No. 16-1161

In the Supreme Court of the United States

BEVERLY R. GILL, ET AL., APPELLANTS

v.

WILLIAM WHITFORD, ET AL., APPELLEES

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

BRIEF FOR THE STATES OF TEXAS, ARIZONA, ARKANSAS, INDIANA, KANSAS, LOUISIANA, MICHIGAN, MISSOURI, NEVADA, OKLAHOMA, SOUTH CAROLINA, AND UTAH AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

Page

Table of Authorities IIII

Interest of amici curiae 1

Summary of argument 2

Argument 3

I. The District Court's Opinion Warrants This Court's Review Because It Threatens Every State's Ability to Reapportion Legislative Seats. 3

A. Partisan purpose is easy to prove when the redistricting process involves partisan actors and necessarily produces partisan effects. 4

B. The district court's indeterminate standard does not draw a clear line between permissible and impermissible partisan effects. 8

II. The District Court's Partisan-Gerrymandering Standard Rests on Unfounded Conceptions of Proportional Representation and Vote Dilution. 11

A. The district court's expectation that single-member districts will result in proportional representation is unfounded. 11

B. The district court's analysis reflects an expansion of vote-dilution claims from

individuals' ability to elect to group-based statewide political influence. 14
Conclusion 18

TABLE OF AUTHORITIES

Page(s)

Cases:

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 15
Anderson v. Celebrezze, 460 U.S. 780 (1983) 17
Brown v. Thomson, 462 U.S. 835 (1983) 15, 16
Chapman v. Meier, 420 U.S. 1 (1975) 2
Common Cause v. Rucho, No. 16-cv-1026, 2017 WL 876307 (M.D.N.C. March 3, 2017) (per curiam) 8
Davis v. Bandemer, 478 U.S. 109 (1986) 5, 10, 12
Gaffney v. Cummings, 412 U.S. 735 (1973) 2, 4
Growe v. Emison, 507 U.S. 25 (1993) 2
Harris v. Ariz. Indep. Redistricting Comm'n, 136 S. Ct. 1301 (2016) 8
Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 17
LULAC v. Perry, 548 U.S. 399 (2006) 12, 14
Miller v. Johnson, 515 U.S. 900 (1995) 6
Reynolds v. Sims, 377 U.S. 533 (1964) 15
Shaw v. Hunt, 517 U.S. 899 (1996) 14
Shaw v. Reno, 509 U.S. 630 (1993) 7

Cases – Continued:

Vieth v. Jubelirer, 541 U.S. 267 (2004) 7, 12, 13
Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) 4, 7

Other Authorities

Paul A. Diller, *Reorienting Home Rule: Part 1—The Urban Disadvantage in National and State Lawmaking*, 77 La. L. Rev. 287 (2016) 13

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INTEREST OF AMICI CURIAE[1]

Amici are the States of Texas, Arizona, Arkansas, Indiana, Kansas, Louisiana, Michigan, Missouri, Nevada, Oklahoma, South Carolina, and Utah. The States have a vital interest in the rules that govern apportionment of seats for state legislative bodies and the United States House of Representatives. This Court has repeatedly held that "reapportionment is primarily the duty and responsibility of the State through its legislature or other

[1] Counsel of record received timely notice of intent to file this brief, as required by Rule 37.2(a).

body, rather than of a federal court." *Growe v. Emison*, 507 U.S. 25, 34 (1993) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)).

And the Court has recognized that reapportionment by state legislatures is an inherently political task. *See, e.g.*, *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973). It has never held that a State violates the Constitution by pursuing or achieving political goals through reapportionment.

Yet in this case, the district court held that Wisconsin violated the Constitution when it passed Act 43, the reapportionment plan for its Assembly and Senate, because that plan was purportedly a partisan gerrymander. The district court's decision invites openly partisan policy battles in the courtroom. This will expose every State to litigation under a legal standard so indeterminate that any party that loses in the statehouse has a fighting chance of overriding that policy decision in the courthouse. The Constitution does not support, let alone compel, this result. The district court's decision therefore warrants review by this Court.

SUMMARY OF ARGUMENT

This Court has repeatedly stated that legislative reapportionment is an inherently partisan task. And the Court has made clear that partisan-gerrymandering claims are not cognizable based on a measure of proportional representation between the votes and seats obtained by a political party.

Nevertheless, the split decision of the district court here recognized a partisan-gerrymandering claim under

an amorphous test that could be used to threaten countless state legislative reapportionment plans. Partisan purpose is inherent in the nature of legislative reapportionment, and the district court's indeterminate standard does not draw a predictable line between permissible and impermissible partisan effects. Furthermore, the district court's analysis is predicated on an expectation that single-member districts should produce proportional representation—a concept this Court has expressly rejected multiple times. And the district court's reliance on vote-dilution cases fundamentally misunderstands the difference between those claims regarding *individual* rights versus the novel *group*-based right recognized here. The Court's review is necessary to reject the district court's flawed analysis before it spreads to other jurisdictions and interferes with the States' fundamental political responsibilities.

ARGUMENT

I. The District Court's Opinion Warrants This Court's Review Because It Threatens Every State's Ability to Reapportion Legislative Seats.

The district court majority held that a redistricting plan violates the First Amendment and the Equal Protection Clause when it "(1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds." J.S. App. 109-10a. That holding will be quite disruptive in practice. First, partisan motivation will be easy to prove because, unlike race or

other presumptively impermissible criteria, political considerations are unavoidable in legislative reapportionment. Second, political impact is foreseeable in any apportionment plan, but there is no clear standard to distinguish permissible from impermissible partisan effects. The district court's indeterminate standard of liability warrants review by this Court because it threatens to entangle every State in protracted, politically motivated litigation.

A. Partisan purpose is easy to prove when the redistricting process involves partisan actors and necessarily produces partisan effects.

In an effort to provide structure to its intentional-discrimination test, the majority purported to borrow the framework for judging discriminatory purpose from racial-discrimination cases, J.S. App. 117a, including the nonexhaustive list of factors identified in *Arlington Heights*. J.S. App. 123-24a (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977)). The problem with this, of course, is that the Court has repeatedly noted that partisan purpose is inherent in legislative reapportionment. So a finding of partisan purpose says nothing about the constitutionality of a reapportionment plan.

This Court has correctly noted that as long as redistricting is carried out by partisan legislatures, partisan intent will be easy to prove. *Gaffney v. Cummings*, for instance, referred to "the impossible task of extirpating politics from what are the essentially political processes of the sovereign States." 412 U.S. at 754. Similarly, in

Davis v. Bandemer, 478 U.S. 109, 129 (1986), the plurality recognized that partisan intent is inherent in legislative redistricting: "As 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."

Because some degree of partisanship is inherent in legislative redistricting, the district court had to consider "what kind of partisan intent offends the Constitution." J.S. App. 111a. The district court's answer to that question sets an extremely low bar.

The hallmark of excessive partisanship, according to the district court, is "an intent to entrench a political party in power." J.S. App. 117a. It did not define "entrenchment," but it described the concept in terms that could apply to any effort to secure an electoral advantage. According to the district court, "excessiveness" or "extreme partisan gerrymanders" do not require any particular distribution of legislative seats. A party with a bare majority of safe seats could be sufficiently "locked-in" to impose "representational harms" on adherents of the other party. J.S. App. 116a.

The district court's opinion illustrates how easy it will be to establish discriminatory intent. It found that "one purpose of Act 43 was to secure the Republican Party's control of the state legislature for the decennial period." J.S. App. 126a. One basis of this finding was the drafters' consideration of partisan data to predict the outcome of elections. J.S. App. 126-36a. The district court found impermissible partisan purpose because "from the outset of the redistricting process, the drafters sought to understand the partisan effects of the maps they were

drawing." J.S. App. 138a. It also relied on the drafters' concern with "the *durability* of their plan," that is, whether the anticipated advantage would persist over the life of the plan. J.S. App. 139a.[2] Ultimately, this was enough to prove "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." J.S. App. 140a.

Under the district court's test, any effort to secure a marginal partisan advantage may qualify as prohibited intentional discrimination. It dismissed the argument that drafters "only wanted to improve their position incrementally," reasoning that if that had been their purpose, "they could have settled on one of the maps that provided a pickup of a smaller number of Republican seats." J.S. App. 145a n.241. But under the majority's reasoning, the "pickup" of a smaller number of seats would still support a finding of intent to "entrench"—it would merely be a lesser degree of entrenchment.

The district court's standard of discriminatory purpose will effectively reverse the presumption of constitutionality afforded to legislative enactments. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (noting "the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments"). After all, "it rarely can 'be said that a legislature

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[2] This concern was proven, in part, by signs of optimism—one drafter assured the Republican caucus that "[t]he maps we pass *will determine who's here 10 years from now.*" J.S. App. 136a.

or administrative body operating under a broad mandate made a decision motivated by a single concern.'" J.S. App. 118-19a (quoting *Arlington Heights*, 429 U.S. at 265). This is particularly true in redistricting—legislatures typically must consider, among other factors, "traditional districting principles such as compactness, contiguity, and respect for political subdivisions." J.S. App. 119a (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)). And since this Court has presumed that politics will figure in that mix, the fact of a legislatively enacted plan will almost always suffice to make out a prima facie case of discriminatory intent under the district court's test.

The States will find no comfort in "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," J.S. App. 123a (quoting *Arlington Heights*, 429 U.S. at 266), since the circumstantial evidence—and likely the direct evidence—will presumably abound with indicators of political motive. *See, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 347-50 (2004) (Souter, J., dissenting) ("[U]nder a plan devised by a single major party, proving intent should not be hard, . . . politicians not being politically disinterested or characteristically naïve."). Contrary to the district court's suggestion, court- or commission-drawn plans will not escape liability if they have a partisan impact. The "components of the analysis" under *Arlington Heights* can never "prevent a finding of a constitutional violation," J.S. App. 171a, because they are not necessary elements of proof; they are merely "subjects of proper inquiry." 429 U.S. at 268. Indeed, a recent case before this Court proves that claims of partisan gerrymandering will not "stall," J.S. App. 171a, merely because a court or commission drew

the challenged plan. *See Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1307 (2016) (rejecting claim that deviations from absolute population equality resulted from the redistricting commission's "political efforts to help the Democratic Party").

B. The district court's indeterminate standard does not draw a clear line between permissible and impermissible partisan effects.

Just as any effort to favor one political party could support a finding of discriminatory intent, any degree of partisan advantage could lead to a finding of discriminatory effect under the district court's standard. The district court did not adopt wholesale the plaintiffs' proposed "efficiency gap" statistical test, instead treating it as corroborating evidence of a purported partisan gerrymander. J.S. App. 176a. But the court nevertheless created an even more open-ended standard that would result in a finding of discriminatory effect whenever a State's redistricting plan would "place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation." J.S. App. 109-10a. The district court's constitutional standard merits this Court's full review because it places every State at risk of constitutional liability, as the district court's decision will be—and has been—relied on by other courts in evaluating partisan-gerrymandering claims. *See Common Cause v. Rucho*, No. 16-cv-1026, 2017 WL 876307 (M.D.N.C. March 3, 2017) (per curiam). This guarantees that every State will face protracted litigation under a test that does not impose clear standards.

The plaintiffs' proposed "efficiency gap" test for partisan gerrymandering shows the extent of the threat to the States. Plaintiffs' "efficiency gap" test attempts to measure the difference between the percentage of statewide votes for legislative seats for a political party compared to the actual percentage of seats held by that party. J.S. App. 159-61a. The plaintiffs' expert Dr. Jackman applied this efficiency-gap test to elections in 41 States over a 43-year period, finding impermissible partisan discrimination whenever the first election produced an efficiency gap greater than 7%.[3] The appellants note that this test would condemn approximately one third of all plans considered. J.S. 14-15. Indeed, considering all elections in the analysis, the plaintiffs' test would have found an impermissible partisan effect in at least one plan in 36 States—including Alabama, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Missouri, Mississippi, Montana, North Carolina, New Mexico, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Vermont, Washington, Wisconsin, West Virginia, and Wyoming. *See* Jackman Rpt. at 34. Confining the analysis to elections held in

[3] *See* Simon Jackman, Assessing the Current Wisconsin State Legislative Districting Plan at 20 (July 7, 2015), ECF No. 1-3 [hereinafter "Jackman Report"]. Dr. Jackman excluded 9 States—Arizona, Idaho, Louisiana, Maryland, Nebraska, New Hampshire, New Jersey, North Dakota, and South Dakota—from his analysis because they had "exceedingly high rates of uncontested races" or because they used multi-member districts, non-partisan elections, or a run-off system. *Id.*

2012 and 2014, Dr. Jackman found an efficiency gap greater than 10% in Florida, Indiana, Kansas, Michigan, Missouri, North Carolina, New York, Ohio, Rhode Island Virginia, Wisconsin, and Wyoming. *See id.* at 73. In addition, Dr. Jackman found consistent partisan bias in post-2010 redistricting plans in Alaska, Colorado, Georgia, Maine, Minnesota, Oregon, Pennsylvania, and Vermont. *Id.*

The district court's standard is even more open-ended. Eschewing the plaintiffs' efficiency-gap metric and its 7% threshold, the district court found that Wisconsin "burden[ed] 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." J.S. App. 176-77a.

The logic of the district court's opinion would permit a finding of partisan gerrymandering based on any degree of disproportionality between statewide votes and legislative seats, provided only that the seats-to-votes gap persisted over the life of the plan. A smaller number of safer seats would arguably provide even stronger evidence of a partisan effect. A narrower majority would allow a greater margin of safety, thereby increasing the durability of the alleged gerrymander. *See, e.g.*, *Bandemer*, 478 U.S. at 152 (O'Connor, J., concurring in the judgment) ("[A]n overambitious gerrymander can lead to disaster for the legislative majority: because it has created more seats in which it hopes to win relatively narrow victories, the same swing in overall voting strength will tend to cost the legislative majority more

and more seats as the gerrymander becomes more ambitious."). As long as the legislature intended to create some degree of electoral advantage—and it is difficult to imagine how this could not be proven—liability would be established. The potential for interference with State redistricting efforts merits review by this Court.

II. The District Court's Partisan-Gerrymandering Standard Rests on Unfounded Conceptions of Proportional Representation and Vote Dilution.

A. The district court's expectation that single-member districts will result in proportional representation is unfounded.

The majority based its partisan-gerrymandering test on the notion that the proportion of statewide votes for a major party's candidates should match the proportion of legislative seats won in single-member legislative districts. As the district court put it, the plaintiffs' proposed test—the efficiency gap—"measures the magnitude of a plan's deviation from the relationship we would expect to observe between votes and seats." J.S. App. 169a. But there is no reason to expect proportional representation in a system based on single-member districts. More importantly, there is no constitutional basis to compel the States to achieve proportional partisan representation in their legislatures.

The premise underlying the majority's decision—"the normative judgment that a party's seats won must be proportional to the party's statewide vote totals," J.S. App. 273a (Griesbach, J., dissenting)—stands at odds with the nature of single-district, winner-take-all elections. This conflict was apparent, and clearly noted, in

Bandemer, where the plurality explained that disproportionality "is inherent in winner-take-all, district-based elections." 478 U.S. at 130 (plurality opinion); *id* at 159 (O'Connor, J., concurring) (explaining that when "voters cast votes for candidates in their districts . . . efforts to determine party voting strength presuppose a norm that does not exist—statewide elections for representatives along party lines").

The district court failed to locate a right to proportional representation in the Constitution. That failure is significant given this Court's prior decisions. *See, e.g.*, *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring) (finding "no authority" for the notion "that a majority of voters in the Commonwealth should be able to elect a majority of the Commonwealth's congressional delegation"); *id.* at 358 (Breyer, J., dissenting) (explaining that systems designed to produce more proportional representation simply "reflect different conclusions about the proper balance of different elements of a workable democratic government"); *LULAC v. Perry*, 548 U.S. 399, 419 (2006) (opinion of Kennedy, J.) ("[T]here 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."). The dissent below noted correctly that "the efficiency gap—or any measure that simply compares statewide votes to seats—is little more than an enshrinement of a phantom constitutional right." J.S. App. 235a (Griesbach, J., dissenting).

The majority's opinion also downplays the impact of geographic clustering, where Democratic-leaning voters tend to concentrate in high-density urban areas. This

well-documented phenomenon exists across the country, with predictable effects on district-level elections. *See, e.g.*, *Vieth*, 541 U.S. at 290 (plurality opinion) (recognizing that "political groups that tend to cluster (as is the case with Democratic voters in cities) would be systematically affected by what might be called a 'natural' packing effect"); Paul A. Diller, *Reorienting Home Rule: Part 1—The Urban Disadvantage in National and State Lawmaking*, 77 La. L. Rev. 287, 336 (2016) ("The same overlap of residential demography and political preference that skews the U.S. House in favor of Republicans operates, perforce, at the state level because a vast majority use contiguous, single-member, winner-take-all districts to elect legislators."). The majority acknowledged, and the plaintiffs conceded, that "Wisconsin's political geography affords Republicans a modest natural advantage in districting." J.S. App. 200a. Indeed, the plaintiffs' demonstration plan, which was drawn to minimize the efficiency gap, still showed an efficiency gap of 2.2% to 3.89% in favor of Republicans under their measure. J.S. App. 202a, 203a n.355.[4]

The majority discounted this factor on the ground that geography alone "cannot explain the burden that Act 43 imposes on Democratic voters in Wisconsin." J.S. App. 217-18a. But other factors, such as larger numbers of uncontested elections and variations in turnout, may correlate with and magnify the effects of geographic clustering. *See* J.S. App. 243a, 309-11a (Griesbach, J.,

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[4] To reach the 2.2% efficiency gap, the plaintiffs' expert assumed that there were no incumbents. Accounting for incumbency, the figure rose to 3.89%. J.S. App. 203a n.355.

dissenting). Without controlling for those factors, the district court had no basis to assume that the responsibility for Act 43's partisan impact lay exclusively, or even primarily, with its drafters.

B. The district court's analysis reflects an expansion of vote-dilution claims from individuals' ability to elect to group-based statewide political influence.

The opinion below also raises a substantial question about the nature and source of vote-dilution claims. The district court majority appeared to leverage constitutional claims based on the rights of individual voters to participate in the political process—the traditional focus of vote-dilution claims—into a constitutional standard based on the right of a group to achieve a certain measure of political success. That marks a significant departure from this Court's jurisprudence.

The district court claimed that "one-person, one-vote and vote-dilution cases provide the foundation for evaluating claims of political gerrymandering." J.S. App. 78a. And it recognized that "[t]he 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." J.S. App. 100a. The right to cast an undiluted vote belongs to each voter as an individual. *LULAC v. Perry*, 548 U.S. at 437 ("[T]he right to an undiluted vote does not belong to the 'minority as a group,' but rather to 'its individual members.'" (quoting *Shaw v. Hunt*, 517 U.S. 899, 917 (1996))); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (citing "the basic principle

that the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups"). The district court did not explain, however, why or how the individual plaintiffs' votes had been diluted or assigned unequal weight. It did not identify the particular Assembly districts in which they live, nor did it consider whether they were able to elect their preferred candidates of choice.

The district court looked past the typical elements of vote-dilution because it treated the plaintiffs' claims as group-based claims, not claims based on individual rights. The concern here, it explained, "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." J.S. App. 224-25a.

The district court's willingness to recognize a group-based right to a specific degree of political power is novel. The district court's attempt to locate that right in the one-person, one-vote doctrine highlights the fundamental problem with its analysis: the absence of an identifiable constitutional baseline. The majority argued that its analysis of partisan effect "finds a constitutional analogue in the malapportionment context." J.S. App. 168a n.299 (citing *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983)). But in malapportionment cases, deviation from population equality makes out a prima facie case of invidious discrimination because the Constitution has been interpreted to require substantially equal population in order to ensure that each *individual*'s vote is measured with the same weight. *Reynolds v. Sims*, 377 U.S. 533, 579 (1964) ("[T]he overriding objective must be substantial equality of population among the various districts, so

that the vote of any citizen is approximately equal in weight to that of any other citizen in the State."). Equal population is the constitutional baseline.[5] There is no equivalent constitutional baseline for *partisan* fairness or equal influence for political parties.

The district court attempted to sidestep this problem by invoking "the ability of voters of a certain political persuasion to form a legislative majority." J.S. App. 106a. According to the majority below, when a group of voters "has a diminished or even no opportunity to effect a legislative majority," each member of that group is "an unequal participant in the decisions of the body politic." J.S. App. 107a.

But the notion that an individual voter suffers a constitutional injury because a political party cannot form a legislative majority is hardly self-evident. The district court did not explain why injury to the party necessarily inflicts an injury on the individual voter. It merely argued that the asserted injury was not a generalized grievance because the harm was "shared by Democratic voters in the State of Wisconsin." J.S. App. 226a. But a wrong shared by the public at large does *not* confer concrete, individualized injury, *e.g.*, *Lujan v. Defenders of*

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[5] The majority was wrong to assert that equal apportionment is "an outcome that the Constitution does not require in the state legislative context." J.S. App. 168a n.299. The Constitution requires equal population, but States have some latitude to deviate from strict mathematical equality. *See Brown*, 462 U.S. at 842 ("Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations.").

Wildlife, 504 U.S. 555, 573-74 (1992), and it does not imply that a wrong shared among any smaller subset of the public at large *does* create an injury sufficient for Article III standing. *Cf.* J.S. App. 225a (interpreting *Lujan* to hold that "an injury is not sufficiently particularized *only* if it is a wrong shared by the 'public at large'"). In any event, if political affiliation is not an immutable characteristic—and it is not; voters may split their tickets—then "Democratic voters" could include any member of the public at large.

Nor can the individual voter's injury be defined as a burden on political expression, at least not as that concept has been articulated in this Court's decisions. Unlike the ballot-access restriction at issue in *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983), which prevented independent voters from expressing support for their preferred candidate, assignment of Democratic voters to a Republican-leaning district does not prevent any voter from expressing his or her support for a Democratic candidate or the views he espouses. The boundaries of a single-member district do not create "restrictions on the eligibility of voters and candidates." *Id.* at 786 n.7.

* * *

The majority's reasoning goes well beyond this Court's vote-dilution jurisprudence, but its partisan-gerrymandering test will not remove partisanship from the redistricting process. Nor will it reduce partisan influence to an acceptable level, as it cannot even identify an acceptable level of partisanship. It is virtually certain,

however, that any judicially created standard for detecting partisan gerrymandering will make naked partisanship a prominent and powerful weapon in redistricting *litigation*. Given the uncertain contours of the district court's test—not to mention the questionable status of the "rights" it protects—this case suggests strongly that any hypothetical test trying to identify impermissible partisan redistricting will only create unwarranted interference with the States' fundamental political responsibilities.

CONCLUSION

The Court should note probable jurisdiction and reverse the decision of the district court.

Respectfully submitted.

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