No. 16-1161

IN THE

Supreme Court of the United States

BEVERLY R. GILL, ET AL.,
Appellants,

v.

WILLIAM WHITFORD, ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Wisconsin

BRIEF OF CURRENT MEMBERS OF CONGRESS AND BIPARTISAN FORMER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
DAVID H. GANS
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amici Curiae

September 05, 2017 * Counsel of Record

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are current members of Congress and bipartisan former members of Congress who have a strong interest in redistricting and in the robust enforcement of the constitutional principles that govern the electoral process. As current and former members of Congress, *amici* appreciate the significance of the fundamental republican principle that voters choose their representatives, not the other way around, and they are familiar with the constitutional provisions that ensure that this principle is respected. Indeed, as current and former members of Congress, *amici* are particularly familiar with the Elections Clause, which gives Congress the power to override state regulation of the time, place, and manner of federal elections, in order to enable Congress to prevent state manipulation of electoral rules. But *amici* also understand the important roles the First and Fourteenth Amendments play in ensuring democratic self-governance and that all Americans enjoy equal protection of the laws, regardless of political affiliation. Having served in Congress, *amici* know well how critical it is that these constitutional provisions be enforced, and accordingly they have a strong interest in this case.

A full listing of *amici* appears in the Appendix.

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

In 2011, the Wisconsin legislature redrew the maps for its State Assembly districts. Legislative leaders of the party in control of the state legislature organized a secretive mapmaking process open only to members of that party. Meeting behind closed doors, the drafters of the plan, together with expert consultants, drew districts to ensure that their party would wield political power far in excess of votes cast in the polls, thereby maintaining their control of the Assembly no matter what happened in future elections.

Wisconsin is historically a closely-divided state, but the brazen gerrymandering of Assembly districts has resulted in a durable Republican super-majority control. Indeed, in 2012, Republicans held a super-majority of Assembly districts even while losing the statewide vote. This is not a bug, but a feature of the gerrymandered Assembly map. The mapmakers wrote the districts to ensure Republican control even in the face of an electoral swing in favor of Democrats. Wisconsin's districting scheme violates "'the core principle of republican government,' namely, 'that the voters should choose their representatives, not the other way around." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015) (quoting Mitch Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781, 781 (2005)). Wisconsin's drawing of lines to "subordinate adherents of one political party," *id.* at 2658, "by reason of their views," *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring), and to burden disfavored "voters' representational rights," *id.*, cannot be squared with the Constitution's text and history and this Court's precedents.

When our Constitution's Framers wrote our national charter more than two centuries ago, they recognized that "the true principle of a republic is, that the people should choose whom they please to govern them." 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 257 (Jonathan Elliot ed., 1836) [hereinafter "Elliot's Debates"]. This republican design is reflected in numerous aspects of the Constitution's text and structure. The Framers were deeply suspicious of partisan manipulation of the electoral process, and they wrote into the Constitution's text and structure protections against partisan gerrymandering and other similar abuses in federal elections.

Most significantly, the Elections Clause empowered Congress to override state election regulations, adopted "when faction and party spirit run high," that "would render the rights of the people insecure and of little value," such as efforts to make an "unequal and partial division of the states into districts for the election of representatives[.]" *Id.* at 27. Congress's broad power to set aside state regulation of the time, place, and manner of federal elections was necessary because, as James Madison argued, "[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." 2 *Records of the Federal Convention* 241 (Max Farrand ed., 1911). Concerns about partisan efforts to manipulate the rules of our democracy are thus as old as the Constitution itself.

In 1789, the First Amendment was added to the Constitution, ensuring protection of "the special structural role of freedom of speech in a representative democracy." Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 25 (1998). The

First Amendment, at its core, protects the "right of freely examining public characters and measures, and of free communication among the people thereon," *see* James Madison, *Report on the Virginia Resolution* (1800), *in* 4 *Elliot's Debates* at 546, 573, reflecting that "the censorial power is in the people over the Government, and not in the Government over the people," 4 Annals of Cong. 934 (1794). Governmental efforts to subject "a group of voters or their party to disfavored treatment by reason of their views," *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring), cannot be squared with the freedom of speech and association the Constitution guarantees to all.

The 18th century Constitution contained few direct limits on the states, but, in the wake of a bloody Civil War fought over slavery, the American people fundamentally altered our federal system, adding to the Constitution universal guarantees of substantive fundamental rights and equal protection of the laws, and, in later amendments as well, protections for the right of citizens to vote, a right that this Court has recognized is "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1440-41 (2014) ("There is no right more basic in our democracy than the right to participate in electing our political leaders."). Significantly, these amendments prohibit more than outright denials of the right to vote, because "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Efforts by the government to subordinate persons on account of their political affiliation cannot be squared with the Fourteenth Amendment's

universal guarantee of the equal protection of the laws.

When the Framers of the Fourteenth Amendment wrote the equal protection guarantee, they were particularly concerned about the efforts of southern states to deny equal rights to citizens associated with the Republican party, who had supported the Union during the Civil War. The report of the Joint Committee on Reconstruction, which authored the Fourteenth Amendment, detailed the animus directed at southern Republicans, and the interviews conducted by the Joint Committee confirmed this sad state of affairs in painstaking detail, demonstrating the need for "such changes of the organic law as shall determine the civil rights and privileges of all citizens in all parts of the republic." Joint Comm. on Reconstruction, *Report of the Joint Committee on Reconstruction*, 39th Cong., 1st Sess. xxi (1866). As ratified, "the Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws." *The Civil Rights Cases*, 109 U.S. 3, 24 (1883). As history shows, that includes state efforts to subordinate persons affiliated with a disfavored political party, such as by "burdening a group of voters' representational rights." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring).

These fundamental principles, reflected both in the Constitution's text and history and in this Court's cases, establish that the Constitution firmly limits the authority of state legislatures to draw lines that systematically subordinate persons associated with one political party and dilute their voting strength, not for any legitimate government purpose, but simply to entrench the governing political party in power.

States do not have carte blanche to use "partisan classifications" in order to "burden[] rights of fair and effective representation," *id.* at 312 (Kennedy, J., concurring), rights at the core of our Constitution's system of democracy and self-governance. There is no "redistricting" exception to the Constitution's First Amendment and equal protection guarantees.

When a plan is drawn—as Wisconsin did here—to entrench a political party in power over the life of the plan and even in the face of an electoral swing to their political opponents, it violates the fundamental constitutional principle that "'the voters should choose their representatives, not the other way around.'" *Ariz. State Legislature*, 135 S. Ct. at 2677 (citation omitted); *Vieth*, 541 U.S. at 361 (Breyer, J., dissenting) ("[P]olitical gerrymandering that so entrenches a minority party in power violates basic democratic norms."). The state may not place such unequal burdens on a group of voters' opportunities to elect their representatives simply because of the party they associate with. Such gerrymandering perverts our Constitution's democratic principles, changing the relationship between the people and their elected representatives.

"[W]hen the rights of persons are violated, 'the Constitution requires redress by the courts' . . . . This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015) (quoting *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014)). As appellees have shown, there are "judicially discernible and manageable standards," *Vieth*, 541 U.S. at 281, to distinguish ordinary political line-drawing from unconstitutional efforts to subordinate a group of voters on account of their political affiliation. Appellees' Br. at 32-56.

Persons subjected to an abridgement of their First and Fourteenth Amendment rights by Wisconsin's extreme partisan gerrymander should not be denied a remedy simply because redistricting is inevitably a political process. In our constitutional system, legislative majorities cannot use their broad powers to draw district lines to nullify the essential premises of our Constitution's system of self-government. Because Wisconsin's extreme and durable partisan gerrymander subordinates adherents of one political party, burdens their representational rights, and dilutes and degrades their right to vote, the district court's judgment should be affirmed.

ARGUMENT

I. AT THE FRAMING, THE CONSTITUTION ESTABLISHED A SYSTEM OF GOVERNMENT IN WHICH THE PEOPLE CHOOSE THEIR ELECTED REPRESENTATIVES, NOT THE OTHER WAY AROUND.

More than two centuries ago, "We the People," "ordain[ed] and establish[ed]" the Constitution, *see* U.S. Const. pmbl., creating a system of government organized around the idea that "the true principle of a republic is, that the people should choose whom they please to govern them," 2 *Elliot's Debates* at 257. As the opening words of the first of the Federalist Papers stress, the Constitution was itself an act of popular sovereignty and self-government. *The Federalist No. 1*, at 1 (Hamilton) (Clinton Rossiter rev. ed., 1999) ("You are called upon to deliberate on a new Constitution for the United States of America."). "It is evident that no other form [of government] would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which

animates every votary of freedom to rest all our political experiments on the capacity of mankind for self-government." *The Federalist No. 39,* at 208 (Madison).

At a time when "democratic self-government existed almost nowhere on earth," Akhil Reed Amar, *America's Constitution: A Biography* 8 (2005), the Framers designed a new system of government "where the true principles of representation are understood and practiced, and where all authority flows from, and returns at stated periods to, the people." 4 *Elliot's Debates* at 331; *see The Federalist No. 14*, at 68 (Madison) ("[E]ven in modern Europe, to which we owe the great principle of representation, no example is seen of a government wholly popular and founded, at the same time, wholly on that principle."). In the republican system of government created by the Framers, "the representatives of the people" could never be "superior to the people themselves." *The Federalist No. 78,* at 435 (Hamilton).

Ensuring fair and effective representation for all had deep roots in America's bid for independence from England. The Framers were familiar with what James Madison called the "vicious representation in G. B.," 1 *Records of the Federal Convention*, at 464, in which "so many members were elected by a handful of easily managed voters in 'pocket' and 'rotten' boroughs, while populous towns went grossly underrepresented or not represented at all," Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 210 (1996). The Declaration of Independence charged that King George III had forced the colonists to "relinquish the right of representation in the legislature, a right inestimable to them and formidable to tyrants only." The Declaration of Independence para. 5 (U.S. 1776). Having

seen the political system manipulated for partisan ends in England, the Framers strove to design a system that reflected that a "free and equal representation is the best, if not the only foundation upon which a free government can be built." 2 *Elliot's Debates* at 25; Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 170 (1969) (observing that of all "the electoral safeguards for the representational system" none "was as important to Americans as equality of representation"). The Framers appreciated that the "genius of republican liberty seems to demand on one side not only that all power should be derived from the people, but that those entrusted with it should be kept in dependence on the people." *The Federalist No. 37*, at 195 (Madison).

These fundamental republican principles are amply reflected in the Constitution's text and structure. In order to ensure that "the foundations of this government should be laid on the broad basis of the people," 4 *Elliot's Debates* at 21, Article I, Section 2 of the Constitution provides that the "House of Representatives shall be composed of Members chosen every second Year by the People of the several States[.]" U.S. Const. art. I, § 2, cl. 1. While the Senate was ultimately designed to represent the several States, the House of Representatives would be "the grand depository of the democratic principle of the Govt." and "ought to know & sympathise with every part of the community," 1 *Records of the Federal Convention* at 48, serving as "the most exact transcript of the whole Society," *id.* at 132. To ensure rights of fair and effective representation, Article I, Section 2 allocates representatives to the states "according to their respective Numbers," U.S. Const. art. I, § 2, cl. 3, reflecting that "'every individual of the community at large has an equal right to the protection of government,'" *Ev-*

enwel v. Abbott, 136 S. Ct. 1120, 1127 (2016) (quoting 1 *Records of the Federal Convention* at 473).

The Constitution also establishes explicit rules concerning the right to vote in federal elections and to run for Congress, recognizing that "[i]f the Legislature could regulate those of either, it can by degrees subvert the Constitution. A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorized to elect." 2 *Records of the Federal Convention* at 250. Because the "definition of the right of suffrage is very justly regarded as a fundamental article of republican government," *The Federalist No. 52,* at 294 (Madison), the Framers provided that "the electors are to be the great body of the people of the United States," *The Federalist No. 57*, at 319 (Madison), incorporating state suffrage rules to broadly protect the right to vote in federal elections. *Id.* ("Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune.").

Along similar lines, the Constitution establishes minimal qualification for candidates for federal office. *Id.* ("Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people."). The Framers recognized that "[q]ualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partizans of (a weaker) faction," 2 *Records of the Federal Convention* at 250, reflecting their con-

cern about partisan manipulation of the electoral process.

The Constitution also conferred specific powers on the federal government to ensure the integrity of the system of government established by the Constitution. The Guarantee Clause empowers the "United States" to "guarantee to every State in this Union a Republican Form of Government," U.S. Const. art. IV, § 4, protecting the Constitution's system of government from "aristocratic or monarchical innovation," *The Federalist No. 43*, at 242 (Madison). Even more on point, the Elections Clause of Article I, Section 4 gives Congress the power to override state regulation of the time, place, and manner of federal elections, a reflection of the "Framers' distrust of the States regarding elections." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 811 n.21 (1995). As history shows, this grant of power was "intended to act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate." *Ariz. State Legislature*, 135 S. Ct. at 2672; *see Vieth*, 541 U.S. at 275 (discussing the Framers' conclusion that "Congress must be given the power to check partisan manipulation of the election process by the States").

During the debates over the Elections Clause at the Constitutional Convention, James Madison argued that a limit on state power was necessary because "[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." 2 *Records of the Federal Convention* at 241. The Elections Clause gave "a controuling power to the Natl. legislature," *id.,* because "State Legislatures will sometimes fail or refuse to

consult the common interest at the expense of their local conveniency or prejudices," *id.* at 240. Madison observed that "it was impossible to foresee all the abuses that might be made of the discretionary power," *id.*, noting that there were many ways—including districting—that state legislative majorities might manipulate the democratic process in order to "materially affect the appointments," *id.* at 241.

In debates over the Elections Clause during state ratifying conventions, those urging the Constitution's ratification justified "Congress's power over elections as a way of correcting unjust state voting systems and defending the people's right to equal voting power." Pauline Maier, *Ratification: The People Debate the Constitution*, *1787-1788*, at 210 (2010). For example, at the Massachusetts convention, Theophilus Parsons explained that the Elections Clause provided a remedy against state manipulation of the democratic process for partisan ends. "[W]hen faction and party spirit run high," Parsons warned, state legislative majorities "might make an unequal and partial division of the states into districts for the election of representatives" or introduce other "such regulations as would render the rights of the people insecure and of little value." 2 *Elliot's Debates* at 27. The Elections Clause, he argued, "provides a remedy," empowering Congress to "restore to the people their equal and sacred rights of election." *Id.*

During these debates, the Constitution's supporters often pointed to the case of South Carolina, where "South Carolina's coastal elite had malapportioned their legislature, and wanted to retain the ability to do so." *Ariz. State Legislature*, 135 S. Ct. at 2672; *see* 2 *Elliot's Debates* at 51 ("The representatives, therefore, from [South Carolina], will not be chosen *by the people*, but will be representatives of a faction of that

state. If the general government cannot control in this case, how are the people secure?"); 3 *id.* at 367 ("Elections are regulated now unequally in some states, particularly South Carolina . . . . Should the people of any state by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the general government.").

In short, from the very beginnings of our Constitution's history, attempts by state majorities to manipulate the electoral process have been viewed with deep suspicion. As a consequence, many provisions of the Constitution were drafted to create a republican system of government that helps "secure a representation from every part, and prevent any improper regulations, calculated to answer party purposes only." 1 Annals of Cong. 797 (1789).

II. SUBSEQUENT AMENDMENTS TO THE CONSTITUTION PROTECT THE RIGHT OF INDIVIDUALS TO ASSOCIATE FOR POLITICAL ENDS AND GUARANTEE THAT ALL AMERICANS ENJOY EQUAL PROTECTION OF THE LAWS, REGARDLESS OF POLITICAL AFFILIATION

In 1789, the First Amendment was added to the Constitution, protecting "the special structural role of freedom of speech in a representative democracy." Amar, *The Bill of Rights, supra,* at 25. As this Court has long recognized, the First Amendment "'is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.'" *McCutcheon*, 134 S. Ct. at 1448 (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)); *Cal.*

Democratic Party v. Jones, 530 U.S. 567, 574 (2000) ("Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views.").

Thus, the First Amendment protects the "right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right." James Madison, *Report on the Virginia Resolution* (1800), *in* 4 *Elliot's Debates* at 546, 573; *Citizens United, Inc. v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010) ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people."); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346-37 (1995) ("'In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.'" (quoting *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976))).

The First Amendment—like the original Constitution—reflects that "[i]n our governments, the supreme, absolute, and uncontrollable power *remains* in the people." 2 *Elliot's Debates* at 432 (emphasis in original); *see* James Madison, *Report on the Virginia Resolution* (1800), *in* 4 *Elliot's Debates* at 546, 569 ("[i]n the United States, . . . [t]he people, not the government, possess the absolute sovereignty"). As Madison put it, "[i]f we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." 4 Annals of Cong. 934 (1794).

When the Fourteenth Amendment was added to the Constitution nearly seventy years later, it built upon the First Amendment's guarantee, providing further protection against the possibility that persons affiliated with a disfavored political party would be subject to unequal treatment under law. That Amendment, along with the other "constitutional Amendments adopted in the aftermath of the Civil War[,] fundamentally altered our country's federal system," *McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010), adding to the Constitution sweeping new limits on state governments. These limits were designed to secure "the civil rights and privileges of all citizens in all parts of the republic," *see Report of the Joint Committee* at xxi, to "keep[] whatever sovereignty [a State] may have in harmony with a republican form of government and the Constitution of the country," Cong. Globe, 39th Cong., 1st Sess. 1088 (1866), and, in later amendments as well, to protect the right of citizens to vote, s*ee Shelby County v. Holder*, 133 S. Ct. 2612, 2636 n.2 (2013) (Ginsburg, J., dissenting) ("The Constitution uses the words 'right to vote' in five separate places: the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments.").

The plain text of the Fourteenth Amendment, which prohibits a state from denying to "any person" the "equal protection of the laws," establishes a broad guarantee of equality for all persons, forbidding legislative majorities from discriminating against disfavored persons. *See Yick Wo*, 118 U.S. at 369 ("These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . ."); *The Civil Rights Cases*, 109 U.S. at 24 ("The Fourteenth Amendment extends its protec-

tion to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws."); *Romer v. Evans*, 517 U.S. 620, 623 (1996) (explaining that the "Equal Protection Clause enforces" a "commitment to the law's neutrality where the rights of persons are at stake").

As history shows, the original meaning of the equal protection guarantee "establishes equality before the law," Cong. Globe, 39th Cong., 1st Sess. at 2766, "abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another," *id.* The Fourteenth Amendment "put in the fundamental law the declaration that all citizens were entitled to equal rights in this Republic," Chi. Trib., Aug. 2, 1866, at 2, *reprinted in Speeches of the Campaign of 1866 in the States of Ohio, Kentucky, and Illinois* 6 (1866), placing all "throughout the land upon the same footing of equality before the law, in order to prevent unequal legislation," Cincinnati Com., Aug. 20, 1866, at 2.

The Fourteenth Amendment's Framers crafted a broad guarantee of equality for all persons to bring the Constitution back into line with fundamental principles of American equality, which had been betrayed and stunted by the institution of slavery. *See McDonald*, 561 U.S. at 807 (Thomas, J., concurring) ("[S]lavery, and the measures designed to protect it, were irreconcilable with the principles of equality . . . and inalienable rights proclaimed by the Declaration of Independence and embedded in our constitutional structure."). After nearly a century in which the Constitution sanctioned racial slavery and allowed all manner of state-sponsored discrimination, the Fourteenth Amendment codified our nation's founding promise of equality through the text of the Equal Pro-

tection Clause. As the Amendment's Framers explained time and again, the guarantee of the equal protection of the laws was "essentially declared in the Declaration of Independence." Cong. Globe, 39th Cong., 1st Sess. at 2961.

Thus, the Amendment's broad wording was no accident. When the 39th Congress designed the Fourteenth Amendment, it chose broad, universal language specifically intended to secure equal rights for *all*. While the Amendment was written and ratified in the aftermath of the Civil War and the end of slavery, it protects all persons. "[S]ection 1 pointedly spoke not of race but of more general liberty and equality." Amar, *The Bill of Rights, supra*, at 260-61 n.*. Indeed, the Reconstruction-Era Framers specifically considered and rejected proposed constitutional language that would have outlawed racial discrimination and nothing else, *see* Benj. B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* 46, 50, 83 (1914), preferring a universal guarantee of equality that secured equal rights to all persons. Whether the proposals were broad in scope or were narrowly drafted to prohibit racial discrimination in civil rights, the Framers of the Fourteenth Amendment consistently rejected limiting the Amendment's equality guarantee to racial discrimination. *See J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 151 (1994) (Kennedy, J., concurring) ("Though in some initial drafts the Fourteenth Amendment was written to prohibit discrimination against 'persons because of race, color or previous condition of servitude,' the Amendment submitted for consideration and later ratified contained more comprehensive terms . . . ."). The Fourteenth Amendment's "neutral phrasing," "extending its guarantee to 'any person,'" *id.* at 152 (Kennedy, J., concurring), secures equal

rights and "equal dignity in the eyes of the law," *Obergefell*, 135 S. Ct. at 2608, for all men and women of any race, no matter what their political views. Efforts by the government to subordinate persons affiliated with a political party disfavored by the state cannot be squared with the Fourteenth Amendment's universal guarantee of the equal protection of the laws.

History shows that the Framers wrote the Amendment's guarantees broadly because, among other things, they were concerned about state efforts in the South to single out for discrimination persons belonging to or associated with the Republican party, which had supported the Union during the Civil War and opposed efforts to reinstitute slavery. The Framers were aware of "the white South's inability to adjust to the end of slavery, the widespread mistreatment of blacks, Unionists, and Northerners, and a pervasive spirit of disloyalty." Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, at 225 (rev. ed. 2014); s*ee McDonald*, 561 U.S. at 779 (discussing the "plight of whites in the South who opposed the Black Codes"). In the South, Unionists associated with the Republican party were subject to all manner of discrimination because of their views. Debates in the 39th Congress repeatedly made the point that "[t]he courts are rebel, jurors rebel, Legislatures rebel . . . . They do not disguise their hate for Union men," Cong. Globe, 39th Cong., 1st Sess. at 783, and therefore "the adoption of this Amendment" was "essential to the protection of the Union men" who "will have no security in the future except by force of national laws giving them protection against those who have been in arms against them," *id.* at 1093; *id.* at 1263 ("[W]hite men . . . have been driven from their homes, and have had their

lands confiscated in State courts, under State laws, for the crime of loyalty to their country . . . .").

This sad state of affairs was documented in painstaking detail in the report of the Joint Committee on Reconstruction, "which was widely reprinted in the press and distributed by Members of the 39th Congress to their constituents shortly after Congress approved the Fourteenth Amendment," *McDonald*, 561 U.S. at 772, and "extensively catalogued the abuses of civil rights in the former slave States," *id.* at 827 (Thomas, J., concurring). The Committee, which took the "testimony of a great number of witnesses," Cong. Globe, 39th Cong., 1st Sess. at 2765, learned of a deep-seated hostility to both the newly freed slaves and their Republican allies. The witnesses the Committee spoke with confirmed that, in the South, "there is . . . a great bitterness towards the [R]epublican party" and that people "look upon them with the greatest hatred, the greatest ill-will imaginable for one class of men to feel towards another." *Report of the Joint Committee*, pt. II, at 66, 208. As a result, the Committee concluded that, without federal protection, "Union men, whether of northern or southern origin, would be obliged to abandon their homes" because of animus "totally averse to the toleration of any class of people friendly to the Union, be they white or black." *Id.* at xvii. "Southern men who adhered to the Union are bitterly hated and relentlessly persecuted." *Id.* at xvii-xviii. Numerous witnesses confirmed that civil rights protections could not be enjoyed because a "loyal man" could not "get his rights in the courts" because of "prejudice," *id.* at pt. II, 97, that newly formed governments "would legislate against them in every way," *id.* at pt. I, 106, and that it was unlikely that persons "would be allowed to express openly their Union sentiments with-

out the protection of the United States troops," *id.* at pt. III, 101. Should a Republican Unionist run for office "[h]e would have no chance at all"; "[t]hey would break up their polls and destroy their ballots." *Id.* at pt. IV, 81.

To prevent these sorts of past abuses as well as new ones that might arise in the future, the Fourteenth Amendment established equality under the law and equality of rights for all persons as a constitutional mandate, forbidding state majorities from using the democratic process to subject disfavored persons—whether by reason of their race, their political views, or some other form of animus—to discriminatory treatment and the loss of their fundamental rights. This sweeping guarantee of equality applies to the appellees in this case, who seek to enjoy the "right to participate in electing our political leaders," *McCutcheon*, 134 S. Ct. at 1440-41, on an equal basis with all other voters in their state. "To the extent that a citizen's right to vote is debased, he is that much less a citizen." *Reynolds*, 377 U.S. at 567. As the district court observed, because of the discrimination in this case, a "voter" belonging to or seeking to affiliate with Democratic candidates for office "is in essence an unequal participant in the decisions of the body politic." Juris. Statement App. ("J.S. App.") at 107a.

There is no "redistricting" exception to these fundamental Fourteenth Amendment principles. The text of the Fourteenth Amendment's guarantee of equality "speaks in general terms, and those are as comprehensive as possible." *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880). Moreover, the right to vote is a fundamental right, "preservative of all rights." *Yick Wo*, 118 U.S. at 370. Indeed, no right is protected by more parts of the Constitution. U.S.

Const. amend. XIV, § 2; amend. XV, § 1; amend. XIX, § 1; amend. XXIV, § 1; amend. XXVI, § 1. For good reason, "[a]llegations of unconstitutional bias in apportionment are most serious claims, for we have long believed that 'the right to vote' is one of 'those political processes ordinarily to be relied upon to protect minorities.'" *Vieth*, 541 U.S. at 311-12 (Kennedy, J., concurring) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)). A districting plan that, in essence, "declar[es] that in general it shall be more difficult for one group of citizens"—defined by their political views—to "seek aid from the government" through the political process is "itself a denial of equal protection of the laws in the most literal sense." *Romer*, 517 U.S. at 633; *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring) ("If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation' . . . we would surely conclude that the Constitution had been violated."). Thus, this Court's "precedents recognize an important role for the courts when a districting plan violates the Constitution." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 415 (2006) (opinion of Kennedy, J.). The next section examines this case law.

III. PARTISAN GERRYMANDERING THAT HAS THE PURPOSE AND EFFECT OF SUBORDINATING ADHERENTS OF A POLITICAL PARTY AND SEVERELY LIMITING THE EFFECTIVENESS OF THEIR VOTES VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS

Three lines of this Court's precedents strongly support the proposition that extreme, durable partisan gerrymanders that have the purpose and effect of

subordinating adherents of a political party and severely limiting the effectiveness of their votes violate the First and Fourteenth Amendments. As these cases make clear, when a state uses "partisan classifications" in a manner that "burdens rights of fair and effective representation," *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring), and violates "'the core principle of republican government,' namely, 'that the voters should choose their representatives, not the other way around,'" *Ariz. State Legislature*, 135 S. Ct. at 2677 (citation omitted), judicial relief is warranted, *see Reynolds*, 377 U.S. at 566 ("[A] denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us."). A plan that so degrades the rights of persons belonging to or associated with a disfavored party cannot be squared with "the concept of 'we the people' under the Constitution" which "visualizes no preferred class of voters but equality among those who meet the basic qualification." *Gray v. Sanders*, 372 U.S. 368, 379-80 (1963).

First, this Court's one-person, one-vote cases beginning with *Reynolds* have held 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." *Reynolds*, 377 U.S. at 565-66. Applying these principles, *Reynolds* held unconstitutional a state legislative districting scheme that gave disproportionate political representation to persons living in rural areas, concluding that "[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment." *Id.* at 566; *see Bd. of Estimate v. Morris*, 489 U.S. 688, 693-94 (1989) ("If

districts of widely unequal population elect an equal number of representatives, the voting power of each citizen in the larger constituencies is debased and the citizens in those districts have a smaller share of representation than do those in the smaller districts."); *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) (explaining that *Reynolds*' rule is "designed to prevent debasement of voting power and diminution of access to elected representatives").

Reynolds stressed both equal protection principles as well as republican principles deeply rooted in the text and structure of the Constitution. "As long as ours is a representative government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." *Reynolds*, 377 U.S. at 562. Any other result would "sanction minority control of state legislative bodies" and prevent legislatures from being "collectively responsive to the popular will." *Id.* at 565. A system that gave persons more political power based on where they lived burdened voters' representational rights, denying certain citizens "an equally effective voice in the election of members of his state legislature." *Id.*

Second, this Court's cases have also vindicated the rights of racial minorities to participate equally in the political process by preventing at-large and multi-member districting schemes from "being used invidiously to cancel out or minimize the voting strength of racial groups." *White v. Regester*, 412 U.S. 755, 765 (1973); *see Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) (striking down redrawing of boundaries designed to "despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights"). Drawing on the one-person, one-vote principle enun-

ciated in *Reynolds*, the Court's cases have affirmed that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot," *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969), and that the plaintiffs may prove vote dilution—and therefore an unconstitutional burden on their representational rights—by demonstrating that racial minorities "had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *White*, 412 U.S. at 766; *see Rogers v. Lodge*, 458 U.S. 613, 617 (1982) ("[M]ultimember districts violate the Fourteenth Amendment if 'conceived or operated as purposeful devices to further racial discrimination' by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population." (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971))); *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973) (explaining that "multimember districts may be vulnerable, if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized"); *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965) (recognizing that "designedly or otherwise, a multi-member constituency apportionment scheme" might "operate to minimize or cancel out the voting strength of racial or political elements of the voting population"). These cases, thus, quite explicitly protect "rights of fair and effective representation," *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring), by ensuring that "each citizen have an equally effective voice in the election of members of his state legislature," *Reynolds*, 377 U.S. at 565.

Likewise, this Court's cases construing the results test of Section 2 of the Voting Rights Act, a statute that enforces constitutional protections, have held

that states may not "dilut[e] minority voting power" by the "manipulation of district lines." *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993); *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986) ("Dilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority."); *League of United Latin Am. Citizens*, 548 U.S. at 428-29 (finding that redrawing of lines to reduce percentage of Latino voting age population "prevented the immediate success of the emergent Latino majority" and resulted in "a denial of opportunity in the real sense of that term").

Manipulation of district lines—whether through packing or cracking voters—can burden voters' representational rights by severely limiting the effectiveness of their votes. That is exactly what the evidence shows that Wisconsin has done here. *See* Appellees' Br. at 7.

Third, and finally, this Court's First Amendment cases have repeatedly struck down efforts to subordinate persons belonging to or associated with a political party disfavored by the state. "[P]olitical belief and association constitute the core of those activities protected by the First Amendment," *Elrod v. Burns*, 427 U.S. 347, 356 (1976), and the "right to associate with the political party of one's choice is an integral part of this basic constitutional freedom," *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973); *see Cal. Democratic Party*, 530 U.S. at 574 (recognizing that the First Amendment protects "'the freedom to join together in furtherance of common political beliefs'" (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214-215 (1986))). Subordinating adherents of a disfavored political party "based on disapproval of the[ir]

ideas or perspectives" is "the essence of viewpoint discrimination." *Matal v. Tam*, 137 S. Ct. 1744, 1765, 1766 (2017) (Kennedy, J., concurring); Appellees' Br. at 36.

As this Court's precedents make clear, "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," *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring), because "the system of government the First Amendment was intended to protect" is a "democratic system whose proper functioning is indispensably dependent on the unfettered judgment of each citizen on matters of political concern," *Elrod*, 427 U.S. at 372. The First Amendment does not permit the state to subject to disfavored treatment persons whose "beliefs and associations" do not "conform . . . to some state-selected orthodoxy," *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 (1990), in order to "tip[] the electoral process in favor of the incumbent party," *Elrod*, 427 U.S. at 356; *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1417 (2016) ("With a few exceptions, the Constitution prohibits a government employer from discharging or demoting an employee because the employee supports a particular political candidate. The basic constitutional requirement reflects the First Amendment's hostility to government action that 'prescribe[s] what shall be orthodox in politics.'" (quoting *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943))). "[G]overnment discrimination based on the viewpoint of one's speech or one's political affiliations" is simply antithetical to the First Amendment. *See Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 683 (1996); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 721 (1996) (refusing to permit government to "coerce

support" simply because of "dislike of the individual's political association").

The First Amendment analysis that applies in this case and others involving state regulation of the electoral process "concentrates on whether the legislation burdens the representational rights of the complaining party's voters for reasons of ideology, beliefs, or political association." *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring). This Court's cases insist on a "pragmatic or functional assessment that accords some latitude to the States," *id.*; *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), while ensuring "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," *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). Under these established First Amendment principles, "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status." *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983). That reflects that "[c]ompetition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." *Williams*, 393 U.S. at 32. Because "voters can assert their preferences only through candidates or parties or both," *Anderson*, 460 U.S. at 787, efforts by a state to subordinate adherents of a disfavored party and severely limit the effectiveness of their votes cannot be squared with the fundamental limits enshrined in the First Amendment. The First Amendment denies to the government the authority to entrench one party in power.

It is, of course, true that "[p]olitics and political considerations are inseparable from districting and

apportionment" and that "districting inevitably has and is intended to have substantial political consequences." *Gaffney*, 412 U.S. at 753. But a state does not have carte blanche to draw district lines free from constitutional constraints. *See id.* at 754 ("What is done in so arranging for elections, or to achieve political ends or allocate political power, is not wholly exempt from judicial scrutiny under the Fourteenth Amendment."); *Gomillion*, 364 U.S. at 345 (refusing to "sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions"); c*f. Rutan*, 497 U.S. at 64 ("To the victor belong only those spoils that may be constitutionally obtained."). The fact that the government makes political choices in districting does not carry with it a license to subordinate a group of voters and dilute their right to vote because of their political affiliation.

Republican principles embedded in the Constitution's text and structure, fundamental First Amendment principles that safeguard freedom of political association, and equal protection principles that ensure equal rights under the law for all persons, regardless of their political convictions—principles deeply rooted in the Constitution's text and history and reaffirmed time and again in this Court's precedents—do not permit the government to use its power over the districting process to give disproportionate political power to a group of citizens based on their political association and views. This "ingrained structural inequality," *Evenwel*, 136 S. Ct. at 1123—like the malapportionment invalidated in *Reynolds* and the cases that followed it—singles out a group of citizens and dilutes and debases their right to vote in a manner manifestly inconsistent with the Constitution's guarantees and our Constitution's system of

fair and effective representation. "To the extent that a citizen's right to vote is debased, he is that much less a citizen." *Reynolds*, 377 U.S. at 567. The fact that an individual belongs to one political party or another "is not a legitimate reason for . . . diluting the efficacy of his vote." *Id.*; *Carrington v. Rash*, 380 U.S. 89, 94 (1965) ("'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."); Appellees' Br. at 34-35.

The government may not debase and dilute the voting rights of those who do not "conform . . . to some state-selected orthodoxy," *Rutan*, 497 U.S. at 75, denying these citizens "an equally effective voice in the election of members of his state legislature," *Reynolds*, 377 U.S. at 565. Efforts to "fenc[e] out of the political process" certain "political groups" by "invidiously minimiz[ing]" their "political strength," *Gaffney*, 412 U.S. at 754, and to "tip[] the electoral process in favor of the incumbent party," *Elrod*, 427 U.S. at 356, cannot be squared with the Constitution's text and history or this Court's precedents. The fact that one party controls state government at the beginning of a decade does not give it license to entrench itself in power for the rest of the decade. Ultimately, "the basic principle of representative government remains . . . unchanged," *Reynolds*, 377 U.S. at 567—"'the voters should choose their representatives, not the other way around,'" *Ariz. State Legislature*, 135 S. Ct. at 2677 (citation omitted).

Given these fundamental constitutional principles, "[a] determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring); *Gaffney*, 412 U.S. at 752 ("It would be idle . . . . to

contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it."). The fact that a state legislature drew district lines with political considerations in mind is the beginning, not the end, of the analysis. "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." *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring). In other words, there must be a showing that "partisan classifications burden[] rights of fair and effective representation." *Id.* at 312 (Kennedy, J., concurring). This requires concrete evidence demonstrating that a partisan gerrymander has the purpose and effect of subordinating adherents of a political party and severely limiting the effectiveness of their votes, conferring legislative power far in excess of votes cast at the polls. It requires showing that the partisan gerrymander unjustifiably obstructs the basic workings of representative government, "subjecting a group of voters or their party to disfavored treatment by reason of their views." *Id.* at 314 (Kennedy, J., concurring). These inquiries "limit and confine judicial intervention," establishing "clear, manageable, and politically neutral standards," *Vieth*, 541 U.S. at 307, 308 (Kennedy, J., concurring), for separating ordinary political line drawing from unconstitutional efforts to degrade and dilute a group of voters' opportunities to elect representatives on account of their political affiliation. *See* Appellees' Br. at 32-56; Amicus Br. of Bernard Grofman and Ronald Keith Gaddie at 4-22.

This high threshold is satisfied here. Republicans in control of the districting process drafted a plan that was designed to ensure Republican control of the State Assembly, even in the face of political shifts in

their opponents' favor. Meeting in secret, Republican leaders and their experts rigorously tested their preferred lines, seeking to ensure that Republicans would maintain their power whatever happened at the polls. As the district court found, "[t]he evidence establishes . . . that even when Republicans are an electoral minority, their legislative power remains secure." J.S. App. at 154a. The mountain of evidence introduced at trial confirms that the tests the mapmakers used were designed to ensure a durable pro-Republican bias. The plan's design and effect was to "sanction minority control of state legislative bodies," *Reynolds*, 377 U.S. at 565, turning on its head our Constitution's system of representative government. A state cannot use its considerable power to draw lines to nullify the fundamental principles at the core of our Constitution's system of government.

Judicial relief is thus warranted here. "[W]hen the rights of persons are violated, 'the Constitution requires redress by the courts' . . . . The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter." *Obergefell*, 135 S. Ct. at 2605 (quoting *Schuette*, 134 S. Ct. at 1637). Although this case, like many others, is undeniably sensitive and demands careful judgment, "this is what courts do." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012); *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (Kennedy, J., concurring) ("[T]he judicial power is often difficult in its exercise. We cannot here ask another Branch to share responsibility, as when the argument is made that a statute is flawed or incomplete. For we are presented with a clear and simple statute to be judged against a pure command of the Constitution. The outcome can be laid at no door but ours.").

Application of these principles is exceptionally important to redress "unconstitutional bias in apportionment" because 'the right to vote' is one of 'those political processes ordinarily to be relied upon to protect minorities,'" *Vieth*, 541 U.S. at 311, 312 (Kennedy, J., concurring) (quoting *Carolene Prods.*, 304 U.S. at 153 n.4), and ensure that legislative bodies "are collectively responsive to the popular will," *Reynolds*, 377 U.S. at 565. Because Wisconsin's partisan gerrymander subordinates adherents of one political party, burdens their representational rights, and dilutes and degrades their right to vote, the district court's judgment should be affirmed.

CONCLUSION

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

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
DAVID H. GANS
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amici Curiae

September 5, 2017 * Counsel of Record

APPENDIX

APPENDIX:
LIST OF *AMICI*

Campbell, Tom
Former Representative of California

Carbajal, Salud
Representative of California

Castro, Joaquin
Representative of Texas

Clarke, Yvette D.
Representative of New York

Clyburn, James E.
Representative of South Carolina

Cohen, Steve
Representative of Tennessee

Conyers, John, Jr.
Representative of Michigan

Espaillat, Adriano
Representative of New York

Garamendi, John
Representative of California

Gutiérrez, Luis
Representative of Illinois

Heck, Denny
Representative of Washington

Huffman, Jared
Representative of California

LIST OF *AMICI* – cont'd

Jackson Lee, Sheila
Representative of Texas

Jayapal, Pramila
Representative of Washington

Jeffries, Hakeem
Representative of New York

Johnson, Henry C. "Hank" Jr.
Representative of Georgia

Khanna, Ro
Representative of California

Lee, Barbara
Representative of California

Lieu, Ted
Representative of California

Lofgren, Zoe
Representative of California

McCollum, Betty
Representative of Minnesota

Moore, Gwen
Representative of Wisconsin

Morella, Constance
Former Representative of Maryland

Nadler, Jerrold
Representative of New York

LIST OF *AMICI* – cont'd

Norton, Eleanor Holmes
Representative of the District of Columbia

Pallone, Frank, Jr.
Representative of New Jersey

Payne, Donald M., Jr.
Representative of New Jersey

Pelosi, Nancy
Representative of California

Perriello, Tom
Former Representative of Virginia

Porter, John Edward
Former Representative of Illinois

Richmond, Cedric
Representative of Louisiana

Scott, Robert C. "Bobby"
Representative of Virginia

Skaggs, David
Former Representative of Colorado

Smith, Peter
Former Representative of Vermont

Soto, Darren
Representative of Florida

Swalwell, Eric
Representative of California

LIST OF *AMICI* – cont'd

Thompson, Mike
Representative of California

Walsh, James T.
Former Representative of New York

Welch, Peter
Representative of Vermont