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 OPPOSING MOTION TO AFFIRM

BRAD D. SCHIMEL
Attorney General

KEVIN M. LEROY
LUKE N. BERG
Deputy Solicitors General

State of Wisconsin
Department of Justice
17 West Main Street
Madison, WI 53703
tseytlinm@doj.state.wi.us
(608) 267-9323

MISHA TSEYTLIN
Solicitor General
Counsel of Record

RYAN J. WALSH
Chief Deputy Solicitor General

AMY C. MILLER
Assistant Solicitor General

BRIAN P. KEENAN
Assistant Attorney General

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTRODUCTION

In their Motion to Affirm, Plaintiffs do not dispute Defendants' showing that Act 43 would be lawful under any test that any Justice of this Court has ever articulated. JS 37–38. Nor do they defend the district court's approach, which is built upon the entrenchment concept at the heart of the *Davis v. Bandemer*, 478 U.S. 109 (1986), plurality's test. JS 30–34. And they no longer support their principal argument below: that the "efficiency gap" should be the sole test for identifying an impermissible effect. Instead, they now argue for a vague test, under which a plan would have unlawful effect if it failed some unspecified combination of "social scientific measures," such as "partisan bias," "efficiency gap," and "sensitivity testing." Mot. 19–21. Plaintiffs also have no credible response for Defendants' argument that affirmance in this case would immediately put at risk *one of every three* plans drawn by state legislatures in this country. JS 14–15; *see generally* States Amicus Br. 8–10.

One of the critical reasons that Plaintiffs' approach runs roughshod over districting plans nationwide is that it disregards two limitations from this Court's caselaw. First, the majority of the Justices of this Court in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), concluded that statewide political-gerrymandering claims are nonjusticiable. JS 21–25. Second, the majority of Justices in *Vieth* would not permit a political-gerrymandering claim when

the legislature complied with traditional redistricting principles. JS 26–28. Plaintiffs respond that this "theory of precedent"—the theory that lower courts must respect the votes of *all* of the Justices of this Court—has "yet to occur to this Court." Mot. 4, 26. But Plaintiffs have no answer for the cases that adopt precisely that "theory": *United States v. Jacobsen*, 466 U.S. 109, 115–18 & n.12 (1984), *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation,* 460 U.S. 1, 17 (1983), and Justice Kennedy's treatment of *Vieth* in *League of United Latin American Citizens v. Perry (LULAC)*, 548 U.S. 399, 418 (2006) (plurality op.).

Plaintiffs' approach is also unlawful because it is not "limited and precise." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment); *see* JS 30–37. Having now abandoned their indefensible reliance on the efficiency gap as the sole measure of partisan effect, Plaintiffs admit that they have not identified "any particular technique for demonstrating" partisan effect. Mot. 22 (emphasis removed). This is about as candid a concession as possible that Plaintiffs' test is not "limited and precise."

The district court's and Plaintiffs' disregard for this Court's binding caselaw makes summary reversal appropriate. Alternatively, given the conceded "importance of the issue," Mot. 5, merits briefing and argument would be warranted.

ARGUMENT

I. A Majority Of This Court Has Already Correctly Held That A Statewide Partisan-Gerrymandering Claim Is Nonjusticiable

The majority of the Justices in *Vieth* concluded that statewide partisan-gerrymandering claims are nonjusticiable. JS 21–22. The four-Justice plurality made this specific point, explaining that both they and Justice Stevens concluded that "statewide claims are nonjusticiable." 541 U.S. at 292. Justice Stevens did not dispute this account. Accordingly, under this Court's treatment of divided opinions, the district court had no authority to adjudicate Plaintiffs' statewide claim here. JS 21–23.

Plaintiffs claim that lower courts are free to ignore the votes of Justices of this Court, even when a majority of Justices clearly endorse a particular outcome. Mot. 26. Plaintiffs cite no case to support this approach, which is foreclosed by *Jacobsen* and *Moses H. Cone*, as well as Justice Kennedy's understanding of *Vieth* as articulated in *LULAC*. JS 20–21. The fatal flaw in Plaintiffs' approach can be illustrated by a hypothetical question: could a district court reject a single-district political-gerrymandering claim because, in its view, *all* political-gerrymandering claims are nonjusticiable? Of course not, because Justice Kennedy and four dissenting Justices concluded to the contrary in *Vieth*. For the same reason, a district court cannot ignore the conclusion of a

majority of the Justices in *Vieth* and hold that *statewide* political-gerrymandering claims are justiciable.

Plaintiffs further assert that the *Vieth* plurality's decision was that political-gerrymandering claims are "nonjusticiable," whereas Justice Stevens' decision was merely based upon "how the claim should operate." Mot. 26. This is contrary to *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), JS 22–23, which Defendants relied upon and Plaintiffs ignore. *Schlesinger* explained that "either the absence of standing," which Justice Stevens found in *Vieth*, "or the presence of a political question," which the *Vieth* plurality found, "suffices to prevent the power of the federal judiciary from being invoked." *Id.* at 215.

Plaintiffs' point that this Court in *LULAC* did not mention this statewide justiciability issue, Mot. 27, also does not support their position. When the power of a court to adjudicate a claim is "assumed by the parties, and [] assumed without discussion by the Court," a decision on the merits has "no precedential effect" on the assumption. *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 91 (1998). That is precisely what occurred in *LULAC*, as Plaintiffs concede. *See* Mot. 27.[1] *LULAC* is further irrelevant

[1] For the same reason, it does not help Plaintiffs that district courts after *Vieth* have easily rejected statewide claims on

here because it dealt with plaintiffs' proposal to create a bespoke legal test, applicable to "mid-decennial redistricting, when solely motivated by partisan objectives." 548 U.S. at 416. In contrast, the present case deals with precisely the type of garden-variety statewide gerrymandering claim that the majority of the Justices in *Vieth* held is nonjusticiable.

Finally, Plaintiffs offer no reason for this Court to permit statewide partisan-gerrymandering claims. As Defendants explained, it makes no sense to allow more broad-based invalidation in the political-gerrymandering context than this Court has permitted in the racial-gerrymandering context. JS 23–25. Plaintiffs' only response is to assert, without any support, that "partisan gerrymandering is *inherently* a statewide activity." Mot. 4. This is clearly wrong; the plaintiff in *Vieth* (among others, *see, e.g.*, *Shapiro v. McManus*, 203 F. Supp. 3d 579, 585 (D. Md. 2016)), brought a single-district claim. Given that plaintiffs in the racial context have no standing to bring statewide challenges, it follows that plaintiffs in the political context also lack such standing.

---

the merits. *See Fletcher v. Lamone*, 831 F. Supp. 2d 887, 903–04 (D. Md. 2011) (collecting cases, while observing that it is uncertain whether plaintiffs have "standing to assert" the claim "at all").

II. A Majority Of This Court Has Already Correctly Held That A Plan That Complies With Traditional Redistricting Principles Is Not An Unlawful Political Gerrymander

Plaintiffs are wrong to defend the district court's decision to invalidate Act 43 as a partisan gerrymander even though the plan complies with traditional redistricting principles, for much the same reasons discussed above. The majority of the Justices in *Vieth* would uphold a plan that complies with these principles, which is enough to foreclose a district court from reaching the opposite conclusion. JS 26–27.

Plaintiffs incorrectly seek refuge in the fact that the *Vieth* plurality criticized Justice Souter's approach, Mot. 30, under which the defendant must prove noncompliance with traditional redistricting principles as an element of its claim. The plurality simply explained that these principles did not solve the problem of partisan-gerrymandering claims' nonjusticiability. 541 U.S. at 295–96. Plaintiffs offer no answer to Defendants' critical point: in cases like this one, where the plan complies with traditional redistricting principles, the plurality would unquestionably combine with other *Vieth* Justices to reject the claim. Accordingly, district courts must reach the same result.

Plaintiffs' assertion that Act 43 does not comply with traditional redistricting principles, Mot. 32, is

without record support. Before the district court, Defendants made Act 43's compliance with these principles a core argument, explaining that Act 43 performed as well as court-drawn maps in terms of compactness, contiguity, and respect for political-subdivision lines. JS 12, 19. Plaintiffs chose not to make any contrary showing. Plaintiffs' belated cherry-picking of the number of counties split (while ignoring splits of cities and towns), a miniscule difference in compactness, and one district redrawn due to a violation of the Voting Rights Act, Mot. 32, does not come close to showing Act 43 "paid little or no heed to [] traditional districting principles," *Vieth*, 541 U.S. at 348 (Souter, J., dissenting).

III. Neither The District Court's Nor Plaintiffs' Approaches Are "Limited And Precise"

Plaintiffs' assertion that Defendants "barely tr[ied] to argue" that the district court's test does not state a proper rule for partisan gerrymandering claims, Mot. 4, is bizarre given that Defendants devoted the entirety of Section II of their Jurisdictional Statement to that argument. Defendants' syllogism on this score is simple and irrefutable: the three-prong test that the district court adopted has no *constitutionally relevant distinctions* from the *Bandemer* plurality's three-prong test, which all nine Justices of this Court rejected in *Vieth*. JS 30–37.

Plaintiffs' contrary argument is that, because the district court announced a three-prong approach

that included some concepts that this Court has applied in other areas, this must be the *correct* test. Mot. 17–25. But that is obviously wrong. The *Bandemer* plurality's approach involved the same familiar concepts: intent, effects (defined as entrenchment), and justification, JS 30–34, and yet this Court rejected that test in *Vieth*. The district court's approach suffers from the same exact infirmity, to the same degree, as did the *Bandemer* plurality's test: the test's three prongs are not a "limited and precise rationale." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment). And while Plaintiffs argue for a different approach to the effects prong than the district court adopted, Plaintiffs' approach is no more "limited and precise."

As a threshold matter, there is no meaningful difference between the first and third *Bandemer* prongs—intent and justification—and the district court's first and third prongs. With regard to intent, Plaintiffs do not explain how it would be logical for a legislature to have the intent that the *Bandemer* plurality identified (intent to discriminate against "an identifiable political group," with "substantial political consequences," 478 U.S. at 127, 129), but lack the intent the district court here condemned ("an intent to entrench a political party in power," App. 117a). Plaintiffs' entire response is an *ipse dixit* that the district court's intent test is somehow "more rigorous." Mot. 34. As to justification, Plaintiffs do not (and could not possibly) argue that the *Bandemer* plurality's justification prong is less "lim-

ited and precise" than the district court's justification approach. JS 32–33. Both justification inquiries permit the legislature to show that it could not adopt a "better" map if it did not take into account political considerations—a showing that would, as a practical matter, be impossible for partisan legislatures to make, given that politics is always part of legislative map-drawing and a different map is always possible if politics are removed entirely.

Accordingly, the entirety of Plaintiffs' claim that they have identified the elusive "limited and precise rationale" for discovering unlawful political gerrymanders rests upon their conception of the effects prong. Plaintiffs do not urge this Court to adopt the district court's effects approach, based on the *Bandemer* plurality's entrenchment concept. JS 31–32. And they no longer defend their core argument below that the efficiency gap should be the sole measure of partisan effect. Plaintiffs "do not ask the Court to endorse *any* particular measure of partisan asymmetry or *any* particular technique for demonstrating durability." Mot. 22 (emphasis altered). Instead, they urge this Court simply to approve the general validity of considering some unspecified brew of "social scientific measures like partisan bias and the efficiency gap," and "sensitivity testing," and then leave it to lower courts to figure out the rest in "subsequent litigation." Mot. 19, 22–23.

Plaintiffs' "social science" hodgepodge is the antithesis of "limited and precise." Under this test,

each legislatively-drawn plan would be immediately challenged in court by the minority party. *See* States Amicus Br. 3–11; Wisconsin State Senate And Assembly Amicus Br. 7–10. Then, a trial would be held, where each side would present its own "social scientific" expert(s) and the district court would pick a winner unbounded by what social-science measures it could consider, or how it could weigh differing results from different metrics. That is just what happened here, as the disagreements between the majority and dissent illustrate. Notably, under the particular "social science" that Plaintiffs advocated in this case, *one third of all legislatively drawn* plans would fail the critical effects test. JS 14–15.[2] There would be no way for any legislature to know, *ex ante*, whether any particular district court would adopt this view of the disputed "social science."

Contrary to Plaintiffs' submission, Mot. 20–21, Justice Kennedy's opinions in *Vieth* and *LULAC* directly refute their approach. Justice Kennedy in *Vieth* sought "a workable standard" that was "limited and precise." 541 U.S. at 306, 311. There is nothing "workable" or "limited and precise" about a

[2] Plaintiffs quibble with this figure, Mot. 23 n.10, but their response boils down to an unsupported claim that legislatures—which are inherently political—will be able to salvage their plans by somehow proving that they were not motivated by politics or be able to "justify" their inherently political map-drawing judgments by entirely nonpolitical considerations.

test based on an unspecified combination of "social science" approaches. And Justice Kennedy in *LULAC* specifically explained that "asymmetry alone" could "not [serve as] a reliable measure of unconstitutional partisanship," in the process of rejecting a test urged in an amicus brief submitted by Professors Gary King and Bernard Grofman (among others). 548 U.S. at 419–20. Apparently intending no irony, Plaintiffs rely upon the *same* professors' work to argue that their test comports with Justice Kennedy's *LULAC* opinion. Mot. 21 & n.9 (citing to Tr. Ex. 333:6, an article written by Professors King and Grofman).

Nor do other Justices' opinions in *Vieth* and *LULAC*, Mot. 20, support Plaintiffs' approach. Justices Souter and Ginsburg in *Vieth* argued for a five-element test, under which Act 43 is unquestionably lawful, *see* JS 37, and their tentative nod to possible consideration of social science in *LULAC* does not disclaim their test, 548 U.S. at 483–84. Justice Stevens in *Vieth* made clear that he would uphold plans like Act 43, which comply with traditional redistricting principles, *see* JS 37, and he did not back away from this principle in *LULAC* when he described one social-science measure as "helpful (though certainly not talismanic)," 548 U.S. at 468 n.9, when discussing the "unique" context of mid-decennial, sole-motivation cases, *id.* at 456. And Justice Breyer in *Vieth* was concerned with plans under which a majority party (by vote) had "*twice* failed to obtain a

majority" in the legislature, 541 U.S. at 366, which is not at issue here, JS 38.

Finally, Plaintiffs' claim that Act 43 is somehow an "extreme outlier[]" is wrong. JS 12. Plaintiffs cannot seriously dispute that the election results that have occurred under Act 43 are strikingly similar to those that obtained in the plan that this Court upheld in *Bandemer*, JS 5, 31–32, as well as the results under the 2002 court-drawn map in Wisconsin (under which Republicans won 58 seats with 50.50% of the vote in 2002, 60 seats with 50% in 2004, 52 seats with 45.25% in 2006, 46 seats with 46% in 2008, and 60 seats with 53.50% in 2010, JS 11). Nor is Plaintiffs' citation, *see* Mot. 1, 9, to the district court's claim that Democrats have no realistic chance to win a majority of the Wisconsin Assembly under Act 43 supported by the record. Even according to the documents that the district court relied upon in making its claim, Democrats would win a majority of seats (50 out of 99) if they obtained just over 53% of the vote, but under 54%, *see* Tr. Ex. 282; App. 230a—a vote percentage that Democrats exceeded as recently as 2006 and 2008, Dkt. 125 ¶¶ 254–55; *see* JS 11, and Republicans exceeded in 2010, JS 11.[3] And because Plaintiffs below never

[3] Given that these numbers come directly from the very analysis that the district court relied upon, App. 150a & n.257 (discussing Tr. Ex. 282), Plaintiffs' assertion that they would need a vote share "achieved just once by either party over the

proposed entrenchment as their test—focusing instead on the efficiency gap—Defendants had no reason to present their own detailed analysis of this issue. JS 38–39.[4]

IV. Plaintiffs' Half-Hearted Suggestion Of Summary Affirmance Is Meritless And Would Throw Numerous Redistricting Plans Into Immediate Doubt

Plaintiffs' oblique claim that this Court could, perhaps, affirm the district court "summarily," Mot. 5, is meritless. There is no plausible argument that the district court's decision, with its unprecedented finding of an unlawful political gerrymander, is so obviously correct that Defendants' appeal presents no "substantial question." *In re Primus*, 436 U.S. 412, 414 (1978). More generally, since summary affirmances by this Court are binding upon lower

---

last generation" in order to gain a majority in the Assembly under Act 43, Mot. 8, is extremely puzzling.

[4] Plaintiffs' claim, Mot. 36, that Defendants had sufficient notice that entrenchment would be a significant issue in this case—based upon a line in the district court's summary-judgment opinion stating this concept "makes some sense," Dkt. 94:20—overlooks the fact that the district court issued that opinion more than three months *after* Defendants' expert deadline had passed, *compare* Dkt. 33:2, *with* Dkt. 94. Plaintiffs do not cite a single word in any of their own filings focusing on this topic.

courts, *see Hicks v. Miranda*, 422 U.S. 332, 344 (1975), such an approach in this case would throw States across the country into chaos, given that up to one third of all plans drawn by legislatures are vulnerable under the district court's test, *see supra* p. 1.

CONCLUSION

This Court should note probable jurisdiction. This Court may also wish to consider summary reversal.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

KEVIN M. LEROY
LUKE N. BERG
Deputy Solicitors General

State of Wisconsin
Department of Justice
17 West Main Street
Madison, WI 53703
tseytlinm@doj.state.wi.us
(608) 267-9323

MISHA TSEYTLIN
Solicitor General
Counsel of Record

RYAN J. WALSH
Chief Deputy Solicitor General

AMY C. MILLER
Assistant Solicitor General

BRIAN P. KEENAN
Assistant Attorney General

May 2017