9-2017

Section 6: Election Law Panel

Institute of Bill of Rights Law, William & Mary Law School

VI. Election Law Panel

In This Section:

Gill v. Whitford

16-1161

Ruling Below: *Whitford v. Gill*, 218 F.Supp.3d 837 (W.D.Wis., 2016)

Democratic voters filed § 1983 action against members of Wisconsin Elections Commission, claiming that redistricting plan drafted and enacted by Republican-controlled Wisconsin legislature was unconstitutional partisan gerrymander that systematically diluted voting strength of Democratic voters statewide based on their political beliefs, in violation of Equal Protection Clause and First Amendment rights of association and free speech, by two gerrymandering techniques known as "cracking," or dividing party's supporters among multiple districts so they fell short of majority in each one, and "packing," or concentrating one party's backers in few districts that they won by overwhelming margins. The District Court for the Western District of Wisconsin held that the plan was intended to burden representational rights of Democratic voters throughout decennial period; the plan had its intended discriminatory effect; the discriminatory effect was not justified such that plan constituted unconstitutional political gerrymander; and the Democratic voters had standing.

Question Presented: Whether the district court violated Vieth v. Jubelirer when it held that it had the authority to entertain a statewide challenge to Wisconsin's redistricting plan, instead of requiring a district-by-district analysis;

Whether the district court violated Vieth when it held that Wisconsin's redistricting plan was an impermissible partisan gerrymander, even though it was undisputed that the plan complies with traditional redistricting principles;

Whether the district court violated Vieth by adopting a watered-down version of the partisan-gerrymandering test employed by the plurality in Davis v. Bandemer;

Whether the defendants are entitled, at a minimum, to present additional evidence showing that they would have prevailed under the district court's test, which the court announced only after the record had closed;

Whether partisan-gerrymandering claims are justiciable.

William WHITFORD, Roger Anclaim, Emily Bunting, Mary Lunne Donohue, Helen Harris, Wayne Jensen, Wendy Sue Johnson, Janet Mitchell, Allison Seaton, James Seaton, Jerome Wallace and Donald Winter, Plaintiffs,

v.

Beverly R. GILL, Julie M. Glancey, Ann S. Jacobs, Steve King, Don Millis, and Mark L. Thomsen, Defendants.

United States District Court, W.D. Wisconsin

Decided on November 21, 2016

[Excerpt; some citations and footnotes omitted]

RIPPLE, Circuit Judge.

The plaintiffs have brought this action alleging that Act 43, the redistricting plan enacted by the Wisconsin Legislature in 2011, constitutes an unconstitutional partisan gerrymander. Specifically, they maintain that the Republican-controlled legislature drafted and enacted a redistricting plan that systematically dilutes the voting strength of Democratic voters statewide. We find that Act 43 was intended to burden the representational rights of Democratic voters throughout the decennial period by impeding their ability to translate their votes into legislative seats. Moreover, as demonstrated by the results of the 2012 and 2014 elections, among other evidence, we conclude that Act 43 has had its intended effect. Finally, we find that the discriminatory effect is not explained by the political geography of Wisconsin nor is it justified by a legitimate state interest. Consequently, Act 43 constitutes an unconstitutional political gerrymander. This opinion constitutes our findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a)(1).

I

BACKGROUND

We begin our consideration of the plaintiffs' claims by examining Wisconsin's statutory requirements for redistricting as well as its recent redistricting history.

A. Reapportionment in Wisconsin

1. The State's constitutional and statutory framework

Reapportionment of state legislative districts is a responsibility constitutionally vested in the state government. Although some states have chosen to avoid the problem of partisan gerrymandering by vesting this power in a neutral body designed specifically to perform that delicate function, the people of Wisconsin have so far chosen to rely on its legislature to reapportion its districts after the decennial census. They have vested responsibility in the bicameral legislature composed of the Wisconsin State Senate and the Wisconsin State Assembly. Wis. Const. art. IV, §§ 1, 3. According to Wisconsin law, "[t]he state is divided into 33 senate districts, each composed of 3 assembly districts. Each senate district shall be entitled to elect one member of the senate. Each assembly district shall be entitled to elect one representative to the assembly."

The Wisconsin Constitution directs the Wisconsin legislature, "[a]t its first session after each enumeration made by the authority of the United States," to "apportion and district anew the members of the senate and assembly, according to the number of inhabitants." The Wisconsin Constitution also imposes specific requirements for reapportionment plans. Assembly districts are "to be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable." With respect to political subdivisions, a prior federal district court observed that, "[a]lthough avoiding the division of counties is no longer an inviolable principle, respect for the prerogatives of the Wisconsin Constitution dictate that wards and municipalities be kept whole where possible." The Wisconsin Constitution further requires that "no assembly district shall be divided in the formation of a senate district."

In addition to the state constitutional requirements, the Wisconsin legislature must comply with federal law when redistricting. In particular, state legislatures must ensure

that districts are approximately equal in population, so that they do not violate the "one-person, one-vote" principle embedded in the Equal Protection Clause of the Fourteenth Amendment. ("[T]he Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."); (holding "that an apportionment plan with a maximum population deviation under 10%" is presumptively constitutional, while a population deviation larger than 10% must be justified by the state). Further, states also must comply with § 2 of the Voting Rights Act of 1965, which focuses on preserving the voting power of minority groups.

Redistricting laws in Wisconsin are enacted, in large measure, in the same manner as other legislation, specifically, by way of bills originating in either house of the legislature. Tad Ottman, aide to the Senate Majority Leader, explained in some detail this legislative process:

[L]egislators will work either on their own or with drafters or with a small group of people to develop legislation. Usually it's developed among members of your own party, if not just the individual legislator. They create a proposal with the assistance of the Legislative Reference Bureau. At that point, the bill is often, but not always, circulated among other legislators to see if anybody else would want to sign on ....

The bill is then circulated. At some point it is introduced.... And then once they are introduced, they are assigned to a committee. The committee chairman or chairwoman can choose to hold a public hearing on that piece of legislation. Most of the time a public hearing is held.... And then that legislation is forwarded to the full body, either the Senate or the Assembly, for debate and then it is passed over to the other House where a similar process occurs.

A bill must then "be presented to the governor," who can sign or veto the bill.

The caucus system plays a significant role in the legislative process. Caucus meetings are held in the morning prior to the legislative session to vet legislation internally before a vote on the floor. Professor William Whitford, a named plaintiff and retired professor of law from the University of Wisconsin, testified that important "debate and discussion," as well as the "vote[ ] that matters," occur within the caucus meetings. "Once the party caucuses come to a majority result, the other members of the party are expected to follow the party line ...." Thus, it is "extremely difficult" to pass legislation through a bipartisan coalition.

2. The modern history of reapportionment in Wisconsin

In the wake of the 1980 census, the plan that had been enacted in 1972 could no longer satisfy the constitutional requirement of "one-person one-vote." In response to these changes in population, a redistricting plan was drafted and enacted by the Wisconsin legislature, which had a Democratic majority, but it was vetoed by the Republican governor. Consequently, a federal district court was asked to devise a remedy. Upon reviewing several plans submitted by legislators and interest groups, the court "reluctantly concluded" that it could "be more faithful to the goals of reapportionment" by drafting its own plan. In doing so, the court focused on ensuring population equality, avoiding the dilution of racial minority voting strength, and keeping communities of interest together. This "AFL–CIO Plan" remained in effect for one election in 1982. As a result of that election, the Democratic Party held control of both houses of the Wisconsin legislature and also gained the governor's office. The legislature passed, and the governor signed, a new

apportionment plan that lasted for the rest of the decennial period.

Following the 1990 election, the Wisconsin government again was divided between two political parties. The Democratic Party controlled both houses of the Wisconsin legislature while the governor was a Republican. "For that or other reasons, no bill to reapportion the legislature had been enacted into law" by January 1992, leading several Republican legislators to challenge the existing apportionment plan "as unconstitutional and violative of the Voting Rights Act." As a result, the federal court was asked to draft a new plan.

In an attempt to play a more limited role in the redistricting process, the court "asked the parties at the outset whether they had any objection ... to [the court's] selecting the best of the submitted plans rather than trying to create [its] own plan." Upon receiving these submissions, however, the court determined that the plans bore "the marks of their partisan origins." It therefore used parts of one Republican plan and one Democratic plan. The court plan preserved the strengths of the partisan plans, "primarily population equality and contiguity and compactness," while "avoid[ing] their weaknesses." The plan remained in effect through the 2000 election.

Following the 2000 census, a divided Wisconsin legislature again was unable to agree upon a redistricting plan. In an ensuing law suit, the federal district court determined that "the existing Wisconsin Assembly and Senate districts," which had not been redrawn since 1992, were "violative of the 'one person, one vote' standard." A new plan was therefore necessary. The court considered sixteen plans that had been submitted by legislators and other interest groups, but "found various unredeemable flaws" in all of them. The court therefore drew a plan "in the most neutral way it could conceive—by taking the 1992 reapportionment plan as a template and adjusting it for population deviations." In making these changes, the court attempted to "maintain[ ] municipal boundaries and unit[e] communities of interest." The "Baumgart Plan" was in effect from 2002 until 2010.

B. Drafting of Act 43

In 2010, for the first time in over forty years, the voters of Wisconsin elected a Republican majority in the Assembly, a Republican majority in the Senate, and a Republican Governor. This uniformity in control led the Republican leadership to conclude that a legislatively enacted redistricting plan was possible.

In January 2011, Scott Fitzgerald, Wisconsin Senate Majority Leader, and Jeff Fitzgerald, Speaker of the Wisconsin Assembly, retained attorney Eric McLeod and the law firm of Michael Best & Friedrich, LLP, to assist with the reapportionment of the state legislative districts. The firm supervised the work of Tad Ottman, staff member to Senate Majority Leader Fitzgerald; Adam Foltz, staff member to Speaker Fitzgerald; and Joseph Handrick, a consultant with the law firm Reinhart Boerner Van Deuren s.c., in planning, drafting, and negotiating the new districting plan. Ottman, Foltz, and later Handrick, worked in a room located in the offices of Michael Best & Friedrich, which they referred to as the "map room."

Ottman, Foltz, and Handrick also received assistance from Professor Ronald Keith Gaddie, a professor of political science at the University of Oklahoma. Michael Best & Friedrich had retained Professor Gaddie "as an independent advisor on the appropriate racial and/or political make-up of legislative and congressional districts in Wisconsin." Professor Gaddie described his job as "devis[ing] measures and consult[ing] ... about measures" of partisanship,

compactness, "the integrity of counties, the integrity of city boundaries, the so-called good government principles of redistricting." "Where [he] ... spent most of [his] time was trying to disentangle the performance of the majority/minority districts in Milwaukee County."

A "significant part" of his work was "building a regression model to be able to test the partisan makeup and performance of districts as they might be configured in different ways." As explained by one of the plaintiffs' experts, Professor Kenneth Mayer, "[r]egression is a technique where we can seek to explain a dependent variable, the variable that we're trying to account for.... [W]e attempt to explain the values that a dependent variable take[s] with what are called independent variables or underlying causal variables." In this instance, Professor Gaddie's dependent variable was the baseline partisanship of a unit of geography, which then could be aggregated into different configurations of Assembly districts. In this way, Professor Gaddie was able to assess the partisanship of the Assembly maps that the drafters passed on to him for analysis. Professor Mayer testified that "the political science literature is essentially unanimous" that the approach taken by Professor Gaddie is "the appropriate method," and Professor Mayer used the same methodology to construct his Demonstration Plan.

Ottman, Foltz, and Handrick began drafting the map that would become Act 43 in April 2011, after they received census data from the Legislative Technology Services Bureau ("LTSB"). The LTSB also had provided them with computers loaded with the redistricting software, autoBound. Ottman described in detail how the software was used:

[Y]ou would open up a plan that you'd been working on or label a new plan and assign it the Assembly district that you wanted to work with and then you could also pick a color that you wanted that Assembly district to be. It's sort of like a color-by-number exercise. ...

You also determine what other layers that you want to look at on the screen. There were a number of different overlays that you have, anywhere from existing Senate and Assembly districts, ... count[y] boundaries, municipal boundaries, ward boundaries all the way down to census block boundaries. As a practical matter what you tried to do is you would zoom in the region of your screen to the area that you're looking at to the smallest amount that you could see and then have kind of the fewest layers displayed that you would need because the more information that you were requiring it to display slows down the computer speed a lot and makes it really slow to render.

....

And then what you would do is there were a couple different ways that you could add population to the district.

Ottman further explained that, in more populated areas, the drafters worked more at the ward level: "So you would have the wards displayed and you would literally draw a circle, click on it, and it would assign it to the map and fill it in." "In other parts of the state ... you might do that at the county level because it's so sparsely populated so you'd grab three or four counties at [a] time."

When the drafters would increase the area size of the districts that they were drawing, autoBound provided demographic information for the area that the drafter had included, such as the number of people in the district, the deviation from the ideal population, voting-age population, and different minority group populations. It also allowed the user to include "customized ... demographic data."

One piece of "customized demographic data" employed by the drafters was a composite partisan score. From the time that Ottman, Foltz, and Handrick received the census data from the LTSB, they worked to develop a composite partisan score that accurately reflected the political make-up of the population units. Having this measure was necessary so that, when they aggregated those units into new districts, they could assess the partisan make-up of the new district they had drawn. On April 19, 2011, they developed a composite of "all statewide races from [20]04 to 2010" that "seem[ed] to work well." They sent this composite measure to Professor Gaddie, who tested it against his regression model. Professor Gaddie confirmed to Handrick that "the partisanship proxy you are using (all races) is an almost perfect proxy for the open seat vote, and the best proxy you'll come up with." Once Professor Gaddie confirmed the usefulness of their composite measure, Ottman, Foltz, and Handrick could "assess the partisan impact of the map[s] that [they] drew."

Although Ottman, Foltz, and Handrick worked in the same room at Michael Best & Friedrich, they worked independently on their own maps. They drew several statewide maps, and even more regional maps from which the legislative leadership eventually would choose. As they drew the maps, they would ensure that the districts were "close-to-ideal population." They did an "eyeball test" for "compactness and contiguousness." They "looked at ... what the core of the existing district was compared to the new district," "looked at municipalities that were split," whether the new district had changed Senate districts, and "where incumbents lived."

The drafters were attentive to traditional districting criteria like population equality, compactness, and municipal splits throughout the drafting process. When the drafters had created a statewide map with which they were satisfied, they would export the district-by-district partisanship scores from autoBound into a spreadsheet for that "finalized" "statewide" plan.

The drafters used their composite score to evaluate the statewide maps that they had drawn based on the level of partisan advantage that they provided to Republicans. In many instances, the names of the maps reflected the level of partisan advantage achieved by the districting plan; for instance, there are maps labeled "Assertive" and "Aggressive." Foltz testified that "aggressive" in this context meant "probably that [the map] was a more aggressive map with regard to GOP leaning."

The drafters created spreadsheets which collected the partisan scores, by district, for each of the statewide map alternatives. Each spreadsheet included a corresponding table comparing the partisan performance of the draft plan to the prior map drawn by the Baumgart court, which they called the "Current Map." These performance comparisons were made on the following criteria: "Safe" Republican seats, "Lean" Republican seats, "Swing" seats, "Safe" Democratic seats, and "Lean" Democratic seats.

The process of drafting and evaluating these alternative district maps spanned several months. In early April 2011, the drafters produced a document comparing the partisan performance of the Current Map to two early draft maps: Joe's Basemap Basic and Joe's Basemap Assertive. Under the Current Map, the drafters anticipated that the Republicans would win 49 Assembly seats. This number increased to 52 under the Joe's Basemap Basic map and to 56 under the Joe's Basemap Assertive map. The number of safe and leaning Republican seats increased from 40 under the Current Map to 45 under the Joe's

Basemap Basic map and 49 under the Joe's Basemap Assertive map; the number of swing seats decreased from 19 to 14 to 12.42 The number of safe and leaning Democratic seats, however, remained roughly the same under all three maps, hovering between 38 and 40.

The drafters prepared and evaluated the partisan performance of at least another six statewide alternative maps. Each of these maps improved upon the anticipated pro-Republican advantage generated in the initial two draft plans. The total number of safe and leaning Republican seats now ranged between 51 and 54, and the number of swing seats was decreased to between 6 and 11. The number of safe and leaning Democratic seats again remained about the same under each draft map, ranging between 37 and 39.

The drafters sent their completed draft maps to Professor Gaddie for further analysis. For each map, Professor Gaddie created an "S" curve—a "visual aide[ ] to demonstrate the partisan structure of Wisconsin politics." These "S" curves show how each map would operate within an array of electoral outcomes.

The "S" curves give a visual depiction of how each party's vote share (on the x axis), ranging from 40% to 60%, relates to the number of Assembly seats that party likely will secure (on the y axis). Democratic seats are depicted by shades of blue, and Republican seats by shades of red. To produce the "S" curves, Professor Gaddie first used his regression analysis to calculate the expected partisan vote shares for each new district. He then shifted the vote share of each district ten points in either direction, from 40% to 60%, and assigned a color to districts that "tend[ed]" towards, or were "safe" seats, for that party. The "S" curves—at least some of which were printed in large format and kept in the map room—allowed a non-statistician, by mere visual inspection, to assess the partisan performance of a particular map under all likely electoral scenarios. On one occasion, Senator Fitzgerald came to the map room, and Professor Gaddie showed him one of the large printouts of the "S" curves and "basically explain[ed] how to interpret" them.

Not long after Professor Gaddie had performed his analyses, the Republican legislative leadership contacted the drafters and indicated that they wanted to be prepared to act on a redistricting plan. Over several days in early June, the drafters presented a selection of regional maps drawn from their statewide drafts, approximately three to four per region, to the Republican leadership. Along with these regional alternatives, the leadership "saw the partisan scores for the maps that [the drafters] presented to them in those alternatives." Foltz testified during his deposition that, although he could not recall a particular example, he was sure that he was asked by the leadership about the partisan performance of the various regional options.

Following this meeting, the drafters amalgamated the regional alternatives chosen by the leadership. Foltz testified that "the draft map called team map emerged as a result of the ... leadership's choices at those meetings." Under the Team Map, which was also referred to as the "Final Map," the Republicans could expect to win 59 Assembly seats, with 38 safe Republican seats, 14 leaning Republican, 10 swing, 4 leaning Democratic, and 33 safe Democratic seats. In a document bearing the heading "Tale of the Tape," the drafters, among other things, compared the partisan performance of the Team Map directly to the Current Map on each of these criteria. They highlighted specifically that under the Current Map, 49 seats are "50% or better" for Republicans, but under the Team Map, "59 Assembly seats are 50% or better."

The Team Map underwent even more intense partisan scrutiny in a document identified as "summary.xlsx." The drafters divided the new Team Map districts into six categories of partisan performance, listing beside each district its "new incumbent" and its Republican vote share under the Current Map and the Team Map. The drafters considered five districts to be "Statistical Pick Up[s]," meaning they were currently held by a Democratic incumbent but likely to become Republican; they grouped fourteen districts under the heading "GOP seats strengthened a lot"; they designated eleven districts "GOP seats strengthened a little"; they labeled three districts as "GOP seats weakened a little"; they considered another three GOP districts "likely lost"; and, finally, they identified four districts where the Democrats were "weakened." The drafters also listed the twenty Republican Assembly members who, under the Team Map, could be considered "GOP Donors to the Team": "Incumbents with numbers above 55% that donate[d] to the team." These representatives stood in contrast to "GOP non-donors," who were Republican incumbents with "over 55% who d[id] not donate points."

The Team Map was then sent to Professor Gaddie, who conducted an "S" curve analysis. The Team Map demonstrated that Republicans would maintain a majority under any likely voting scenario; indeed, they would maintain a 54 seat majority while garnering only 48% of the statewide vote. The Democrats, by contrast, would need 54% of the statewide vote to capture a majority.

Once the map had been finalized, Foltz presented each Republican member of the Assembly with information on his or her new district. The memos prepared for the Assembly members informed them whether the district number had changed, whether adjustment to the district population was necessary based on the census numbers, and provided a "[c]omparison of [k]ey [r]aces" in the new district compared to the old. Specifically, the memorandum detailed what percentage of the population in the old and new districts voted for Republican candidates in representative statewide and national elections held since 2004. This information also was provided in terms of raw votes. The memoranda did not provide the individual legislators with any information about contiguity, compactness, or core population.

Ottman engaged in a similar process with Republican members of the State Senate. For each meeting, he created a talking-points memo that included information about population, where changes in the district's population had occurred, and the geography of the new district. These also contained information on how the re-configured district had voted in national and statewide elections.

Ottman also made a presentation to the Republican caucus. His notes for that meeting state: "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."

On July 11, 2011, the redistricting plan was introduced by the Committee on Senate Organization. On July 13, 2011, a public hearing was held, during which Ottman and Foltz presented the plan and fielded questions. The Senate and Assembly passed the bill on July 19, 2011, and July 20, 2011, respectively. The Governor signed the bill, and it was published as Wisconsin Act 43 on August 23, 2011.

C. Prior Court Challenges to Act 43

Even before Act 43 was passed, two actions were brought challenging the plan on constitutional and statutory grounds, including under Section 2 of the Voting Rights Act. The court consolidated the actions for decision and concluded that the

plan did not violate the "one-person, one-vote" principle, nor did it violate the Equal Protection Clause by "disenfranchise[ing]" voters who were moved to a new Senate district and were unable to vote for their state senator for another two years. However, the court did find that the plaintiffs were entitled to relief on their claim that Act 43 violated the Voting Rights Act by diluting the voting power of Latino voters in Milwaukee County, and it ordered the State to redraw these districts. The remainder of Act 43, however, remained intact and governed the 2012 and 2014 Assembly elections.

In 2012, the Republican Party received 48.6% of the two-party statewide vote share for Assembly candidates and won 60 of the 99 seats in the Wisconsin Assembly. In 2014, the Republican Party received 52% of the two-party statewide vote share and won 63 assembly seats.

II

PROCEDURAL HISTORY

A. Allegations of the Complaint

We now turn to the dispute before this court. Plaintiffs William Whitford, Roger Anclam, Emily Bunting, Mary Lynne Donohue, Helen Harris, Wayne Jensen, Wendy Sue Johnson, Janet Mitchell, James Seaton, Allison Seaton, Jerome Wallace, and Don Winter are United States citizens registered to vote in Wisconsin. They reside in various counties and legislative districts throughout Wisconsin. All of them are "supporters of the Democratic party and of Democratic candidates and they almost always vote for Democratic candidates in Wisconsin elections." Defendants are Beverly R. Gill, Julie M. Glancey, Ann S. Jacobs, Steve King, Don Millis, and Mark L. Thomsen, each in his or her official capacity as a member of the Wisconsin Elections Commission.

According to the plaintiffs, in drafting Act 43, the Republicans employed two gerrymandering techniques: "cracking"—"dividing a party's supporters among multiple districts so that they fall short of a majority in each one"—and "packing"—"concentrating one party's backers in a few districts that they win by overwhelming margins," in order to dilute the votes of Democrats statewide. This "cracking and packing result[ed] in 'wasted' votes: votes cast either for a losing candidate (in the case of cracking) or for a winning candidate but in excess of what he or she needs to prevail (in the case of packing)." They therefore urge the court to adopt a new measure for assessing the discriminatory effect of political gerrymanders—the efficiency gap (or "EG"). "The efficiency gap is the difference between the parties' respective wasted votes in an election, divided by the total number of votes cast." When two parties waste votes at an identical rate, a plan's EG is equal to zero. An EG in favor of one party, however, means that the party wasted votes at a lower rate than the opposing party. It is in this sense that the EG arguably is a measure of efficiency: Because the party with a favorable EG wasted fewer votes than its opponent, it was able to translate, with greater ease, its share of the total votes cast in the election into legislative seats. In short, the complaint alleges that Act 43 purposely distributed the predicted Republican vote share with greater efficiency so that it translated into a greater number of seats, while purposely distributing the Democratic vote share with less efficiency so that it would translate into fewer seats.

The plaintiffs' complaint incorporated the EG into a proposed three-part test for partisan gerrymandering. First, plaintiffs would have to establish that a State had an intent to gerrymander for partisan advantage. Second, the plaintiffs would need to prove a partisan effect, by proving that the EG for a plan

exceeds a certain numerical threshold (which the plaintiffs proposed, based on historical analysis, to be 7%). If a plan exceeds that threshold, the plaintiffs asserted that it should be presumptively unconstitutional. Third, and finally, the plaintiffs placed the burden on the defendants to rebut the presumption by showing that the plan "is the necessary result of a legitimate state policy, or inevitable given the state's underlying political geography." If the state is unable to rebut the presumption, then the plan is unconstitutional.

The plaintiffs alleged that they had satisfied all of these elements. According to the complaint, Act 43 "was drafted and enacted with the specific intent to maximize the electoral advantage of Republicans and harm Democrats to the greatest possible extent." Additionally, Act 43 "produced a pro-Republican efficiency gap of 13% in 2012 and 10% in 2014." They further claimed that this EG is unjustified because one of their experts, Professor Mayer, had crafted a "Demonstration Plan" with "an efficiency gap of just 2% in 2012," which "perform[ed] at least as well as [Act 43] on every other relevant metric."

For these reasons, plaintiffs claimed that Act 43 "treats voters unequally, diluting their voting power based on their political beliefs, in violation of the Fourteenth Amendment's guarantee of equal protection," and "unreasonably burdens their First Amendment rights of association and free speech." They requested a declaration that Act 43 is unconstitutional, an injunction prohibiting further elections under the map, and the drawing of a new redistricting map.

B. Motion to Dismiss

The defendants filed a motion to dismiss on August 18, 2015, which contended that the court could not grant relief for three primary reasons. First, the defendants argued that the EG was directly analogous to the proportional-representation standard rejected by the Supreme Court in Vieth v. Jubelirer, 541 U.S. 267, 287–88, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004). Second, the defendants argued that the EG failed to account for the impact of traditional districting criteria like contiguity and compactness. Finally, the defendants argued that the plaintiffs lacked the standing to challenge Act 43 on a statewide basis, and instead could only challenge their individual districts.

In an order dated December 17, 2015, we denied defendants' motion to dismiss. We first noted that the claim was justiciable, and that, "[u]ntil a majority of the Supreme Court rules otherwise, lower courts must continue to search for a judicially manageable standard." We acknowledged the defendants' argument that the EG was analogous to a proportionality standard, but noted that the plaintiffs' experts disagreed with the defendants' contention and that factfinding therefore was needed. We concluded that "[a] determination whether plaintiffs' proposed standard is judicially manageable relies at least in part on the validity of plaintiffs' expert opinions" and that a more developed record would be necessary to resolve that question. Finally, we concluded that the plaintiffs had standing, explaining that "[b]ecause plaintiffs' alleged injury in this case relates to their statewide representation, it follows that they should be permitted to bring a statewide claim." We noted, however, that the defendants were "free to raise this issue again on a more developed record."

C. Motion for Summary Judgment

Defendants subsequently filed a motion for summary judgment, raising new challenges to the plaintiffs' claims. In the motion, the defendants argued that the EG metric was overinclusive and captured several plans—including court-drawn plans in Wisconsin—that were not drawn with any partisan intent.

Furthermore Democratic voters tended to live in cities, which created a "natural packing" effect and distorted the EG.

The defendants acknowledged the plaintiffs' argument that a requirement of partisan intent could remedy this over-inclusivity problem, but noted that the intent element was not sufficiently demanding. The defendants contended that "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." The intent element proposed by the plaintiffs was, therefore, "meaningless," and the Supreme Court's decision in Vieth already had ruled out the more demanding standard of "predominant intent."

The defendants levied two additional criticisms of the plaintiffs' test. First, they noted that the plaintiffs' "Demonstration Plan" was based on a counterfactual scenario and therefore failed to address concerns raised by some Justices about a standard which dealt with a "hypothetical state of affairs." Second, they alleged that the EG is highly sensitive to "vote-switchers" in swing districts. Had voters in close (or competitive) elections voted for the other party, and had a few candidates of the other party won those seats, then the EG might be dramatically different. In their view, a plan that included such competitive districts could be found unconstitutional under the plaintiffs' proposed standard.

We denied the motion for summary judgment. We explained that judgment "as a matter of law would be premature because there [we]re factual disputes regarding the validity of plaintiffs' proposed measurement." We also noted that there was conflicting evidence on the "natural packing" of Democrats in Wisconsin. We further observed that the defendants' arguments might serve as "a suggestion to alter the threshold of the plaintiffs' test and, perhaps, shift the burdens of production or proof." In particular, we left open the question of the requisite level of intent and directed the plaintiffs to "be prepared to present the strongest evidence that they have on this issue ... in order to meet even the most demanding intent requirement." We therefore set the case for trial.

D. Witnesses Testifying at Trial

During the four-day trial, from May 24, 2016, through May 28, 2016, the parties presented their cases through eight witnesses. Some of the testimony of the witnesses involved in the passage of Act 43 has been set forth above, so it is not necessary to summarize it again here. An overview of the remaining testimony is set forth below.

1. William Whitford

First to testify was William Whitford, one of the plaintiffs in this litigation and a resident of the 76th Assembly District. Professor Whitford testified to his long-time affiliation with the Democratic Party. He related that he consistently has voted for Democratic candidates, has made donations to Democratic Assembly candidates outside of his own district, has raised money on their behalf, and has donated to the Assembly Democratic Campaign Committee. According to Professor Whitford, given Wisconsin's caucus system, "[t]he only practical way to accomplish [his] policy objectives is to get a majority of the Democrats in the Assembly and the Senate," which is "virtually impossible under this apportionment [plan]."

2. Ronald Keith Gaddie

Professor Gaddie was deposed by the plaintiffs on March 9, 2016, and a video of that deposition was admitted into evidence and played at trial. As explained in some detail above, Professor Gaddie testified that he was retained by Michael Best & Friedrich

on April 11, 2011, to "serv[e] as an independent advisor on the appropriate racial and/or political make-up of legislative and congressional districts in Wisconsin." In particular, Professor Gaddie took "the electoral data ... and constructed a regression analysis ... in order to create an estimate of the vote performance of every district." He explained that this analysis "could be used to create a set of visual aids to demonstrate the partisan structure of Wisconsin politics."

As noted above, Professor Gaddie's regression analysis was employed to confirm the validity of the composite measure developed by Foltz, Ottman, and Handrick. Professor Gaddie also used his regression analysis to assess each of the drafters' proposed maps and to create "S" curves to illustrate how the Republican seat share would change based on changes in the party's statewide vote share. In Professor Gaddie's words, the "S" curves were "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?" At least some of the "S" curves were printed and kept in the map room at Michael Best & Friedrich; in print form, the "S" curves were large enough to "cover half th[e] table."

3. Adam Foltz

Foltz worked as a legislative aide for Speaker Fitzgerald and served as one of the primary drafters of Act 43. One additional aspect of Foltz's testimony at trial, however, is worthy of note. His testimony revealed a shortcoming in the drafters' composite partisan measure. Specifically, the composite score likely was skewed to show a greater Republican advantage because of an error in the data for the 2006 Governor's race (one of the components of the composite score). As a result of this error, the partisan estimates in the drafters' spreadsheets were distorted and differed from the estimates reached by Professor Gaddie in his "S" curves. Foltz testified that he had not noticed this discrepancy at the time of drafting. He explained that, at the time, he "didn't spend a whole lot of time with" Professor Gaddie so he "[did]n't really understand the nuts and bolts" of the "S" curves.

4. Tad Ottman

Ottman testified to his involvement in the drafting and passage of Act 43.

5. Kenneth Mayer

Kenneth Mayer, a professor of political science at the University of Wisconsin, served as an expert witness for the plaintiffs. His ultimate goal was to design an alternative districting plan to Act 43 "that had an efficiency gap as low to zero as I could get it" while also complying with traditional districting criteria to the same extent as Act 43. He first created a regression model that estimated partisanship for each geographic area, so that he could compare his plan to Act 43. To ensure the model was accurate, Professor Mayer compared the predictions made by his regression model to the actual results in 2012. Once he was confident in his model, Professor Mayer "used a GIS redistricting program called Maptitude ... to ... complete the task of actually drawing the Assembly district map."

Professor Mayer's alternative "Demonstration Plan" yields a 2.2% EG in favor of the Republicans, compared to an 11.69% EG yielded by Act 43. According to Professor Mayer, "[o]n all constitutional requirements, the Demonstration Plan is comparable to Act 43." On cross-examination, however, the defendants pointed out that Professor Mayer did not take account of incumbents when drawing the plan. As a result, his plan paired a greater number of incumbents than Act 43, including

one pairing in a majority-minority district. Further, Professor Mayer had not drawn any Senate districts, and therefore had not taken account of disenfranchisement.

In addition to discussing the Demonstration Plan, Professor Mayer responded to points made by the defendants' experts in their reports. Specifically, Professor Mayer testified that he had conducted a sensitivity analysis to address concerns about the effect of "wave" elections—elections that dramatically favor one party—on the EG calculations for both the Demonstration Plan and Act 43. He first looked over the last twenty years of elections in Wisconsin and found the greatest and smallest statewide vote shares for each party. Using these vote shares as the likely electoral spectrum, he performed a swing analysis where the Democrats received an additional 3% of the statewide vote (compared to their 2012 share) and the Republicans received an additional 5% of the statewide vote (again compared to their 2012 share) "to see what effect that would have on [his] efficiency gap calculations for the Demonstration Plan." Professor Mayer's analysis revealed that the Demonstration Plan's EG remained below 4%, regardless of the swing. Act 43's EG, however, increased during a Democratic swing but significantly decreased during a Republican swing. Professor Mayer noted that this is because "we've swung the Republican vote percentage up to 54 percent" but "[t]he number of [Republican] seats doesn't change." In Professor Mayer's view, the result "is a confirmation that the bias in Act 43 is about the maximum that you can get."

6. Simon Jackman

Simon Jackman, a professor of political science and statistics at Stanford University, also served as an expert witness for the plaintiffs. Professor Jackman primarily testified about the reliability and practicability of the EG. He conducted a survey of 786 state legislative elections (under 206 different districting plans) in the United States between 1972 and the present day, in order to ascertain whether there was a baseline EG which should "trigger scrutiny" and also to compare Act 43 to other redistricting plans.

Professor Jackman sought to determine how much the EG varied from election year to election year, and whether a districting plan had any impact on that EG. Professor Jackman presented a "scatterplot," which graphed the relationship between the EG in the first election year of a redistricting plan (set forth on the x axis) and the average EG over the lifetime of the plan (set forth on the y axis). He found a "relatively strong predictive relationship," meaning that a high EG in the first year of a redistricting plan likely means that the EG will remain high for the lifetime of the plan.

Based on his research, Professor Jackman proposed that an EG of 7% or higher should be legally significant:

"I arrived at 7 percent because that seemed to be a reasonable threshold for saying yes, if the first election under a plan produces an efficiency gap score at least that big, then you can be confident now that you've seen not just a one-off, but something that's going to persist over the life of the plan as a signal of—a reliable signal as to the set of efficiency gap scores and the average efficiency gap score you might see if the plan were allowed to run."

In other words, an EG of 7% in favor of one party in the first election year of a plan almost certainly means that the EG will favor that same party in each subsequent election year under that plan.

Professor Jackman noted that the EGs for the 2012 and 2014 races in Wisconsin—13% and 10%, respectively—were particularly high by

historical levels. The EG in 2012 was, according to Professor Jackman, "among the largest scores we've seen anywhere" and "in the top 3 percent in terms of magnitude." Act 43's average EG ranked fifth out of the 206 plans that Professor Jackman surveyed. He testified that he was "virtually certain" that "Act 43 will exhibit a large and durable advantage in favor of Republicans over the rest of the decade."

7. Sean Trende

Sean Trende, Senior Elections Analyst for the website RealClearPolitics, served as an expert witness for the defendants. Mr. Trende primarily testified on the political geography of Wisconsin and its potential effect on the EG.

Mr. Trende explained that, as a general matter, political geography of the United States currently favors Republicans. In his view, the Democratic coalition has contracted geographically and is now concentrated heavily in urban areas. This concentration, in turn, has hurt the Democratic Party in congressional elections, which tend to favor parties with wider geographic reach.

Mr. Trende also testified to the political geography of Wisconsin itself, which he analyzed using a measure called the "partisan index" ("PI"). The purpose of the PI is "to determine the partisan lean of political units," in order to "compare results across elections." Mr. Trende explained that the county and ward PI values within Wisconsin have shifted such that the Democratic Party's influence was strengthening in areas "that already leaned Democratic," but was contracting geographically.

Mr. Trende then applied his PI analysis to Wisconsin's wards in what he referred to as a "nearest neighbor" analysis, which assessed the median distance between heavily Democratic wards compared to the median distance between heavily Republican wards. From this analysis, Mr. Trende concluded that it has "become[ ] progressively harder to draw ... Democratic districts elsewhere in the state," which in his view explained at least some of the EG. However, he did not determine exactly how much of the EG was attributable to geography.

8. Nicholas Goedert

Nicholas Goedert, a visiting professor of political science at Lafayette College, was retained by the defendants to offer opinions on using the EG to measure partisan gerrymandering.

Professor Goedert's main objection to the EG was its perceived volatility. In Professor Goedert's view, "wave elections are the norm," meaning that "much more often than not one party wins by 5 percent or more" of the vote. Therefore, relying on an EG from one election year, which might have taken place during a close election, might not be reliable. Professor Goedert opined that, "at a very minimum, ... you need to have some sort of robust sensitivity testing that would be codified if you were going to use the efficiency gap in any way."

Professor Goedert also raised a series of policy concerns. First, he pointed out that the EG measure arguably rests on a "2-to-1" vote-to-seats ratio and therefore a certain standard of proportionality. He also noted that there are "normatively good reasons why a state might cho[ose] to draw a map in a certain way and even under these normatively good reasons we could and actually do observe very high efficien[cy] gaps." For example, Professor Goedert noted that some states may wish to create a more proportional system or encourage competitive elections. In his view, states might be discouraged from pursuing these policy goals if the court adopted the EG as the standard for partisan gerrymandering.

E. Post–Trial Briefing

Both parties filed post-trial briefs, which summarized their views of the case in light of the evidence presented at trial. The plaintiffs contended that they satisfied their proposed three-part test by proving discriminatory intent, discriminatory effect, and an absence of a justification for that effect. On intent, the plaintiffs focused in particular on the alternative maps that the drafters rejected, the "S" curves drawn by Professor Gaddie, and memos written by Foltz and Ottman. On effect, the plaintiffs stressed that the EG was not only likely to favor Republicans for the lifetime of the plan, but that it also was likely to stay relatively high. The plaintiffs also highlighted the sensitivity testing that had been conducted by Professors Jackman and Mayer. On justification, the plaintiffs pointed out that the previous Assembly maps in Wisconsin, the alternative plans drafted by the defendants, and Professor Mayer's Demonstration Plan all exhibited lower EGs while arguably complying as well with traditional districting criteria.

In response, the defendants contended that "a plan that complies with all neutral districting criteria, and whose efficiency gap is consistent with prior court-drawn plans" cannot be unconstitutional. The defendants noted that Act 43's districts were congruent, compact, and fairly equal in population. Further, much of the secrecy surrounding Act 43's enactment was consistent with how bills typically are enacted in Wisconsin. The defendants also pointed to evidence that the political geography in Wisconsin favors Republicans, which they contend explains the trend in EGs towards that party over the past two decades. In the defendants' view, this evidence also illustrates the unreliability of the EG. The defendants concluded that the plaintiffs had not presented enough of a reason for a court to intervene in the redistricting process.

We express our appreciation to both parties for their thorough and informative presentation, and now turn to the legal principles that must guide our analysis of the case.

III

THE LEGAL LANDSCAPE

The plaintiffs' claim is that Act 43 violates their First and Fourteenth Amendment rights because it discriminates against Democratic voters by diminishing the strength of their votes in comparison to their Republican counterparts.

We note, as a prefatory matter, that we have acknowledged, throughout this litigation, that the plaintiffs' standing to maintain a cause of action is a threshold issue. Indeed, in our disposition of the defendants' motion to dismiss, we addressed extensively standing and "conclude[d] that plaintiffs' alleged injury [wa]s sufficiently concrete and particularized under current law to satisfy *Lujan* with respect to a statewide challenge to the districting plan." "We reach[ed] the same conclusion with respect to [*Lujan*'s] second and third elements of standing, which are causation and redressability." We noted, though, that the "defendants [we]re free to raise this issue again on a more developed record."

Lujan explains that, because the elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." Our assessment of the evidence, as well as our elucidation of the political gerrymandering cause of action, therefore will inform our standing analysis. Consequently, we postpone a plenary discussion of standing until we fully have set

forth the evidence as well as the constitutional standard. As a precursor, however, we conclude that the plaintiffs have established a concrete and particularized injury: "[a]s a result of the statewide partisan gerrymandering, Democrats do not have the same opportunity provided to Republicans to elect representatives of their choice to the Assembly. As a result, the electoral influence of plaintiffs and other Democratic voters statewide has been unfairly [and] disproportionately ... reduced" for the life of Act 43.155 Additionally, the plaintiffs have shown causation: Act 43 was designed with the purpose of solidifying Republican control of the legislature for the decennial period and, indeed, has had that effect. Finally, the plaintiffs have established that their injury is redressable: adopting a different statewide districting map would redress the constitutional violation by removing the state-imposed impediment on Democratic voters.

In resolving the plaintiffs' claim, we face a significant analytical problem. Although the Supreme Court's political gerrymandering cases establish that "an excessive injection of politics is unlawful," (emphasis removed), the Court has not come to rest on a single, judicially manageable or discernible test for determining when the line between "acceptable" and "excessive" has been crossed. Indeed, a signature feature of these cases is that no single opinion has garnered a majority of the Court.

But the absence of a well-trodden path does not relieve us of the obligation to render a decision. True, we cannot anticipate that the Court will alter course from the decisional law, however sparse, that currently exists. Nor can we cobble together the opinions of the various Justices who have written on the matter and call the resulting amalgam binding precedent. Nevertheless, understanding that we are in an area where the navigational signs are not yet well-placed, we must decide the case before us and satisfy our "duty ... to say what the law is," or at least what we believe it to be.

We begin by examining the cases that set forth the constitutional principles which later informed the Court's political gerrymandering decisions.

A. The Foundational Case Law

1.

Over half a century ago, the Supreme Court recognized that the constitutionality of legislative apportionments is governed by the Equal Protection Clause of the Fourteenth Amendment. Reynolds was not a political gerrymandering case, but addressed allegations that an outdated apportionment scheme resulted in "serious discrimination with respect to the allocation of legislative representation" in violation of the Equal Protection Clause. Nevertheless, the Supreme Court spoke to the importance and nature of the right to vote in terms that also inform our consideration of the plaintiffs' claims.

The Court first observed that the right to vote "is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." The Court explained that "[m]ost citizens" exercise their "inalienable right to full and effective participation in the political process" by voting for their elected representatives. "Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature." Moreover, the concept of equal protection has been traditionally viewed as requiring the

uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live.

The Court explained, however, that the requirement of equal treatment was not limited to where a voter resided. Instead, "[a]ny suggested criteria for the differentiation of citizens are insufficient to justify any discrimination, as to the weight of their votes, unless relevant to the permissible purposes of legislative apportionment." (emphasis added). The Court therefore concluded that,

"[s]ince the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, ... the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status."

Reynolds therefore establishes that, in electing state representatives, the votes of citizens must be weighted equally. If an apportionment scheme violates the principle of one-person, one-vote, it must be justified on the basis of other, permissible, legislative considerations.

2.

The Court soon had the opportunity to apply the principles set forth in Reynolds to allegations of vote-dilution brought by racial minorities. In Fortson v. Dorsey, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965), the Court considered the constitutionality of an apportionment scheme which included traditional single-member districts and multimember districts, where citizens reside in a comparatively larger district and vote for multiple representatives. Voters alleged that these multimember districts were "defective because county-wide voting in multi-district counties could, as a matter of mathematics, result in the nullification of the unanimous choice of the voters of a district." The district court granted summary judgment to the plaintiffs, finding that the statute was unconstitutional on its face.

The Supreme Court disagreed that such districts were unconstitutional per se, and it declined to strike the plan. The Court acknowledged, however, that "[i]t might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." The Court, therefore, remanded for factfinding to determine whether the plaintiffs could meet this burden.

Following Fortson, the Court has held that multimember districts violate the Constitution when the plaintiffs have produced evidence that an election was "not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice."

Later cases refined the methodology by which courts evaluate claims of vote dilution. In Rogers v. Lodge, Burke County, Georgia, employed an at-large system of elections to determine its Board of Commissioners, rather than dividing the county into districts and allowing each district to choose a commissioner. African–American citizens in that county brought an action in which they alleged that the county's system of at-large elections violated their First, Thirteenth,

Fourteenth, and Fifteenth Amendment rights by diluting their voting power. The district court held that, although the at-large electoral system was neutral in origin, it was being maintained for invidious purposes and therefore ordered the county to be divided into districts for purposes of electing commissioners.

The Supreme Court affirmed. It explained that districts violate the Equal Protection Clause when " 'conceived or operated as purposeful devices to further racial discrimination' by minimizing, cancelling out or diluting the voting strength of" minority populations. These cases "are thus subject to the standard of proof generally applicable to Equal Protection Clause cases," specifically the " 'quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.' " Discriminatory intent, however, "need not be proved by direct evidence," but may be " 'inferred from the totality of the relevant facts.' "

Applying this standard, the Court "decline[d] to overturn the essential finding of the District Court ... that the at-large system ... ha[d] been maintained for the purpose of denying blacks equal access to the political processes in the county." Evidence of discriminatory purpose included the fact that no African American ever had been elected despite "overwhelming evidence of bloc voting along racial lines." There also was evidence of historical discrimination in the form of literacy tests, poll taxes, and school segregation; of a disparity in socio-economic status that "result[ed] in part from the lingering effects of past discrimination,"; and of county elected officials' unresponsiveness and insensitivity to African-American constituents.

Although focused on racially discriminatory apportionment schemes, Fortson and subsequent vote-dilution cases establish that Equal Protection concerns arise when apportionment plans "minimize or cancel out the voting strength" either of racial minorities or, as we have here, "political elements of the voting population." Moreover, they instruct that vote-dilution cases are governed by the same standards as other equal-protection claims, namely the plaintiffs must establish both a discriminatory intent and a discriminatory effect.

B. Present Supreme Court Precedent

1.

The Court drew heavily from the Fortson line of cases in resolving the political gerrymandering claim asserted in Gaffney v. Cummings. In Gaffney, the Connecticut Apportionment Board created a redistricting plan designed to yield Democratic and Republican seats in proportion to the statewide vote. A three-judge district court invalidated the plan on the ground that the deviations from equality of population in both houses were not "justified by any sufficient state interest," "[m]ore particularly, ... that the policy of partisan political structuring ... cannot be approved as a legitimate reason for violating the requirement of numerical equality of population in districting."

The Supreme Court reversed. In its analysis, the Supreme Court acknowledged that "[s]tate legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment"; it stated:

A districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed "to minimize or cancel out the voting strength of racial or political elements of the voting population." We must, therefore, respond to appellees' claims in this case that even if acceptable populationwise, the

Apportionment Board's plan was invidiously discriminatory because a "political fairness principle" was followed in making up the districts in both the House and Senate.

The Court, however, was "unconvinced" that the plan violated the Fourteenth Amendment. The Court observed that Connecticut's Apportionment Board had sought to "achieve a rough approximation of the statewide political strengths of the Democratic and Republican parties," by implementing a "political fairness" plan. (internal quotation marks omitted). The Court saw no constitutional impediment to the State's considering partisan interests in this way.

The Court made clear, however, that the drawing of legislative districts along political lines "is not wholly exempt from judicial scrutiny under the Fourteenth Amendment." Relying on its vote-dilution cases, it gave as an example "multimember districts [that] may be vulnerable" to constitutional challenges "if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized." "Beyond this," the Court continued, it had "not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States."

In closing, however, the Court was careful to distinguish the plan before it, which employed political classifications for benign—even salutary—purposes, with plans that did not have proportional representation as their aim:

"[N]either we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State."

In sum, the Court reiterated that its concern was invidious discrimination by the State; absent the plaintiffs' establishing an intent to dilute the strength of a particular group or party, the Equal Protection Clause was not offended.

2.

The Court next addressed partisan gerrymandering in Davis v. Bandemer. Because Bandemer was the first case in which a party directly raised, and the Court squarely addressed, a claim that a legislative redistricting plan invidiously discriminated against members of a political party, we treat it in some depth.

In Bandemer, Indiana Democrats challenged the 1981 state reapportionment plan passed by a Republican-controlled legislature. Specifically, they alleged that the plan was intended to disadvantage Democrats in electing representatives of their choosing, in violation of the Equal Protection Clause under the Fourteenth Amendment. In November 1982, before the case went to trial, elections were held under the new plan. The district court had "sustained an equal protection challenge to Indiana's 1981 state apportionment on the basis that the law unconstitutionally diluted the votes of Indiana Democrats," but the Supreme Court reversed. A majority of the Court first concluded that the issue before the Court, like those in the one-person, one-vote cases and in the vote-dilution cases, "is one of representation" and "decline[d] to hold that such claims [we]re never justiciable." "As Gaffney demonstrates," the Court continued, the fact that a "claim is submitted by a political group, rather than a racial group, does not distinguish it in terms of justiciability." That the complaining group does not share an "immutable" characteristic

or otherwise "has not been subject to the same historical stigma may be relevant to the manner in which the case is adjudicated, but these differences do not justify a refusal to entertain such a case."

Turning to the standard to be applied, a majority of the Court agreed that the "plaintiffs were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." A majority of the Court also believed that the first requirement—intentional discrimination against an identifiable group—had been met. Indeed, it observed that, "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended."

The plurality, however, rejected "the District Court's legal and factual bases for concluding that the 1981 Act visited a sufficiently adverse effect on the appellees' constitutionally protected rights to make out a violation of the Equal Protection Clause." It was not the case that "any apportionment scheme that purposely prevents proportional representation is unconstitutional." Indeed, the plurality noted that precedent "clearly foreclose[d] any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be."

Moreover, the plurality held "that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice" also did "not render that scheme constitutionally infirm. In reaching this conclusion, it noted that the Court had refused to approve the use of multimember districts "[o]nly where there [wa]s evidence that excluded groups ha[d] 'less opportunity to participate in the political processes and to elect candidates of their choice.' " It emphasized that "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole":

"[A]n equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. In this context, such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process."

Applying this standard to the facts before them, the plurality concluded that "this threshold condition" had not been met. It observed that the district court had relied "primarily on the results of the 1982 elections" in which Democratic candidates had garnered "51.9% of the votes cast statewide," but secured only 43 seats. Id. Republicans, however, had received only "48.1% ... yet, of the 100 seats to be filled, Republican candidates won 57." "Relying on a single election to prove unconstitutional discrimination," however, was "unsatisfactory." The plurality specifically noted a lack of evidence that (1) the 1981 Act prevented the Democrats from "secur[ing] ... sufficient vote[s] to take control of the assembly"; (2) "the 1981 reapportionment would consign the Democrats to a minority status in the Assembly throughout the 1980's"; or (3) "the Democrats would have no hope of doing any better in the reapportionment that would occur after the 1990 census." "Without findings of this nature," the plurality stated, "the District

Court erred in concluding that the 1981 Act violated the Equal Protection Clause."

The plurality then addressed a few aspects of Justice Powell's opinion. "[T]he crux of [his] analysis" was that—"at least in some cases—the intentional drawing of district boundaries for partisan ends and for no other reason violates the Equal Protection Clause." It disagreed that "the specific intention of disadvantaging one political party's election prospects," standing alone, established a constitutional violation. Instead, invidious intent must be coupled with evidence that "the redistricting d[id] in fact disadvantage [a party] at the polls," and the disadvantage must be more than "a mere lack of proportionate results in one election." The plurality, however, acknowledged that "election results" were "relevant to a showing of the effects required to prove a political gerrymandering claim under our view. And the district configurations may be combined with vote projections to predict future election results," which also would be relevant to showing discriminatory effects.

The plurality recognized that its own test "may be difficult of application." "Nevertheless," it concluded, the test "recognizes the delicacy of intruding on this most political of legislative functions and is at the same time consistent with our prior cases regarding individual multimember districts, which have formulated a parallel standard."

Justice O'Connor, joined by Chief Justice Burger and Justice Rehnquist, concurred in the judgment, but wrote separately. Justice O'Connor took issue with the plurality's reliance on both the "one-person, one-vote" principle and the Court's vote-dilution cases. In her view, Reynolds makes plain that the one person, one vote principle safeguards the individual's right to vote, not the interests of political groups: "To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote."

Justice O'Connor also viewed political gerrymandering as distinct from racial gerrymandering. She explained that, "where a racial minority group is characterized by 'the traditional indicia of suspectness' and is vulnerable to exclusion from the political process, individual voters who belong to that group enjoy some measure of protection against intentional dilution of their group voting strength by means of racial gerrymandering."

"[M]embers of the Democratic and Republican Parties," however, did not constitute "a discrete and insular group vulnerable to exclusion from the political process by some dominant group: these political parties are the dominant groups, and the Court has offered no reason to believe that they are incapable of fending for themselves through the political process."

In an opinion concurring in part and dissenting in part, Justice Powell, joined by Justice Stevens, concluded that a redistricting plan violated the Constitution when it served "no purpose other than to favor one segment—whether racial, ethnic, religious, economic, or political—that may occupy a position of strength at a particular time, or to disadvantage a politically weak segment of the community." He believed that this conclusion followed from the principles articulated in Reynolds, namely "that equal protection encompasses a guarantee of equal representation, requiring a State to seek to achieve through redistricting 'fair and effective representation for all citizens.' " He further explained that

"[t]he concept of "representation" necessarily applies to groups: groups of voters elect representatives, individual voters

do not. Gross population disparities violate the mandate of equal representation by denying voters residing in heavily populated districts, as a group, the opportunity to elect the number of representatives to which their voting strength otherwise would entitle them. While population disparities do dilute the weight of individual votes, their discriminatory effect is felt only when those individual votes are combined. Thus, the fact that individual voters in heavily populated districts are free to cast their ballot has no bearing on a claim of malapportionment."

Applying these standards, Justice Powell believed that the "case present[ed] a paradigm example of unconstitutional discrimination against the members of a political party that happened to be out of power" and would have found that Indiana's redistricting plan violated the Equal Protection Clause.

Although history would establish that the plurality correctly predicted that its test for political gerrymandering was, in fact, "difficult of application," Bandemer nevertheless provides some meaningful guidance. First, the Court's one-person, one-vote and vote-dilution cases provide the foundation for evaluating claims of political gerrymandering. Second, that a "claim is submitted by a political group rather than a racial group, does not distinguish it in terms of justiciability." And, third, a successful political gerrymandering claim must include a showing of both discriminatory intent and discriminatory effect.

3.

The Court revisited the issue of political gerrymandering in Vieth v. Jubelirer. In Vieth, the Court addressed an action filed by Democratic voters in Pennsylvania that challenged the state legislature's new congressional districting plan. Justice Scalia, writing for a plurality, began with a critique of the standard articulated in Bandemer:

Over the dissent of three Justices, the Court held in Davis v. Bandemer that, since it was "not persuaded that there are no judicially discernible and manageable standards by which political gerrymander cases are to be decided," such cases were justiciable.... There was no majority on that point. Four of the Justices finding justiciability believed that the standard was one thing; two believed it was something else. The lower courts have lived with that assurance of a standard (or more precisely, lack of assurance that there is no standard), coupled with that inability to specify a standard, for the past 18 years.

In the plurality's view, "[e]ighteen years of judicial effort with virtually nothing to show for it justif[ied] ... revisiting the question whether the standard promised by Bandemer exists." It concluded that "no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking [such standards]," it concluded, "political gerrymandering claims are nonjusticiable and ... Bandemer was wrongly decided."

The plurality turned first to the shortcomings of the test proposed by the plaintiffs:

To satisfy appellants' intent standard, a plaintiff must "show that the mapmakers acted with a predominant intent to achieve partisan advantage," which can be shown "by direct evidence or by circumstantial evidence that other neutral and legitimate redistricting criteria were subordinated to the goal of achieving partisan advantage." ... As compared with the Bandemer plurality's test of mere intent to disadvantage the plaintiff's group, this proposal seemingly makes the standard more difficult to meet—but only at the expense of making the standard more indeterminate.

The plurality determined that, in a statewide plan, there was no principled way to discern predominant intent.

The test also included an "effects" prong: "The requisite effect is established when '(1) the plaintiffs show that the districts systematically "pack" and "crack" the rival party's voters, and (2) the court's examination of the "totality of circumstances" confirms that the map can thwart the plaintiffs' ability to translate a majority of votes into a majority of seats.' " According to the plurality, this aspect of the test also was not judicially discernible because there is no constitutional right to proportional representation: the Constitution "guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups." Nor, in the plurality's opinion, was the proposed test judicially manageable because there was no reliable method to establish "a party's majority status" or for "ensur[ing] that party wins a majority of seats—unless we radically revise the States' traditional structure for elections."

The plurality then critiqued the standards proposed by the dissenting Justices. Contrary to the view held by other members of the Court, the plurality did not believe that the "one-person, one-vote cases" had any "bearing upon this question," either "in principle" or "in practicality."

"Not in principle, because to say that each individual must have an equal say in the selection of representatives, and hence that a majority of individuals must have a majority say, is not at all to say that each discernible group, whether farmers or urban dwellers or political parties, must have representation equivalent to its numbers. And not in practicality, because the easily administrable standard of population equality adopted by Wesberry and Reynolds enables judges to decide whether a violation has occurred (and to remedy it) essentially on the basis of three readily determined factors—where the plaintiff lives, how many voters are in his district, and how many voters are in other districts; whereas requiring judges to decide whether a districting system will produce a statewide majority for a majority party casts them forth upon a sea of imponderables, and asks them to make determinations that not even election experts can agree upon."

Turning first to Justice Stevens's view, the plurality agreed that "severe partisan gerrymanders" were "incompatib[le] ... with democratic principles." It could not agree, however, that political gerrymandering should be treated equivalently to racial gerrymandering. In the plurality's view, "[a] purpose to discriminate on the basis of race receives the strictest scrutiny under the Equal Protection Clause, while a similar purpose to discriminate on the basis of politics does not." The plurality was unpersuaded by Justice Stevens's reference to political patronage cases, contending that "the underlying rights, and consequently constitutional harms, are not comparable."

The plurality also rejected Justice Souter's multi-factor test, which was "loosely based in form on [the Court's] Title VII cases." According to the plurality, this test was "doomed to failure" because "[n]o test—yea, not even a five-part test—can possibly be successful unless one knows what he is testing for. In the present context, the test ought to identify deprivation of that minimal degree of representation or influence to which a political group is constitutionally entitled." Although Justice Souter "vaguely describe[d] the harm he is concerned with as vote dilution, a term which usually implies some actual effect on the weight of a vote," no element of his test measured this effect. Consequently, the plurality was unsure of "the precise constitutional deprivation his test [wa]s designed to identify and prevent."

Addressing Justice Breyer's dissent, the plurality agreed "that our Constitution sought to create a basically democratic form of government," but found that this was "a long and impassable distance away from the conclusion that the Judiciary may assess whether a group (somehow defined) has achieved a level of political power (somehow defined) commensurate with that to which they would be entitled absent unjustified political machinations (whatever that means)."

The plurality concluded, therefore, that the Equal Protection Clause did not "provide[ ] a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting."

Justice Kennedy concurred in the judgment. He agreed that "[a] decision ordering the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process." "The Court," he stated, was "correct to refrain from directing this substantial intrusion into the Nation's political life." Furthermore, "[w]hile agreeing with the plurality that the complaint the appellants filed in the District Court must be dismissed, and while understanding that great caution is necessary when approaching this subject, [he] would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases."

Justice Kennedy believed that

"[a] determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective."

In this case, Justice Kennedy explained, the plaintiffs had not overcome the dual hurdles of discernibility and manageability:

"The fairness principle appellants propose is that a majority of voters in the Commonwealth should be able to elect a majority of the Commonwealth's congressional delegation. There is no authority for this precept. Even if the novelty of the proposed principle were accompanied by a convincing rationale for its adoption, there is no obvious way to draw a satisfactory standard from it for measuring an alleged burden on representational rights. The plurality demonstrates the shortcomings of the other standards that have been considered to date."

However, Justice Kennedy was not willing to go so far as the plurality and hold partisan gerrymanders nonjusticiable. Although agreeing that there were "weighty arguments for holding cases like these to be nonjusticiable" and acknowledging that "those arguments may prevail in the long run," it was Justice Kennedy's view that "the arguments [we]re not so compelling that they require us now to bar all future claims of injury from a partisan gerrymander." According to Justice Kennedy, the Court's "willingness to enter the political thicket of the apportionment process with respect to one-person, one-vote claims ma[de] it particularly difficult to justify a categorical refusal to entertain claims against this other type of gerrymandering."

Justice Kennedy noted specifically that, in the end, it may be the First Amendment, not the Equal Protection Clause, which provides the framework within which political gerrymandering claims should be analyzed. "After all," he explained, "these allegations involve the First Amendment interest of not

burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views. Under general First Amendment principles those burdens in other contexts are unconstitutional absent a compelling government interest." Moreover, a " '[r]epresentative democracy ... is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views.' " According to Justice Kennedy, these precedents demonstrate that

"First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights."

Justice Kennedy disagreed with the plurality that application of a First Amendment standard would render invalid "all consideration of political interests in an apportionment." He explained:

"The inquiry is not whether political classifications were used. The inquiry instead is whether political classifications were used to burden a group's representational rights. If a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the State shows some compelling interest."

Because "[t]he First Amendment analysis concentrates on whether the legislation burdens the representational rights of the complaining party's voters for reasons of ideology, beliefs, or political association," Justice Kennedy suggested that "[t]he analysis allows a pragmatic or functional assessment that accords some latitude to the States."

Justice Stevens dissented. Drawing both on the Court's racial gerrymandering cases, and the Court's political patronage cases, Justice Stevens believed that the plaintiffs had standing, presented a redressable claim, and were entitled to relief. Specifically, he observed that "political belief and association constitute the core of those activities protected by the First Amendment" and that government employment decisions that burden these interests are subject to strict scrutiny. "Thus," he continued, "unless party affiliation is an appropriate requirement for the position in question, government officials may not base a decision to hire, promote, transfer, recall, discharge, or retaliate against an employee, or to terminate a contract, on the individual's partisan affiliation or speech." Justice Stevens concluded that "[i]t follows" therefore "that political affiliation is not an appropriate standard for excluding voters from a congressional district."

Justice Souter wrote a dissenting opinion, joined by Justice Ginsburg, which rested on the "one-person, one-vote" principle. According to Justice Souter:

"Creating unequally populous districts is not, however, the only way to skew political results by setting district lines. The choice to draw a district line one way, not another, always carries some consequence for politics, save in a mythical State with voters of every political identity distributed in an absolutely gray uniformity. The spectrum of opportunity runs from cracking a group into impotent fractions, to packing its members into one district for the sake of marginalizing them in another. However equal districts may be in population as a formal matter, the consequence of a vote cast can be minimized or maximized, and if unfairness is sufficiently demonstrable, the guarantee of

equal protection condemns it as a denial of substantial equality."

Justice Souter acknowledged the Court's prior struggles in articulating a workable test for political gerrymandering. Accordingly, he suggested preserving the holding in Bandemer that political gerrymandering was justiciable, but "otherwise start[ing] anew." Specifically, he suggested using a burden-shifting test similar to that in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), "calling for a plaintiff to satisfy elements of a prima facie cause of action, at which point the State would have the opportunity not only to rebut the evidence supporting the plaintiff's case, but to offer an affirmative justification for the districting choices, even assuming the proof of the plaintiff's allegations."

Justice Breyer, also in dissent, opined that "the workable democracy that the Constitution foresees" must include "a method for transforming the will of the majority into effective government." In his view, this method could be harmed by "the unjustified use of political factors to entrench a minority in power." Justice Breyer quoted extensively from Reynolds to support his view that "[t]he democratic harm of unjustified entrenchment is obvious":

"Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators.... Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will."

Where unjustified entrenchment takes place, voters find it far more difficult to remove those responsible for a government they do not want; and these democratic values are dishonored.

Consequently, "gerrymandering that leads to entrenchment amounts to an abuse that violates the Constitution's Equal Protection Clause."

Although the test articulated in Bandemer proved unworkable, Vieth has placed district courts in an even greater quandary. For all its shortcomings, the Bandemer decision at least set forth a test for district courts to apply. In Vieth, however, the members of the Court were unanimous only in their willingness to jettison the test set forth in Bandemer. We conclude, therefore, that the specific test for political gerrymandering set forth in Bandemer no longer is good law. Moreover, any attempt to craft a new test ought to avoid those shortcomings in the Bandemer test specifically identified by the members of the Court.

4.

The Supreme Court's most recent case on partisan gerrymandering, gives little more in the way of guidance. Nevertheless, we set forth those aspects of the decision that may be useful in evaluating the plaintiffs' claims.

In the 1990s, the Democrats controlled both houses of the Texas legislature and the statehouse and enacted what was "later described as the shrewdest gerrymander of the 1990s." Following the 2000 census, Texas was entitled to two additional congressional seats. However, the legislature now was split politically between a Republican Senate and a Democratic House of Representatives. "As so constituted, the legislature was unable to pass a redistricting scheme," resulting in a court-ordered plan which left "[t]he 1991 Democratic Party gerrymander largely in place as a 'legal' plan." In 2002, however, Republicans gained control of both houses of the legislature and enacted legislation that re-drew congressional districting lines; these new districts resulted in the Republicans securing

21 seats with 58% of the vote in statewide races, compared to the Democrats' 11 seats with 41% of the vote.

Shortly after the plan was enacted, some Texas voters mounted both statutory and constitutional challenges to it. In the constitutional challenge, the plaintiffs claimed that a decision to enact a new redistricting plan mid-decade, "when solely motivated by partisan objectives, violates equal protection and the First Amendment because it serves no legitimate public purpose and burdens one group because of its political opinions and affiliation." The Supreme Court disagreed.

Justice Kennedy, joined by Justices Souter and Ginsburg, opined that "a successful claim attempting to identify unconstitutional acts of partisan gerrymandering must do what appellants' sole-motivation theory explicitly disavows: show a burden, as measured by a reliable standard, on the complainants' representational rights." Moreover, Justice Kennedy was concerned that the plaintiffs' proposed test would exempt from constitutional scrutiny other, more serious examples of partisan gerrymandering:

"The text and structure of the Constitution and our case law indicate there is nothing inherently suspect about a legislature's decision to replace mid-decade a court-ordered plan with one of its own. And even if there were, the fact of mid-decade redistricting alone is no sure indication of unlawful political gerrymanders. Under appellants' theory, a highly effective partisan gerrymander that coincided with decennial redistricting would receive less scrutiny than a bumbling, yet solely partisan, mid-decade redistricting. More concretely, the test would leave untouched the 1991 Texas redistricting, which entrenched a party on the verge of minority status, while striking down the 2003 redistricting plan, which resulted in the majority Republican Party capturing a larger share of the seats. A test that treats these two similarly effective power plays in such different ways does not have the reliability appellants ascribe to it."

Justice Kennedy also noted that the current Texas map could "be seen as making the party balance more congruent to statewide party power." "To be sure," Justice Kennedy continued,

"there is no constitutional requirement of proportional representation, and equating a party's statewide share of the vote with its portion of the congressional delegation is a rough measure at best. Nevertheless, a congressional plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority."

Justice Kennedy also commented on a submission by an amicus which "propose[d] a symmetry standard that would measure partisan bias by 'compar[ing] how both parties would fare hypothetically if they each (in turn) had received a given percentage of the vote.' " He stated:

Amici's proposed standard does not compensate for appellants' failure to provide a reliable measure of fairness. The existence or degree of asymmetry may in large part depend on conjecture about where possible vote-switchers will reside. Even assuming a court could choose reliably among different models of shifting voter preferences, we are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs. Presumably such a challenge could be litigated if and when the feared inequity arose. More fundamentally, the counterfactual plaintiff would face the same problem as the present, actual appellants: providing a standard for deciding how much partisan dominance is too much. Without

altogether discounting its utility in redistricting planning and litigation, I would conclude asymmetry alone is not a reliable measure of unconstitutional partisanship.

Justice Kennedy thus concluded that "a legislature's decision to override a valid, court-drawn plan mid-decade" is not "sufficiently suspect to give shape to a reliable standard for identifying unconstitutional political gerrymanders." Consequently, he concluded that the petitioners had not established a "legally impermissible use of political classifications" and had not stated a claim on which relief could be granted.

Justice Stevens, in a separate opinion joined by Justice Breyer, reiterated the view of impartiality that he had articulated in Vieth. He observed that "the Fourteenth Amendment's prohibition against invidious discrimination[ ] and the First Amendment's protection of citizens from official retaliation based on their political affiliation" "limit the State's power to rely exclusively on partisan preference in drawing district lines." He explained:

The equal protection component of the Fourteenth Amendment requires actions taken by the sovereign to be supported by some legitimate interest, and further establishes that a bare desire to harm a politically disfavored group is not a legitimate interest. Similarly, the freedom of political belief and association guaranteed by the First Amendment prevents the State, absent a compelling interest, from "penalizing citizens because of their participation in the electoral process, ... their association with a political party, or their expression of political views." These protections embodied in the First and Fourteenth Amendments reflect the fundamental duty of the sovereign to govern impartially.

Justice Stevens also set forth some of the representational harms engendered by political gerrymanders. Specifically, he noted that, "in addition to the possibility that a representative may believe her job is only to represent the interests of a dominant constituency, a representative may feel more beholden to the cartographers who drew her district than to the constituents who live there."

Justice Breyer, in addition to joining Justice Stevens's opinion, wrote separately to describe why he believed that the plan violated the Constitution:

[B]ecause the plan entrenches the Republican Party, the State cannot successfully defend it as an effort simply to neutralize the Democratic Party's previous political gerrymander. Nor has the State tried to justify the plan on nonpartisan grounds, either as an effort to achieve legislative stability by avoiding legislative exaggeration of small shifts in party preferences or in any other way.

In sum, "the risk of entrenchment is demonstrated," "partisan considerations [have] render[ed] the traditional district-drawing compromises irrelevant," and "no justification other than party advantage can be found." The record reveals a plan that overwhelmingly relies upon the unjustified use of purely partisan line-drawing considerations and which will likely have seriously harmful electoral consequences. For these reasons, I believe the plan in its entirety violates the Equal Protection Clause.

Justices Souter and Ginsburg adhered to their view, set forth in Vieth, as to the proper test for political gerrymandering, but concluded that there was "nothing to be gained by working through these cases on th[at] standard" because, like in Vieth, the Court "ha[d] no majority for any single criterion of impermissible gerrymander." Chief Justice

Roberts, joined by Justice Alito, agreed with Justice Kennedy "that appellants ha[d] not provided a reliable standard for identifying unconstitutional political gerrymanders," but took no position as to "whether appellants ha[d] failed to state a claim on which relief can be granted, or ha[d] failed to present a justiciable controversy." Finally, Justices Scalia and Thomas reiterated their view that the voters' political gerrymandering claims were nonjusticiable.

5.

In its consideration of the reapportionment issue, the Court has acknowledged that the appropriate analysis is grounded not only in its jurisprudence of equal protection, but also its jurisprudence of associational rights under the First Amendment. The gravamen of an equal protection claim is that a state has burdened artificially a voter's ballot so that it has less weight than another person's vote. A year after Reynolds, the Court again articulated this concept in Fortson v. Dorsey, when it evaluated whether multimember legislative districts had a constitutionally impermissible impact on the weight of African–American voters. There, the Court reiterated its concern that voters' ability to participate in the electoral process was unequal. While declining to hold multimember districts were unconstitutional per se, it noted that "designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, [might] operate to minimize or cancel out the voting strength of racial or political elements of the voting population." Again, in White v. Regester, the Court held that certain multimember districts were violative of the Constitution when the plaintiffs produced evidence that an election was not "equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." In Gaffney, the Court again noted that apportionment plans that "invidiously minimize[ ]" the voting strength of "political groups" "may be vulnerable" to constitutional challenges.

In these cases, the Court's emphasis on ensuring that an individual's vote receive the same weight as every other person's vote necessarily implicates that individual's associational rights. The Court previously has observed the link between the right to vote and the right to associate in its ballot-access cases. One of the foundational ballot-access cases, involved a challenge to a state law which required independent candidates to file their nominating petitions seventy-five days before the primary election in order to qualify for the general election ballot. The Court observed that the statute in question implicated both the "right to vote" and "freedom of association": "Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends."

The Court then outlined the analysis a court must undertake in considering a challenge to a state's election law:

"It 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. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the

reviewing court in a position to decide whether the challenged provision is unconstitutional."

Applying these steps, the Court determined that the early filing deadline at issue in Anderson placed a burden on independent parties and that "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group." After considering the state's interests in keeping voters well-educated about the candidates, being fair to the parties who hold primaries, and ensuring political stability, the Court held that there was an unconstitutional burden on "the interests of the voters who chose to associate together to express their support for [an independent's] candidacy and the views he espoused." The Court also noted that, in reaching its conclusion, it was relying "directly on the First and Fourteenth Amendments" and was "not engag[ing] in a separate Equal Protection Clause analysis." It had relied, however,

"on the analysis in a number of our prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment. These cases, applying the "fundamental rights" strand of equal protection analysis, have identified the First and Fourteenth Amendment rights implicated by restrictions on the eligibility of voters and candidates, and have considered the degree to which the State's restrictions further legitimate state interests."

Since Anderson, the Court has continued to assess election laws through the lens of the First and Fourteenth Amendments, without explicit reference to the Equal Protection Clause. In evaluating election laws, the Court employs a multi-step process that looks at the totality of the circumstances:

"When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms."

Nevertheless, the close relationship between equal protection and associational rights is clear. For example, one of the equal protection cases relied upon in Anderson, the Court considered the constitutionality of a law which required new political parties to obtain the signatures of electors equaling 15% of the number of ballots cast in the preceding gubernatorial election. It stated:

[W]e have ... held many times that "invidious" distinctions cannot be enacted without a violation of the Equal Protection Clause. In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification. In the present situation the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of

association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States. Similarly we have said with reference to the right to vote: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."

The Court held that the law in question was unconstitutionally burdensome on new political parties.

We therefore believe that there is a solid basis for considering the associational aspect of voting in assessing the gravamen of the harm allegedly suffered by the plaintiffs. Indeed, in this case, the associational harm is especially important to the analysis because the testimony of the defendants' witnesses as well as the plaintiffs' demonstrate that, given the legislative practice and custom of Wisconsin, legislative action is controlled, as a practical matter, solely by the majority caucus. In such a circumstance, when the state places an artificial burden on the ability of voters of a certain political persuasion to form a legislative majority, it necessarily diminishes the weight of the vote of each of those voters when compared to the votes of individuals favoring another view. The burdened voter simply has a diminished or even no opportunity to effect a legislative majority. That voter is, in essence, an unequal participant in the decisions of the body politic.

On the facts presented in past cases, some members of the Supreme Court have expressed the view that judicial enforcement of the principle that each voter has a right to have his vote treated equally must be limited to situations where the dilution is based on classifications such as race and population. These reservations have been grounded in the concern that distinguishing between legitimate and illegitimate political motivations is not a task to be undertaken by judges. In their view, moreover, there are insurmountable problems in formulating manageable standards. Other Justices have not accepted such a limitation. As we shall discuss at greater length later, however, this case does not present these conundrums. We are not presented with the problem of distinguishing between permissible and impermissible political motivations. We have a far more straight-forward situation. The plaintiffs have established, on this record, that the defendants intended and accomplished an entrenchment of the Republican Party likely to endure for the entire decennial period. They did so when the legitimate redistricting considerations neither required nor warranted the implementation of such a plan.

IV

ELEMENTS OF THE CAUSE OF ACTION

As our description of the case law reveals, the law governing political gerrymandering, still in its incipient stages, is in a state of considerable flux. We must, however, accept that situation and seek in these authorities a solution to the case before us. Therefore, while not discounting the difficulty of the task before us, we now identify the guideposts available to us.

We begin with a principle that is beyond dispute. State legislative apportionment is the prerogative and therefore a duty of the political branches of the state government. We must "recognize[ ] the delicacy of intruding on this most political of legislative functions." We also know that we cannot rely on the simple finding "that political classifications were applied." Similarly, "the

mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination."

It is clear that the First Amendment and the Equal Protection Clause protect a citizen against state discrimination as to the weight of his or her vote when that discrimination is based on the political preferences of the voter. This principle applies not simply to disparities in raw population, but also to other aspects of districting that "operate to minimize or cancel out the voting strength of racial or political elements of the voting population." Specifically, apportionment plans that "invidiously minimize[ ]" the voting strength of "political groups" "may be vulnerable" to constitutional challenges, because "each political group in a State should have the same chance to elect representatives of its choice as any other political group,"

We conclude, therefore, that the First Amendment and the Equal Protection clause prohibit a redistricting scheme which (1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds.

A. Discriminatory Intent or Purpose

The Supreme Court has stressed the "basic equal protection principle that the invidious quality of a law ... must ultimately be traced to a discriminatory purpose." A legislature's discriminatory intent also factors into a First Amendment analysis.

The Court explicitly has held that equal protection challenges to redistricting plans require a showing of discriminatory purpose or intent. This requirement applies with equal force to cases involving political gerrymanders.

1.

When considering the level of partisan intent necessary to establish a political-gerrymandering claim, our first task is to determine what kind of partisan intent offends the Constitution. The plurality in Bandemer simply required a plaintiff to show any level of "intentional discrimination against an identifiable political group." It suggested that "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." A majority of the Court in Vieth, however, rejected the Bandemer plurality's test, which included this standard of intent.

At the outset, we note that the Court recently has acknowledged that the constitutionality of partisan favoritism in redistricting is an open question. Nevertheless, we know that legislatures may employ some political considerations when making redistricting decisions; considerations such as achieving "political fairness," and "avoiding contests between incumbent[s]," are permissible.

That some political considerations may intrude into the redistricting process without running afoul of the Constitution, however, does not answer the question whether partisan favoritism is permissible. The Court's members appear to acknowledge that some level of partisanship is permissible, or at least inevitable, in redistricting legislation. The plurality in Vieth, for instance, noted that "partisan districting is a lawful and common practice." In his opinion, Justice Kennedy observed that political classifications are "generally permissible." Justices Souter and Breyer, dissenting in Vieth, expressed the view that partisan favoritism in some form was inevitable, if not necessarily desirable.

Other justices, however, have not acknowledged that political affiliation is "an appropriate standard for excluding voters

from a congressional district." Even so, these justices have proposed tests that "cover only a few meritorious claims" and "preclude extreme abuses" of the districting process.

As a starting point, it is safe to say that this concept of abuse of power seems at the core of the Court's approach to partisan gerrymandering. In Arizona State Legislature v. Arizona Independent Redistricting Commission, the Court defined partisan gerrymandering as "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power." Justice Kennedy noted in Vieth that a claim of partisan gerrymandering "must rest ... on a conclusion that [political] classifications ... were applied in an invidious manner or in a way unrelated to any legitimate legislative objective." The plurality, as well, acknowledged that "an excessive injection of politics is un lawful." And Justice Breyer in dissent observed that there was "at least one circumstance where use of purely political boundary-drawing factors can amount to a serious, and remediable, abuse, namely, the unjustified use of political factors to entrench a minority in power."

When "acceptable"—or at least tolerable—crosses a line to become "excessive," however, remains unclear. Moreover, as Justice Kennedy warns, a standard of excessiveness has its drawbacks:

"[C]ourts must be cautious about adopting a standard that turns on whether the partisan interests in the redistricting process were excessive. Excessiveness is not easily determined. Consider these apportionment schemes: In one State, Party X controls the apportionment process and draws the lines so it captures every congressional seat. In three other States, Party Y controls the apportionment process. It is not so blatant or egregious, but proceeds by a more subtle effort, capturing less than all the seats in each State. Still, the total effect of party Y's effort is to capture more new seats than Party X captured. Party X's gerrymander was more egregious. Party Y's gerrymander was more subtle. In my view, however, each is culpable."

"Excessiveness" does not need to be defined simply in terms of raw seat tallies. The danger with extreme partisan gerrymanders is that they entrench a political party in power, making that party—and therefore the state government—impervious to the interests of citizens affiliated with other political parties. This imperviousness may be achieved by manipulating a map to achieve a supermajority. But it also may be achieved by "lock[ing]-in" or creating the requisite "safe seats" such that legislators "elected from such safe districts need not worry much about the possibility of shifting majorities" and "have little reason to be responsive to the political minorities within their district."

When a party is "locked-in" through the intentional manipulation of legislative districts, "representational harms" to those affiliated with the "out"-party necessarily ensue. Specifically, "in addition to the possibility that a representative may believe her job is only to represent the interests of a dominant constituency, a representative may feel more beholden to the cartographers who drew her district than to the constituents who live there." The result is a system that assigns different weights to the votes of citizens and accords to those citizens different levels of legislative responsiveness based on the party with which they associate.

Whatever gray may span the area between acceptable and excessive, an intent to entrench a political party in power signals an excessive injection of politics into the redistricting process that impinges on the representational rights of those associated with the party out of power. Such a showing,

therefore, satisfies the intent requirement for an equal protection violation.

2.

A " 'discriminatory purpose' ... implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part, 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." The plaintiffs therefore must show that the intent to entrench the Republican Party in power was "a motivating factor in the decision." It need not be the "sole[ ]" intent or even "the 'dominant' or 'primary' one." Indeed, it rarely can "be said that a legislature or administrative body operating under a broad mandate made a decision motivated by a single concern." This is certainly true in redistricting legislation where the Court has identified "traditional districting principles such as compactness, contiguity, and respect for political subdivisions" that legitimately may inform drafters in the drawing of district lines.

Relying on traditional districting principles, defendants propose a novel rule: a redistricting plan that "is consistent with, and not a radical departure from, prior plans with respect to traditional districting principles" cannot, as a matter of law, evince an unconstitutional intent. In other words, compliance with traditional districting principles necessarily creates a constitutional "safe harbor" for state legislatures.

The defendants' approach finds no support in the law. It is entirely possible to conform to legitimate redistricting purposes but still violate the Fourteenth Amendment because the discriminatory action is an operative factor in choosing the plan. Indeed, the Court rejected a similar claim in Fortson: while acknowledging that there was no "mathematical disparity" that violated the principle of "one-person, one-vote," it did not rule out the possibility that a districting plan, which included multimember districts, could "operate to minimize or cancel out the voting strength of racial or political elements of the voting population." Similarly, in Gaffney, the Court observed that "[s]tate legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment."

Moreover, the Court has made clear that "traditional districting principles" are not synonymous with equal protection requirements. Instead, they "are objective factors that may serve to defeat a claim that a district has been gerrymandered." In other words, they are constitutionally permissible, but not "constitutionally required." Id. Individual Justices also have noted that a map's compliance with traditional districting principles does not necessarily speak to whether a map constitutes a partisan gerrymander:

> "[E]ven those criteria that might seem promising at the outset (e.g., contiguity and compactness) are not altogether sound as independent judicial standards for measuring a burden on representational rights. They cannot promise political neutrality when used as the basis for relief."

Highly sophisticated mapping software now allows lawmakers to pursue partisan advantage without sacrificing compliance with traditional districting criteria. A map that appears congruent and compact to the naked eye may in fact be an intentional and highly effective partisan gerrymander. When reviewing intent, therefore, we cannot simply ask whether a plan complied with traditional districting principles. Therefore, the defendants' contention—that, having adhered to traditional districting principles, they have satisfied the requirements of equal protection—is without merit.

We therefore must confront the question of how we are to discern whether, in creating the map that became Act 43, the drafters employed an impermissible intent—cutting out for the long-term those of a particular political affiliation. In assuming this task, we are mindful that "[i]nquiries into congressional [and other legislative bodies'] motives or purposes are a hazardous matter." When the issue is one of "mixed intent" as it is here, "[e]valuating the legality of acts ... can be complex .... When the actor is a legislature and the act is a composite of manifold choices, the task can be even more daunting." "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," including (1) "[t]he impact of the official action" as "an important starting point"; (2) "the historical background of the decision"; (3) "[t]he specific sequence of events leading up to the challenged decision"; (4) "[d]epartures from the normal procedural sequence"; (5) "legislative or administrative history ..., especially ... contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports."

However, discerning the intent of a legislative body can be less daunting in some cases than in others. In some cases, the legislature is aware that a distinction is constitutionally impermissible and surreptitiously attempts to create legislation on the basis of that distinction. These cases require that we engage in a careful inquiry of circumstantial evidence, because the drafters' intent often is hidden from the casual observer. In other cases, a legislature seems unaware that a distinction is constitutionally impermissible and deliberately enacts legislation on the basis of that distinction. This situation typically arises in periods before the Supreme Court has illuminated the full meaning of a constitutional right. In these cases, courts are able to discern the legislature's intent more easily and less intrusively because the evidence is far more direct.

This case falls more in the latter category. The Court never has invalidated a redistricting plan on the ground of partisan gerrymandering, and the Court's recent pronouncements have caused some district courts to question the viability of the cause of action. Here, the record demonstrates that, although the drafters were aware of some constitutional limits on the degree to which they could neutralize the political power of the opposition party, those limits were not firmly established.

We therefore turn to the sequence of events that led to the enactment of Act 43 to discern whether one purpose behind the legislation was to entrench a political party in power.

3.

a. Evidence of intent

The evidence at trial establishes that one purpose of Act 43 was to secure the Republican Party's control of the state legislature for the decennial period. The drafters' concern with the durable partisan complexion of the new Assembly map was present from the outset of the legislative process. Ottman, Foltz, and Handrick began drafting the map that would become Act 43 in April 2011. One of their first orders of business was to develop a composite partisan score that accurately reflected the political makeup of population units, which would allow them to assess the partisan make-up of the new districts. When they came up with a composite of "all statewide races from [20]04 to 2010" that "seem[ed] to work well," they sent it to Professor Gaddie.

Professor Gaddie, the "advisor on the appropriate racial and/or political make-up of legislative ... districts," "buil[t] a regression

model ... to test the partisan makeup and performance of districts as they might be configured in different ways." Professor Gaddie then tested the drafters' composite measure against his model and confirmed that their measure was "almost a perfect proxy for the open seat vote, and the best proxy you'll come up with." Professor Mayer testified that the drafters' composite measure correlated very strongly with his own measure of partisanship, which led him to conclude that "they knew exactly what they were doing, that they had a very accurate estimate of the underlying partisanship of the Act 43 maps."

Once Ottman, Foltz, and Handrick received Professor Gaddie's imprimatur on their composite measure, they employed this measure "to assess the partisan impact of the map[s] that [they] drew." We find that the maps the drafters generated, as well as the statistical comparisons made of the various maps, reveal that a focal point of the drafters' efforts was a map that would solidify Republican control. The maps often bore names that reflected the level of partisan advantage achieved. For instance, maps labeled "aggressive" referenced "a more aggressive map with regard to GOP leaning." When producing these more advantageous maps, the drafters did not abandon traditional districting criteria; to the contrary, the maps complied with traditional districting criteria while also ensuring a significant partisan advantage.

The drafters also created spreadsheets that collected the partisan scores, by district, for each of the map alternatives. For each spreadsheet, there was a corresponding table that listed the number of "Safe" Republican seats, "Lean" Republican seats, "Swing" seats, "Safe" Democratic seats, and "Lean" Democratic seats; these figures also were compared to the number of seats in each category under the Current Map, the map drawn by the court in Baumgart v. Wendelberger.

The process of drafting and evaluating these alternative district maps spanned several months. In April, the drafters produced a document comparing the partisan performance of the Current Map to two early draft maps: Joe's Basemap Basic and Joe's Basemap Assertive. Under the Current Map, the drafters anticipated that the Republicans would win 49191 Assembly seats. This number increased to 52 under the Joe's Basemap Basic map and to 56 under the Joe's Basemap Assertive map. The number of safe and leaning Republican seats increased from 40 under the Current Map to 45 under the Joe's Basemap Basic map and 49 under the Joe's Basemap Assertive map; the number of swing seats decreased from 19 to 14 to 12. The number of safe and leaning Democratic seats, however, remained roughly the same under all three maps, hovering between 38 and 40.

The drafters prepared and evaluated the partisan performance of at least another six statewide alternative maps.196 Each of these maps improved upon the anticipated pro-Republican advantage generated in the initial two draft plans. The total number of expected Republican seats now ranged between 57 and 60, and the number of swing seats was diminished to between 6 and 11. The number of Democratic seats again remained about the same under each draft map.

The drafters sent their completed draft maps to Professor Gaddie, who created a visual "S" curve for each map. These "S" curves show how each map would operate within an array of electoral outcomes. To produce the "S" curves, Professor Gaddie calculated the expected partisan vote shares for each district. He then shifted the vote share of each district ten points in either direction, from 40% to 60%, and assigned a color to districts that "lean[ed]" towards, or were "safe" seats

for that party. Professor Gaddie explained that his analysis "was designed to tease out a potential estimated vote" under a range of electoral scenarios, when either "the Democrats have a good year" or "the Republicans have a good year." At bottom, the "S" curves—at least some of which were printed in large format and kept in the map room—allowed a non-statistician, by mere visual inspection, to assess the partisan performance of a particular map under all likely electoral scenarios. On one occasion, Professor Gaddie showed the "S" curves to Senator Fitzgerald and explained to the Senator "how to interpret" them.

Over several days in early June, the drafters presented a selection of regional maps drawn from their statewide drafts, approximately three to four per region, to the Republican leadership. Along with these regional alternatives, the leadership "saw the partisan scores for the maps that [the drafters] presented to them in those alternatives." Foltz testified during his deposition that although he could not recall a particular example, he was sure that he was asked by the leadership about the partisan performance of the various regional options.

Following this meeting, the drafters amalgamated the regional alternatives chosen by the leadership. Foltz testified that "the draft map called team map emerged as a result of the ... leadership's choices at those meetings." Under the Team Map, which was also referred to as the "Final Map,"208 the Republicans could expect to win 59 Assembly seats, with 38 safe Republican seats, 14 leaning Republican, 10 swing, 4 leaning Democratic, and 33 safe Democratic seats. In the Tale of the Tape, the drafters compared the partisan performance of the Team Map directly to the Current Map on each of these criteria.210 They highlighted specifically that under the Current Map, "49 seats are 50% or better," but under the Team Map, "59 Assembly seats are 50% or better."

The Team Map underwent even more intense partisan scrutiny in a document identified as "summary.xlsx." The drafters divided the new Team Map districts into six categories of partisan performance, listing beside each district its "new incumbent" and its Republican vote share under the Current Map and the Team Map; the change in Republican vote share was the district's "improvement" under the new plan. The drafters considered five districts to be "Statistical Pick Up[s]," meaning they were currently held by a Democratic incumbent but "move[d] to 55% or better" in Republican vote share under the new Team Map. Fourteen districts were grouped under the heading "GOP seats strengthened a lot," meaning they were "[c]urrently held GOP seats that start[ed] at 55% or below that improve[d] by at least 1%" in Republican vote share.215 Eleven districts were "GOP seats strengthened a little," meaning they "improve[d] less than 1%."216 Only three districts were labeled "GOP seats weakened a little," meaning they had "start [ed] at 55% or below" but "decline[d]" slightly in Republican vote share.217 Another three districts were "GOP seats likely lost," *894 meaning they had "drop[ped] below 45%" Republican vote share under the Team Map. Finally, the drafters noted four districts where Democrats were "weakened," which were districts with "45% or better" Democratic vote share "that bec[a]me more GOP" under the Team Map. The drafters also identified twenty Republican Assembly members who enjoyed sufficiently comfortable partisan scores such that they could become "GOP donors to the team." These were members of the Assembly who had partisan scores of 55% or greater and, therefore, could spread their partisan voting strength to politically weaker colleagues.

The Team Map also was sent to Professor Gaddie. The "S" curve demonstrates that this map would allow the Republicans to maintain a comfortable majority under likely voting scenarios; their statewide vote share could fall to 48%, and they still would preserve a 54 seat majority in the Assembly. The Democrats, by contrast, would need 54% of the statewide vote to capture a simple majority of Assembly seats.

Once the map had been finalized, Foltz presented each Republican member of the Assembly with information on his or her new district. These memos provided a "[c]omparison of [k]ey [r]aces" in the new districts compared to the old. Specifically, the memoranda detailed what percentage of the population in the old and new districts voted for Republican candidates in representative statewide and national elections held since 2004. Importantly, the memoranda did not provide the individual legislators with any information about contiguity, compactness, or core population.

Additionally, Ottman made a presentation to the Republican caucus that highlighted the long-term effects of Act 43, as reflected in his prepared notes: "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."

In sum, from the outset of the redistricting process, the drafters sought to understand the partisan effects of the maps they were drawing. They designed a measure of partisanship and confirmed the accuracy of this measure with Professor Gaddie. They used this measure to evaluate regional and statewide maps that they drew. They labeled their maps by reference to their partisanship scores, they evaluated partisan outcomes of the maps, and they compared the partisanship scores and partisan outcomes of the various maps. When they completed a statewide map, they submitted it to Professor Gaddie to assess the fortitude of the partisan design in the wake of various electoral outcomes.

The map that emerged from this process reduced markedly the possibility that the Democrats could regain control of the Assembly even with a majority of the statewide vote. The map that would become Act 43 had a pickup of 10 Assembly seats compared to the Current Map. As well, if their statewide vote fell below 48%, the design of Act 43 ensured that the Republicans would maintain a comfortable majority.

Finally, it is clear that the drafters were concerned with, and convinced of, the durability of their plan. Professor Gaddie confirmed the staying power of the Republican majority under the plan, and Ottman emphasized to the Republican caucus the long-term consequences of enacting the plan.

We conclude, therefore, that the evidence establishes that one of the purposes of Act 43 was to secure Republican control of the Assembly under any likely future electoral scenario for the remainder of the decade, in other words to entrench the Republican Party in power.

b. Alleged shortcomings in the evidence

The defendants point to the miscalculation of the composite measure, to limitations of the composite measure itself, and to the drafters' lack of reliance on Professor Gaddie's analysis as evidence that they did not have the requisite intent to subjugate the voting strength of Democrats. The defendants first note that the drafters' partisan score "was not even correct." Because of an error in the data for the 2006 Governor's race—one of the components for their composite measure—the drafters' numbers were skewed, and the resulting partisan scores were more pro-Republican than if the scores had been calculated with the correct data. However, as

the plaintiffs note, these errors may diminish the reliability of the composite measure, but they are irrelevant to the drafters' intent.

The defendants also disparage the notion that "the partisan scores were a crystal ball with predictive powers ensuring that Act 43 would lock Democrats out from seats that leaned Republican." They contend that their composite did not have a "forward-looking component," but was simply "an average of past elections applied to the new districts." We reject as not worthy of belief the assertion that the drafters would have expended the time to calculate a composite score for each district on the statewide maps simply to gain an historical understanding of voting behavior. Their measure was only useful to them—and the exercise of calculating the composite was only worth the effort—if it helped them assess how Republican representatives in the newly created districts likely would fare in future elections.

Moreover, each completed map was submitted to Professor Gaddie, who then generated an "S" curve. The "S" curves were designed to discern "the political potential of the district." Professor Gaddie explained that, when he used the term "potential," he meant "[i]f you had an election in the future, how might it turn out. So when I say potential ... this is our best estimate of what a non-incumbent election would look like given a particular set of circumstances, depending on whether one party is stronger or weaker."

According to the defendants, however, Professor Gaddie's "S" curves are irrelevant to the issue of intent because the drafters "didn't look at them much." We cannot accept that estimation of the importance of Professor Gaddie's work to the drafters. The record makes clear that the drafters sent Professor Gaddie their completed maps for which he produced "S" curves. Both Ottman and Foltz testified that, when the "S" curves were generated, Professor Gaddie provided an explanation of what they showed. That Ottman may not have used the "S" curves much once they were generated, or that Foltz was not able to explain their full significance at trial, five years later, does not diminish the fact that the drafters sought, and received, Professor Gaddie's expert analysis on how each map would behave under the range of likely electoral scenarios.

Finally, the defendants contend that the partisan intent shown by the evidence in this case cannot be considered invidious because Act 43's districts are consistent with traditional districting principles. However, as we have explained earlier, a plan that adheres to those principles can violate the Equal Protection Clause. Here, the evidence shows that one purpose of enacting Act 43 was to secure Republican control of the Wisconsin Assembly. In particular, the history of Act 43 reveals that the drafters created several alternatives that resulted in a less severe partisan outcome. Of the maps presented to them, the Republican leadership opted for a map that significantly increased the number of Republican-leaning districts compared to the Current Map. Further, the memos prepared for the Assembly members informed them whether the district number had changed, whether adjustment to the district population was necessary based on the census numbers, and provided a "[c]omparison of [k]ey [r]aces" in the new districts compared to the old, but provided little information regarding traditional districting factors.

These facts, in tandem with the overwhelming number of reports and memoranda addressing the partisan outcomes of the various maps, lead us to conclude that, although Act 43 complied with traditional redistricting principles, it nevertheless had as one of its objectives entrenching the Republicans' control of the Assembly.

B. Discriminatory Effect of Act 43

Act 43 also achieved the intended effect: it secured for Republicans a lasting Assembly majority. It did so by allocating votes among the newly created districts in such a way that, in any likely electoral scenario, the number of Republican seats would not drop below 50%. Through the combination of the actual election results for 2012 and 2014, the swing analyses performed by Professors Gaddie and Mayer, as well as the plaintiffs' proposed measure of asymmetry, the efficiency gap (or "EG"), the plaintiffs have "show[n] a burden, as measured by a reliable standard, on [their] representational rights."

1.

It is clear that the drafters got what they intended to get. There is no question that Act 43 was designed to make it more difficult for Democrats, compared to Republicans, to translate their votes into seats. In the Tale of the Tape, the drafters compared the partisan performance of the Team Map directly to the Current Map. Where the Current Map had only "49 [Assembly] seats" that were "50% or better" for Republicans, the Team Map increased that number by ten so that "59 Assembly seats" were designated as "50% or better" for Republicans. Moreover, under the Team Map that became Act 43, Republicans expected the following seat distribution: 38 safe Republican seats, 14 leaning Republican, 10 swing, 4 leaning Democratic, and 33 safe Democratic seats.

Professor Mayer explained the significance of this distribution at trial. Using the baseline partisan measure that he used to create his Demonstration Plan, Professor Mayer created a histogram that graphed the predicted percentage of Republican vote of each district (by 5% increments) on the x axis, and the number of districts that fell into each 5% increment on the y axis. The graph reveals that Act 43 includes 42 districts with predicted Republican vote percentages of between 50 and 60%; only seventeen districts have predicted Democratic vote percentages of between 50 and 60%. This demonstrates that, under Act 43, Republican voters are distributed over a larger number of districts so that they can secure a greater number of seats; in short, "Republicans are distributed in a much more efficient manner than Democrats." Professor Mayer's graph also reveals that there are only 15 districts with a predicted Republican vote percentage of 60% or greater; this is compared to 25 districts that have a predicted Democratic vote percentage of 60% or greater. In other words, Democrats have been packed into "safe" Democratic districts.

The 2012 and 2014 election results reveal that the drafters' design in distributing Republican voters to secure a legislative majority was, in fact, a success. In 2012, Republicans garnered 48.6% of the vote, but secured 60 seats in the Assembly.250 In 2014, Republicans increased their vote percentage to 52 and secured 63 Assembly seats.

Moreover, Professors Gaddie and Mayer testified that, consistent with what actually occurred in 2012 and 2014, under any likely electoral scenario, the Republicans would maintain a legislative majority. After Professors Gaddie and Mayer developed their regression models to measure baseline partisanship, each conducted a separate swing analysis to demonstrate this outcome. "What a swing analysis does," Professor Mayer explained, "is ask the question ... what might happen" under different electoral conditions. To determine this, "the statewide vote percentage" is altered by a fixed amount, typically in one-percentage-point increments, across all districts. "It's a way of, generally speaking, estimating what is a plausible outcome given a change in the statewide vote, which in this case a change in the statewide vote is a proxy for a different election environment, what might happen if

there's a pro-Democratic swing or a pro-Republican swing."

Professor Gaddie's swing analysis is contained in his "S" curves. His "S" curves include the electoral outcome for each map based on Republican statewide vote percentage ranging from 40% to 60%. The "S" curve for the Team Map demonstrates that, to maintain a comfortable majority (54 of 99 seats), Republicans only had to maintain their statewide vote share at 48%. The Democrats, by contrast, would need more than 54% of the statewide vote to obtain that many seats.

Professor Mayer's swing analysis did not include the wide-ranging electoral scenarios set forth in Professor Gaddie's "S" curves. Instead, Professor Mayer included only likely electoral scenarios in his analysis. He looked at the electoral outcomes dating back to 1992 and determined that the maximum statewide vote share the Democrats had received was 54% in 2006, or roughly 3% more than they had received in 2012. The minimum statewide vote share Democrats had received was 46% in 2010, or roughly 5% less than they had received in 2012. Professor Mayer's swing analysis, therefore, looked at how Act 43 would fare under these two scenarios—the Democrats receiving 46% of the vote, and the Democrats receiving 54% of the vote. Adjusting the Democratic vote share in each district by these amounts, Professor Mayer predicted that a 5% decrease in Democratic vote share would have no effect on the allocation of legislative seats; the Republicans would keep the 60 seats they had, but would not increase their numbers. When Democratic vote share increased by 3% to 54%, Professor Mayer predicted that the Democrats would secure only 45 seats.

However, both Professor Gaddie and Professor Mayer underestimated the strength of Act 43 when it came to securing and maintaining Republican control. When the Republican vote share dropped in 2012 to 48.6%, Republicans still secured 60 seats—10 more than what Professor Gaddie's "S" curve predicted. Additionally, when the Republican vote share increased in 2014 to 52%, the Republicans increased the number of seats they held by 3, as opposed to their seat share being stagnant, as predicted by Professor Mayer. In other words, the actual election results suggest that Act 43 is more resilient in the face of an increase in the statewide Democratic vote share, and is more responsive to an increase in the statewide Republican vote share, than either Professor Gaddie or Professor Mayer anticipated.

The fact that Democrats and Republicans were treated differently under Act 43 becomes even more stark when we examine the number of seats secured when the parties obtain roughly equivalent statewide vote shares. In 2012, the Democrats received 51.4% of the statewide vote, but that percentage translated into only 39 Assembly seats. A roughly equivalent vote share for Republicans (52% in 2014), however, translated into 63 seats—a 24 seat disparity. Moreover, when Democrats' vote share fell to 48% in 2014, that percentage translated into 36 Assembly seats. Again, a roughly equivalent vote share for Republicans (48.6% in 2012) translated into 60 seats—again a 24 seat disparity. The evidence establishes, therefore, that, even when Republicans are an electoral minority, their legislative power remains secure.

2.

The record here is not plagued by the infirmities that have precluded the Court, in previous cases, from concluding that a discriminatory effect has been established. In Bandemer, the Court made clear that plaintiffs could not establish a constitutional violation based "on a single election." This was because

"Indiana is a swing State. Voters sometimes prefer Democratic candidates, and sometimes Republican. The District Court did not find that because of the 1981 Act the Democrats could not in one of the next few elections secure a sufficient vote to take control of the assembly.... The District Court did not ask by what percentage the statewide Democratic vote would have had to increase to control either the House or the Senate. The appellants argue here, without a persuasive response from the appellees, that had the Democratic candidates received an additional few percentage points of the votes cast statewide, they would have obtained a majority of the seats in both houses. Nor was there any finding that the 1981 reapportionment would consign the Democrats to a minority status in the Assembly throughout the 1980's or that the Democrats would have no hope of doing any better in the reapportionment that would occur after the 1990 census. Without findings of this nature, the District Court erred in concluding that the 1981 Act violated the Equal Protection Clause."

The record here answers the shortcomings that the Bandemer plurality identified. First, we now have two elections under Act 43. In 2012, the Democrats garnered 51.4% of the vote, but secured only 39 seats in the Assembly—or 39.3% of the seats.267 In 2014, the Democrats garnered 48% of the vote and won only 36 seats—or 36.4% of the seats.268 If it is true that a redistricting "plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination," then a plan that deviates this strongly from the distribution of statewide power suggests the opposite.

Moreover, as described in some detail above, Professor Gaddie's "S" curve and Professor Mayer's swing analysis reveal that the Democrats are unlikely to regain control of the Assembly. And Act 43 has proven even more resistant to increases in Democratic vote share, and more responsive to increases in Republican vote share, than was predicted. Consequently, it is not the case that "an additional few percentage points of the votes cast statewide" for the Democrats will yield an Assembly majority.

Furthermore, because we have the actual election results to confirm the reliability of Professor Gaddie's model and "S"—curve analysis, we are not operating only in the realm of hypotheticals—a prospect that at least one member of the Court in LULAC found troubling. In LULAC, Justice Kennedy commented on a proposal by one of the amici to adopt a partisan-bias standard, which would compare how the two major parties "would fare hypothetically if they each (in turn) had received a given percentage of the vote." Justice Kennedy explained that,

"[e]ven assuming a court could choose reliably among different models of shifting voter preferences, we are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs. Presumably such a challenge could be litigated if and when the feared inequity arose."

Professor Gaddie's "S" curves and Professor Mayer's swing analysis, like a partisan-bias analysis, depend upon a hypothetical state of affairs: they assume a uniform increase or decrease in vote share across all districts—something that does not occur in actual elections. Here, however, the predictive work of the professors is combined with the results of two actual elections in which the feared inequity did arise.

3.

While the evidence we have just described certainly makes a firm case on the question of discriminatory effect, that evidence is further bolstered by the plaintiffs' use of the "efficiency gap," or EG for short, to

demonstrate that, under the circumstances presented here, their representational rights have been burdened. We begin with an explanation of the EG. Because the EG is a new measure and was the focus of extensive testimony at trial, we believe it appropriate to examine its value and shortcomings in detail.

a.

The allegations in this case are that Act 43's drafters employed two of the traditional methods of gerrymandering in order to diminish the electoral power of Democratic voters in Wisconsin: "packing" and "cracking." Packing refers to the concentration of a party's voters in a limited number of districts; as a result, the party wins these packed districts by large margins.270 Cracking, on the other hand, is the division of a party's voters across a number of districts such that the party is unable to achieve a majority in any. The EG is a measure of the degree of both cracking and packing of a particular party's voters that exists in a given district plan, based on an observed electoral result.

The EG calculation is relatively simple. First, it requires totaling, for each party, statewide, (1) the number of votes cast for the losing candidates in district races (as a measure of cracked voters), along with (2) the number of votes cast for the winning candidates in excess of the 50% plus one votes necessary to secure the candidate's victory (as a measure of packed voters). The resulting figure is the total number of "wasted" votes for each party. These wasted vote totals are not, of themselves, independently significant for EG purposes; rather, it is the comparative relationship of one party's wasted votes to another's that yields the EG measure. The EG is the difference between the wasted votes cast for each party, divided by the overall number of votes cast in the election. When the two parties waste votes at an identical rate, the plan's EG is equal to zero. An EG in favor of one party (Party A), however, means that Party A wasted votes at a lower rate than the opposing party (Party B). It is in this sense that the EG is a measure of efficiency: because Party A wasted fewer votes than Party B, Party A was able to translate, with greater ease, its share of the total votes cast in the election into legislative seats. Put simply, an EG in Party A's favor means it carried less electoral dead weight; its votes were, statistically, more necessary to the victories of its candidates, and, consequently, it secured a greater proportion of the legislative seats than it would have secured had Party A and Party B wasted votes at the same rate.

In a related sense, the EG can be viewed as a measure of the proportion of "excess" seats that a party secured in an election beyond what the party would be expected to obtain with a given share of the vote. In a purely proportional representation system, a party would be expected to pick up votes and seats at a one-to-one ratio, i.e., for every additional percentage of the statewide vote the party gains, it should also gain a percentage in the share of the seats. Based on decades of observed historical data, however, the parties' experts agreed that with single-member, simple-plurality systems like Wisconsin's, we can expect that for every 1% increase in a party's vote share, its seat share will increase by roughly 2%. Thus, a party that gets 52% of the statewide vote should be expected to secure 54% of the legislative seats. If the party instead translates its 52% of the vote into 58% of the seats, the district plan has demonstrated an EG of 4% in favor of that party (the difference between the expected seat share and the actual seat share).

Both Professors Mayer and Jackman calculated the EG for the 2012 Assembly elections in Wisconsin. In his analysis, Professor Mayer employed the "full method," which requires aggregating, district-by-district, the wasted votes cast for

each party. Applying this methodology, he determined that Act 43 yielded a pro-Republican EG of 11.69%. Professor Jackman, however, used the "simplified method," that assumes equal voter turnout at the district level. His calculations estimated a pro-Republican EG of 13% for the 2012 election. Professor Jackman also calculated an EG for the 2014 election; that calculation resulted in a pro-Republican EG of 10%.

Professor Jackman also conducted an historical analysis of redistricting plans which compared the trends in efficiency gaps across a wide variety of states over the last forty years (a total of 786 state legislative elections). He observed that an EG in the first year after a districting plan is enacted bears a relatively strong relationship to the efficiency gap over the life of a plan. The party that "wastes" more votes in the first election year is likely to continue "wasting" more votes in future elections.

Relatedly, Professor Jackman conducted two additional analyses which suggest that an efficiency gap above 7% in any districting plan's first election year will continue to favor that party for the life of the plan. First, Professor Jackman compared districting plans across a wide variety of states, and determined that over 95% of plans with an EG of at least 7% will never have an EG that favors the opposite party. Second, Professor Jackman conducted a "swing analysis" of all redistricting plans since 2010 and determined that nearly all plans that resulted in a 7% efficiency gap favoring one party in the first election year will retain an efficiency gap that favors that same party, even when one adjusts a party's statewide vote share by five points.

Professor Jackman then compared his EG estimates for Act 43 with the historical EG estimates from other states. Given historical trends and averages, he opined that Wisconsin's plan would have an average pro-Republican efficiency gap of 9.5% for the entire decennial period. Therefore, in his expert opinion, Wisconsin Democrats would continue to have a less effective vote for the life of the plan. Barring an "unprecedented political earthquake," Democrats would be at an electoral disadvantage for the duration of Act 43.

Professor Jackman also presented a swing analysis that was specific to Wisconsin. He relied on the actual results from 2012 in each district in Wisconsin and then adjusted the vote in each district based on a 5% swing in each party's vote share. He then calculated the EG for each of these vote-share levels. Professor Jackman observed that, even with a 5% swing in the Democrats' favor, the EG would not drop below 7%.

As we already have seen, this more efficient distribution of Republican voters has allowed the Republican Party to translate its votes into seats with significantly greater ease and to achieve—and preserve—control of the Wisconsin legislature. In both elections held under Act 43, the Republicans obtained a far greater proportion of the Assembly's 99 seats than they would have without the leverage of a considerable and favorable EG. In 2012, the Republicans won 61% of Assembly seats with only 48.6% of the statewide vote, resulting in a 13% EG in their favor. In 2014, the Republicans garnered 52% of the statewide vote but secured 64% of Assembly seats, resulting in a pro-Republican EG of 10%.295 Thus, the Republican Party in 2012 won about 13 Assembly seats in excess of what a party would be expected to win with 49% of the statewide vote, and in 2014 it won about 10 more Assembly seats than would be expected with 52% of the vote.

Moreover, the expert testimony before us indicates that the Republican Party's comparative electoral advantage under Act 43 will persist throughout the decennial period; Democratic voters will continue to find it more difficult to affect district-level

outcomes, and, as a result, Republicans will continue to enjoy a substantial advantage in converting their votes into seats and in securing and maintaining control of the Assembly.

b.

The defendants have made a number of legal, methodological, and policy-based attacks against judicial use of the EG as a measure of a district plan's partisan effect. We begin with their claim that use of the EG is foreclosed by Supreme Court precedent. The Supreme Court has made clear that the Constitution does not require that a map result in each party gaining a share of the legislative seats in proportion to their share of the statewide vote. ("To be sure, there is no constitutional requirement of proportional representation ...."). The defendants have argued throughout this action that this precept forecloses the use of any metric that employs a votes-to-seats relationship as its starting point to measure a plan's partisan effect. The EG, they say, is rooted in a baseline requirement that a district plan deliver hyper-proportional representation in the form of the 2-to-1 seats-to-votes ratio described above and is therefore unavailable for use as a measure of discriminatory effect.

We cannot accept this argument. To say that the Constitution does not require proportional representation is not to say that highly dis proportional representation may not be evidence of a discriminatory effect. Indeed, acknowledging that the Constitution does not require proportionality, Justice Kennedy observed in LULAC that "a congressional plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority." We do not believe, therefore, that the Constitution precludes us from looking at the ratio of votes to seats in assessing a plan's partisan effect.

As it has been presented here, the EG does not impermissibly require that each party receive a share of the seats in proportion to its vote share. Rather, the EG measures the magnitude of a plan's deviation from the relationship we would expect to observe between votes and seats. We do not believe Vieth or LULAC preclude our consideration of the EG measure.

We turn next to what are best described as methodological and operational critiques of the EG measure. First, the defendants point out that the plaintiffs have proposed two distinct methods for calculating the EG. The differing approaches can yield materially different EG values, which, in turn, will produce uncertainty in the maps that should be subject to judicial scrutiny. As explained previously, Professor Mayer employed the "full method," which included aggregating every district's wasted votes for each party. Professor Jackman used the "simplified method" that assumes equal voter turnout at the district level. These two methods produce identical results when voter turnout is equal across districts; however, where voter turnout varies, as it does in Wisconsin, the EG measure will differ depending on the method used.

Although we view the full method as preferable because it accounts for the reality that voters do not go to the polls at equal rates across districts, we do not believe that this calls into question Professor Jackman's use of the simplified method in his analysis. Professor Goedert in his expert report described the simplified method as "an appropriate and useful summary measure" for calculating the EG,302 and the parties have stipulated that the shortcut's implied 2-to-1 votes-to-seats relationship reflects the "observed average seat/votes curve in historical U.S. congressional and legislative elections." Were there record evidence indicating that Professor Jackman's shortcut

did not correlate highly with both the full method and electoral reality, we would have reason to doubt its validity. Because this is not the case here, we are not troubled by the existence of distinct methods of calculating the EG. Moreover, we are not addressing a legislative plan that is at the statistical margins. In this case, both methods yield an historically large, pro-Republican EG.

The defendants also contend that the EG, as an indicator of partisan gerrymandering, is both overinclusive and underinclusive. They presented evidence that districting plans, which had been put in place by courts, commissions, or divided governments, sometimes register high EG values.304 Conversely, the defendants pointed to several congressional districting plans that are commonly understood as partisan gerrymanders but registered low EG values or even EG values favoring the party that did not create the districting map. We do not share this particular concern. If a nonpartisan or bipartisan plan displays a high EG, the remaining components of the analysis will prevent a finding of a constitutional violation. For example, if a claim of partisan gerrymandering is brought against a court- or commission-drawn district plan with a high EG, it will stall when the plaintiffs attempt to make the necessary showing of discriminatory intent. In the same way, a challenge to a map enacted with egregious partisan intent but demonstrating a low EG also will fail because the plaintiffs cannot demonstrate the required discriminatory effect. The present case, of course, does not present either of these situations. Here, the plaintiffs have put forward sufficient evidence showing both that Act 43 was enacted with impermissible intent and that it demonstrates a large and durable EG value.

Lastly, the defendants argue that the EG measure is overly sensitive to small changes in voter preferences. At trial, Mr. Trende testified that the EG will vary depending on whether there is a national wave in the electorate favoring one party or the other. He described a hypothetical scenario in which a national pro-Republican wave resulted in an increase in Republican vote share in every district of two points above the otherwise expected Republican vote share. This slight change, Mr. Trende explained, could alter the outcomes in particularly close races and thus produce a significantly different EG value than if the national wave had not occurred. Professor Goedert raised a related point. He suggested that assessing a given plan based on the results of the first observed election under the plan is arbitrary and may yield problematic results if that first election happens to be a national wave election.

We acknowledge these as legitimate criticisms of the EG measure generally; however, they are less compelling in the context of this case. Both concerns are rooted in an EG being drawn from only a single election, which, for any number of reasons, may represent an electoral aberration. Here we have the results of two elections under Act 43, one in which the Republicans failed to garner a majority of the statewide vote (2012), and one in which they exceeded it by two percentage points. Under both electoral scenarios, there was a sizeable pro-Republican efficiency gap: 13% in 2012 and 10% in 2014.

Even in the absence of these results, however, there is evidence in the record that establishes the durability of Act 43's pro-Republican efficiency gap. Professor Jackman conducted an historical analysis of redistricting plans which compared the trends in efficiency gaps across a wide variety of states over the last forty years (totaling 786 state legislative elections). Based on this analysis, Professor Jackman estimated that Wisconsin's plan, with an initial pro-Republican efficiency gap of 13.3%, would have a plan average pro-

Republican efficiency gap of 9.5%. In other words, the Republicans' ability to translate their votes into seats will continue at a significantly advantageous rate through the decennial period.

Moreover, Mr. Trende himself attested to the durability of Act 43's EG in the face of a wave election. In his expert report, Mr. Trende observed that if the Democrats engaged in a "modestly better effort" to get out the vote, and secured just 600 more votes in Districts 1 and 94, the "EG falls by more than two points off these modest shifts, to 9.466." Nevertheless, Mr. Trende conceded that, although such a shift might affect the EG's applications in other contexts, it "would not make a difference in terms of whether the Wisconsin map invited Court scrutiny" because the EG still was above the plaintiffs' proposed threshold of 7%.

The defendants also raise policy-based objections to the EG as a measure of discriminatory effect. First, they claim that the creation of many competitive districts, which may be a desirable and non-partisan policy choice, will result in a highly sensitive map in which the EG could swing rather wildly with even mild electoral shifts. We do not doubt this is the case. However, as with some of the criticisms that we already have discussed, this concern is ameliorated by other aspects of the equal protection analysis. It would be difficult to establish that drafters who designed a map with many competitive districts had the requisite partisan intent to show a constitutional violation.

The defendants similarly claim that identifying an EG of zero as the baseline or ideal would discourage states from enacting systems of proportional representation. Professor Goedert in particular noted that if a state successfully achieved proportional representation, the plan might fail an EG analysis because it fails to give a hyper proportional share to the party winning the majority of the statewide vote. Again, however, drafters who had the intent to create a proportional system hardly could be accused of harboring a discriminatory intent. Moreover, the defendants have offered no evidence that Act 43's drafters had any interest in hewing closely to proportional representation; indeed, the evidence is directly to the contrary. For these reasons, we are not persuaded that the policy objections to the EG bear any relationship to this case. We further emphasize, in any event, that we have not determined that a particular measure of EG establishes presumptive unconstitutionality, which itself diminishes all of the defendants' policy-based arguments. Instead, we acknowledge that the expert opinions in this case have persuaded us that, on the facts before us, the EG is corroborative evidence of an aggressive partisan gerrymander that was both intended and likely to persist for the life of the plan.

In sum, we conclude that the plaintiffs have established, by a preponderance of the evidence, that Act 43 burdens the representational rights of Democratic voters in Wisconsin by impeding their ability to translate their votes into legislative seats, not simply for one election but throughout the life of Act 43. We therefore turn our attention to whether the burden is justified by some legitimate state interest.

V

JUSTIFICATION

In the initial stages of this litigation, the plaintiffs took the view that, should they successfully establish the intent and effects elements of their constitutional claim, the burden should then shift to the defendants to show that Act 43's unlawful effects were " 'unavoidable' in light of the state's political geography and legitimate districting objectives." In our summary judgment order, we noted that "some type of burden-shifting

is appropriate," adding that "to the extent that plaintiffs have an initial burden to show that [Act 43] cannot be justified using neutral criteria," it was met at the summary judgment stage by their presentation of the Demonstration Plan. We left open the question of which party ultimately should bear the burden of proving Act 43's legitimacy. However, we rejected definitively the plaintiffs' "unavoidable" standard as an "overstate[ment]" of the degree of the burden.

In response, the plaintiffs reformulated the third step of their test to allow the defendants to avoid liability if they can justify Act 43's effects on the basis of legitimate districting goals or Wisconsin's natural political geography. They maintain, however, that it is the State's burden ultimately to prove that Act 43's effect is justified and not their burden to prove that it is not.

The defendants maintain that even this lesser showing is too demanding. They argue that because Act 43 complies with traditional districting objectives, its partisan effect is necessarily excusable as a matter of law and need not be explained by neutral considerations. We already have considered this argument in detail in our evaluation of the intent element of the plaintiffs' claim, and so we do not repeat that discussion here.

In the absence of explicit guidance from the Supreme Court, we think that the most appropriate course in this context is to evaluate whether a plan's partisan effect is justifiable, i.e., whether it can be explained by the legitimate state prerogatives and neutral factors that are implicated in the districting process. This approach allows us to hew as closely as possible to the Supreme Court's approach in analogous areas. As we observed in our summary judgment order, members of the Court have applied this formulation at several points throughout its political gerrymandering case law. It is also consistent with the Court's approach in the state legislative malapportionment context.

The record before us does not require us to anticipate how the Supreme Court will resolve the allocations of proof on this issue. It is clear that the parties, recognizing the present ambiguity on this point, placed before us all the evidence they could in support of their respective positions. Assuming the plaintiffs have the ultimate burden of proof on the issue, they have carried that burden.

The evidence further makes clear that, although Wisconsin's natural political geography plays some role in the apportionment process, it simply does not explain adequately the sizeable disparate effect seen in 2012 and 2014 under Act 43. Indeed, as we already noted and will discuss again, the defendants' own witnesses produced the most crucial evidence against justifying the plan on the basis of political geography. Their testimony credibly established that Act 43's drafters produced multiple alternative plans that would have achieved the legislature's valid districting goals while generating a substantially smaller partisan advantage. We therefore must conclude that, regardless where the burden lies, Act 43's partisan effect cannot be justified by the legitimate state concerns and neutral factors that traditionally bear on the reapportionment process.

A.

The defendants' primary argument is that Wisconsin's political geography naturally favors Republicans because Democratic voters reside in more geographically concentrated areas, particularly in urban centers like Milwaukee and Madison. For this reason, they submit, any districting plan in Wisconsin necessarily will result in an advantageous distribution of Republican voters statewide just as Act 43 does.

The plaintiffs have stressed, as a general matter throughout this litigation, that even if there were some inherent pro-Republican bias in Wisconsin, there is no evidence that such a bias could explain Act 43's large EG measures. They maintain that without such evidence, political geography cannot justify the burden that Act 43 places on Democratic voters in Wisconsin.

The bulk of evidentiary support for the defendants' political geography argument was presented through the testimony of Mr. Trende. His overarching theory is that the Democratic coalition nationwide has become more liberal over the last several decades; as a result, it has contracted geographically and is now concentrated heavily in urban areas. This concentration, in turn, has hurt the Democratic Party in congressional elections, which tend to favor parties with wider geographic reach. Mr. Trende first demonstrated this theory using color-coded maps illustrating the 1996, 2004, and 2008 presidential vote results by county in Texas, Oklahoma, Arkansas, Louisiana, Mississippi, Alabama, Tennessee, Kentucky, and Virginia. Over the three election cycles, the number of counties shaded blue (indicating that a majority of the county's votes in the presidential election were cast for the Democratic candidate) decreased, and the number of red counties (indicating that a majority of the county's votes in the presidential election were cast for the Republican candidate) increased. Mr. Trende testified that these maps supported his hypothesis that the Democratic coalition has shrunk over time.

We are skeptical that presidential voting trends at the county level in states other than Wisconsin bear directly on the determination that we must make about Wisconsin's political geography. Moreover, the color-coding of Mr. Trende's maps, although a useful demonstrative, purported to serve as a substitute for quantitative data on the margin of victory in each county. Without this information, we cannot know whether, for example, a county won by a Republican presidential candidate was deeply or narrowly Republican. Nor can we tell how the partisan breakdown of that county may have changed over time; as long as the county retained the same partisan majority, it remained the same color. In our view, this evidence is worthy of little, if any, weight.

The remainder of Mr. Trende's testimony concerned the political geography of Wisconsin itself, which he analyzed using a measure called the "partisan index" ("PI"). The PI, he explained, is the difference between a party's vote share at one electoral level and its vote share at a larger electoral level. For example, the Republican PI for the State of Wisconsin is "computed by subtracting the share of the state that voted for the Republican presidential candidate from the share of the nation that voted for the Republican presidential candidate." The purpose of the PI is "to determine the partisan lean of political units" in order to "compare results across elections."

Mr. Trende explained that Wisconsin's statewide PI, as compared to the national electorate, has remained stable since the 1980s; however, the county and ward PI values have shifted. He presented color-coded maps illustrating Wisconsin's presidential vote results by county in 1996, 2004, and 2012. Each county was colored a shade of blue or red depending on its degree of partisanship, e.g., counties with large Democratic or Republican PI values were shaded dark blue or dark red, respectively. Although the maps did not contain the actual county PI values, Mr. Trende testified that the pro-Democratic PI values of Dane and Milwaukee Counties increased significantly between 1996 and 2012. He also testified that the combined PI values of three of

Wisconsin's reliably Democratic counties—Dane, Milwaukee, and Rock—nearly doubled between 1996 and 2012, despite the statewide Democratic vote share actually decreasing over that time. On cross-examination, Mr. Trende conceded that the heavily Republican Ozaukee, Washington, and Waukesha Counties had Republican PI values as large as the Democratic PI values in Dane and Milwaukee Counties. However, the trial evidence also showed that the total number of votes cast for major-party candidates in the Republican counties were significantly smaller than their Democratic counterparts.

Mr. Trende then applied the PI to Wisconsin's wards in what he referred to as a "nearest neighbor" analysis. First, he calculated ward-level PI values in order to determine the average partisan lean of Wisconsin's wards from 2002 to 2014. Mr. Trende testified that, based on his analysis, "over time, the average Democratic ward had become about two-and-a-half percent more Democratic than it was in 2002"; he did not, however, observe the same trend in Republican wards. Mr. Trende then grouped the wards into quantiles based on their degree of partisanship—the more heavily Democratic wards together with similarly Democratic wards and the same for Republican wards—and used a computer program to determine, for each ward in each grouping, the median distance between that ward and a ward of similar partisanship. Mr. Trende concluded that, over time, Democratic-leaning wards in each quantile had grown closer together but Republican-leaning wards actually had grown farther apart. In his view, this made it more difficult to draw a neutral districting plan that did not favor Republicans.

Although Mr. Trende's report and testimony provides some helpful background information on political trends and political geography generally, they do not provide the level of analytical detail necessary to conclude that political geography explains Act 43's disparate partisan effects. Mr. Trende's conclusions regarding the PI values of Wisconsin's counties were based largely on the shaded maps rather than quantitative data analysis. And although Mr. Trende did provide PI values for particular pro-Democratic counties, he conceded on cross-examination that several counties had pro-Republican PI values as large as the pro-Democratic numbers observed in Dane and Milwaukee counties.

Additionally, we question how useful Mr. Trende's nearest neighbor analysis is in the context of this case. The significance of the distance between wards of similar partisanship is not clear given the restraints placed on the districting process in Wisconsin. Under the Wisconsin Constitution, Assembly districts must "be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable." Wis. Const. art. IV, § 4. Accordingly, the distance between wards of similar partisanship is relevant to reapportionment only to the extent that it is feasible that those wards be grouped together in one contiguous district. The nearest neighbor analysis, however, does not differentiate between those wards that realistically could be aggregated to form a lawful assembly district—wards that are physically adjacent (or at least near one another) and not separated by legally significant boundaries—and those that are not.

This problem is further compounded by Mr. Trende's use of the median distance between wards rather than the mean distance. Although the average Republican ward is twice the size of the average Democratic ward, the undisputed trial evidence was that the median Republican ward is six times the size of the median Democratic ward. When

the mean is used, however, Professor Mayer demonstrates that the distance between Democratic and Republican wards of similar partisanship "are exactly parallel," and the disparity between Republican- and Democratic-leaning wards and their closest neighboring ward of similar partisanship substantially decreases.

Like Mr. Trende, Professor Goedert testified that Wisconsin's political geography inherently favors Republicans. Using Wisconsin's 2012 Presidential election results, Professor Goedert employed a uniform swing to adjust the vote share in each ward and anticipate the results in an election where each party garnered 50% of the total statewide vote. He then assembled the wards into ten different groups based on this adjusted percentage of the Democratic vote share. Professor Goedert's analysis showed that between seven and eight percent of Wisconsin's wards had a very high concentration of Democrats (more than eighty percent), while fewer than one percent of wards demonstrated a similar strength in Republican vote. He testified that because significantly more wards in Wisconsin are narrowly Republican than are narrowly Democratic, it is "fairly easy" "to try to pack Democrats into a small number of districts," because "there are so many wards that are already so heavily packed." For the same reasons, he explained, it is "easy" to "disperse" Republican voters.

The persuasiveness of Professor Goedert's ward-level analysis was called into question at trial. To begin, the evidence showed that in the 2010 redistricting cycle Wisconsin's wards were, for the first time in the state's modern history, drawn after the Assembly district lines were created under Act 43. Professor Goedert admitted that he was unaware of this chronology when he conducted his analysis. The partisan imbalance in Act 43's district configuration therefore may have affected Professor Goedert's ward-level analysis. Furthermore, Professor Mayer testified that, in this context, the relevant geographic unit is not the ward but rather the district because, to create a district plan, wards ultimately must be aggregated into districts, at which point their biases may disappear. He also presented his own analysis illustrating that Wisconsin's ward distribution, although "not perfectly symmetrical," resembles a normal distribution (i.e., a bell curve). He testified that such a distribution is closer to what would be expected given a neutral political geography. When Professor Mayer aggregated the wards into Act 43's districts, however, the resulting distribution was skewed due to "an unusually large number of districts where the Democrats will receive between 40 and 50 percent" of the district vote. In Professor Mayer's opinion, this incongruity between the distributions of Wisconsin's wards and its districts demonstrates that Act 43's partisan imbalance is caused by its district configuration; indeed, he characterized this distribution of districts as "the fingerprint of a gerrymander ... the absolute DNA of cracking."

Professor Mayer also presented his own analysis of Wisconsin's political geography. Specifically, he testified at length about measures known as the "Isolation Index" and "Global Moran's I," which he said are far more common in this area of academic study than the methods employed by the defendants' experts. According to Professor Mayer, he used the Isolation Index to measure the extent to which the average Republican or Democratic voter lives in a ward that leans more heavily Republican or Democratic than the state as a whole. Global Moran's I, he explained, was used to measure the likelihood that a Republican- or Democratic-leaning ward is adjacent to a similarly Republican- or Democratic-leaning

ward. Professor Mayer testified that both of these measures show that Wisconsin's political geography is neutral and does not inherently favor one party or the other.

We do not find these methods reliable as they have been applied in this context. Professor Mayer acknowledged on cross-examination that he had not heard of the Isolation Index before he was retained as an expert in this case. Similarly, Professor Mayer testified that he had never calculated the Global Moran's I measure before he was retained for this litigation. Moreover, the defendants emphasized during trial that Professor Mayer relied on scholarly articles that either used a related measure known as Local Moran's I, or used Global Moran's I to study demographic groups. He could not point to any peer-reviewed, scholarly article that had used either measure specifically on partisanship.

Having carefully examined the evidence bearing on this issue, we find that substantial portions of the record indicate, at least circumstantially, that Wisconsin's political geography affords Republicans a modest natural advantage in districting. Indeed, the plaintiffs conceded as much in their closing argument when counsel stated that "there likely is some natural packing" of Democratic voters, "especially of minority voters in places like Milwaukee." Several pieces of evidence lead us to this conclusion. The first, and most compelling, is Professor Mayer's analysis comparing the distributions of Wisconsin's wards and Act 43's districts by Democratic vote share. As Professor Mayer himself testified, the ward-level distribution is "not perfectly symmetrical." In fact, the mean ward in the distribution—the highest point on the curve—is located left of the fifty percent line, which indicates that the average ward in Wisconsin leans slightly Republican. His analysis also shows that there are a substantial number of wards that are over eighty percent Democratic, but virtually no wards that are similarly Republican. We find these facts to be consistent with the notion that Democratic voters are uniquely packed in urban centers like Milwaukee and Madison.

Moreover, Mr. Trende's testimony establishes that the counties with the highest Democratic PI values are far larger in population than counties with equivalent Republican PI values. This fact indicates that some of the most heavily Democratic areas in Wisconsin are more densely populated than their equally Republican counterparts. Again, we find this to be consistent with a modest Republican advantage in the State's political geography.

We also find it significant that Republican-leaning wards in Wisconsin tend to be twice the size of Democratic-leaning wards. Indeed, when Professor Mayer conducted his own nearest neighbor analysis using the mean distances between wards, it became clear that this size differential exists at every level of partisanship. We recognize that the impact of this disparity on the districting process arguably is negligible because districts must be approximately equal in population; ward size, therefore, does not directly bear on the creation of districts. Still, the tendency of Republican wards to be much larger than Democratic wards is consistent with the notion that Democratic voters on the whole are more likely than Republican voters to live in geographically concentrated areas. This, in turn, increases the prospect that heavily Democratic wards will exist within the same political boundary such that it is, at least somewhat, more difficult to draw politically competitive districts in that part of the state.

Finally, it is undisputed that Professor Mayer's Demonstration Plan itself exhibited a slight pro-Republican bias despite his stated objective, reiterated at trial, of drawing an alternative to Act 43 that performed

comparably on traditional districting objectives but "had an efficiency gap as low to zero as [he] could get it." Under the Demonstration Plan, when the Republicans secure 48% of the statewide vote as they did in 2012, the plan still yields an EG of 2.2% in favor of the Republicans. This certainly is a far smaller advantage than the 11.69% pro-Republican EG generated under Act 43 in 2012, but it nevertheless illustrates that even a neutrally drawn plan, crafted under conditions unimpeded by politics, imposes a slight burden on Democratic voters.

For these reasons, we find that Wisconsin's political geography, particularly the high concentration of Democratic voters in urban centers like Milwaukee and Madison, affords the Republican Party a natural, but modest, advantage in the districting process.

B.

Because the evidence at trial establishes that Wisconsin has a modestly pro-Republican political geography, we now examine whether this inherent advantage explains Act 43's partisan effect. We conclude that it does not.

The record reveals that, before the legislature enacted Act 43, its drafters had produced several alternative district plans that performed satisfactorily on traditional districting criteria but secured a materially smaller partisan advantage when compared to the advantage produced by Act 43. Foltz and Ottman testified that, while drafting a particular map, they would remain attentive to various districting criteria—population equality, compactness, contiguity, and municipal and county splits—as well as where incumbents lived and levels of disenfranchisement. When the drafters finalized a statewide map, they were able to generate various reports through the autoBound software that evaluated the plan on these different districting criteria. In particular, once the drafters had "a statewide plan finalized, all 99 assembly districts," they would "take th[e] [partisan] composite column from auto[B]ound and then move it over into ... Excel spreadsheets." These spreadsheets evaluated a plan's expected district-by-district partisan performance, and the drafters exported and saved them for numerous statewide draft plans.

Although the autoBound software also enabled the drafters to generate reports on other districting criteria that they were considering, the defendants have not pointed us to any documents in the record that compare the various maps under consideration according to traditional district criteria. It therefore is unclear precisely how the drafters' statewide maps performed on other districting criteria. Nevertheless, Foltz testified that the drafters "would pull regional alternatives from" the statewide maps they had finalized and evaluated. These regional maps were then presented to the Republican leadership with the expectation that they ultimately would be a part of a final district plan. Neither Foltz nor Ottman testified, and nothing in the record indicates, that any of these statewide plans performed unsatisfactorily on any other districting criteria. Indeed, had these maps demonstrated, for instance, insufficiently compact districts or an unacceptable number of municipal splits, the drafters would not have pulled regional alternatives from them to present to the legislative leadership. We therefore can infer that the finalized statewide plans for which we have partisan performance spreadsheets in the record complied satisfactorily with the other districting criteria that the drafters considered.

The evidence also revealed that as the reapportionment process progressed and the drafters finalized and evaluated these statewide draft plans, the magnitude of the

expected partisan advantage increased. In many instances, the names of these plan alternatives reflected the degree of partisan advantage that could be anticipated in the map, e.g., "Assertive" or "Aggressive." Each of the drafters' partisan score spreadsheets included a corresponding table comparing the partisan performance of the draft plan to the Current Map. These performance comparisons were made on the following criteria: "Safe" Republican seats, "Lean" Republican seats, "Swing" seats, "Safe" Democratic seats, and "Lean" Democratic seats. Under the Current Map, the drafters anticipated that the Republicans would secure 49 Assembly seats, with 40 districts safe or leaning Republican, 40 districts safe or leaning Democratic, and 19 swing districts. However, by the time the drafters had solicited the preferences of the Republican legislative leadership and pieced together the Team Map—the closest version in the record to Act 43—the expected Republican seats had ballooned to 59. The number of safe or leaning Republican districts had grown from 40 to 52, apparently at the expense of swing districts, which decreased from 19 to 10. The number of safe or leaning Democratic districts also were reduced from 40 to 37.

Careful review of the record convinces us that benign factors cannot explain this substantial increase in Republican advantage between the Current Map and the plan that would become Act 43. Rather, it is evident that the drafters achieved this end by making incremental "improvements" to their plan alternatives throughout the drafting process. For example, the Republican advantages expected in the drafters' initial two draft plans, produced in early April 2011, were significantly smaller than the advantage anticipated in the Team Map. Under these draft plans—Joe's Basemap Basic and Joe's Basemap Assertive—the drafters expected Republican candidates to win 52 and 56 seats, respectively, compared to the 49 expected under the Current Map. The Current Plan's 40 safe and leaning Republican districts improved to 45 and then to 49, while the number of swing districts dwindled from 19 to 14 to 12. The number of pro-Democratic districts, however, remained relatively constant.

Apparently not satisfied with the political performance of these early plans, the drafters produced and evaluated at least another six statewide maps prior to their meeting with the Republican leadership in early June 2011. Each of these maps improved upon the anticipated pro-Republican advantage generated in the initial two draft plans. The total number of expected Republican seats in these drafts ranged between 57 and 60, and the number of swing seats ranged between 6 and 11. The number of Democratic seats again remained about the same under each draft map.

The Team Map, as an amalgamation of several statewide plan alternatives, reflects the drafters' iterative efforts throughout the drafting process to achieve a substantial, if not maximal, partisan advantage. That these efforts were highly successful is obvious with the benefit of hindsight. But the drafters themselves took pains to gauge their success at the time, taking stock of the degree to which they had improved upon the Current Map. In their Tale of the Tape, the drafters compared the partisan performance of the Team Map directly to the Current Map. They highlighted specifically that under the Current Map, "49 seats are 50% or better," but under the Team Map, "59 Assembly seats are 50% or better." In a second document, they categorized each of Wisconsin's Assembly districts according to its partisan "improvement" from the Current Map to the Team Map. For example, five districts were "Statistical Pick Up[s]," held by a Democratic incumbent who would now face

a "55% or better" Republican vote share. Another fourteen districts were "strengthened a lot": "Currently held GOP seats that start[ed] at 55% or below [and] improve[d] by at least 1%" in Republican vote share. The drafters also made particular note of which Republican Assembly members had contributed to the achievement of their partisan goals, the 20 so-called "GOP donors to the team."

The substantial record evidence of the multiple statewide plan alternatives produced during the drafting process convinces us that Wisconsin's modest, pro-Republican political geography cannot explain the burden that Act 43 imposes on Democratic voters in Wisconsin. The drafters themselves disproved any argument to the contrary each time they produced a statewide draft plan that performed satisfactorily on legitimate districting criteria without attaining an expected partisan advantage as drastic as that demonstrated in the Team Map and, ultimately, in Act 43. In reaching this conclusion, we emphasize that we did not require, as the plaintiffs initially proposed, that the defendants show that Act 43's partisan effect was necessary or unavoidable. Rather, our task at trial was to determine whether the burden that Act 43 imposes is justifiable in light of legitimate districting considerations and neutral circumstances. The defendants offered Wisconsin's natural political geography as one such neutral circumstance. Because we find that a Republican advantage in political geography, although it exists, cannot explain the magnitude of Act 43's partisan effect, and because we find that the plan's drafters created and passed on several less burdensome plans that would have achieved their lawful objectives in equal measure, we must conclude that the burden imposed by Act 43 is not justifiable.

Professor Mayer's Demonstration Plan provides additional evidence that the legislative imbalance resulting from Act 43 is not attributable to political geography. Professor Mayer attempted to draw an alternative districting plan to Act 43 "that had an efficiency gap as low to zero as I could get it" while also complying with traditional districting criteria as well as Act 43. He first created a regression model that estimated partisanship for each geographic area, so that he could compare his plan to Act 43. To ensure the model was accurate, Professor Mayer compared the predictions made by his regression model to the actual results in 2012. He concluded that the results aligned almost perfectly.

Once he was confident in his model, Professor Mayer "used a GIS redistricting program called Maptitude for redistricting to go ahead and complete the task of actually drawing the Assembly district map." Proceeding along this course, Professor Mayer was able to draw a districting map that would have yielded a pro-Republican EG of only 2.2% for 2012, and "is comparable to Act 43" with respect to "all constitutional requirements." Specifically his plan has a population deviation of .86% whereas Act 43 has a population deviation of .76%. He also noted that his plan keeps the same number of majority-minority districts. The plan is also slightly more compact, based on the "Reock score," than Act 43. Finally, it had three fewer county splits but two more municipal splits than Act 43.

The defendants argue that we should discount the evidentiary value of the Demonstration Plan for several reasons. First, they maintain that the Demonstration Plan "achieved its EG through 20/20 hindsight" and that the low EG will "hold only for those specific election conditions" that occurred in 2012. Specifically, the defendants contend that if the Republicans had a good electoral

outcome like the one they saw in 2014, they would have received 63 seats under the Demonstration Plan and ended up with the same EG as Act 43. Consequently, from the standpoint of partisan effects, the Demonstration Plan is just as problematic as Act 43.

Although this evidence shows the need to test how the Demonstration Plan fares under likely electoral scenarios, it does not render the Demonstration Plan useless for our purposes. Under Professor Mayer's Demonstration Plan, the EG would be significantly pro-Republican had the Republicans received a high vote share in the first election year of the plan. However, had the opposite happened, and Democrats received a higher vote share in the first election year, the EG would have skewed towards the Democrats. This is because the Demonstration Plan was designed to have competitive districts, and the EG will be reactive to such districts. By contrast, as Professor Gaddie's and Professor Jackman's sensitivity analyses show, Act 43 will remain pro-Republican regardless of the electoral outcome. Consequently, the Demonstration Plan and Act 43 do not suffer from the same infirmities.

The defendants also contend that Professor Mayer's Demonstration Plan fails to account for core retention, i.e., it does not try to keep districts from the previous districting plan in a similar form. Although there is testimony by Ottman that the drafters "looked at kind of what the core of the existing district was compared to the new district," we question how much this consideration actually factored into the drafting process. In Baldus, the court noted that "[o]nly 323,026 people needed to be moved from one assembly district to another in order to equalize the populations numerically," but that "Act 43 moves more than seven times that number—2,357,592 people"—a number that the court found to be "striking."

On a similar note, the defendants point out that Professor Mayer did not draw Senate districts and therefore did not account for how many voters would be disenfranchised by moving into a Senate district where they would not get a vote for another two years. Ottman testified that, because he worked for Senator Fitzgerald and "was familiar with the Senate seats," he "was able to eyeball [disenfranchisement] a little bit." Foltz testified that "you can notice [disenfranchisement] when you're drawing individual districts. But I think it's another one of those metrics where the back-end report is really where you get a sense for where you're sitting." Although Foltz ran "disenfranchisement reports on [his] plans," he did not testify as to specific numerical targets he was aiming for, nor did he testify that any of his maps were changed in response to the reports that were generated.

The defendants also urge that the Demonstration Plan incorporates districts around Fond du Lac that are not compact. There may be individual districts in the Demonstration Plan that are not as compact as their equivalent districts in Act 43. Nevertheless, the Demonstration Plan has a better overall "Reock score"—the measure of compactness utilized by the drafters—than Act 43 has. We cannot conclude, therefore, that, overall, the Demonstration Plan was less compact than Act 43.

Finally, the defendants argue that the Demonstration Plan fails to protect incumbents to the same degree as Act 43. Professor Mayer testified that he "didn't pay attention to where incumbents resided." The defendants contend that the number of paired incumbents in the Demonstration Plan was so great that such a plan would not have passed in the legislature. According to the defendants, the Demonstration Plan paired 37

incumbents, 13 more than were paired in Act 43.

There is no question that, unlike Act 43, the Demonstration Plan does not take into account incumbency concerns. This infirmity does not negate entirely the value of the Demonstration Plan. Notably, the defendants have not argued that the location of incumbents hampered them in their efforts to draw a non-partisan plan or otherwise accounts for the electoral imbalance resulting from Act 43. Nevertheless, Professor Mayer's lack of attentiveness to this concern well might diminish the Demonstration Plan's worth as a viable, legislative alternative. The Demonstration Plan still shows, however, that it is very possible to draw a map with much less of a partisan bent than Act 43 and, therefore, that Act 43's large partisan effect is not due to Wisconsin's natural political geography.

The evidence of multiple statewide plan alternatives produced during the drafting process, coupled with Professor Mayer's Demonstration Plan, convinces us that Wisconsin's modest, pro-Republican political geography cannot explain the burden that Act 43 imposes on Democratic voters in Wisconsin. The drafters established this finding themselves; they produced several statewide draft plans that performed satisfactorily on legitimate districting criteria without attaining the drastic partisan advantage demonstrated in the Team Map and, ultimately, in Act 43. Professor Mayer's Demonstration Plan further dispels the defendants' claim. As we have noted in our discussion, the evidence in support of a larger effect of political geography simply lacked specificity and careful analysis and, consequently, was less convincing.

VI

STANDING

Lujan v. Defenders of Wildlife makes clear that we must assess the issue of standing at all stages of the proceedings. Therefore, now that we have set forth the factual record and the elements of a political gerrymandering cause of action, we revisit the issue of standing.405 The standing requirement is meant to ensure that the plaintiffs have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." The party invoking federal jurisdiction, here the plaintiffs, bears the burden of establishing Article III standing.

The constitutional requirements for standing are well-established:

First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.' " Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

We turn first to the question whether the plaintiffs have established the invasion of a legally protected interest. Although the proposition is not settled in Supreme Court jurisprudence, we hold, for the reasons set forth in this opinion, that state legislatures cannot, consistent with the Equal Protection Clause, adopt a districting plan that is intended to, and does in fact, entrench a political party in power over the decennial period. The plaintiffs have established that, "[a]s a result of the statewide partisan

gerrymandering, Democrats do not have the same opportunity provided to Republicans to elect representatives of their choice to the Assembly. As a result, the electoral influence of plaintiffs and other Democratic voters statewide has been unfairly [and] disproportionately ... reduced" for the life of Act 43. Professor Whitford testified to the impact of political gerrymandering on individual voters in Wisconsin where it is "extremely difficult" to pass legislation through a bipartisan coalition. Wisconsin's strict caucus system means that all of the important "debate and discussion" of proposed legislation takes place in the party caucus meeting, and the party's vote, yea or nay, is the one "that matters." Consequently, erecting a barrier that prevents the plaintiffs' party of choice from commanding a legislative majority diminishes the value of the plaintiffs' votes in a very significant way.

We believe the situation here is very close to that presented in Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691. In Baker, the plaintiffs' constitutional claim was that a decades-old districting statute constitute[d] arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the State's Constitution or of any standard, effecting a gross disproportion of representation to voting population. The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-à -vis voters in irrationally favored counties.

The Court explained that, "[i]f such impairment does produce a legally cognizable injury, [the appellants] are among those who have sustained it." As noted above, today we recognize a cognizable equal protection right against state-imposed barriers on one's ability to vote effectively for the party of one's choice. Moreover, Act 43 did, in fact, prevent Wisconsin Democrats from being able to translate their votes into seats as effectively as Wisconsin Republicans. Wisconsin Democrats, therefore, have suffered a personal injury to their Equal Protection rights—akin to that suffered by the plaintiffs in Baker—that is both concrete and particularized.

Moreover, there can be no dispute that a causal connection exists between Act 43 and the plaintiffs' inability to translate their votes into seats as efficiently as Republicans. The evidence has established that one of the purposes behind Act 43 was solidifying Republican control of the legislature for the decennial period. Indeed, the drafters had drawn other statewide maps that, their own analysis showed, would secure fewer Republican seats. Finally, adopting a different statewide districting map, perhaps one of those earlier maps or a map as proposed in Professor Mayer's Demonstration Plan, would redress the constitutional violation by removing the state-imposed impediment on Democratic voters.

Defendants nevertheless contend that the plaintiffs lack standing for several reasons. First, they assert that "[a] majority of Justices in Vieth properly recognized that a statewide challenge to a redistricting plan was not justiciable." This view, however, is not the equivalent of holding that the plaintiffs did not have standing to pursue their cause of action. Standing is just one aspect of justiciability, which also includes ripeness, mootness, and the political question doctrine. The Vieth plurality held that the plaintiffs' claim for political gerrymandering presented a nonjusticiable political question; only one Justice opined that the plaintiffs lacked standing to bring a statewide political gerrymandering claim.

The defendants also claim that in recognizing the plaintiffs' standing to challenge a statewide map, we are at odds with the Court's holding in United States v. Hays. Hays, like its predecessor, involved allegations that a districting map constituted "an effort to segregate voters into separate voting districts because of their race." This particular cause of action is limited, therefore, to individuals who "reside[ ] in a racially gerrymandered district" because they are the ones who "ha[ve] been denied equal treatment because of the legislature's reliance on racial criteria."

The rationale and holding of Hays have no application here. As we already have discussed, the harm in such cases is not that the racial group's voting strength has been diluted, but that race has been used "as a basis for separating voters into districts." The district lines, therefore, "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." The concern here is a very different one: it is the effect of a statewide districting map on the ability of Democrats to translate their votes into seats. The harm is the result of the entire map, not simply the configuration of a particular district. It follows, therefore, that an individual Democrat has standing to assert a challenge to the statewide map.

The defendants also argue that the wrong alleged by the plaintiffs is not sufficiently "particularized" to satisfy the standing requirement. According to the defendants, "the plaintiffs are asserting an injury that is not personal to any one of them, but instead is common to anyone who supports the Democratic Party." We cannot take the defendants' arguments at face value. If, for instance, Congress should pass a law that imposed income taxes only on Democrats, surely an individual Democrat could bring a constitutional challenge to the law even though the harm was shared by so many. Moreover, an injury is not sufficiently particularized only if it is a wrong shared by the "public at large":

> "We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy."

The harm that the plaintiffs have experienced is not one shared by the public at large. It is one shared by Democratic voters in the State of Wisconsin. The dilution of their votes is both personal and acute. Consequently, the plaintiffs have satisfied the requirement of a particularized injury.

The defendants finally maintain that "[t]here is no reliable causal connection between re-doing statewide districts and what the Plaintiffs themselves are involved in, namely localized elections." We believe that this claim is belied by the evidence. The plaintiffs have established that, given Wisconsin's caucus system, the efficacy of their vote in securing a political voice depends on the efficacy of the votes of Democrats statewide. Moreover, the drafters themselves drew maps that would have resulted in significantly greater partisan balance than that obtained by Act 43. In short, there is no question that Act 43 imposed a disability on Democratic voters and that redrawing a district map—indeed, perhaps employing one of the drafters' earlier efforts—would remove that disability.

VII

ORDER

A. Remedy

In their complaint, the plaintiffs request three types of relief: (1) that we declare the Assembly districts established by Act 43 unconstitutional; (2) that, "[i]n the absence of a state law establishing a constitutional district plan for the Assembly districts, adopted by the Legislature and signed by the Governor in a timely fashion, [we] establish a redistricting plan that meets the requirements of the U.S. Constitution and federal statutes ..."; and (3) that we enjoin the defendants from "administering, preparing for, and in any way permitting the nomination or election of members of the State Assembly from the unconstitutional districts that now exist."

We defer, at this time, a ruling on the appropriate remedy. The parties have not had an opportunity to brief fully the timing and propriety of remedial measures. We therefore order briefing on the appropriate remedy according to the following schedule:

1. The parties shall file simultaneous briefs on the nature and timing of all appropriate remedial measures in 30 days' time;

2. Simultaneous response briefs are due 15 days thereafter.

The parties will provide the court with all evidentiary and legal support they believe is required for the court to make its ruling. If the parties do not believe that the court can rule on the appropriate remedy without the benefit of additional testimony, they should inform the court of the nature and extent of the testimony they believe is required.

B. Evidentiary Matters

For the reasons set forth in this opinion, the motions set forth in our docket numbers 151 (with respect to the admission of exhibits 98–100, 102, 118–119, 131, 141, 148, 150–152, 333, 391, 394, 405–406, 408, 414–415, 417, and 498) and 154 are DENIED. The motions set forth in our docket numbers 152 and 158 are GRANTED.

IT IS SO ORDERED.

"Partisan gerrymandering is almost as old as America, but will the Supreme Court decide it has gone too far?"

Los Angeles Times

David G. Savage

June 19, 2017

The Supreme Court agreed Monday to decide whether partisan gerrymandering — in which voting districts are drawn to favor one party — is a time-honored American political tradition or has evolved into an unconstitutional rigging of elections.

The Wisconsin case of Gill vs. Whitford, to be heard in the fall, could yield one of the most important rulings on political power in decades.

Gerrymandering has been derided for generations, often mocked in cartoons depicting bizarre-shaped districts that look like salamanders or spiders.

But in recent decades, because of software programs, gerrymandered maps look less obvious and are more effective in giving one party an insurmountable advantage. The maps can all but ensure that the party in power at the beginning of a decade — when districts are drawn — will keep control of a state legislature and win most of a state's seats in the U.S. House of Representatives.

Democrats maintain that the Republican Party has used its control of electoral maps after the 2010 census to give Republicans an unfair grip on power in Congress.

For example, Pennsylvania, Ohio and Michigan are closely divided states in terms of party affiliation and all voted for former President Obama. Yet 34 of their 48 House representatives are Republican largely because of gerrymandering.

North Carolina's electoral map was rejected by the Supreme Court recently for illegally using race in an effort to create more GOP-leaning districts. It sends 10 Republicans and three Democrats to the House, even though statewide races often reflect a population that is narrowly divided.

Democrats have played the same game, although they now control far fewer states. In Maryland, Democrats drew a map that allowed their party to control seven of the eight seats in the House.

What is unclear is whether the justices see this as politics as usual. The Supreme Court has viewed political gerrymandering as distasteful but not illegal. The justices have never struck down a state's electoral map because it was unfairly partisan, though they have outlawed gerrymandering along racial lines.

Voting rights advocates are hopeful that it will be different this time. They say party

leaders have gone too far in rigging the system in their favor.

Paul Smith, a lawyer for the Campaign Legal Center, said gerrymandering "is worse now than any time in recent memory." He represents a dozen Democratic voters from Wisconsin who sued the state over its electoral map for the state Assembly.

The map makes it likely the GOP will win a supermajority of seats in the Assembly even when more votes are cast statewide for Democrats than for Republicans.

In 2012, 51% of Wisconsin voters cast ballots for Democrats in the state legislative races, compared with 48.6% for Republicans. But Republicans still won 60 of the 99 seats in the Assembly.

Last year, a three-judge federal panel agreed with the challengers and ruled 2 to 1 that the Wisconsin map was unconstitutional. The map's "motivating factor" was an "intent to entrench a political party in power," said Judge Kenneth Ripple, a Reagan appointee to the U.S. 7th Circuit Court of Appeals in Chicago. The judges cited the work of University of Chicago law professor Nicholas Stephanopoulos, who devised a mathematical formula that showed the Wisconsin plan was an extreme gerrymander.

Trevor Potter, president of the Campaign Legal Center and former Republican chairman of the Federal Election Commission, urged the high court to affirm that decision. "The threat of partisan gerrymandering isn't a Democratic or Republican issue. It's an issue for all American voters," he said. "We're confident that when the justices see how pervasive and damaging this practice has become, the Supreme Court will adopt a clear legal standard that will ensure our democracy functions as it should."

The Republican National Committee does not share his assessment of the problem or the solution. Its lawyers urged the Supreme Court to take up the Wisconsin case and uphold the state's map. They argued that their party's advantage reflects the "reality of political geography." They say Democratic voters are concentrated in the cities, giving the GOP a big edge elsewhere. "The Constitution contains no right to proportional representation in legislative bodies based on statewide totals," they argued.

Wisconsin's attorney general directly appealed to the Supreme Court. The state's lawyers said the districts were compact and neatly drawn. They said the Democrats are at a disadvantage because their voters are concentrated in Milwaukee and Madison.

They urged the court to overturn the lower-court ruling and throw out the claim on the grounds that redistricting is a political process, not a legal one. They also won a procedural ruling on Monday that could be a good omen for the Republicans.

Shortly after announcing the court would hear the case, the justices issued an order that put on hold the lower court's decision that required Wisconsin lawmakers immediately redraw the map for its legislative districts. The order came on a 5-4 vote. The four Democratic appointees — Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor and Elena Kagan — dissented.

That means the court’s five Republican appointees voted with Wisconsin’s Republican leaders. The five justices apparently agreed with the state's argument that it should not be forced to redraw the map until the high court finally rules on its constitutionality. But the order also suggests they are skeptical of the lower court's ruling.

"The Supreme Court Takes On Partisan Gerrymandering"

The Atlantic

Vann R. Newkirk II

June 19, 2017

Partisan gerrymandering can be unconstitutional—at least in theory. In the 1986 case of Davis v. Bandemer, the Supreme Court did not find reason to declare an unconstitutional gerrymander, but its ruling did state "that political gerrymandering cases are properly justiciable under the Equal Protection Clause."

Despite that ruling, and despite regular rulings against racial gerrymanders over the past five decades, the Court hasn't actually declared a single political district unconstitutional on the grounds that it disenfranchises voters by political party. In the 2004 Vieth v. Jubelirer case, Justice Antonin Scalia's ruling on Pennsylvania congressional districts "concluded that political gerrymandering claims are nonjusticiable because no judicially discernible and manageable standards for adjudicating such claims exist."

That ruling will be tested over the coming weeks, as the Court agreed Monday to review Gill v. Whitford, after a federal district court in November struck down Republican-drawn state assembly maps in Wisconsin on the grounds of partisan gerrymandering. In a story similar to other gerrymandering cases percolating in federal courts now, after grabbing control of the Wisconsin state legislature in 2010, Republicans used the Census-based decennial redistricting as an opportunity to dilute Democratic votes and solidify partisan advantage in the future. That advantage was so effective that at the time of the lower court's ruling, scholars claimed Democrats would have to win 54 percent of the available votes to regain political control of the state.

There's still an uphill battle for the Wisconsin plaintiffs and for opponents of partisan gerrymandering. In the Court's order, the question of jurisdiction was postponed until a hearing on the merits of the case. That means the justices will have to determine if partisan gerrymandering is even justiciable. If they decide it's not, that might be the death blow to future cases alleging partisan gerrymandering.

But there's some hope for the plaintiffs yet. As Ian Millhiser at ThinkProgress notes, in the 2004 Vieth v. Jubelirer case, Justice Anthony Kennedy left the door open for a challenge. In response to Scalia's holding that partisan gerrymanders are impossible to consider because there are no standards to measure how they affect constitutional rights and no useful objective tests to identify them (unlike racial gerrymanders, where discrete known factors are applied by the Court), Kennedy wrote that "if workable standards

do emerge to measure these burdens … courts should be prepared to order relief."

The lower court, at least, was swayed by one such standard. The University of Chicago professor Nicholas Stephanopoulos and the Public Policy Institute of California fellow Eric McGhee devised a way to measure the "efficiency gap" between parties. They measure "wasted" votes that occur either when a voter votes for a losing candidate or when a voter votes for a candidate who would have won anyways, which in turn captures the extent to which voters are "cracked" and placed in districts where their preferred candidates will never win or "packed" into hyper-concentrated districts. If one party has substantially more wasted voters and a lower efficiency than the other, then Stephanopoulos and McGhee claim that's proof of an unconstitutional gerrymander. The lower court found that claim compelling.

It's unclear if the Supreme Court will find their formula equally compelling, but its decision will reverberate either way. North Carolina's redrawn congressional districts now face review by federal courts as partisan gerrymanders after the original Republican-drawn maps were struck down by the Supreme Court. There are also ongoing lawsuits in Maryland and Pennsylvania over partisan gerrymandering.

The Court's decision might impact those cases, but it could also have major effects on the future of redistricting. The 2020 Census isn't far away, and Republicans in 2010 created a proof-of-concept for using hyper-partisan redistricting to amplify Democratic voter concentration and dominate local, state, and federal lawmaking bodies. Opponents—armed now with landmark analysis from Justice Kagan making it much easier to identify racial gerrymanders—will have real tools to fight this advanced gerrymandering, especially if the precedent in this case makes a partisan test available.

But if the Court takes the view that partisan gerrymandering is simply not actionable—or the more extreme view that it's not any different from other partisan pieces of the political process under the Constitution—that decision will make it difficult to stop an increasingly sophisticated wave of hyper-partisan gerrymandering in 2021 and beyond.

"How 2 academics got the Supreme Court to reexamine gerrymandering"

Vox

Dylan Matthews

June 19, 2017

The Supreme Court has officially agreed to hear a case with the potential to put firm limits on partisan gerrymandering — and dramatically change the way states draw legislative boundaries.

The case, Gill v. Whitford, challenges the 2011 Wisconsin state assembly map. Those districts were drawn by the Republican state legislature in Wisconsin, and packed Democrats into a smaller number of districts to maximize Republican odds. The lawsuit argues that the map is an unconstitutional effort to help Republicans retain power.

That kind of gerrymandering, the suit alleges, violates Democrats' constitutional rights in two ways: under the First Amendment freedom of association, since they're being disenfranchised based on the party they chose to join, and under the 14th Amendment's equal protection clause, because Democrats are effectively entitled to less representation than Republicans.

A divided three-judge panel of the US District Court for Wisconsin ruled last year against the Wisconsin map, concluding that the plaintiffs are correct and that the map's gerrymandering is unconstitutional. Kenneth Ripple, the author of that opinion, wrote, "We conclude … that the evidence establishes that one of the purposes of [the district map] was to secure Republican control of the Assembly under any likely future electoral scenario for the remainder of the decade, in other words to entrench the Republican Party in power."

The panel stayed the map and ordered the legislature to redraw it. As part of agreeing to hear the case, the five conservatives on the Supreme Court (John Roberts, Neil Gorsuch, Samuel Alito, Clarence Thomas, and Anthony Kennedy) stayed the ruling, effectively removing the near-term requirement that Wisconsin redraw its map. The four liberals (Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan) dissented.

The Wisconsin state assembly districts being challenged. Wisconsin State Legislature

Gerrymandering is as old as the American republic, and has been done for a variety of reasons. Historically, districting meant to reduce the power of black voters has been very common. But partisan gerrymandering has also been a dominant force. Typically, the party in control of a state legislature will try

to draw congressional and state legislative districts in such a way as to maximize their own odds.

For instance, Democrats in charge of the Maryland legislature have divvied up Democratic base voters in the DC suburbs and Baltimore into large a number of districts, while concentrating Republicans in more rural parts of the state in a smaller number of districts. Republicans in Ohio and Pennsylvania have done the reverse, concentrating urban voters in a few heavily Democratic districts.

While the Supreme Court has ruled on many aspects of the districting process — banning state legislative districts with unequal populations and banning districts intended to disenfranchise black voters — it has issued muddled opinions on the question of whether partisan gerrymanders are unconstitutional. There's extensive case law on racial gerrymanders, which has established that racial discrimination in districting is subject to strict scrutiny by courts.

But discrimination on the basis of party is not the same as racial discrimination. The Court has agreed to no firm standard as to which political considerations are and are not allowed in creating congressional and legislative districts, and in 2004's Vieth v. Jubelirer a plurality opinion by the right wing of the Court argued that no such standard is even possible.

But the Court's four liberals dissented, and Anthony Kennedy filed a concurrence arguing that it was possible the Court could develop such a standard in the future.

Since then, there's been a lot of academic energy around trying to develop such a standard. University of Chicago law professor Nicholas Stephanopoulos and political scientist Eric McGhee devised one promising option, which notes that gerrymandering forces the losing party to "waste" votes by placing all its voters into a small number of districts where the party gets a landslide, rather than spreading out those voters so they can have more impact.

Stephanopoulos and McGhee argue that fair districting requires a roughly equal number of wasted votes for each party, and that districting schemes where one party is wasting many more votes are unconstitutional. They call their metric the "efficiency gap," calculated by taking the difference between the number of "wasted votes" for each party, and dividing that difference by the total number of votes.

The efficiency gap is key to the plaintiffs' arguments in Gill v. Whitford. They proposed setting a threshold of 7 percent: If a districting plan produces a larger gap than that, if one party is getting a wasted-vote advantage of more than 7 percent of the total vote, then it's getting a huge leg up, which will continue for a long time. As Yale Law School dean Heather Gerken noted in a Vox piece following the initial district court decision, a gap above that amount indicates that the disadvantaged party "would have almost no chance of taking control of the legislature during the 10-year districting cycle."

By contrast, the Wisconsin plan created efficiency gaps of 13 percent and 10 percent in 2012 and 2014, respectively. Those are

truly massive advantages enjoyed by the Republican Party.

By taking up the case, the Supreme Court is essentially promising to rule on the merits of the efficiency gap as a means of determining whether an improper partisan gerrymander has happened — and, if one has occurred, on whether that violates either First or 14th Amendment protections.

The key question, as always on this Supreme Court, is where Kennedy will land. His 2004 concurrence indicated an openness to quantitative measures of partisan skew, and the efficiency gap and similar measures were to some extent devised to answer that demand of his. However, he sided with the Court's conservatives in staying the lower court ruling, which might indicate a lack of sympathy with the plaintiffs and a willingness to let the map slide.

"How This Supreme Court Case Will Affect the Next Election"

Time

Thomas Wolf

June 21, 2017

The U.S. Supreme Court has agreed to hear argument this fall in a potentially landmark partisan-gerrymandering case from Wisconsin. This will give the Justices an opportunity to weigh in on an important question that they've never clearly answered: Whether there are any constitutional limits on politicians' ability to draw electoral maps to give their party a leg up. How the Court decides will go a long way to determining whether you choose your representatives — or the other way around — and whether you'll be able to hold them accountable when they put party agendas over your interests.

The Wisconsin case — known as Gill v. Whitford — is a great opportunity for the Justices to (attempt to) answer this question because it involves an especially extreme and troubling example of gerrymandering. In 2010, Wisconsin voters elected a Republican governor and Republican majorities to both statehouses, giving the GOP total control over the state's redistricting process for the first time in 40 years. The party's leaders seized the opportunity. They hired a private law firm to supervise aides and consultants who worked away in a secret "map room" Democrats were shut out of the process, and even rank-and-file Republicans were shown only information relating to their own districts. Leadership rushed the approval process for the final plan, which was engineered to ensure Republicans would get a 54-seat majority even if they only garnered 48% of the statewide vote.

The map performed even more reliably than expected. In 2012, Republicans won 60 of the 99 seats in the Wisconsin Assembly despite winning only 48.6% of the two-party state-wide vote; in 2014, they won 63 seats with only 52% of the state-wide vote. These results are way off from what we'd expect given the history of Wisconsin's elections. And using this extremely unusual majority, Republicans in the legislature went on to pass a raft of controversial legislation, including (on party lines) a law eliminating investigations into political misconduct that had targeted associates of Scott Walker, the state's Republican governor.

Parties using super-majorities to pursue extreme agendas is unfortunate and wrong, but not hard to explain. After all, if legislators think their majorities are safe regardless of how you vote, why wouldn't they think they have leeway to push the envelope? (A similar dynamic seems to be at work in Congress right now, where the wildly unpopular health care bill passed the House even with twenty Republicans defecting.)

In 2015, a group of Wisconsin voters sued to force the legislature to draw a less biased and more representative map. This was, in many ways, a gamble: no plaintiffs had taken a partisan-gerrymandering case to trial and won in more than three decades. But the plaintiffs broke that streak. (Plaintiffs in racial gerrymandering cases — which ask courts to determine whether mapmakers relied too heavily on race when drawing district lines — have historically had more success, including a major victory in North Carolina in May.)

The trial court ruled that the assembly map was "an aggressive partisan gerrymander" that unconstitutionally guaranteed a Republican majority in the state assembly "in any likely electoral scenario," violating both the Fourteenth Amendment's Equal Protection Clause (which, among other things, requires that all voters have an equal opportunity to participate in elections) and the First Amendment. In making their case to the court, the challengers pointed to strong evidence that the bias in the Wisconsin map wasn't accidental, including documents showing how the mapmakers used advanced statistics to figure out how each district would vote and how they developed a string of maps that became increasingly biased in favor of Republicans with each iteration. The goal of the map, as one key document said, was to "determine who's here 10 years from now." The plaintiffs also relied on the results of the "efficiency gap," a mathematical test that can flag maps that have a level of bias so high that it's statistically unlikely that it's random.

Wisconsin argued that it was impossible to draw a less biased map because Democrats were clustered together while Republicans were spread around the state. The trial court found, however, that any clustering — to the extent it existed — couldn't account for the map's severe and durable levels of bias.

If the Supreme Court agrees that Wisconsin's gerrymander is unconstitutional, you could see substantial changes to redistricting. The ruling would open the door to challenges targeting other maps that have the same kind of extreme, lasting bias favoring one party that's been seen in Wisconsin. A recent report by the Brennan Center shows there are roughly six congressional maps and nine or so state legislative maps like that right now. Challenges are already pending in North Carolina and Pennsylvania. More importantly, a win for the plaintiffs will change the rules of the game for the next round of redistricting in 2021. If legislators can no longer get a pass for drawing maps to maximize their party's advantage, they're less likely to try to do so.

Changes in how legislators draw maps would likely have a major impact on how Congress and state legislatures look and act. For example, the same Brennan Center report shows that 16 to 17 Republican seats in the current House of Representatives are due to extremely biased maps. That's a majority of the 24 seats Democrats would need to win to take back control of the House. With a different mix of legislators on the Hill, Congress' legislative priorities could change.

This all means that you could see the return of legislatures that more accurately mirror the diverse communities they represent, and

legislators that are more responsive to your concerns. When politicians can't pick their voters and retreat to their safe seats, voters are back in charge.

If, meanwhile, the Court rules in a way that gives partisan gerrymandering a greenlight, the battle against partisan abuses likely would shift from the courts to voters. In several states — including Michigan and Ohio — reformers are putting together ballot initiatives to turn redistricting over to independent commissions. But this solution isn't available in every state, only underscoring the importance of the Court stepping in this fall to provide some new ground rules.

Those rules will set the tone for American politics and elections for a generation and determine whether voters, rather than politicians, run our governments. It doesn't get much more fundamental than that.

"Does Partisan Gerrymandering Violate the First Amendment?"

Slate

Mark Joseph Stern

June 19, 2017

On Monday morning, the Supreme Court agreed to hear Gill v. Whitford, a blockbuster case that could curb partisan gerrymandering throughout the United States. Shortly thereafter, the justices handed down two excellent decisions bolstering the First Amendment's free speech protections for sex offenders and derogatory trademarks. While the link between these two rulings and Whitford isn't obvious at first glance, it seems possible that both decisions could strengthen the gerrymandering plaintiffs' central argument—and help to end extreme partisan redistricting for good.

The first ruling, Matal v. Tam, involves "a dance-rock band" called the Slants that sought to trademark its name. Simon Tam, the founding member, chose the name precisely because of its offensive history, hoping to "reclaim" the term. (He and his fellow band members are Asian American.) But the Patent and Trademark Office refused to register the name, citing a federal law that bars the registration of trademarks that could "disparage … or bring … into contemp[t] or disrepute" any "persons, living or dead, institutions, beliefs, or national symbols." (The same rule spurred the revocation of the Redskins' trademark.)

Every justice agreed that the anti-disparagement law ran afoul of the First Amendment. They split, however, on the question of why, exactly, the rule violates the freedom of speech. Justice Samuel Alito, joined by Chief Justice John Roberts as well as Justices Clarence Thomas and Stephen Breyer, applied the somewhat lenient test for commercial speech, which requires that a law be "narrowly drawn" to further "a substantial interest." The trademark rule, Alito wrote, is ridiculously broad: It could apply to such theoretical trademarks as "Down with homophobes" (disparaging beliefs) and "James Buchanan was a disastrous president" (disparaging a person, "living or dead"). The law, then, "is not an anti-discrimination clause," Alito concluded. It "is a happy-talk clause," one that is far too sweeping to survive constitutional scrutiny.

Justice Anthony Kennedy perceived even more insidious censorship at play. In a concurrence joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan, Kennedy wrote that the measure in question constitutes "viewpoint discrimination"—an "egregious" form of speech suppression that is "presumptively unconstitutional." Under the First Amendment, Kennedy explained, the government may not "singl[e]out a subset of messages for disfavor based on the views expressed," even when the message is

conveyed "in the commercial context." The anti-disparagement rule does exactly that, punishing an individual who wishes to trademark a name that the government finds offensive. "This is the essence of viewpoint discrimination," Kennedy declared, and it cannot comport with the First Amendment.

A similar rift opened up between the justices in the second free speech case of the day, Packingham v. North Carolina—another unanimous ruling with split opinions. (Justice Neil Gorsuch did not participate in either case, as oral arguments came before he was confirmed.) Packingham involved a North Carolina law that prohibited registered sex offenders from accessing any social media website, including Facebook, LinkedIn, and Twitter. The language of the statute is so sweeping that it also barred access to websites with commenting features such as Amazon and even the Washington Post. In essence, the law excludes sex offenders from the internet. North Carolina has used it to prosecute more than 1,000 people.

Kennedy, joined by all four liberals, subjected the law to intermediate scrutiny, asking whether it "burden[s] substantially more speech than is necessary to further the government's legitimate interests." He easily found that it did. The "Cyber Age is a revolution of historic proportions," Kennedy wrote, and "social media users … engage in a wide array of protected First Amendment activity on topics as diverse as human thought." Our interactions on the internet alter "how we think, express ourselves, and define who we want to be"; to "foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." The North Carolina law therefore suppresses too much expression and is thus in contravention of the Constitution.

In his ode to social media, Kennedy proclaimed that the internet has become "the modern public square," the 21st-century equivalent to those "public streets and parks" where the Framers hoped Americans would "speak and listen, and then, after reflection, speak and listen once more." (Kennedy's prose remains distinctive as ever.) In a concurrence, Alito, joined by Roberts and Thomas, rejected Kennedy's public square theory as "loose," "undisciplined," and "unnecessary rhetoric" that elides "differences between cyberspace and the physical world." The three conservatives agreed that the North Carolina law swept too far but insisted that Kennedy's opinion granted sex offenders a dangerous amount of freedom on the web.

So: What do these cases—both correctly decided, in my view—have to do with gerrymandering?

To start, it's important to view gerrymandering through a free speech lens, one developed by Kennedy himself in 2004. When the government draws districts designed to dilute votes cast on behalf of the minority party, it punishes voters on the basis of expression and association. To create an effective gerrymander, the state classifies individuals by their affiliation with political parties—a fundamental free speech activity—then diminishes their ability to elect their preferred representatives. Supporters of the minority party can still cast

ballots. But because of their political views, their votes are essentially meaningless.

Kennedy has called this a "burden on representational rights." It's also something much simpler: viewpoint discrimination. In performing a partisan gerrymander, the government penalizes people who express support for a disfavored party—much like, in Tam, the government penalizes those who wish to trademark a disfavored phrase. Both state actions punish individuals on the basis of their viewpoints: If you back the minority party, your vote won't matter; if you give your band an offensive name, you can't trademark it. And even though neither action qualifies as outright censorship, both restrict "the public expression of ideas" that the First Amendment is meant to protect.

Packingham also includes a subtler gift to the Whitford plaintiffs. In an aside, Kennedy compared the North Carolina law unfavorably to a Tennessee measure that bars campaigning within 100 feet of a polling place. Unlike the North Carolina law, Kennedy explained, the Tennessee statute "was enacted to protect another fundamental right—the right to vote."

Perhaps this passage is just more "loose rhetoric"—but I doubt it. Fundamental rights receive heightened protection under the Constitution. And although most Americans would probably agree that voting is a fundamental right, the Supreme Court has been cagey about saying so and inconsistent in safeguarding it. When the court upheld a voter ID law in 2008, for example, six justices paid lip service to the "right to vote" even as they shredded it; only the dissenting justices noted that the right is "fundamental" under the Constitution. Similarly, when the court's conservatives gutted the Voting Rights Act in 2013, they did not call the right to vote "fundamental." Instead, they celebrated the "fundamental principle of equal sovereignty," an archaic and discredited states' rights doctrine. The upshot of that decision seemed to be that states' rights are fundamental but voting rights are not.

Kennedy voted to uphold the voter ID law and kneecap the Voting Rights Act. But the justice is always evolving, and his aside in Packingham reads to me like a renewed commitment to the franchise set in the free speech context. If so, that's terrific news for opponents of partisan gerrymandering. Such gerrymandering limits an individual's fundamental right to vote (by making her vote useless) on the basis of her viewpoint (that is, her support for a political party). In effect, the practice attaches unconstitutional conditions to both voting rights and free speech, putting many voters in a quandary: They can either muffle their political viewpoints and cast meaningful ballots or express their political viewpoints and cast meaningless ballots. The Constitution does not permit states to punish individuals for exercising their rights in this manner.

Unfortunately, these tea leaves do not indicate inevitable doom for partisan gerrymandering. Kennedy recently indicated concern about judicial intervention into the redistricting process, and in the past he has questioned whether courts can accurately gauge which gerrymanders go too far. The Whitford challengers believe they have the right tool to measure partisan gerrymanders,

a mathematical formula called the efficiency gap. Nobody yet knows if Kennedy will agree, and the justice has sent mixed signals—it's worth noting that he joined the court's conservatives in voting to stay the lower court decision in Whitford while the justices consider the case. (The court had ordered Wisconsin to redraw its maps.)

Still, Monday's decision indicates that Kennedy and the court are, at the very least, moving in the right direction on the issues at the heart of partisan gerrymandering. Free expression and association aren't really free if the government can punish you for your viewpoint by ensuring your ballot doesn't matter; the right to vote isn't fundamental if it can be diluted on the basis of political affiliation. The basic First Amendment principles Kennedy espoused on Monday explain why the court may well curtail partisan gerrymandering next term. In fact, they explain why the Constitution demands nothing less.

"Wisconsin Federal Court Permanently Blocks State Redistricting Plan"

Urban Milwaukee

January 27, 2017

A three-judge panel in the U.S. District Court for the Western District of Wisconsin today permanently blocked the state's redistricting plan that unconstitutionally denies voters the ability to elect lawmakers. This ruling by the court ensures that new, constitutional maps will be in place for the next state legislative elections.

Whitford v. Gill is the first case in 30 years that has allowed a partisan gerrymander challenge to go to trial. The state will now decide whether to appeal to the U.S. Supreme Court.

The Campaign Legal Center (CLC) along with co-counsel represent lead plaintiff Bill Whitford and the other 11 plaintiffs in the case. Private counsel on the case includes Douglas M. Poland of Rathje & Woodward, LLC, Peter G. Earle, Michele L. Odorizzi of Mayer Brown and Nicholas O. Stephanopoulos of University of Chicago Law School.

Should Whitford v. Gill reach the Supreme Court it will provide the nation's highest court the opportunity to set a legal standard on partisan gerrymandering for the first time.

CLC Director of Voting Rights and Redistricting Gerry Hebert released the following statement:

"This is truly another monumental victory for the plaintiffs in this case and for all Wisconsin Voters. Today, the court made a clear statement that holding yet another unconstitutional election under Act 43 would cause significant harm to the voters. The Wisconsin legislature has continuously demonstrated a disregard for the rights of the voters and an inability to craft a fair, legal redistricting plan. In drawing a new plan, the legislature must put voters first, not partisan politics. Rest assured that our plaintiffs will continue to be involved in this process, monitoring the legislature's actions and assuring that the new plan meets all the legal requirements."

Doug Poland, partner attorney at the law firm Rathje & Woodward, released the following statement:

"The November 1 deadline means the legislature has plenty of time to hold hearings with broad participation from Wisconsin citizens," said Doug Poland of the law firm Rathje & Woodward, who served as co-lead trial counsel. "There is no excuse for limiting participation by all interested parties to draw a fair map in an open and transparent process. The time for cloaking the process in secrecy has ended. The plaintiffs, their lawyers, and all of Wisconsin, are watching."

Bill Whitford, the lead plaintiff in the case, released the following statement:

"I'm very pleased with this decision. Today is a good day for Wisconsin voters, and another step in the journey of ensuring that our voices are heard. Now, we will be keeping a watchful eye on the state legislature as they draw the new maps and I ask them, for the sake of our democracy, to put partisan politics aside and the interests of all voters first."

Dale Schultz, former Senate Majority Leader, released the following statement:

"Wisconsin citizens deserve clarity, and potential candidates need to know what districts they would be running in," said former Senate Majority Leader Dale Schultz (R-Richland Center), who co-chairs the Fair Elections Project. "The court is making the right decision to implement their verdict, and we are pleased that Wisconsin is on its way to having honest elections. I hope the Legislature chooses to conduct this new map-drawing process in an open, transparent manner, heeding the concerns of multiple federal panels."

Sachin Chheda, Director of the Fair Elections Project, released the following statement:

"Yet again, the federal courts have ruled clearly – Wisconsin's district maps are an unconstitutional partisan gerrymander, they violate the rights of millions of Wisconsin citizens, and it's time to move ahead and draw new maps," said Sachin Chheda, Director of the Fair Elections Project, which helped organize the lawsuit. "This is a victory for democracy and we look forward to a process to draw these maps that engage the community and invite public participation.

Husted v. A. Philip Randolph Institute

16-980

Ruling Below: *A. Philip Randolph Institute v. Husted*, 838 F.3d 699 (C.A.6 (Ohio), 2016)

Organizations and an individual brought action for declaratory and injunctive relief against Ohio Secretary of State, alleging violations of National Voter Registration Act (NVRA) and Help America Vote Act (HAVA), relating to state's process for removing inactive registrants from state's registered voter rolls and state's confirmation notice for registrants whose residence had changed. The United States District Court for the Southern District of Ohio, George C. Smith, J., denied plaintiffs' request for permanent injunction and entered judgment for Secretary. Plaintiffs appealed. The Court of Appeals for the Sixth Circuit reversed and remanded.

Question Presented: Whether 52 U.S.C. § 20507 permits Ohio's list-maintenance process, which uses a registered voter's voter inactivity as a reason to send a confirmation notice to that voter under the National Voter Registration Act of 1993 and the Help America Vote Act of 2002.

A. Philip Randolph Institute; Northeast Ohio Coalition for the Homeless; Larry Harmon, Plaintiffs–Appellants,
v.
Jon Husted, Secretary of State, Defendant–Appellee.

United States Court of Appeals, Sixth Circuit

Decided on September 23, 2016

[Excerpt; some citations and footnotes omitted]

CLAY, Circuit Judge.

The A. Philip Randolph Institute ("APRI"), the Northeast Ohio Coalition for the Homeless ("NEOCH"), and Larry Harmon (collectively "Plaintiffs") filed suit seeking to enjoin the defendant, Ohio Secretary of State Jon Husted ("the Secretary"), from removing the names of registered voters from Ohio's voter rolls pursuant to the state's so-called Supplemental Process, which Plaintiffs allege violates the National Voter Registration Act of 1993 ("NVRA"), and the Help America Vote Act of 2002 ("HAVA"). Plaintiffs also sought an injunction requiring the Secretary either to reinstate otherwise eligible voters who were improperly removed from the rolls pursuant to the Supplemental Process, or to count provisional ballots cast by such persons. Finally, Plaintiffs alleged that the change-of-address confirmation notices mailed to voters as part of the Supplemental Process fail to meet the standards for such notices set out in the NVRA. Before us is Plaintiffs' appeal from the district court's order denying Plaintiffs' request for a permanent injunction and directing entry of judgment in favor of the Secretary. For the reasons set forth below, we REVERSE the district court's judgment and REMAND for further proceedings consistent with this opinion.

BACKGROUND

Factual History

In addition to maintaining procedures for removing the names of the deceased, those who have been adjudicated incompetent, and convicted felons from its voter rolls, Ohio utilizes two processes for identifying and purging from the rolls voters who are no longer eligible to vote because they have moved outside their county of registration. The first is Ohio's "NCOA Process," under which the Secretary's office compares the names and addresses contained in Ohio's Statewide Voter Registration Database to the National Change of Address ("NCOA") database. "The NCOA database contains names and addresses of individuals who have filed changes of address with the United States Postal Service." The Secretary thereafter provides each county's Board of Elections ("BOE") with a list of voters registered therein who appear to have *703 moved, based on the comparison of the two databases. The BOEs then "send[ ] a confirmation notice ... to each individual identified." That notice is a postage prepaid forwardable form on which the voter must indicate whether he or she still lives at the same address. Recipients of the notice are removed from the rolls if they: (1) do not respond to the confirmation notice or update their registration; and (2) do not subsequently vote during a period of four consecutive years that includes two federal elections.

Ohio's so-called "Supplemental Process" is the second method the state uses for identifying and removing from the rolls voters who are no longer eligible to vote due to a change of residence. The Supplemental Process is largely identical to the NCOA Process, except in the way it begins: rather than identifying voters who may have moved by reference to the NCOA database, each county's BOE compiles a list of registered voters who have not engaged in any "voter activity" for two years. For the purposes of the Supplemental Process, "voter activity" includes "filing a change of address" with a designated state agency; "filing a voter registration card with the [BOE]; ... casting an absentee ballot; casting a provisional ballot; [or] voting on election day." After compiling a list of inactive voters, each BOE sends a confirmation notice to those on its list. As with the NCOA Process, voters sent a confirmation notice are removed from the rolls if they subsequently fail to vote for four years and fail to either respond to the notice or re-register. In sum, under the Supplemental Process, a voter is purged from the rolls after six years of inactivity—even if he or she did not move and otherwise remains eligible to vote.

When this litigation began, the confirmation notices sent to voters pursuant to both the NCOA Process and Supplemental Process required that voters provide their name, current Ohio address, date of birth, and either their Ohio driver's license number, their Social Security number, or a copy of a document verifying their identity and address. The notices required that voters provide such information regardless of whether they had changed address or were merely confirming that they still lived at the same address. Moreover, the notices did not adequately inform voters of the consequences of failing to respond to the notice; rather, the form indicated that the recipient's registration "may" be canceled if he or she did not respond, re-register, or vote in the next four years. Finally, the form failed to inform voters who had moved outside of Ohio on how they could remain eligible to vote in their new state.

As discussed below, the Secretary issued a new confirmation notice form during the pendency of this litigation. On the newly issued form, voters can confirm that they

have not changed address by simply signing, dating, and returning the postage prepaid form. The new form also provides voters with the dates by which they must either return the form or vote in order to remain registered. Notably, however, the new form still lacks information on how persons who have moved to another state can register to vote in their new state.

Procedural History

This case began with two letters sent by NEOCH and APRI to the Secretary in December 2015 and February 2016, respectively. Both letters asserted that Ohio's Supplemental Process violated Section 8 of the NVRA. Not long after sending their letters, APRI and NEOCH representatives began meeting with the Secretary in an attempt to resolve their concerns without litigation. Those meetings failed to produce results, causing Plaintiffs to file this suit in federal district court on April 6, 2016. Plaintiffs' complaint alleged two causes of action relevant to this appeal: first, that the Supplemental Process unlawfully removes registered voters from the rolls due to their failure to vote in violation of Section 8, subsection (b)(2) of the NVRA, 52 U.S.C. § 20507(b)(2); and second, that the confirmation notices sent to voters under both the NCOA Process and the Supplemental Process fail to meet the standards for such forms set out in the NVRA, 52 U.S.C. § 20507(d)(2).

The day after filing their complaint, Plaintiffs moved for a temporary restraining order ("TRO") prohibiting the Secretary from "removing eligible Ohio voters from the voter rolls on account of their failure to vote pursuant to Ohio's 'Supplemental Process.' " Plaintiffs' motion also requested a preliminary injunction compelling the Secretary to reinstate voters already removed from the rolls pursuant to the Supplemental Process. Four days later, Plaintiffs agreed to withdraw their request for a TRO in exchange for the Secretary's agreement not to initiate the Supplemental Process prior to July 1, 2016. A week after Plaintiffs filed their complaint, the parties agreed to engage in limited discovery and to address all the dispositive issues in the case through simultaneous briefing. The parties filed their briefs in May and June of 2016, with Plaintiffs styling their briefs as memoranda supporting motions for summary judgment and a preliminary injunction. On June 17, 2016—the day the parties' final briefs were due before the district court—the Secretary issued a directive requiring BOEs to use a new version of the confirmation notice form. As discussed above, that new form corrected all but one of Plaintiffs' alleged deficiencies.

On June 29, 2016, the district court issued an order denying Plaintiffs' motions for summary judgment and a preliminary injunction; the order directed entry of judgment in favor of the Secretary. Addressing the parties' arguments under permanent injunction standards, the court began by rejecting Plaintiffs' arguments that the Supplemental Process violates the NVRA and the HAVA. The court held that because Section 8 of the NVRA does not explicitly dictate what information states may or must use as a "trigger" for sending a confirmation notice, that decision was impliedly left to the states. The court also concluded that the Supplemental Process does not violate the NVRA and the HAVA's prohibition on removing voters from the rolls solely by reason of their failure to vote because such removal occurs only after a voter has failed to vote and failed to respond to a confirmation notice.

Turning to the Plaintiffs' arguments regarding the legality of Ohio's confirmation notice form, the district court first noted the Secretary's promise that his newly issued

form would be used during the upcoming voter roll purges. Relying on that promise, the court held that the Secretary's voluntary cessation of illegal activity was sufficient to moot Plaintiffs' challenges to the confirmation notice form. Finally, the court rejected Plaintiffs' argument that the newly issued form still violated 52 U.S.C. § 20507(d)(2)(B) by failing to provide those who have moved out of Ohio with information on how to stay registered. The court held that this argument was waived because Plaintiffs' briefing failed to raise the argument, and that the argument failed on the merits in any event because it "defies logic" that the NVRA would require local registrars to "coach" voters on how to register in a different state. Thus having rejected all of Plaintiffs' arguments on the merits, the district court held that no preliminary injunction was warranted and that judgment should be entered for the Secretary.4 Plaintiffs filed their notice of appeal the following day.

DISCUSSION

Standard of Review

The parties agree that there are no disputes regarding the facts recounted above, and that the district court's denial of Plaintiffs' request for an injunction was based solely on its interpretation of the NVRA and the HAVA. "When reviewing the decision of a district court to grant or to deny a request for issuance of a permanent injunction, ... legal conclusions are reviewed de novo." We also review de novo the district court's conclusion that some of Plaintiffs' claims are now moot.

Analysis

I. Plaintiffs' Challenge to Ohio's Supplemental Process

Congress' stated purposes in enacting the NVRA were, inter alia, "to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office; ... [and] to ensure that accurate and current voter registration rolls are maintained." "These purposes counterpose two general, sometimes conflicting, mandates: To expand and simplify voter registration processes so that more individuals register and participate in federal elections, while simultaneously ensuring that voter lists include only eligible ... voters." Those sometimes conflicting mandates are reflected in the language of Section 8 of the NVRA, 52 U.S.C. § 20507, which is where our analysis must begin. Importantly, Section 8's language pairs the mandate that states maintain accurate voter rolls with multiple constraints on how the states may go about doing so.

Those constraints begin with subsection (a) of Section 8, which states that "[i]n the administration of voter registration for elections for Federal office, each State shall ... provide that the name of a registrant may not be removed from the official list of eligible voters except" under certain circumstances. The Act then provides an exhaustive list of circumstances justifying removal: "criminal conviction or mental incapacity as provided by state law, the death of the registrant, or ... a change of the registrant's residence." This case concerns the final circumstance justifying removal—change of residence—which is subject to its own mandate and accompanying constraints. Subsection (a)(4) of Section 8 requires that states "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of ... a change in the residence of the registrant;" the Act thereafter specifies that any such program must be

conducted "in accordance with subsections (b), (c), and (d)." 52 U.S.C. § 20507(a)(4)(B). Subsection (b) provides two additional constraints on states' discretion. First, all roll maintenance procedures must "be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." Second, and more pertinent to this appeal, subsection (b)(2) provides that roll maintenance procedures "shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote." This language from subsection (b)(2) was later modified by the HAVA, which appended the following clause to the general prohibition on removal by reason of failure to vote:

... except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual—

(A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then

(B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

By the HAVA's own terms, however, this language is not to "be construed to authorize or require conduct prohibited under ... or to supersede, restrict, or limit the application of ... [the NVRA]."

Subsections (c) and (d) of Section 8 provide two final constraints on states' roll maintenance procedures. First, subsection (c)(2)(A) provides that "any program the purpose of which is to systematically remove the names of ineligible voters from the official list of eligible voters" must be completed "not later than 90 days prior to the date of a primary or general election for Federal office." Second, subsection (d)(1) establishes that states "shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence" without first subjecting the registrant to the confirmation notice procedure outlined in that subsection. That mandatory confirmation notice procedure is the one described above as the final step of Ohio's NCOA Process and Supplemental Process: a forwardable postage prepaid and pre-addressed form is sent to a voter, and the voter is removed from the rolls if (1) he or she does not respond to the confirmation notice or update his or her registration, and (2) he or she does not subsequently vote during a period of four consecutive years that includes two federal elections.

Finally, we note that in subsection (c)(1) of Section 8, Congress provided states with an example of a procedure for identifying and removing voters who had changed residence that would comply with the NVRA's mandates and accompanying constraints. That subsection provides that "[a] State may meet the requirement of subsection (a)(4) by establishing a program under which" voters who appear to have moved based on information contained in the NCOA database are sent subsection (d) confirmation notices. The parties do not dispute that Ohio's NCOA Process mirrors this so-called "safe-harbor" procedure and that the NCOA Process is thus permissible under the NVRA.

The focus of this case, therefore, is Ohio's Supplemental Process. Specifically, Plaintiffs argue that the Supplemental Process violates the clause of subsection

(b)(2)—hereinafter referred to as the "prohibition clause"—prohibiting roll maintenance processes that "result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote." The Secretary responds that the Supplemental Process is permitted by the exception to subsection (b)(2)'s prohibition clause added by the HAVA—hereinafter referred to as the "except clause"—which states: "... except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d)." The legality of Ohio's Supplemental Process can therefore be boiled down to two questions: whether the Process is expressly permitted by subsection (b)(2)'s except clause; and, if not, whether the Supplemental Process violates that subsection's prohibition clause.

A. The Supplemental Process is not expressly permitted by subsection (b)(2)'s except clause

Turning to the first operative question, it bears repeating that the Supplemental Process fully incorporates subsection (d)'s confirmation notice procedure. Certainly, under the except clause's plain language, such incorporation is permissible even though the confirmation notice procedure itself involves consideration of a registrant's failure to vote. But that conclusion does not end our inquiry—the Supplemental Process does not only employ subsection (d)'s confirmation notice procedure. Rather, under the Supplemental Process, the confirmation notice procedure is "triggered" by a registrant's failure to engage in any "voter activity" for two years. We must therefore determine whether that trigger provision should be analyzed separately from the confirmation notice procedure, such that the trigger is subject to the prohibition clause; or, in the alternative, whether the Supplemental Process' incorporation of the confirmation notice procedure means that the entire Process—including the trigger—is permitted under the except clause.

The Secretary advocates for the second of these two positions. He states, for example, that "[t]he language that a cancellation 'shall not result' from a 'failure to vote' 'except' when coupled with the failure to 'respond[ ]' to an address-confirmation inquiry authorizes the Ohio Supplemental Process." The operative language in this argument is the phrase "when coupled with," by which the Secretary implies that a process resulting in removal by reason of failure to vote is nevertheless permitted by the except clause so long as it is "coupled with" the procedures outlined in subsection (d). We note, however, that neither the phrase "when coupled with," nor any comparable language, appears in the except clause's text. The Secretary's argument is therefore flawed insofar as it requires us to "read[ ] a phrase into the statute when Congress has left it out."

Moreover, the Secretary's reading of the except clause would require us to ignore the traditional rule of statutory construction dictating that exceptions to a statute's general rules be construed narrowly. Contrary to that general rule, the Secretary would have us adopt an expansive interpretation of the except clause under which states can not only "us[e] the procedures described in subsections (c) and (d)," rather, under the Secretary's interpretation, use of those procedures would render states' processes completely immune to the general rule that the except clause modifies. We decline to adopt this interpretation, and instead err on the side of giving maximum effect to the prohibition clause's general rule.

Further counseling against the Secretary's interpretation is the fact that reading "when coupled with" into the except clause would reduce the prohibition clause to mere surplusage. That is because the plain language of subsection (d)(1) provides that processes for removing voters based on change in residence must incorporate subsection (d)'s confirmation notice procedure. In other words, it is required that such processes be "coupled with" subsection (d)'s procedure. Thus, under the Secretary's interpretation, subsection (b)(2)'s prohibition clause would serve no purpose because all state procedures would necessarily be permitted by the except clause by virtue of their (mandatory) incorporation of the confirmation notice procedure. This reading of the NVRA would contravene the Supreme Court's repeated insistence that "a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous."

The Secretary responds that his interpretation does not reduce the prohibition clause to surplusage because when read together, the prohibition and except clauses constitute a single "belt-and-suspenders" rule that merely "explains what is permitted and what is prohibited by describing both sides of the same coin." In other words, the Secretary would have us hold that subsection (b)(2) only prohibits processes that do not incorporate the confirmation notice procedure, and that the except clause simply reinforces that prohibition by expressly "permitt[ing]" use of the confirmation notice and safe-harbor procedures. But this argument once again ignores the fact that subsection (d)(1) already mandates that "[a] State shall not remove the name of a registrant from the official list of voters" without performing the confirmation notice procedure. We decline to read subsection (b)(2) as a mere reiteration of that mandate. Perhaps more importantly, we find that the Secretary's "belt-and-suspenders" argument ignores the NVRA's plain language: subsection (b)(2)'s clauses are not written as alternative presentations of the same rule; rather, those clauses explicitly establish a general rule with a proviso.

The Secretary also argues that the Senate and House reports accompanying the NVRA justify his interpretation of the except clause. Those reports both state, in pertinent part:

> Almost all states now employ some procedure for updating lists at least once every two years, though practices may vary somewhat from county to county. About one-fifth of the states canvass all voters on the list. The rest of the states do not contact all voters, but instead target only those who did not vote in the most recent election (using not voting as an indication that an individual might have moved). Of these, only a handful of states simply drop the non-voters from the list without notice. These states could not continue this practice under [the NVRA].

This passage in the reports, the Secretary argues, suggests that subsection (b)(2)'s prohibition is intended to invalidate only those state processes that "simply drop the non-voters from the list without notice." Id. Thus, the argument goes, the reports indicate that the except clause permits any process that incorporates subsection (d)'s confirmation notice procedure.

This argument is problematic for at least two reasons. First, we may only look to the legislative history of a statute to "explain the meaning and purpose of a provision whose text is genuinely ambiguous." As discussed above, the unambiguous language of Section 8 requires rejecting the Secretary's interpretation, lest we be forced to simultaneously write new language into, and

essentially excise language out of, the NVRA. But even if we did conclude that the NVRA's language is ambiguous, we would find little solace in the even more ambiguous language of the congressional reports on which the Secretary relies. Not only is the above-quoted passage from the congressional reports internally unclear as to which of the practices described therein is prohibited under the NVRA, the passage does not purport to provide an exhaustive list of processes that subsection (b)(2) was designed to prohibit.

Based on the above, we reject the Secretary's contention that the Supplemental Process' incorporation of subsection (d)'s confirmation notice procedure means that the entire Supplemental Process is automatically permitted under the except clause. That interpretation of the NVRA would require us to improperly ignore "the language and design of the statute as a whole." We further conclude that the only reasonable reading of the NVRA is that any part of a state's roll maintenance process that does not mimic the expressly permitted procedures outlined in subsections (c) or (d)—in this case, the Supplemental Process' two-year "trigger" provision—is subject to subsection (b)(2)'s prohibition clause.

B. The Supplemental Process violates subsection (b)(2)'s prohibition clause

Having concluded that we must focus our analysis on the Supplemental Process' two-year trigger provision, we turn to the second dispositive question in this case: whether that trigger provision "result[s]" in removal by reason of failure to vote. We typically "proceed from the understanding that unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." "Webster's dictionary defines 'result' as 'to proceed or arise as a consequence, effect, or conclusion.' " Pension Trust Fund for Operating Eng'rs v. Fed. Ins. Co., 307 F.3d 944, 952 (9th Cir. 2002). In this case, the Supplemental Process' trigger provision explicitly uses a person's failure to engage in any "voter activity"—which includes voting—for two years as the "trigger" for sending a confirmation notice. Under the ordinary meaning of "result," the Supplemental Process would violate the prohibition clause because removal of a voter "proceed[s] or arise[s] as a consequence" of his or her failure to vote.

As noted by the Secretary and the district court, however, subsection (b)(2)'s prohibition clause appears to have been given a more narrow interpretation by the HAVA. Passed in 2002, the HAVA created an "independent ... requirement [that states] maintain an accurate list of eligible voters." In connection with that requirement, the HAVA requires states to implement

> [a] system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters. Under such system, consistent with the National Voter Registration Act of 1993, registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.

This section of the HAVA, the Secretary argues, restates the NVRA's prohibition and except clauses "in slightly different words" and in so doing suggests that subsection (b)(2)'s prohibition on consideration of failure to vote only operates to prohibit state processes that remove registrants from the rolls "solely" by reason of their failure to vote.

In the end, however, this language from the HAVA does not change our analysis because operation of the Supplemental Process' trigger is ultimately based "solely" on a person's failure to vote. This is so, notwithstanding the fact that the Supplemental Process includes voting as one of several types of "voter activity" in which a voter must fail to engage in order to trigger the sending of a confirmation notice. We must assume not only that Congress intended the prohibition clause to play some role in the NVRA's statutory scheme, but also that Congress intended the prohibition to be more than a paper tiger. But the clause would have no teeth at all if states could circumvent it by simply including "voting" in a disjunctive list of activities in which a registrant must fail to engage in order to "trigger" the confirmation notice procedure. In more concrete terms, a state cannot avoid the conclusion that its process results in removal "solely by reason of a failure to vote," by providing that the confirmation notice procedure is triggered by a registrant's failure either to vote or to climb Mt. Everest or to hit a hole-in-one.

For his part, the Secretary reiterates that the Supplemental Process incorporates subsection (d)'s requirement that the voter must fail to respond to a confirmation notice before that voter can be removed from the rolls. He thereafter argues that the Process' incorporation of that failure-to-respond requirement insures that voters are never removed "solely" for failure to vote. But this argument merely rehashes the one we rejected above—that a state's process for identifying and removing voters who have changed residence comports with subsection (b)(2)'s prohibition clause so long as it incorporates subsection (d)'s confirmation notice procedure. This interpretation of the NVRA would render the prohibition clause entirely superfluous because subsection (d)(1) already requires states to use the confirmation notice procedure. Once again, we decline "to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law."

Finally, we note that the parties' arguments and the district court's order raise two additional questions: (1) whether processes for identifying and removing from *712 the rolls voters who have changed residence must have provisions that "trigger" subsection (d)'s confirmation notice procedure; and (2) what the NVRA and the HAVA have to say, if anything, about the form such "triggers" can or cannot take. While these questions are undoubtedly important, we need not answer them in order to hold that Ohio's Supplemental Process is impermissible under the NVRA. Regardless of whether "trigger" provisions are required, and regardless of what forms such "triggers" can or cannot take, it is clear that the Supplemental Process does include a trigger, and that that trigger constitutes perhaps the plainest possible example of a process that "result[s] in" removal of a voter from the rolls by reason of his or her failure to vote. We therefore hold that Ohio's Supplemental Process violates Section 8, subsection (b)(2) of the NVRA.

II. Plaintiffs' Challenge to Ohio's Confirmation Notice Form

Below, the district court held: (1) that Plaintiffs' challenges to Ohio's confirmation notice form were mooted by the Secretary's adoption of a new form that addressed all but one of Plaintiffs' concerns; and (2) that Plaintiffs' remaining challenge to the form—that it fails to provide out-of-state voters with information on how to remain registered—is not supported by Section 8's statutory language. We address these holdings in turn.

A. Mootness

Claims become moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Generally, "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." However, a narrow exception to that general rule exists in cases where a defendant claiming that its voluntary compliance moots a case successfully carries "the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." We have stated that it is a "rare instance" in which this standard will be met.

The Secretary argues that because he is a governmental actor, we should defer to his assurances that his recent changes to the confirmation notice form are permanent. Although it is true that "cessation of the allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties," such solicitude does not carry much of an official's burden of demonstrating that "there is no reasonable expectation ... that the alleged violation will recur." Indeed, the Supreme Court has declined to defer to a governmental actor's voluntary cessation, even where that cessation occurred pursuant to legislative process.

Nevertheless, apparently relying on such solicitude, the district court held that Plaintiffs' claims were moot because "[t]here is no evidence to suggest that the Defendant does not plan to use this Revised Notice in 2016 or at any other point in the future." We note as an initial matter, however, that this holding gets it backwards: Plaintiffs were not required to produce evidence suggesting that the Secretary planned on reengaging in the allegedly illegal behavior after resolution of the case. Rather, it was—and remains—the Secretary's "formidable burden" of "showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." The Secretary has failed to meet that burden in this case.

To begin, the new confirmation notice form was issued pursuant to the Secretary's "directive," rather than any legislative process. Thus, this is not a case in which reversing the cessation would be particularly burdensome. Indeed, it appears from the record that the confirmation notice form is revised on a relatively frequent basis—at least four times in the last nine years, not counting the most recent revision. And because the Ohio Secretary of State is an elected official, there remains a distinct possibility that a future Secretary will be less inclined to maintain the confirmation notice in its current form. Finally, we note that the circumstances of the Secretary's issuance of the new form do not inspire confidence in his assurances regarding the likelihood of recurrence—he issued that new form on the same day as the parties' final merits briefs were due before the district court, attaching the form as an exhibit to his brief and only then presenting his mootness argument. This fact makes the Secretary's voluntary cessation appear less genuine.

Given these facts, we conclude that the Secretary has not carried his burden of showing that it is "absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." Plaintiffs' challenges to the confirmation notice therefore have not been rendered moot by the new form. Even if we felt differently about the possibility of recurrence, however, that alone would not render Plaintiffs' request for

an injunction moot. A claim becomes moot only if "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." As Plaintiffs note, the Secretary's newly-issued form does nothing to correct the fact that Ohio has, for years, been removing voters from the rolls because they failed to respond to forms that are blatantly non-compliant with the NVRA. Thus, in any event, the new form could not render all of Plaintiffs' claims for relief moot.

B. Merits

The final question before us concerns the merits of Plaintiffs' remaining challenge to the newly issued confirmation notice form. Plaintiffs argue that the form does not comply with the NVRA's mandate, contained in subsection (d)(2)(B) of Section 8, that "[i]f the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered," any confirmation notice sent to that voter must provide "information concerning how the registrant can continue to be eligible to vote." Plaintiffs assert that the newly issued form violates this provision because it does not provide Ohio registrants who have moved out of state with information on how to re-register in their new state. This requirement could be satisfied, Plaintiffs contend, by simply modifying the confirmation notice to direct the recipient to the Federal Election Assistance Commission's website, on which the recipient will find "instructions and guidance for voter registration in all states."

Below, the district court held that it "defies logic that the NVRA would saddle the various secretaries of state (or their equivalents) with the onerous burden of coaching out-of-state residents through the registration process in their new states of residence." In support of this assertion, the court noted that the subsection on which Plaintiffs' argument is based provides that states must supply registrants with information on how to "continue" to be eligible to vote. Without much additional analysis, the district court proclaimed that the word "continue" necessarily means "continue to vote within that State—not register in another state." The Secretary's arguments on appeal buttress this conclusion by arguing that "[n]o voter can 'continue to be eligible' to vote by moving from Ohio to Michigan, ... [r]ather, the new Michigander must become a newly registered Michigan voter."

We find this argument unavailing. To begin, subsection (d)(2)(B)'s plain language contains no intra-state limitation. Instead, that subsection provides that information on how to continue to be eligible to vote must be presented to anyone who "has changed residence to a place outside the registrar's jurisdiction." The "outside the registrar's jurisdiction" language is the part of subsection (b)(2)(B)'s mandate that establishes its geographic applicability—had Congress intended to place geographic limitations on the mandate, it would have done so with this language rather than relying on a counterintuitive definition of the word "continue." Moreover, that word—"continue"—must be accorded its ordinary meaning. "Continue" means to "keep up or maintain esp[ecially] without interruption a particular condition." Certainly, a registrant can "keep up or maintain ... without interruption," id. her condition of being "eligible to vote," regardless of whether she must fully re-register or merely confirm her new address.

Further weighing against the Secretary's interpretation of subsection (d)(2)(B)—whereby "continuing" to vote excludes situations in which voters must fully re-register—is the fact that some states require

voters to fully re-register even when they move to a new jurisdiction within the same state. Indeed, the 2007 version of Ohio's confirmation notice form suggests that Ohio itself once required voters who moved between counties to fully re-register. Under the Secretary's reasoning, intra-state movers subject to such re-registration requirements would not be entitled to "information concerning how [they] can continue to be eligible to vote," because the requirement that they re-register means that they are not "continuing" to be eligible to vote. Not only would this outcome completely defeat the purpose of subsection (d)(2)(B)'s mandate in states with re-registration requirements, it would contradict the Secretary and district court's own conclusion that the word "continue" operates to free states of subsection (b)(2)(B)'s mandate with regard to out-of-state movers only.

In sum, we conclude that the district court erred by holding that Plaintiffs' claims regarding Ohio's confirmation notice are moot, and that the court erred by concluding that Ohio need not provide out-of-state movers with information on how they can continue to be eligible to vote.

CONCLUSION

For the reasons stated above, we REVERSE the district court's judgment and REMAND for further proceedings consistent with this opinion.

CONCURRING IN PART AND DISSENTING IN PART

SILER, Circuit Judge, dissenting in part and concurring in part.

Because of the urgency of this issue and the need to allow the Supreme Court to consider it, I write the dissent/concurrence in condensed fashion. It does not reflect the extent to which I disagree with the majority opinion, although I respect it.

I commend the Secretary for issuing a new confirmation notice form during the pendency of this litigation. In all aspects of the law, except for directions on how the voter can continue his registration, it complies with the National Voter Registration Act of 1993 (NVRA) and the Help America Vote Act of 2002 (HAVA).

Both sides agree that the language of the NVRA is unambiguous. "If the words of the statute are unambiguous, the judicial inquiry is at an end, and the plain meaning of the text must be enforced."

This seems to be a much simpler process than as outlined in the majority opinion. The Secretary has established a Supplemental Process for purging voters from the voting rolls in Ohio. The key language in the statute attacked by the plaintiffs is from 52 U.S.C. § 20507(b)(2), which directs that States shall not remove "the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote." However, that same subsection allows a State to use "the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters" under certain circumstances. That subsection indicates that if the voter:

(A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then

(B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office,

then subsection (d) provides how States may cancel registrations of those who may have

changed addresses. Id. It provides that the registrant should not be removed from the list of voters unless he or she confirms that he or she has changed residence or has failed to respond to a notice described in paragraph (2) and has not voted during a certain period of time.

The part of the statute which is in contention is § 20507(b)(2), which indicates that the State shall not remove the voter "by reason of the person's failure to vote." The Secretary indicates that the person is not removed from the voting rolls until after the registrant is sent a notice by mail to find out if he or she still lives at the old address. Not until that person fails to respond, as plaintiff Larry Harmon did, does the State then list the voter as "inactive" in the registration database. Nevertheless, this "inactive" voter has all the rights to cast a regular ballot at any election, but if four years transpire without the registrant's voting, his or her registration record is canceled. However, if the registrant has any voting activity during those four years, he or she returns to an active voter status.

The text of the NVRA directs the States to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of" death or relocation. The district court found the Secretary has made a reasonable effort to carry out that mandate, and I agree. The State cannot remove the registrant's name from the rolls for a failure to vote only, and Ohio does not do so. It removes registrants only if (1) they have not voted or updated their registration for the last two years, (2) also failed to respond to the address-confirmation notice, and (3) then failed to engage in any voter activity in four consecutive years, including two consecutive Federal elections following that notice.

The decision of the district court also follows the language in HAVA. The district court cited the following language from that act:

> [C]onsistent with the National Voter Registration Act of 1993 ..., registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.

As the Secretary has explained, it is his position that no voter is removed solely by reason of a failure to vote, and thus he has complied with the language from both statutes. I agree. The statutes leave it to the States to implement, and Ohio has developed a lawful procedure.

On the question of mootness, I agree with the majority that the plaintiffs had standing to bring the challenge to the notice form when the case was filed. However, I disagree with the conclusion that this case is not moot because the issues, save one, concerning the confirmation notice form have been corrected by the Secretary. Cessation of certain "conduct by government officials has been treated with more solicitude by the courts than similar action by private parties." I agree with the district court that there is no evidence to show that the Secretary would change the current notice, and this court should give him deference on that question. However, I concur with the majority that the current notice does not comply with the NVRA final mandate that when the Secretary sends the confirmation notice that the registrant has been purged, the notice must provide "information concerning how the registrant can continue to be eligible to vote." The district court found that this issue was waived by the plaintiffs for failure to include

it in their pleadings before filing their reply brief. However, their motion for summary judgment argued that the confirmation notice forms do not advise people who have moved out of the State how they could register in their new State. Although I agree with the district court that the State officials have been given an "onerous burden of coaching out-of-state residents through the registration process in their new States of residence," that is what the statute requires. The district court ruled that the mandate only applies to give the registrant information about registering in another location in Ohio, but the language of the statute is broader than that. In their brief on appeal, plaintiffs have suggested that an easy way to comply would be by directing voters to the Election Assistance Commission's website containing the federal form, which provides instructions and guidance for voter registration in all States. Although such a notice should be easy to attach to the notification to the registrants, it assumes that all registrants know how to utilize websites.

Nevertheless, that is the relief which the plaintiffs have requested, and it seems simple enough for the Secretary to institute that amendment to the notice.

Therefore, I would affirm the decision of the district court, except insofar as it declined to require the Secretary to amend its notice to voters who have moved to other States. I would grant relief on that sole issue.

"High court to review Ohio's method for removing voters from registration rolls"

The Washington Post

Robert Barnes

May 30, 2017

The Supreme Court said Tuesday it will hear yet another voting rights dispute next term and consider reinstating Ohio's method for purging the names of those who do not regularly vote from registration rolls.

Civil rights groups, which have successfully challenged the state's process, told the Supreme Court that there was no reason to disturb a decision of the U.S. Court of Appeals for the 6th Circuit striking down the rules as a violation of federal voting law.

Democrats and advocates for the poor say the state's efforts are disproportionately felt in neighborhoods that tend to vote Democratic. The procedure has prompted years of litigation between the advocates and the Republican-led legislature.

But Ohio Secretary of State Jon Husted, a Republican who is running for governor, said the process has been used under both Democrats and Republicans. It is a way to clear the voter rolls of those who have died or moved away and increases public confidence, he said.

"Maintaining the integrity of the voter rolls is essential to conducting an election with efficiency and integrity," Husted said in a statement.

"I remain confident that once the justices review this case they will rule to uphold the decades-old process that both Republicans and Democrats have used in Ohio to maintain our voter rolls as consistent with federal law," he added.

He said that in his time in office, the efforts have resulted in the removal of nearly 560,000 deceased Ohioans from the rolls and "the resolution of more than 1.65 million voters who were registered more than once."

But opponents say it is inappropriate to have such efforts be triggered by a failure to vote.

Under Ohio's procedure, voters who do not vote for two years are sent registration confirmation notices. If they do not respond and do not vote over the next four years, they are removed from the rolls.

The groups that challenged the law said the procedure violates a part of the National Voter Registration Act of 1993, which prohibits a voter-list maintenance program for federal elections that "result[s] in the removal of the name of any person from the official list of voters . . . by reason of the person's failure to vote."

Other states take action only after receiving notice that a person has moved, the groups said.

The provision in the federal law "reflects the basic principle that, just as every eligible voter has the constitutional right to vote, each one also has the right not to cast a vote — and the mere exercise of that right should not be the basis for removal from the voter rolls," the organizations told the court in a brief.

André Washington, president of one of the groups that challenged the state, the Ohio A. Philip Randolph Institute, said in a statement that the names of approximately 40,000 voters in Cuyahoga County were purged in 2015 "and a disproportionate number of those people came from low-income neighborhoods and communities of color."

Husted told the court that it needed to get involved because a growing number of states had similar procedures.

But opponents said only a handful of states do what Ohio does and that the justices should wait for the issue to be examined by other courts.

The case, which will be argued in the term that begins in October, is Husted v. A. Philip Randolph Institute.

"Use It or Lose It?"

The Atlantic

Matt Ford

May 30, 2017

The U.S. Supreme Court will review Ohio's contested purge of its voter rolls next term, adding a potentially major case on voting rights to its docket for the first time since Justice Neil Gorsuch joined the high court.

The justices agreed to hear the case, Husted v. A. Philip Randolph Institute, in their weekly release of orders on Tuesday. At issue is the removal of tens of thousands of Ohio voters from the state's voter list ahead of last November's election. The Sixth Circuit Court of Appeals blocked the process before Election Day last year before it had fully taken effect, while a federal district court allowed 7,515 voters who had already been removed by that point to cast a ballot.

State election officials across the country routinely remove voters who have died, moved to another state, or become otherwise ineligible to vote. In 1994, Ohio added what's known as the "supplemental process" to its standard removal procedure: The Ohio secretary of state's office compiles a list of registered voters who have gone two years without any "voter activity"—which covers acts ranging from updating one's voter information to casting an absentee, provisional, or Election Day ballot—and sends them a confirmation notice. If the notice isn't returned and the registered voter doesn't participate over the following four years, he or she is automatically struck from the rolls.

A group of civil-rights organizations, including the A. Philip Randolph Institute, the think tank Demos, and the ACLU of Ohio, filed a lawsuit against Ohio Secretary of State Jon Husted challenging the supplemental process's legality in early 2016. They pointed to two federal laws, the National Voter Registration Act of 1993 and the Help America Vote Act of 2002, that forbid states from removing registered voters from the rolls for simply not voting. Husted countered that the federal provision doesn't apply because the supplemental process doesn't force voters from the rolls unless they've also failed to respond to the mailed confirmation notice. By his apparent estimation, that intervening step means the state hasn't broken either law.

A federal district court initially dismissed the lawsuit. But a three-judge panel in the Sixth Circuit sided with the organizations, ruling that the prohibition against removing eligible Americans for not voting would be meaningless if states are allowed to use inactivity as one reason, even among many, to strike their names. "In more concrete terms, a state cannot avoid the conclusion that its process results in removal 'solely by reason of a failure to vote,' by providing that

the confirmation notice procedure is triggered by a registrant's failure either to vote or to climb Mt. Everest or to hit a hole-in-one," the court wrote.

A ruling in Ohio's favor would broaden states' powers to remove otherwise-eligible voters from their lists.

Husted appealed the decision to the Supreme Court in February and applauded the justices for agreeing to hear it. "Maintaining the integrity of the voter rolls is essential to conducting an election with efficiency and integrity," he said in a statement. "The decision by the Court to hear this case is encouraging. I remain confident that once the justices review this case they will rule to uphold the decades-old process that both Republicans and Democrats have used in Ohio to maintain our voter rolls as consistent with federal law."

The organizations that brought the lawsuit, for their part, reiterated their view that the purge wrongly targeted disadvantaged Ohioans for disenfranchisement. "In Cuyahoga County alone, approximately 40,000 individuals were unlawfully purged merely for choosing not to vote, and a disproportionate number of those people came from low-income neighborhoods and communities of color," Andre Washington, the president of APRI's Ohio chapter, said in a statement. "The Supreme Court must uphold the Sixth Circuit's decision to ensure that all Ohio citizens have the opportunity to exercise their right to vote."

Freda Levenson, the director of the ACLU of Ohio, went even further, describing the supplemental process as "a powerful mechanism" of voter suppression that violates federal law. "We are confident that the Supreme Court will uphold the correct decision from the Sixth Circuit Court of Appeals, and will ultimately ensure that eligible Ohio voters may not be stricken from the rolls," she said in a statement.

A ruling in Ohio's favor would broaden states' powers to remove otherwise-eligible voters from their lists. It would also come as multiple states have pursued tougher measures to constrain voter registration and participation. President Trump frequently invokes the specter of voter fraud and has ordered a commission to tackle its perceived threat. His remarks aside, virtually all election experts have concluded the United States' highly decentralized electoral system makes systemic voter fraud all but impossible.

Laws purportedly targeting voter fraud often face uphill battles in the judiciary. Earlier this month, the Supreme Court declined to review a Fourth Circuit ruling that found North Carolina's voter ID law targeted black voters with "surgical precision," thus ensuring lower participation. Even lesser restrictions can have a significant effect on the electorate: A recent study found voter ID laws in general double the turnout gap between white and black voters in general elections.

Whether the Supreme Court will obstruct or uphold those efforts remains to be seen. Husted v. AFRI will be the first major election-law case at the high court since Gorsuch joined it in April. He is expected to be a reliably conservative jurist, potentially giving Chief Justice John Roberts and his

right-leaning colleagues a fifth vote in upholding Ohio's supplementary process.

But it's unclear if he'll match the intensity of his predecessor. Antonin Scalia, who held Gorsuch's seat before his death in February 2016, generally favored more restrictive electoral practices. In 2013, he mused aloud during oral arguments in Shelby County v. Holder that "racial entitlements" like the Voting Rights Act of 1965 are difficult to remove "through the normal political process." His fifth vote to curb the VRA's protections in that case helped usher in the restrictive era on which his successor will soon weigh in.

"Federal appeals court rules against Ohio voter-roll purges"

The Washington Post

Sean Sullivan and Sari Horwitz

September 23, 2016

A federal appeals court ruled Friday against Ohio's procedure for removing voters from state rolls, dealing a blow to Republican Secretary of State Jon Husted and handing a victory to voting rights advocates in a key presidential swing state.

A three-judge panel of the U.S. Court of Appeals for the 6th Circuit overruled a U.S. district court judge's decision that Husted was not violating any laws with the process he was using to take inactive voters off the rolls if they did not confirm their status. By a -2-to-1 vote, the court of appeals sent the case back to the district court.

The dispute centers on Ohio's removal of possibly tens of thousands of voters from registration lists because they did not respond to letters seeking to confirm their addresses and have not cast a ballot since 2008, in what is being criticized as a "use it or lose it" rule for voting.

The appeals court ruled that Ohio's practices could unjustifiably remove some eligible voters and are not in compliance with the National Voter Registration Act of 1993.

"A state cannot avoid the conclusion that its process results in removal 'solely by reason of a failure to vote' . . . by providing that the confirmation notice procedure is triggered by a registrant's failure either to vote or to climb Mt. Everest or to hit a hole-in-one," said the ruling.

In a statement, Husted said the court's decision "will effectively force us to put voters back on the voter rolls who have died or long since moved to another address." He said that if "the final resolution requires us to reinstate voting eligibility to individuals who have died or moved out of Ohio, we will appeal."

Ohio Democratic Party Chairman David Pepper called Friday's decision a "huge win for Ohio voters."

"The court's decision reaffirms a basic principle: voters shouldn't lose their right to vote simply because they vote infrequently," he said in a statement.

Both Democrat Hillary Clinton and Republican Donald Trump are heavily contesting Ohio. Polls show a close contest in the state, where 18 electoral votes are up for grabs. Trump campaigned in the state this week.

The current policy of mandating that inactive voters effectively prove that they still belong on the voter rolls appears to be aiding Republicans in Ohio's largest metropolitan areas, according to a recent Reuters study. The study found that in Cleveland, Cincinnati

and Columbus, voters have been taken off the rolls in -Democratic-leaning areas at about twice the rate as in GOP-heavy areas.

The Ohio chapter of the A. Philip Randolph Institute and the Northeast Ohio Coalition for the Homeless, represented by the American Civil Liberties Union of Ohio and Demos, filed suit challenging the law in federal court.

In July, the Justice Department joined the court fight when it and the groups appealed the case to the U.S. Court of Appeals for the 6th Circuit after the district court upheld Husted's decision.

Voting rights advocates have expressed deep concern about the policy. Some cite the 2000 election in Florida, when the state incorrectly stated that about 12,000 registered voters were -ex-cons and then purged them from the rolls.

Republicans have expressed concern that changing the policy could lead to voter fraud. However, documented instances of fraud are rare. A 2014 study by Loyola Law School professor Justin -Levitt found 31 incidents of voter impersonation out of more than a billion ballots cast.

Along with the dispute over the voter rolls, the Supreme Court this month rejected a request from Democrats in Ohio to restore an extra week of early voting. After voters faced long lines in 2004, the state had added the additional week, known as the Golden Week, because the days overlapped with the period for voter registration.

In 2013, a Republican-controlled legislature repealed the law. A federal judge found that action unconstitutional, but his decision was overturned by an appeals court, and the Supreme Court declined to intervene.

Judge Eric L. Clay, who was appointed by President Bill Clinton, delivered the Friday opinion. He was joined by Judge Julia Smith Gibbons, an appointee of President George W. Bush.

Judge Eugene E. Siler Jr. dissented in part and concurred in part. He was appointed by President George H.W. Bush.

"Ohio Can't Purge Infrequent Voters From Its Rolls"

The Atlantic

David A. Graham

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Ohio can't summarily kick tens of thousands of voters off its rolls simply for not having voted recently and not returning a postcard, the Sixth Circuit Court of Appeals said on Friday.

The decision comes just 46 days before the election day, and as tens of thousands of Buckeye State voters have already requested early ballots. But the decision could still be appealed, as one judge noted in his partial dissent.

Ohio has seen a couple high-profile fights over voting laws this year, disputes that have particular importance because the state is a crucial swing state in every presidential election. In this case, Secretary of State Jon Husted, a Republican, decided to remove voters from the state's rolls if they had not voted for six years. The state sent a mailing to these voters asking them to reply if they were still living in their locations and voting, but the mailers neither stated that a reply was mandatory nor made it clear that failing to reply could result in removal from rolls. "If this is [a] really important thing to you in your life, voting, you probably would have done so within a six-year period," Husted said.

Moves such as these tend to disproportionately affect voters in urban areas, who are more likely to move frequently. That in turns means a disproportionate impact on poorer and blacker voters—who happen to be more likely to vote Democratic. Homeless advocates said the purges unfairly targeted those without a stable address.

Voting advocates sued Husted, saying the purge violated the National Voting Rights Act and asking for either an injunction to block the removal or else a requirement to count provisional ballots from people who were removed. They lost in federal district court, but the appeals court decision today concluded that the lower court was mistaken. By a 2-1 ruling, the three-judge panel said that the plaintiff's claims were not made irrelevant when Husted mailed out a second notice with more information, and it ruled that Ohio had to inform people moving out of state about how to register in their new residence.

Judge Eric Clay, a Bill Clinton appointee, and Judge Julia Gibbons, a George W. Bush appointee, ruled in favor of the plaintiffs. Judge Eugene Siler, a George H.W. Bush appointee, dissented in part and concurred in part.

Assuming the ruling is not overturned by a higher court, it's hard to know what effect it

might have on the election. As a Cincinnati Enquirer investigation found, no one really knows how many voters have actually been purged.

In a separate case, Husted was sued for eliminating "Golden Week," a stretch in which Ohioans could both register to vote and cast an early ballot. A district court ruled against Husted in that case, but in August a different Sixth Circuit panel ruled that Husted was within his rights to eliminate it.