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' REPLY TO DEFENDANTS' SUPPLEMENTAL BRIEF ON STANDING

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INTRODUCTION

There is no dispute (1) that the contours of standing are determined by the character of a claim and (2) that plaintiffs have asserted a partisan gerrymandering claim that is statewide in nature. As demonstrated in plaintiffs' Supplemental Memorandum ("Pls' Supp. Br.") and below, that is enough, in and of itself, to show that plaintiffs have standing to challenge the Current Plan in its entirety.

Defendants dispute that proposition on the ground that the only "concrete" injury a voter can possibly have is an inability to elect a candidate in his or her own district. According to defendants, voters have no interest in the make-up of the Assembly as a whole and thus no ability to complain if their party's statewide voting strength has been intentionally diluted. Defendants contend that this is an example of the kind of "generalized grievance" that is not enough to confer standing on plaintiffs. All of these arguments should be rejected.

Under the Equal Protection Clause and the First Amendment, plaintiffs have a right to an electoral system that does not treat them differently because of their political beliefs. That right is infringed by a plan that intentionally packs and cracks Democratic voters in order to make it much more difficult for them to collectively convert their votes to seats than it is for Republican voters. The injury is real and substantial: because they have been put at a structural disadvantage by a discriminatory plan, Democratic voters in Wisconsin have already had their representation in the Assembly diluted and that dilution is likely to continue for the life of the Current Plan. Far from being a "generalized grievance," shared equally by *all* of the public, this is an injury suffered only by supporters of *Democratic* candidates.

Other redistricting cases have recognized that voters' interests are not limited to their own districts. Rather, they extend to the broader regions in which voters live (in cases under

Section 2 of the Voting Rights Act) and to the state as a whole (in one-person, one-vote and partisan gerrymandering cases). Put simply, voters have interests in *both* their ability to fairly elect representatives in their own individual districts *and* their collective ability to fairly elect representatives throughout the state.

Finally, defendants are wrong in arguing that *Vieth v. Jubelirer*, 541 U.S. 267 (2004), rendered inoperative the district court's standing analysis in *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532 (M.D. Pa. 2002). In *Vieth*, the Supreme Court rejected as unmanageable the specific gerrymandering standard endorsed by the plurality in *Davis v. Bandemer*, 478 U.S. 109 (1986), and the standard offered by the plaintiffs in *Vieth*. But the Court did *not* reject *Bandemer*'s recognition of gerrymandering as a statewide claim, on which the district court's standing analysis was based. Nor did it dismiss the plaintiffs' claims in *Vieth* for lack of standing.[1] In fact, since *Vieth*, a majority of the Court has twice confirmed the statewide nature of gerrymandering claims, in *LULAC v. Perry*, 548 U.S. 399, 420 (2006), and *Ariz. State Legis. v. Ariz. Indep. Redist. Comm'n*, 135 S. Ct. 2652, 2657 (2015). The district court's approach to standing in *Vieth* thus remains sound.

I. Defendants Have Conceded All of the Points Necessary to Establish Plaintiffs' Standing to Challenge the Current Plan in Its Entirety.

Boiled down to its essentials, plaintiffs' standing argument has two components. The first is that, in the redistricting context, the scope of standing follows from the nature of the claim, which can be district-specific, regional, or statewide. Second, partisan gerrymandering, like malapportionment, is an inherently statewide claim, directed at vote dilution on a statewide basis. Together, these points mean that plaintiffs who have been injured by a gerrymandered district

[1] Plaintiffs' Supplemental Memorandum demonstrates (at 13-16) that a majority in *Vieth* did *not* conclude that partisan gerrymandering claims were nonjusticiable.

plan (*i.e.*, supporters of the party disadvantaged by the plan) have standing to challenge the plan in its entirety. This is exactly the same outcome as in one-person, one-vote cases, in which plaintiffs who have been harmed by a plan (*i.e.*, residents of overpopulated districts) have standing to attack the plan as a whole. *See* Pls' Supp. Br. at 4-5.

Defendants do not contest either premise of plaintiffs' argument. On the contrary, they agree that the contours of standing are determined by the nature of the claim. *See* Defs' Supp. Br. at 9 ("standing analysis . . . is intertwined with [the] substantive legal theory"). Defendants also agree that plaintiffs have asserted a "statewide legal theory" by challenging the entire Current Plan, on the ground that it deliberately prevents popular support for Democratic candidates from translating as efficiently into Democratic legislative representation. *See* Defs' Supp. Br. at 3; *id.* at 5 ("[P]laintiffs claim they are injured because Democrats cannot translate their total statewide votes into legislative seats as easily as Republicans can."); *id.* at 6 ("[T]he plaintiffs' legal theory is only concerned with the overall statewide results. . . . The important issue in plaintiffs' claim is the overall statewide results . . . .").

Having conceded these points, defendants cannot plausibly contest plaintiffs' standing to challenge the Current Plan as a whole. If it is all of the Current Plan that intentionally disadvantages Democratic voters and candidates, and if a statewide claim necessarily entails standing to attack a plan on a statewide basis, then defendants are left with no legal ground to stand on. Whether plaintiffs can *prevail* on this claim is beside the point. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("standing *in no way* depends on the merits of the plaintiff's contention that particular conduct is illegal") (emphasis added). Having articulated a statewide injury and asserted a statewide challenge, plaintiffs have standing to pursue that claim, whether they ultimately prevail or not.

II. Voters Have a Legitimate Interest in Their Statewide Representation.

Defendants repeatedly argue that plaintiffs lack standing to pursue a statewide claim because voters only have an interest in the outcomes of elections in their own districts. *See* Defs' Supp. Br. at 3 (claiming that voters are unaffected "by the election of representatives that do not represent them and for whom they cannot vote for or against"); *id.* at 6 ("what the Plaintiffs do" is "vote for localized representatives"). This is why, according to defendants, plaintiffs do not satisfy the traceability and redressability requirements set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992): there is no necessary link between the Current Plan and a voter's ability to elect her preferred candidate in her own district, and no guarantee that a new map would enhance this ability. *See* Defs' Supp. Br. at 3-4. The flaw in this argument lies in defendants' misconception of voters' interests. As recognized in the malapportionment and the partisan gerrymandering cases, voters have a legitimate interest not only in choosing their individual district representatives, but also in their collective legislative representation.

This broader interest was described in the foundational one-person, one-vote case, *Reynolds v. Sims*, 377 U.S. 533, 565 (1964), as "each and every citizen['s] inalienable right to full and effective participation in the political processes of his State's legislative bodies." The *Reynolds* Court added that because "legislatures are responsible for enacting laws by which all citizens are to be governed," "they should be bodies which are collectively responsive to the popular will." *Id.* Plainly, these concerns about effective participation in legislative processes, and the collective responsiveness of legislatures to the will of the people, are not restricted to voters' individual districts. Rather, they extend to the makeup of the legislature in its entirety, which as an institution enacts the policies that shape the lives of voters throughout the state. *See* Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 Tex. L. Rev. 1705,

1717 (1993) ("*Reynolds* sought to protect the governance rights of the majority, which was unable to elect a legislature whose overall composition reflected its preferences.").

Similarly, in *Bandemer*, the plurality characterized the interest of "Democratic voters over the State as a whole" as relating to their "direct or indirect influence on the elections of the state legislature as a whole." 478 U.S. at 127, 133 (plurality opinion); *see also id.* at 141 (stating that a violation is established when redistricting "affects election results and political power statewide"). Justice Powell and Justice Stevens agreed with this characterization, commenting that "[t]he concept of 'representation' necessarily applies to groups: groups of voters elect representatives, individual voters do not." *Id.* at 167 (Powell, J., concurring in part and dissenting in part); *see also id.* at 170 ("[I]t defies political reality to suppose that members of a [disadvantaged] party have as much political influence over state government as do members of the [gerrymandering] party."). Again, these concerns obviously cannot be confined to the four corners of voters' own districts. Instead, they involve the overall composition and operation of the state legislature, in which voters have at least as much of an interest as in their specific districts' representation.

Once plaintiffs' interests are understood to include their collective legislative representation, it is clear that all of *Lujan*'s requirements are satisfied. The Current Plan's enormous (and intentional) pro-Republican efficiency gap injures all Democrats in Wisconsin by diluting the collective value of their individual votes on a statewide basis. The Plan's gap does so even though, as defendants note, it derives from "the election of representatives that do not represent [plaintiffs] and for whom they cannot vote for or against." Defs' Supp. Br. at 3. Likewise, the reduction of plaintiffs' statewide representation is traceable to the enactment of the Plan, whose authors deliberately and successfully set out to achieve exactly this goal. This

traceability is not undercut by the fact that the Plan's impact stems from "choices by other voters." *Id.* And plaintiffs' collective injury would be redressed by the Plan's invalidation and replacement with a balanced map under which their *opportunity* to convert their votes to seats on a statewide basis would not be unconstitutionally skewed. That this relief depends on the election of "statewide representatives, most of whom the plaintiffs do not and cannot vote for or against," is immaterial. *Id.* at 4.

III. Plaintiffs Do Not Allege a "Generalized Grievance" Because Only a Subset of the Public—Supporters of Democratic Candidates—Has Standing Under Their Theory.

Defendants also contend that plaintiffs seek to remedy a generalized grievance, indistinguishable from that of the public at large and not "personal" to any of them. Defendants argue that the alleged harm to plaintiffs is therefore not "concrete and particularized." Lujan, 504 U.S. at 560. *See* Defs' Supp. Br. at 2 ("[T]hey allege generalized concerns or grievances related to the fact that they would like more state representatives identifying as Democrats to be elected"); *id.* at 5 (the claim is not "personal" to plaintiffs). This argument should also be rejected.

Courts deem an injury too general to support standing only when it is shared equally by *all* of the public. In *Lujan* itself, the Court held that a plaintiff "claiming only harm to his *and every citizen's* interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him *than it does the public at large*[] does not state an Article III case or controversy." 504 U.S. at 573-74 (emphasis added). Likewise, in *Fed. Election Comm'n v. Akins*, 524 U.S. 11 (1998), the Court held in an electoral case that a generalized grievance is one suffered "in common with people generally" and based on "the public's interest in the administration of the law." *Id.* at 24 (internal quotation marks omitted). The *Akins* Court distinguished a situation "where a harm is concrete, though widely shared," noting that the Court

had found injury in fact in such cases, especially where the claims were "directly related to voting, the most basic of political rights." *Id.* at 24-25.

Here, it is clear that *all* Wisconsin residents do not have standing to challenge the Current Plan under plaintiffs' theory. Supporters of the Republican Party, or of no party, lack standing because they have not been disadvantaged in any way by the Plan. Plaintiffs therefore do not raise a generalized grievance, as that term has been construed by the Supreme Court, because only a *subset* of Wisconsin's population—namely, voters who back the Democratic Party—claim an injury in fact. While this may be a sizeable group, the Supreme Court has made clear that "widely shared" injuries suffice to produce standing when "voting, the most basic of political rights" is at stake. *Id.*

Defendants argue that plaintiffs' injuries are *too* widely shared because they have been incurred by all Democrats in Wisconsin. *See* Defs' Supp. Br. at 1, 2, 5. But defendants do not even attempt to distinguish this scenario from the one-person, one-vote cases, in which all residents of overpopulated districts, all around the state, have standing. In fact, the shares of voters who have standing in malapportionment and in partisan gerrymandering cases are usually very similar. The typical malapportioned plan overpopulates many districts and underpopulates many as well, resulting in standing for all of the residents of the former. *See, e.g.*, *Harris v. Ariz. Indep. Redist. Comm'n*, 993 F. Supp. 2d 1042, 1049 (D. Ariz. 2014), *probable jurisdiction noted*, 135 S. Ct. 2926 (2015) (Arizona district plan that overpopulated eighteen districts and underpopulated twelve). Likewise, the typical partisan gerrymander benefits one major party and disadvantages the other, leading to standing for all of the handicapped party's adherents.

In any event, the complaint here alleges that a number of the plaintiffs live in districts where Democrats were packed or cracked with the purpose and effect of skewing statewide

election results. *See* Compl. ¶¶ 60-74. Those individuals have suffered a "personal" harm because their own district boundaries have been directly affected. Indeed, those who reside in districts that have been "cracked" suffer precisely the injury defendants seem to admit would be sufficient to give them standing because they are less able to elect the candidates of their choice. At the very least, plaintiffs who reside in districts that have been cracked and packed should be able to challenge the entire plan. Again, the one-person, one-vote cases provide a good analogy. Voters who reside in overpopulated districts have standing to challenge the statewide plan. The same should be true of Democratic voters who reside in districts that have been cracked or packed. Indeed, if even these voters were deemed to lack standing to bring a statewide partisan gerrymandering challenge, then *no one* would be able to do so.

IV. The Standing Analysis Adopted by the *Vieth* District Court Remains Applicable.

Finally, defendants argue that the standing analysis adopted by the district court in *Vieth* —which properly acknowledged voters' interest in their collective legislative representation— should be rejected because it relied on *Bandemer*'s substantive standard for partisan gerrymandering, which the Supreme Court declined to adopt in *Vieth*. *See* Defs' Supp. Br. at 8-11. In fact, the district court's analysis rested not on *Bandemer*'s specific standard, but rather on that case's recognition of partisan gerrymandering as a statewide claim, which remains good law today. Defendants also err by attempting to link the scope of standing to unrelated aspects of the merits of *Bandemer*'s standard.

That the *Vieth* district court's analysis was driven by the statewide nature of partisan gerrymandering claims is undeniable. The court did not even *cite* the legal standard adopted in *Bandemer*—that district lines must "consistently degrade . . . a group of voters' influence on the political process as a whole." 478 U.S. at 143 (plurality opinion). Instead, the court focused on

the statewide theory underlying these claims, which condemns "the configuration of the districts as a whole when they serve to disadvantage a certain class of voters." 188 F. Supp. 2d at 540; *see also id.* "([T]he injury is done to the entire identifiable political group."). Accordingly, the continuing applicability of the court's analysis is unaffected by the Supreme Court's subsequent rejection of *Bandemer*'s standard. Instead, it hinges on whether statewide partisan gerrymandering claims are still cognizable.

As plaintiffs have previously explained, they plainly are. Five Justices in *Vieth* were unwilling to preclude statewide claims. *See* Pls' Supp. Br. at 13-16. In *LULAC*, the same 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 statewide support into statewide representation with approximately equal ease. 548 U.S. at 466 (Stevens, J., concurring in part and dissenting in part). And in *Ariz. State Legis.*, a majority of the Court again conceived of partisan gerrymandering in statewide terms, 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 2657. Since statewide claims remain viable, the district court's conclusion that plaintiffs who are adherents of the disadvantaged party have standing to challenge plans in their entirety on partisan gerrymandering grounds remains correct as well.

In a further attempt to muddy the standing analysis, defendants claim that the plaintiffs in *Vieth* had standing to attack statewide plans under *Bandemer* only because of the stringency of the standard that case adopted. *See* Defs' Supp. Br. at 11 ("The more generalized nature of the injury recognized in *Bandemer* went hand-in-hand with the high burden of proof the *Bandemer* standard demanded of plaintiffs."). But defendants offer no support for this assertion, nor is any available. In fact, as noted above, the Supreme Court has cautioned that "standing *in no way*

depends on the merits of the plaintiff's contention that particular conduct is illegal." *Warth*, 422 U.S. at 500 (emphasis added). What standing *does* depend on, in the redistricting context, is the kind of claim that is advanced. The gerrymandering claims in *Bandemer*, *Vieth*, and *LULAC* were all statewide in nature, which is why the plaintiffs in all of those cases had standing to contest the plans in their entirety. The same is true here.

In any event, the burden of proof under plaintiffs' proposed standard is *not* significantly lower than the *Bandemer* standard and *does* "limit judicial involvement in the redistricting process." Defs' Supp. Br. at 11. Relief is available under plaintiffs' proposal only if (1) a plan is designed with partisan intent; (2) the plan's partisan asymmetry, assessed using a reliable metric such as the efficiency gap or partisan bias, is egregious relative to historical norms; and (3) the plan's partisan asymmetry is not the result of compliance with legitimate districting criteria or the state's underlying political geography. *See* Compl. ¶¶ 81-89. The vast majority of plans would be left untouched by this approach, leaving only blatant gerrymanders like the Current Plan to be struck down by the courts. Accordingly, even if there were any authority for the notion that the scope of standing is tied to a standard's strictness, it would not salvage defendants' argument.

CONCLUSION

Defendants' motion to dismiss on standing grounds should be denied.

Respectfully submitted,

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