No. 16-1161

IN THE
Supreme Court of the United States

BEVERLY R. GILL, *ET AL.*,
Appellants,
v.
WILLIAM WHITFORD, *ET AL.*,
Appellees.

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

BRIEF OF *AMICI CURIAE* JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF APPELLANTS

Robert D. Popper
Counsel of Record
Chris Fedeli
Lauren M. Burke
Eric W. Lee
JUDICIAL WATCH, INC.
425 Third Street SW
Washington, DC 20024
(202) 646-5172
rpopper@judicialwatch.org

Counsel for Amici Curiae

Dated: August 4, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTERESTS OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT.....2

ARGUMENT 4

I. The Shape and Location of the "S" Curve That is Central to the Efficiency Gap Theory Is an Unsettled Empirical Question. 6

II. The Efficiency Gap Is a Poor Tool for Identifying Partisan Gerrymandering. 13

CONCLUSION.....16

TABLE OF AUTHORITIES

CASES **Page(s)**

Davis v. Bandemer, 478 U.S. 109 (1986).....4, 15

Kumho Tire Co., Ltd. v. Carmichael,
..... 526 U.S. 137 (1999) 6

Parrott v. Lamone,
2016 U.S. Dist. LEXIS 112736
(D. Md. Aug. 24, 2016),
appeal dismissed, 137 S. Ct. 654 (2017) 2

Vieth v. Jubelirer, 541 U.S. 267 (2004) 4

Other Authorities

Daniel D. Polsby & Robert D. Popper,
The Third Criterion: Compactness as a Procedural Safeguard against Partisan Gerrymandering,
9 YALE L. & POL'Y REV. 301 (1991).....6, 7, 9

Edward R. Tufte,
The Relationship between Seats and Votes in Two-Party Systems,
67 AM. POL. SCI. REV. 540 (1973).....8, 9, 10

Gary King & Robert X. Browning,
Democratic Representation and Partisan Bias in Congressional Elections,
81 AM. POL. SCI. REV. 1251 (1987).....7, 8, 9, 10

Nicholas O. Stephanopoulos & Eric M. McGhee,
Partisan Gerrymandering and the Efficiency Gap,
82 U. CHI. L. REV. 831 (2015) 5

Philip A. Schrodt,
A Statistical Study of the Cube Law in Five Electoral Systems,
7 POL. METHODOLOGY 31 (1981).....9

Richard H. Pildes,
Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America,
99 CAL. L. REV. 273 (2011).....14

Wendy K. Tam Cho,
Measuring Partisan Fairness: How Well Does the Efficiency Gap Guard Against Sophisticated as Well as Simple-Minded Modes of Partisan Discrimination,
166 U. PA. L. REV. ONLINE 17 (2017),
https://goo.gl/mHTRQF.....12

INTERESTS OF THE *AMICI CURIAE*[1]

Judicial Watch, Inc. ("Judicial Watch") is a nonpartisan, nonprofit § 501(c)(3) educational foundation that seeks to promote transparency, integrity, and accountability in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs as a means to advance its public interest mission and has appeared as *amicus curiae* in this Court on a number of occasions.

The Allied Educational Foundation ("AEF") is a 501(c)(3) nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs as a means to advance its purpose and has appeared as an *amicus curiae* in this Court on a number of occasions.

In this case, a divided panel of the U.S. District Court for the Western District of Wisconsin found an unconstitutional partisan gerrymander, relying in part on what *amici* believe to be a fatally flawed theory about how to identify such gerrymanders. As explained herein, a central component of Appellees' "efficiency gap" analysis is indeterminate, and the use of this approach would lead courts to invalidate

---

[1] *Amici* state that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. The parties have consented to the filing of *amicus* briefs in this case.

redistricting plans where no undue partisan advantage is apparent. Further, Appellees' approach is a poor indicator of partisan gerrymandering. Properly understood, it is simply a mechanism for guaranteeing proportional partisan *results*. At the same time, Appellees' standard ignores violations of traditional districting criteria like compactness, contiguity, and respect for established political boundaries, which are the true hallmarks of partisan gerrymandering.

Amici are experts in the important political and constitutional questions concerning partisan gerrymandering that are raised by the District Court's decision. *Amici* believe, moreover, that partisan gerrymandering gives rise to a justiciable, constitutional claim, and they have argued for their own standard based on violations of traditional districting criteria. *See Parrott v. Lamone*, 2016 U.S. Dist. LEXIS 112736 (D. Md. Aug. 24, 2016), *appeal dismissed*, 137 S. Ct. 654 (2017).

Appellees, however, are using the wrong theory and are measuring the wrong thing. Their proposed standard would exacerbate rather than resolve the difficult issues posed by partisan gerrymandering.

SUMMARY OF ARGUMENT

Appellees argued in the District Court that an "efficiency gap" analysis based on the concept of "wasted" votes was the proper method to identify unconstitutional partisan gerrymandering. While not adopting all of Appellees' analysis on this point,

the District Court's majority accepted it as "evidence" of partisan gerrymandering. Accordingly, in order to best assist the Court in considering this appeal, *amici* will address the single issue of the usefulness of Appellees' "efficiency gap" standard in identifying partisan gerrymanders.

Appellees' approach depends on one's ability to determine the rate at which votes would be translated into legislative seats in a fair (un-gerrymandered) world. The "efficiency gap" is then computed by comparing the actual rate of "wasted" votes to such a hypothetical ideal. If the rate of translation is not known, or if it may not accurately and particularly be determined, Appellees' theory is simply unworkable.

The mathematical tool for predicting the fair translation of votes to seats in single-member districts is the "S" curve, which is derived in turn from a formula known as the "cube law of politics." But a critical value in this formula – the exponent from which it derives its name – is determined empirically, and real-world estimates of that value from particular electoral systems and in particular elections vary a great deal. Indeed, the graphs accompanying the complaint in this action contain anomalies which suggest that Appellees do not know the correct value of that exponent. Because Appellees cannot accurately determine the shape of their "S" curve, they cannot compare it to any actual rate of "wasted" votes or hope to use it to identify partisan gerrymanders.

More generally, the "efficiency gap" approach is flawed because it looks at the wrong indicators of partisan gerrymandering and ignores the right ones. Its use would import a new proportionality requirement into the constitutional law of redistricting. It gives undue weight to the outcomes of close elections, which may have nothing to do with gerrymandering. Meanwhile, it fails to see the violations of traditional districting criteria that have always been recognized as the distinctive marks of partisan gerrymandering.

ARGUMENT

In *Davis v. Bandemer*, 478 U.S. 109 (1986), the Court first held that a claim that a political gerrymander violated the Constitution was, in principle, justiciable. In the three decades following that decision, however, no majority of the Court has ever agreed upon the proper standard for identifying and adjudicating such a claim. *See Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion) ("no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged").

In their arguments before the District Court, Appellees claimed to have found the elusive standard that would allow courts to adjudicate claims of partisan gerrymandering: the "efficiency gap." This standard is based on the concept of "wasted votes," which are defined as all votes cast either (1) for a losing candidate, or (2) for a winning candidate who already had the bare majority of votes

necessary to win. The efficiency gap is simply a comparison between parties' wasted votes. Specifically, it is "*the difference between the parties' respective wasted votes, divided by the total number of votes cast in the election.*"[2] It is postulated that an efficiency gap favoring one party indicates partisan gerrymandering.[3]

The majority opinion of the District stated that it was not adopting Appellees' theory as a sufficient test for partisan gerrymandering, asserting that "we have not determined that a particular measure of EG [efficiency gap] establishes presumptive unconstitutionality." J.S. App. 176a. The District Court held nonetheless "that, on the facts before us, the EG is corroborative evidence of an aggressive partisan gerrymander." *Id.* Regardless of the District Court's disclaimer, Appellees are likely to reargue their theory of the efficiency gap in their merits brief.

The sole focus of this *amicus* brief will be to show that the efficiency gap is not reliable, either as a standalone test for partisan gerrymandering or as "corroborative evidence" that it has occurred. This is because a critical value that must be known, and must be stable, for the theory to be workable in practice has not been empirically established.

---

[2] Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 851 (2015).

[3] *Id.* at 852 ("we believe the gap is the essence of what critics have in mind when they refer to partisan gerrymandering.").

Unless and until this value is known with certainty, any attempt to apply the efficiency gap will yield only arbitrary and meaningless results. The Court should not rely on the theory in this case, let alone as a basis for fundamentally remaking the law of partisan districting. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 159 (1999) (Scalia, J., concurring) (courts must seek to exclude "expertise that is *fausse* and science that is junky").

I. The Shape and Location of the "S" Curve That is Central to the Efficiency Gap Theory Is an Unsettled Empirical Question.

Anyone attempting to compare the wasted votes of two political parties in a particular jurisdiction in order to determine the "efficiency gap" immediately has to address a difficult question: How much of the observed gap between the wasted votes of the majority and the minority parties is to be expected in a single-member district system like ours, and how much is due to partisan self-dealing?

After all, it is not the case that *any* deviation from the strict proportional representation of voters by party is suspicious. For example, it is not ordinarily expected that a party commanding 55% of the votes will obtain 55% of the available legislative seats, or that a party garnering 70% of the votes will earn 70% of the seats, and so on. Rather, it has long been known that the single-member district system used in the United States confers a "victory bonus" on majority parties, which bonus increases as the

size of the majority increases.[4] To be clear, this bonus is *not* attributable to partisan manipulation, but is an observed, structural feature of our electoral system. Thus, it is important to find a way to quantify the expected victory bonus, so as to isolate it from other, partisan considerations.[5]

Theoretical models attempting to quantify this natural bonus rely on a "curve which correlates the pro-majority bias to the size of the majority."[6] The formula for this curve operates by raising the ratio of partisan votes to a particular exponent, in order to calculate a projected ratio of legislative victories. Because the exponent most often used is three, the formula has been dubbed the "cube law of politics."[7] This formula produces an "S"-shaped curve showing the expected correlation between any percentage of votes cast for a party in a general election, and the

---

[4] *See* Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard against Partisan Gerrymandering,* 9 YALE L. & POL'Y REV. 301, 312 (1991) ("As has long been recognized," a single-member district system "inflates the majority party's influence in the legislature beyond what its popular support warrants," in a way that varies based on "the size of its margin of victory.").

[5] *See* Gary King & Robert X. Browning, *Democratic Representation and Partisan Bias in Congressional Elections,* 81 AM. POL. SCI. REV. 1251, 1266 (1987) (noting that the fact that a party received "55% of the votes and 75% of the seats" may indicate either "severe partisan bias or a fair system with majoritarian representation").

[6] Polsby & Popper, *supra* note 4, at 312 n. 52.

[7] *Id.*

related percentage of seats it should expect to obtain in a legislative body.[8]

In the District Court in this case, Appellees' experts relied on just such an "S" curve to try to distinguish partisan self-dealing presumably associated with gerrymandering from the ordinary victory bonus naturally achieved by electoral majorities in single-member districts. An expert report specifically addressing this issue was filed as an exhibit to the initial complaint. *See* Simon Jackman, *Assessing the Current Wisconsin State Legislative Districting Plan*, *Whitford v. Nichol*, No. 15-cv-421-bbc (W.D. Wis. Jan. 25, 2016), Joint Appendix Vol. II, at SA189 n. 1 (applying standard formula with three as the exponent) and SA190 (graph of the resulting "S" curve).

As Appellees' report necessarily admits, the use of an exponent of three is not theoretically required. It is instead an approximation of available empirical data. SA189 n. 1 (the "Cube Law" is "an approximation for the lack of proportionality we observe in single-member district systems, though hardly a 'law.'"); *see* King & Browning, *supra* note 5, at 1258 and *passim* (at best the cube law is a probabilistic, empirical finding, not a deterministic law). But this very fact – namely, that the cube law

---

[8] *See, e.g.,* Edward R. Tufte, *The Relationship between Seats and Votes in Two-Party Systems*, 67 AM. POL. SCI. REV. 540, 544-45 (1973) (deriving an "S" curve); J.S. App. 42a n. 111 ("the 'S' curves give a visual depiction of how each party's vote share . . . relates to the number of Assembly seats that party likely will secure").

and the particular "S" curve derived from it are empirical rather than *a priori* conclusions – suggests why they are the wrong tools to accomplish the wide-ranging redistricting revolution Appellees hope to achieve.

The simple fact is that the value of the crucial exponent has not been empirically established, either as a general matter or in particular cases. *See* Polsby & Popper, *supra* note 4, at 312 n. 52 ("actual electoral systems vary widely, and index results ranging from 0.71 to 4.4 have been obtained"); King & Browning, *supra* note 5, at 1260 ("a number of studies have shown that [the exponent] is not equal to 3," although "most find that [it] falls between 2 and 4"); Philip A. Schrodt, *A Statistical Study of the Cube Law in Five Electoral Systems*, 7 POL. METHODOLOGY 31, 33 (1981) ("even a cursory examination of election statistics shows that [the cube law] does not hold perfectly. . . . Even in Great Britain, where the cube law originated, [the exponent] can vary by as much as -.637 (1951) to 4.233 (1955) between a single pair of consecutive elections."); Tufte, *supra* note 8, at 544-45 (disputing empirical basis of cube law); *id.* at 546 (denying that cube law applies to certain electoral systems and maintaining that "[i]f one wants . . . a very crude rule of thumb summarizing the history of votes-seats relationship in two-party systems, then the 2.5 rule is preferable to the cube law.").

Even a slight change in the key exponent would alter the entire "S" curve, and the range of differences observed by the above authors is

significant. Furthermore, even if one were to agree with those authors who maintain that the exponent has "an average of about 3" (King & Browning, *supra* note 5, at 1260), it would remain just that: an average, an approximation across electoral systems and across time. But particular cases are not decided "on average" or "approximately."[9]

Appellees' own expert provided a revealing look at the messy reality of American elections, which cannot accurately be described by a single exponent or curve. Mr. Jackman plotted the seat and vote shares of 786 state legislative elections from 1972 to 2014 in 41 states. SA213. The resulting graph shows a rough, slanted cloud of data points both above and below Appellees' line of perfect efficiency. *Id.*

Of particular interest are the data points on that graph indicating that a party that garnered a clear majority of votes actually obtained fewer seats than the cube law's "S" curve would have predicted. (If the graph on page SA213 were a clock, this would

---

[9] It is worth noting as well that Appellees do not even rely on the cube law's "S" curve itself. Rather, they make a further approximation of that curve, in which "for every one percentage point gain in vote share, seat share should go up by two percentage points." SA198 (describing orange line). By this means, Appellees pile one approximation on top of another and further diminish any empirical validity their project might have. Note, too, that this two-percent estimate is itself subject to empirical dispute. *Compare* Tufte, *supra* note 8, at 546 ("The rate of translation of votes into seats differs greatly across political systems, ranging between gains of 1.3 to 3.7 per cent in seats for each 1.0 per cent gain in votes.").

include all of the data points between about 1:30 p.m. and 3:00 p.m.) The very existence of these cases poses a challenge to Appellees' basic theory. According to Mr. Jackman's report, the parties who won these elections obtained no victory bonus at all. Indeed, they appear to have suffered a "victory penalty." The graph shows that some of these victorious parties attracted almost 70% of the votes cast – an epic landslide by American standards. The fact that they carried a *lower* percentage of districts than expected in a single-member district system suggests that deficits in the efficiency gap (or being on the wrong side of the "S" curve) are *not* distinctive hallmarks of majoritarian, partisan gerrymandering. In the alternative, it suggests that Appellees have put their "S" curve in the wrong place.

The uncertainty regarding the proper location of the "S" curve is an insurmountable problem for Appellees. They seek nothing less than a constitutional revolution, in which state legislative enactments would be overturned as partisan gerrymanders if it were found that a majority party wasted fewer votes, and a minority party wasted more votes, "than expected" given a particular winning margin for the majority. How many wasted votes were "expected" for each party thus becomes a critical determination, and it primarily is based on Appellees' calculation of the "S" curve. As Mr. Jackman explains, "[t]he efficiency gap can be computed by noting how far the observed *S* [the number of seats] lies above or below the orange line in Figure 4." SA199. Thus, for Appellees' standard to work, the "orange line" must be in the right place.

If it is not, Appellees risk asking courts to strike down redistricting laws even though the majority party did *not* have more seats "than expected" given the extent of its victory margin. Stated differently, if Appellees cannot accurately identify when an "undue" partisan advantage has been obtained, they cannot accurately identify partisan gerrymanders.[10]

Before courts accept Appellees' implicit invitation to become more heavily involved in political redistricting decisions, and to review those decisions based on the efficiency gap, they must be certain that Appellees have a way to tell the difference between "expected" and "undue" partisan advantage. The efficiency gap, the cube law, and the associated "S" curve do not provide a reliable means for doing so.

---

[10] While this is its most fundamental flaw, the efficiency gap standard is beset with technical problems. *See* Wendy K. Tam Cho, *Measuring Partisan Fairness: How Well Does the Efficiency Gap Guard Against Sophisticated as Well as Simple-Minded Modes of Partisan Discrimination*, 166 U. PA. L. REV. ONLINE 17 (2017), https://goo.gl/mHTRQF. For example, the efficiency gap is unjustifiably more volatile when applied to smaller delegations (*id*. at 20 n. 10, 31-32); it scores two sets of outcomes the same even though one of the two could not be improved by redistricting (*id*. at 23); it wrongly equates "wasted" winning votes with "wasted" losing votes, and so does not recognize changes in electoral competitiveness that matter a great deal to voters and politicians (*id*. at 26-27, 33); it is blind to bipartisan gerrymanders (*id*. at 35); and, strangely, it can find optimal efficiency whenever the vote splits 75-25 (*id*. at 34). Professor Tam concludes that, "[f]or ensuring partisan fairness, the efficiency gap is too easily fooled." *Id*. at 36.

II. The Efficiency Gap Is a Poor Tool for Identifying Partisan Gerrymandering.

As explained above, the efficiency gap standard is impaired by a fundamental and unsolved data problem that renders it unworkable. In addition, the standard is wrong in principle. It emphasizes attributes of electoral systems that do not help to identify partisan gerrymanders, while it ignores features that are characteristic of such gerrymanders.

As the dissent rightly noted, Appellees' proposed standard would enshrine in the Constitution a right to proportional representation. J.S. App. at 269a. Admittedly, the efficiency gap standard would not require or favor strict, 1-to-1 proportional representation, where a particular percentage of votes would translate into an *equal* percentage of legislative seats. Rather, the efficiency gap standard would limit deviations from whatever level of representation was required by the "S" curve. This is proportional representation as well, because each particular level of voter support is invariably associated with a particular level of legislative control.

But this kind of proportional representation has nothing to do with preventing gerrymandering. Deviations from proportional representation, however defined, may occur for any number of reasons other than gerrymandering, including the political views or missteps or personal qualities of

the candidates of one of the parties. The absence of proportional representation does not uniquely identify gerrymanders. In any event, proportional representation is not required by the Constitution.

The dissent also was right to note that the practical effect of an approach based on the efficiency gap is to unduly penalize losses in close elections, because that is where the most votes are wasted. J.S. App. at 293a ("winning close elections is the surest way to make sure the other side racks up lots of wasted votes"). But this fact "does not tell us anything about gerrymandering, however, even if partisan intent is present; it simply means one side won significantly more close elections than the other." *Id.* Nor is any change in the rate at which we see close elections due to gerrymandering. *See* Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 312 (2011) ("the evidence that gerrymandering is a major cause of the decline in competitive elections is not powerful. Most of the increase in safe seats over the last thirty years, and the decline in marginal seats . . . has occurred in the years between redistricting cycles").

Finally, Appellees' approach to identifying gerrymandering ignores the factors that commentators and the Court usually have viewed as typical signs of the practice. To gerrymander properly, voters must be placed within or without districts on the basis of their partisan affiliations. Because voters typically do not choose their place of residence to favor politicians, electoral districts must

be stretched and shrunk so as to include the partisan mix of voters that best suits the scheming mapmaker. The inevitable result is noncompact, occasionally noncontiguous district boundaries that needlessly cross existing political boundaries. These are the true hallmarks of partisan gerrymanders. *See Bandemer*, 478 U.S. at 173 (Powell, J., concurring in part and dissenting in part) (of the factors that "should guide both legislators who redistrict and judges who test redistricting plans against constitutional challenges," the "most important . . . are the shapes of voting districts and adherence to established political subdivision boundaries") (citations omitted).

CONCLUSION

For the foregoing reasons, *amici* Judicial Watch, Inc. and Allied Educational Foundation respectfully request that the Court reverse the judgment of the District Court.

Respectfully submitted,

Robert D. Popper
Counsel of Record
Chris Fedeli
Lauren M. Burke
Eric W. Lee
JUDICIAL WATCH, INC.
425 Third Street SW
Washington, DC 20024
(202) 646-5172
rpopper@judicialwatch.org

Counsel for Amici Curiae

August 4, 2017