).

Following 2010, Republicans controlled North Carolina congressional redistricting. But once again, the State's plan was the subject of a *Shaw* challenge. The State countered by defending its plan as a "'strictly' political gerrymander." *Cooper v. Harris*, 137 S. Ct. at 1473. This Court recognized that "[g]etting to the bottom of a dispute like this one poses special challenges for a trial court" especially when "'racial identification is highly correlated with political affiliation.'" *Id.* (quoting *Easley*, 532 U.S. at 243)). In the case before it, the Court affirmed the district court's conclusion that race impermissibly served as the predominant motive for the challenged districts' configurations.

But litigation over North Carolina's congressional districts is hardly over. When the state legislature redrew the map, it went out of its way to characterize the new map as a partisan gerrymander, purportedly crafted to entrench the Republican "partisan advantage" first achieved "under the map held unconstitutional in [*Cooper v.*] *Harris*." *Common Cause v. Rucho*, 2017 WL 876307, at *2 (M.D.N.C. 2017) (three-judge court) (denying the defendants' motion to dismiss). As with the plan struck down in the *Cooper v. Harris* litigation, the new plan packs Democratic voters (many of whom are African

American) into the First and Twelfth Congressional districts, leaving the remaining districts disproportionately Republican.

c. Texas congressional districting provides an example of how litigation over fiercely partisan gerrymanders occurs in the context of Section 2 racial vote dilution cases.

After the 1990 census, Democrats controlled the redistricting process in Texas. "[D]raw[ing] district lines with artful precision, the legislature enacted a plan later described as the 'shrewdest gerrymander of the 1990s.'" *LULAC v. Perry*, 549 U.S. 399, 410-11 (2006) (opinion of Kennedy, J.) (quoting M. Barone, R. Cohen, & C. Cook, Almanac of American Politics 2002, at 1448 (2001)). The plan allowed the Democrats to control a significant majority of Texas's seats even though Republican candidates garnered 59% of the vote statewide. Nevertheless, a claim that the plan represented an unconstitutional partisan gerrymander failed. *See Terrazas v. Slagle,* 821 F. Supp. 1162, 1175 (W.D. Tex. 1993) (three-judge court).

Because of divided control of the Texas Legislature, the State was unable to draw a new congressional map immediately after the 2000 census. But in 2003, Republicans gained control of both houses. They then drew a new map, "the single-minded purpose" of which "was to gain partisan advantage." *Session v. Perry*, 298 F. Supp. 2d 451, 470 (E.D. Tex. 2004) (three-judge court), *vacated and remanded in light of Vieth v. Jubelirer*, 543 U.S. 941 (2004).

The ensuing lawsuit presented claims of both an unconstitutional partisan gerrymander and violations

of Section 2 of the Voting Rights Act. This Court rejected the various theories as to why the plan involved constitutionally excessive partisanship, but held that the State's configuration of House District 23 violated Section 2 of the Voting Rights Act. An "increasingly powerful Latino population" was "threaten[ing] to oust" an incumbent Republican congressman, Henry Bonilla. *LULAC*, 548 U.S. at 423 (majority opinion). Republicans reconfigured his district (and necessarily several adjacent ones) to reduce the Latino share of the citizen voting-age population and thereby serve the "dual goal of increasing Republican seats in general and protecting Bonilla's incumbency in particular." *Id.* at 425. (Eliminating Latino voters' ability to elect the representative of their choice in the district drawn to protect Bonilla required the State to draw "an offsetting" majority-minority district elsewhere, *id.* at 429, in order to obtain preclearance of its plan; the district it drew—House District 25—"combine[d] two farflung" heavily Latino areas, *id.* at 433. This Court expressed its disapproval of that new district.)

This Court explained that the new district "took away the Latinos' opportunity [to elect the representative of their choice] because Latinos were about to exercise it. This bears the mark of intentional [racial] discrimination that could give rise to an equal protection violation." *LULAC*, 548 U.S. at 440. Thus, even if "the State's action was taken primarily for political, not racial, reasons," it was impermissible. *Id.* Because the Court struck down House District 23 on Section 2 grounds, it was unnecessary to address the plaintiffs' claims "that the use of race and politics in drawing that district violate[d] the First Amendment

and equal protection." *Id.* at 442. And redrawing that district would, of necessity, require redrawing other districts as well. Accordingly, the Court declined to rule on an equal protection violation with respect to other districts. *Id.*

Amici could provide numerous other examples of how litigation over state legislative and congressional redistricting will occur regardless whether this Court articulates a judicially enforceable limit on the degree of permissible partisanship. These examples would simply reinforce the fact that litigation is often brought by partisan actors and, whether or not that is the case, often requires analysis of allegedly partisan purposes and effects of the challenged plan in the course of adjudicating claims raising other constitutional or statutory violations.

The Wisconsin Legislature claims that affirming the judgment below will allow "a virtually limitless universe of plaintiffs" to bring suit, cabin States' control over their redistricting processes, and undercut legislative privilege. Brief for *Amici Curiae* Wisconsin State Senate and Wisconsin State Assembly in Support of Appellants 10, 11-14 ("Wisconsin Legislative Amicus Br."). But those problems existed long before the district court here struck down Wisconsin's plan. No matter what this Court decides, courts can continue to expect redistricting cases "[l]ike a periodic comet, once every ten years." *Radogno v. Ill. State Bd. of Elections*, 2011 WL 5025251, at *1 (N.D. Ill. 2011) (three-judge court).

II. The absence of a straightforward mechanism for adjudicating claims of unconstitutional partisan gerrymandering has led to troubling distortions of other constraints on redistricting.

Channeling litigants' and courts' concerns about excessive partisanship in redistricting into other doctrinal pigeonholes is not costless. To the contrary, it has produced a series of pernicious consequences.

A. The absence of a straightforward partisan gerrymandering claim has distorted one-person, one-vote.

1. The doctrine governing one-person, one-vote is a bad fit for addressing excessive partisanship.

As the Court explained in its foundational decision in *Reynolds v. Sims*, 377 U.S. 533 (1964), the requirement of equipopulous districting is meant to protect a right that is "individual and personal" to each voter. *Id.* at 561; *see Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 736 (1964) (describing the right at issue as "[a]n individual's constitutionally protected right to cast an equally weighted vote").

Almost immediately, this Court recognized that one-person, one-vote did not itself ensure the fair allocation of political power among political groups. In *Fortson v. Dorsey*, 379 U.S. 433 (1965), the Court confronted a state legislative apportionment where there was "substantial equality of population" across the various districts. *Id.* at 436. It recognized that nonetheless, a plan might violate the Constitution if it "operate[s] to minimize or cancel out the voting strength of racial or political elements of the voting population." *Id.* at 439; *see also Gaffney v. Cummings*, 412 U.S. 735, 751 (1973) ("[L]egislative districts may

be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment."). The individual analysis at the heart of one-person, one-vote is thus distinctive from the outcome-dependent claim that a group of voters are unable to elect their preferred candidates, because the focus of the latter type of case is "not on population-based apportionment but on the quality of representation." *Whitcomb v. Chavis*, 403 U.S. 124, 142 (1971); *see Nevett v. Sides*, 571 F.2d 209, 215-16 (5th Cir. 1978) (distinguishing between the two types of claims), *cert. denied*, 446 U.S. 951 (1980).

Given this analytic distinction, it is no surprise that the remedy available in a one-person, one-vote case is a hit-or-miss way of addressing the qualitative harm of partisan gerrymandering. A plaintiff who wins a one-person, one-vote claim is entitled only to a new map with more equipopulous districts. *Reynolds*, 377 U.S. at 586. But while deviations from population equality once offered a useful tool for obtaining partisan advantage, "rapid advances in computer technology" often make it possible for line drawers to create equipopulous districts while also furthering other "secondary goals," such as partisan advantage. *Karcher v. Daggett*, 462 U.S. 725, 733 (1983). Thus, proving a violation of one-person, one-vote may do nothing to alleviate the political consequences that led the plaintiff to sue in the first place.

Vieth v. Jubelirer, 541 U.S. 267 (2004), proves the point. Initially, Democratic voters brought and won a one-person, one-vote challenge based on a maximum population deviation of nineteen people. *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 675, 678 (M.D. Pa. 2002) (three-judge court), *appeal dismissed as moot*,

537 U.S. 801 (2002). After the legislature drew a remedial plan, voters immediately filed another challenge on the grounds of both malapportionment and excessive partisan gerrymandering. This time, the district court upheld the plan, despite the fact that, "like its predecessor," the plan drawers had "jettison[ed] every other neutral non-discriminatory redistricting criteria that the Supreme Court ha[d] endorsed." *Vieth v. Pennsylvania*, 241 F. Supp. 2d 478, 483 n.3 (M.D. Pa. 2003) (three-judge court), *aff'd*, 541 U.S. 267 (2004). The court found it irrelevant that the plan was allegedly "rigged to guarantee that thirteen of Pennsylvania's nineteen congressional representatives will be Republicans" despite the two major parties enjoying "nearly equal support in the Commonwealth," *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 546, 536 (M.D. Pa. 2002) (three-judge court); *see Vieth v. Pennsylvania*, 241 F. Supp. 2d at 485 (reaffirming this analysis). The reason? This time, the population deviations were minimized.

2. Despite the conceptual mismatch, lower courts are increasingly using one-person, one-vote as a mechanism for striking down plans essentially because the courts conclude that excessive partisanship is at work.

Until recently, the "general matter" seemed to be that a plan with "a maximum population deviation under 10%" involved deviations "insufficient to make out a prima facie case." *Brown v. Thomson*, 462 U.S. 835, 842 (1983).

But faced with "the sense that legislative restraint was abandoned," *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring in the judgment), federal courts seem increasingly willing to strike down plans with these

previously safe population deviations. *Amici* have already described *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (three-judge court), *summarily aff'd*, 542 U.S. 947 (2004), where the district court struck down such a plan because of its "systematic favoring of Democratic incumbents," *id.* at 1353. *See supra* pp. 12-13; *see also Hulme v. Madison County*, 188 F. Supp. 2d 1041, 1051 (S.D. Ill. 2001) (invalidating highly partisan plan as "unquestionably tainted with arbitrariness and discrimination").

More recently, courts have taken as an authorization to strike down plans for excessive partisanship this Court's suggestion that plaintiffs can attack plans for violating one-person, one-vote if they show that "it is more probable than not that a deviation of less than 10% reflects the predominance of illegitimate reapportionment factors," *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1307 (2016). Thus, in *Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333 (4th Cir. 2016), the court of appeals struck down local electoral districts on the grounds that it was "more probable than not that the population deviations at issue here reflect the predominance of a[n] illegitimate reapportionment factor—namely an 'intentional effort' to create 'a significant . . . partisan advantage.'" *Id.* at 345 (citation omitted) (quoting *Larios*, 542 U.S. at 947-49 (Stevens, J., concurring)). And in *Perez v. Abbott*, SA-11-CV-360, 2017 WL 1450121 (W.D. Tex. Apr. 20, 2017) (three-judge court), a court struck down several state legislative districts in a plan with less than 10% total deviation. Two districts were unconstitutional because the motives for the otherwise-minor population deviations "were exceedingly political and

racial." *Id.* at *74. Similarly, another district was unconstitutional because the population deviation w "not the result of any legitimate redistricting considerations, and instead [was] driven only by the partisan objective of re-electing" a Republican incumbent. *Id.* at *69.

3. The practical problems with this emerging use of one-person, one-vote are several.

First, without guidance from this Court on when partisan considerations are illegitimate—the core question in this case—lower federal courts are likely to take divergent positions when they get to the justification phase of malapportionment suits. Judges will disagree on the degree of partisanship sufficient to render population deviations illegitimate. And because lower court decisions diverge, many courts faced with such a claim expend significant time and attention on trying to figure out the law. *See, e.g.*, *Perez*, 2017 WL 1450121, at *60-*74.

In *Anne Arundel County Republican Central Committee v. State Administrative Board of Election Laws*, 781 F. Supp. 394 (D. Md. 1991) (three-judge court), *summarily aff'd*, 504 U.S. 938 (1992), the district court split 2-1 over the constitutionality of a congressional map with a maximum deviation of ten people (from ideal districts of 597,683.5 people each). *Id.* at 395. The majority required the State to justify the deviation, but upheld the plan because it believed the State's interests were sufficiently legitimate "to warrant the very small numerical variance among the congressional districts seen here." *Id.* at 396-97. In dissent, Judge Niemeyer took issue with both prongs of the majority's analysis. He doubted that any "policy or consideration" would be "served by shifting three or

four persons from one district to another or needs to be advanced for failing to shift them." *Id.* at 402. That being said, he argued that the plan was unconstitutional because it could not be justified by legitimate, neutral districting principles. *See id.* at 408-10.

Moreover, absent guidance from this Court, jurisdictions cannot intelligently assess their litigation risk with respect to plans whose deviations realistically have no effect on the mathematical equality of any individual voter's ballot. This deprives them of the "play in [the] joints," *Reynolds*, 377 U.S. at 577 n.57 (citation omitted), that led this Court to reject a strict population equality standard for state and local electoral districts. Jurisdictions may be reluctant to deviate even minimally for wholly legitimate reasons given the risk of litigation and the cost of defending themselves. Redistricting law would work better if this Court once again gave those who draw state and local districts some flexibility with respect to district populations. By articulating a standard for judicial review of partisan gerrymandering claims, the Court could relieve the pressure on courts to engage one-person, one-vote "issues" as a tool for addressing the real constitutional infirmity.

In addition, when the real impetus for a one-person, one-vote lawsuit is partisan consequences, there may be gamesmanship with respect to the timing of litigation. Absent some change in the identity or interests of the people who draw the new lines, plaintiffs who win a malapportionment suit will likely find themselves confronted with an equally partisan new map. Litigation will therefore get brought, and the pace will be set, by the parties' sense

of whether, if the map is struck down, control over redrawing the lines will shift to actors who share the plaintiffs' political interests or will deadlock, leaving the task of setting district boundaries to the court. Because "political gerrymandering, a purely partisan exercise, is inappropriate for a federal court drawing a congressional redistricting map," *Balderas v. Texas*, No. 6:01CV158, 2001 WL 36403750, at *4 (E.D. Tex. Nov. 14, 2001) (three-judge court), *summarily aff'd*, 536 U.S. 919 (2002), the lines in the new plan will likely be more politically neutral. *See Connor v. Finch*, 431 U.S. 407, 415 (1977). The upshot of these practical considerations is that lawsuits may be brought well into the decade, by which time the ostensible population deviations no longer reflect any reality on the ground, *see Karcher v. Daggett*, 462 U.S. 725, 732 (1983) (pointing to "the well-known restlessness of the American people [that] means that population counts for particular localities are outdated long before they are completed").

Finally, when judicial decisions strike down plans based on minuscule numerical differences in district populations, courts risk the public perception that they are being disingenuous. *See, e.g.*, Terry Madonna & Michael Young, Opinion, *Is Court Changing Rules on Redrawing Political Maps?*, Morning Call (Allentown, Pa.) (Apr. 26, 2002), http://tinyurl.com/16-1161-tsacB (suggesting that "[a]rcane statistics" about population deviations were not the district court's real concern in the first round of *Vieth*, but that the court was motivated by "the partisan nature of the Republican plan").

B. The absence of a straightforward partisan gerrymandering claim has distorted doctrines designed to address racial discrimination in redistricting.

The absence of a partisan gerrymandering standard has had the "perverse consequence[]" of incentivizing litigants in multiracial or multiethnic jurisdictions to "squeeze all claims of improper manipulation of redistricting into the suffocating category of race." Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593, 630-31 (2002). This dynamic creates a harmful and unnecessary fixation on race and fosters cynicism about the Voting Rights Act, undermining the national commitment to ensuring that all citizens, regardless of race, are able to elect candidates of their choice. And the problems that come from doctrinal entanglement has only grown more complex over time.

1. Twenty years ago, Justice Stevens presciently warned that *Shaw* claims might become "useful less as a tool for protecting against racial discrimination than as a means by which state residents may second-guess legislative districting in federal court for partisan ends." *Shaw v. Hunt*, 517 U.S. 899, 920 (1996) (Stevens, J., dissenting).

Like reapportionment itself, litigation over reapportionment "is one area in which appearances do matter." *Shaw v. Reno*, 509 U.S. 630, 647 (1993). Packaging political disputes as impermissible racial gerrymanders "reinforces the perception," *id.*, that race lies at the heart of American politics and threatens to "exacerbate" the racial polarization that antidiscrimination law is designed to combat, *id.* at 648. Such packaging creates a "corrosive discourse" in

which "race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

2. Not only does the absence of a clear path for attacking excessive partisanship create an incentive for plaintiffs to cry intentional racial discrimination when their real objection is political, but it gives jurisdictions an incentive to defend themselves by asserting that instead of committing one violation of constitutional principles by excessively relying on racial considerations, they actually committed another: they sought to "minimize or cancel out the voting strength" of "political elements of the voting population." *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965). This incentive lay at the heart of North Carolina's defense in *Cooper v. Harris*, 137 S. Ct. 1455, 1476-77 (2017). The availability of an "'it was really politics' defense," *id.* at 1481, encourages a sort of litigation shell game that reinforces public suspicion that race and politics are interchangeable. For example, faced with challenges to its post-1990 congressional districts, Texas legislators defended against a partisan gerrymandering claim by asserting that they were motivated by race, and against a racial gerrymandering claim by asserting that they were motivated by politics. *Bush v. Vera*, 517 U.S. 952, 970 (1996) (plurality opinion).

Even worse, if courts uphold redistricting plans based on the "blame it on politics" defense and do not articulate any limits on partisan considerations, they become complicit in potential constitutional violations.

Far from simply declaring challenges to partisan gerrymandering nonjusticiable, courts that accept the defense are actually giving judicial imprimatur to partisan gerrymanders.

By contrast, adopting a judicially enforceable limit on the permissible degree of partisanship would reinforce democratic principles and dissuade states from justifying redistricting plans by claiming that they were deliberately trying to cancel out citizens' ability to elect public officials responsive to their needs. Moreover, adopting such a limit would authorize lower courts to resolve partisan gerrymandering cases without unnecessarily focusing on race.

2. Shoehorning partisan disputes into Section 2 claims creates cynicism about the Voting Rights Act, threatening the national commitment to providing all citizens with an equal opportunity to elect representatives of their choice.

The central goal of the Act "is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race." *Georgia v. Ashcroft*, 539 U.S. 461, 490 (2003). But until partisan disputes can be litigated openly, "the party out of power [will attempt] to stretch the protective cover of the Voting Rights Act, urging dilution of critical standards that may, if accepted, aid their party in the short-run but work to the detriment of persons now protected by the Act in the long-run." *Session v. Perry*, 298 F. Supp. 2d 451, 474 (E.D. Tex. 2004) (three-judge court), *vacated and remanded in light of Vieth v. Jubelirer*, 543 U.S. 941 (2004). When courts perceive that a proportion of Section 2 claims are nothing more than disputes

between the major political parties, doctrines may emerge that make it harder for minority communities whose voting strength has actually been diluted to enforce the statute.

This is a serious problem given that "voting discrimination still exists; no one doubts that." *Shelby County v. Holder*, 133 S. Ct. 2612, 2619 (2013). Even today, Section 2 is vital to addressing electoral districts that deny minority voters equal opportunities to elect candidates of their choice. *See, e.g.*, *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 674 (S.D. Tex. 2017) (finding Section 2 violation involving intentional discrimination against Latino voters), *stay denied pending appeal*, 677 F. App'x 950, 953 (5th Cir. 2017); *Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1082 (E.D. Mo. 2016), *appeal docketed,* No. 16-4511 (8th Cir. Dec. 21, 2016). By enabling courts to address partisan gerrymandering head on, this Court can preserve Section 2 for cases where minority voters are denied the ability other citizens have to elect representatives of their choice. Those cases may overlap cases in which unconstitutional partisanship played a role, but they are not identical.[5]

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[5] This Court generally encourages avoiding constitutional questions—such as unconstitutional partisanship—when a case can be resolved on statutory grounds. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). But questions of race are sometimes so fraught that there may be situations in which it is appropriate to resolve the constitutional claim that a plan involves a blatant partisan gerrymander without first addressing the Section 2 claim. Establishing a standard for excessive partisanship would provide a neutral alternative to unnecessarily fixating on race.

Amici are not under the illusion that recognizing an express cause of action for unconstitutional partisan gerrymandering will necessarily stop *litigants* whose primary motivation is to change the partisan complexion of a plan from continuing to include other causes of action in their complaints. But this Court can provide *courts* with a tool for avoiding the problems that come from resolving cases on those grounds when the constitutional infirmity is best characterized as excessive partisanship.

III. Recognizing a judicially enforceable claim against partisan gerrymandering will not unjustifiably constrain states' redistricting choices.

Assertions that permitting express challenges to partisan gerrymanders would "leav[e] little (if any) room" for jurisdictions to accommodate legitimate state interests, Wisconsin Legislative Amicus Br. 16, are overblown.

1. Enforcing a constitutional limit on the degree of partisan advantage the party controlling redistricting can seize would not place an unduly burdensome constraint on states' redistricting options.

Appellees have not asked this Court to forbid all consideration of political consequences in drawing a plan. *See* Br. for Appellees 26 (only "both parties' most egregious gerrymanders" would violate the effects prong of the test they propose). An affirmance by this Court, combined with guidance about how to measure when the partisan consequences of a plan exceed tolerable limits, can provide a roadmap for plan drawers to craft defensible plans. Jurisdictions already consider the data and run predictions on

partisan effects. All they would need to do differently is use that information to stay within constitutional bounds rather than to maximize partisan advantage.

Moreover, requiring some modicum of political fairness does not require line drawers to walk the kind of tightrope they face in complying with other sorts of constraints on districting. Consider, for example, the role of race in the apportionment process. Section 2 of the Voting Rights Act often requires taking race into account in order to ensure that district configurations do not deny minority voters an equal opportunity to elect representatives of their choice. At the same time, this Court's *Shaw* jurisprudence forbids taking it into account too much. Jurisdictions that guess wrong about what the Act requires may produce a plan that gets struck down because race has played too great a role, *see, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455 (2017), or because they have failed to draw majority-minority districts where such districts are required, *see, e.g.*, *LULAC v. Perry*, 548 U.S. 399 (2006).

No such tension exists in the case of partisanship. "There are no comparable affirmative legal obligations that require states to take partisanship into account." Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28, 67 (2004). The fact that states with independent redistricting commissions often expressly forbid partisan considerations proves the point. To the extent that this Court restricts legislatures' options in announcing a justiciable limit on partisan considerations, it simply reins in "a system in which the representatives choose their constituents, rather than vice-versa." *Vieth v. Jubelirer*, 541 U.S. 267, 332 (2004) (Stevens, J., dissenting) (citation

omitted). That some jurisdictions may draw plans that forgo a permissible amount of partisanship is a small price to pay for restoring coherence to redistricting doctrine and preventing egregious gerrymandering.

2. Placing some judicially enforceable restriction on the degree of permissible partisanship in drawing electoral district boundaries does not usurp states' proper authority over redistricting.

The Legislative Amicus Brief argues that imposing a judicially enforceable limit on partisan gerrymandering runs afoul of this Court's concern that redistricting not be "'recurringly removed from legislative hands and performed by federal courts.'" Wisconsin Legislative Amicus Br. 4 (quoting *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973)). But that quotation has been ripped out of context. It appears in a paragraph discussing the *Gaffney* plaintiffs' one-person, one-vote claims. This Court was doing nothing more than expressing an aversion to judicial "displacement of otherwise appropriate state decisionmaking in the name of essentially minor deviations from perfect census-population equality that no one, with confidence, can say will deprive any person of fair and effective representation in his state legislature." *Gaffney*, 412 U.S. at 749.

This case involves a very different sort of claim. As appellees explain, Wisconsin's plan deprives the roughly half the State's electorate that supports Democratic candidates of its right to fair and effective representation in the state legislature. *See* Appellees' Br. 14-17. And the reason this Court recognizes that nakedly partisan line drawing is "incompatible with democratic principles," *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658

(2015) (alterations omitted) (quoting *Vieth*, 541 U.S. at 292 (2004) (plurality opinion)), is precisely because it *does* threaten these representational injuries.

While legislatures, in most states, clearly have the "primary role" in redistricting, this Court's "precedents recognize an important role for the courts when a districting plan violates the Constitution." *LULAC*, 548 U.S. at 415 (2006) (opinion of Kennedy, J.). It should make clear that this role extends to situations where a districting plan violates constitutional constraints on excessive partisanship.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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