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

WILLIAM WHITFORD, ROGER ANCLAM, EMILY BUNTING, MARY LYNNE DONOHUE, HELEN HARRIS, WAYNE JENSEN, WENDY SUE JOHNSON, JANET MITCHELL, ALLISON SEATON, JAMES SEATON, JEROME WALLACE, and DONALD WINTER, Plaintiffs, v. GERALD C. NICHOL, THOMAS BARLAND, JOHN FRANKE, HAROLD V. FROEHLICH, KEVIN J. KENNEDY, ELSA LAMELAS, and TIMOTHY VOCKE, Defendants.	)	No. 15-cv-421-bbc

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PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Throughout their motion to dismiss, defendants quarrel with the facts alleged in the complaint. For example, defendants suggest that the indisputable advantage Republican candidates have under 2011 Wisconsin Act 43 (the "Current Plan") is an inevitable byproduct of the State's political geography. *See* Defts' Br. at 21-22, 24-26. But the complaint alleges the opposite. It offers particularized allegations showing that the Current Plan was designed by the Republican leadership of the House and Senate for the specific purpose of entrenching the Republican majority by diluting the strength of Democratic votes through "cracking" and "packing." *See* Compl. ¶¶ 31-43, 54-77. Furthermore, the complaint alleges that it was feasible to fashion a plan that treats both parties symmetrically and that is as good as or better than the Current Plan in terms of equal population, compactness, respect for municipal boundaries and compliance with the Voting Rights Act. In fact, plaintiffs themselves put together a Demonstration Plan, which is appended as Ex. 2 to the complaint, showing what such a plan could look like. *See* Compl. ¶¶ 10, 78-80, 87. In ruling on the motion to dismiss, the Court must assume that these allegations are true.

Defendants also argue that there are problems with the "nuts and bolts" of the two expert reports plaintiffs attached to their complaint, claiming (among other things) that the statistical analysis Professor Jackman performed comparing the Current Plan to statehouse plans nationwide over a forty-year period was flawed. Defts' Br. at 27-28. These are not the kinds of arguments that can be resolved on a motion to dismiss. Instead, the Court must assume that the analysis plaintiffs have presented is right and that, as measured by the efficiency gap, the Current Plan is (as the Jackman report shows) one of the worst partisan gerrymanders in modern American history. The Court must also assume, as plaintiffs allege, that the Current Plan is an

extremely durable partisan gerrymander that is highly unlikely to become neutral over its ten-year lifespan.

The legal question presented by defendants' motion to dismiss is whether a plan with all of the characteristics alleged—a partisan gerrymander that was specifically intended to and has had the effect of discriminating against Democratic voters to an unprecedented degree and that is likely to endure for the entire decade—violates the Equal Protection Clause.[1] Defendants contend that the Supreme Court has rejected the kind of metric plaintiffs offer to measure the effect of the Current Plan and that plaintiffs thus have failed, as a matter of law, to solve the supposedly "unsolvable" problem of determining what constitutes unconstitutional partisan gerrymandering. But, as demonstrated below, far from rejecting the concept of partisan symmetry on which plaintiffs' metric is based, five members of the Supreme Court have indicated that they would be open to new analyses based on precisely that concept.

Furthermore, contrary to defendants' argument, plaintiffs' proposed test is both judicially discernible and judicially manageable. A standard is judicially discernible if it is tied to a constitutional principle. *Vieth v. Jubelirer*, 541 U.S. 267, 288 (2004) (plurality opinion). Under the Equal Protection Clause, voters are entitled to be treated equally and to be free from state action that discriminates against them and dilutes their voting power based on their political beliefs. The concept of partisan symmetry stems directly from these fundamental rights inasmuch as it asks whether the electoral system "treat[s] similarly-situated parties equally," such that neither major party enjoys a systematic advantage in how its votes are converted into seats. *LULAC v. Perry*, 548 U.S. 399, 466 (2006) (Stevens, J., concurring in part and dissenting in part). Partisan symmetry is "widely accepted by scholars as providing a measure of partisan

[1] Plaintiffs have also asserted a claim under the First Amendment in Count II, but defendants do not address the First Amendment claim in their motion.

fairness in electoral systems." *Id.* It therefore answers Justice Kennedy's call for a "principled, well-accepted rule[] of fairness that should govern districting." *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring in the judgment).

The test plaintiffs suggest also provides a judicially manageable way of distinguishing between redistricting decisions that are a permissible part of the political process and unconstitutional partisan gerrymandering. The test begins with intent. If the legislature intended to gerrymander districts for partisan advantage, the next question is whether, once it was implemented, the plan actually created an "efficiency gap"—that is, a difference in how efficiently each party is able to convert its votes into legislative seats, as measured by the number of "wasted" votes on each side. If so, the plan's efficiency gap is compared to other efficiency gaps that have been calculated nationwide in the modern "one person, one vote" era to determine whether it is an outlier (as the Wisconsin plan clearly is) and whether it is likely to endure in the future. A plan that exhibits a large efficiency gap, compared to historical norms, and that is likely to endure—and thus be resistant to alteration through the political process—is presumptively unconstitutional.[2]

Finally, in the last step of plaintiffs' proposed test—which defendants simply ignore—the state has an opportunity to show that an efficiency gap of the magnitude exhibited by the plan was inevitable due to the state's underlying political geography or the need to comply with legitimate redistricting criteria. In this case, the complaint affirmatively alleges that the State of Wisconsin cannot meet that burden. *See* Compl. ¶¶ 10, 78-80, 87.

[2] Plaintiffs have suggested, based on Professor Jackman's analysis, that a 7% efficiency gap would be an appropriate dividing line. But the Court need not decide precisely where the line should be drawn in ruling on the motion to dismiss—Wisconsin's plan is well over the line regardless of where it should be drawn. What is important for present purposes is that the efficiency gap analysis provides the courts with a workable methodology to use in a line-drawing exercise.

Defendants argue that the complaint should be dismissed either because it poses a nonjusticiable political question or because it fails to state a claim on which relief can be granted. But the Supreme Court has unanimously agreed that partisan gerrymandering can rise to the level of a constitutional violation. *See Vieth*, 541 U.S. at 293 (plurality opinion) ("[A]n *excessive* injection of politics is *un*lawful. So it is, and so does our opinion assume.") (emphasis in original). And the Court has thrice decided, first in *Davis v. Bandemer*, 478 U.S. 109, 127 (1986), then in *Vieth*, and then again in *LULAC v. Perry*, 548 U.S. 399, 414 (2006), that a challenge to a district plan on grounds of partisan gerrymandering is justiciable. In both *Vieth* and *LULAC*, five Justices expressed hope that a judicially discernible and judicially manageable standard might be developed in the future. In the face of a rising tide of partisanship and partisan gerrymandering throughout the United States, plaintiffs respectfully submit that the Court should not dismiss plaintiffs' proposed test out of hand, as defendants suggest, but rather should allow that theory to be tested through discovery and trial.

BACKGROUND

The Current Plan

From beginning to end, Wisconsin's 2010 redistricting process was designed to achieve one goal: maximizing the electoral advantage of Republicans at the expense of Democratic voters. *See Baldus v. Members of Wisc. Gov. Accountability Bd.*, 849 F. Supp. 2d 840, 851 (E.D. Wis. 2012) (finding that "partisan motivation. . . clearly lay behind Act 43"). The complaint details how the Republican leadership of the House and Senate created the map in secret, using past election results to assess the partisanship of the electorate and to draw lines that would maximize the number of districts that would elect a Republican and minimize the number of districts that would elect a Democrat. *See* Compl. ¶¶ 31-43.

Under a legal regime in which each district must have an approximately equal population, there are only two ways to implement a partisan gerrymander. First, the opposing party's supporters can be cracked among a large number of districts so that they fall somewhat short of a majority in each one. These voters' preferred candidates then predictably lose each race. Second, the opposing party's backers can be packed into a small number of districts in which they make up enormous majorities. These voters' preferred candidates then prevail by overwhelming margins. All partisan gerrymandering is accomplished through cracking and packing, which enables the party controlling the map to manipulate vote margins in its favor. Compl. ¶¶ 5, 48.

In this case, the Republican leadership engaged in packing and cracking on a massive scale, shifting district boundaries throughout the State in a blatant attempt to "waste" as many Democratic votes as possible. The Mayer Report, attached as Ex. 2 to the complaint, shows that Democratic voters were cracked so that Republican candidates were far more likely to prevail in close races (where the winner had 60% or less of the vote): Republicans were likely to win 42 such districts, while Democrats would win only 17. Democrats were also packed into a number of districts where they would win overwhelmingly (by getting 80% or more of the vote): there were eight districts where Democrats would win by this margin, compared to *zero* districts where Republicans would win such a lopsided victory. *See* Mayer Report at 50-51; *see also* Compl. ¶¶ 60-77 (providing numerous examples of packing and cracking in specific districts).

To make sure that their gerrymandering efforts would be successful, the Republican leadership hired a professor of political science at the University of Oklahoma, Ronald K. Gaddie, who created a model to analyze the expected partisan performance of all of the districts established by Act 43. Professor Gaddie's model forecast that the Assembly plan would have a pro-Republican efficiency gap of 12%. When a common methodology is used to ensure an

apples-to-apples comparison, this is almost exactly the efficiency gap that the Assembly plan actually exhibited in the 2012 election. *See* Compl. ¶¶ 36, 56. The plan's extreme Republican tilt was thus predicted with uncanny precision before any voters had even gone to the polls.

Before Act 43 was introduced into the legislature, only the Republican leadership and the law firm it hired at state expense (Michael Best) were allowed to see the entire district plan.[3] After signing a confidentiality agreement, Republican legislators were allowed to see how their own districts would be affected so they could be assured that they would be reliable Republican districts. Compl. ¶ 37. But neither Democratic legislators nor the public were allowed access. *Id.* ¶ 38. Indeed, the Republican leadership and Michael Best went to extraordinary lengths to shield their communications about redistricting from disclosure, asserting attorney-client and attorney work product privileges as part of an elaborate "charade" "to cover up a process that should have been public from the outset." *Baldus v. Members of Wisc. Gov. Accountability Bd.*, 843 F. Supp. 2d 955, 958-61 (E.D. Wis. 2012); *see also* Compl. ¶¶ 39-41.

When Act 43 was finally announced, it was rushed through the legislature in only nine days: the bill was introduced on July 11, 2011, a public hearing was held two days later, and the bill was passed by the Senate on July 19 and by the Assembly on July 20. *See* Compl. ¶ 42.

In the first election after the Current Plan was enacted (2012), it performed exactly as the Republican leadership had hoped and expected. Republican candidates won sixty of the Assembly's ninety-nine seats even though Democratic candidates won a clear majority of the statewide Assembly vote. *See* Compl. ¶ 1. That lopsided victory was made possible by a gap of about 13% between the Republicans' efficiency in converting votes to seats and the Democrats' efficiency. *See* Jackman Report at 36 (producing 13% estimate based on nationwide data over

[3] The State paid Michael Best $431,000 for its work on the Current Plan. *See* Compl. ¶ 43.

1972-2014 period); Mayer Report at 46 (producing 12% estimate based on Wisconsin-specific data from 2012 election).

The efficiency gap captures in a single number all of a district plan's cracking and packing. It does so by counting two categories of "wasted" votes: (1) votes cast for a losing candidate and (2) votes cast for a winning candidate in excess of what the candidate needed to prevail. The efficiency gap is the difference between the parties' respective wasted votes, divided by the total number of votes cast. Compl. ¶ 50. So, for example, if a district is "packed" so that a Democrat wins with 80% of the vote, 30% (minus 1 vote) of the Democratic votes will be deemed wasted, while all of the Republican votes will be deemed wasted. Similarly, where Democrats have been "cracked" so they are in the minority in a district and the Democratic candidate loses by a margin of 60-40%, all of the Democratic votes will be deemed wasted and 10% of the Republican votes (minus one vote) will be deemed wasted. In 2012, adjusting for uncontested races, 2,844,676 votes were cast statewide in Assembly races. Democrats had 877,445 wasted votes and Republicans had 544,893 wasted votes, for an efficiency gap of approximately 12%. *See* Mayer Report at 46; *see also* Jackman Report at 36 (arriving at nearly identical 13% estimate using nationwide data over a longer period).[4]

An efficiency gap of 12-13% is off the charts when compared to efficiency gaps calculated for all statehouse plans nationwide between 1972 and 2014. During that period, fewer than 4% of all statehouse plans in the country benefited a party to that extent. In the 2014

[4] Defendants make much of the difference in efficiency gap calculations between plaintiffs' two experts. But both were using the exact same analytical approach, although they applied it to different data sets. For his calculations nationwide, Professor Jackman had only statewide numbers. He calculated the efficiency gap for each state and each election using the same methodology, so he could make an apples-to-apples comparison. Professor Mayer painstakingly calculated the efficiency gap for Wisconsin by counting up the wasted votes for each district (based on ward-level data available for Wisconsin but not necessarily other states) and adding them up.

election, Wisconsin's efficiency gap remained extremely large at 10%. Between 1972 and 2010, not a *single* plan anywhere in the United States had an efficiency gap as large as the Current Plan in the first two elections after redistricting. The complaint alleges and plaintiffs' experts confirm that a district plan this lopsided is highly unlikely ever to become neutral over its ten-year lifespan. In fact, we can predict with nearly 100% confidence that, absent this Court's intervention, Wisconsin's Current Plan will continue to unfairly favor Republican voters and candidates—and unfairly disadvantage Democratic voters and candidates—throughout the remainder of the decade. *See* Compl. ¶¶ 55, 85; Jackman Report at 60.

The Current Plan is also an outlier by another measure of partisan symmetry—partisan bias. Partisan bias is the difference between the shares of seats that the parties would win if they each received the same share of the statewide vote (often set to 50% for the sake of convenience). In 2012, there was a 13% bias in favor of Republicans; in a tied election, Republicans would have won 63% of the Assembly seats, with Democrats winning only 37%. In 2014, there was a 12% bias in favor of Republicans. *See* Compl. ¶ 9. These figures are every bit as extreme as the efficiency gap estimates, and confirm the Current Plan's extraordinary partisan unfairness.

This extraordinary unfairness was also entirely unnecessary. Attached as Ex. 2 to the complaint is a Demonstration Plan designed by one of plaintiffs' experts showing that it would have been possible for Wisconsin to enact an Assembly plan that treated both parties symmetrically and did not disproportionately waste Democratic votes. The Demonstration Plan would have had an efficiency gap of just *2%* in 2012 (assuming all contested districts and no incumbents). *See* Mayer Report at 45. This far better score is attributable to plaintiffs' efforts *not* to crack and pack Democratic voters, and instead to enable both parties to convert their popular

support into legislative seats with equal ease. Notably, plaintiffs' Demonstration Plan performs at least as well as the Current Plan on every other relevant metric. Both plans have total population deviations of less than 1%—far below the courts' 10% threshold for presumptive constitutionality. Both plans have six African American opportunity districts and one Hispanic opportunity district, and so are identical for Voting Rights Act purposes. The Demonstration Plan splits one fewer municipal boundary than the Current Plan (119 versus 120), and so is superior in that regard. And the Demonstration Plan's districts are substantially more compact than the Current Plan's (average compactness of 0.41 versus 0.28). *See* Mayer Report at 37; Compl. ¶¶ 78-80.

Plaintiffs' Proposed Test

In their motion to dismiss, defendants suggest that plaintiffs' proposed standard is based entirely on the size of a plan's efficiency gap. But that is not true. The first prong of plaintiffs' proposed test is partisan intent, that is, "intentional discrimination against an identifiable political group." *Bandemer*, 478 U.S. at 127 (plurality opinion). While intent may be proven directly or through circumstantial evidence, in this case the complaint alleges direct proof that legislative leaders set out to intentionally discriminate against Democrats in order to entrench Republicans in power. *See* Compl. ¶¶ 1, 6, 8, 31-43, 58, 82, 89.

The test's second prong is partisan effect. This prong has two steps that mirror the doctrinal framework for state legislative reapportionment claims—a well-established framework that courts have used effectively for decades. *See infra* at 20-21. The first step is whether a plan's efficiency gap exceeds a reasonable threshold. If so, the plan is presumptively unconstitutional. *See* Compl. ¶ 83; *see also*, *e.g.*, *Voinovich v. Quilter*, 507 U.S. 146, 161 (1993) (holding that "a prima facie case of discrimination" is established where "the maximum total deviation from ideal

district size exceeded 10%"); *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983) ("A plan with larger disparities in population . . . creates a prima facie case of discrimination . . . .").

As alleged in the complaint, the Current Plan is so extreme and durable in its partisan consequences that it exceeds any plausible threshold. As a result, the Court need not set a cutoff in this litigation. As in the state legislative reapportionment cases, the threshold may be allowed to emerge over time as courts become more familiar with the extent of partisan gerrymandering. *See* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 890-91 (2015) (describing how the 10% population deviation threshold was set only after Court first struck down plans with deviations of 20%, 26%, and 34%, and upheld plans with deviations of 8% and 10%, over a nine-year period).[5]

The effect prong's second step is whether the state can show that its plan's unusually large efficiency gap was the necessary result of either a legitimate state policy or the state's underlying political geography. If so, the presumption of unconstitutionality is rebutted. If not, the plan is unlawful. *See* Compl. ¶ 83; *see also Voinovich*, 507 U.S. at 161 (noting that "appellants were required to justify the [overly high population] deviation"); *Brown*, 462 U.S. at 844 (holding that population deviation above 10% is permissible if it is "entirely the result of the consistent and nondiscriminatory application of a legitimate state policy").

Plaintiffs' proposed test is not set in stone. The Court may consider adding or subtracting to the factors outlined above. *See Baldus*, 849 F. Supp. 2d at 853 (noting that courts presented with partisan gerrymandering claims may "share[]" with plaintiffs "responsibility for the development of the law"). For example, a separate intent requirement could be omitted from the

[5] If the Court were to consider setting a threshold, plaintiffs have suggested 7%. Compl. ¶ 86. Expert analysis shows that partisan unfairness of this magnitude is both highly unusual and highly durable. Setting the appropriate threshold, however, would require a factual determination and cannot be done on the pleadings.

test—although the fact that Wisconsin's gerrymandering was undoubtedly intentional supports the conclusion that the Current Plan is unconstitutional. The Court could use a different measure of partisan symmetry, such as partisan bias, instead of or in addition to the efficiency gap. 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. *See* Compl. ¶¶ 90-96. Under this framework, the Court would consider whether "an apportionment has the purpose and effect of burdening a group of voters' representational rights." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment). 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.

STANDARD OF REVIEW

A motion to dismiss must be denied if plaintiffs' complaint "'contain[s] sufficient factual matter, accepted as true, to state a claim that is plausible on its face.'" *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 463 (7th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The Court must "accept all facts in the complaint as true," "view them in the light most favorable to the [plaintiffs]," and "draw all reasonable inferences in their favor." *Id.* "[T]he bar to survive a motion to dismiss is not high." *Id.*; *see also, e.g.*, *Indep. Trust Corp. v. Stewart Info. Servs. Corp.*, 665 F.3d 930, 935 (7th Cir. 2012) ("[A] plaintiff's claim need not be probable, only plausible."); *Richards v. Mitcheff*, 696 F.3d 635, 637 (7th Cir. 2012) ("Complaints need not anticipate defenses and attempt to defeat them."). A faithful application of this standard requires defendants' motion to be denied.

ARGUMENT

There is no doubt that "excessive" partisan gerrymandering is unconstitutional. *Vieth*, 541 U.S. at 293 (plurality opinion). There is also no doubt that drawing district boundaries to entrench one party and disadvantage the other is profoundly undemocratic. *See Ariz. State Legislature v. Ariz. Independent Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015) (partisan gerrymandering threatened a "'core principle of republican government,' namely, 'that the voters should choose their representatives, not the other way around'"); *Vieth*, 541 U.S. at 292 (plurality opinion) (there is no disagreement about the "incompatibility of severe partisan gerrymanders with democratic principles"). Indeed, precisely because it rigs the game, a partisan gerrymander can be extremely difficult to remedy through the ordinary political process. That, in turn, means that the legislature's composition and the policies it enacts will fail to reflect the public's will.

As Professor Gaddie's 2011 work in Wisconsin demonstrates, new technological tools have made it easy for legislators to predict with remarkable accuracy how their redistricting decisions are likely to affect the outcome of future elections. Not surprisingly, given the growing surge of partisanship throughout the country, the kind of extreme partisan gerrymandering evident in Wisconsin has also been on the rise elsewhere. In fact, measured by the absolute size of the efficiency gap, gerrymandering is more severe today than at any point in the last forty years. *See* Jackman Report at 47. If courts continue to decline to intervene because of a perceived lack of manageable standards to determine when gerrymandering based on political considerations has become excessive, that trend will only accelerate in the future.

Part I below explains the affirmative case for plaintiffs' proposed standard. In *LULAC*, five members of the Supreme Court deemed the concept on which plaintiffs' proposed standard is based (partisan symmetry) to be potentially promising. Part I explains how plaintiffs'

implementation of that concept answers the concerns raised by Justice Kennedy and creates a test that is both judicially discernible and judicially manageable. Part II responds to defendants' specific criticisms of plaintiffs' proposed standard, including their erroneous assertion that the concept of partisan symmetry has been rejected by the Supreme Court. Part III demonstrates that, contrary to defendants' argument, plaintiffs do have standing to challenge the Current Plan on a statewide basis. Finally, in Part IV we show that the separate First Amendment claim alleged in Count II of the complaint is unchallenged, and therefore should stand regardless of how the Court rules on defendants' motion to dismiss the Equal Protection claim in Count I.

I. Plaintiffs' Proposed Standard Meets the Requirements Imposed by the Supreme Court.

A. The *LULAC* Court Recognized that Partisan Symmetry Is a Promising Concept.

In *Bandemer*, the Supreme Court held that a partisan gerrymandering claim brought under the Equal Protection Clause was justiciable but failed on the merits. The Court upheld a three-judge district court's decision following a trial that the Indiana legislature had intended to discriminate against Democrats in redistricting the state General Assembly in 1981. 478 U.S. at 127 (plurality opinion). But it reversed the lower court's decision declaring the map unconstitutional because it found that the challengers had not shown a "sufficiently adverse effect" on Democratic voters' "constitutionally protected rights to make out a violation of the Equal Protection Clause." *Id.* at 129. The Court rejected the notion that the Constitution requires proportional representation or that legislatures in reapportioning must "come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *Id*. at 130. Although in 1982 Republicans had won 57% of the Assembly seats with only 48.1% of the statewide vote, the Court noted that the district court had not found that this

was either the predictable consequence of the 1981 Act or a reliable predictor of future results. Under those circumstances, there was insufficient proof that the electoral system had been "arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Id.* at 142-43.

Eighteen years later, in *Vieth*, the Court considered a challenge to Pennsylvania's 2001 congressional redistricting plan. Five members of the Court once again found that the challengers had not come up with a clear standard for judging the effects of partisan gerrymandering. The plurality rejected a test based on whether the boundaries had been drawn solely for partisan ends to the exclusion of all other neutral factors. 541 U.S. at 286 (plurality opinion). And it rejected an effects test based on whether the map thwarted the ability of the disadvantaged party to translate a majority of votes into a majority of seats. *Id.* at 290. The plurality concluded that this test was not judicially discernible because the Constitution provides no right to proportional representation and was not judicially manageable because, in a winner-take-all district system, there can be no guarantee that a majority of votes statewide will translate into a majority of seats. *Id.* at 288-89. Based on the absence of any workable test, the plurality suggested throwing in the towel by reversing *Bandemer* and declaring partisan gerrymandering claims nonjusticiable. *Id.* at 305. While he concurred in the conclusion that the plaintiffs in *Vieth* had not offered a viable test, Justice Kennedy declined to join the plurality in overturning *Bandemer*.

In concurring in the judgment, Justice Kennedy recognized the importance of the rights the plaintiffs sought to vindicate and the threat to democracy posed by rampant partisan gerrymandering. Although he concluded that no test had yet been proposed that would measure the burdens imposed on the disfavored group's representational rights, Justice Kennedy held out hope that a standard could be developed in the future:

> [T]he rapid evolution of technologies in the apportionment field suggests yet unexplored possibilities. Computer assisted districting has become so routine and sophisticated that legislatures, experts, and courts can use databases to map electoral districts in a matter of hours, not months. . . . Technology is both a threat and a promise. On the one hand, if courts refuse to entertain any claims of partisan gerrymandering, the temptation to use partisan favoritism in districting in an unconstitutional manner will grow. On the other hand, these new technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties. That would facilitate court efforts to identify and remedy the burdens, with judicial intervention limited by the derived standards.

Id. at 312-13 (Kennedy, J., concurring in the judgment); *see also Ariz. State Legislature*, 135 S. Ct. at 2658 (noting that "Justice Kennedy "left open the possibility that a suitable standard might be identified in later litigation").

Most recently, in *LULAC*, the Court considered a partisan gerrymandering challenge to Texas's 2003 mid-decade redrawing of its congressional districts. The challengers proposed a standard based on proof of a "single-minded purpose . . . to gain partisan advantage." *LULAC*, 548 U.S. at 417 (opinion of Kennedy, J.). The Court declined to adopt this standard, which was "markedly similar" to one already considered and rejected in *Vieth*. *Id.* at 418; *see also Vieth*, 541 U.S. at 292-95 (plurality opinion).

However, a group of political scientists submitted an amicus brief in *LULAC* laying out a very different approach—and one in which the Court evinced much more interest. Partisan symmetry was the key concept underpinning this approach. *LULAC*, 548 U.S. at 466 (Stevens, J., concurring in part and dissenting in part). An electoral system is symmetric when both major parties are able to translate their popular support into legislative representation with approximately equal ease. Conversely, a system is asymmetric when one party enjoys a significant advantage in how efficiently its votes convert into seats. *See id.*

The political scientist amici discussed one particular measure of partisan symmetry called partisan bias. Partisan bias, again, refers to "the extent to which a majority party would fare better than the minority party, should their respective shares of the vote reverse." *Id.* at 420 (opinion of Kennedy, J.); *see also id.* at 466 (Stevens, J., concurring in part and dissenting in part) (defining absence of bias as situation where "each [party] receives the same fraction of legislative seats for a particular vote percentage as the other party would receive if it had received the same percentage"). According to this metric, Texas's 2003 plan had a pro-Republican bias of 12.5%. If they had received 50% of the statewide vote, Republicans would have won twenty of Texas's thirty-two congressional seats (62.5%), leaving only twelve seats for Democrats (37.5%). *See id.* at 465-68.

Compared to every other idea offered to the Court in the decades since *Bandemer*, it is fair to say that partisan symmetry won an enthusiastic response. Justice Stevens observed that it is "widely accepted by scholars as providing a measure of fairness in electoral systems," and called it a "helpful (though certainly not talismanic) tool." *Id.* at 466, 468 n.9. Justice Souter (joined by Justice Ginsburg) noted the "utility of a criterion of symmetry as a test" and urged "further attention [to] be devoted to the administrability of such a criterion at all levels of redistricting and its review." *Id.* at 483-84 (Souter, J., concurring in part and dissenting in part). Justice Breyer commented that asymmetry may cause a plan to "produce a majority of congressional representatives even if the favored party receives only a minority of popular votes." *Id.* at 492 (Breyer, J., concurring in part and dissenting in part).

Perhaps most importantly, Justice Kennedy wrote with respect to partisan symmetry that he did not "discount[] its utility in redistricting planning and litigation." *Id.* at 420 (opinion of Kennedy, J.). Other Justices seized on this language. Justice Stevens "appreciate[d] Justice

Kennedy's leaving the door open to the use of the standard in future cases." *Id.* at 468 n.9 (Stevens, J., concurring in part and dissenting in part). Justice Souter remarked that "[i]nterest in exploring this notion is evident." *Id.* at 483 (Souter, J., concurring in part and dissenting in part). And for their part, scholars lauded *LULAC*'s "potential sea change in how the Supreme Court adjudicates partisan gerrymandering claims." Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering After* LULAC v. Perry, 6 Election L.J. 2, 4 (2007).

Like partisan bias, the efficiency gap is a measure of partisan symmetry. When the major parties waste the same number of votes, "the electoral system treat[s] similarly-situated parties equally." *LULAC*, 548 U.S. at 466 (Stevens, J., concurring in part and dissenting in part). But when one party's supporters are packed and cracked to a greater extent than its rival's, the electoral system is tilted against this party, and the votes it receives do not translate into seats with equal ease. In this case, plaintiffs have alleged that the Current Plan exhibits a significant partisan bias *and* an efficiency gap that is not only large, but an outlier compared to statehouse plans nationwide over a forty-year period.

Thus, contrary to defendants' argument, the Supreme Court did not reject either partisan symmetry or the assumptions underlying it in either *Vieth* or *Bandemer*. *See*, *e.g.*, Defts' Brief at 17 ("Tests based on 'partisan symmetry' . . . were rejected by a majority of the Supreme Court in *Vieth*."). Partisan symmetry was not even raised in these cases. Furthermore, when partisan symmetry was discussed for the first time in *LULAC*, the Court did not view it as precluded by earlier decisions. Nor did the Court raise any objection to the representational theory—that the electoral system should treat similarly situated parties symmetrically—underlying the concept. On the contrary, five of the Justices were intrigued by the concept, inviting litigants to develop

approaches based on partisan symmetry, rather than dismissing the theory out of hand, as defendants suggest.

B. Plaintiffs' Proposed Standard Is Judicially Discernible and Judicially Manageable.

Defendants correctly point out that a partisan gerrymandering standard cannot be selected in a theoretical vacuum. There must be a compelling "model of fair representation" in which the standard is rooted. Defts' Br. at 20. Otherwise, the standard is not "judicially discernible in the sense of being relevant to some constitutional violation." *Vieth*, 541 U.S. at 288 (plurality opinion). Plaintiffs' proposed test meets that requirement because it is rooted in a model of fair representation—namely, partisan symmetry. And partisan symmetry, in turn, 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.

Partisan symmetry is not a novel or newfangled idea. To the contrary, it is "widely accepted by scholars as providing a measure of partisan fairness in electoral systems." *LULAC*, 548 U.S. at 466 (Stevens, J., concurring in part and dissenting in part). In the words of two prominent academics, "[s]ocial scientists have long recognized partisan symmetry as the appropriate way to define partisan fairness in the American system of plurality-based elections, and for many years such a view has been virtually a consensus position of the scholarly community." Grofman & King, *supra*, at 6. Partisan symmetry is thus exactly the kind of

"principled, well-accepted rule[] of fairness that should govern districting" sought by Justice Kennedy in *Vieth*. 541 U.S. at 308 (Kennedy, J., concurring in the judgment).

That partisan symmetry meets Justice Kennedy's criteria for an underlying theory is also clear from the rest of his *Vieth* opinion. He referred repeatedly to the "*representational* rights of . . . *parties*," making clear that a suitable theory must involve parties' levels of legislative representation. *Id.* at 313 (emphasis added); *see also id.* at 312 (discussing "Party X's rights to fair and effective representation"); *id.* at 315 (noting "the representational rights of the complaining party[]"). Partisan 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. It therefore satisfies Justice Kennedy's theoretical requirements.

Plaintiffs' three-part test is also judicially manageable. Unlike some of the "totality of the circumstances" standards that the Supreme Court has rejected, plaintiffs' test is neither vague nor arbitrary. The efficiency gap is a metric that can be easily calculated and then compared to historical norms. Whether a large efficiency gap was inevitable is also an inquiry that can be conducted simply by designing alternative maps. And even whether there was discriminatory intent can be determined by examining a plan's level of cracking and packing, as well as the process by which the plan was enacted. As Justice Kennedy observed in *Vieth*, given the computer tools available today, partisan gerrymandering is not likely to happen by accident; on the contrary it is probable that the effect of any district plan will be accurately forecast before the plan is even adopted. *See* 541 U.S. at 312-13 (Kennedy, J., concurring in the judgment).

To be sure, the Court will have to decide at what point the efficiency gap becomes so large that it should be deemed presumptively unconstitutional. But this line-drawing exercise is no different than the one the Court went through in the 1960s and 1970s in setting the 10%

threshold for state legislative reapportionment claims. Particularly given the safety valve afforded by the second step of the effect prong, courts should have no difficulty applying the test plaintiffs propose in a consistent and non-arbitrary fashion. That distinguishes this case from *Radogno v. Illinois State Bd. of Elections*, 2011 WL 5868225 (N.D. Ill. Nov. 22, 2011), which defendants cite. *See* Defts' Br. at 12, 14. In *Radogno*, the challengers suggested a six-factor test that was precisely tailored to their specific situation. Even if the plaintiffs there could have met the standard they proposed, there was no reason to think that "*these six factors* make out *the* appropriate standard for adjudicating partisan gerrymandering claims as a general matter." *Id*. at *4 (emphasis in original).[6] Here, by contrast, the test plaintiffs propose constitutes an appropriate general standard for evaluating partisan gerrymanders.

Lastly, plaintiffs' test is manageable because it so closely resembles the approach that courts have used for decades to decide one person, one vote cases at the state legislative level—an approach about which John Hart Ely famously quipped that "administrability is its long suit." John Hart Ely, Democracy and Distrust 121 (1980). Plaintiffs' test, like the one person, one vote approach, compares a quantitative measure of the constitutional harm (here, the efficiency gap; there, population deviation) to a numerical threshold. And also like the one person, one vote approach, plaintiffs' test allows scores above the threshold to be excused if the state can show that they are necessitated by legitimate governmental interests. This feature properly balances a constitutional imperative (here, partisan fairness; there, equal population) against other valid

[6] The six factors included, for example, whether more than two-thirds of incumbent pairings pitted minority-party incumbents against each other, whether minority-party incumbents were deprived of a "substantially greater proportion of their core constituencies than majority-party incumbents" and whether the plan was less compact and split more traditional political boundaries than the one it replaced. *Id*. at *4.

objectives. In short, if reapportionment doctrine is workable, so should be a proposal that mirrors that doctrine except with the efficiency gap substituted for population deviation

C. Plaintiffs' Proposed Test Resolves All of the Issues Identified by Justice Kennedy in *LULAC*.

In their brief discussion of *LULAC*, defendants note that Justice Kennedy voiced certain concerns about the particular measure of partisan symmetry—partisan bias—that was raised there. *See* Defts' Br. at 21 n.3. Plaintiffs' proposed test, however, is designed to address all of these concerns.

Justice Kennedy's first point was that partisan bias "depend[s] on conjecture about where possible vote-switchers will reside." *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.). This observation is accurate: because partisan bias asks what would have happened in a hypothetical election in which the parties' vote shares flipped, *see id.* at 419-20, it requires assumptions to be made about the districts in which vote-switchers are located. But the efficiency gap requires no such assumptions. The votes that were *actually* wasted, in the election that *actually* occurred, are tabulated for each party. No votes are shifted in any direction, and no hypothetical election is simulated.

Second, Justice Kennedy was hesitant about striking down a plan before an election had taken place and the plan's partisan unfairness had been demonstrated. "[W]e are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs. Presumably such a challenge could be litigated if and when the feared inequity arose." *Id.* at 420 (opinion of Kennedy, J.). This concern also does not apply to plaintiffs' proposed test because the test relies on *past* election results—not predicted *future* ones—to assess the extent of partisan gerrymandering. Here, for instance, the Current Plan has

been used in the 2012 and 2014 elections, and it is the outcomes of these elections that reveal the Plan's extreme partisan tilt.

Third, Justice Kennedy questioned how "a standard for deciding how much partisan dominance is too much" could be set using data from only a single lawsuit. *Id.* It is true that in the absence of comparative information there is no way to know if a state's plan is especially unfair. That is precisely why one of plaintiffs' experts, Professor Jackman, analyzed the statehouse plans of all available states over the entire modern redistricting era. This database of nearly 800 plans is what enables plaintiffs to recommend an efficiency gap threshold and to conclude that the Current Plan is a historical outlier, in the worst 4% of all modern plans. Nothing like this data was available to the Court in *LULAC*.[7]

And fourth, Justice Kennedy commented that "asymmetry *alone* is not a reliable measure of unconstitutional partisanship." *Id.* (emphasis added). In other words, the standard for unlawful gerrymandering should incorporate *both* asymmetry *and* other relevant considerations. Plaintiffs' proposed test does exactly that. The intent prong asks whether a plan was designed with the goal of disadvantaging a particular party. And the second step of the effect prong asks whether legitimate factors such as compliance with traditional districting criteria or a state's underlying political geography necessitated a plan's large efficiency gap. Asymmetry alone is never enough to invalidate a plan under this approach.

[7] Defendants criticize the Jackman study on the ground that it did not take into account "the varying political geography between the different states." Defts' Brief at 28. This is precisely the kind of criticism that cannot be resolved on a motion to dismiss. In any event, "the varying political geography" in no way affects the calculation of the efficiency gap and thus would not have been an appropriate factor to take into account. Plaintiffs' proposed test incorporates political geography at the *second* step of the effect prong, in which a state may argue that, because of how the parties' supporters are geographically distributed, no plan with a smaller efficiency gap was possible.

II. Defendants' Challenges to Plaintiffs' Proposed Standard Should Be Rejected.

A. Defendants Confuse Partisan Symmetry with a Series of Unrelated Concepts.

Turning to defendants' specific arguments, their central contention is that partisan symmetry is synonymous with certain concepts the Supreme Court has already rejected as bases for a partisan gerrymandering test. These are: (1) proportional representation; (2) majoritarianism; and (3) any reliance on statewide seat and vote figures. *See* Defts' Brief at 14-19. In fact, partisan symmetry is distinct from all of these concepts, and the third has not actually been proscribed by the Court's case law.

1. Partisan Symmetry Is Distinct from Proportional Representation.

Defendants repeatedly claim that partisan symmetry is equivalent to proportional representation. *See*, *e.g.*, Defts' Br. at 15 (the "underlying assumption" of plaintiffs' approach is that parties "have a right to seats in the legislature in proportion to their percentage of the state wide vote total"); *id.* at 16 (describing plaintiffs' test as "[a] constitutional standard based on proportionality"). There is just one problem with this assertion: it is entirely incorrect.

Proportional representation exists when a party's statewide vote and seat shares are equal. Thus, if a party receives 35% of the statewide vote, it should receive 35% of the seats in the legislature, and if a party wins 65% of the vote, it should win 65% of the seats. *See Vieth*, 541 U.S. at 288 (plurality opinion) (defining proportional representation as "equal representation in government [for] equivalently sized groups"); *Bandemer*, 478 U.S. at 130 (plurality opinion). In contrast, the efficiency gap is not calculated by comparing statewide vote and seat shares. Rather, it is the difference between the parties' respective wasted votes—tallied district by

district—divided by the total number of votes cast.[8] *See* Compl. ¶¶ 5, 48-51. As scholars have recognized, measures of partisan symmetry simply are not the same as proportional representation. *See, e.g.*, Grofman & King, *supra*, at 8 ("Measuring symmetry and partisan bias does *not* require proportional representation (where each party receives the same proportion of seats as it receives in votes).") (emphasis in original).

To see the distinction, assume that a state has ten districts, each with a hundred voters, and two parties, Party A and Party B. Assume also that Party A wins two districts by a margin of 80 to 20 and four districts by a margin of 70 to 30, and that Party B wins four districts by a margin of 60 to 40. Then there is perfectly proportional representation; Party A receives 600 of the 1000 votes in the state ((2 x 80) + (4 x 70) + (4 x 40)) and wins six of the ten seats. But the efficiency gap here is *not* zero. It is actually 10%, the difference between Party A's 300 wasted votes ((2 x 30) + (4 x 20) + (4 x 40)) and Party B's 200 wasted votes ((2 x 20) + (4 x 30) + (4 x 10)), divided by the 1000 total votes cast. This result is not a quirk of the example. In fact, plans with perfectly proportional representation never have an efficiency gap of zero, and plans with an efficiency gap of zero are never perfectly proportional. *See* Stephanopoulos & McGhee, *supra*, at 854.

The same point holds for the measure of partisan symmetry—partisan bias—that was at issue in *LULAC*. Imagine that Party A receives 60% of the vote and 60% of the seats, but that if Party B had won 60% of the vote, it would have won only 55% of the seats. Such a plan produces perfectly proportional representation, but it is also biased against Party B. Conversely,

[8] A shortcut for calculating the efficiency gap "[i]n the special case where there are only two parties and all districts are equal in population" is to subtract a party's vote margin of victory, multiplied by two, from the party's seat margin of victory. Eric M. McGhee, *Measuring Partisan Bias in Single-Member District Electoral Systems*, 39 Legis Stud. Q. 55, 68 (2014); *see also* Stephanopoulos & McGhee, *supra*, at 853; Jackman Report at 16-17. This shortcut also does not involve simply measuring the deviations between statewide vote and seat shares.

imagine that Party A receives 55% of the vote and 65% of the seats, and that if Party B had won 55% of the vote, it would also have won 65% of the seats. Then the plan does not give rise to proportional representation, but it is completely unbiased. Again, partisan symmetry and proportional representation are not alike.

This is a distinction that makes a difference. Under plaintiffs' test, entitlement to relief would *not* depend on whether there was proportional representation following a particular election. Instead, it would depend on (1) whether there was proof of discriminatory intent, (2) whether the plan's efficiency gap or partisan bias was large enough to make the plan presumptively unconstitutional, and (3) whether the state was able to offer a neutral explanation for the plan's lack of partisan symmetry. Under this framework, some proportional plans might be struck down, while some non-proportional plans might be upheld.

Defendants argue that a court cannot ensure that a plan will achieve proportional representation (or presumably any other measure of partisan fairness). *See* Defts' Brief at 16. But under plaintiffs' proposed test, it would be the elected branches, not the judiciary, that would have the obligation to enact a plan with an efficiency gap that is within historical norms—and then only if such a plan were feasible given compliance with traditional districting criteria and the state's underlying political geography. Moreover, even if legislative inaction compelled a court to design a map, there are numerous cases of courts explicitly—and successfully—taking partisan fairness into account. For example, the court that drew Wisconsin's state legislative districts in the 1990s considered election results from the previous decade, and produced the plan that was the "least partisan" and "create[d] the least perturbation in the political balance of the state." *Prosser v. Elections Bd.*, 793 F. Supp. 859, 871 (W.D. Wis. 1992). This plan had an average efficiency gap of only 2% over the course of the ensuing cycle. *See* Jackman Report at

72; *see also, e.g.*, *Legislature v. Reinecke*, 516 P.2d 6, 38 (Cal. 1973) (designing plan that would not "produce a manifestly unfair political result," and in fact had average efficiency gap of 2.5%); *Maestas v. Hall*, 274 P.3d 66, 79 (N.M. 2012) (designing plan that "avoid[s], to the extent possible, partisan bias," and in fact had average efficiency gap of 1.6%).

In their discussion of proportional representation, defendants also highlight the outcome of *Bandemer*, in which Indiana's statehouse plan was upheld even though Democrats received 52% of the vote but only 43% of the seats in the 1982 election. *See* Defts' Brief at 18-19. But it is impossible to tell from this state-level information what efficiency gap the plan might have had, because the necessary district-by-district results are missing. It is also entirely unclear whether a fairer plan could have been drawn given the state's political geography or while still complying as well with traditional districting criteria. And most importantly, the plan was upheld under *Bandemer*'s now-discredited standard—whether "the electoral system is arranged in a manner that will consistently degrade . . . a group of voters' influence on the political process as a whole"—a test that *no* plaintiff managed to satisfy over its eighteen-year lifetime. *See Vieth*, 541 U.S. at 279 (plurality opinion) (noting that *Bandemer*'s standard "invariably produced the same result as would have obtained if the question were nonjusticiable"). Accordingly, the only conclusion that can be drawn from *Bandemer*'s outcome is that *Bandemer*'s test was indeed unsatisfactory.

2. Partisan Symmetry Is Distinct from Majoritarianism.

The next concept defendants confuse with partisan symmetry is majoritarianism: the idea that the party that receives a majority of the statewide vote should also win a majority of legislative seats. Time and again, they point out that the Court has rejected "the principle that a majority of the electorate should be able to [elect] a majority of representatives." Defts' Brief at

15; *see also id.* at 16 (noting lack of support for notion that "a majority of voters should be able to elect a majority of representatives"). Plaintiffs' proposed test, however, does not require that the majority statewide will always have a majority in the legislative body.

First, not all plans in which a popular majority is unable to elect a legislative majority would be invalidated by plaintiffs' test. Not all of these plans are designed with partisan intent. In addition, not all of them could have been drawn in majoritarian fashion given the state's political geography or while still complying as well with traditional districting criteria. And even of the plans whose motivation is partisan and whose non-majoritarianism is avoidable, many have efficiency gaps below any actionable threshold. Of the non-majoritarian plans covered by the Jackman study, notably, more than half (52 out of 94) have efficiency gaps below plaintiffs' suggested 7% cutoff. *See* Jackman Report at 33-34.

Second, not all of the plans in which a popular majority *is* able to elect a legislative majority would be upheld under plaintiffs' test. In particular, if the party that receives a popular majority wins too many or too few legislative seats (though still a majority), then a plan can have an efficiency gap above the threshold. In the Jackman study, for instance, a significant fraction of the majoritarian plans (168 out of 693) have efficiency gaps above 7%, and so would be invalid if the other elements of plaintiffs' test were satisfied as well. *See id.* The point, again, is that partisan symmetry and majoritarianism do not always point in the same direction. Many plans that are consistent with one concept are inconsistent with the other, and vice versa.

3. Consideration of Statewide Seat and Vote Shares Is Not Necessary to Calculate the Efficiency Gap and Is Permissible Anyway.

The final conceptual underbrush to clear is defendants' claim that, under the Court's case law, statewide seat and vote shares cannot be considered *at all* in fashioning a test for partisan gerrymandering. *See, e.g.*, Defts' Brief at 17 (arguing that a plan cannot be "judged on how

statewide vote totals translate into legislative seats"). This claim is inapplicable to the efficiency gap, which is calculated using district- rather than state-level data. And it is wrong to boot; the Court has never banned, and indeed often cites, state-level electoral information.

The efficiency gap only requires district-level data to be computed because it is the difference between the parties' respective wasted votes *in all of a plan's individual districts*, divided by the total number of votes cast. *See* Compl. ¶¶ 5, 48-51. This computation does not involve any use of statewide seat and vote shares; it only relies upon election results from each district. For instance, when one of plaintiffs' experts, Professor Mayer, determined the efficiency gap for the Current Plan and the Demonstration Plan, he did so exclusively by tallying the parties' wasted votes district by district. *See* Mayer Report at 48-51.

As noted earlier, there is a shortcut for calculating the efficiency gap that can be used "[i]n the special case where there are only two parties and all districts are equal in population." McGhee, *supra*, at 68; *see also* Stephanopoulos & McGhee, *supra*, at 853; Jackman Report at 16-17. This shortcut is to subtract two times a party's vote margin of victory (the party's vote share minus fifty percent) from the party's seat margin of victory (the party's seat share minus fifty percent). *See id.* While this procedure employs statewide data, it is arithmetically identical to—though computationally easier than—adding the parties' wasted votes district by district. It would be illogical to proscribe this procedure simply because it saves the analyst some time and trouble. It is also wrong to label this procedure a "different definition[] of the efficiency gap." Defts' Brief at 27. It is the same definition and produces the same outcomes under the conditions in which it is applicable.[9]

[9] For example, the district-by-district computation produces an efficiency gap of 12% for Wisconsin in 2012, *see* Compl. ¶ 56; Mayer Report at 46, while the shortcut produces an efficiency gap of 13%, *see* Compl. ¶ 55; Jackman Report at 63. That these figures are so similar,

In any event, defendants' assertion that statewide seat and vote shares cannot form part of a test for partisan gerrymandering is belied by the Court's case law. In *Bandemer*, the plurality discussed the same statewide results that defendants themselves emphasize: namely, that Indiana's Democrats won 52% of the vote but only 43% of the seats in the 1982 election. *See id.* at 18-19; *Bandemer*, 478 U.S. at 134 (plurality opinion). These results did not persuade the plurality that the plan was *unlawful*, because they would have shifted substantially had the Democrats "received an additional few percentage points of the votes cast statewide." *Id.* at 135. But the plurality nowhere suggested that the results were constitutionally *irrelevant*.

Similarly, in *Vieth*, Justice Kennedy laid out a hypothetical that revolved around statewide seat and vote shares. "Consider these apportionment schemes: In one State, Party X . . . draws the lines so it captures every congressional seat. In three other States, Party Y . . . proceeds by a more subtle effort, capturing less than all the seats in each State. . . . Party X's gerrymander was more egregious. Party Y's gerrymander was more subtle. In my view, however, each is culpable." *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring in the judgment). Not only does this hypothetical not *reject* statewide data, it relies on it to arrive at a verdict of *culpability*.

In *LULAC* as well, Justice Kennedy noted the outcome of Texas's 2004 election, in which "Republicans won 21 seats to the Democrats' 11, while also obtaining 58% of the vote in statewide races against the Democrats' 41%." *LULAC*, 548 U.S. at 413 (opinion of Kennedy, J.). Far from ignoring this information, he then argued that it supported his conclusion that Texas's plan was valid. "Plan 1374C can be seen as making the party balance more congruent to statewide party power. . . . [A] congressional plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination . . . ." *Id.* at 419.

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despite being calculated using different data and models, confirms the methods' functional equivalence.

Accordingly, it is clear that the Court has never shut its eyes to some of the most useful data for assessing partisan gerrymandering.

B. Plaintiffs' Test Captures the Usual Meaning of Partisan Gerrymandering.

While labeling it a manageability rather than a discernibility argument, defendants also contend that plaintiffs' proposed test does not actually target partisan gerrymandering. In defendants' view, "a partisan gerrymander as commonly understood . . . involves ignoring traditional districting criteria . . . [and] drawing strangely-shaped districts." Defts' Brief at 21. This understanding, however, is not one shared by the Court. In *Bandemer*, *Vieth*, *LULAC*, and *Ariz. State Legislature*, the Court made it unmistakably clear that the cause of action for *partisan* gerrymandering involves the redrawing of districts to achieve *partisan* advantage.

In *Bandemer*, the plurality adopted a gerrymandering standard that made no reference at all to district shape or to compliance with traditional districting criteria. Whether "the electoral system is arranged in a manner that will consistently degrade . . . a group of voters' influence on the political process as a whole" simply has nothing to do with the shape of the district. *Bandemer*, 478 U.S. at 132 (plurality opinion). Indeed, the plurality went out of its way to *criticize* Justice Powell for focusing on "the shapes of the districts and their conformity with political subdivision boundaries." *Id.* at 138. These factors did "not contribute to a finding that Democratic voters have been disadvantaged in fact," and did "not show any actual disadvantage beyond that shown by the election results." *Id.* at 140. The plurality thus "disagree[d] . . . with [Justice Powell's] conception of a constitutional violation." *Id.* at 139.

Similarly, in *Vieth*, the plurality defined partisan gerrymandering as "giv[ing] one political party an unfair advantage by diluting the opposition's voting strength." *Vieth*, 541 U.S. at 271 n.1 (plurality opinion). In addition, while the *Vieth* plaintiffs *alleged* noncompliance with

traditional districting criteria, *see* Defts' Brief at 22-23, their proposed *test* did not include such noncompliance as an element. Instead, its prongs were "predominant intent to achieve partisan advantage," "systematically 'pack[ing]' and 'crack[ing]' the rival party's voters," and "thwart[ing] plaintiffs' ability to translate a majority of votes into a majority of seats." *Vieth*, 541 U.S. at 284-87 (plurality opinion). And while Justice Stevens discussed district shape in his dissent, *see* Defts' Brief at 23, he did so only because it is sometimes probative of legislative intent. *See Vieth*, 541 U.S. at 321 (Stevens, J., dissenting) ("[A] district's peculiar shape *might* be a symptom of an illicit purpose in the line-drawing process") (emphasis added). He nowhere hinted that district shape *itself* could amount to a constitutional violation.

In *LULAC* too, both the general theory (partisan symmetry) and the specific metric (partisan bias) considered by the Court are unrelated to how districts look or whether they comply with traditional criteria. Justice Stevens made this point emphatically. Texas had tried to defend its plan on the ground that its districts "frequently followed county lines, made an effort to keep certain entire communities within a given district, and otherwise followed certain neutral principles." 548 U.S. at 459 n.3 (Stevens, J., concurring in part and dissenting in part). "But these facts [were] not relevant to the narrow question presented by these cases," which was whether Texas's plan unlawfully discriminated against Democrats. *Id.*

And just a few months ago in *Ariz. State Legislature*, the Court once more confirmed that partisan gerrymandering is fundamentally a matter of partisan advantage, not district form. In the decision's very first sentence, the Court defined partisan gerrymandering as "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power." 135 S. Ct. at 2658. The Court later added that partisan gerrymandering is the process "by which the majority in the legislature draws district lines to their party's advantage." *Id.* at

2676. Plainly, neither of those formulations bears any resemblance to defendants' idiosyncratic use of the term.

Nor do the Court's racial gerrymandering decisions offer any help to defendants. *See* Defts' Brief at 23-24. For one thing, racial gerrymandering is an entirely distinct cause of action. Moreover, it is clear that district shape is *not* dispositive in racial gerrymandering cases. Rather, it is simply one of several items that may be evaluated to determine whether "race was the predominant factor" motivating a district's creation. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). As the Court explained in *Miller*, "[s]hape is relevant not because bizarreness is a necessary element of the constitutional wrong . . . but because it may be persuasive circumstantial evidence that race . . . was the legislature's dominant and controlling rationale." *Id.* at 913; *see also id.* (rejecting notion that "a district's appearance . . . can give rise to an equal protection claim"). Here, by contrast, the motive behind the Current Plan is crystal clear, and there is thus no need to consider whether intent can be inferred from the districts' shapes.

C. Plaintiffs' Proposed Test Takes into Account Both Traditional Districting Criteria and Political Geography.

After wrongly claiming that partisan gerrymandering *is* noncompliance with traditional districting criteria, defendants argue that plaintiffs' proposed test ignores both traditional criteria and states' underlying political geography. *See* Defts' Brief at 21-26. These arguments should also be rejected. Traditional criteria and political geography are the two factors at the heart of the second step of the test's effect prong.

1. A State May Argue That an Efficiency Gap Above the Threshold Was Necessitated by Its Effort to Comply with Traditional Districting Criteria.

Contrary to defendants' argument, plaintiffs' proposed test does not overlook traditional redistricting criteria "to focus solely on the political results." Defts' Br. at 21; *see also id.* at 23

(asserting that test does not include "adherence to traditional districting principles"). In fact, one of the two ways a state can rebut the presumption of unconstitutionality that follows from an above-threshold efficiency gap is by demonstrating that the large gap was the necessary result of the state's effort to comply with traditional criteria. *See* Compl. ¶¶ 10, 84, 87.

To make this showing, a state would begin by identifying the traditional criteria that its plan sought to observe—for example, equal population, the Voting Rights Act, compactness, respect for political subdivisions, or respect for communities of interest. The state would then argue that any plan with a smaller efficiency gap would have required sacrifices in how well these criteria were followed. That is, a smaller gap could not have been achieved while still complying with the criteria to the same extent. Notably, this is *exactly* the argument that a state whose legislative plan has a total population deviation above 10% must currently make to avoid having the plan struck down on one person, one vote grounds. *See*, *e.g.*, *Voinovich*, 507 U.S. at 161 (noting that Ohio was "arguing that the deviation resulted from the State's constitutional policy in favor of preserving county boundaries"); *Mahan v. Howell*, 410 U.S. 315, 325 (1973) (observing Virginia's "asserted justification for the divergences in this case—the State's policy of maintaining the integrity of political subdivision lines"). As the reapportionment cases illustrate, traditional criteria are not "ignore[d]," Defts' Brief at 21, when they enter into the analysis at its second stage.

It is true, of course, that traditional criteria are not part of the *first* step of the effect prong. Thus, under plaintiffs' proposed test, noncompliance with traditional criteria does not result in a presumption of unconstitutionality. But it could hardly be otherwise given the Court's holding in *Vieth*. Five Justices rejected Justice Souter's proposed standard, whose centerpiece was

"disregard of traditional districting principles." *Vieth*, 541 U.S. at 296 (plurality opinion). Plaintiffs cannot be faulted for declining to embrace an approach the Court has already rebuffed.

2. A State May Also Argue That an Efficiency Gap Above the Threshold Was Necessitated by Its Underlying Political Geography.

The other factor defendants criticize plaintiffs for supposedly overlooking is the underlying political geography of a state. *See*, *e.g.*, Defts' Brief at 21-22 ("the plaintiffs' standard . . . ignores the political effects inherent in all districting decisions"); *id.* at 25 ("The plaintiffs' plan . . . does not account for the fact that the geographic concentration of a group's voters matters . . . ."). This criticism is puzzling since political geography is also a justification for an above-threshold efficiency gap that a state can offer at the second step of the test's effect prong. *See* Compl. ¶¶ 10, 80, 84, 87. Nor is the criticism bolstered by Wisconsin's experience with a court-drawn plan in the 2000 cycle, which sheds no light on the test's manageability.

It is perfectly clear that how voters are distributed geographically may affect a district plan's partisan fairness. If a party's supporters are heavily concentrated in a small area, or evenly dispersed throughout a larger region in which they make up a minority of the population, the party may be disadvantaged by certain district configurations. Plaintiffs' proposed test explicitly takes into account this basic fact about redistricting. A state that believes its plan's above-threshold efficiency gap was necessitated by the state's political geography may make this argument at the second step of the test's effect prong. If the argument is persuasive—that is, if the court finds that a fairer plan could not have been drawn due to the geographic allocation of the parties' supporters—then the presumption of unconstitutionality is rebutted and the state's plan is upheld. *See id.*

Perhaps because it is indisputable that plaintiffs' proposed test *does* "account for the fact that the geographic concentration of a group's voters matters," Defts' Brief at 25, defendants downplay the test itself and focus instead on Wisconsin's court-drawn plan in the 2000 cycle. Defendants emphasize that this plan had an average efficiency gap of 8% over its lifespan. *See id.* at 24-26. This single statistic, however, does not remotely support the broad conclusions that defendants seek to draw from it.

First, the court-drawn plan would *not* have failed plaintiffs' proposed test for the obvious reason that it was not motivated by partisan intent. Partisan intent is the test's first prong, and there can be no liability—and indeed, no consideration of partisan effect—if that prong is not satisfied. Accordingly, Wisconsin's experience in the 2000 cycle actually leads to the opposite inference about manageability. A plan that *should* not have been struck down *would* not have been struck down, thus confirming that the test produces sensible outcomes.

Second, there appear to be idiosyncratic reasons why the 2000s court-drawn plan gave rise to a large efficiency gap (8%) while the 1990s court-drawn plan did not (2%). In the 1990s, the court took into account likely electoral effects and designed the map that was the "least partisan" and "create[d] the least perturbation in the political balance of the state." *Prosser*, 793 F. Supp. at 871. In the 2000s, in contrast, the court did *not* explicitly consider likely electoral effects. Instead, the court limited itself to "maintaining municipal boundaries and uniting communities of interest." *Baumgart v. Wendelberger*, 2002 WL 34127471, at *7 (E.D. Wis. May 30, 2002). The 2000s plan is also substantially more similar to the map submitted to the court by the Republican intervenors than to the map offered by the Democratic intervenors. *See id.* (comparing plans' population deviation, core retention, splitting of municipalities, and compactness).

Third, the 2000s plan does not prove that Wisconsin's political geography inherently favors Republican candidates. *See* Defts' Brief at 25-26. All it shows is that one *particular* plan that complied with traditional districting criteria—one plan out of the vast universe of such plans—benefited Republican candidates. *Another* plan that complied with traditional criteria, the court-drawn 1990s plan, did *not* benefit Republican candidates to any substantial extent. Nor did the court-drawn plan in the 1980s, which also had had an average efficiency gap of just 2%. *See* Jackman Report at 34. In any event, plaintiffs have alleged that an alternative plan could easily have been drawn in 2011 and have attached as an exhibit the Demonstration Plan, which scores at least as well as the Current Plan on every traditional metric, but has an efficiency gap of only 2%. *See* Mayer Report at 46. In ruling on the motion to dismiss, the Court must assume the truth of that allegation.

Finally, the 2000s plan is just one data point among many. Its efficiency gap shows how a single state's plan performed in a single decade. But, as Justice Kennedy pointed out in *LULAC*, a partisan gerrymandering test cannot be assessed based on such limited information. *See LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.) (noting that one state's experience cannot establish "how much partisan dominance is too much"). Rather, comparative data from *multiple* states over *multiple* decades is necessary to determine whether a test is manageable. The Jackman study provides exactly this sort of comparative data. It cannot be dismissed based on a single supposed counterexample. Even the most workable of tests will face the occasional borderline case.

D. A Partisan Gerrymandering Test Need Not Take Minor Parties into Account, but the Efficiency Gap Is Able to Do So.

On the basis of a single sentence in *Vieth*, defendants argue that a partisan gerrymandering test must allow not just the two major parties, but minor parties as well, to bring

claims. This sentence reads in full: "[The Constitution] nowhere says that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers." *Vieth*, 541 U.S. at 288 (plurality opinion). Plainly, all this sentence says is that the Constitution does not require proportional representation for any group, be it a major party or any other faction. It says nothing at all about *which* groups must be able to initiate partisan gerrymandering actions.

Moreover, it is indisputable that the Court's precedents have *only* involved gerrymandering claims by major parties and have *never* held that minor parties must be able to bring such claims too. It was Democratic voters who filed suit in *Bandemer*, and the Court recognized that their "claim [was] that the 1981 apportionment discriminates against Democrats." *Bandemer*, 478 U.S. at 127 (plurality opinion). Similarly, "registered Democrats who vote in Pennsylvania" were the plaintiffs in *Vieth*. 541 U.S. at 272 (plurality opinion). And the appellants' argument in *LULAC* was that the plan "burdens *one* group"—Democratic voters—"because of its political opinions and affiliation." *LULAC*, 548 U.S. at 417 (opinion of Kennedy, J.) (emphasis added); *see also, e.g.*, *Cox v. Larios*, 542 U.S. 947, 947-51 (2004) (Stevens, J., concurring) (involving partisan gerrymandering challenge by Republican voters). None of these cases have even hinted at what standard might apply if the adherents of minor parties were the plaintiffs instead.

The Court's focus on major parties is understandable. Electoral systems using single-member districts—now adopted by nearly every state in the country—typically give rise to two large parties. *See generally* Maurice Duverger, Political Parties (1951). This is because a plurality of all votes cast is needed to win a single-member district, and minor parties usually have no realistic shot at achieving a plurality. Voters inclined to support minor parties thus tend

to vote instead for the major party closer to their ideological position. *See id.* Accordingly, there is very rarely any effort to gerrymander against minor parties. There is no *need* to do so, since these parties are highly unlikely to win many (or even any) seats no matter how districts are drawn.

In any event, it is straightforward to calculate the efficiency gap for minor parties. Instead of excluding minor parties from the gap's computation, their wasted votes could be tallied as well, and then compared to the wasted votes of the two major parties. This analysis would not be especially illuminating, since no matter how districts are configured, minor parties tend to lose (almost) all races and so waste (almost) all of their votes. But there is no reason the analysis could not be done if it was deemed necessary.

III. Plaintiffs Have Standing to Bring Statewide Claims.

Defendants' final argument is that partisan gerrymandering claims can only challenge individual districts, not plans in their entirety, and thus that plaintiffs only have standing to object to the specific districts in which they live. *See* Defts' Brief at 28-29. This assertion finds no support in any of the Court's partisan gerrymandering decisions. So it is unsurprising that defendants resort to citing dissents and unrelated *racial* gerrymandering cases.

In *Bandemer*, the Court made clear that a partisan gerrymandering claim can be brought with respect to a statewide plan as a whole. The Court "agree[d]" that the appellees' argument was that Indiana's legislative plans "discriminate[d] against Democrats *on a statewide basis*." *Bandemer*, 478 U.S. at 127 (plurality opinion) (emphasis added). The Court added that the "appellees' claim, as we understand it, is that Democratic voters *over the State as a whole*, not Democratic voters in particular districts, have been subjected to unconstitutional discrimination." *Id.* (emphasis added). The Court further distinguished between the standard for district-specific

claims and the test "where unconstitutional vote dilution is alleged in the form of *statewide* political gerrymandering." *Id.* at 132 (emphasis added). In the latter case only, a violation occurs "when the electoral system is arranged in a manner that will consistently degrade . . . a group of voters' influence on the political process as a whole." *Id.*

In *Vieth*, similarly, the plaintiffs challenged Pennsylvania's congressional plan in its entirety. This is evident from the standard they proposed. Its intent prong asked whether "'partisan advantage was the predominant motivation *behind the entire statewide plan*.'" *Vieth*, 541 U.S. at 285 (plurality opinion) (emphasis in original). And its effect prong inquired whether "'districts *systematically* 'pack' and 'crack' the rival party's voters,'" and whether the plan "'thwart[s] the plaintiffs' ability to translate *a majority of votes into a majority of seats*.'" *Id.* at 286-87 (emphasis added). All of these elements are inherently statewide in nature. And while the Court declined to adopt them, it nowhere hinted that the problem was their statewide rather than district-specific character.

In *LULAC* as well, the two key concepts discussed by the Court, partisan symmetry and partisan bias, are intelligible only with respect to a plan as a whole. It is incoherent to ask how efficiently a party's votes translate into seats within a single district, where there is only one seat to be won. Likewise, "the extent to which a majority party would fare better than the minority party, should their respective shares of the vote reverse," can be determined only with respect to an entire plan. *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.). *LULAC* thus shows that, far from embracing a district-specific theory of gerrymandering, the Court is only interested in statewide standards.

It is true that, in *Vieth*, two dissenting Justices suggested gerrymandering tests that would have proceeded district by district. *See* Defts' Brief at 29. But the Court explicitly *rejected* these

tests, meaning that they carry no precedential weight. *See Vieth*, 541 U.S. at 292-98 (plurality opinion). In addition, one of the dissenters embraced statewide approaches both before and after *Vieth*. *See LULAC*, 548 U.S. at 456-73 (Stevens, J., concurring in part and dissenting in part); *Bandemer*, 478 U.S. at 173-84 (Powell and Stevens, JJ., concurring in part and dissenting in part). And the other dissenter was open to recognizing statewide claims after accruing enough "experience with individual district claims." *Vieth*, 541 U.S. at 353 (Souter, J., dissenting).

It is also true that *racial* gerrymandering claims are directed at particular districts, not at whole plans. *See* Defts' Brief at 29. But, as noted earlier, racial gerrymandering is an entirely different cause of action from partisan gerrymandering. It involves race rather than partisanship, and the "predominant intent" behind a district's formation rather than the partisan symmetry of a statewide plan. *Miller*, 515 U.S. at 916. It therefore provides no guidance in this unrelated area.

In any event, if plaintiffs were limited to challenging the districts in which they resided, additional claimants could be found in all of Wisconsin's remaining Assembly districts. There is no shortage of Democratic voters dissatisfied with the state's blatant partisan gerrymander. The case could also be converted into a class action on behalf of all Democratic voters (in all districts) in the state. And, as even Justice Souter recognized in *Vieth*, "[a]t a certain point," when multiple districts are contested, "the ripples would reach the state boundary, and it would no longer make any sense for a district court to consider the problems piecemeal." *Vieth*, 541 U.S. at 353 (Souter, J., dissenting). Here, with plaintiffs in eleven separate districts, it is clear that this point has been reached.

IV. Defendants Offer No Response to Plaintiffs' First Amendment Claim.

In Count II of the Complaint, plaintiffs allege that their First Amendment rights to freedom of association and expression are violated by Wisconsin Act 43. This is a separate and

independent claim from the Equal Protection claim in Count I, alleging that "the drafters of the Current Plan deliberately discriminated against plaintiffs and other Democratic voters because they are Democrats and have voted for and will vote for Democratic candidates and because of the positions they have expressed and will take on public affairs—that is, because of their views and the content of their expression." Compl. ¶ 92. The complaint further alleges that because "Act 43 and the Current Plan have the purpose and effect of subjecting Democrats to disfavored treatment because of their views, Act 43 and the Current Plan are subject to strict scrutiny and cannot be upheld absent a compelling government interest, which is not present in this case." *Id.* ¶ 95.

Defendants' motion to dismiss does not address these allegations or the theory behind plaintiffs' First Amendment claim. Because defendants make no attempt to argue that Count II fails to state a valid cause of action, Count II cannot be dismissed regardless of how the Court rules on plaintiffs' Equal Protection claim in Count I.[10]

CONCLUSION

The Supreme Court has invited a proposal for a partisan gerrymandering standard based on the concept of equal treatment of voters and political parties, pursuant to the Equal Protection

[10] It is well-established that arguments not raised in the movant's opening brief are waived. Thus, defendants cannot expand the scope of their motion by seeking dismissal of Count II in their reply. *See*, *e.g., Spoerle v. Kraft Foods Global, Inc.*, 527 F. Supp. 2d 860, 869 (W.D. Wis. 2007) ("Defendant makes a number of new arguments in its reply brief, none of which is persuasive and in any event may not be considered because plaintiffs had no opportunity to respond to them."); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States*, 2003 WL 23272379, at *2 (W.D. Wis. 2003) (plaintiffs improperly engaged in "an attempt to do an end run around the prohibition against asserting a new legal claim in a reply brief").

Clause and the First Amendment. Plaintiffs' complaint sets forth workable standards of exactly this kind. For the reasons set forth above, defendants' motion to dismiss should be denied.

Respectfully submitted,

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