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

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| 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,<br><br>Plaintiffs,<br><br>v.<br><br>GERALD C. NICHOL, THOMAS BARLAND, JOHN FRANKE, HAROLD V. FROEHLICH, KEVIN J. KENNEDY, ELSA LAMELAS, and TIMOTHY VOCKE,<br><br>Defendants. | ) | No. 15-cv-421-bbc |

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**PLAINTIFFS' SUPPLEMENTAL MEMORANDUM REGARDING STANDING**

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Plaintiffs submit this supplemental memorandum in response to the Court's Order dated November 17, 2015, to further explain why the twelve plaintiffs, who are Democratic voters residing in eleven of Wisconsin's 99 Assembly districts, have standing to challenge Act 43 (the "Current Plan") on a statewide basis.

**INTRODUCTION**

Defendants argue that the Court should look to *United States v. Hays*, 515 U.S. 737, 745 (1995), to decide who has standing to pursue a partisan gerrymandering claim. Under *Hays*, racial gerrymandering claims can only be pursued on a district-by-district basis by minority voters who reside in the affected district. But partisan gerrymandering cases are fundamentally different than racial gerrymandering cases. *See Vieth v. Pennsylvania*, 188 F. Supp. 532, 540 (M.D. Pa. 2002). Plaintiffs here do not complain about the treatment of particular voters in a specific district or region. Rather, they seek to redress the intentional dilution of their voting strength *statewide* based on their political beliefs and affiliations.

The complaint alleges that plaintiffs have been injured by the Current Plan "because it treats Democrats unequally based on their political beliefs and impermissibly burdens their First Amendment right of association." Compl. ¶ 15. A number of the plaintiffs live in districts that were cracked or packed with the purpose and effect of disadvantaging Democratic voters. *See*, *e.g.*, Compl. ¶¶ 60-74. But *all* of the plaintiffs have suffered a common, concrete injury:

> Regardless of where they reside in Wisconsin and whether they themselves reside in a district that have been cracked or packed, all of the plaintiffs have been harmed by the manipulation of district boundaries in the Current Plan to dilute Democratic voting strength. As a result of the statewide partisan gerrymandering, Democrats do not have the same opportunity provided to Republicans to elect representatives of their choice to the Assembly. As a result, the electoral influence of plaintiffs and other Democratic voters statewide has been unfairly, disproportionately, and undemocratically reduced.

Compl. ¶ 16.

In light of the nature of the injury alleged and the relief plaintiffs seek, the one-person, one-vote cases provide a much better analogy for analyzing standing than the racial gerrymandering cases. In the one-person, one-vote cases, even a single voter residing in an overpopulated district has standing to challenge a redistricting plan on a statewide basis on the theory that his or her electoral influence was unconstitutionally diluted. That is true even though the plaintiff may well have been able to elect the representative of his or her choice and the relief requested would also benefit other voters in other overpopulated districts. In those cases, the only way to remedy the injury to the plaintiff is to reconfigure the entire map to eliminate the dilutive effect of the population deviations. So too in this case, the only way to eliminate the unconstitutional burden on the plaintiffs' Equal Protection and First Amendment rights is to restructure the districts to significantly narrow or eliminate the statewide efficiency gap.

When plaintiffs' claims are properly analyzed, it becomes clear that they meet the requirements for standing set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). *First*, plaintiffs have suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* at 560 (internal quotation marks omitted). The intentional dilution of Democratic votes by the systematic packing and cracking of Democratic voters has injured plaintiffs by reducing the proportion of Democratic legislators in the Assembly relative to the number that would have been elected under a balanced map. That injury is concrete and actual, rather than theoretical: it has already occurred in the 2012 and 2014 elections and will persist for the remainder of the decade in the absence of judicial intervention. *See* Compl. ¶¶ 15-27, 55.

*Second*, plaintiffs' injury is "fairly traceable to the challenged action of the defendant"—namely, the enactment of the Current Plan. *Lujan*, 504 U.S. at 560 (internal quotation marks,

ellipses, and alterations omitted). Had the legislature not systematically cracked and packed Democratic voters on a statewide basis, plaintiffs would not have been treated asymmetrically and would not have suffered the harms described above. *See Barnett v. City of Chicago*, 1996 WL 34432, at *6 (N.D. Ill. Jan. 29 1996) ("[T]he Plaintiffs allege that the Defendants created the wards and that those wards caused the Plaintiffs to suffer a dilution of their voting strength. We conclude that, for purposes of standing, that is sufficient to establish a causal connection.").

*Third*, it is "likely, as opposed to merely speculative," that plaintiffs' "injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotation marks omitted). A favorable decision would entail the invalidation of the Current Plan and its replacement by a map (designed by either the legislature or, if the legislature is unable to act, the Court) that is *not* a partisan gerrymander and that does *not* treat plaintiffs' preferred party asymmetrically and dilute plaintiffs' electoral influence. There is no doubt that a suitable remedial map can be drawn. In fact, plaintiffs' expert has already submitted a plan that complies at least as well as the Current Plan with all federal and state criteria, but that reduces the efficiency gap to a level statistically indistinguishable from zero. *See* Compl. ¶¶ 78-80; *see also Barnett*, 1996 WL 34432, at *6 (finding the redressability requirement satisfied in a vote dilution case where plaintiffs "allege[d] that a map could be drawn in accordance with the traditional redistricting standards which would provide a remedy for defendants' unlawful conduct").

**STANDARD OF REVIEW**

"'[W]hen standing is challenged on the basis of the pleadings, we 'accept as true all material allegations of the complaint, and …construe the complaint in favor of the complaining party,' *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *see also Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979)." *Pennell v. City of San Jose,* 485 U.S. 1, 7 (1987). "At the

pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we `presume[e] that general allegations embrace those specific facts that are necessary to support the claim.' (Citation omitted.)" *Lujan,* 504 U.S. at 561.

"The party invoking federal jurisdiction has the burden of establishing [the] elements [required to show standing], but at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." *Family & Children's Center v. School City of Mishawaka*, 13 F.3d 1052, 1058 (7th Cir. 1994). As the Court noted in *Alliant Energy Corp. v. Bie*, 277 F.3d 916, 919 (7th Cir. 2002), "'[c]omplaints need not be elaborate, and in this respect injury (and thus standing) is no different from any other matter that may be alleged generally."

## ARGUMENT

### I. Plaintiffs Have Standing to Bring A Statewide Challenge to The Current Plan.

#### A. Which Aspects of a District Plan Plaintiffs May Challenge Depends on the Type of Claim They Bring.

Standing "turns on the nature and source of the claim asserted." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Redistricting may trigger a variety of different kinds of claims, including one-person, one-vote claims focusing on population deviations among districts; claims under Section 2 of the Voting Rights Act alleging racial vote dilution; racial gerrymandering claims alleging that the legislature acted with excessive racial motivation in drawing certain district lines; and partisan gerrymandering claims like this one. *Who* has standing to bring such claims and *which aspects* of a plan the plaintiffs may challenge depend on the character of the claim itself.

For example, one-person, one-vote claims are inherently statewide. Such claims are based on the assertion that districts throughout a state have been malapportioned, thus overrepresenting certain voters and underrepresenting others. *See Reynolds v. Sims*, 377 U.S. 533, 560 (1964)

(recognizing the "basic principle of equality among voters within a State"). Only voters who live in overpopulated (and therefore underrepresented) districts have standing to sue because they alone have been *harmed* by the malapportionment. *See Baker v. Carr*, 369 U.S. 186, 207-08 (1962) (holding that voters have standing when a plan "disfavors [them] in the counties in which they reside . . . vis-à-vis voters in irrationally favored counties"). But a voter in an overpopulated district is not limited to challenging how his or her particular district lines were drawn. Instead, courts have routinely recognized that voters in an overpopulated district have standing to challenge the entire state-wide plan. *See*, *e.g., Larios v. Perdue*, 306 F. Supp. 2d 1190, 1209 (N.D. Ga. 2003) ("[A]ny underrepresented plaintiff may challenge *in its entirety* the redistricting plan that generated his harm.") That rule makes perfect sense: malapportionment by definition occurs on a statewide basis, as some districts are overpopulated, while others are underpopulated, and thus it must be attacked on a statewide basis as well.

By contrast, a racial vote dilution claim under Section 2 of the Voting Rights Act is regional. The core of a Section 2 claim is that a specific minority group, in a specific region, has been denied the ability to elect its preferred representatives. That means that only minority voters who reside in the affected area have standing to sue. *See LULAC v. Perry*, 548 U.S. 399, 429 (2006); *Pope v. Cty. of Albany*, 2014 WL 316703, at *5 (N.D.N.Y. Jan. 28, 2014) (plaintiffs had standing because they "reside in a reasonably compact area that could support additional [majority-minority districts]"). Furthermore, since the injury plaintiffs in a Section 2 case are seeking to redress is the dilution of their electoral influence in a particular region, the plaintiffs may not challenge all districts throughout the state, but rather are limited to those specific areas in which their electoral influence is allegedly being unlawfully diluted. *See Shaw v. Hunt*, 517 U.S. 899, 917 (1996) (*Shaw II*) ("a § 2 violation is proved for a particular area").

Racial gerrymandering claims are the narrowest type of gerrymandering claims, limited to a specific district. The crux of such claims is that race was the "predominant factor" motivating the creation of a particular district, *Miller v. Johnson*, 515 U.S. 900, 916 (1995), thus "classifying [that district's] citizens by race" and causing the district's representative to "believe that [his or her] primary obligation is to represent only the members of [the minority] group, rather than the[ir] constituency as a whole," *Shaw v. Reno*, 509 U.S. 630, 646-47 (1993) (*Shaw I*). Only residents of the allegedly gerrymandered district have standing to sue because only they "suffer the special representational harms racial classifications can cause in the voting context." *United States v. Hays*, 515 U.S. 737, 745 (1995). Furthermore, district residents only have "standing to challenge the legislation which created that district." *Shaw II*, 517 U.S. at 904. They lack standing to challenge *other* districts as racial gerrymanders because, by definition, they cannot have suffered the special representational harms racial classifications cause in districts in which they do not reside. *See Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015) (holding that a "racial gerrymandering claim" "applies district-by-district" and "does not apply to a State considered as an undifferentiated 'whole'").

Thus, gerrymandering claims run the gamut from district-by-district to statewide, based on the nature of the claim and the rights that are affected. There are no universal rules dictating which plaintiffs have standing and which aspects of a redistricting plan they may challenge. The crucial question for this Court is what kind of claim partisan gerrymandering is—statewide, regional, or district-specific?

**B. Plaintiffs' Partisan Gerrymandering Claim Is Statewide in Nature.**

Figuring out the right answer to the question posed above is complicated by the fact that the Supreme Court has not adopted a theory of partisan gerrymandering and thus there is no

definitive guidance as to the nature and source of such a claim. In *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (plurality opinion), a plurality of the Justices held that "unconstitutional vote dilution" may be "alleged in the form of statewide political gerrymandering." The appellants in *Vieth v. Jubelirer*, 541 U.S. 267, 285-87 (2004) (plurality opinion), also claimed that "'partisan advantage was the predominant motivation *behind the entire statewide plan*,'" and that the plan "'thwart[ed] the plaintiffs' ability to translate a majority of votes into a majority of seats.'" But a plurality in *Vieth* declined to endorse the approaches of either the *Bandemer* plurality or the *Vieth* appellants. *See id.* at 284, 290. Two dissenting Justices in *Vieth* also proposed district-specific standards, though these were rejected as well by the plurality. *See id.* at 317-41 (Stevens, J., dissenting); *id.* at 342-55 (Souter, J., dissenting).[1]

The Court's most recent foray into partisan gerrymandering, however, strongly suggests that a majority of the Justices are open to a theory that treats partisan gerrymandering as an inherently statewide claim. As we have previously noted, in *LULAC v. Perry*, 548 U.S. 399 (2006), five Justices expressed interest in the concept of partisan symmetry: the idea that "the electoral system [should] treat similarly-situated parties equally," so that each party is able to translate its popular support into legislative representation with approximately equal ease. *Id.* at 466 (Stevens, J., concurring in part and dissenting in part); *see also* Pls.' Opp. to Defs.' Mot. to Dismiss at 15-18 (listing the positive comments made by the Justices in *LULAC* about partisan symmetry). Partisan symmetry is intelligible only with respect to a statewide plan as a whole, inasmuch as it requires equal treatment by a state's "electoral system" rather than an individual district. Likewise, in *Ariz. State Legis. v. Ariz. Indep. Redist. Comm'n*, 135 S. Ct. 2652, 2657

[1] In Part II below, we discuss the *Vieth* plurality's inaccurate statement that a majority of the Court (the plurality and Justice Stevens) agreed that "statewide claims are nonjusticiable." 541 U.S. at 292.

(2015), the majority began its opinion by defining "partisan gerrymandering" as "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power." This sort of manipulation can only be carried out on a statewide basis.

In any event, there is no doubt that *plaintiffs'* theory of partisan gerrymandering is statewide, not regional or district-specific. The injury plaintiffs seek to redress is not an inability to elect a representative of their own choice in their own districts or dilution of their electoral influence in a particular region. Rather, it is the Current Plan's dilution of their voting power on a *statewide* basis by denying an entire group of voters (Democrats) equal treatment. Plaintiffs' theory is based on partisan symmetry, which is a statewide concept. *See* Compl. ¶¶ 4, 45. Plaintiffs' proposed test requires a showing of statewide partisan intent on the part of the legislature. *See id.* ¶¶ 6, 8, 31, 82, 89. It also requires a showing of a statewide asymmetric effect through an analysis of the efficiency gap or partisan bias, both of which focus on the statewide results of a districting plan. *See id.* ¶¶ 46-51. Even the justifications for an unbalanced map that defendants could present to avoid plaintiffs' suggested presumption of unconstitutionality—that the imbalance was necessitated by the legislature's efforts to achieve legitimate goals or by the state's underlying political geography—apply statewide as well. *See id.* ¶¶ 83-84, 87.

In light of the statewide nature of plaintiffs' claim, only supporters of the Democratic Party have standing to sue, because they alone have been treated asymmetrically and detrimentally by Wisconsin's electoral system. *See Vieth v. Pennsylvania*, 188 F. Supp. at 540 (holding that a partisan gerrymandering plaintiff "must allege that he or she is a member of a politically salient class" and that "Defendants have utilized the . . . redistricting process to vanquish Plaintiffs' political voice"). Democratic voters have the right to challenge the entire statewide map because it is the layout of all of the state's districts that benefits Republican voters

and candidates and disadvantages Democratic ones. The entire plan is the problem, not any of its districts taken in isolation. *See Vieth*, 188 F. Supp. 2d at 540 ("The constitutional injury lies not in inequality among various individual districts, but rather in the configuration of the districts as a whole when they serve to disadvantage a certain class of voters.").

This result is consistent with the one-person, one-vote cases. Voters who reside in overpopulated districts are the only ones with standing to sue, because only they suffer the harm of underrepresentation. Voters who live in underpopulated districts do not have standing since they are the *beneficiaries* of the plan's malapportionment. *See League of Women Voters v. Nassau Cty. Bd. of Sup'rs*, 737 F.2d 155, 161-62 (2d Cir. 1984); *Fairley v. Patterson*, 493 F.2d 598, 604 (5th Cir. 1974). Here, Democratic voters are in the same position as residents of overpopulated districts, while Republican voters are similarly situated to residents of underpopulated districts. Accordingly, the former have standing to sue while the latter do not.

Furthermore, plaintiffs in one-person, one-vote cases have standing to challenge a statewide map even though they reside and vote in only one district. Because such claims seek to vindicate the plaintiffs' right to equal treatment on a statewide basis, voters living in overpopulated districts have standing to attack a plan in its entirety. One-person, one-vote claimants are *not* limited to asking that the populations of only their own districts be corrected. *See Larios*, 306 F. Supp. at 1210 ("[A]ny plaintiff who . . . lives in an underrepresented district[] has standing to challenge the entire legislative apportionment scheme . . . ."). Analogously, partisan gerrymandering plaintiffs who have standing have the right to contest the statewide district arrangement that disadvantaged their preferred party. They need not resort to requesting that only their own districts' boundaries be adjusted.

### C. Plaintiffs' Injuries Are Not Related to Particular Election Outcomes in Particular Districts.

In addition to asking the parties to analyze standing generally, the Court posed a series of more specific questions. It asked "how a voter who votes for the winning candidate in his or her district suffers a concrete injury" and how "a voter in one district suffers a concrete injury as the result of an election in another district." Order at 3. The implication in these questions is that voters only have an interest in ensuring that their own representatives are fairly elected. But voters also have a legitimate interest in the level of their statewide representation. Again, the one-person, one-vote cases prove the point: voters have an interest of constitutional dimensions in ensuring that their electoral power in the state as whole is not diluted because of a violation of their Equal Protection rights. In the one-person, one-vote cases the dilution is the straight-forward result of giving the voters in an overpopulated district less power than they should have in the state legislature. In the partisan gerrymandering context, the voting strength of adherents of the disfavored particular political party is diluted by wasting more of their votes and thus making it harder for them to convert their votes to seats.

Malapportionment cannot be cured by a voter's ability to elect her candidate of choice in her own district. Nor can an impermissibly large efficiency gap. These are statewide problems that require statewide solutions. Even if a voter votes for the winning candidate in her district, she has still been injured if she supports a party that is less able than its adversary to convert its statewide votes into statewide seats. By the same token, a voter whose preferred candidate is *defeated* in her district has *not* been injured if she backs a party that is treated symmetrically by the state's plan as a whole. While the ability to elect one's preferred candidate in one's own district is an important consideration in other redistricting contexts, such as Section 2 of the Voting Rights Act, it is immaterial in the partisan gerrymandering context. *See Cousins v. City*

*Council of City of Chicago*, 466 F.2d 830, 845 (7th Cir. 1972) (holding that plaintiff's interest in "the [citywide] voting strength of his group" gave rise to standing "even though the particular plaintiff is in a ward where his group is in the majority").

To make the point more concrete, a Democratic voter in a Wisconsin district that elected a Democratic candidate in 2012 and 2014 has still been harmed by the Current Plan's extreme partisan tilt. Thanks to this tilt, there are fewer Democratic officeholders in the Assembly to join with that voter's representative to advocate and vote for the policies the voter favors. In fact, one of the mechanisms through which Wisconsin's partisan gerrymander was constructed was the overconcentration of Democratic voters in a relatively small number of districts. So the location of a Democratic voter in a heavily Democratic district is often a *sign* of gerrymandering, not proof that the voter has not been injured.

The same analysis applies to the Court's second question as to how "a voter in one district suffers a concrete injury as the result of an election in another district." The answer is that the concrete injury that plaintiffs have suffered is a reduction in the total number of legislative seats won by Democratic candidates, relative to a balanced map, because of the Current Plan's rampant packing and cracking. This injury is not solely, or even primarily, attributable to the election results in one plaintiff's individual district. Rather, it is the product of many elections across the state that Republican candidates won by relatively small margins (due to cracking) and fewer elections that Democratic candidates won by very large margins (due to packing). The Current Plan's enormous efficiency gap demonstrates that all of the plaintiffs suffered a concrete injury, which was caused by all of the elections held pursuant to the Plan.

This same interdistrict logic applies to the harm in one-person, one-vote cases. There too, a plaintiff's grievance cannot be discerned by examining her district in isolation, since nothing

about the district alone reveals whether it is underpopulated or overpopulated. Instead, a plaintiff's district must be considered along with all of the other districts in the plan, so that the ideal population and the population deviation of each district can be calculated. Accordingly, in both the malapportionment and partisan gerrymandering contexts, a plaintiff's injury necessarily follows from conditions in districts other than her own.

The Court also asked why, under the standing approach adopted by the *Vieth* district court and recommended by plaintiffs, "it is appropriate to consider harm to those who are not parties to the case." Order at 4. The answer is that, in every kind of redistricting case, courts have always been satisfied by the presence of at least one plaintiff who has actually been injured. Courts have never insisted that *every* individual who has been harmed by a district plan be included as a party. For instance, in the one-person, one-vote cases, a single voter residing in a single overpopulated district has standing to challenge all of the plan's malapportionment. *See Baker*, 369 U.S. at 204-05 (finding standing where residents of five overpopulated districts brought suit); *Cousins*, 466 F.2d at 845 (observing that "[a]lthough reapportionment litigation necessarily affects the interests of a large class," "the class action device is not essential").[2]

Similarly, cases under Section 2 of the Voting Rights Act typically feature a handful of minority voters as plaintiffs, rather than joining all minority voters in the area of the alleged vote dilution. *See, e.g.*, *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994) (plaintiffs were "a group of Hispanic voters"). In racial gerrymandering cases as well, the claimants are generally a small number of aggrieved individuals, not all residents of the contested district. *See, e.g.*, *Shaw I*, 509

[2] The same principle applies in other contexts as well. In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 688 (1973), the Court noted that "[t]o deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody."

U.S. at 636-37 ("Appellants are five residents of Durham County . . . ."). In all of these contexts, because of the fundamental nature of the rights potentially threatened by redistricting, a single plaintiff who has genuinely been harmed may attack all aspects of the plan that are responsible for her injury. *See Akins*, 524 U.S. at 24-25 (noting that standing is easily established when a plaintiff's injury is "directly related to voting, the most basic of political rights"); *Arbor Hill Concerned Citizens Neighborhood Ass'n. v. Cty. of Albany*, 2003 WL 21524820, at *4 (N.D.N.Y. July 7, 2003) (holding in a vote dilution case that "[b]ecause at least one plaintiff satisfies the requirements for standing," the litigation could proceed).

## II. A Majority of the Supreme Court Has Not Deemed Statewide Partisan Gerrymandering Claims Nonjusticiable.

While most of the Court's Order asked the parties to address questions of standing, the Court also raised a separate justiciability issue: "the statement of the plurality in *Vieth*, 541 U.S. at 292, that a majority of the Court (the four-justice plurality and Justice Stevens) agree that 'statewide claims are nonjusticiable.'" Order at 4. This statement was incorrect. Justice Stevens actually declared in his *Vieth* dissent that, in his view, plaintiffs *could* bring statewide gerrymandering claims. Justice Stevens also confirmed this position in opinions he wrote before and after *Vieth*. Moreover, any intimations to the contrary are the result of Justice Stevens' idiosyncratic view, shared by no other Justice, that racial and partisan gerrymandering are fundamentally the same cause of action. It is thus unsurprising that no court since *Vieth* has thought that statewide claims have been precluded by a majority of the Justices.

Justice Stevens could not have been clearer in his *Vieth* dissent that plaintiffs should be able to mount statewide partisan gerrymandering claims. At one point in his opinion, he wrote, "The plurality opinion in *Bandemer* dealt with a claim that the Indiana apportionment scheme . . . discriminated against Democratic voters on a statewide basis. In my judgment, the *Bandemer*

Court was correct to entertain that statewide challenge." 541 U.S. at 327 (Stevens, J., dissenting) (internal citations omitted). At another point, he stated even more explicitly, "I surely would not suggest that a plaintiff would never have standing to litigate a statewide claim." *Id.* at 327 n.16; *see also id.* at 317 (noting his "agreement" with the approaches of the other dissenters, all of whom were willing to entertain statewide claims). These categorical pronouncements mean that the plurality mischaracterized Justice Stevens' stance, and thus that a majority of the Court has never held that statewide claims are nonjusticiable.

That Justice Stevens considered statewide claims to be justiciable is also apparent from his opinions before and after *Vieth*. In *Karcher v. Daggett*, 462 U.S. 725 (1983), he laid out an entire framework for adjudicating claims that one party's supporters have been disadvantaged statewide. Among other elements, plaintiffs would have to establish that "in the State as a whole, their proportionate voting influence has been adversely affected," which could be shown through a "statewide statistical analysis." *Id.* at 754 (Stevens, J., concurring). In *Bandemer*, Justice Stevens joined Justice Powell's opinion in full, which would have struck down Indiana's state house and state senate plans in their entirety. *See* 478 U.S. at 161, 185 (Powell, J., concurring in part and dissenting in part). And in *LULAC*, Justice Stevens was the Court's most enthusiastic advocate for the concept of partisan symmetry—a concept that is coherent only on a statewide basis. *See* 548 U.S. at 466-67 (Stevens, J., concurring in part and dissenting in part). Justice Stevens would also have invalidated Texas's whole congressional plan because it "impose[d] a severe statewide burden on the ability of Democratic voters and politicians to influence the political process." *Id.* at 464.

It is true that certain language in Justice Stevens' *Vieth* dissent suggests that plaintiffs might not have standing to bring statewide claims. But this language is *entirely* attributable to

Justice Stevens' unique view that "racial and political gerrymanders are species of the same constitutional concern." 541 U.S. at 327 (Stevens, J., dissenting); *see also Karcher*, 462 U.S. at 749 (Stevens, J., concurring) ("[R]acial, religious, ethnic, and economic gerrymanders are all species of political gerrymanders." (internal quotation marks omitted)). Because of this view, Justice Stevens believed that *Hays*' holding that *racial* gerrymandering plaintiffs must live within the districts they challenge had to apply to *partisan* gerrymandering plaintiffs too. *See Vieth*, 541 U.S. at 327 & n.16 (Stevens, J., dissenting) (asserting that "*Hays* has altered the standing rules for gerrymandering claims" and granting *Hays* "*stare decisis* effect in the political gerrymandering context").

No other Justice appears to share Justice Stevens' position on the equivalence of racial and partisan gerrymandering claims. Indeed, the *Vieth* plurality *refused* to extend the "predominant factor" test of the racial gerrymandering cases to the partisan gerrymandering context. *See id.* at 285 (plurality opinion) ("Vague as the 'predominant motivation' test might be when used to evaluate single districts, it all but evaporates when applied statewide."). Justice Kennedy also observed that racial gerrymandering "implicate[s] a different inquiry" from partisan gerrymandering," because "[r]ace is an impermissible classification" while "[p]olitics is quite a different matter." *Id.* at 307 (Kennedy, J., concurring in the judgment). Accordingly, at least a majority—and perhaps all—of the Justices oppose equating racial and partisan gerrymandering, and so disagree with the basis for Justice Stevens' comments about statewide standing.

Finally, it is significant that *no* court since *Vieth* has considered statewide partisan gerrymandering claims to be precluded by that decision. To the contrary, as demonstrated below, courts have generally engaged with the merits of plaintiffs' proposed standards, many of them

statewide in nature, before concluding that they were nonjusticiable. Notably, in *Radogno v. Illinois State Bd. of Elections*, 2011 WL 5868225, at *2-3 (E.D. Ill. Nov. 22, 2011), the court listed *seven* approaches that the Court rejected in *Vieth* and *LULAC*. Nowhere on this extensive list were statewide claims as a category, for the simple reason that the *Vieth* plurality's inaccurate statement about their viability has universally been ignored.

## III. No Post-*Vieth* Case Holds That Plaintiffs in a Partisan Gerrymandering Case Lack Standing to Seek Statewide Relief.

There is no decision, by any court, post-*Vieth*, holding (i) that plaintiffs lack standing in a partisan gerrymandering case because the plaintiffs are registered voters in individual districts alleging a statewide harm, or (ii) that plaintiffs in a partisan gerrymandering case can seek relief only in their own particular districts, rather than statewide. This Court should not be the first.

Fifteen decisions have considered partisan gerrymandering claims since the Supreme Court's decision in *Vieth*. Of those fifteen, five cases affirmatively considered the issue and found that the plaintiffs had standing to sue.[3] One assumed standing and then rejected plaintiffs' argument on other grounds.[4] The remaining nine did not discuss standing. Since, as this Court has noted, a federal court must satisfy itself that it has jurisdiction before proceeding to the

[3] *Kidd v. Cox,* 2006 WL 1341302 (N.D.Ga. 2006) at *4-5 (voters as plaintiffs); *Perez v. Texas*, 2011 WL 9160142 (W.D.Tex. 2011) at *9 (Texas Democratic party, legislators, and voters as plaintiffs; *Radogno v. Illinois State Bd. of Elections*, 2011 WL 5025251 (N.D.Ill. 2011) at *4 (legislators, Illinois Republican party, and voters as plaintiffs); *League of Women Voters v. Quinn*, 2011 WL 5143044 (N.D.Ill. 2011) at *1, *aff'd*, *sub nom. League of Women Voters of Illinois v. Quinn*, -- U.S. --, 132 S.Ct. 2430 (2012) (League of Women Voters of Illinois as plaintiff); *Alabama Legislative Black Caucus v. Alabama*, 988 F.Supp.2d 1285, 1297 (N.D. Ala.), *appeal dismissed*, -- U.S. --, 134 S.Ct. 694 (2013) (Alabama Legislative Black caucus, Alabama Association of Black County Officials, legislators, and county officials as plaintiffs).

[4] *Fletcher v. Lamone,* 831 F.Supp.2d 887, 903-04 (D.Md. 2011), *aff'd*, -- U.S-- , 133 S.Ct. 29 (2012) (voters as plaintiffs).

merits, we can only assume that these courts believed that the plaintiffs in those cases did indeed have standing.[5]

**IV. At The Very Least, Plaintiffs Should Be Permitted to Amend.**

For all of the reasons outlined above, plaintiffs have standing to pursue statewide claims. But if the Court holds otherwise, plaintiffs seek leave to amend their complaint to cure any deficiency. If the Court were to conclude that plaintiffs must be added from all 99 Assembly districts in order to ensure that plaintiffs collectively have standing to challenge the Current Plan on a statewide basis, then plaintiffs would add the necessary plaintiffs. In addition or alternatively, plaintiffs would seek leave to transform this case into a class action on behalf of all Democratic voters in the state. The end result would be the same, although the procedural posture of the case would become more complicated. Leave to amend should ordinarily be liberally granted, particularly where a complaint has been dismissed and the proposed amendment would not be futile. *Barry Aviation v. Land O'Lakes Municipal Airport*, 377 F.3d 682, 687 (7th Cir. 2004).[6]

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[5] *Shapiro v. Berger*, 328 F.Supp.2d 496 (S.D.N.Y. 2004) (candidate and voters as plaintiffs); *State ex rel. Cooper v. Tennant*, 730 S.E.2d 368 (W.Va. 2012) (legislators and county officials, in their official and individual capacity, as plaintiffs); *Gonzalez v. State Apportionment Comm'n,* 53 A.3d 1230 (N.J.Super. A.D. 2012) (voters and tea party members as plaintiffs); *Radogno v. Ill.State Bd. of Elec.*, 2011 WL 5868225 (N.D.Ill. 2011 ("Radogno II") (legislators, Illinois Republican Party, and voters as plaintiffs); *Committee for a Fair and Balanced Map v. Ill. State Bd. of Elec.*, 835 F.Supp.2d 563 (N.D.Ill. 2011) (non-profit organization, legislators, and voters as plaintiffs); *Baldus v. Members of Wisc. Gov't Accountability Bd*., 849 F.Supp.2d 840 (E.D.Wisc. 2012) (legislators and voters as plaintiffs); *Ala. Legislative Black Caucus v. Ala.*, 988 F.Supp.2d 1285 (M.D.Ala. 2013) (Alabama Legislative Black caucus, Alabama Association of Black County Officials, legislators, and county officials as plaintiffs); *Perez v. Perry*, 26 F.Supp.3d 612 (W.D. Tex. 2014) (Texas Democratic party, legislators, and voters as plaintiffs).

[6] It is common to amend a complaint to add additional plaintiffs. *See, e.g., Hawkins v. Groot Industries, Inc.*, 210 F.R.D. 226 (N.D. Ill. 2002); *Riley-Jackson v. Casino Queen, Inc.*, 2008 WL 3992685 (S.D. Ill.2008); *Turner v. LaFond*, 2009 WL 3400987 (N.D. Cal. 2009).

## CONCLUSION

Plaintiffs have standing to bring a complaint challenging the Current Plan on a statewide basis. Defendants' motion to dismiss on standing grounds should be denied.

Respectfully submitted,

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