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' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

The plaintiffs' brief in opposition to the motion to dismiss makes clear that their legal test is not judicially discernible because it is not tied to an actual constitutional violation. Simply put, the major political parties have no right "to translate their popular support into legislative representation with approximately equal ease." (Dkt. 31:18.) The plaintiffs' brief likewise does not resolve the problems with using their "efficiency gap" theory to measure partisan gerrymandering.

I. The plaintiffs' proposed legal standard is not a "fact" that the defendants and the Court must assume is true.

The plaintiffs misunderstand the legal standard governing motions to dismiss. The defendants and the Court are only bound to accept factual allegations as true. *E.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The defendants' motion assumes the plaintiffs' factual allegations are true, such as the alleged size of the efficiency gap and the facts related to the process of redistricting. The defendants contend that, even assuming the facts alleged in the complaint are true, the plaintiffs have not stated a claim upon which relief can be granted.

The plaintiffs' proposed legal standard is a legal conclusion that is owed no deference by the Court. *Iqbal*, 556 U.S. at 678 ("the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"). The defendants are free to point out the shortcomings in the plaintiffs' proposed legal standard by challenging the assumptions and conclusions underlying that standard. The defendants' argument is that, even assuming the underlying facts alleged are true, the experts' reports do not establish a judicially discernible or judicially manageable standard for evaluating partisan gerrymandering claims. This type of analysis is entirely appropriate in a motion to dismiss a partisan gerrymandering claim. *See Radogno v. Ill. State Bd. of Elections*, No. 1:11-CV-04884, 2011 WL 5868225, at *2-5 (N.D. Ill. Nov. 22, 2011) (analyzing and rejecting the plaintiffs' proposed standard on a motion to dismiss).

II. The plaintiffs' test is not judicially discernible because it is not related to a constitutional violation.

The plaintiffs' test is based on a non-existent constitutional right. The plaintiffs claim that partisan symmetry is rooted in the Constitution because it

> is directly tied to every voter's constitutional right to equal treatment in the electoral system—and the right *not* to be treated differently based on the voter's political beliefs. A necessary consequence of that right is that both major parties should be able to translate their popular support into legislative representation with approximately equal ease. Neither party should enjoy a significant advantage in how efficiently its votes convert into seats—because this kind of edge means that the parties' supporters are *not* being treated equally by the electoral system.

(Dkt. 31:18.) The plaintiffs elaborate that "[p]artisan symmetry, of course, is at its core a theory about parties' levels of legislative representation. It holds that these

levels should be linked to popular support in the same way for both parties." (Dkt. 31:19.) The plaintiffs provide no citations to precedent supporting these rights, likely because the Supreme Court has held that there is no constitutional requirement that legislative seats be linked to popular support. *Vieth v. Jubelirer*, 541 U.S. 267, 288 (plurality opinion); *id.* at 308 (Kennedy, J, concurring in the judgment.).

The Court in *Vieth* specifically rejected the contention that electoral districts are unconstitutional if they do not allow political groups the opportunity to secure a percentage of legislative seats corresponding to their statewide popular support. The Court held that

> the Constitution contains no such principle. It 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 plaintiffs cannot escape the import of the *Vieth* decision by merely asserting that their purported constitutional right is different from the one rejected in *Vieth*. "Deny it as [plaintiffs] may (and do)," their partisan symmetry standard "rests upon the principle that groups (or at least political-action groups) have a right to proportional representation." *Vieth*, 541 U.S. at 288 (plurality opinion).

The plaintiffs are incorrect that their standard is saved because they do not require strict proportional representation—for example, a map would be acceptable if it allowed a party to get 65% of the seats with 55% of the votes so long as the

other party could do the same. (Dkt. 31:24-25.) The plaintiffs, however, misunderstand the import of the holding in *Vieth*. The Court held that there is no constitutional right that levels of legislative representation be linked to popular support; *i.e.*, there is no right to "equal representation in government" for Republicans and Democrats (or any other groups) because their candidates receive the same number of votes statewide. 541 U.S. at 288 (plurality opinion). The Court rejected any link between legislative seats and statewide popular support; it did not narrowly reject a requirement of strict proportionality between seats and votes. Under *Veith*, there is simply no right to a political system that links legislative representation to popular support, let alone a political system that links legislative "to popular support in the same way for both parties." (Dkt. 31:19.)

There simply is no constitutional right to an electoral system with partisan symmetry. All of the Supreme Court's partisan gerrymandering cases have involved asymmetrical district maps that placed one party at a significant disadvantage in converting their level of popular support in statewide percentage into legislative representation (and thus also gave the other party a corresponding advantage in achieving legislative representation). The plaintiffs rely heavily on *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006), as somehow establishing partisan symmetry as a valid test for partisan gerrymandering. Yet the Court did not find a constitutional violation in that case even though the Texas map had a 12.5% partisan bias in favor of Republicans. (Dkt. 31:17 (citing *LULAC*, 548 U.S. at 465-68 (Stevens, J.).) Plaintiffs do not explain why the result should be

different here, where the Wisconsin plan has an identical level of partisan bias (Dkt. 31:8) and their "efficiency gap" is a practically identical percentage.

In addition, the plaintiffs do not resolve the problem in asserting a right that apparently belongs only to the two major political parties. (*See* Dkt. 31:18 ("both major parties should be able to translate their popular support into legislative representation with approximately equal ease"). The *Vieth* Court recognized that the Fourteenth Amendment would need to protect all political action groups and not just two political parties, 541 U.S. at 288 (plurality opinion), and a First Amendment-based claim would be no different. There are no constitutional rights enjoyed only by two political parties to the exclusion of all others; to hold otherwise creates its own constitutional problem. *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).[1]

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

The plaintiffs' response brief has not shown that the "efficiency gap" provides a judicially manageable standard for measuring unconstitutional partisan gerrymandering. As Justice Kennedy recognized, the problem with partisan gerrymandering cases "is the lack of comprehensive and neutral principles for drawing electoral boundaries." *Vieth*, 541 U.S. at 306-07 (Kennedy, J.). The plaintiffs ignore the many complications involved in districting that have

[1] This point shows that the plaintiffs' theory is not a constitutional requirement. If there were a right to convert popular support into legislative seats, then proportional representation would be required. It achieves the alleged constitutional requirement perfectly and treats all parties equally by giving them the same right to seats.

confounded the courts in partisan gerrymandering claims (*i.e.*, how to balance partisan effects with traditional districting principles). They rely on only one factor (political symmetry) to determine that a map is presumptively unconstitutional.

This maneuver passes the difficult part of partisan gerrymandering claims to defendants, who are left with the task of proving that their districts are not unconstitutional gerrymanders (but without guidance as to how they could make the required showing). This is not just stealing first base; this is stealing first, second, third, and home and then leaving the defendants to plead with an umpire to disallow the run—but with no definitive standards to govern the umpire's decision. The Court should not allow the plaintiffs, who bear the burden of proving a law is unconstitutional, to shift the job of "sail[ing] successfully between the Scylla of administrability and the Charybdis of non-arbitrariness" to the defendants. *Radogno*, 2011 WL 5868225, at *5.

A. The efficiency gap wrongly assumes that perfect symmetry should be the ideal against which districts are judged.

The assumption underlying the efficiency gap has no basis in the Constitution or in the practical realities of districting. The efficiency gap assumes that the Platonic ideal of districting involves complete symmetry between the parties in converting statewide total votes for their legislative candidates into legislative seats. Thus, a plan that diverges from symmetry by 7% (or some other yet-to-be-determined amount (Dkt. 31:2 n.2)) is presumptively unconstitutional. Courts, however, recognize that political parties whose supporters are

geographically concentrated are disadvantaged by the mere existence of districting. *E.g.*, *Vieth*, 541 U.S. at 289-90 (plurality opinion).

Complete symmetry cannot be the starting point for analyzing partisan gerrymandering when symmetry would not be the end result of "a legislature that draws district lines with no objectives in mind except compactness and respect for the lines of political subdivisions." *Id.* at 290 (plurality opinion). The plaintiffs do not explain why courts should adopt a standard that would not be met even by a perfectly enlightened districting body that had no concern whatsoever about politics. Ironically, it makes politics the focal point of districting when the alleged wrong in partisan gerrymandering is excessive focus on politics to the exclusion of other districting principles.

The plaintiffs are wrong that partisan symmetry is now an accepted principle of fairness in districting. The Court has not come close to expressing support for partisan symmetry such that it could be used as the key factor in establishing a districting plan as presumptively unconstitutional. Justice Stevens, in dissent, expressed support for partisan symmetry. *LULAC*, 548 U.S. at 466 (Stevens, J.). Three Justices, at best, noted problems with using partisan symmetry while leaving open the possibility that it someday might be a relevant factor. *Id.* at 420 (Kennedy, J.); *id.* at 483 (Souter, J. and Ginsberg, J.). Notably, though, the *LULAC* Court rejected the claim even though the challenged plan had a 12.5% partisan bias (*i.e.*, was asymmetrical). *See LULAC*, 548 U.S. at 465-68 (Stevens, J.).

B. The plaintiffs do not sufficiently address the concentration of voters.

The plaintiffs fail to address the significance of the fact that their test finds that the judge-drawn 2002 plan was a presumptively unconstitutional partisan gerrymander. This problem is not solved by noting that their test includes an intent element. A proposed standard for partisan gerrymandering, especially one that purports to show presumptive unconstitutionality, should not yield "false positives" finding partisan gerrymandering where it could not exist. *See Vieth*, 541 U.S. at 289-90 (plurality opinion). The fact that the judge-drawn 2002 plan would be presumptively unconstitutional merely reflects that partisan symmetry does not measure partisan gerrymandering—the symmetry number (however measured) is significantly influenced by the geographical concentration of voters.

Despite the fact that courts recognize that districting, by its nature, produces asymmetry due to concentration of voters, *Vieth*, 541 U.S. at 290 (plurality opinion); *Baumgart v. Wendelberger*, No 01-C-0121, 2002 WL 34127471, a *6 (E.D. Wis. May 30, 2002), the plaintiffs would find a plan presumptively unconstitutional without even considering concentration. This goes against Justice Kennedy's admonition that gerrymandering becomes unconstitutional only when political classifications "were applied in an invidious manner or in a way unrelated to any legitimate legislative objective." *Vieth*, 541 U.S. at 307 (Kennedy, J.). Reliance on political results cannot show invidiousness or the lack of relation to legitimate districting principles. Instead, exclusive focus on the efficiency gap elevates the partisan effects over all other considerations.

Applying the plaintiffs' test to the court-drawn plans simply highlights that their test captures a significant amount of "natural packing" as partisan gerrymandering—and that Wisconsin has enough "natural packing" of Democrats that plans enacted solely on neutral districting principles would be presumptively unconstitutional under the plaintiffs' test. The Jackman report shows that Wisconsin has had significant efficiency gaps in favor of Republicans in every election since 1998, over the course of two court-drawn plans and the current plan. (Dkt. 1-3:72; Jackman Rep. Fig. 35.) Professor Jackman calculates the efficiency gap at about 7% in 1998 and 6% in 2000 under the 1992 Plan and an average of 8% under the 2002 Plan (with two elections comparable to his 2012 and 2014 numbers). (Dkt. 1-3:72; Jackman Rep. Fig. 35.) This is not "idiosyncratic;" it is a sustained and significant advantage for Republicans over multiple plans, even two drawn by neutral bodies.

If the efficiency gap is actually worthy of being the basis for a constitutional standard, then courts and parties need to be able to rely on it when examining a state's election results. As calculated for Wisconsin, the efficiency gap shows that Republicans naturally enjoy a large advantage in converting votes to seats. The fact that every election since 1998 has had an efficiency gap around the alleged threshold of constitutionality, spanning two court-drawn plans, shows the proposed threshold is not indicative of unconstitutional partisan gerrymandering in Wisconsin.

The efficiency gaps in other states in decades past have no bearing on whether Wisconsin's plan is an unconstitutional partisan gerrymander.

The concentration of voters and the relative strength of the two parties will vary from state to state. Thus, each state will have a unique political make-up, which changes over time. Even though the concentration patterns of voters in 2015 are very different from what they were in the 1970s and the 1980s, Professor Jackman compares Wisconsin's current system with election results back to 1972, including many states with different political make-ups. (Dkt. 1-3:6.) The plaintiffs do not explain why the partisan balance of today's districting plans should be based on 1970s and 1980s voting patterns, let alone why Wisconsin's plan should be judged based on an average of different states with much different political make-ups.

C. The plaintiffs cannot cure the faults in their standard by shifting the difficulties of proving partisan gerrymandering to defendants.

The plaintiffs' standard is not saved by their burden-shifting approach that allows defendants to rebut the presumptive unconstitutionality if the efficiency gap "was the necessary result of the state's efforts to comply with traditional criteria." (Dkt. 31:33.) As an initial matter, this standard provides no guidance to defendants or the courts as to what is "necessary" and how asymmetry should be judged in relation to compliance with traditional districting criteria. Thus, the test fails because it is not "an objective, measurable standard that admits of rational judicial resolution and is a direct *and* non-arbitrary implication of accepted constitutional norms." *Radogno*, 2011 WL 5868225, at *4.

Essentially, the plaintiffs are attempting to push the problem of defining a judicially manageable standard on to the defendants. The plaintiffs' attempt to put the burden on state officials to justify a duly enacted legislative districting plan is

entirely backwards. Courts rightfully approach partisan gerrymandering claims "with great caution" because courts "risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Vieth*, 541 U.S. at 306-07 (Kennedy, J.). The plaintiffs therefore have the burden of justifying court intervention into a process specifically entrusted to the political branches. Wisconsin's plan was enacted by a legislature and Governor elected by the people (notably, under a court-drawn plan that was not gerrymandered). Allowing the plaintiffs to make state officials prove a map is constitutional turns the system on its head.

D. The one-person, one-vote cases are inapplicable here.

While the plaintiffs rely heavily on the one-person, one-vote cases, the *Vieth* Court recognized these cases "have no bearing upon this question, neither in principle nor in practicality." 541 U.S. at 290 (plurality opinion). The principle that "that each individual must have an equal say in the selection of representatives," that underlies the one-person, one-vote cases does not mean "that each discernible group, whether farmers or urban dwellers or political parties, must have representation equivalent to its numbers." *Id.* Further, "the easily administrable standard of population equality adopted by *Wesberry* and *Reynolds*" contrasts heavily with a test for partisan gerrymandering that "casts [courts] forth upon a sea of imponderables, and asks them to make determinations that not even election experts can agree upon." *Id.*

In addition, the plaintiffs' attempt to invoke the one-person, one-vote cases in support of its rebuttable presumption of unconstitutionality puts the cart before the

horse. In the one-person, one-vote cases, the Court first established the constitutional right at issue, leaving the specifics of the test to be developed later. The Court held that "the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators." *Reynolds v. Sims*, 377 U.S. 533, 566 (1964). The constitutional standard was that "that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Id.* at 568. The court did not establish a hard limit for population deviation because "it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters." *Id.* at 577. With a firm understanding of the constitutional principle at issue, courts could analyze the claims to establish a working test.

In contrast, the plaintiffs are trying to use their numerical test to show the existence of a constitutional violation. The courts developed a numerical test in the one-person, one-vote cases after the constitutional standard of equal population had been established. They did not use a rule of 10% population deviation to come to the conclusion that vote dilution was unconstitutional; they used the principle of equal population to determine that 10% was an acceptable amount of population deviation. The plaintiffs reverse this order and use the efficiency gap calculation to establish the very existence of a constitutional violation. The Court should not accept this circular reasoning.

E. The plaintiffs use two different measures for the efficiency gap.

If the efficiency gap is to be the standard by which partisan gerrymandering claims are judged, then the plaintiffs should at least be able to clearly and accurately explain how it works. The fact that the plaintiffs cannot adequately explain how Professor Jackman's efficiency gap is equivalent to Professor Mayer's "wasted votes" efficiency gap further shows that the plaintiffs have not proposed a judicially manageable standard. The plaintiffs claim that the *Bandemer* election results are irrelevant because "it is impossible to tell from this state-level information what the efficiency gap the plan might have had, because the necessary district-by-district results are missing." (Dkt. 31:26.) But Professor Jackman uses state-level information to calculate the efficiency gap. (Dkt. 31:29.) This statewide information either can be used to calculate the efficiency gap or it cannot; either way, the plaintiffs cannot use it when it favors them but ignore it when it does not.

In fact, the two measurements of the efficiency gap are not equivalent because they measure different things. Both numbers are expressed as percentages, which involve dividing one number (a numerator) by another number (a denominator). To compare apples to apples, the percentages need to be of the same unit; *i.e.*, they both need to be percentages of votes cast, or seats won, etc.

The plaintiffs' two measurements of the efficiency gap are not apples to apples comparisons because they are percentages of different things. Professor Mayer uses a percentage of votes cast. He divides the gap in wasted votes, calculated on a district-by-district basis, by the total number of votes cast statewide.

(Dkt. 1-2:46; Mayer Rep. Table 10.) Professor Jackman, however, measures the difference in a party's percentage of seats in the legislature from its percentage of the statewide vote. (Dkt. 1-3:17-19.)[2] Jackman says his efficiency gap is "an 'excess seats' measure" comparing the seats actually won with what his votes-to-seats curve says the party should have won. (Dkt. 1-3:19.) The efficiency gap is the gap between a party's actual seat share and its expected performance based on a hypothetical votes-to-seats curve created by Professor Jackman. (Dkt. 1-3:17-19.)

The plaintiffs mix apples and oranges throughout their complaint and response brief. They use Jackman's historical calculations (using seats-to-votes) to establish the alleged constitutional threshold of 7% gap. Mayer's 13% gap cannot be compared to Jackman's historical data, however, because it is measured in a percentage of votes cast and not the difference in seat percentage from vote percentage. The Jackman "gap" of 12% and the Mayer "gap" of 13% cannot be compared because they measure different things. That the plaintiffs cannot explain why these calculations are equivalent leads to the conclusion that the efficiency gap is not judicially manageable.

[2] Jackman's equation is EG [efficiency gap] = S [seat share percentage] minus 0.5 minus 2 times (V [vote share percentage] minus 0.5). (Dkt. 1-3:19.)

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

The plaintiffs misunderstand the state of the law following the Supreme Court decisions in *Vieth* and *LULAC* when contending they can bring a statewide claim. There is currently no authority that allows a partisan gerrymandering claim as to the entire map of a state. Justice Kennedy has left open the "possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases." 541 U.S. at 306 (Kennedy, J.) The *Vieth* dissenters that would have recognized partisan gerrymandering claims did not countenance statewide challenges to election districts and thought that a plaintiff would only have standing to challenge the district of his residence. *Vieth*, 541 U.S. at 318, 328 (Stevens, J.); *id.* at 346-47 (Souter, J.). While the plaintiffs' entire case should be dismissed under the plurality and concurrence in *Vieth*, if they are allowed to proceed, they should not be able to bring a claim that goes beyond what was contemplated by the *Vieth* dissenters.

V. The defendants' motion to dismiss demonstrated that all claims, including the First Amendment claim, should be dismissed.

The plaintiffs incorrectly assert that the defendants only seek to dismiss the equal protection claim, and have not moved to dismiss the First Amendment claim. (Dkt. 31:41-42.) The defendants' motion and brief, however, plainly state that they are moving to dismiss the case in total. (*See, e.g.*, Dkt. 25:1 ("The Court should dismiss this case . . . .").) The defendants presented one argument to dismiss both claims because the plaintiffs assert the same legal test as an allegedly judicially discernible and manageable standard for both claims. Indeed, their First

Amendment claim expressly relies on the very same "efficiency gap" and other factors as the equal protection claim. (Dkt. 1:28, ¶ 94.)

The plaintiffs do not explain otherwise in their response brief. Rather, they simply assert that their First Amendment claim is "a separate and independent claim" (Dkt. 31:41-42) without explaining how the First Amendment claim would survive the arguments raised in the defendants' motion to dismiss if those arguments successfully defeated the Fourteenth Amendment claim. Tellingly, elsewhere in the response brief the plaintiffs essentially concede that this is just a matter of labels. Based on the same "partisan symmetry" and "efficiency gap" lingo, the plaintiffs assert that "the Court could also decide, as Justice Kennedy has suggested, that partisan gerrymandering claims are better evaluated under the First Amendment than under the Equal Protection Clause. . . . A measure of partisan symmetry, such as the efficiency gap or partisan bias, would then be used to determine the extent of the burden on voters' representational rights." (Dkt. 31:11.)

The premise of the defendants' motion to dismiss is that the plaintiffs' proposed standard of "partisan symmetry" does not provide a judicially discernible and manageable standard for both claims. Their proposed standard does not address the problems with gerrymandering cases that the Supreme Court has identified, including Justice Kennedy. When Justice Kennedy hypothesized in *Vieth* that the First Amendment might provide a better label than equal protection for a partisan gerrymandering lawsuit, he acknowledged that "all this depends *first* on

courts' having available a manageable standard by which to measure the effect of the apportionment . . . ." 541 U.S. at 315 (Kennedy, J.) (emphasis added). In any event, the First Amendment was just an idea proposed by Justice Kennedy but not adopted by any other Justice, *id.* at 315-16, and it has been rejected by lower courts as an independent grounds for a partisan gerrymandering claims. *Radogno v. Ill. State Bd. of Elections*, No. 1:11-CV-04884, 2011 WL 5025251, at *7 (N.D. Ill. Oct. 21, 2011).

In sum, the defendants have moved to dismiss the entire lawsuit and, in response, the plaintiffs have not explained how or why a First Amendment claim would survive the defendants' arguments.

CONCLUSION

For the foregoing reasons and for the reasons stated in the defendants' opening brief, the Court should grant the motion to dismiss the plaintiffs' complaint.

Dated this 9th day of October, 2015.

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General Information

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Federal Nature of Suit	State Reapportionment[400]
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