IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WILLIAM WHITFORD, et al.,

Plaintiffs,

v. Case No. 15-CV-421-bbc

GERALD NICHOL, et al.,

Defendants.

DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS

The Court should dismiss this case because it cannot grant the relief sought by the plaintiffs. The plaintiffs' claim is essentially the one rejected in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), in which a plurality of the Supreme Court held that partisan gerrymandering claims present nonjusticiable political questions and Justice Kennedy concurred in the judgment dismissing the case. While Justice Kennedy left open the possibility that "standards for measuring the burden a gerrymander imposes on representational rights," might emerge in the future, *id.* at 317, the plaintiffs fail to state a claim because their proposed standard is based on the same principle the Supreme Court has repeatedly rejected.

There is no constitutional right for political groups to obtain a percentage of legislative seats corresponding to the percentage of votes their candidates earn statewide in legislative contests. As a result, a districting plan does not become unconstitutional because it departs from partisan symmetry or results in more "wasted votes" for the candidates of one party. The *Vieth* Court, including Justice Kennedy, rejected the principles offered by the plaintiffs in this case because they

do not correspond to an actual constitutional violation. The lack of a judicially manageable standard is a symptom of this root problem, and mathematical models cannot provide a judicially discernible standard when there is no viable constitutional theory of what the models should be measuring.

In any event, the plaintiffs' proposed standard does not address the reasons the Supreme Court has held that there is no judicially manageable standard for political gerrymandering claims. The plaintiffs' standard assumes that political gerrymandering must exist when one party faces a more difficult time in translating the total votes cast for its candidates statewide into legislative seats. This standard completely fails to account for the reason why Democrats are disadvantaged: Democratic supporters are concentrated in specific locations such that they naturally are "packed" into districts drawn using ordinary districting principles. Highlighting the deficiency of the plaintiffs' proposed threshold of a 7% "efficiency gap," the Wisconsin Assembly map instituted following the 2000 census would be considered an unconstitutional political gerrymander because the plaintiffs' expert says that plan had an average 8% efficiency gap against Democrats. That efficiency gap was not the result of partisan gerrymandering, however, because those Assembly districts were drawn by three federal judges based on neutral districting criteria.

Whether the precise reasoning is that this is a nonjusticiable political question or simply the failure to state a claim, this Court cannot grant the plaintiffs relief.

FACTS

For purposes of this motion to dismiss only, the facts alleged in the complaint are assumed to be true. The Court is not bound to accept legal conclusions contained in the Complaint as true. *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

I. The parties

The plaintiffs are registered voters who support the Democratic Party and reside in various legislative districts in Wisconsin. (Compl. ¶¶ 15-27.) The plaintiffs reside in the 22nd, 23rd, 26th, 31st, 42nd, 49th, 55th, 63rd, 66th, 76th, and 91st Assembly Districts. (Compl. ¶¶ 17-27.) The plaintiffs challenge the 99 State Assembly districts that were formed by the Wisconsin legislature in 2011 Wisconsin Act 43 ("Act 43"), alleging that the plan is a partisan gerrymander that is unconstitutional under the First and Fourteenth Amendments. (Compl. ¶¶ 1-2.)

The defendants are sued in their official capacities as the members and executive director of the Wisconsin Government Accountability Board, which administers Wisconsin's laws relating to elections. (Compl. ¶¶ 28-30.)

II. Background facts on Wisconsin legislative districting

In the November 2010 general election, Republican candidates won the governorship and a majority of seats in the Assembly and State Senate. By winning these elections, elected officials who are members of the Republican Party were able to pass a bill establishing state legislative districts and federal congressional districts following completion of the 2010 census. This was the first redistricting in Wisconsin in many years that was done by the political branches. The state's district lines were drawn by federal courts following the 1990 and 2000 censuses.

A. Redistricting after the 1990 census

Following the 1990 census, a panel of three federal judges drew Wisconsin's legislative districts because Governor Tommy Thompson, a Republican, vetoed plans passed by a Wisconsin legislature controlled by Democrats. *Prosser v. Elections Bd.*, 793 F. Supp. 859, 862 (W.D. Wis. 1992). The court used parts of two plans submitted in the case, one by Republicans and one by Democrats, and "preserve[d] their strengths, primarily population equality and contiguity and compactness, and avoid[ed] their weaknesses." *Id.* at 870.

This court-drafted plan, referred to as the "1992 Plan," was in effect for the 1992, 1994, 1996, 1998, and 2000 elections.

B. Redistricting after the 2000 census

Following the 2000 census, another panel of three federal judges drew Wisconsin's legislative districts because Republicans controlled the Assembly and Democrats controlled the Senate. *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at *1 (E.D. Wis. May 30, 2002), *amended*, 2002 WL 34127473 (E.D. Wis. July 11, 2002). The court drew its plan "in the most neutral way it could conceive—by taking the 1992 reapportionment plan as a template and adjusting it for population deviations." *Id.* at *7. "When making the necessary changes to the boundaries of the existing districts, the court was guided by the neutral principles of maintaining municipal boundaries and uniting communities of interest." *Id.*

The court rejected the argument advanced by Democrats that a plan should not be enacted "if the Democrats win a bare majority of votes, they will take less than 50% of the total number of seats in the Assembly." *Id.* at *6. The court held

that "[t]he problem with using this finding as the basis for a plan is that it does not take into account the difference between popular and legislative majorities, and the fact that, practically, there is no way to draw plans which use the traditional criteria and completely avoid this result." *Id.* The court found that "Wisconsin Democrats tend to be found in high concentrations in certain areas of the state, and the only way to assure that the number of seats in the Assembly corresponds roughly to the percentage of votes cast would be at-large election of the entire Assembly[.]" *Id.*

This court-drafted plan, referred to as the "2002 Plan," was in effect for the 2002, 2004, 2006, 2008, and 2010 elections.

C. Redistricting after the 2010 census

The Wisconsin legislature approved the districts for the State and Assembly in 2011 Wisconsin Act 43, which was passed by the Senate on July 19, 2011, and the Assembly on July 20, 2011, and published on August 23, 2011. (Compl. ¶ 42.) The plaintiffs take issue with the process that led to Act 43 and essentially allege that the legislature enacted a districting plan that would favor Republicans and disfavor Democrats. (Compl. ¶¶ 32-43.)

Act 43 has been in place for the 2012 and 2014 elections (with one change to the districts made by a federal court under the Voting Rights Act). *See Baldus v. Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 854-58 (E.D. Wis. 2012).

III. The plaintiffs' proposed standard for partisan gerrymandering claims

A. The efficiency gap

The plaintiffs' proposed standard is "based on the concept of partisan symmetry—the idea that a district plan should treat the major parties symmetrically with respect to the conversion of votes to seats." (Compl. ¶ 4.) The plaintiffs contend that courts should measure districting plans using an "efficiency gap" that measures the difference "between the performances of the two major parties." (Compl. ¶ 5.) The plaintiffs use two different definitions of the "efficiency gap," and the complaint does not always clearly indicate which version it is using.

The plaintiffs contend that the efficiency gap is a number showing "all of a district plan's ***cracking*** and ***packing***." (Compl. ¶ 5 (emphasis in original).) The plaintiffs allege that partisan gerrymanders are achieved by "cracking," meaning "dividing a party's supporters among multiple districts so they fall short of a majority in one" and "packing," meaning "concentrating one party's backers in a few districts that they win by overwhelming margins." (Compl. ¶ 5.) The efficiency gap purports to measure the difference in "wasted votes," between the two major political parties. "Wasted votes" are defined as votes cast "for a losing candidate (in the case of cracking) or for a winning candidate but in excess of what he or she needed to prevail (in the case of packing)." (Compl. ¶ 5.) The plaintiffs submit a report by Kenneth Mayer to calculate this version of the "efficiency gap" in Wisconsin. (Compl. Ex. 2, *hereinafter*, "Mayer Rep.")

The plaintiffs, however, also use another definition of the "efficiency gap" that purports to measure "partisan bias," defined as "the difference in the share of seats that each party would win if they tied statewide." (Compl. ¶ 9.) This calculation is based on a conversion of the total vote for a party's candidates in all legislative races into an expected number of seats that party would win. (Compl., Ex. 3 at 19-20, *hereinafter*, "Jackman Rep.".) The plaintiffs submit a report by Simon Jackman to calculate this version of the "efficiency gap." (Jackman Rep.)

1. The Mayer report

Mayer's opinions are based on partisan symmetry, which "requires that the number of seats one party would receive if it garnered a particular percentage of the vote be identical to the number of seats the other party would receive if it had received the same percentage of votes." (Mayer Rep. at 38-39.) He opines that "[a]ny discussion of Act 43 must begin with the fact that in 2012 Republicans achieved a 60-39 majority in the Assembly in an election when the Democratic Party achieved 53.5% of the statewide two-party presidential vote." (Mayer Rep. at 38.) With respect to the vote total at issue in this case—the statewide legislative vote in 2012—Mayer calculates the Democratic candidates' share at 51.1%. (*See* Mayer Rep. at 46, Table 10 (1,454,717 Democratic votes of 2,844,676 total votes).)

Mayer performs a district-by-district calculation of the "wasted votes" in each district, which is then totaled statewide for the Republican and Democratic candidates. (Mayer Rep. at 50-51, Table 8.) Mayer makes two adjustments to the actual vote totals: (1) he adjusts to account for the advantages of incumbents in each race, and (2) in uncontested races he adjusts the losing party's vote total to

reflect its share of the presidential vote. (Mayer Rep. at 44-45.) He divides the difference in statewide wasted votes for Republican candidates and Democratic candidates (the "gap") by the total number of votes to yield an "efficiency gap." (Mayer Rep. at 46.) He contends that Act 43 has an efficiency gap of 11.69% because Democrats had 332,552 more wasted votes than Republicans out of 2,844,676 total votes. (Mayer Rep. at 46.)[1]

2. The Jackman report

Jackman's opinions are also based on partisan symmetry. He opines that a "partisan gerrymander" exists when there is a "systemic advantage for one party over the other." (Jackman Rep. at 48.) He defines the "efficiency gap" as an "'excess seats' measure, reflecting the nature of the partisan gerrymander." (Jackman Rep. at 3.) An efficiency gap exists when one party "translat[es] its votes across the jurisdiction into more seats than its opponents." (Jackman Rep. at 3.) While Jackman references "wasted votes," he actually measures the efficiency gap by comparing the amount of seats one party's candidates win against that party's share of the statewide vote in all legislative races. (Jackman Rep. at 3.)

Jackman opines that Wisconsin had an efficiency gap of 13% in 2012, based on the fact that Democratic candidates won 51.4% of the statewide legislative vote yet only won 39.4% of Assembly Seats. (Jackman Rep. at 69.) He opines that the efficiency gap was 10% in the 2014 election (in which Democrats won 48% of the

[1] Notably, Mayer does not calculate the "efficiency gap" for the November 2014 elections, in which Republican candidates won a majority of votes cast for Assembly candidates statewide along with the gubernatorial race.

statewide legislative vote). (Jackman Rep. at 69.) These results "indicate the disparity between vote shares and seat shares in these elections, which in turn, is consistent with partisan gerrymandering." (Jackman Rep. at 69-71.)

Jackman concludes that "Wisconsin has recorded an unbroken run of negative *EG* estimates [unfavorable to Democrats] from 1998 to 2014." (Jackman Rep. at 36.) The complaint summarizes Jackman's opinions by alleging that Wisconsin had "an average Republican gap of 2%" in the 1980s and 1990s, which "deepened in the 2000s to an average of 8%" and then "surged, thanks to the Current Plan, to an average gap of ***11%*** in 2012 and 2014." (Compl. ¶ 54 (emphasis in original).) Jackman opines that Wisconsin's court-drawn 2002 Plan had an "unambiguous" disadvantage to Democrats and calculates that it had an average efficiency gap of 7.6%, with a high year of 11.8%. (Jackman Rep. at 55.) The 10% gap in 2014 is actually more favorable to Democrats than the gaps in 2004 and 2006 under the court-drawn 2002 Plan. (Jackman Rep. at 71.)

Jackman contends that an efficiency gap of 7% should be actionable as an unconstitutional partisan gerrymander, based on his analysis of the efficiency gaps in other state legislative contests from 1972-2014 (Jackman Rep. at 20, 65-66.) He opines that 15% of plans analyzed have a 7% or greater gap unfavorable to Democrats while 12% have a 7% or greater gap unfavorable to Republicans. (Jackman Rep. at 65.) He contends that Act 43 should be actionable because the efficiency gap exceeds his 7% threshold. (Jackman Rep. at 69-71.)

B. The Demonstration Plan

The plaintiffs submit an alternative redistricting plan drawn by Mayer, called the Demonstration Plan. (Compl. ¶ 10.) The plaintiffs contend the Demonstration Plan is roughly equivalent to Act 43 in terms of population deviation, compactness, number of municipal splits, and Voting Rights Act compliance. (Mayer Rep. at 37.) Mayer opines that it would produce a gap of 62,414 wasted votes and a 2.20% efficiency gap in wasted votes. (Mayer Rep. at 46.)

C. The plaintiffs' proposed legal standard

The plaintiffs contend that the efficiency gap provides a judicially discernible and manageable standard to measure partisan gerrymandering because it "measures a party's ***undeserved*** seat share: the proportion of seats a party receives that it would ***not*** have received under a balanced plan in which both sides have approximately equal wasted votes." (Compl. ¶ 51 (emphasis in original).) The plaintiffs claim that wasted votes is the appropriate measure for partisan gerrymandering because "[a]ll partisan gerrymandering is accomplished through cracking and packing, which enables the party controlling the map to manipulate the vote margins in its favor." (Compl. ¶ 48.)

The plaintiffs rely on the Jackman Report in contending that any plan with an efficiency gap of over 7% should be "presumptively unconstitutional." (Compl. ¶¶ 85-86.) The plaintiffs allege that the "efficiency gap provides a workable test to identify unconstitutional partisan gerrymandering" because it is similar to the test applied in one-person, one-vote cases. (Compl. ¶ 83.)

ARGUMENT

The plaintiffs' claims should be dismissed because their proposed standard is based on a principle the Supreme Court has repeatedly rejected. The plaintiffs contend that a redistricting plan must be an unconstitutional gerrymander, irrespective of its compliance with traditional districting principles, if one political party faces a disadvantage in converting the total votes its candidates receive statewide into legislative seats. The Supreme Court rejected a similar claim in *Vieth* because groups have no right to seats in a legislature in proportion to their total of the statewide vote. Thus, a districting plan is not unconstitutional because it lacks "symmetry" between the parties' ability to convert total votes into seats or has an "efficiency gap," whether measured in "wasted votes" or "excess seats."

In addition, the plaintiffs' proposed "efficiency gap" standard does not solve the problems the Supreme Court has identified with political gerrymandering claims. Most tellingly, the plaintiffs do not even attempt to answer Justice Kennedy's call for a substantive theory of representational rights that would allow a court to analyze a partisan gerrymandering claim. Instead, the plaintiffs assume that a plan must be a partisan gerrymander if it disadvantages one political party, which becomes unconstitutional if that disadvantage passes an arbitrary threshold based on hypothetical election results.

Further, the standard does not actually measure gerrymandering because it fails to account for traditional districting principles. Thus, the plaintiffs do not address the fact that districting, by its nature, disadvantages groups that are concentrated geographically. Plaintiffs' own expert opines that Wisconsin's

asymmetry has been increasing since the 1990s despite the fact that courts drew the plans in effect in the 1990s and 2000s. The plaintiffs' 7% efficiency gap threshold is not a judicially manageable standard for partisan gerrymandering because it leads to the conclusion that the court-drawn 2002 Plan was an unconstitutional partisan gerrymander.

Lastly, the Court must dismiss this case because there is no recognized cause of action for a statewide challenge to all legislative districts, as recognized even by the *Vieth* dissenters. In any event, the plaintiffs lack standing to challenge Act 43 on a statewide basis because plaintiffs can only challenge the district of their residence.

I. Background on the case law of political gerrymandering claims.

Some background on political gerrymandering claims is needed because "[t]he caselaw addressing political gerrymandering claims under the Equal Protection Clause is foggy at best." *Radogno v. Ill. State Bd. of Elections*, No. 1:11-CV-04884, 2011 WL 5025251, at *4 (N.D. Ill. Oct. 21, 2011). The most recent political gerrymandering decisions are "cobbled-together plurality opinions that place district courts in the untenable position of evaluating political gerrymandering claims without any definitive standards." *Id.*

The Supreme Court first addressed political gerrymandering claims in *Davis v. Bandemer*, 478 U.S. 109 (1986), which involved a challenge to Indiana's districting following the 1980 census on the grounds that Democratic candidates received 51.9% of the statewide vote in races of the state House but won only 43% of

the seats. *Id.* at 115. Six justices held that political gerrymandering claims were justiciable (a four-Justice plurality and two-Justice dissent), and three justices held that the claims were nonjusticiable political questions. *Id.* at 109-12. The case was dismissed because the plurality held that the plaintiffs had not stated "a prima facie case of an equal protection violation" on the merits, *id.* at 143 (plurality opinion), with the concurrence holding that the case was not justiciable. *Id.* at 144-61 (O'Connor, J., concurring in the judgment).

The Court next addressed the political gerrymandering issue in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), a challenge to Pennsylvania's congressional districts. A four-Justice plurality held that *Bandemer* should be overruled because political gerrymandering claims were nonjusticiable political questions with no "judicially enforceable limit on the political considerations that the States and Congress may take into account when districting." *Id.* at 305 (plurality opinion). Justice Kennedy concurred in the judgment that the plaintiffs' complaint "states no valid claim on which relief can be granted," *id.* at 313 (Kennedy, J., concurring in the judgment), but held open the possibility that political gerrymandering claims would become justiciable if "workable standards" emerged for "measuring the burden a gerrymander imposes on representational rights." *Id.* at 317 (Kennedy, J., concurring in the judgment).

The Court again addressed the issue in *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006), a challenge to Texas's congressional districts. The "Court punted on the question of justiciability—finding that the issue

was not before it—but held that plaintiffs' claims must nevertheless be dismissed because of 'the absence of any workable test for judging partisan gerrymanders.'" *Radogno*, 2011 WL 5025251, at *5 (quoting *LULAC*, 548 U.S. at 420 (plurality opinion)).

When examining a political gerrymandering claim brought by Illinois Republicans, a three-judge panel in the Northern District of Illinois determined that "political gerrymandering claims are justiciable *in principle*, but also currently unsolvable" because no standard exists to judge them. *Id.* at *6 (emphasis in original). The plaintiffs here have not solved the unsolvable because their standard is based on principles the Supreme Court rejected in *Bandemer* and *Vieth* and does not provide a judicially manageable standard for judging partisan gerrymanders.

II. The Supreme Court has repeatedly rejected the principle underlying the plaintiffs' proposed standard.

A. Because there is no right to representation in a legislature at an equivalent level of the statewide vote, a districting map is not unconstitutional because it disadvantages groups in converting statewide votes into legislative seats.

This Court should dismiss this case because the Supreme Court has repeatedly rejected the principle underlying the standard proposed by the plaintiffs. The plaintiffs contend that districting plans should be judged on their "partisan symmetry—the idea that district plans should treat the major parties symmetrically with respect to their conversion of votes to seats" and offer two versions of the "efficiency gap" as a way to measure partisan symmetry (Compl. ¶¶ 4-5, 9.) The plaintiffs' contention that the "efficiency gap" measures "a party's ***undeserved*** seat share," (Compl. ¶ 51 (emphasis in original)), only works as a

standard if there is a constitutional basis for holding that a party's deserved seat share should be calculated by the total votes its candidates receive statewide. If the Constitution does not require that seat share be correlated to the statewide vote total, then the plaintiffs' standard has no connection to a constitutional violation.

The "efficiency gap" has no relation to a constitutional violation because the Supreme Court has rejected its underlying assumption in both *Vieth* and *Bandemer* by holding that political groups (including the two major political parties) do not have a right to seats in the legislature in proportion to their percentage of the state wide vote total. In *Vieth*, the plurality held that the constitution

> guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups. It nowhere says that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers.

541 U.S. at 288 (plurality opinion). The plurality held that a standard based on the principle that a majority of the electorate should be able to represent a majority of representatives was not "judicially discernible in the sense of being relevant to some constitutional violation." *Id.* The principle from one-person, one-vote cases was not implicated because the principle that each individual have an equal say in the election of representatives did not mean that "each discernible group, whether farmers or urban dwellers or political parties, must have representation equivalent to its numbers." *Id.* at 290.

Importantly, this is a majority holding of the Court because Justice Kennedy explicitly agreed that the plurality demonstrated "the standards proposed . . . by the parties before us, and by our dissenting colleagues, are either unmanageable or

inconsistent with precedent or both." *Id.* at 308 (Kennedy, J., concurring in the judgment) (citation omitted)). Justice Kennedy specifically agreed that "[t]here is no authority for this precept" that a majority of voters should be able to elect a majority of representatives. *Id.* at 308. (Kennedy, J.).

The *Vieth* Court further explained that even if there were some constitutional basis for proportional representation, there was no "judicially manageable" standard to judge it because majority status in statewide races does not "establish[] majority status for district contests." *Id.* at 288 (plurality opinion). The plurality approvingly quoted an article for the proposition that "[t]here is no statewide vote in this country for the . . . state legislature. . . . Political parties do not compete for the highest statewide vote totals or the highest mean district vote percentages: They compete for specific seats." *Id.* at 289 (quoting Lowenstein & Steinberg, The Quest of Legislative Districting in the Public Interest: Elusive or Illusory, 33 UCLA L. Rev. 1, 59-60 (1985)).

A constitutional standard based on proportionality was also not manageable because the Court could not ensure that a party that won a majority of votes statewide would win a majority of seats "unless we radically revise the States' traditional structure for elections." *Id.* at 289. Under the "winner-take-all district system, there can be no guarantee, no matter how the district lines are drawn, that a majority of party votes statewide will produce a majority of seats for that party." *Id.* The *Vieth* Court recognized that party members would always "wind up 'packed' in some districts and 'cracked' throughout others." *Id.* Under a system of districting

based solely on compactness and with respect for political subdivisions, "political groups that tend to cluster (as is the case with Democratic voters in cities) would be systematically affected by what might be called a 'natural' packing effect." *Id.*

The *Vieth* Court's decision was in line with the *Bandemer* plurality's rejection of the principle "that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." 478 U.S. at 130 (plurality opinion). The *Bandemer* plurality explained that disproportion between statewide vote totals and legislative seats

> is inherent in winner-take-all, district-based elections, and we cannot hold that such a reapportionment law would violate the Equal Protection Clause because the voters in the losing party do not have representation in the legislature proportionate to the statewide vote received by their party candidates.

Id. The plurality flatly rejected the principle the plaintiffs espouse by holding that "a group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult." *Id.* at 132.

Tests based on "partisan symmetry," "wasted votes," or "partisan bias" cannot sustain a viable political gerrymandering claim because the principles underlying these measures were rejected by a majority of the Supreme Court in *Vieth*. While the plaintiffs claim that their standard is not based on proportional representation (Compl. ¶ 51), the partisan symmetry standard only makes sense if a legislative districting system should be judged on how statewide vote totals translate into legislative seats. As the *Vieth* plurality said, "[d]eny it as appellants may (and do), this standard rests upon the principle that groups . . . have a right to

proportional representation." 541 U.S. at 286. The plaintiffs' contention that their standard measures "***undeserved*** seat share," assumes a party only deserves as many seats as it would get if wasted votes were equal between parties. (Compl. ¶ 51.) And the plaintiffs' definition of "wasted votes" is based on the principle that statewide vote totals need to translate into legislative seats because votes are "wasted" only when they do not translate into additional seats in the legislature.

Indeed, the fact that is supposed to shock this Court into realizing the allegedly extreme partisan nature of Wisconsin's districting (*i.e.,* 51% of the statewide vote translating into 39% of legislative seats) is practically identical to results the *Bandemer* plurality held were not unconstitutional. Democrats claimed Indiana Republicans had instituted a partisan gerrymander because Democratic candidates received 53.1% percent of the statewide legislative vote yet only secured 43 of 100 House seats in the 1982 election. 478 U.S. at 115. The district court declared the plan unconstitutional on the very grounds advanced in this case: the plan was intended "to favor Republican incumbents and candidates and to disadvantage Democratic voters" which "was achieved by 'stacking' Democrats into districts with large Democratic majorities and 'splitting' them into other districts so as to give Republicans safe but not excessive majorities in those districts." *Id.* at 116-17 (footnotes omitted).[2] The Supreme Court denied relief to the plaintiffs despite the large "efficiency gap" in the Indiana plan (53% of votes yielding only

[2] The Indiana plan also had a "peculiar mix of single-member and multi-member districts." *Bandemer*, 478 U.S. at 116.

43% of seats) achieved through cracking and packing of Democratic voters. The plaintiffs do not explain why what was constitutional thirty years ago is now unconstitutional when the Court has only become more skeptical of partisan gerrymandering claims.

B. The plaintiffs' standard merely repackages the standard rejected in *Vieth*.

While the plaintiffs allege that they are offering a new standard for political gerrymandering claims, they are merely repackaging the standard rejected in *Vieth* with an added veneer of math. In *Vieth*, the plaintiffs proposed that political gerrymandering was established when "(1) the plaintiffs show that the districts systematically 'pack' and 'crack' the rival party's voters, and (2) the court's examination of the 'totality of circumstances' confirms that the map can thwart the plaintiffs' ability to translate a majority of votes into a majority of seats." 541 U.S. at 286-87 (citation omitted) (plurality opinion).

The plaintiffs' maintain the requirement for "packing" and "cracking" of the rival party's voters (Compl. ¶¶ 48-50), but have replaced the "totality of the circumstances" requirement with the "efficiency gap." While the "efficiency gap" provides a numerical measurement (albeit one that fails for reasons discussed below), it does not address the central problem of political gerrymandering claims. The Supreme Court has not only struggled with these claims because of the lack of a tool for measurement, but also because no one can articulate a constitutional principle defining what should be measured. The "efficiency gap" does not resolve

the substantive weaknesses that led both the *Vieth* plurality and Justice Kennedy to reject the standard proposed in that case.

The *Vieth* plurality rejected the standard offered not only because it was not manageable, but because it was not "judicially discernible in the sense of being relevant to some constitutional violation." 541 U.S. at 288 (plurality opinion). In Justice Kennedy's words, political gerrymandering claims face two obstacles: (1) the lack of "any agreed upon model of fair . . . representation," and (2) "the absence of rules to confine judicial intervention." 541 U.S. at 307 (Kennedy, J., concurring in the judgment). Justice Kennedy noted that the second obstacle "is related to the first" because the lack of "substantive principles of fairness in districting" meant there was "no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights." *Id.* at 307-08 (Kennedy, J.). The plaintiffs here attempt to address Justice Kennedy's second obstacle without addressing the first.

The plaintiffs do not offer a "model of fair representation" that differs from the one offered by the plaintiffs in *Vieth*. The plaintiffs attempt to steal first base when they allege that the efficiency gap measures "a party's ***undeserved*** seat share." (Compl. ¶ 51 (emphasis in original).) One cannot determine undeserved seat share, however, without first determining a principle for deciding how many seats are deserved. As noted above, the Supreme Court has rejected the plaintiffs' principle when it held that political groups have no right to translate statewide support into legislative seats. To the extent the plaintiffs will argue partisan

symmetry is different from the principle rejected in *Vieth*, Justice Kennedy explicitly rejected it when he wrote for the *LULAC* plurality that "asymmetry alone is not a reliable measure of unconstitutional partisanship." 548 U.S. at 420.[3]

III. The efficiency gap is not a judicially manageable standard for measuring partisan gerrymandering.

Even assuming that the plaintiffs have articulated a judicially discernible standard, the efficiency gap does not provide a judicially manageable standard for determining when otherwise appropriate consideration of political classifications turns into an unconstitutional political gerrymander. The plaintiffs' standard fails because it ignores traditional districting criteria to focus solely on the political results. In fact, the plaintiffs do not even allege a partisan gerrymander as commonly understood, which involves ignoring traditional districting criteria (such as compactness, contiguity, and keeping communities of interest together) by drawing strangely-shaped districts solely for political reasons. Instead, the plaintiffs assert that a districting plan must be unconstitutional gerrymandering if it has sufficiently asymmetrical political results.

In addition, the plaintiffs' standard does not measure the effect of partisan gerrymandering because it ignores the political effects inherent in all districting

[3] The plaintiffs are incorrect that "a majority of Justices expressed support for a test based on the concept of partisan symmetry." (Compl. ¶ 45.) Justice Kennedy (along with Justice Alito and the Chief Justice) explicitly did not support using partisan symmetry. *LULAC*, 548 U.S. at 420; *id.* at 492-93 (Roberts, C.J.). Justices Scalia and Thomas held the claim was nonjusticiable. *Id.* at 511-12 (Scalia, J., concurring in the judgment and dissenting in part). Further, Justice Souter, joined by Justice Ginsburg, merely "did not rule out the utility of a criterion of symmetry as a test." *Id.* at 483 (Souter, J., concurring in part and dissenting in part).

decisions. The Supreme Court recognizes that traditional districting criteria results in natural asymmetry for groups that are geographically concentrated, even in the absence of any partisan gerrymandering. Wisconsin's political geography is naturally asymmetrical to the detriment of Democrats, which is reflected in the asymmetry in the court-drawn 1992 and 2002 Plans. The plaintiffs' standard would even hold that the court-drawn 2002 Plan was a partisan gerrymander on behalf of Republicans because it resulted in an average 8% efficiency gap. This result shows why the plaintiffs' standard is neither judicially discernible nor manageable.

Simply put, the plaintiffs have not found a way to untie the Gordian Knot of political gerrymandering claims. The "unsolvable" problem of political gerrymandering claims is not solved by a standard that ignores the very problems that have made the development of a workable standard unattainable.

A. The plaintiffs' standard does not actually measure gerrymandering.

The plaintiffs' standard is not judicially manageable because it does not even measure gerrymandering. The term "gerrymander" dates to 1812, when

> there occurred the notoriously outrageous political districting in Massachusetts that gave the gerrymander its name—an amalgam of the names of Massachusetts Governor Elbridge Gerry and the creature ("salamander") which the outline of an election district he was credited with forming was thought to resemble.

541 U.S. at 274. Previously, plaintiffs making gerrymandering claims have alleged that States ignored ordinary districting criteria. For example, the *Vieth* plaintiffs alleged the challenged districts "were 'meandering and irregular' and 'ignor[ed] all traditional redistricting criteria, including the preservation of local government

bodies, solely for the sake of partisan advantage." *Id.* at 271-72. Even Justice Stevens's dissent in *Vieth* would require a plaintiff to show that "all traditional criteria are subverted for partisan advantage." *Id.* at 318 (Stevens, J., dissenting).

The plaintiffs' standard, however, does not measure this type of gerrymandering at all. Instead, it simply declares that districting systems that make it more difficult for one party to convert its votes into legislative seats must be an unconstitutional partisan gerrymander, regardless of their compliance with traditional districting principles. The plaintiffs' examples of purported gerrymandering rely exclusively on the political results of the districting with no discussion of adherence to traditional districting principles. (Compl. ¶¶ 60-77.) The Demonstration Plan does not show that Act 43 ignored traditional districting principles; at most, it shows it is hypothetically possible to draw a map that is better for Democrats politically and roughly equivalent on traditional districting criteria. The Supreme Court has never held, or even hinted that it would hold, that the governing party's decision to choose a plan that benefits itself over a plan that benefits the opposing party constitutes partisan gerrymandering when the plans are equivalent with regard to traditional districting principles.

The plaintiffs' claim in this case would actually fail as a racial gerrymandering claim because in those cases plaintiffs must allege that "the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 648 (1993). This standard is satisfied by

"redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race.'" *Id.* at 644 (citation omitted). The districts in *Shaw* were described as a "Rorschach ink-blot test," a "bug splattered on a windshield," and a 160-mile long district that "winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas 'until it gobbles in enough enclaves of black neighborhoods.'" *Id.* at 635-36 (citation omitted). The plaintiffs do not allege that Act 43 makes any such bizarre districting decisions, nor could the "efficiency gap" accurately capture such decisions even if they had been made.

B. The plaintiffs' standard does not distinguish between natural political geography and partisan gerrymandering.

The "efficiency gap" likewise does not determine when partisan gerrymandering occurs. Instead, it merely assumes that an efficiency gap of 7% must mean that the district lines are the product of partisan gerrymandering. By ignoring all traditional districting criteria, the plaintiffs' standard fails to accurately measure the effects of partisanship of districting in Wisconsin.

The plaintiffs' 7% efficiency gap threshold is not a judicially manageable standard because it identifies partisan gerrymandering where it could not possibly exist. The complaint alleges that Wisconsin had "an average Republican gap of 2%" in the 1980s and 1990s, which "deepened in the 2000s to an average of 8%" and then "surged, thanks to the Current Plan, to an average gap of 11% in 2012 and 2014." (Compl. ¶ 54 (emphasis omitted).) Thus, the court-drawn 2002 Plan, with its nearly 8% efficiency gap, was an unconstitutional partisan gerrymander using the plaintiffs' legal standard. A standard that finds judicially crafted districting plans

to be partisan gerrymandering is not judicially manageable. *See Vieth*, 541 U.S. at 289-90 (plurality opinion) (rejecting a proposed standard because it was contradicted by elections conducted under a court-drawn Pennsylvania plan).

The plaintiffs' plan produces this absurd result because it does not account for the fact that the geographic concentration of a group's voters matters in that group's ability to convert votes into legislative seats. The *Vieth* plurality noted that complete adherence to traditional districting principles disadvantages "political groups that tend to cluster (as is the case with Democratic voters in cities)" because they are naturally "packed" in districts. 541 U.S. at 290. The three-judge panel that drew the 2002 Plan found that "Wisconsin Democrats tend to be found in high concentrations in certain areas of the state, and the only way to assure that the number of seats in the Assembly corresponds roughly to the percentage of votes cast would be at-large election of the entire Assembly." *Baumgart*, 2002 WL 34127471, at *6.

Instead of accounting for this recognized fact, the plaintiffs simply ignore it. Thus, their standard wrongly assumes that a state's districting system should start at partisan symmetry even though application of traditional districting principles in Wisconsin disadvantages Democrats in converting statewide votes into legislative seats. In fact, the 8% efficiency gap found throughout the existence of the 2002 Plan could be considered the "natural" efficiency gap present under neutral districting. By using a 0% efficiency gap as a baseline, the plaintiffs' standard actually requires legislatures to look to political symmetry ahead of the other traditional districting

criteria. The Supreme Court has never indicated that legislatures engage in political gerrymandering by looking to the traditional principles over political balance, and the *Bandemer* plurality specifically held that the Constitution does not require districting to ensure "political fairness." 478 U.S. at 131.

The efficiency gap therefore does not provide a standard for measuring whether a legislature has "gone too far" in using political considerations in districting. *Vieth*, 541 U.S. at 293 (plurality opinion). The plaintiffs do not explain why an 11% average efficiency gap in 2012 and 2014 is unconstitutional when districts drawn by a neutral body—a three-judge judicial panel—produced an average 8% efficiency gap from 2002 to 2010. Some increase in the gap would be expected when Republicans were able to enact a plan following their sweep of the 2010 elections, and the plaintiffs offer no principled reason why an increase of 3% over a judge-drawn plan is unconstitutional. Under the plaintiffs' standard, the Republicans were engaged in partisan gerrymandering merely by not enacting a plan that was more favorable to Democrats than the 2002 Plan.

C. The plaintiffs' standard poses additional problems, preventing it from being a judicially manageable standard.

There are other reasons why the plaintiffs' standard does not provide a judicially manageable standard, both theoretical and practical. On a theoretical level, the plaintiffs' standard provides constitutional rights to the two major political parties that would not apply to any other political group, whether smaller political parties or interest groups. The *Vieth* plurality recognized that a principle behind partisan gerrymandering claims would have to encompass all political action

groups, whether "farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats." 541 U.S. at 288. In contrast, the plaintiffs' standard grants constitutional rights to the members of the two major political parties, which members of other groups would not enjoy.

The plaintiffs' standard thus appears to create an equal protection problem while trying to correct a non-existent equal protection problem. *See Williams v. Rhodes*, 393 U.S. 23, 32 (1968) ("There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them.") The plaintiffs do not explain why Democrats and Republicans have the right to a political system that allows them to translate statewide votes into legislative seats, but other parties (like the Libertarian Party or Green Party) or groups with positions on particular political issues, would not enjoy these same rights.

There are additional problems with respect to the practical nuts and bolts of the efficiency gap. First, the plaintiffs alternate between two different definitions of the efficiency gap. The 7% threshold is taken from Jackman's study of how statewide votes translate into legislative seats (Compl. ¶ 86), but the plaintiffs principally rely on Mayer's "efficiency gap" that is calculated by dividing the difference in wasted votes between the two major parties by the total number of votes cast. The mixing-and-matching of two different measurements does not instill confidence that the "efficiency gap" provides a meaningful standard by which courts can judge political gerrymandering claims.

In addition, the Jackman study does not account for the varying political geography between the different states or the time period he examined (from the 1970s to today). The plaintiffs' proposed standard assumes that any movement in favor of one political party must be a result of gerrymandering and not a change in the electorate. The increase in the efficiency gap from the 1970s to today, however, could be caused by a change in the electorate in which Democratic support has become more concentrated and thus less effective at translating statewide vote totals into legislative seats. Further, Jackman simply averages results across all states without accounting for the differences between their political make-up. The plaintiffs' standard therefore does not account for changes in the composition of the electorate or even the differing political geographies of states, considerations which undoubtedly affect the range of partisan balance a state can achieve by following traditional districting principles.

While these are not the sum total of the issues with the plaintiffs' standard, they suffice to show that the plaintiffs have not provided a judicially discernible or manageable standard by which political gerrymandering claims can be judged.

IV. The Court must dismiss the challenge to the entire statewide map.

The plaintiffs' statewide challenge of the Assembly Districts in Act 43 must be dismissed because there is no cause of action for a statewide challenge. In any event, the plaintiffs lack standing to challenge all of the districts.

A. There is no cause of action to redraw districts on a statewide basis.

There is no authority on which this Court can grant a complete redrawing of Act 43's Assembly districts. In *Vieth*, even the dissenters disavowed the possibility of a statewide challenge to all districts. Justice Stevens "agree[d] with the plurality's refusal to undertake [the] ambitious project" of reviewing statewide election results and limited his opinion to a claim made by one individual resident that one particular district was gerrymandered. 541 U.S. at 318 (Stevens, J., dissenting). Justice Souter, joined by Justice Ginsburg, suggested an approach that "concentrated as much as possible on suspect characteristics of individual districts instead of statewide patterns." *Id.* at 346 (Souter, J., dissenting). Thus, eight out of nine Justices in *Vieth* did not recognize a cause of action for statewide redistricting.

B. The plaintiffs do not have standing to challenge all of the districts on a statewide basis.

The plaintiffs do not have standing to challenge Act 43 on a statewide basis. In racial gerrymandering claims, plaintiffs do not have standing to challenge an alleged gerrymander unless they live in the district that was allegedly gerrymandered. *United States v. Hays*, 515 U.S. 737, 744-45 (1995). The dissenters in *Vieth* thought this standing analysis should apply in political gerrymandering claims. *Vieth*, 541 U.S. at 328 (Stevens, J., dissenting); *Id.* at 347 (Souter, J., dissenting). Even assuming the plaintiffs' claim is justiciable, it is only justiciable as to plaintiffs who actually reside in the challenged districts. Should this case survive a motion to dismiss, this case must be limited to the 22nd, 23rd, 26th, 31st, 42nd, 49th, 55th, 63rd, 66th, 76th, and 91st Assembly Districts. (Compl. ¶¶ 17-27.)

CONCLUSION

For the foregoing reasons, this Court should dismiss this case. The plaintiffs' proposed standard has not resolved the problems with political gerrymandering claims that caused the dismissal of the plaintiffs' claim in *Vieth*.

Dated this 18th day of August, 2015.

BRAD D. SCHIMEL
Attorney General

s/ Brian P. Keenan
BRIAN P. KEENAN
Assistant Attorney General
State Bar #1056525

ANTHONY D. RUSSOMANNO
Assistant Attorney General
State Bar #1076050

Attorneys for Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0020 (*Keenan*)
(608) 267-2238 (*Russomanno*)
(608) 267-2223 (Fax)
keenanbp@doj.state.wi.us
russomannoad@doj.state.wi.us