UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

WILLIAM WHITFORD, et al.

Plaintiffs,

Case No. 3:15-CV-00421-jdp

v.

BEVERLY R. GILL, et al.,

Defendants.

BRIEF IN SUPPORT OF WISCONSIN STATE ASSEMBLY'S MOTION TO INTERVENE PURSUANT TO FRCP 24(A) & (B)

INTRODUCTION

In *Sixty-Seventh Minnesota State Senate v. Beens,* the Supreme Court held that a state legislative body was a proper mandatory intervenor in an apportionment lawsuit even though there was another State defendant present in the action. The Court's rationale was straightforward and unassailable: a legislative body is directly affected by the decree in a case involving the validity of its legislative districts, and thus has a substantial interest in the outcome.

Here, plaintiffs' lawsuit challenges the validity of all 99 Assembly districts. A decree from this court will directly affect the Wisconsin State Assembly. *Beens* instructs that state legislative bodies are proper intervenors under these circumstances.

Moreover, this motion is filed before any scheduling order has been entered or any discovery has taken place in this second phase of this litigation. It is thus timely.

Respectfully, the Wisconsin State Assembly requests the Court grant it defendant-intervenor status.

ABOUT PROPOSED-INTERVENORS

The Wisconsin State Assembly is one of the two bodies comprising Wisconsin's bicameral legislative branch.[1] The members of the Wisconsin State Assembly are "chosen biennially, by single districts, … by the qualified electors…."[2] Today, there are 99 Assembly districts, and thus, 99 representatives of the Assembly.[3]

The Wisconsin Constitution expressly charges the legislature with the responsibility of creating new legislative districts after each federal census.[4] The legislature fulfilled this responsibility for the current decennial when it enacted 2011 Wisconsin Act 43. Plaintiffs challenge the constitutionality of Act 43's Assembly district lines.[5]

ARGUMENT

I. Proposed-Intevenors Are Entitled To Intervene As A Right

Federal Rule of Civil Procedure 24(a) entitles a person to intervene when the proposed-intervenor:

- Files a timely motion;
- Has an interest in the subject of the action;

[1] Wis. Const. Art. IV, § 1.
[2] Wis. Const. Art. IV, § 4.
[3] Wis. Stat. § 4.001.
[4] Wis. Const. Art. IV, § 3.
[5] *See* Amend. Compl. (Dkt. # 201), ¶¶ 179-82 (Relief Requested).

- Is situated such that disposing of the matter may impair or impede proposed-intervenor's ability to protect its interest; and
- Does not have its interests adequately represented by an existing party.[6]

These elements are met here.

A. Proposed-Intevernors Motion Is Timely

Whether a motion to intervene is timely is a question "committed to the sound discretion of the district court"[7] and depends on an evaluation of multiple factors. These may include (1) the length of time the intervenor knew or should have known of its interest in the case; (2) prejudice to the parties caused by any delay; (3) the resulting prejudice to intervenors if the motion is denied; and (4) any other unusual circumstances.[8]

To be sure, Proposed-Intervenors concede they became aware of this action at or around the time the case was filed in this Court in July of 2015. Nevertheless, the legislature has been significantly involved in this litigation. Legislative employees responded to third-party discovery and testified at the May 2016 trial.[9] Thus, the parties have already had the benefit of discovery from legislative employees. Additionally, the United States Supreme Court permitted the Wisconsin State Assembly and Senate, as amici, to present oral argument.[10]

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[6] Fed. R. Civ. P. 24(a)(2); *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658 (7th Cir. 2013) (cleaned up to remove internal quotations an alterations).

[7] *Shea v. Angulo*, 19 F.3d 343, 348 (7th Cir. 1994).

[8] *South v. Rowe*, 759 F.2d 610, 612 (7th Cir. 1985).

[9] *See, e.g.,* Dkt ## 113, 118, 147-48.

[10] *Gill v. Whitford*, 138 S.Ct. 52 (2017) (order granting divided argument to Wisconsin State Senate and Wisconsin State Assembly).

Moreover, while this case is three years old, it is also brand new. This Court lacked subject-matter jurisdiction over the first phase of the case.[11] As a result, the initial trial proceedings have no preclusive effect that would foreclose the opportunity of any party (whether new or existing) from asserting claims and defenses.[12] Nor does the doctrine of law of the case apply.[13] Further, the amended complaint adds numerous parties, revises the "vote dilution" claim,[14] and contains a brand new claim[15]—one which has not been the subject of discovery or any adversarial proceedings. Similarly, while the Supreme Court's decision did not rule on significant merits questions, the attached brief in support of the Wisconsin State Assembly's

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[11] *Gill v. Whitford,* -- U.S. --, 138 S.Ct. 1916, 1934 (2018). The *Gill* Court acknowledged that it was uncommon to remand the case back to the district court instead of dismissing it outright. *Id.* at 1933-34. Were the usual course to have been followed, this would have been a brand new case in every respect.

[12] *Cf. Montana v. United States*, 440 U.S. 147, 153 (1979) ("A fundamental precept … embodied in the related doctrines of collateral estoppel and res judicata is that a right, question or fact distinctly put in issue and directly determined by a court of *competent jurisdiction* … cannot be disputed in a subsequent suit between the same parties or their privies.") (emphasis added; internal quotation deleted).

[13] The law of the case doctrine does not apply where an issue that was decided by a lower court was appealed. *Cf., Schering Corp. v. Illinois Antibiotics Co.*, 89 F. 3d 357, 358 (7th Cir. 1996) (law of the case doctrine applies where issue decided by lower court could have been appealed but was not). Here, the justiciability of political gerrymandering claims was a subject of the appeal. *Gill*, 138 S.Ct. at 1929 (noting justiciability issue was raised but would not be decided).

[14] Plaintiffs now attempt to plead district-specific harms, *see* Amend. Compl., ¶¶ 18-104 (containing new allegations not in Complaint at Dkt #1), and limit their "Vote Dilution" claim to district-specific remedies. *Compare* Amend. Comp., ¶ 180 (seeking a declaration that 29 districts in which there are plaintiffs with standing are invalid and violate plaintiffs' rights "not to be subjected to intentional vote dilution") *with* Dkt #1 "Relief Requested" (containing no parallel district-specific allegation).

[15] *Compare* Amend. Compl., ¶¶ 173-178 ("Burden on Right To Association") *with* Compl., ¶¶ 90-96 ("First Amendment Violation").

motion to dismiss argues that the decision undermines the statewide gerrymander theory on which plaintiffs constructed their trial and appear set on advancing again.[16]

Effectively, then, this matter has the essential elements of a new case – new parties and new claims yet to be subjected to the adversarial process, and other existing-but-not-determined claims whose analysis is affected by an intervening Supreme Court decision. In this second phase, as of this filing, there is no scheduling order, no dispositive motions have been filed, and plaintiffs have indicated their intention to embark on new expert discovery.[17]

Intervention now would thus allow Proposed-Intervenors to participate in all aspects of this litigation on remand. Recently, the Sixth Circuit found an intervention motion timely in a redistricting case where, at the time the proposed-intervenors moved, a dispositive motion was pending, "no scheduling order … [was] in place and discovery had not yet begun."[18]

Last, the existing parties would not be prejudiced by the Wisconsin State Assembly's intervention at the dawn of the second phase of this case. To the extent that discovery is sought from legislative employees, it was provided in the first phase. And since matters between the parties have not been adjudicated (and thus the state

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[16] *See, e.g.,* Attachment 2 at 1-2, 28, 36-39, 48 ("Brief In Support of Wisconsin State Assembly's Motion To Dismiss").

[17] Dkt # 198 at 2.

[18] *League of Women Voters of Michigan v. Johnson*, --- F.3d ---, No. 18-1437, slip op. at 5, 7 (6th Cir. Aug. 30, 2018) (slip. op. available on Sixth Circuit's website at http://www.opn.ca6.uscourts.gov/opinions.pdf/18a0194p-06.pdf) (also attached as Attachment 4).

defendants retain any right a litigant would have at the start of a case), all issues remain on the table and no delay ensues from Proposed-Intervenors' participation.

In addition, plaintiffs and defendants have conceded that they would not be prejudiced by starting over. Plaintiffs have consented to the consolidation of this matter with a brand new matter filed on September 14, 2018.[19] Defendants do not oppose that consolidation.[20]

Intervention in this second phase of this case is thus timely, would not cause delay, and would not prejudice the existing parties.

B. The Wisconsin State Assembly Has An Interest In This Matter

"Intervention as of right requires a direct, significant, and legally protectable interest in the question at issue in the lawsuit."[21]

The Wisconsin State Assembly (and its members) has several distinct and substantial interests at stake in this litigation. We assert three here. First, the relief plaintiff seeks would require changing Assembly districts, changing the composition of district constituencies, and likely affecting the composition of the bodies. Second, legislative bodies always have an interest in defending their laws, duties, and powers. And third, individual legislators have an interest in the continuity of their relationships with their constituents.

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[19] *See Wisconsin Assembly Democratic Campaign Committee v. Gill*, No. 18-cv-763, Dkt # 2 (Motion to consolidate) (representing that "Plaintiffs in *Whitford v. Gill*, No. 15-cv-421-jdp … consent to the cases' consolidation").

[20] *Id.* (representing that "Defendants have authorized counsel for [plaintiffs] to indicate to the Court that they do not oppose this motion to consolidate").

[21] *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658 (7th Cir. 2013) (cleaned up to remove internal quotations an alterations).

Any of these interests satisfy Rule 24's interest requirement. Indeed, it is not too much to say that the Wisconsin State Assembly is the real party in interest in this case.

1. It Is Settled Law That A Legislative Body Has An Interest In Lawsuits Affecting Their Composition

This case seeks to declare the Assembly districts created by Act 43 unconstitutional and replace them with new districts.[22] The Assembly, of course, is comprised of one member from each district.[23] That member must reside in the district he or she represents.[24] If declared unconstitutional, new districts will need to be created, thus changing not only which group of electors will select a representative from any changed electoral district, but also changing the pool of eligible electors who may also serve as a member for any particular district. Moreover, current members will likely be "paired."

The Supreme Court has recognized a state legislature's interest in its composition as a sufficient for mandatory intervention.[25] In *Sixty-Seventh Minnesota Senate v. Beens*, Plaintiffs sued the Minnesota Secretary of State, claiming that the state legislative districts drawn in 1966 were malapportioned after the 1970 Census.[26] The Minnesota State Senate intervened pursuant to Fed. R. Civ. P. 24(a).[27] After trial, they appealed the District Court's orders that declared the existing maps

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[22] *Amend. Compl.*, ¶¶ 179, 180, 182.
[23] Wis. Const. Art. IV, § 4.
[24] Wis. Const. Art. IV, § 6.
[25] *See, e.g., Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 194, (1972).
[26] *Id.* at 190.
[27] *Id.* at 191.

unconstitutional, enjoined future elections on those maps, reduced the number of Senate seats, and adopted a new map.[28]

In the Supreme Court, the plaintiffs sought to dismiss the appeal, claiming the Minnesota State Senate was not a proper intervenor. The Supreme Court disagreed:

> [C]ertainly the senate is directly affected by the District Court's orders. That the senate is an appropriate legal entity for the purpose of intervention and, as a consequence, of an appeal in a case of this kind is settled by our affirmance of *Silver v. Jordan*, … where it was said: "The California State Senate's motion to intervene as a substantially interested party was granted because it would be directly affected by the decree of this court."[29]

Here, as in *Beens* and the summarily affirmed *Silver*, the Wisconsin State Assembly would be directly affected the Court's orders regarding the constitutionality of Act 43's district lines. The Wisconsin State Assembly has the same right to intervene as the Minnesota State Senate had in *Beens* to protect the equivalent interest.

While *Beens* applies and dispositively answers the question as to whether the Wisconsin State Assembly has a protectable interest at stake in this litigation, we offer two additional substantial interests below.

2. Legislative Bodies Have An Interest In Defending The Validity of Their Acts And Defending Their Institutional Powers And Duties

[28] *Id.* at 191-93.

[29] *Id.* at 194 (quoting *Silver v. Jordan*, 241 F.Supp. 576 (S.D.Cal.1964), *aff'd*, 381 U.S. 415, 85 S.Ct. 1572 (1965)). *Silver* was another malapportionment case in which the state senate was allowed mandatory intervention while the Secretary of State was the defendant.

The Wisconsin State Assembly also has an interest in defending the effectiveness its enactments. In *Coleman v. Miller*,[30] the Supreme Court concluded that state legislators suing in sufficient numbers such that their votes would only be vindicated if they succeeded with their legal theory "have a plain, direct and adequate interest in maintaining the effectiveness of their votes."[31] As the Court would explain in *Raines v. Byrd*, "our holding in *Coleman* stands … for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified."[32]

Coleman's holding as it relates to blocs of legislators has been extended to state legislatures, and in the districting context. In *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, the Court held that the Arizona Legislature had standing to challenge the validity of Proposition 106, Arizona's constitutional amendment that reassigned districting responsibilities to an independent districting commission.[33] The Arizona legislature asserted that the U.S. Constitution (the Elections Clause) and federal law (2 U.S.C. § 2a(c)) bestowed redistricting prerogatives upon it that could not be displaced by state law.

The Court concluded that *Coleman* applied and the legislature had standing because "Proposition 106, together with the Arizona Constitution's ban on efforts to

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[30] 307 U.S. 433 (1939).

[31] *Id.* at 438.

[32] *Raines v. Byrd*, 521 U.S. 811, 823 (1997).

[33] -- U.S. --, 135 S.Ct. 2652, 2663-66 (2015).

undermine the purposes of the initiative, 'would completely nullif[y]' any vote by the Legislature, now or 'in the future,' purporting to adopt a redistricting plan."[34]

A party opposing this motion might argue that *Coleman* and *Arizona Redistricting Comm'n* require not just that a legislative act could be invalidated, but that a legislative *power* will be undermined. While we acknowledge this argument might have some purchase in a standing analysis, the type of interest sufficient to constitute intervention does not need to be the same interest that is required for standing.[35] Where the only question is whether there is an interest sufficient for Rule 24, courts have found that even a single individual legislator's interest in the validity of a law enacted by the legislature satisfies Rule 24's interest requirement.[36]

But more importantly, there *are* core legislative powers at issue in this case that would satisfy Article III's standing requirement (and, *a fortiori*, Rule 24's "interest" requirement).[37] First, the Wisconsin legislature is vested with the mandatory duty to pass districting laws.[38] And Proposed-Intervenors are arguing

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[34] *Id.* at 2665 (quoting *Raines*, 521 U.S. at 823-24.)

[35] *United States v. Bd. of Sch. Comm'rs*, 466 F.2d 573, 577 (7th Cir. 1972) ("The requirements for intervention … should generally be more liberal than those for standing to being suit."); *Cf. Town of Chester v. Laroe Estates, Inc.*, 137 S.Ct. 1645, 1651 (2017) (An "intervenor of right must have Article III standing *in order to pursue relief that is different* from that which is sought from a party") (emphasis added);

[36] *See, e.g., Commack Self-Service Kosher Meats, Inc. v. Rubin*, 170 F.R.D. 93, 101 (E.D.N.Y. 1996) (speaker of New York Assembly has a sufficient-for-intervention interest in upholding the constitutionality of state's consumer protection law aimed at addressing fraud in kosher foods industry).

[37] *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 320 (D.C.Cir. 2015) (stating that if a party "has constitutional standing, it *a fortiori* has an interest [sufficient for intervention] relating to the property or transaction which is the subject of the action.")

[38] Wis. Const. Art. IV, § 3.

that plaintiffs' political gerrymandering claim is always nonjusticiable.[39] Put simply, if Proposed-Intervenors prevail, their constitutional power (and obligation) to district will be final and not subject to judicial review, at least insofar as political gerrymandering claims are concerned. That makes it like the Arizona legislature's interests that were at stake in *Arizona Redistricting Comm'n.*

Second, the legislature has a "duties and powers" interest in ensuring that it, and not a federal court, has the opportunity to pass a remedial map should this Court declare Act 43 unconstitutional. This flows from the fact that "legislative apportionment is 'primarily a matter for legislative consideration and determination.'"[40] Normally, when courts find laws unconstitutional, they do not rewrite the law.[41] They declare offending laws unconstitutional and possibly enjoin their enforcement, but then it is up to the legislature to decide whether to enact new legislation.

But districting laws, unlike other laws, are not discretionary. The state constitution not only mandates that the Legislature district,[42] but *any* district-based elected representative body requires there to be districts in place to provide constituents representation and to conduct elections. This is why the Supreme Court has countenanced judicial apportionment plans since the initial one-person, one-vote

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[39] Attachment 2 at 8-73.

[40] *Connor v. Finch,* 431 U.S. 407, 414 (1977) (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964))

[41] *U.S. v. Stevens*, 559 U.S. 460, 481 (2010) ("We will not rewrite a law to conform it to constitutional requirements for doing so would constitution a serious invasion of the legislative domain[.]") (cleaned up to remove internal alterations, citations, and quotations).

[42] *See* Wis. Const. Art. IV, § 3.

cases.[43] The Wisconsin State Assembly's participation in this case will protect its ability to exercise its core legislative power to district in the event that the Court finds Act 43 unconstitutional.[44]

Third, should the state-defendants fall short in their defense of Act 43's maps—a distinct possibility in the context of any districting litigation[45] and all the more likely in an apparently partisan-motivated lawsuit[46] to address an allegedly partisan districting law[47]—then the Supreme Court has acknowledged that one house of the legislature possesses an interest in defending its laws sufficient for Article III standing. As the Court explained in *U.S. v. Windsor*, such circumstances "pose grave

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[43] *Reynolds v. Sims*, 377 U.S. 533, 586-87 (1964).

[44] Plaintiffs, to their credit, appear to acknowledge that the legislature should have the opportunity to enact a new districting plan should Act 43 be declared unconstitutional. Amend. Compl. ¶ 182. But only if it is "timely." The question of what constitutes timeliness would likely be the subject of litigation.

[45] In *Beens*, for example, it was the Minnesota State Senate alone who appealed (and successfully). 406 U.S. at 192-93, 200.

[46] Plaintiffs have brought this case because they are supporters of democrats and they wish to see more democrats elected. *See, e.g.,* Amend. Compl., ¶¶ 45 (plaintiff Donohue is a "supporter of Democratic candidates and policies"); 146 (under plaintiffs' demonstration map, Plaintiff Donohue's district would have elected a Democrat and not a Republican); 172 (current plan entrenches rival political party in power).

[47] For a recent example, *see Common Cause v. Rucho*, No. 1:16-CV-1026 (M.D.N.C., Sept. 12, 2018) (order conditionally staying pending appeal court's enjoinment of North Carolina's districting plan found to be an unconstitutional gerrymander; noting that only the legislative defendants sought a stay, and that the Executive did not) (available on PACER). The Court may take judicial notice that the legislative defendants in that case are Republicans and that the North Carolina Governor (a party) and the Attorney General (the executive's attorney) are democrats. *See* FRE 201. North Carolina's State Board of Elections & Ethics Enforcement posts election results on its webpage, and the 2016 statewide office election results, which list candidates' political affiliations, are available at https://er.ncsbe.gov/?election_dt=11/08/2016&county_id=0&office=COS&contest=0). The Court may take judicial notice of the 2016 Presidential Elections results, tabulated by county, and as reported by a government body. These are facts that "can be accurately and readily determined from [a] source[] whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b)(2); *Menominee Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998) (it is proper to take judicial notice of the reports of administrative bodies).

challenges to the separation of powers," particularly the "legislative power" when the legislature "has passed a statute and [the Executive] has signed it" but later the "Executive at a particular moment" "nullifies [the legislative] enactment solely on its own initiative and without any determination from the Court" by "fail[ing] to defend the constitutionality of an Act … based on a constitutional theory not yet established in judicial decisions."[48] Certainly, this case involves an unestablished legal theory.[49]

In sum, the Wisconsin Assembly has an interest in defending both the validity of its laws and protecting its legislative power to enact districting legislation without judicial interference on the basis of political gerrymandering or First Amendment claims.

3. Individual Legislator Members Of The Wisconsin State Assembly Have An Interest In Maintaining Constituent-Legislator Relationships

Not only does the Wisconsin State Assembly have an interest in this litigation, so, too, does the Assembly's constituent members. Associational standing exists when (a) an organization's members have standing; (b) the interests the association seeks to protect are germane to the organization's purpose; and (c) neither the claim

[48] *U.S. v. Windsor*, 570 U.S. 744, 762 (2013) (House of Representatives, though power delegated to Bipartisan Legal Advisory Group of the United States House of Representatives, had standing to defend constitutionality of the Defense of Marriage Act).

[49] *Gill*, 138 S.Ct. at 1926-29 (2018) (surveying political gerrymandering decision, recognizing a lack of settled doctrine, and noting that "[o]ur previous attempts at an answer" to "what judicially enforceable limits, if any, the Constitution sets on the gerrymandering of voters on partisan lines" "have left few clear landmarks for addressing the question" and "generated conflicting views both of how to conceive of the injury … and of the appropriate role for the Federal Judiciary in remedying that injury").

asserted or the defense requires the participation of individual members in the lawsuit.[50] Those conditions exist here.

Courts have repeatedly held that legislators have interests in their office sufficient for standing when their district is being challenged.[51] And while plaintiffs could object that this is a "personal" interest and not an interest of the Assembly (i.e., an interest germane to the Assembly's purpose), there is no question that the work of a legislator-as-legislator is also affected by plaintiffs' action. The job of a legislator contains many facets; "[s]erving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator."[52] As the Eastern District of New York observed, "[t]he modern role of legislators centers less on the formal aspects of representing—e.g., legislating and policymaking—and more on maintaining the relationship between legislators and their constituents."[53] Whether or not constituent service is more important than policymaking is not a question this Court needs to resolve; suffice it to say that

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[50] *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). While *Hunt* involves standing to intervene as a plaintiff, the associational interest test applies to intervention motions. *See, e.g., Wiggins v. Martin*, 150 F.3d 671, 675 (7th Cir. 1998) (applying *Hunt* test to proposed-intervenor asserting associational interest); *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 821-22 & n.3 (9th Cir. 2001) (same).

[51] *See, e.g., League of United Latin Am. Citizens, Council No. 44343 v. Clements,* 884 F.2d 185, 188 (5th Cir. 1989); *Johnson v. Mortham*, 915 F. Supp. 1529, 1538 (N.D. Fla. 1995); Williams v. State Bd. of Elections, 696 F. Supp. 1563, 1569-73 (N.D. Ill. 1988).

[52] *McCormick v. United States*, 500 U.S. 257, 272 (1991).

[53] *Gordon v. Griffith*, 88 F. Supp.2d 38, 47 (E.D.N.Y. 2000) (attributing increasing significance of legislator-constituent relationship to voter-demand for assistance in navigating modern state bureaucracies) (citing Malcolm E. Jewell, *Representation in State Legislatures* at 10-18 (1982).

constituent service and passing legislation are organizational goals of any legislative body.

Members of the Wisconsin State Assembly have developed relationships with their constituencies since they were elected. If Plaintiffs' action requires new boundaries to be drawn, these bonds will be broken. Constituents will be required to develop new relationships with different members and existing members will need to cultivate new relationships with new constituents.

Finally, it is clear that the defenses Proposed-Intervenors intend to assert do not depend on the individual participation of its members. The critical questions in this case are not individual-legislator-dependent, whether those issues are of fact or law.

In sum, the Wisconsin State Assembly has an interest in this litigation, as a body, and as a representative of its members.

C. Denying Intervention Would Impair Or Impede The Wisconsin State Assembly's Ability To Protect Its Interest

Proposed-Intervenors' interest is in preserving the district maps that the legislature created in Act 43. Should plaintiffs prevail in this litigation with or without Proposed-Intervenors' participation as a party, Act 43 will be enjoined, new lines will be drawn (potentially by the Court), elections will be held using different districts,[54] there will be no collateral mechanism to reestablish those district lines, and Proposed-Intervenors' interest will be extinguished.

[54] Amend. Compl., ¶ 182.

D. The Wisconsin State Assembly Is Not Adequately Represented By The Existing Parties

The Supreme Court explained in *Trbovich v. United Mine Workers of America* that only a minimal showing of inadequate representation is required to satisfy Rule 24(a)'s inadequate representation prong.[55] Nevertheless, Proposed-Intervenors acknowledge, as we must, that the law of this circuit is that "when a prospective-intervenor and a named party have the same goal," a rebuttable "presumption exists that the representation in the suit is adequate."[56] In addition, adequacy "can be presumed when the party on whose behalf the applicant seeks intervention is a governmental body or officer charged by law with representing the interest of the proposed intervenor." We further also acknowledge that mere quibbling about litigation strategy is insufficient to rebut this presumption.[57]

But unlike most cases involving a state defendant who may be presumed to share an interest in defending the law, the Supreme Court has already concluded mandatory intervention is appropriate for state legislative bodies seeking to intervene in redistricting cases. They did so in *Beens*, where the Court expressly held the Minnesota State Senate was a proper mandatory intervenor.[58] And they did so when they affirmed the mandatory-intervention ruling in *Silver*.[59]

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[55] *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972).

[56] *Wisconsin Educ. Ass'n Council*, 705 F.3d at 659 (cleaned up to remove internal quotations and alterations); *Keith v. Daley*, 764 F.2d 1265, 1270 (7th Cir. 1985).

[57] *Id.*

[58] *Beens,* 406 at 194.

[59] *Silver v. Jordan*, 241 F.Supp. 576 (S.D.Cal.1964), *aff'd*, 381 U.S. 415, 85 S.Ct. 1572 (1965).

In these cases, the legislative intervenors are the true party in interest, for it is their body that risks being altered as a result of this litigation and their members' constituent relationships that risk being irrevocably changed. And while *Beens* Court did not expressly discuss adequacy of representation, its conclusion that the district court's Rule 24(a) determination was appropriate affirms this holding, as Rule 24(a) then, as now, included a condition requiring adequacy of representation.[60]

Even if *Beens* did not apply, the Wisconsin State Assembly contends there is inadequate representation. First, the state-defendants have not moved to dismiss the Amendment Complaint. Proposed-Intervenors believe that this matter can and should be resolved without the need to engage in costly and timely expert or other discovery. While the state-defendants assert an affirmative defense on the basis of non-justiciability and failure to state a claim—the main arguments in the attached Motion to Dismiss brief—state-defendants' pleading does not demonstrate a commitment to make all the various arguments contained within the brief. Some of these arguments speak directly to legislative powers and prerogatives.[61] Whether and to what degree the legislature is subject to court oversight should not be determined exclusively by the arguments that disinterested election officials *might* (but have not yet) set forth.

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[60] *See* Fed. R. Civ. P. 24(a)(2)(1971)(intervention as a right requires that "the representation of an applicant's interest is or may be inadequate"). Since *Beens* Rule 24(a)'s language changed into its current form (in relevant part) by a 1987 amendment. But the Advisory Committee notes indicate that the changes were technical and that "no substantive change is intended." *See* Fed. R. Civ. P. 24 (Advisory Committee Notes, 1987 Amendment).

[61] *See, e.g.,* Attachment 2 at 66-73.

Second, the Supreme Court of the United States permitted divided argument to allow the Wisconsin State Assembly and Senate (as amicus) to provide oral argument.[62] This is indicative of the Court's understanding that the legislature's participation was not a simple "me too."[63]

Third, there is a considerable likelihood that the state-defendants will not "have the same goal" throughout the course of this litigation. The Commissioners are represented by the Attorney General, who ultimately controls this litigation and the decision to appeal an adverse judgment.[64] The Attorney General is an elected position, and is up for election this fall on a partisan ballot. While the incumbent has, to date, defended Act 43, a new Attorney General may change course. One major party candidate favors taking redistricting out of the hands of the legislature[65] and

[62] *Gill v. Whitford*, 138 S.Ct. 52 (2017).

[63] The Wisconsin State Assembly advanced related-but-different arguments in their Supreme Court amicus brief than those advanced by the state-defendants. For example, the Wisconsin State Assembly and Senate argued that plaintiffs' legal theories rested on a distorted view of representative democracy. The State Assembly and Senate argued that candidates matter, that voters elect individual candidates not party delegations, that voters supporting losing candidates are not deprived of representation, and that significant split balloting occurs in Wisconsin demonstrating that partisan affiliation is not immutable. *See* Br. for Amici Curiae Wisconsin State Senate and Wisconsin State Assembly at 17-31, *Gill v. Whitford*, No. 16-1161 (Sup. Ct.). Those arguments are reformulated in a separate context in the attached Brief In Support Of Motion To Dismiss. *See, e.g.,* Attachment 2 at 28-36. If the Wisconsin State Assembly is permitted to intervene and plaintiffs' claims survive a motion to dismiss, then the Wisconsin State Assembly could produce expert or fact testimony on voter behavior that was largely absent from the first trial but is highly relevant.

[64] *See* Wis. Stat. § 165.25(6) (attorney general, not agency, has power to compromise actions in which he has been asked to represent state defendant); *see also Koschkee v. Evers*, 2018 WI 82, ¶ 50 & n.18, 382 Wis.2d 666 (attorney general controls decision to appeal) (Grassl Bradley, J., concurring in part and dissenting in part).

[65] Ken Krall, "Josh Kaul Stops In Rhinelander As Part of AG Campaign," WXPR (April 24, 2018) (available at http://www.wxpr.org/post/josh-kaul-stops-rhinelander-part-ag-campaign)

intends to downsize the Solicitor General's office,[66] which represented the state-defendants on appeal in this matter.[67]

In a typical litigation, state-defendants and Attorneys General may be presumed to defend the law adequately. But make no mistake, this is not a typical litigation.[68] This is a case about politics and partisanship and whether the Constitution authorizes the judiciary to regulate how much politics and partisanship may influence legislation. Partisan elected executive officers have a history of failing to vigorously defend the law and not appeal or take every effort to preserve a map.[69] We cannot represent that this *will* happen here; only that this is precisely the kind of case where it has happened before and is likely to happen again.

Proposed-intervenors have a right to intervene.

II. Permissive Intervention Is Appropriate

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[66] Katelyn Ferral, "Democratic Attorney General candidate Josh Kaul says if elected he would reduce Solicitor General's office, go after environmental polluters," The Capitol Times (Sept. 6, 2018) (available at https://madison.com/ct/news/local/govt-and-politics/democratic-attorney-general-candidate-josh-kaul-says-if-elected-he/article_54003498-ad48-5e2b-8fd1-2d7de2d117b3.html_).

[67] *See* Br. for Appellants, *Gill v. Whitford*, No. 16-1161 (S.Ct.) (filed June 28, 2017) (filed by the Solicitor General, Chief Deputy Solicitor General Walsh, Deputy Solicitor General LeRoy, Assistant Solicitor General Miller, and Assistant Attorney General Keenan) (available at http://www.scotusblog.com/wp-content/uploads/2017/08/16-1161-ts.pdf).

[68] *Gill*, 138 S. Ct. at 1933-34 (concluding this is not the "usual case" as a justification from the normal rules that cases should be dismissed outright where jurisdiction is not established at trial).

[69] *See, e.g., Beens*, 406 U.S. at 192-93 (state defendant not appealing apportionment decision, leaving intervening legislative body as only party); *see Common Cause v. Rucho*, No. 1:16-CV-1026 (M.D.N.C., Sept. 12, 2018) (order conditionally staying pending appeal court's enjoinment of North Carolina's districting plan found to be an unconstitutional gerrymander; noting that only the legislative defendants sought a stay, and that the executive did not) (available on PACER) & n.47, *supra.*

In the alternative, or if the court concludes the standards for mandatory intervention have not been met, permissive intervention is appropriate. Under Fed. R. Civ. P. 24(b), permissive intervention is appropriate where a proposed-intervenor files a timely motion and asserts a "claim or defense that shares with the main action a common question of law or fact."[70] "In exercising its discretion" to allow permissive intervention, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights."[71]

For the reasons stated above, this motion is timely. And there exists a common question of law or fact.[72]

The recent Sixth Circuit decision in *League of Women Voters of Michigan v. Johnson* is particularly instructive to the question of permissive intervention. *League of Women Voters of Michigan* involved a political "packing and cracking" claim that is similar to the "vote dilution" claim in the instant case.[73] It also presented a First Amendment claim.[74] The named defendant was the Michigan Secretary of State, who, like the defendants in this matter, is responsible for the conduct of the state's elections.[75]

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[70] Fed. R. Civ. P. 24(b).

[71] Fed. R. Civ. P. 24(b)(3).

[72] *See, e.g.,* Dkt # 207 (state-defendants answer to amended complaint, raising non-justiciability as affirmative defense) *with* Attachment 2 at 8-73 (arguing amended complaint fails to state a justiciable claim) *and* Attachment 3 (incorporating affirmative defenses by reference).

[73] *League of Women Voters of Michigan*, slip op at 2, 3.

[74] *Id.* at 3.

[75] *Id.*

A couple of months after the lawsuit was filed, Members of Congress whose districts were being challenged sought intervention.[76] The district court denied intervention as a right, reasoning that the Congressional intervenors' constituent-legislator relationship interest was a generalized interest and that this interest would be adequately protected by the Secretary of State.[77]

The district court also denied permissive intervention. It found that "the complex issues raised by the parties, the need for expeditious resolution of the case, and the massive number of citizens who share the [Congressmen's] interest" weighed against intervention because "granting the [Congressmen's] motion to intervene could create a significant likelihood of undue delay and prejudice to the original parties."[78]

The Sixth Circuit reversed, holding that the district court had erroneously denied the Congressmen permissive intervention.[79] Not only did the district court fail to articulate how its findings matched with its conclusion that intervention posed a substantial likelihood of delay and prejudice, but the Sixth Circuit held those findings were erroneous and intervention would not cause undue prejudice or delay.[80] The *League of Women Voters of Michigan* Court explained that the issues raised in the litigation by the parties and the proposed-intervenors were common to

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[76] *Id.* at 3.

[77] *Id.* at 4.

[78] *Id.* at 4.

[79] Because the Sixth Circuit rules that permissive intervention was appropriate, it did not address the Congressional-Intervenors the intervention as a right. *Id.* at 5.

[80] *Id.* at 5-8.

redistricting litigation.[81] It further found that participation by intervenors would be unlikely to delay an expeditious resolution of the case because the case was "in its infancy" when the intervention motion was filed: the defendants' motion to dismiss had not been ruled on, no scheduling order was in place, and discovery had not begun.[82]

Further, the court found there were facets about congressional-intervenors that weighed in favor on permissive intervention. These included (1) that the congressional-intervenors had a direct interest in the outcome of the litigation, whereas the Secretary of State's interest was passive; (2) that the intervenors' interest was different than that held by the citizens-at-large; and (3) that permitting intervention now may well prove more efficient in the long run given the delay that would occur should a newly elected Secretary of State change litigation posture and necessitate intervention closer to the trial.[83]

Each of the factors observed by the Sixth Circuit in Michigan's redistricting case is present here. This case, too, is in its infancy. To be sure, this case has been pending since 2015.[84] But as explained above, no issues have been preclusively determined and so the existing parties retain the right to assert any claims or

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[81] *Id.* at 6.

[82] *Id.* at 6-7.

[83] *Id.* at 8-9. The court explained that while mandatory intervention factors such as "substantial interest" and

[84] The fact that this case is the "same" case as opposed to one filed for the first time is the result of the Supreme Court's unusual decision to not simply dismiss the action after plaintiffs failed to prove jurisdiction at trial. *See Gill*, 138 S.Ct. 1933-34; *see id.* at 1942 (Thomas, J., concurring).

defenses they asserted previously, no scheduling order is in place, no "phase II" discovery has taken place, and no dispositive motions have been determined. Undue prejudice and delay will not result from the Wisconsin State Assembly's participation; plaintiffs concede as much by consenting to allowing their litigation *allies* to procedurally join this matter in a brand new case.[85] To be sure, because the state-defendants have not filed a motion to dismiss, more legal work might initially be required by the parties and the Court if this motion is granted, but this work will not delay the resolution of the case and, if successful, it will reduce the time and costs associated with achieving a full resolution of the matter.

And as much or even more than in *League of Women Voters of Michigan*, Proposed-Intervenors have a direct and unique interest at stake that is different than the state defendants. The interest here is not personal, as might be a Congressman's office; it is one that speaks to both Proposed-Intervenor's organization and Proposed-Intervenor's ability to freely exercise its legislative function.

Finally, if the Court doubts whether the Wisconsin State Assembly's interests are adequately represented at this moment, like in the Michigan case, there exists the prospect that an election may alter the adequacy of representation before this case is concluded. Where the attorney general fails to defend a state law or appeal a judgment declaring that law unconstitutional, the law of this circuit leaves no doubt

[85] *See Wisconsin Assembly Democratic Campaign Committee v. Gill*, No. 18-cv-763, Dkt # 2 (Motion to consolidate) (representing that "Plaintiffs in *Whitford v. Gill*, No. 15-cv-421-jdp … consent to the cases' consolidation").

that the Wisconsin State Assembly would be permitted to intervene.[86] Permissive intervention now would reduce the risk of significant delay that would be occasioned by the state defendants' potential pre-trial abandonment of some or all of its legal defenses. And were the state defendants to defend-but-not-appeal an adverse decision, permitting intervention now would allow the Proposed-Intervenors to appeal the case on a record it helped to develop as opposed to one developed by a party who abandoned a case with that involved an unsettled legal theory.

For these reasons, permissive intervention is appropriate.

CONCLUSION

For the foregoing reasons and those contained in the accompanying motion, intervention should be granted.

Respectfully submitted this 4th day of October, 2018.

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[86] *See Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 571-74 (7th Cir. 2009) (trade association permitted to intervene after trial and judgment where Wisconsin attorney general declined to bring appeal).

ATTACHMENT 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

WILLIAM WHITFORD, et al.,

Plaintiffs,

Case No. 3:15-CV-00421-jdp

v.

BEVERLY R. GILL, et al.,

Defendants.

WISCONSIN STATE ASSEMBLY'S MOTION TO DISMISS

Intervenor-Defendant Wisconsin State Assembly, through its attorneys, hereby moves to dismiss the complaint pursuant to Fed. R. of Civ. P. 12(b)(6). For the reasons stated in the attached Brief In Support Of Wisconsin State Assembly's Motion To Dismiss, Plaintiffs Amended Complaint fails to state a justiciable claim for which relief can be granted.

Intervenors request the court enter an order and judgment dismissing the complaint.

Respectfully submitted this 4th day of October, 2018.

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ATTACHMENT 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

WILLIAM WHITFORD, et al.,

Plaintiffs,

Case No. 3:15-CV-00421-jdp

v.

BEVERLY R. GILL, et al.,

Defendants.

BRIEF IN SUPPORT OF WISCONSIN STATE ASSEMBLY'S MOTION TO DISMISS

INTRODUCTION

Justice O'Connor commented in *Bandemer* that the "opportunity to control the drawing of electoral boundaries through the legislative process is a critical and traditional part of politics in the United States."[1] The Supreme Court remarked in *Gaffney* that "politics and political considerations are inseparable from districting and apportionment."[2] Had the framers of the United States and Wisconsin Constitutions intended for courts to take politics out of the districting process, surely they would not have vested the political branch with the responsibility of drawing lines.

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[1] *Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring).

[2] *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973).

Plaintiffs wish upend this tradition, create constitutional law, and invite this Court to find Wisconsin's redistricting plan unconstitutionally political on the basis of a purely political calculation – the efficiency gap, a measure of partisan symmetry and a variation of proportional representation.

But the Supreme Court has rejected as nonjusticiable all standards for assessing political gerrymandering claims that attempt to apply proportional representation as a Constitutional norm. This is because the Constitution contains no such principle. In fact, the principle is antithetical to traditional, single-member-district, winner-take-all elections.

Moreover, by insisting on presenting their gerrymandering claim as a statewide violation, Plaintiffs fail to state a species of a "vote dilution" claim. Vote dilution claims are necessarily district-specific. By persisting with a statewide analysis to identify a statewide gerrymander, plaintiffs maintain what the Supreme Court's decision in this very case found to be the "fundamental problem with the plaintiffs' case…. It is a case about group political interests, not individual legal rights."[3]

Plaintiffs do no better with their "Burden on Association" claim. Perhaps democratic supporters are dispirited; perhaps they fear their associational activities will not result in success. But the First Amendment is not implicated where a law does not prevent, impose a cost on, or condition a benefit on expressive conduct.

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[3] *Gill v. Whitford*, -- U.S. --, 138 S. Ct. 1916, 1933 (2018).

Plaintiffs have not articulated a judicially discernable and manageable standard to adjudicate their gerrymandering claim, and their First Amendment Claim fails to state a claim for which relief may be granted.

Plaintiffs' claims should be dismissed.

FACTUAL AND LEGAL BACKGROUND: ALLEGATIONS AND CLAIMS ASSERTED IN THE COMPLAINT

Under Wisconsin's Constitution, the legislature must apportion the state into legislative districts after every federal census.[4] 2011 Wisconsin Act 43 fulfilled that obligation for the current decennial. The Act divides the state into 99 Assembly districts and 33 Senate Districts.[5] The Assembly districts comprised by Act 43 are what plaintiffs refer to as the "Current Plan." (*Amend. Compl.*, ¶ 1).

Plaintiffs allege that the legislature's intent in adopting the Current Plan was to create Assembly districts "with the specific intent to maximize electoral advantage of Republicans and harm Democrats to the greatest possible extent, by packing and cracking Democratic voters and thus wasting as many Democratic votes as possible." (*Amend. Compl.*, ¶ 113; *see also id.* at 165). Plaintiffs allege the Current Map produces an "extraordinary level of partisan unfairness through the rampant cracking and packing of Wisconsin's Democratic voters, which results in their votes being disproportionately wasted." (*Amend. Compl.*, ¶ 140). The overall result, according to plaintiffs, is that the Current Plan has the "effect of subordinating the

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[4] Wis. Const. Art. IV, § 3.

[5] 2011 Wisconsin Act 43, §§ 1, 7; *codified at* Wis. Stat. §§ 4.001 & 4.01-4.99.

adherents of one political power and entrenching a rival political party in power." (*Amend. Compl.*, ¶ 172).

Plaintiffs are 40 individuals who are "qualified, registered-voter[s] in the State of Wisconsin" and who "support[] … Democratic candidates and policies." (*Amend. Compl.*, ¶¶ 18, 21, 24, 27, 30, 33, 36, 39, 42, 45, 48, 51, 54, 57, 60, 63, 66, 69, 72, 75, 78, 81, 84, 87, 90, 93, 96, 99, 102; *see also id.*, ¶¶ 16, 105-111). Five plaintiffs also identify as members of the Wisconsin Democratic Party; one identifies herself as a member of the Racine County Democratic Party. (*Amend. Compl.*, ¶¶ 105, 107-111).

Plaintiffs assert two claims: an equal protection claim, labelled "Intentional Vote Dilution," and a First Amendment claim, labelled "Burden on Right to Association." (*Amend Compl.*, ¶¶ 164-172; 173-78).

With respect to the Intentional Vote Dilution claim, seven plaintiffs residing in six different districts allege they are "packed" into Democratic Districts[6] and allege that it would be possible to draft a politically symmetric map[7] where they are in a less heavily Democratic District. (*Amend. Compl.*, ¶¶ 21-23, 27-29, 75-77, 84-89, 102-

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[6] In this brief, we use "Democratic Districts" to mean those identified in the Amended Complaint as districts "expected to have a Democratic vote share of" greater than 50% and we use "Republican Districts" to mean those districts identified in the Amended Complaint as districts "expected to have a Republican vote share of" greater than 50%. (*See, e.g., Amend. Compl.*, ¶ 19 (example of Republican District); ¶ 22 (example of Democratic District)). According to the Amended Complaint, whether a district is a Republican District or Democratic District depends on the output of "the drafters' partisan composite" as altered by plaintiffs based on their "recalculation of the composite using more accurate data." (*Amend. Compl.*, ¶ 19 & n.2).

[7] According to the Complaint, "Plaintiffs' expert used a computer algorithm to generate an alternative Assembly map (the "computer-generated map") that beats the Current Plan on every one of its nonpartisan objectives but that treats the major parties almost perfectly symmetrically." (*Amend. Compl.*, ¶ 20).

104). 26 plaintiffs residing in 23 different districts allege that they are "cracked" into Republican-leaning Districts, but that it would be possibly to draft a politically symmetric map where they could have been placed into Democratic-leaning Districts. (*Amend. Compl.*, ¶¶ 18-20, 24-26, 30-74, 78-83, 90-101).[8]

While the "cracked" voters allege that they could have been placed in a Democratic District, on the face of the Complaint, this is *not* the asserted constitutional violation. Instead, the "intentional vote dilution" claim is that the Current Plan "disproportionally wast[es]" the votes of *all* "Democratic voters," statewide, as compared with all Republican voters. (*Amend. Compl.*, ¶ 165; *see also Amend. Compl.*, ¶ 142). The Amended Complaint defines wasted votes as "cast either for a losing candidate (in the case of cracking) or for a winning candidate but in excess of what he or she needed to prevail (in the case of packing)." (*Amend. Compl.*, ¶ 5).

Plaintiffs claim this "partisan unfairness" can be measured by calculating the "efficiency gap," itself a measure of "partisan symmetry." (*Amend. Compl.*, ¶ 130; *see generally id.*, ¶¶ 127-136). The efficiency gap is defined as "the difference between the parties' respective wasted votes in an election divided by the total number of votes cast in an election," with "election" to include all district contests. (Amend. Compl., ¶ 133). A wasted vote is one cast for a losing candidate or that was unnecessary to

[8] A third group of seven plaintiffs reside in districts where there is no allegation as to whether the District is a Democrat District or a Republican District and no allegation these voters were "cracked" or "packed." (Amend. Compl., ¶¶ 105-111). Given the *Gill* decision, we presume these plaintiffs bring only a burden on association claim.

achieve victory – every vote in excess of those needed to achieve 50% of the total vote + 1 in a two-candidate race. (*Amend. Compl.*, ¶ 132). The efficiency gap calculation is alleged to "measure[] a party's undeserved seat share: the proportion of seats a party receives that it would not have received under a plan in which both sides had approximately zero wasted votes." (*Amend Compl.*, ¶ 134) (emphasis removed). A "balanced" plan allegedly has an efficiency gap of zero.

According to plaintiffs, the Current Plan exhibits "the largest and most pro-Republican efficiency gap ever recorded in Wisconsin history," and the "28th-worst score in modern American history (out of nearly 800 total plans)." (*Amend. Compl.*, ¶¶ 137, 138). They further allege the availability of alternative maps with small or nonexistent efficiency gaps, and which also comply with other districting principles. (*See, e.g., Amend. Compl.*, ¶¶ 20, 161-62). The Complaint makes no allegations that the districts drawn are malapportioned, non-compact, not contiguous, or fail to respect communities of interest.

Relevant to their "Burden on Right to Association" claim, plaintiffs allege that Act 43 "subject[s] supporters of the Democratic Party to an exceptionally large and durable pro-Republican asymmetry," which "deters them from, and hinders them in, turning out the vote, registering voters, volunteering for campaigns, donating money to candidates, running for office, appealing to independents, and advocating and implementing their preferred policies." (*Amend. Compl.*, ¶ 51). For each plaintiff other than William Whitford, the Amended Complaint contains a boiler plate provision that the plaintiff is a "supporter of Democratic candidates and policies" and

that his or her "ability to affiliate with like-minded Democrats and to pursue Democratic associational goals has been impaired by the Current Plan." (*Amend. Compl.*, ¶¶ 18, 21, 24, 27, 30, 33, 36, 39, 42, 45, 48, 51, 54, 57, 60, 63, 66, 69, 72, 75, 78, 81, 84, 87, 90, 93, 96, 99, 102; 106-111). For Whitford, the Amended Complaint includes the same boiler plate but adds:

> Because of the plan, he has less opportunity than a similarly situated Republican to advocate for, and achieve, a legislative majority for his preferred party. His efforts to canvass voters, phone bank, recruit campaign volunteers, fundraise, and work with candidates are less likely to be successful, and he consequently has less incentive to engage in these activities.

(*Amend. Compl.*, ¶ 105).

As a remedy for their burden on association claim, Plaintiffs seek a declaration that all "Wisconsin's 99 State Assembly Districts" are "unconstitutional and invalid," and that the "maintenance of these districts for any … election [is] a violation of plaintiffs' associational rights." (*Amend. Compl.*, ¶ 179). As a remedy for their intentional vote dilution claim, Plaintiffs seek an additional declaration that "the 29 Assembly Districts in which the Plaintiffs … reside" are "unconstitutional and invalid" and that the "maintenance of these districts for any … election [is] a violation of plaintiffs' rights not to be subjected to intentional vote dilution." (*Amend. Compl.*, ¶ 180). Plaintiffs further seek to enjoin the defendants and their agents from conducting elections in those districts found to be unconstitutional, and further seek judicial reapportionment should a constitutional district plan not be enacted into law. (*Amend. Compl.*, ¶¶ 181-82).

These are the core facts and claims stated in the Amended Complaint.

ARGUMENT

Plaintiffs complaint should be dismissed for two principle reasons. First, their intentional vote dilution fails to state a justiciable claim. The standard plaintiffs propose fails to overcome any of the problems with justiciability that have doomed every other standard for determining when a political gerrymander has gone "too far." Beyond that, to the extent that any Supreme Court precedent indicates the potential viability of political gerrymandering claims, they must be district-specific. But plaintiffs' standard rests on a statewide metric that does not distinguish between districts alleged to contain unconstitutional dilution and those that do not, and does not make any distinctions among the districts alleged to cause unconstitutional vote dilution.

Plaintiffs' burden on association claim fails to state a claim for which relief can be granted. A disincentive to engage in expressive activity because that activity is less likely to be successful is not a "burden" that implicates a First Amendment interest.

I. Pleading Standards For Analyzing Motions To Dismiss

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim of relief that is plausible on its face.'"[9] Allegations that are pure legal conclusions or legal conclusions couched as a factual

[9] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

allegations, however, are not accepted as true.[10] Although "detailed factual allegations" are not required, the complaint must contain more than "'naked assertions' devoid of 'further factual enhancement.'"[11] "[B]are and conclusory allegations … are insufficient to state a claim."[12]

Thus, to determine the sufficiency of a complaint, courts "first identif[y] the well-pleaded factual allegations by discarding the pleadings that are 'no more than conclusions'" and "then determine whether the remaining well-pleaded factual allegations" "plausibly suggest a claim…."[13]

For the reasons discussed below, Plaintiffs' complaint fails to state a justiciable claim for which relief may be granted.

II. Political Gerrymandering Claims Are Nonjusticiable.

Political gerrymandering[14] has been around longer than the 14th Amendment on which Plaintiffs' claims rest.[15] It has been the subject of litigation for at least the past 50 years,[16] and has been litigated up to the Supreme Court for nearly as long.[17]

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[10] *Id.*

[11] *Id.* (quoting *Twombly*, 550 U.S. at 555).

[12] *Diedrich v. Ocwen Loan Servicing, LLC*, 839 F.3d 583, (7th Cir. 2016).

[13] *Silha v. ACT, Inc.*, 807 F.3d 169, 173 (7th Cir. 2015) (quoting *Iqbal*, 556 U.S. at 679).

[14] We use the terms "partisan gerrymandering" and "political gerrymandering" interchangeably.

[15] *See Vieth v. Jubelirer*, 541 U.S. 267, 274–75 (2004) (plurality op.) (describing history of political gerrymandering).

[16] *See, e.g., Sinock v. Roman*, 233 F. Supp. 615, 620 (D. Del. 1964) (plaintiffs asserting that City of Wilmington was gerrymandered with the deliberate intention to deny representation to Republicans).

[17] *Gaffney v. Cummings*, 412 U.S. 735, 738, 752-53 (1973).

In spite of the Supreme Court's "considerable efforts" to address political gerrymandering, its decisions "leave unresolved whether such claims … are justiciable."[18]

They are not. The potential standards that have been considered by the Supreme Court lack a sufficient connection to any constitutional principle, are inconsistent with precedent and with the historical conception of district-based representation decided in district-specific winner-take-all elections, and, setting aside those difficulties, suffer from indeterminacy, overinclusion, or underinclusion. Plaintiffs' proposed standard does not overcome the Supreme Court's concerns with other rejected standards. If anything, *Gill* crystalizes how the kind of statewide evaluation of partisan unfairness that plaintiffs propose is divorced from any constitutional right.

In addition, the *LULAC* decision indicates that courts should not consider alternative standards of justiciability to determine whether plaintiffs claim might be addressed a standard other than the one proposed by a challenger. In any event, this Court's test adopted in the first phase of this case fails to overcome the Supreme Court's concerns with justiciability.

Finally, not only do political gerrymandering claims fail to elucidate a judicially discernable and manageable standard, but they interfere with a responsibility textually committed to state legislatures, require courts to undertake

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[18] *Gill*, 138 S. Ct. at 1929.

initial policy determinations, and almost necessarily invade the legislative process. These factors also augur for a finding of nonjusticiability.

The Court should dismiss plaintiffs' claim as nonjusticiable.

A. General Principles of Nonjusticiability

Nonjusticiable political questions may arise in a number of circumstances. For example, a controversy involves a political question "where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department,"[19] where there exists "a lack of judicially discoverable and manageable standards for resolving it,"[20] where it is "impossib[le to] decid[e the case] without an initial policy determination of a kind clearly for nonjudicial discretion,"[21] and where it is impossible for a court to reach independent resolution without expressing a lack of respect due to coordinate branches.[22] If a case involves a political question, "court[s] lack[] the authority to decide the dispute before it."[23]

The Supreme Court has largely analyzed partisan gerrymandering claims in reference to the second of these factors – the lack of judicially discernable and manageable standard for resolving the controversy.[24] We will focus on the same here.

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[19] *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012).

[20] *Id.*

[21] *Baker v. Carr*, 369 U.S. 186, 217 (1962).

[22] *Id.*

[23] *Zivotofsky*, 566 U.S. at 195.

[24] *See, e.g., Gill*, 138 S. Ct. at 1926-30; *Vieth,* 541 U.S. at 277-306 (plurality op.); *id.* at 307-08 (Kennedy, J., concurring); *id.* at 321 (Stevens, J., dissenting); *id.* at 344-45 (op. of Souter, J., dissenting); *id.* at

B. The Court Has Yet To Divine A Judicially Discernable And Manageable Standard To Evaluate Partisan Gerrymandering Claims.

In *Gaffney, Bandemer, Vieth,* and *LULAC*, the Court considered and rejected no less than eight different standards for evaluating partisan gerrymandering claims.[25] While the opinions in those cases are voluminous, *Gill* provides a compact summary, which is further summarized immediately below.[26]

1. Gaffney v. Cummings[27]

In *Gaffney*, a unanimous Court rejected a challenge to a map that "consciously … followed a policy of political fairness" yet which the Plaintiff alleged to be "nothing less than a gigantic political gerrymander."[28] *Gaffney* reasoned that "it would be idle to hold that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it because districting inevitably has and is intended to have substantial political consequences."[29]

2. Davis v. Bandemer[30]

In *Bandemer*, the Court was faced with a state legislative plan alleged "to favor Republican incumbents and candidates and to disadvantage Democratic voters

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355 (Breyer, J., dissenting); *Bandemer*, 478 U.S. at 125-26 (plurality op.), *id.* at 147-161 (op. of O'Connor, J., concurring), *id.* at 165 (op. of Powell, J., concurring in part and dissenting in part)).

[25] *See, infra,* § II.C.

[26] *Gill*, 138 S.Ct. at 1926-29.

[27] 412 U.S. 735 (1973).

[28] *Gill*, 138 S.Ct. at 1926-1927 (cleaned up to remove quotations and citations to *Gaffney*).

[29] *Id.* at 1927 (also cleaned up).

[30] 478 U.S. 109 (1986).

through" the "packing" and "cracking" of Democrats.[31] The *Bandemer* Court, which reversed the district court's finding of an equal protection violation,[32] was nevertheless unable to "settle on a standard for what constitutes an unconstitutional partisan gerrymander."[33]

The four-justice plurality opinion would have required proof of intentional discrimination against an identifiable group and an actual discriminatory effect on that group, which in turn would require proof of discriminatory effect in multiple elections.[34] Elaborating on *Gill's* description, the discriminatory effect was not merely a measure of seats won or lost, but the ability of voters to influence the political process as a whole.[35]

Three justices concluded that "the Equal Protection Clause does not supply judicially manageable standards for resolving purely political gerrymandering claims."[36]

The remaining two justices would have rejected the statewide claim but would have entertained a district-specific challenges "focused on the question whether the

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[31] *Gill*, 138 S.Ct. at 1927 (cleaned up to remove quotations, citations, an parentheticals to *Bandemer*).

[32] *Bandemer*, 478 U.S. at 143 (plurality op., announcing judgment of the Court).

[33] *Gill*, 138 S.Ct. at 1927.

[34] *Id.*

[35] *Bandemer*, 478 U.S. at 131-32 (plurality op.).

[36] *Gill*, 138 S.Ct. at 1927. (cleaned up to remove quotations and citations to Justice O'Connor's opinion concurring in judgment).

boundaries of the voting districts have been distorted deliberately and arbitrarily to achieve illegitimate ends."[37]

3. Vieth v. Jubelirer [38]

In *Vieth*, the Court affirmed the district court's finding that a Pennsylvania congressional redistricting plan against a constitutional partisan gerrymandering challenge.[39] Again, the Court was unable to come to a majority as to the rationale for its judgment, resulting in five opinions.

A four-justice plurality, in an opinion authored by Justice Scalia, concluded political gerrymandering claims were nonjusticiable because there was no judicially discernable and manageable standard by which to test them.[40]

Justice Kennedy concurred, finding that "we have no basis on which to define clear, manageable, and politically neutral standards for measuring a plans burden" on constitutional rights. While his opinion left open the possibility that a suitable "standard might emerge," he "rejected the principle" that "a majority of voters should be able to elect" "a majority of" representatives."[41]

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[37] *Id.* (cleaned up to remove quotations and citations to Justice Powell's opinion concurring in part and dissenting in part).

[38] 541 U.S. 267.

[39] *Vieth*, 541 U.S. at 306 (plurality op., announcing judgment of the Court).

[40] *Gill*, 138 S.Ct. at 1927-28.

[41] *Id.* at 1928.

Justice Stevens' dissenting opinion argued for "a legal standard similar to that used in racial gerrymandering" cases, by which any district with a "bizarre shape for which the only possible explanation was a naked desire to increase partisan strength would be found unconstitutional."[42]

Justice Souter, joined by Justice Ginsberg, "agreed that a plaintiff alleging an unconstitutional gerrymander should be allowed to proceed on a district-by-district basis."[43]

Justice Breyer's solo dissent "would have distinguished between gerrymandering for passing political advantage and gerrymandering and gerrymandering leading to the unjustified entrenchment of a political party."[44]

4. LULAC[45]

LULAC involved a mid-decennial redistricting, and once again, the Court rejected a partisan gerrymandering challenge. Plaintiffs argued that "a decision … to effect mid-decennial redistricting, when solely motivated by partisan objectives, violates equal protection and the First Amendment because it serves no legitimate public purpose and burdens one group because of its political opinions and affiliations."[46]

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[42] *Id.*

[43] *Id.* (cleaned up to remove quotations and citations to Justice Suter's dissent). Justice Souter's test for identifying a political gerrymander is described in more detail in subsection II.C., below.

[44] *Id.* (cleaned up to remove quotations and citations to Justice Breyer's dissent).

[45] *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006).

[46] *Id.* 548 U.S. at 416-47.

As characterized by *Gill*, "a majority of the Court could find no justiciable standard by which to resolve the plaintiffs' partisan gerrymandering claims."[47]

Justice Kennedy concluded that partisan symmetry standards shed "no light on how much partisan dominance is too much" and concluded "asymmetry alone is not a reliable measure of unconstitutional partisanship."[48]

"Justice Stevens alone would have found a partisan gerrymander based in part on the asymmetric advantage it conferred on Republicans in converting seats to votes."[49] We add to the *Gill* Court's observation that Justice Stevens appears to have required a "sole motivation" standard to his test (as was asserted by the challengers), as well as a condition that the new plan perform more poorly on traditional criteria than the previous plan.[50]

Justice Souter, joined by Justice Ginsberg, "would not rule the utility of a criterion of symmetry" and noted that "further attention could be devoted to the administrability of such a criterion."[51]

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[47] *Gill*, 138 S.Ct. at 1928. While concluding that plaintiffs did not propose a manageable standard, the *LULAC* Court did "not revisit the justiciability holding" in *Vieth* and *Bandemer*, noting "[t]hat disagreement persists." *LULAC*, 548 U.S. at 414.

[48] *Gill*, 138 S.Ct. at 1928 (cleaned up to remove quotations and citations to the portions of Justice Kennedy's lead opinion that did not command a majority).

[49] *Id.* at 1928-29. In the portion of Justice Stevens' dissent joined by Justice Breyer, Justice Stevens appears to articulate a "sole motivation" intent standard, which in his view was not difficult to show in the case of a mid-decennial redistricting.

[50] *LULAC*, 548 U.S. at 447-48 (Stevens, J. dissenting).

[51] *Gill*, 138 S.Ct. at 1929 (cleaned up to remove quotations and citations to the opinion of Justice Souter concurring in part and dissenting in part). Three other opinions were issued in *LULAC* addressing justiciability that are not described in *Gill*. Justice Scalia, joined by Justice Thomas would have dismissed the claims of unconstitutional partisan gerrymandering as always being nonjusticiable.

C. The Current Status Of Justiciability: The Nonjusticiable Standards For Evaluating Political Gerrymandering

After summarizing these decisions, *Gill*'s unanimous conclusion was that the partisan gerrymandering cases "leave unresolved whether such claims … are justiciable."[52] Nevertheless, some standards have been rejected by a majority of Justices as articulating a judicially manageable standard. Five justices in *Vieth* concluded that a judicially discernable and manageable standard either (1) does not exist or (2) had not yet been articulated, *and* that those which had been offered in the many *Bandemer* and *Vieth* opinions and those offered by the parties in *Vieth* were nonjusticiable standards.[53] *LULAC* adds to this pantheon of proposed-but-unmanageable standards the Court's rejection of the "sole intent" test proposed by challengers, as well as the rejection of any test based solely on partisan asymmetry.[54]

In the table below, we list standards which have been rejected by the Court as justiciable, together with the reasons each were rejected:

LULAC, 548 U.S. at 511-12 (Scalia, J., concurring in part and dissenting in part). Chief Justice Roberts, joined by Justice Alito, concluded plaintiffs' test was nonjusticiable but took no position on the global justiciability question answered in Justice Scalia's opinion because it was not argued in the case.[51] *Id.* at 492-93 (Roberts, C.J., concurring in part and dissenting in part). And Justice Breyer would find a partisan gerrymander unconstitutional following his *Vieth* opinion, where "the risk of entrenchment is demonstrated, partisan considerations have rendered traditional district-drawing compromised irrelevant, and no justification other than party advantage can be found." *LULAC* at 492 (Breyer, J., concurring in part and dissenting in part).

[52] *Gill*, 138 S. Ct. at 1929.

[53] *Vieth*, 541 U.S. at 290 (plurality op.); 308, 317 (Op. of Kennedy, J.) (finding no judicially manageable standard though not closing of the potential it would be found in the future, adding "[t]he plurality demonstrates the shortcomings of the other standards that have been considered to date" in *Bandemer*, "by the parties before us, and by our dissenting colleagues" as either "unmanageable or inconsistent with precedent or both").

[54] *LULAC*, 528 at 418-20 (Op. of Kennedy, J., rejecting sole-intent test and concluding "asymmetry alone is not a reliable measure of unconstitutional partisanship").

TEST	WHY TEST IS NONJUSTICIABLE
Proof of discriminatory intent against an identifiable group coupled with demonstrable proof of discriminatory effect, based on the results of two successive elections, not just in terms of votes-to-seats, but an inability to directly or indirectly influence elections of the state legislature as a whole. (*Bandemer plurality*).	• Effects prong indeterminate, and too difficult a judicial inquiry.[55]
District-specific challenges, where there is a discriminatory intent and effect of discriminating against political opponents, and that a review of totality of circumstances, particularly the shape of the districts and adherence to political subdivision (but not to the exclusion of other factors such as legislative process) indicates the unfairness of a districting plan. (Justice Powell's *Bandemer* decision).	• Totality test determining whether a plan has gone "too far" or is "not fair" does not enable legislators to know their limits, does not meaningfully constrain judicial discretion, and would not inspire public acceptance of judicial intrusion into the foundation of democratic decisionmaking.[56]
Predominate intent to achieve a partisan advantage combined with the effect of (a) systematically packing and cracking voters and, (b) under a totality of circumstances analysis, that the map can in fact thwart a plaintiffs' ability to translate a majority of votes into a majority of seats. (*Vieth Plaintiffs'* proposed standard).[57]	• "Predominate intent" evaporates as a meaningful standard when applied statewide because line drawing involves multiple districts; partisan intent might be focused on a minority of districts; lack of clarity as to weight vs. other goals. • District-specific predominate intent problematic because partisan intent is not unlawful, leaves room for lawsuits whenever there is legislative redistricting, and the concept of "too much" partisanship is "dubious and unmanageable."

[55] *Vieth*, 541 U.S. at 282-83 (plurality op.).

[56] *Id.* at 291.

[57] *Id.* at 284, 287

TEST	WHY TEST IS NONJUSTICIABLE
	• On effects prong, rejects analogy to § 2 VRA cases because a person's politics, unlike race, is rarely discernable and never permanent; candidates matter. • Setting aside difficulties in identifying political majority, no constitutional principle indicates majority party should have majority of seats; constitution does not guarantee proportional representation; constitution does not preference "parties" over other characteristics (urban/rural, religious affiliations, etc.) no reliable measure for identifying the majority party; party affiliation not the only factor in voting. • In winner-take-all elections there can be no guarantee, no matter how district lines are drawn, that a majority of party votes statewide will produce a majority of seats.[58]
District-specific challenges only, a legal standard similar to racial gerrymandering, where the only plausible explanation for the lines was a naked desire to increase partisan strength. (Justice Stevens' *Vieth* dissent).	• In addition to other concerns raised by other tests, racial gerrymandering and partisan gerrymandering are different, racial discrimination is always suspect an requires strict scrutiny, political considerations are ordinary (not suspect) and so test cannot be the same. • Concept of "excessive" partisan motivation unmanageable.[59]
Plaintiffs' bear burden of (1) identifying a politically cohesive group in the district to which the plaintiff belonged; (2) making a "straightforward" showing that the legislature paid little to no heed for traditional districting criteria; (3) that there	• Final four prongs of test are ill-suited to the development of judicial standards: how much disregard or traditional principles?; how many traditional districting principles must be followed; how many correlations between

[58] *Id.* at 285-89.

[59] *Id.* at 292-95.

TEST	WHY TEST IS NONJUSTICIABLE
is a correlation between the deviations from traditional criteria and the political affiliation; (4) that an alternative district that would perform better on traditional criteria than the challenged law's district and ameriolate plaintiffs' political gerrymandering complaint; and (5) that the state intended to intentionally manipulate the shape of the district to pack or crack plaintiffs' group. Then the state would bear the burden of demonstrating of showing the districts enacted had objectives other than "naked partisan advantage" or show that legitimate legislative objectives are better served by the enacted districts as opposed to plaintiffs' hypothetical.[60] (Justice Souter's *Vieth* dissent, referenced also in his *LULAC* opinion).[61]	deviations and distributions?; how much would alternate plan have to remedy the deviations?; how many legislators would have to share the intent; how dominate would that intent have to be? • Test fails to identify what is being tested for, *contra* the *Bandemer* plurality ("a chance to effectively influence the political process") or the *Vieth* plaintiffs (the ability to translate votes to seats). • To the extent "vote dilution" is being tested for, adherence to traditional principles – including most obviously incumbent protection – may result in vote dilution. [62]
Though political considerations will likely play an important, and proper, role in the drawing of district boundaries, unjustified entrenchment of a political party violates the constitution. (Justice Breyer's *Vieth* dissent).	• Unjustified entrenchment, as assessed by reference to democratic theory of responsiveness, is not manageable and provides no guidance as to component parts of the analysis, including identifying who is the political majority and identifying what are neutral criteria that would explain why the "majority" did not receive a majority of seats.[63]
Mid-decennial districting where sole intent serving no legitimate public purpose. (*LULAC* plaintiffs).	• Any political gerrymandering claim, if justiciable, would have to show a burden on representational rights; sole-motivation does not address.

[60] *Vieth*, 541 U.S. at 347-51 (Souter, J., dissenting).

[61] *LULAC*, 548 U.S. 399, 483 (Souter, J. dissenting) (not applying, but appearing to continue to endorse, multi-factor test stated in *Vieth* dissent).

[62] *Vieth*, 541 U.S. at 295-98 (plurality op.).

[63] *Id.* at 299-301.

TEST	WHY TEST IS NONJUSTICIABLE
	• Moreover, determining sole motivation is "daunting" when the actor is the legislature and mixed motives surely exist. • Partisanship is not impermissible when drawing lines.[64]
Partisan symmetry standard comparing how parties would fare depending on percentage of vote received. (*LULAC* Amicus)	• No measure for determining how much dominance is too much.[65]

To those rationales provided by the *Vieth* plurality, Justice Kennedy added his observation that neither the adversarial process nor independent research have revealed any "discussion on the principles of fair districting [from] the annals of parliamentary of legislative bodies."[66] The point is simple but powerful: if the constitution was intended to regulate "fair districting," then there should be some historical evidence as to the concept of fair districting from which a constitutional standard may be drawn. It is an observation in harmony with the addressed in the *Vieth* plurality Justice O'Connor's *Bandemer* concurrence: that the tests proposed by the parties and expressed in various opinions that did not command a court majority are not tied to any discernable constitutional principle and do not follow from the

[64] *LULAC,* 548 U.S. at 418 (op. of Kennedy, J.).

[65] *Id.* at 420.

[66] *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring).

application of precedent in related contexts.[67] We elaborate on those observations further below. But first, we turn to plaintiffs' proposal.

D. Plaintiffs' Proposed Standard

Plaintiffs offer the following test for determining whether the Current Plan is an unconstitutional partisan gerrymander—what they frame as "intentional vote dilution" in violation of the 14th Amendment:

- **Step 1**: If a redistricting "plan's efficiency gap exceeds a certain numerical threshold," it "is presumptively unconstitutional."[68] If it is within the threshold, the plan is "presumptively valid."

Terminology is important to understanding plaintiffs' claims. "The efficiency gap" "is the difference between the parties' respective wasted votes in an election, divided by the total number of votes cast."[69] It is, according to the complaint, a "measure of partisan symmetry."[70] *Id.* It is a "statewide" measure.[71] Plaintiffs suggest a 7% efficiency gap in an election is the numerical threshold for presumptive

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[67] *See, e.g., Vieth*, 541 U.S. at 287-88 (plurality op.) (proportional representation is not constitutionally protected); *id.* at 290 (distinguishing one-person one-vote cases); *id.* at 297 (criticizing Justice Souter's test for tailing to identify the constitutional deprivation); *Bandemer*, 478 U.S. 148-55 (O'Connor, J., concurring) (distinguishing principles in *Reynolds* an racial gerrymandering cases from political gerrymandering cases).

[68] Amend. Compl., ¶¶ 167.

[69] Amend Compl., ¶ 5. For a more detailed discussion of how the efficiency gap is calculated, see Jackman Report, Dkt #1, Exh. #3 at 15-16. The Court may properly consider on a motion to dismiss documents referenced in the complaint that are central to the plaintiffs' claim. *Wright v. Associated Ins. Cos.*, 29 F.3d 1244, 1248 (7th Cir.1994). Professor Jackman's report is refenced in the Amended Complaint, and is central to their claim that the Current Plan violates Plaintiffs' proposed test. (Amend. Compl., ¶¶ 168-69).

[70] Amend Compl., ¶ 5.

[71] *See, e.g., id.* ¶ 7 (addressing efficiency gap of entire state plan).

unconstitutionality because they allege that is indicative of an efficiency gap that will not flip signs, i.e., where the wasted vote differential will favor the same party throughout the life of the plan.[72]

This might be considered the "effects" prong of Plaintiffs' test.

- **Step 2**: If the efficiency gap is presumptively unconstitutional, the defendants would have the burden in showing that "the plan's severe partisan unfairness is the necessary result of a legitimate state policy, or inevitable given the state's underlying political geography."[73]

This might be considered the "justification" prong of Plaintiffs' test.

E. Plaintiffs Proposed Standard In Not A Judicially Discernable And Manageable Standard For Measuring A Constitutional Violation.

Plaintiffs' proposed standard fails for multiple reasons. First, the standard lacks an intent requirement. Second, the standard attempts to measure a variation on proportionality, which is not a constitutional principle. Third, the standard fails to reliably measure a normative political baseline because it rests on a fiction that all voters are solely motivated by partisan affiliation. Fourth, because voters are diverse, plaintiffs claim fails to allege the essential elements of any equal protection claim: the existence of an identifiable group of voters, alike in all material respects, who are treated disfavorably by the law as compared to a similarly situated group of comparators, who are also alike in all material respects. Fifth, *Gill* makes clear that all political gerrymandering claims are limited to district-specific inquiries. Sixth,

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[72] Amend. Compl., ¶¶ 169.

[73] Amend Compl., ¶ 167.

plaintiffs' standard does not measure vote dilution as it has been recognized in malapportionment claims or in racial vote dilution claims. Seventh, plaintiffs' test's justification prong improperly subjects legislative decisionmaking to strict scrutiny and is otherwise unmanageable. Eighth, the efficiency gap does not reliably test what it purports to measure. Ninth, the plaintiffs' proposed standard is underinclusive because it does not allow any plaintiff to make a showing of unconstitutionality when a map is presumptively constitutional. And finally, plaintiffs' propose standard is inapplicable to any non-partisan election, rendering it incapable of assessing unconstitutional political gerrymandering that may occur throughout in the nation in the election of local legislative bodies.

1. No Intent Requirement

First, plaintiffs' standard fails to contain any intent or purpose requirement. Act 43 is neutral on its face, and does not create classifications based upon political affiliation or belief. Yet "[p]roof of … discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."[74] For this reason alone, Plaintiffs have not proposed a standard that would demonstrate *any* Fourteenth Amendment violation.

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[74] *Washington v. Davis*, 426 U.S. 229 (1976).

2. The Efficiency Gap Tests A Form Of Proportionality Called Partisan Symmetry, Which Is Not A Constitutional Standard

Plaintiffs offer that their proposed two-part test is a "workable test" similar to the Supreme Court's approach to resolving malapportionment claims, "only with the efficiency gap substituted for total population deviation."[75] The fundamental problem with this substitution is that total population deviation relates directly to a constitutional principle (one person, one vote), the efficiency gap does not.

To be sure, plaintiffs' claim obfuscates what the efficiency gap is testing. The amended complaint contains a hodgepodge of redistricting lingo: "wasted votes," "crack[ing] and pack[ing]," "vote dilution," "severe partisan unfairness," "entrenching a rival party," etc.[76] Removing the noise, we presume that the principle Plaintiffs are trying to enforce as a constitutional principle is what they initially claim the efficiency gap measures: partisan symmetry, or "the idea that a district plan should treat the major parties symmetrically with respect to the conversion of votes into seats."[77]

The efficiency gap does so by comparing "wasted votes" cast for each party[78] to determine the "efficiency" at which votes are converted into seats.[79] Wasted votes are

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[75] Amend. Compl., ¶¶ 166-67.

[76] *See, e.g.,* Amend. Compl., ¶¶ 5, 165, 167, & 172, title of Count I.

[77] Amend. Compl., ¶ 4.

[78] Amend. Compl., ¶¶ 132-33.

[79] *Id.*; *see also id.*, ¶ 140.

those cast for the losing candidate or in excess of those necessary to elect a winning candidate – inefficient votes.[80] "[D]isproportionate[] "wast[ed] … votes," according to the complaint, are the result of "severe[] pack[ing] and crack[ing of] Democratic voters."[81] In other words, Plaintiffs' claim the efficiency gap tests for disproportional "packing and cracking" that results in the likelihood vote-seat conversion ratios will not be equal as between the parties. One example of this disequilibrium, of course, is where a majority of votes for one party does not translate into a majority of seats, but when a majority of votes is received by the other party, it would.

This is simply the effects test the *Vieth* challengers proposed, but using the efficiency gap as the universal measure to demonstrate the components of the *Vieth* Plaintiffs' standard: a statewide plan is unconstitutional if there is (1) systematic packing and cracking and (2) the map can in fact thwart a plaintiff's ability to translate voting majorities into seat majorities.

Assuming the efficiency gap actually tests partisan symmetry, the efficiency gap may be a more elegant and manageable measurement than the "totality of circumstances" test pushed by the *Vieth* Plaintiffs. But that it is more manageable does not mean it is "judicially discernably in the sense of being relevant to some constitutional principle."[82] This is because, in the words of the *Vieth* plurality and

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[80] *Id.* at 132.

[81] Amend. Compl., ¶ 165.

[82] *Vieth*, 541 U.S. at 287-88 (plurality op.); *id.* at 295 ("This Court may not willy-nilly apply standards—even manageable standards—having no relation to constitutional harms.").

echoing the sentiments held by a majority of the Court in *Vieth* and *Bandemer,* having a majority of votes translate into a majority of seats "rests on the principle that groups … have a right to proportional representation. But the Constitution contains no such principle."[83] And if the Constitution did require proportional representation, there is nothing in the Constitution that would indicate it should be based on party affiliation of voters (or candidates), and not the gender of voters (or candidates), the religious affiliation of voters (or candidates), or the occupations of voters (or candidates).[84]

One reason why the Constitution does not contain a principle of proportionality (of which partisan symmetry is a variant) is that it is fundamentally inconsistent with winner-take-all single-district elections[85] – far and away the most common electoral system in the United States[86] and the one exclusively employed in Wisconsin for Assembly elections.[87] As the *Bandemer* plurality observed, even if all districts

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[83] *Id.* at 288; *see also LULAC*, 548 U.S. at 419 (opinion of Kennedy, J.) ("[T]here is no constitutional requirement of proportional representation."); *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring) (finding "no authority" for the proposition "that a majority of voters in the Commonwealth should be able to elect a majority of the Commonwealth's congressional delegation"); *Bandemer*, 478 U.S. at 130 (1986) (plurality op.); *id.* at 158 (O'Connor, J., dissenting) ("[P]roportional representation, whether loose or absolute, is judicially manageable… The flaw [is] that it is contrary to the intent of [the 14th Amendment's] Framers and to the traditions of this Republic.").

[84] *Vieth*, 541 U.S. at 288 (plurality op.); *Bandemer*, 487 U.S. at 147 (O'Connor, concurring).

[85] *See Vieth*, 541 U.S. at 289 (plurality op.); *Bandemer*, 478 U.S. at 130 (plurality op.); *id.* at 159-60 (O'Connor, J., concurring)

[86] *Bandemer*, 478 U.S. at 130 (plurality op.) ("The typical election for legislative seats in the United States is conducted in described geographical districts, with the candidate receiving the most votes in each district winning the seat allocated to that district.")

[87] Wis. Const., Art. IV, § 4 (providing for single district elections of state assembly members); Wis. Stat. § 5.01(3) (providing that the winner of any election is the person "receiving the greatest number of legal votes for the office").

were drawn to be competitive, a narrow statewide preference for either party could result in a landslide for one party or another.[88] Indeed, competitive elections produce the greatest delta of wasted votes between the parties and thus have the greatest influence on an efficiency gap calculation. A party that wins a seat by one vote has zero "wasted" votes, whereas every vote cast for the losing candidate was "wasted."

Because Plaintiffs' proposed test is simply another run at constitutionalizing a proportionality principle, the Court must find it nonjusticiable.

3. The Efficiency Gap Rests On A Fiction That Voters Are Motivated Solely By Partisan Affiliation And Thus Is Not A Reliable Test Of Political Gerrymandering

Partisan symmetry measures of all types, including the efficiency gap, rest on a giant fiction: votes cast in all state legislative contests are votes for parties and not individual candidates, and therefore these votes represent the political sentiment of a state. It is from this fictional election for party preference that plaintiffs' standard purports to divine a neutral baseline from which to evaluate the effects of an alleged gerrymander. But as the Supreme Court pointed out in *Gill*, a voter resides in a single district and votes for a single candidate.[89] And as the *Vieth* plurality explained, there is no guarantee that an individual who votes for a Democrat candidate in one

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[88] *Bandemer*, 478 U.S. at 130 (plurality op.).

[89] *Gill*, 158 S.Ct. at 1930.

district election would not have preferred a Republican in another (or a third-party, or cast a nonvote).[90]

Using statewide votes for party candidates as a dispositive measure of identifying statewide political majorities is another way of saying partisan affiliation is the only factor important to a voter in a given election. As the *Vieth* plurality noted, "[t]his is assuredly not true."[91] Quoting from a law review article, the plurality continued:

> There is no statewide vote in this country for … the state legislature. Rather, there are separate elections between separate candidates in separate districts, and that is all there is. If the districts change, the candidates change, their strengths and weaknesses change, their campaigns change, their ability to raise money changes, the issues change—everything changes. Political parties do not compete for the highest statewide vote totals or the highest mean district vote percentages. They compete for specific seats.[92]

As the *Vieth* plurality commented, "we dare say (and hope) that the political party which puts forward an utterly incompetent candidate will lose even its registration stronghold."[93] By relying only on election results (in a fictitious election, no less) to measure statewide political sentiment, the efficiency gap (and other asymmetry metrics) miss the reality that not all votes cast reflect party support. And

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[90] *Vieth*, 541 U.S. at 288 (plurality op.).

[91] *Id.*

[92] *Id.* at 289 (quoting in full, Lowenstein & Stenberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory*, 33 UCLA L. Rev. 1, 59-60 (1985)).

[93] *Id.* at 287.

these measures thus ignore entirely the question of what degree nonvoters support one party, the other, or neither.

To illustrate the efficiency gap's blindness to the phenomena of candidate quality and voter choice, consider a simple hypothetical scenario on a facially neutral map. This state has 7 districts – 3 districts with an expected Democrat vote share of 48 (A, B, and C), one with an expected Democrat vote share of 50 (D), and 3 with an expected Democrat vote share of 52 (E, F, G).

Assume districts A, B, D, E, F have incumbents with an incumbent-advantage of 4 points over the expected vote share. But there is a catch – the incumbent in district E, a democrat-leaning district, is a Republican; the incumbent in the District D is a Democrat. There is another catch, too. The Republican candidate in District D is very wealthy, and willing to spend $10 million dollars in a campaign (more than all money spent by all other candidates in these state races). This candidate once donated $200 million to local charities to great fanfare, and he advocates for local conservation issues that are widely popular among district voters but out-of-step with the majority of his party. His notoriety, issue positions, and ability to communicate his positions give him an 9-point bump over a convetional candidate. There is a third catch: four days before the election, the Republican candidate in District G is indicted for embezzling from the veteran's home. As a result, he loses a quarter of his expected supporters to his opponent and another quarter of his would-be supporters abstain from voting (another significant voter-population ignored by all partisan

gerrymandering theories). All other candidates are equal in relative quality, and perform as they'd be expected to perform.

Here are the final election results, where each district has 100,000 voters, except for G, where 25% of expected Republican voters stay home:

District	Republican Candidate Votes	"Republican" Wasted Votes[94]	Democrat Candidate Votes	"Democrat: Wasted Votes
A	56,000	12,000	44,000	44,000
B	56,000	12,000	44,000	44,000
C	52,000	4,000	48,000	48,000
D	55,000	10,000	45,000	45,000
E	52,000	4,000	48,000	48,000
F	44,000	44,000	56,000	12,000
G	24,000	24,000	64,000	40,000
Statewide vote	339,000	106,000	349,000	281,000

With Democrat candidates receiving 175,000 more wasted votes than Republican candidates out of 688,000 votes cast, this map would have an efficiency gap of more than 25%. Democrats would win 50.7% of the votes, but would hold only 2 of 7 seats.

[94] Wasted votes are calculated in the manner of the example described Paragraph 133 of the Amended Complaint. This methodology overstates the winning candidate's wasted vote total by 1 vote, but that is immaterial to the overall calculation in the examples used in this brief.

This map, with no partisan bias and no packing or cracking[95] would be presumptively unconstitutional under plaintiffs' standard. Plaintiffs might respond that the map could be saved by its "justification test." Maybe so, maybe not. The justification criteria they propose does not allow a court to explore the strengths and weaknesses of individual candidates, the effect of crossover voting, or the impact of nonvoting. And there might not have been a state policy "necessary" to justify these particular lines. The point here, though, is to demonstrate that a high efficiency gap can be the result of candidate quality and corresponding crossover voting (or voters' decision to stay home from the polls).

In fact, this example highlights a perversity inherent in the efficiency gap. The more an individual candidate like the Republican in District D appeals to voters across conventional party lines, the greater chance plaintiffs' proposed test will indicate the map is biased in favor of the party to which the attractive candidate belongs. Had the Republican candidate in district D been a run-of-the-mill candidate, there would have been 46,000 "wasted" Republican votes instead of 10,000 and 4,000 "wasted" Democrat votes instead of 45,000 – a respective difference of 77,000 "wasted" votes -- a figure that would move the efficiency gap over 10% in this example. Clearly,

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[95] Plaintiffs' claim asserts that a district with an expected Republican vote share of 50.4% is cracked. Amend. Compl., ¶ 54. This is implausible. What constitutes a "cracked" district may be an issue of fact, but we note that courts have considered districts "competitive" (which is to say neither packed nor cracked) when they fall within the range of 45-55. *See Bandemer*, 478 U.S. at 130 (plurality opinion); *see also Gill*, 138 S.Ct. at 1936 (opinion of Kagan, J.) (defining a cracked district to be one in which a chosen candidate stands "no chance of prevailing").

not every wasted vote is the result of bias, but that is the uncontestable presumption baked into plaintiffs' proposed standard.

4. Plaintiffs' Claim Does Not Involve An Identifiable Group Of Individuals Who Are Being Treated Less Favorably Than A Class Of Substantially Similar Comparators

The issue of crossover voting highlights a fundamental doctrinal complication that goes beyond the efficacy of the efficiency gap. The equal protection clause is "concerned with governmental classifications that 'affect some groups of citizens differently than others.'"[96] "Plaintiffs in such cases generally allege that they have been arbitrarily classified as members of an 'identifiable group.'"[97] To that end, they must show that there are comparators who are similarly situated to the plaintiffs and his "identifiable group"—meaning a group that is directly comparable to plaintiffs' group in all material regards—but who are treated more favorably by the law. [98]

But what is this "identifiable group" to which plaintiffs belong and what is the group of comparators whose members are "directly comparable in all regards" but who are treated more favorably with respect to some representational or voting interest? The "Intentional Vote Dilution" claim seems to assert the identifiable group

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[96] *Engquist v. Oregon Dept. of Ag.*,553 U.S. 591, 601 (2008) (quoting *McGowan v. Maryland*, 366 U.S. 420 425 (1961)).

[97] *Id.* (quoting *Personnel Administrator of Mass. V. Feeney*, 442 U.S. 256 (1979)).

[98] *La Bella Winnetka, Inc. v. Village of Winnetka*, 628 F.3d 937, 941-42 (7th Cir. 2010).

are "Democratic voters."[99] But this could mean individuals who always vote for Democrat candidates, individuals who usually vote for Democratic candidates, or individuals who sometimes vote for Democratic candidates. Any of these types might be included in plaintiffs' phrase, but this collection of individuals is not comparable for all material purposes. A "usually Democratic voter" who lives in one of plaintiffs' alleged cracked districts surely cannot be said to have their representational rights violated if they crossover from time to time based on candidate preference. Consider, for example, the usually-Democrat voter who voted Republican in one of the allegedly cracked districts.

Surely the "identifiable group" cannot be not "voters who voted for a Democrat candidate in a particular election after the law was passed," the only group the efficiency gap evaluates. This group would contain those who sometimes vote Democrat, sometimes abstain, sometimes vote third-party, and sometimes vote Republican – none of whom the legislature could predict would vote Democrat in any given election. Ideologically, one would expect this group to contain socialists, liberals, libertarians, anarchists, progressives, "new democrats," independents, moderates, liberal Republicans, and people who simply disliked the Republican opponent's attitude or liked the Democrat candidate's personality and character.

Adding to this indeterminacy, plaintiffs themselves are not alleged to always vote Democrat. They are referred to in the Amended Complaint as "Democratic

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[99] Amend. Compl., ¶ 165.

voters" and "supporters of Democratic issues and candidates."[100] Only a few allege themselves to be members of the Democratic Party,[101] only one alleges that he never votes Republican[102] – and these party members do not allege that they live in packed or cracked districts have conceded they lack standing for the Intentional Vote Dilution claim.[103] And not one plaintiff alleges he or she always votes for a Democrat candidate in every election.[104] In any event, if the claim is intended to assert a right of those who always vote Democrat, the test Plaintiffs propose makes no effort to identify those individuals because election returns do not identify those individuals. Nor are all votes cast for Democratic candidates necessarily from people like plaintiffs "who support Democratic candidates" or who are "Democratic voters."

The same indeterminacy problem exists with identifying the comparators – the persons comparable to plaintiffs in all material respects to whom the law allegedly treats more favorably. Voters who are not "Democratic voters" or who did not vote for a Democratic candidate in any given election may include: crossover voters who sometimes vote Democrat, issue- or candidate-specific voters, voters who prefer incumbents, independents, abstainers, or the inflexible partisans that plaintiffs'

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[100] Amend. Compl., ¶¶ 18, 21, 24, 27, 30, 33, 36, 39, 42, 45, 48, 51, 54, 57, 60, 63, 66, 69, 72, 75, 78, 81, 84, 87, 90, 93, 96, 99, 102.

[101] Amend. Compl., ¶¶ 105, 107-111.

[102] Amend. Compl., ¶ 105.

[103] Amend. Compl., ¶ 180.

[104] *See* allegations relating to plaintiffs, Amend. Compl., ¶¶ 18-111.

complaint presumes we all are. The permutations are endless, and therein lies the problem with *all* partisan gerrymandering claims as identified by the *Vieth* plurality:

> [A] person's politics is rarely as readily discernible—and *never* as permanently discernible—as a person's race. Political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line.[105]

Plaintiffs' claim fails to account for the diversity and freewill of voters. In doctrinal terms, Plaintiffs claim lacks an "identifiable group" of individuals who are similarly situated in all material regards to a group of comparators. As a result, Plaintiffs either fail to state an equal protection claim or propose a test that is nonjusticiable.

5. *Gill* Makes Clear That The Equal Protection Clause Protects Individuals, Not Groups, And Thus Limits Political Gerrymandering Claims To District-Specific Inquiries

To evade the messy problem of individual voter diversity, plaintiffs seek to vindicate a group right (collective representation of democrat voters)[106] as opposed to an individual right (i.e., fair representation based one based on an individual's representational interest).

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[105] *Vieth*, 541 U.S. at 287.

[106] *See, e.g.,* Amend. Compl., ¶ 172.

But the "Fourteenth Amendment[] … protect[s] persons, not groups."[107] And as *Gill* made clear, "a person's right to vote is individual and personal in nature."[108] "To the extent that the plaintiffs' harm is the dilution of their votes, that injury is district specific."[109] Moreover, a "citizen's interest in the overall composition of the legislature is embodied in his right to vote for *his* representative."[110]

To be sure, *Gill* addressed whether Plaintiff Whitford suffered a concrete and particularized injury-in-fact sufficient for standing. But its principles have broader application. A voter votes for a single representative, not a legislative body.[111] A voter's representational interests – not just in terms of standing but in terms of what is protected by the Fourteenth Amendment – must necessarily relate to the district in which he is elected.

Plaintiffs' formulation of their claim ignores this limiting principle entirely. To be sure, the Amended Complaint now restricts its prayer for relief to remedy its Intentional Vote Dilution claim to the 29 districts in which they allege "Democrat

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[107] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

[108] *Gill*, 138 S.Ct. at 1929; *cf. Shaw v. Hunt*, 517 U.S. 899, 917 (1996) (in context of Voting Rights Action, rejecting legal theories that were based on the principle that the right to an undiluted vote belongs to the minority group as opposed to the group's individual members).

[109] *Id.* at 1930.

[110] *Id.* a 1931 (emphasis added). *Cf. Mobile v. Bolden*, 446 U.S. 55, 78-79 (1980) (plurality op.) ("[P]olitical groups [do not] have an independent constitutional claim to representation.") (citing *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977); *White v. Regester*, 412 U.S. 755 (1973); and *Whitcomb v. Chavis*, 403 U.S. 124 (1971)).

[111] *Id.* at 1930; Wis. Const. Art IV, § 4.

voters" are cracked and packed.[112] But what makes "wasted votes" objectionable to Plaintiffs is not that they exist – they exist *by definition* for virtually half of a district's electorate no matter how a map is drawn – nor that they exist due a manipulation of districting criteria in a plaintiff's district.[113] Instead, plaintiffs find wasted votes objectionable if they contribute to wasted vote totals for all candidates of the two major parties at the state level.[114] In fact, as shown by plaintiffs' proposed test, plaintiffs' claims are *solely* dependent on statewide partisan effect because that is all the plaintiffs' standard—the efficiency gap—measures.[115]

The fact that plaintiffs are really asserting a group right in collective representation instead of some type of individual right is evidenced (1) by their chief complaint (that that the Current Plan allegedly denies all Democrats the opportunity to exercise "power,"[116] which plaintiffs appear to equate to a legislative majority); and (2) the standard that they employ (that examines collective vote-to-seat efficiency). Notably, if all districts were packed such that the winning candidate received 75% of

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[112] Amend. Compl., ¶ 180.

[113] Plaintiffs do not allege that any district violates any traditional districting criteria, and it cannot be inferred from their Complaint. On a statewide level, they admit to approximating the Plan's criteria with respect to the Voting Rights Act, compactness, municipal splits, an equal population when developing their alternatives. *See, e.g.,* Amend. Compl., ¶ 162.

[114] *See, e.g.,* Amend. Compl., ¶ 146-48 (describing political makeup of two Sheboygan County area districts "contributed to Wisconsin's current pro-Republican efficiency gap"); Amended Compl., ¶¶ 131-36 (describing efficiency gap calculation as a formula based on the results of elections statewide).

[115] *See Gill*, 138 S.Ct. at 1933.

[116] Amend. Compl. ¶ 172.

the vote and the losing candidate 25%, the efficiency gap would be zero.[117] But in such a scenario, the voter preferring the losing party's candidate would effectively have no ability to elect a candidate of his or her choosing. If there is an individual right to fair representation or equal protection that depends on a partisan voter's ability to elect a candidate of his choosing (or be treated the same as his partisan opposite in this regard), then this would be the scenario.

The current plaintiffs might have standing to assert a claim that their district has been gerrymandered,[118] but by continuing to present the alleged constitutional violation as a "group right," they have not corrected what *Gill* described as "the shortcoming [that is] fundamental problem with the plaintiffs' case as presented on this record. It is a case about group political interests, not individual legal rights."[119]

6. Plaintiffs' Test Does Not Measure The Representational Right Embodied By The Concept Of Vote Dilution

Rather than measuring for partisan symmetry, it is possible that plaintiffs are trying to assert a pure vote dilution claim.[120] These claims arise in three contexts:

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[117] Consider a district with 10,000 votes cast; 7,500 for the Democrat and 2,500 for the Republican. Using the efficiency gap calculation modeled in Paragraph 133 of the Amended Complaint, 2,500 Democrat votes are wasted (each vote greater than that needed to win), and 2,500 Republican votes are wasted.

[118] If this motion is not granted and an answer becomes due, Proposed-Intervenors plan on asserting they lack standing as an affirmative defense.

[119] *Gill*, 138 S.Ct. at 1933.

[120] We note while plaintiffs style Count I as an intentional vote dilution claim, the specific paragraphs supporting that Count do not again use the term dilution. Amend. Compl., ¶¶ 165-72.

malapportionment claims,[121] racial gerrymandering,[122] and statutory violations of the voting rights act.[123]

For the reasons we show below, plaintiffs' "vote dilution" claim is nothing like the "vote dilution" recognized by the Supreme Court in the above-listed contexts. First, Plaintiffs are not asserting any right of the type addressed in *Reynolds v. Sims*, which is a right to be enjoyed by all citizens regardless of where they live. Second, with respect to the analogy to racial gerrymandering constitutional claims and voting rights act claims, plaintiffs are asking the court to find a much lower standard to identify the "effects" of political gerrymandering as is applied to racial gerrymandering or Voting Rights Act claims. Moreover, vote dilution in each of these contexts is local, yet plaintiffs insist on applying a test that examines only statewide effects. So whether or not the constitution prohibits partisan "vote dilution" as a constitutional principle, plaintiffs' proposed standard does not test for vote dilution as it has been heretofore understood.

a. The One-Person One-Vote Principle Does Not Suggest The Equal Protection Clause Is Concerned

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[121] *See, e.g., City of Mobile v. Bolden*, 446 U.S. 55, 116 (Marshall, J., dissenting) ("The equal protection problem attacked by the "one person, one vote principle is … one of vote dilution: under *Reynolds*, each citizen must have an equally effective voice in the election.") (cleaned up).

[122] *See, e.g., Rogers v. Lodge*, 458 U.S. 613, 616-20 (1982) (describing racial gerrymandering cases addressing vote dilution); *Whitcomb*, 403 U.S. 124, 149 (1971) (concluding that multimember districts violate the Fourteenth Amendent is "conceived of or operated as purposeful devises to further racial discrimination by minimizing, cancelling out or diluting the voting strength of racial elements of the voting population").

[123] *See, e.g., Thornburg .v Gingles*, 478 U.S. 30, 50-51 (1986).

With The Political Makeup Of Districts Or The State Legislature As A Whole

The *Bandemer* plurality concluded that partisan gerrymandering claims were justiciable by relying on *Reynolds v. Sims*.[124] *Reynolds*, of course, formulated the one-person one-vote standard governing legislative apportionment.[125] *Reynolds* stated that the basic aim of apportionment is "achieving fair and effective representation for all citizens" and that the "Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of State legislators."[126] The Court thus concluded that "[d]iluting the weight of votes because of place of residence" impaired 14th Amendment rights.[127]

The *Bandemer* plurality acknowledged that the rights asserted in *Reynolds* and in political gerrymandering cases were different. In the plurality's words, *Reynolds* involved the right of "*each elector*" "to vote for and be represented by the same number of lawmakers" as any other elector.[128] Political gerrymandering claims, on the other hand, involve "the claim … that *each political group* should have the same chance to elect representatives of its choice as any other political group."[129] Nevertheless, the *Bandemer* plurality asserted that "*Reynolds* surely indicates the

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[124] *Bandemer*, 478 U.S. at 123-24 (plurality op.).

[125] *Reynolds v. Sims*, 377 U.S. at 577-81 (1964).

[126] *Id.* at 565-66.

[127] *Id.* at 566.

[128] *Bandemer*, 478 U.S. at 124 (plurality op.) (emphasis added).

[129] *Id.* (emphasis added).

justiciability of claims going to the [substantive] adequacy of representation of the state legislatures."[130] The question of whether it does, however, is now "unresolved"[131] and *Bandemer* is not authoritative on the question.

And *Reynolds* does not lead to this conclusion, either expressly or implicitly. The "[f]air and effective representation" guarantee evoked by *Reynolds* was something to be enjoyed by "*all* citizens," and it was achieved by ensuring that the "with respect to the allocation of legislative representation, all voters, as citizens of a state, stand in the same relation regardless of where they live."[132] In other words, a citizen should not share with 500,000 others a single representative while a neighboring citizen shares his representative with only 50,000 others; a citizen should not have his or vote contribute to 1/10th the representational interest in a collective body than the citizen of another district. In addition, when it comes to voting (as opposed to representation), it was a "participat[ory]" "right," not an outcome or opportunity-for-outcome based right. It was the right to be an equal citizen and have one's vote counted the same as every other's citizens, not the right of every citizen to have that vote have the same abstract chance at electing the winning candidate.[133]

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[130] *Id.* Justice Powell's *Bandemer* opinion also stated that the right at stake was to "fair and effective representation." *Id.* at 162 (op. of Powell, J., concurring in part and dissenting in part).

[131] *Gill*, 138 S.Ct. at 1929.

[132] *Reynolds*, 377 U.S. at 565-66 (emphasis added).

[133] *Id.* at 565-66.

The core feature of the right to "fair representation" announced in *Reynolds* is something that it is shared by all citizens equally, as individuals. Extending *Reynolds* beyond these core features unmoors it from a connection to the equal protection clause.

Partisan gerrymandering cases are not seeking to enforce *Reynolds'* "equal opportunity for participation by all voters" "regardless of where they live" principle – even if we assume for the sake of argument that "equal opportunity to participate" includes a substantive "opportunity to elect." This is because "opportunity to elect" is a concept that is *never* enjoyed by voters equally within districts or across districts. Partisan political affiliation is not uniformly distributed "save for in a mythical State with voters of every political identity distributed in an absolutely gray uniformity."[134] Thus, it is always the case that a voter living in a given district, whether or not drawn as a result of excessive partisanship, will have a different "opportunity to elect" a candidate of his choice (or have his vote "wasted") than his neighbor who has opposing political views.[135] Similarly, a Democrat living in Dane County is going to have a different chance of electing a Democrat than one living in Ozaukee County.[136]

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[134] *Vieth*, 541 U.S. at 343 (op. of Souter, J., dissenting).

[135] *Cf. Baumgart v. Wendelberger*, No. 01-C-0121, 02-C-0366, 2002 WL 34127471 at *6 (E.D. Wis. May 30, 2002) (describing impossibility of a politically fair map while adhering to redistricting criteria in Wisconsin given unequal distribution of population) (attached to Brief In Support Of Motion To Intervene as Attachment 5).

[136] In Dane County, Secretary Clinton received 217,697 votes of the 309,354 votes cast in the 2016 Presidential Election – over 70%. In Waukesha County, she received 79,224 of the 237,593 votes cast, or 33% of the vote. *See* Wisconsin Elections Commission, County by County Report, 2016 General Election (available at https://elections.wi.gov/sites/default/files/County%20by%20County%20Report%20President%20of%20the%20United%20States%20Recount.pdf.) The Court may take judicial notice

If the equal protection clause were concerned with "opportunity to elect" based on partisan affiliation – and if *Reynolds*' "fair representation" is the source the constitutional principle being enforced – then voters "regardless of where they live," including those in Dane County, Waukesha County, or any of Wisconsin's other 70 counties, would be treated identically with respect to the "opportunity to elect."

But that is not plaintiffs' claim, nor any partisan gerrymandering claim.[137] Presuming that they believe their computer-generated map is something that would be constitutional,[138] they assert it is constitutional for a Democrat and Republican voter living in Wauwatosa to be in a district with an expected 60% Democrat vote share, but unconstitutional for the same voters to live in a district with an expected 60% Republican vote share.[139] They assert that it is constitutional for a voter living in Shorewood to reside in a district with an expected Democrat vote share of 63%, but unconstitutional for a voter living in Ridgeway to be placed in a district with an expected Democrat vote share of 61%.[140] Note that each example involves a voter

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of the 2016 Presidential Elections results, tabulated by county, and as reported by a government body. These are facts that "can be accurately and readily determined from [a] source[] whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b)(2); *Menominee Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998) (it is proper to take judicial notice of the reports of administrative bodies). Judicial notice may be taken at any stage of the proceedings and doing so does not convert a motion to dismiss into a motion for summary judgment. Fed. R. Evid. 201(d); *Menominee Tribe of Wisconsin*, 161 F.3d at 456.

[137] If it were, then all traditional districting criteria – even a state's insistence that districts be contiguous – would violate this principle. *Vieth*, 541 U.S. at 290-91.

[138] *See* Amend. Compl., ¶ 20 (describing a computer-generated map plaintiffs have created that "beats the Current Plan on every one of its nonpartisan objectives").

[139] Amend. Compl. ¶¶ 24-26.

[140] *Compare* Amend. Compl., ¶¶ 21-23 *with id.*, ¶¶ 87-89.

with a virtually equivalent opportunity to elect a candidate of his or her choosing, each district would result in roughly the equivalent number of "wasted" votes for the losing and winning sides, but that some districts are alleged to be constitutional and others are not. But the voters in these examples are not being treated *differently* from one another with respect to *their* votes to elect *their* representatives – the only legally protectable interest they possess.[141] Thus, under plaintiffs' equal protection theory, however it is formulated, a situation where there is *equal* treatment with respect to individuals' "opportunity to elect" or "wasted votes" actually violates the equal protection clause.

Last, *Reynolds'* concern about unequal representation-in-fact is not implicated by partisan gerrymandering cases. There is simply no denial of representation for a voter who is in the substantive minority. It seems an obvious-if-often-overlooked point that legislators represent *all* of their constituents—not just the ones who voted for them. The premise that a representative has no obligations to voters who did not elect him is "antithetical to our system of representative democracy."[142] So while a losing candidate's supporters might be "without representation" *by their candidate of choice*,[143] courts "cannot presume … that the candidate elected will entirely ignore the interests of those voters."[144] Instead, those voters are "deemed to be adequately

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[141] *See Gill*, 138 S.Ct. at 1930.

[142] *Shaw v. Reno*, 509 U.S. 630, 648 (1993).

[143] *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971).

[144] *Bandemer*, 478 U.S. at 132 (plurality op.).

represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district."[145] Were it to be otherwise, then every voter who votes for a losing legislative candidate would be inadequately represented, a concept that would render all winner-take-all election schemes unconstitutional. They are not.[146]

In sum, the features whatever interest challengers are asserting, it is not of a fair-representation-for-all-individuals regardless-of-their-residence type that *Reynolds* recognized and which provided is a natural fit with the Equal Protection Clause.

b. Plaintiffs' Claim Is Not Analogous To Racial Vote Dilution Claims And Plaintiffs' Test Would Not Identify Vote Dilution As Understood In The Race Context

The Supreme Court has recognized that the Constitution protects racial minorities from unconstitutional vote dilution.[147] But it does not follow that there is a justiciable claim relating protecting partisans from vote dilution. Racial gerrymandering is not analogous to partisan gerrymandering, and should not have

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[145] *Id.* at 131.

[146] *See, e.g., Whitcomb*, 403 U.S. at 160 ("We are not prepared to hold that district-based elections decided by plurality vote are unconstitutional in either single- or muliti-member districts simply because the supporters of losing candidates have no legislative seats assigned to them.").

[147] *See, e.g., Rogers v. Lodge*, 458 U.S. 613, 616-20 (1982) (describing racial gerrymandering cases addressing vote dilution); *Whitcomb*, 403 U.S. 124, 149 (1971) (concluding that multimember districts violate the Fourteenth Amendent is "conceived of or operated as purposeful devises to further racial discrimination by minimizing, cancelling out or diluting the voting strength of racial elements of the voting population").

the same test applied. And though racial discrimination is doubtlessly more pernicious than political opportunism, the "effects" tests considered in racial gerrymandering vote dilution claims are far more difficult to prove than the effects test proposed by Plaintiffs' standard.

At the outset, we repeat that a person's politics is not an immutable and unchangeable characteristic like race, and that this makes political gerrymandering an ill-fit for any equal protection claim.[148] But if plaintiffs could overcome this problem, it does not follow that racial and partisan gerrymandering claims would be analyzed the same way. Strict scrutiny applies to racial classifications because they involve suspect classifications; partisan gerrymanders do not. As the Supreme Court reasoned in *Shaw:*

> [N]othing in [the Supreme Court's] case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting—as well as our Fourteenth Amendment jurisprudence—would seem to compel the opposite conclusion.[149]

Indeed, "race is an impermissible classification" but "[p]olitics is quite a different matter."[150] Unlike drawing districts on the basis of race, which has no place

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[148] *See* § II.E.3 and 4, *supra.*

[149] *Shaw v. Reno*, 509 U.S. 630, 650 (1993); *see also Vieth*, at 293-94 (plurality opinion); *Bush v. Vera*, 517 U.S. 952, 964 (1996) (plurality opinion) ("We have not subjected political gerrymandering to strict scrutiny.").

[150] *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment) (cleaned up).

in redistricting absent a compelling state interest,[151] the use of partisan considerations in districting is a "lawful and common practice."[152]

But even if partisan vote dilution were to be treated like racial gerrymandering dilution, this is not the claim that plaintiffs are pursuing. First, constitutional racial gerrymandering claims are challenges to specific districts,[153] challenges to multi-member districts must be split into single-member districts to not dilute the minority vote,[154] or challenges that an at-large scheme must be split into single districts so as to not dilute the minority vote.[155] While plaintiffs are alleging voters are cracked and packed, their proposed test—the efficiency gap—is not specific to any single district. As the Gill Court concluded,

> [N]either the efficiency gap nor the other measures of partisan asymmetry offered by the plaintiffs are capable of telling the difference between what Act 43 did to Whitford and what it did to Donohue. The single statewide measure of partisan advantage delivered by the efficiency gap treats Whitford and Donohue as indistinguishable, even though their individual situations are quite different.

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[151] *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017).

[152] *Vieth*, 541 U.S. at 286 (plurality opinion); *see also Gaffney*, 412 U.S. at 753 ("The reality is that districting inevitably has and is intended to have substantial political consequences.").

[153] *Alabama Legislative Black Caucus v. Aabama*, -- U.S. --, 135 S.Ct. 1257, 1265 ("A racial gerrymandering claim … applies to the boundaries of specific districts … and does not apply to a State as an undifferentiated whole.")

[154] *See, e.g., Whitcomb*, 403 U.S. at 158.

[155] *See, e.g., City of Mobile v. Bolden,* 446 U.S. at 59; *Rogers v. Lodge*, 458 U.S. 613, 624 (1982).

This logic of this observation is not confined to a standing analysis, since the vote dilution *claim* is district-specific. And plaintiffs have not refined their proposed equal protection standard on remand.[156]

Second, it is not enough in racial gerrymandering vote dilution cases to show that the group claimed to be discriminated against did not have members of their group win office.[157] But Democrats failure to win as many seats as plaintiffs believe their statewide vote share indicates they should win is plaintiffs' only concern and all their standard purports to test. Racial gerrymandering vote dilution claims, however, require a showing that the racial group was effectively shut out of the political process.[158] Winning or losing elections can be probative, but courts must also examine such things as the minority group's access to the candidate selection process, the unresponsiveness of elected officials to minority interests, evidence of past discrimination, and so on.[159] Plaintiffs' proposed standard does not test for any of these phenomena, they do not provide allegations that if proven would establish this phenomena, and it fails *Iqbal/Twombley's* plausibility standard to assert that a major political party is experiencing anything remotely similar to the type of political exclusion that African-Americans and other minority racial groups have experienced in our nation's history.

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[156] *Compare* Amend. Compl., ¶¶ 164-72 *with* Compl. (Dkt #1), ¶ 81-89.

[157] *Rogers*, 458 U.S. at 623-24.

[158] *See, e.g., Rogers*, 458 U.S. at 623-627.

[159] *Id.* at 619 & n.8.

The issue here is whether there is any judicially and manageable standard for adjudicating partisan gerrymandering claims. If constitutional racial gerrymandering vote dilution claims provide a blueprint for such actions, then, as the *Bandemer* plurality held,[160] the gerrymandering claim is about whether a partisan set of voters is shut out of the political process, not simply whether they were able to win elections. Plaintiffs' proposed standard does not test for this and thus it is not a proper or justiciable standard for "vote dilution" claim. Additionally, plaintiffs' amended complaint lacks the factual allegations necessary to plead a vote dilution claim of this sort.

c. Section 2 Vote Dilution

Section 2 of the voting rights act provides for an actionable vote dilution claim where a minority group's members are cracked across multiple districts such that they "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[161] Like constitution-

[160] *Bandemer*, 478 U.S. at 131-34 (plurality opinion).

[161] 42 U.S.C. § 1973(b); *Growe v. Emison*, 507 U.S. 25, 40-41 (1993).

based racial gerrymandering claims, Section 2 claims are district specific,[162] whether challenges are to multi-member districts[163] or single-member districts.[164]

To demonstrate a discriminatory effect in a given district, Section 2 plaintiffs are required to show three necessary preconditions: (1) the minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district, (2) the minority group must be politically cohesive, and (3) the majority must vote sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.[165] After establishing the prerequisites, courts conduct "a totality of the circumstances" analysis to determine whether a district denies minorities an opportunity to participate in the political process; whether minority-preferred candidates were elected is only part of the equation.[166]

There are obvious objections to finding that Section 2's vote dilution effects criteria are required by the Fourteenth Amendment. First, it is implausible that a statutory enactment was required to protect the rights of classes specifically shielded from discrimination by the Fourteenth Amendments when the identical protection was hidden in the Fourteenth Amendment all along to protect the rights of persons

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[162] *LULAC*, 548 U.S. 437 (The question of whether the absence of an additional opportunity district "requires an intensely local appraisal of the challenged district … because the right to an undiluted vote does not belong to the minority as a group, but rather to its individual members") (cleaned up to remove quotations and citations).

[163] *Gingles*, 480 U.S. at 50-51.

[164] *Growe*, 507 U.S. at 40-41.

[165] *Gingles*, 480 U.S. at 50-51.

[166] *Johnson v. DeGrandy*, 512 U.S. 997, 1011-22 (1994); *see also, LULAC*, 548 U.S. 436-42.

(or groups) not specifically protected by the Fourteenth Amendment. Second, at some point in the Section 2 analysis, courts consider statewide proportionality as part of the "totality of circumstances."[167] But partisan proportionality is not a constitutional consideration, for reasons explained above. Third, the Section 2 approach has already been rejected as a justiciable standard by a majority of the Supreme Court, primarily because "a person's politics is rarely as readily discernable—and *never* as permanently discernable—as a person's race."[168] Fourth, applying these standards to two major political parties (as opposed to discrete minority groups) would potentially entangle the courts in the drawing of most if not all district lines. This is because either Republicans or Democrats are statewide parties of similar strength. If one party's voters can meet the *Gingles* test in a given area, it is likely that the other party's voters can do so as well with a slightly altered district map. Courts would essentially be choosing between whether a democrat voter or a republican voter will get the benefit of an opportunity district or an influence district in a geographic area where each party's followers can make a *Gingles* demonstration. Courts would be making choices based on political considerations (because that is how the groups are defined), applying a discretion-filled totality of the circumstances test, and thus

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[167] *LULAC*, 548 U.S. at 437.

[168] *Vieth*, 541 U.S. at 286 (plurality opinion) (finding challengers proposed nonjusticiable); *id.* at 308 (opinion of Kennedy, J., concurring) ("The plurality demonstrates the shortcomings of [the standard offered by the parties as] unmanageable or inconsistent with precedent, or both.").

"commit[ting] federal and state courts to unprecedented intervention in the American political process."[169]

But if all those hurdles could be overcome, then plaintiffs' standard is not the justiciable test and plaintiffs' claim fails to state a claim for which relief can be granted. This is because, among other reasons, they do not plead (or test for) facts relating to the *Gingles* factors or the "intensely local appraisal" required in Section 2 cases[170] to determine whether opportunity or influence districts must be created.

7. Plaintiffs' Justification Mechanism For Resolving Presumptively Unconstitutional Plans Improperly Subjects Legislative Map Drawing To Strict Scrutiny And Is Otherwise Unmanageable

If the efficiency gap analysis triggers presumptive unconstitutionality, then plaintiffs' proposed Step #2 shifts the burden to the state to show that the plan's "severe partisan unfairness is the necessary result of a legitimate state policy, or inevitable given the state's underlying political geography."[171] This second prong of the test is inconsistent with precedent and unworkable.

It is inconsistent with precedent because any "necessity" requirement is a species of strict scrutiny. But the Court noted in *Shaw* that political gerrymandering

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[169] *Vieth*, 541 U.S. at 306 (opinion of Kennedy, J., concurring).

[170] *LULAC*, 548 U.S. at 437.

[171] Amend. Compl., ¶ 167.

claims should not be held to that level of scrutiny.[172] Moreover, the concurring and dissenting opinions that would find a partisan gerrymandering claim justiciable (or allow it might be), do not place such a heavy burden on the state. For example, in *Vieth*, Justice Stevens' test, which would only consider a district-specific challenge, required there to be "no neutral criteria to justify the lines drawn." So long as a district's shape could be explained by a "rational basis," he would have upheld it.[173] Justice Souter, joined by Justice Ginsberg, articulated a single-district multifactorial test where if all of the conditions were met, the state would only have the burden of showing reference to objectives other than naked partisan advantage that are either not served by a plaintiffs' proposal, or are better served by the enacted plan.[174]

Second, while plaintiffs claim to borrow their justification prong from malapportionment cases where there is more than a *de minimis* population deviation, the test in those cases less stringent than plaintiffs contend. Instead, a population deviation that is more than *de minimis* can be upheld if (1) the plan may reasonably be said to advance a rational state policy, and if so, (2) whether the deviations exceed constitutional limits.[175] Plaintiffs' more aggressive formulation of this test is close to

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[172] *Shaw v. Reno*, 509 U.S. 630, 650 (1993); *see also Vieth*, at 293-94 (plurality opinion); *Bush v. Vera*, 517 U.S. 952, 964 (1996) (plurality opinion) ("We have not subjected political gerrymandering to strict scrutiny."); *see also Vieth*, 541 U.S. at 293.

[173] *Vieth*, 541 U.S. at 337-39 (Stevens, J., dissenting).

[174] *Vieth*, 541 U.S. at 351 (Souter, J., dissenting).

[175] *Voinovich v. Quilter*, 507 U.S. 146, 161.

the doctrine as characterized in a dissenting opinion, but even that opinion would provide the state greater latitude in justifying a plan than plaintiffs propose.[176]

As importantly, this "justification" standard is not manageable in the context of plaintiffs' proposed test. Apportionment claims involve a single malapportioned district, and the justification prong is addressed to whether the state has a legitimate justification for the district that cannot be better served by a smaller population deviation.[177]

But Plaintiffs are testing for statewide deviation from some norm (statewide partisan symmetry), of which individual districts are only contributors in the calculation. Plaintiffs' standard is not, step #1: Assembly District 1 violates a *de minimis* standard; step #2: is it justified? To that claim, the state might respond that the district is surrounded by water on three sides (it is Door County) and there is not any meaningful flexibility given the population of the peninsula.

But here, the claim is that the Current Plan, as a whole, exhibits "severe partisan unfairness." To justify the "Current Plan," would the state have to explain every jot or tittle that went into the creation of a plan? Plaintiffs seem to suggest

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[176] *Brown v. Thomson*, 462 U.S. 835, 852 (Brennan, J., dissenting) (deviations from the *de minimis* 10% standard should not be "*significantly greater* than necessary to serve the state's asserted policy") (emphasis added).

[177] *Brown*, 462 U.S. at 846 ("The issue therefore is not whether a 16% average deviation and an 89% maximum deviation, considering the state apportionment plan as a whole, are constitutionally permissible. Rather, the issue is whether Wyoming's policy of preserving county boundaries justifies the additional deviations from population equality resulting from the provision of representation to Niobrara County.")

that the existence of an alternate plan that that "compl[ies] with all federal and state criteria" shows that the state will not be able to meet Plaintiffs' justification prong.[178] But there is more to "state policy" than "compliance." A statewide compactness score, for example, does not answer the question of whether a *specific* district in an alternative map is more or less compact than the one the state adopted. That an alternative map may have the same number of municipal splits on a statewide level does not mean that the state is not pursing a legitimate policy in determining *where* those splits occur. For example, Act 43 keeps Assembly District 18 wholly in the city of Milwaukee and within a single community of interest rather than stretching it into the suburbs as Plaintiffs' computer-generated map would do.[179] Finally, there are a host of legitimate considerations that Plaintiffs' alternatives do not (on the face of the complaint) consider, even political considerations, such as protecting incumbents.[180] How is a court to weigh legitimate individual district decisions against a statewide "score"?

The point here is not to argue the merits of the potential justifications for the Current Plan, but to demonstrate that Plaintiffs test is either unmanageable because it requires the comparing proverbial apples and oranges, or the justification prong is

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[178] Amend. Compl., ¶ 170.

[179] *See* Amend. Compl. ¶ 28-29.

[180] *See Karcher v. Daggett,* 462 U.S. 725, 740 (1983); *White v. Weiser,* 412 U.S. 783, 797 (1973); *Burns v. Richardson,* 384 U.S. 73, 89, n. 16 (1966).

underinclusive because it denies the state the ability to justify each district drawn on its merits.

Nor is it manageable to determine whether "severe partisan unfairness" "inevitable given the state's political geography." This test provides no guidance, for example, as to whether the legislature must "correct" for correlative "packing" of applying traditional criteria. One example is the packing that frequently associated with drawing VRA-mandated minority opportunity or influence districts, districts where "racial identification is highly correlated with political affiliation."[181] Surely such districts significantly impact the efficiency gap calculation. But does a map exhibit "severe partisan unfairness" because a legislature failed to intentionally pack together voters who do not share the political views predominate in § 2 districts to offset the efficiency gap contribution of packed-without-partisan-purpose districts?

Moreover, plaintiffs suggest that "inevitability" means the *inability* to draw a district map with less partisan bias than that contained in a current plan. Plaintiffs offer a computer-drawn comparison and a political-scientist crafted alternative drawn to attempt to achieve a zero efficiency gap, implying that if *any* state map could be drawn with a more equal distribution, it is constitutionally required.[182]

But it is assuredly not the law to subordinate all traditional criteria to political calculations and only those criteria that can be measured with computers and

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[181] *Easley v. Cromartie*, 532 U.S. 234, 243 (2001).

[182] Amend. Compl., ¶¶ 20, 170.

statistics. Courts have never taken this approach when faced with the task of drawing a map due to a legislative impasse. The *Baumgart* three-judge district court decision explaining the court's line-drawing decisions for the map that governed Wisconsin Assembly elections from 2002-2010 illustrates this point:

> The Baumgart intervenors' method for analyzing political fairness was more sophisticated than the base-race method and is correct in the results found, namely, that even if the Democrats win a bare majority of votes, they will take less than 50% of the total number of seats in the Assembly. The problem with using this finding as the basis for a plan is that it does not take into account the difference between popular and legislative majorities, and the fact that, practically, there is no way to draw plans *which use the traditional criteria and completely* avoid this result. Theoretically, it would be possible to draw lines for Assembly districts that would assure that the party with the popular majority holds every seat in the Assembly. However, Wisconsin Democrats tend to be found in high concentrations in certain areas of the state, and the only way to assure that the number of seats in the Assembly corresponds roughly to the percentage of votes cast would be at-large election of the entire Assembly, which neither side has advocated and would likely violate the Voting Rights Act.[183]

And so the Court drew the Assembly maps, "guided by the neutral principles of maintaining municipal boundaries and uniting communities of interest" while keeping population deviations low,[184] and the resulting map produced an *average* efficiency gap of 8%.[185] Political geography did not, according to the Court's findings, make "partisan unfairness" *theoretically inevitable*, it simply recognized that

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[183] *Baumgart*, No. 01-C-0121, 02-C-0366, 2002 WL 34127471 at *6 (E.D. Wis. May 30, 2002) (Attachment 5 to Brief In Support of Wisconsin State Assembly's Motion To Intervene) (emphasis added).

[184] *Id.* at *7.

[185] Amend. Compl., ¶ 137.

partisan fairness as the lodestar in drawing maps is in tension with the natural and neutral application of legitimate traditional redistricting policy.

If plaintiffs' justification prong does not allow the Legislature the latitude enjoyed by courts to draw neutral lines, surely it is not the proper test.[186]

8. Other Shortcomings With Plaintiffs' Proposed Standard

a. The Efficiency Gap's Baseline Partisanship Determination Is Not Restricted To Actual Results

Even if it were methodologically sound to determine a state's political makeup through a statewide tally of votes for all Assembly candidates by party, the efficiency gap does not do this. This is because the efficiency gap does not just use actual district-specific votes in its calculations.

Not all 99 Assembly districts have competitive races. In the 2016 general election, for example, Republicans did not have a candidate on the ballot in 28 districts and Democrats did not field a candidate in 21 districts.[187] To generate an efficiency gap calculation, a plaintiff would have to either ignore half of the state's

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[186] *Cf. Connor v. Finch,* 431 U.S. 407, 414 (1977) ("legislative apportionment is 'primarily a matter for legislative consideration and determination.'") (quoting *Reynolds*, 377 U.S. at 586).

[187] *See* Wisconsin Elections Commission, *Canvass Results for 2016 General Election*, pp. 9-31 (available at https://elections.wi.gov/sites/default/files/Statewide%20Results%20All%20Offices%20%28post-Presidential%20recount%29.pdf). The Court may take judicial notice of the election results as reported by the state elections commission, as they "can be accurately and readily determined from [a] source[] whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b)(2); *Menominee Tribe of Wisconsin*, 161 F.3d at 456 (it is proper to take judicial notice of the reports of administrative bodies). Judicial notice may be taken at any stage of the proceedings and doing so does not convert a motion to dismiss into a motion for summary judgment. Fed. R. Evid. 201(d); *Menominee Tribe of Wisconsin*, 161 F.3d at 456.

districts or, as they allege they have here, impute results using some other method.[188] In other words, to determine the political baseline to assess whether a party has earned "underserved" seats, the efficiency gap uses *projected* results from district races that never happened. And not just one or two districts, but *half* the races. The efficiency gap is thus a fiction on top of a fiction – a determination of how many seats a party should have won based upon how many votes should have been cast (but were not) in a statewide election for "Assembly" that does not actually exist.

b. The Efficiency Gap Does Not Reliably Measure Partisan Symmetry Or Packing And Cracking

What's more, the efficiency gap does not reliably measure what it purports to measure – political symmetry. Consider a state with 340,000 voters and 8 districts. Half of the voters will vote for each party, and half of the seats will be won by each party (the definition of symmetry). In this state, like Wisconsin, per-district voter turnout varies substantially. [189] In such a state, the efficiency gap calculation could trigger presumptive unconstitutionality:

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[188] Plaintiffs' expert Simon Jackman's report describes a process for imputing votes for the 27 uncontested Assembly elections in 2012 and the *52* uncontested races in 2014. His calculation is based on massaged Presidential election results in those districts. Jackman Report at 69. The Court may properly consider on a motion to dismiss documents referenced in the complaint that are central to the plaintiffs' claim. *Wright v. Associated Ins. Cos.*, 29 F.3d 1244, 1248 (7th Cir.1994). Professor Jackman's report is refenced in the Amended Complaint, and is central to their claim that Plaintiffs' proposed test was violated. (Amend. Compl., ¶¶ 168-69).

[189] Even on maps like the Current Plan that conform with the Constitution's equal population requirement, *Baldus v. Members of the Wisconsin Government Accountability Bd.,* 849 F. Supp.2d 840, 849-52 (E.D. Wis. 2012) (holding Act 43 complies with equal population requirement), per-district turnout can vary dramatically. In 2014, for example, there were 6,454 votes cast for all candidates for Assembly District 8, which is a § 2 district in Milwaukee. *See id.* at 854-50 (discussing Assembly District 8 as § 2 district); *see also,* 862 F. Supp.2d 860 (remedial order in same case). In the same general election, there were 31,501 votes cast in Assembly District 23, a suburban Milwaukee district

District	Republican Candidate votes	"Republican" Wasted Votes[190]	Democrat Candidate	"Democrat" Wasted Votes
A	28,000	8,000	20,000	20,000
B	28,000	8,000	20,000	20,000
C	29,000	9,000	20,000	20,000
D	29,000	9,000	20,000	20,000
E	18,000	18,000	20,000	2,000
F	18,000	18,000	20,000	2,000
G	15,000	15,000	30,000	15,000
H	5,000	5,000	20,000	15,000
Statewide vote	170,000	90,000	170,000	114,000

With Democrats wasting 24,000 more votes than Republicans out of 340,000 total votes, the efficiency gap is greater than 7%. It might be that this map is the product of cracking and packing, but it is not asymmetrical.

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covering portions of Milwaukee and Ozaukee Counties. Neither election was close, with the Democrat candidate wining District 8 with nearly 80% of the vote and the Republican winning District 23 with over 63% of the vote. *See* Wisconsin Government Accountability Board, *Canvass Results for 2014 GENERAL ELECTION*, p. 11, 14 (available at https://elections.wi.gov/sites/default/files/11.4.14%20Summary%20Results-all%20offices.pdf). The Court may take judicial notice of the election results as reported by the state elections commission, as they "can be accurately and readily determined from [a] source[] whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b)(2); *Menominee Tribe of Wisconsin*, 161 F.3d at 456 (it is proper to take judicial notice of the reports of administrative bodies). Judicial notice may be taken at any stage of the proceedings and doing so does not convert a motion to dismiss into a motion for summary judgment. Fed. R. Evid. 201(d); *Menominee Tribe of Wisconsin*, 161 F.3d at 456.

[190] Wasted votes are calculated in the manner of the example described Paragraph 133 of the Amended Complaint. This methodology overstates the winning candidate's wasted vote total by 1 vote, but that is immaterial to the overall calculation in the examples used in this brief.

Nor does the efficiency gap necessarily alert when there are cracked or packed districts. Consider the following eight district state, where 6 districts score 60% or higher – "packed" districts according to the amended complaint.[191] Republicans are packed into 4 districts—every district they ultimately win—and Democrats are packed into only 2 districts:

District	Republican Candidate votes	"Republican" Wasted Votes[192]	Democrat Candidate	"Democrat" Wasted Votes
A	4,000	4,000	9,000	5,000
B	4,000	4,000	8,000	4,000
C	17,000	17,000	17,500	500
D	17,000	17,000	17,500	500
E	15,000	5,000	10,000	10,000
F	15,000	5,000	10,000	10,000
G	15,000	5,000	10,000	10,000
H	15,000	5,000	10,000	10,000
Statewide vote	170,000	62,000	170,000	50,000

In this hypothetical state, Republicans win 52.5% of the statewide vote, the seats are even, and the efficiency gap threshold (12,000 votes out of 194,000 cast: 6%) is not met. But using Plaintiffs' definitions, the Plan creates more "packed"

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[191] *See* Amend. Compl., ¶ 104 (democrat voter living in a district with an expected 61% Democrat vote share alleged to be in packed district).

[192] Wasted votes are calculated in the manner of the example described Paragraph 133 of the Amended Complaint. This methodology overstates the winning candidate's wasted vote total by 1 vote, but that is immaterial to the overall calculation in the examples used in this brief.

Republican districts than Democrat districts, and gives Democrats a fair shot at obtaining half the seats in the Legislature without earning half the statewide vote.

These two examples, combined with the candidate quality/crossover voter example, show that efficiency gap calculations can indicate presumptive unconstitutionality with a neutral map, can indicate presumptive unconstitutionality when a map is symmetrical, and can fail to indicate unconstitutionality when there is unequal packing.

The only thing the efficiency gap reliably measures is itself.[193]

c. Plaintiffs Provide No Mechanism For Determining The Unconstitutionality Of Plans That Are Presumptively Constitutional

Given that the efficiency gap might not indicate where voters are being treated unequally in a constitutionally significant way—a condition presumed by the fact Plaintiff's characterize their test as "presumptively constitutional"—then a justiciably discernable and manageable standard should include a mechanism identifying these examples. After all, if there is an underlying constitutional principle at stake and a claim is justiciable, a standard should have the capability to vindicate that constitutional right.

But plaintiffs' standard does not contain such mechanism – quite possibly because it would require them to make plain the constitutional principle they are

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[193] Even that is a stretch, given that different methodologies (whether for imputing votes or establishing the "neutral" baseline) yield different efficiency gap scores. *Compare* Amend. Compl., ¶ 138 *with* Amend. Compl., ¶ 139.

trying to test for. At any rate, the *Vieth* plurality concluded that standards which were necessarily underinclusive failed to meet the standards for justiciability.[194]

d. Plaintiffs' Test Is Incapable Of Application To Nonpartisan Races

Plaintiffs' test relies on the ability to ascertain a (supposedly) neutral baseline assuming that a votes for candidates with an R or D next to their name reflects the baseline partisan affiliation of the electorate. If political gerrymandering claims violate the 14th Amendment based on a violation of some representational right, then the standards used to identify those violations must be applicable must be standards used to identify the violation that would be applicable with respect to any violation of that right.

But not all legislative bodies are elected on a partisan ballot. In Wisconsin, for example, members of multi-member local legislative bodies are elected on a nonpartisan ballot.[195] The 14th Amendment applies to elections of these officials just as it applies to elections to representatives of a state legislature.[196] In Nebraska, state legislators are elected on nonpartisan tickets.[197] Plaintiffs standard provides no mechanism for identifying constitutional violations in these scenarios.

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[194] *Vieth*, 541 U.S. at 298.

[195] Wis. Stat. § 5.60(1)(ar) (designating that "[n]o party designation may appear on the official ballot" next to the same of any candidate for several offices, including "county supervisor"); *See also* Wis. Stat. § 5.60(3)(am)(same restriction relating to all city officials, which would include alders).

[196] *Cooper v. Aaron*, 358 U.S. 1, 17 (1958).

[197] Neb. Rev. Stat., § 32-813(6)(a).

F. The Court Should Not Create Its Own Standard To Evaluate Plaintiffs' Claim

In one of the few portions of the *LULAC* decision forming an opinion of the Court, the Court framed its justiciability inquiry as "whether *appellants*' claims offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution."[198] Whether the Court was required to consider *other* standards was not an overlooked issue, but the subject of concurring opinions.[199] Thus, the threshold question in this case is not whether there may be a justiciable standard, but whether *plaintiffs*' proposed standard is justiciable.

The Court should refrain from creating its own standard, particularly without providing a pretrial opportunity to address whether that standard is justiciable. At any rate, the court's standard articulated in the first phase of this case,[200] which has neither preclusive effect nor status as law of the case,[201] is a nonjusticiable standard.

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[198] *LULAC*, 548 U.S. at 414 (emphasis added).

[199] Chief Justice Roberts, joined by Justice Alito, concurred in judgment because "appellants have not provided a reliable standard for identifying unconstitutional gerrymanders" but, consistent with the opinion of the Court, stated he would not go further on justiciability because the parties did not argue justiciability. *LULAC*, 548 U.S. at 492-93 (cleaned up) (op. of Roberts, C.J., concurring in part and dissenting in part). Justice Scalia's opinion, joined by Justice Thomas, argued that it was the Court's role in exercising its adjudicatory function to identify a different standard than the one offered by the law's challengers, if one exists. *Id.* at 512 (op. of Scalia, J., concurring in part and dissenting in part).

[200] *See Whitford v. Gill*, 218 F. Supp.2d 837, 884 (W.D. Wis. 2016) (concluding that a "redistricting scheme which (1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds" is unconstitutional), *rev'd for lack of subject matter jurisdiction by Gill v. Whitford*, 138 S. Ct. 1916 (2018).

[201] Because this Court lacked subject-matter jurisdiction, its previous opinion is not subject to the doctrines of issue preclusion or claim preclusion. *See, e.g., Montana v. United States*, 440 U.S. 147, 153 (1979) (an element of the doctrines of collateral estoppel and res judicata is that first court possesses "competent jurisdiction"). Because justiciability was appealed to the Supreme Court, *Gill*, 138 S.Ct. at 1929 (noting justiciability question was raised by appeal but not decided), the law of the

Its intent prong, which appears to define impermissible intent as the excessive interjection of politics,[202] contains the same shortcomings the *Vieth* Plaintiffs' test.[203]

The effects prong looked to whether the Current Plan created a durable majority for Republicans and thus denied plaintiffs' representational rights.[204] This echoes Justice Breyer's "unjustified enrichment" test that was rejected by a majority of the *Vieth* Court.[205]

Moreover, as explained above—and as the *Gill* Court made clear in stressing the district-specific nature of the constitutional rights that may be at stake here—the right to representation does not extend to any group right of a political majority have a legislative majority in one house of the legislature.[206]

And third, the court's justification prong suffers from the same shortcomings as plaintiffs' proposed justification prong.

Finally, we note that the *Gill* court's treatment of the right to vote as a district-specific right appears to exclude *any* vote dilution claim (which Plaintiffs assert they

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case doctrine does not apply. *Cf., Schering Corp. v. Illinois Antibiotics Co.*, 89 F. 3d 357, 358 (7th Cir. 1996) (law of the case doctrine applies where issue decided by lower court could have been appealed but was not).

[202] *Whitford*, 218 F. Supp.3d at 884-90.

[203] *Vieth*, 541 U.S. at 284-87 (plurality op.) (concluding "predominate intent to disadvantage political rival" standard is not discernable or manageable in statewide or district-specific contexts).

[204] *Whitford*, 218 F. Supp.3d at 898.

[205] *Vieth*, 541 U.S. at 299-301 (plurality op.); *id.* at 308, 317 (Kennedy, J., concurring) (accepting plurality's rationale for rejecting standards proposed by dissenting justices).

[206] The arguments critical of Plaintiffs' proposed effects test stated above in sections IIB.2-6 of this brief are applicable to the court's test articulated in Phase I of this litigation. We will not repeat them here.

are bringing) on the basis of statewide results.[207] Similarly, as addressed in Section II.6. above, the apportionment claims and the racial gerrymandering vote dilution claims, which provide the only arguable extension of a constitutional principle to political gerrymandering claims, must be district-specific. It follows that if there is a judicially discernable and manageable standard, it must relate to gerrymandering in a specific district.

III. Further Reasons For Finding Nonjusticiability

Where cases involve a matter textually committed to another branch, require courts to make initial policy decisions, or require a court to exhibit a lack of respect for a coordinate branch of government if it is to reach an independent resolution, cases fall within the political question doctrine.[208] We note that elements of all three of these factors exist here.

The responsibility of districting—at both for Congress and the statehouse—is a matter textually committed to state legislators.[209] This is not to say that courts may not decide cases involving legislative districting and the adjudication of an individual right. Supreme Court precedents interpreting the Equal Protection Clause and the Voting Rights Act ("VRA"), a state legislature *must* draw districts with nearly perfect population equality,[210] and must *not* (1) dilute the voting strength

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[207] *Gill*, 138 S.Ct. at 1931, 1933.

[208] *Baker v. Carr*, 369 U.S. 186, 217 (1962).

[209] U.S. Const., Art I, Sec. 4; Wis. Const., Art. IV, § 3.

[210] *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016).

of sufficiently large and politically cohesive minority groups;[211] (2) cause retrogression in minority voting strength in jurisdictions covered by Section 5 of the VRA;[212] (3) allow racial considerations to predominate over traditional districting principles absent a compelling interest (notwithstanding the VRA's command to consider the impact of district lines on minority voters);[213] or (4) purposefully discriminate against minority voters.[214]

But political gerrymandering requirements are different in kind than these requirements. This is because they ask a court to prevent the *political branch* from making *political decisions*. "[P]olitics and political considerations are inseparable from districting and apportionment,"[215] and the "opportunity to control the drawing of electoral boundaries through the legislative process is a critical and traditional part of politics in the United States."[216] Had the framers of the United States and Wisconsin Constitutions intended for courts to take politics out of the districting process, surely they would not have vested the political branch with the responsibility of drawing lines.

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[211] *Gingles*, 478 U.S. at 50-51.

[212] *Ala. Legislative Black Caucus v. Alabama*, -- U.S. --, 135 S. Ct. 1257, 1273 (2015).

[213] *Bethune-Hill v. Virginia State Bd. of Elections*, -- U.S. --, 137 S. Ct. at 788, 797 (2017).

[214] *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960).

[215] *Gaffney*, 412 U.S. at 753.

[216] *Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring).

Moreover, excessive judicial intervention in this area is *inconsistent* with the representational rights, given that legislators and legislatures, not judges and courts, provide representation. As *Gaffney* acknowledged,

> [T]he goal of fair and effective representation [is not] furthered by making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurringly removed from legislative hands and performed by federal courts which themselves must make the political decisions necessary to formulate a plan or accept those made by reapportionment plaintiffs who may have wholly different goals from those embodied in the official plan. From the very outset, we recognized that the apportionment task, dealing as it must with fundamental choices about the nature of representation, is primarily a political and legislative process.[217]

And much more so than apportionment cases, political gerrymandering claims require courts to made an initial policy determination: what is fair? This is because unlike apportionment cases, which are grounded by a constitutionally prescribed ideal (one person, one vote), or racial gerrymandering cases, which address the very discrimination and exclusion from the political process that the post-Civil War Amendments were designed to prevent, there is no fixed constitutional principle informing a political gerrymandering claim. There is no constitutionally prescribed ideal votes-to-seats ratio. There is no proportional representation. And in fact, these concepts are fundamentally *inconsistent* with area- and population-based single-member districts.

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[217] *Gaffney*, 412 U.S. at 749 (cleaned up to remove internal quotations and citations).

What is left then, is whether a map seems "fair" – and that really is the crux of Plaintiffs' complaint – that Act 43 exhibits "severe partisan unfairness."[218] But "fairness" is not a judicially manageable standard.[219] Fairness is not a component of an equal protection analysis.[220] And concluding that "fairness" is measured against proportionality is itself an initial policy choice that "*Baker v. Carr* rightly requires [courts] refrain from making … in order to evade what would otherwise be a lack of judicially manageable standards."[221]

More than that, "what is fair" is *the* quintessential legislative question. Assigning citizens to electoral districts requires "tough value-laden decisions" about "how communities should be represented" and how to foster "service relationships between representatives and constituents that fit into larger public policy programs."[222] Those tough decisions, like all other policy choices, are best made as part of the "give-and-take of the legislative process,"[223] by legislators who can undertake a "careful assessment of local conditions."[224] Courts do not have the institutional capacity to make these "value-laden" decisions, which by their nature require a subjective balance of numerous and sometimes conflicting considerations to

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[218] Amend. Compl., ¶¶ 140, 167

[219] *Vieth*, 541 U.S. at 291 (plurality op.).

[220] *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) ("Equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.")

[221] *Bandemer*, 487 U.S. at 158 (O'Connor, J., concurring).

[222] Nathaniel Persily, *In Defense of Foxes Guarding Henhouses*, 116 Harv. L. Rev. 649, 679 (2002).

[223] *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 10, 249 Wis.2d 706.

[224] *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 801 (2017).

select a specific map that is one out of a nearly boundless group of alternatives. This is not of a kind analysis courts employ when exercising judicial discretion.[225]

Last, we note that it is impossible for a court to independently adjudicate political gerrymandering cases without expressing disrespect for the legislative branch. Partisan intent is assuredly not *verboten,* but if there is to be a political gerrymandering claim, "too much" is. And because legislative maps do not create facial classifications based on politics and because equal protection analysis requires discriminatory intent, courts have felt compelled to pierce legislative privilege and immunity because it is the best way for a plaintiff to discover evidence that may illuminate the seemingly imponderable question of the predominate intent of the 50+ legislators who enacted the law.[226]

Yet common law legislative immunity protects legislators against "all civil process," and it was not abrogated by Section 1983.[227] Neither the Supreme Court nor

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[225] *Cf. Baumgart*, No. 01-C-0121, 02-C-0366, 2002 WL 34127471 at *7 (recognizing that drawing maps involves making "subjective choices" regarding communities of interest).

[226] *See, e.g., Benisek v. Lamone*, No. 1:13-cv-03233, 2017 WL 959641, at *8 (D. Md. Mar. 13, 2017); ("[C]onversations between and among legislators" are "the most probative evidence of intent."); *Baldus v. Mebers of the Wisconsin Government Accountability Bd.*, 843 F. Supp.2d 955, 959 (E.D. Wis. 2012) ("Those argued privileges, though, exist in derogations of the truth…. And the truth here—regardless of whether the Court ultimately finds the redistricting plan unconstitutional—is extremely important to the public, whose political rights stand significantly affected by the efforts of the legislature."); *Comm. For A Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11-C-5065, 2011 WL 4837508, at *6 (N.D. Ill., Oct. 12, 2011).

[227] *Tenney v. Brandhove*, 341 U.S. 367, 372, 375-76 (1951); *see also See, e.g., Bogan v. Scott-Harris*, 523 U.S. 44, 46 (1998) (extending "absolute immunity from civil liability for their legislative activities" enjoyed by state legislators to local legislative officials and was not abrogated by the law that is today codified as 42 U.S.C. § 1983).

the 7th Circuit has ever issued an opinion piercing common law legislative immunity or privilege in the context of a civil suit.[228]

The reasons for the doctrine of legislative privilege is so that legislators can undertake their constitutional responsibilities "with firmness and success." To that end, they must enjoy "the fullest liberty of speech, and … be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense."[229] Moreover, the Supreme Court explained in *Tenney* that the "claim of an unworthy purpose does not defeat the privilege… The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial … or to the hazard of a judgment against them based upon … speculation as to motive."[230]

Yet by qualifying the privilege enjoyed by legislators and their staffs in political gerrymandering cases – qualifications that have not received the imprimatur of authoritative appellate decisions – courts necessarily disrespect the functioning of the legislative branch by subjecting it to inquiries that will ultimately stifle legislative decisionmaking. It is no different in kind than if the legislature were to

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[228] *Reeder v. Madigan*, 780 F. 3d 799, 802 (7th Cir. 2015) (addressing and rejecting argument that state legislators were entitled to a narrower legislative privilege than their federal counterparts in cases that were not criminal actions); *cf. United States v. Gillock*, 445 U.S. 360, 372-73 (legislative privilege for state legislator may be pierced in criminal proceedings).

[229] *Tenney*, 341 U.S. at 373 (quoting Constitutional framer James Wilson as reported in, II Works of James Wilson (Andrews ed. 1896), p. 38).

[230] *Id.* at 377.

subpoena a multi-member court to discover whether the deciding judges had conversations that evinced impartiality.

Indeed, partisan gerrymandering claims pose a uniquely potent threat to legislative autonomy: They are so easy to allege that they will be filed after almost every election; every standard that has ever been proposed for adjudicating them is so indeterminate that the inevitable litigation will be utterly unpredictable; and they provide plaintiffs with such an easy way to pierce the legislative privilege that the potential for abuse will be ever-present.

Allowing claims like plaintiffs' to proceed would therefore wrest control over the districting process away from the state legislators to whom state constitutions assign the task, and hand it to federal judges, opportunistic plaintiffs, and social scientists seeking to convert academic theories into constraints on the democratic process.

For all these reasons, the court should find plaintiffs' political gerrymandering claims nonjusticiable.

IV. Plaintiffs' Burden On Association Claim Fails To State A Claim For Which Relief May Be Granted

Plaintiffs' "Burden on Association" claim fails for a simple reason: because what Plaintiffs call a "burden" is nothing more than an allegation that their expressive associational activity is now less likely to be successful and therefore they have less incentive to engage in it. This is not a "burden" that implicates a First Amendment interest.

Act 43 does not have any of the hallmarks of burdening expressive activity. It does not prohibit any expressive activity; does not impose costs on the exercise of any expressive activity; does not regulate the internal affairs of the Democratic party, its relationship with supporters, or its supporters' relationship with one another; does not chill the exercise of any associational right by raising the specter of fine, penalty, or, arbitrary enforcement; and does not require Plaintiffs to forego a right or tangible benefit in order to associate. The Court should dismiss Plaintiffs' claim that the First Amendment guarantees associations a static level of popularity.

The Supreme Court has explained that the right to associate, outside the context of intimate relationships (not applicable here), involves the "right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion," also known as "expressive association."[231]

The first step in analyzing an association claim, then, is whether there is an allegation of associational expressive activity. Here, we concede that some (though not all) of the underlying activities mentioned in the Amended Complaint involve expressive activity that may fall within the ambit of First Amendment protection.[232]

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[231] *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984).

[232] For example, paragraph 176 of the Amended alleges that the Current Plan "deters [supporters of the Democratic Party] from, and hinders them in … donating money to candidates." Setting aside for another day whether Voter-Plaintiffs have actually been hindered in this activity by Act 43, donating money to candidates is expressive activity protected (though not absolutely) by the First Amendment. *See, e.g., Randall v. Sorrell*, 548 U.S. 230, 248 (2006). But paragraph 176 also states that Democratic supporters have been hindered in "implementing their preferred policies." No judicial decision, to our knowledge, would extend the First Amendment to policy implementation as opposed to advocacy for a

But merely because an associational expressive activity is alleged to be *effected* by a law does not mean a complaint has alleged a *burden* necessary to state a plausible First Amendment claim.

The paradigm expressive association infringement, of course, is when political speech is banned. As the Court explained in *Citizens United*, "If the First Amendment has any force, it prohibits Congress for fining or jailing citizens, or associations of citizens, for simply engaging in political speech."[233] Act 43 does not impose any sanction on engaging in speech, whether by Democrats, Republicans, or otherwise, and voter-plaintiffs do not contend that it does. But their allegations that that Act 43 "burdens" their speech—a conclusory allegation that the Court does not take as true under *Iqbal/Twombley*—is not supported by concrete allegations or controlling authority.

Expressive activity is "burdened" when laws or regulations impose a requirement or duty on a speaker or association when they speak. Campaign disclosure and disclaimer regulations are one example. As the Court stated in *Citizens United*, "disclaimer and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities and do not prevent anyone from speaking."[234] For this reason, disclaimer and disclosure requirements

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policy position. The opposite is true. "Although the First Amendment protects political speech …, it does not the right to make law, by initiative or otherwise…." *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082, 1100 (10th Cir. 2006).

[233] *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 349 (2010).

[234] *Citizens United*, 558 U.S. at 366 (cleaned up to remove internal quotations and citations).

are subject to "exacting scrutiny,"[235] something closer to intermediate scrutiny than strict scrutiny.

Describing the burden at issue in *Citizens United* and the "burden" claimed here helps illustrates that Plaintiffs are not claiming a state-imposed burden at all. The burdening (though upheld) law at issue in *Citizens United* required speakers to identify in their televised political-speech advertisements the person or group responsible for the ad's content. Specifically, the law compelled speakers to devote valuable airtime to audio of the disclaimer and valuable screen space to displaying the disclaimer—40% of time of some of the law's challengers' promotional ads.[236] In essence, the law required speakers to *do something* in exchange for the right to engage in expressive activity. That "something" was the burden.

Here, Act 43 does not require voter-plaintiffs to *do anything* in exchange for the ability to speak. Instead, the government-imposed "cost" of speech is the same today as it was before Act 43 passed.

And plaintiffs' "burden" is not of a kind with other burdens held by the Supreme Court to be First Amendment violations.[237] For example, Act 43 does not disqualify Voter-Plaintiffs from public benefits or privileges as a result of their

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[235] *Id.* at 366-67.

[236] *Id.* at 366.

[237] *See Clingman v. Beaver*, 544 U.S. 581, 587 (2005) (listing cases and holdings of Supreme Court decisions finding infringements of expressive associational rights).

associations,[238] does not compel plaintiffs to associate with others to whom they do not wish to associate as a condition of engaging in First Amendment activity,[239] and does not prevent new persons from affiliating with the voter-plaintiffs and democrats after a given date.[240]

In fact, Act 43 does not impose any restriction, impairment, or regulation of voter-plaintiffs' speech. It is not the fear of fine, sanction, or cost affecting Plaintiffs' expressive association activities. It is their fear that their speech will fail at achieving their ultimate ends. In short, what they call a "burden on association" is simply a claim that their associational activities are less likely to be successful.

That is not a cognizable First Amendment burden. The Tenth Circuit case of *Initiative and Referendum Institute v. Walker*[241] neatly captures the problems with Plaintiffs' burden on association theory. In that case, Utah amended its constitution to require a super-majority to pass certain laws relating to taking wildlife.[242] The plaintiffs argued that this made it very difficult to secure passage of a wildlife initiative, and that this in turn "dispirited" their organizational activities and caused

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[238] *See, e.g., Elrod v. Burns*, 427 U.S. 347, 351, 372-73 (1976) (sheriff's deputies may not be discharged solely because they did not support Democratic Party); *Keyishan v. Board of Regents*, 385 U.S. 589, 595-96, 604 (1967) (public employment may not be conditioned on loyalty oaths requiring non-affiliation with Communist Party).

[239] *California Democratic Party v. Jones*, 530 U.S. 567, 577 (2000).

[240] *See Tashijan v. Republican Party of Conn.*, 479 U.S. 208, 210-11, 217-25 (1986).

[241] 450 F.3d 1082 (10th Cir. 2006).

[242] *Id.* at 1086.

them to feel "marginalized" and "silenced." In a nutshell, plaintiffs in that case alleged analogous burdens those alleged here.

The Tenth Circuit rejected the claim. Citing United States Supreme Court decisions, the court explained, "there is a crucial difference between a law that has the 'inevitable effect' of reducing speech because it restricts or regulates speech, and a law that has the 'inevitable effect; of reducing speech because it makes particular speech less likely to succeed."[243] The Tenth Circuit concluded by noting that Plaintiffs "constitutional claim begins … from a basic misunderstanding. The First Amendment ensures that all points of view ay be heard; it does not ensure that all points of view are equally likely to prevail."[244]

Anderson v. Celebrezze and *Burdick v. Takushi*, the two majority opinions cited in the Amended Complaint at ¶ 175 as legal support for Plaintiffs theory,[245] do not help Plaintiffs to overcome the obvious hurdle that Act 43 imposes no costs or conditions on expressive association. *Anderson* and *Burdick* were variations of ballot-access cases. *Anderson* involved a state law (held to be unconstitutional) that

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[243] *Id.* at 1100 (citing *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 790 n. 5 (1988) (stressing the difference between "a statute regulating how a speaker may speak" and a statute with a "completely incidental impact" on speech, which does not implicate the First Amendment); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671–72 (1991) (rejecting a challenge to a state court's application of promissory estoppel to a newspaper's promise of anonymity to a confidential source, in part because any effect on First Amendment freedoms was "self-imposed," "no more than incidental, and constitutionally insignificant").

[244] *Id.* at 1101.

[245] Plaintiffs also cite *Crawford v. Marion County*, 553 U.S. 181 (2008). (*Amend. Compl.*, ¶ 177). *Crawford* did not have a majority opinion, as Justice Stevens' lead opinion was joined by only two other Justices.

prevented Independent candidates from appearing on a general election ballot if signatures were not gathered by mid-March of the election year while *allowing* the major party nomination process to continue for another five months.[246] The burden imposed by the law was that Independents had a compressed timeline to engage in pre-nomination activities as compared with Democrats or Republicans. Put differently, Independents were *prevented* from engaging in pre-nomination associational activity during spring and early summer while the Democrats and Republicans were able to do so. And most obviously, Independent voters could not check a box to select their candidate on their ballots whereas Democrats and Republicans could.

Burdick involved a state law (held to be constitutional) that prevented write-in voting,[247] and thus prevented a form of speech at the ballot box and implicitly burdened at least a portion of those wishing to vote for a candidate to engage in the activities (expressive and otherwise) necessary to place a candidate on the ballot if that candidate were to receive a vote.

Act 43 does not impose any legal requirements that would treat Democrats or plaintiffs differently than other group with respect to ballot access or the ability to engage in political activity. Nor does it prevent plaintiffs from casting a ballot (by

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[246] *Anderson v. Celebrezze*, 460 U.S. 780, 790-91 (1983).

[247] *Burdick v. Takushi*, 504 U.S. 428, 441 (1992).

write in or otherwise) for the candidate of their choice. Act 43 is completely silent on these matters.

Nor is Plaintiffs' Justice Kagan's concurring opinion in *Gill* or the three-judge district court's recent decision in *Rucho* persuasive. Justice Kagan's concurring opinion involved, in the opinion of the Court, "speculative and advisory conclusions" about a case not before the Court that involved "allegedly different burdens."[248] And in offering the concurring opinion, Justice Kagan did not cite a single majority opinion that supports the idea that a government-imposed "burden" may exist without government-imposed restriction, limitation, or condition on expressive associational activity.

As for *Rucho*, district court opinions are not authoritative, and the case is being appealed.[249] Many other district courts have rejected First Amendment claims in far more persuasive opinions. In fact, the Supreme Court has summarily affirmed district court decisions rejecting First Amendment political gerrymandering claims similar to the claim presented here, and summary affirmances have precedential value.[250] We provide three examples.

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[248] *Gill*, 138 S.Ct. at 1931.

[249] *See Common Cause v. Rucho*, Nos. 1:16-cv-1026; 1:16-cv-1164 at 3 (M.D.N.C., Sept. 4, 2018) (acknowledging defendants had filed a notice of appeal) (available in publicly accessible electronic database in PACER, Dkt & 150).

[250] *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (quoting Second Circuit with approval, stating "lower courts are bound by summary decisions by this Court until such time as the Court informs them that they are not") (cleaned up); *but see Mandel v. Bradley*, 432 U.S. 173, 176 (stating that "a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not

1. In *Badham v. March Fong Eu*, a group of Republican congressional representatives and Republican voters challenged California's congressional districting law as a Democrat gerrymander that "diluted the strength of Republican voters."[251] In rejecting plaintiffs' First Amendment claim that they were being penalized for their affiliations and chilled in public debate about issues of public importance, the Court distinguished *Anderson* on the basis that the voters could still vote for the party and candidate they wished and found their "chilled speech" assertion to be "wholly without merit": "While plaintiffs may be discouraged by their lack of electoral success, they cannot claim [the districting law] regulates their speech or subjects them to any criminal or civil penalties for engaging in expression."[252]

2. In *League of Women Voters v. Quinn*, the district court rejected the notion that a districting plan could constitute an impairment of expressive rights because "it brushes aside a critical first step to bringing a content-based First Amendment challenge: the challenged law must actually restrict some form of protected expression. It seems a rather obvious point."[253]

3. In *Anne Arundel County Republican Cent. Committee v. State Administrative Bd. of Election Laws*, the district court dispatched with plaintiffs'

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be gleaned solely from the opinion below" and is to be given "appropriate, but not necessarily conclusive, weight").

[251] *Badham v. March Fon Eu*, 694 F. Supp. 664, 667 (N.D. Cal. 1988), *sum. aff'd*, 488 U.S. 1024 (1989).

[252] *Id.* at 675.

[253] Case No. 1:11-cv-5569, slip op. at 4 (N.D. Ill. Oct. 28, 2011) (available in publicly accessible database on PACER, Dkt #34) (dismissing First Amendment political gerrymandering claim), *sum. aff'd*, 566 U.S. 1007.

First Amendment claim because "nothing about [the districting law] affects in any proscribed way plaintiffs' ability to participate in political debate…. They are free to join pre-existing political committees, form new ones, or use whatever other means are at their disposal to influence the opinions of their congressional representatives."[254]

These summarily affirmed decisions are precedential and should be applied here.

Plaintiffs have not alleged a First Amendment claim for which relief may be granted.

CONCLUSION

For the foregoing reasons, plaintiffs fail to state a justiciable claim for which relief can be granted, and dismissal is appropriate.

Respectfully submitted this 4th day of October, 2018.

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[254] 781 F. Supp. 394, 401 (D. Md. 1991), *sum. aff'd* 504 U.S. 938 (1992).

ATTACHMENT 3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

WILLIAM WHITFORD, et al.,

Plaintiffs,

Case No. 3:15-CV-00421-jdp

v.

BEVERLY R. GILL, et al.,

Defendants.

WISCONSIN STATE ASSEMBLY'S ANSWER TO AMENDED COMPLAINT

Intervenor-Defendant Wisconsin State Assembly, through their counsel, respond as follows as their Answer to the Amended Complaint (Dkt #201):

Pursuant to Fed. R. Civ. P. 10(c), Wisconsin State Assembly adopts by reference "Defendants' Answer To Amended Complaint," filed September 28, 2018 (Dkt # 207). This adoption-by-reference includes all responses contained in the numbered paragraphs, all responses to the "Relief Requested," and all "Affirmative Defen[s]es" stated therein.

Intervenor-Defendants reserve the right to supplement in this Answer and its Affirmative Defenses should further information become known to Intervenor and as permitted by the Court.

Respectfully submitted this 4th day of October, 2018.

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Attorneys for Wisconsin State Assembly

ATTACHMENT 4

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0194p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LEAGUE OF WOMEN VOTERS OF MICHIGAN; ROGER J. BRDAK; FREDERICK C. DURHAL, JR.; JACK E. ELLIS; DONNA E. FARRIS; WILLIAM "BILL" J. GRASHA; ROSA L. HOLLIDAY; DIANA L. KETOLA; JON "JACK" G. LASALLE; RICHARD "DICK" W. LONG; LORENZO RIVERA; RASHIDA H. TLIAB,

Plaintiffs-Appellees,

v.

RUTH JOHNSON, in her official capacity as Michigan Secretary of State,

Defendant,

JACK BERGMAN; BILL HUIZENGA; JOHN MOOLENAAR; FRED UPTON; TIM WALBERG; MIKE BISHOP; PAUL MITCHELL; DAVID TROTT, Republican Congressional Delegation,

Proposed Intervenors-Appellants.

No. 18-1437

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

No. 2:17-cv-14148—Eric L. Clay, Circuit Judge; Denise Page Hood, Chief District Judge; and Gordon J. Quist, District Judge.[*]

Argued: August 1, 2018

Decided and Filed: August 30, 2018

Before: SILER, MOORE, and GRIFFIN, Circuit Judges.

[*]Pursuant to 28 U.S.C. § 2284, the United States Court of Appeals for the Sixth Circuit designated Judge Eric L. Clay and Judge Gordon J. Quist to serve with Chief Judge Denise Page Hood in this matter.

COUNSEL

ARGUED: Jason Brett Torchinsky, HOLTZMAN VOGEL JOSEFIAK TORCHINSKY, Warrenton, Virginia, for Appellants. Ryan M. Hurley, FAEGRE BAKER DANIELS LLP, Indianapolis, Indiana, for Appellees. **ON BRIEF:** Jason Brett Torchinsky, HOLTZMAN VOGEL JOSEFIAK TORCHINSKY, Warrenton, Virginia, Brian D. Shekell, CLARK HILL, Detroit, Michigan, for Appellants. Joseph H. Yeager, Harmony Mappes, Jeffrey P. Justman, Matthew K. Giffin, FAEGRE BAKER DANIELS LLP, Indianapolis, Indiana, Mark Brewer, GOODMAN ACKER P.C., Southfield, Michigan, for Appellees.

SILER J., delivered the opinion of the court in which GRIFFIN, J., joined. MOORE, J. (pp. 11–15), delivered a separate dissenting opinion.

OPINION

SILER, Circuit Judge. In this suit, Democratic voters from Michigan and a nonpartisan voting-rights organization allege that the state's congressional and legislative districts are unconstitutionally gerrymandered in favor of Republicans. Eight Republican Congressmen from Michigan moved to intervene, seeking to defend the lawfulness of the state's apportionment schemes. The three-judge district court panel denied the Congressmen's motion, finding they were not entitled to intervene as a matter of right (under Rule 24(a)) or with the court's permission (under Rule 24(b)). Because the district court abused its discretion by denying permissive intervention, we REVERSE and REMAND.

I.

Following the 2010 census, Michigan's Republican-controlled government created and enacted new legislative and congressional districting plans. Plaintiffs allege the district maps violate the Equal Protection Clause by diluting the voting power of Democratic voters in Michigan. Specifically, they claim the district lines "pack" some Democratic voters "into a few supermajority districts" and "crack[]" other Democratic voters "into a large number of districts where [Republicans] can command a safe but more modest majority of the vote." The result, Plaintiffs say, is a scheme that "destroys fair and effective representation, minimizing

[Democratic] voters' ability to influence elections and to have a fair chance to affect the political process." Plaintiffs also claim the apportionment plan "violates the First Amendment because it intentionally diminishes and marginalizes the votes of [Democrats] . . . based on party affiliation." If left unchanged, the current maps will remain in effect through 2020.

Plaintiffs brought suit in December 2017 against the Michigan Secretary of State, Ruth Johnson, "the 'chief election officer' . . . responsible for the conduct of Michigan elections." They ask the three-judge district court to declare the current district maps unconstitutional and to enjoin Johnson from allowing any state or federal representatives to be elected or nominated based on those maps in the 2020 election cycle.

In January 2018, Johnson moved to dismiss the suit for lack of standing. She also asked the district court to stay the case pending the Supreme Court's decision in two then-pending redistricting cases, *Gill v. Whitford*, 138 S. Ct. 1916 (2018), and *Benisek v. Lamone*, 138 S. Ct. 1942 (2018).

In February, while the district court's decision on Johnson's motion was pending, eight Republican Congressional representatives from Michigan moved to intervene. The Congressmen pursued both intervention of right under Federal Rule of Civil Procedure 24(a) and permissive intervention under Rule 24(b). They argued that they stood "to be irrevocably harmed by any redrawing of congressional districts" and asserted that none of the original parties to the action adequately represented their interests. Attached to the Congressmen's motion to intervene were two proposed motions, one to dismiss and one to stay. Johnson supported the Congressmen's motion to intervene, but Plaintiffs did not.

In March, while the Congressmen's motion to intervene was being briefed, the district court denied Johnson's motion to stay. Recognizing that "[v]oting rights litigation is notoriously protracted" and that a remedial plan would have to be in place by March 2020 if Plaintiffs succeeded, the court found there was "a fair possibility that a stay would prejudice Plaintiffs as well as the public interest."

In April, the district court denied the Congressmen's motion to intervene. As to intervention of right, the district court found that the Congressmen's asserted interests—

protecting their relationships with constituents and avoiding spending money to learn about new districts—were "not materially distinguishable from the generalized interest shared by all citizens." The court held that the Congressmen's "legitimate, generalized interest in this litigation will be adequately represented by [Johnson's] interest in protecting the current apportionment plan and other governmental actions from charges of unconstitutionality." As to permissive intervention, the court found that "the complex issues raised by the parties, the need for expeditious resolution of the case, and the massive number of citizens who share the [Congressmen's] interest" weighed against intervention because "granting the [Congressmen's] motion to intervene could create a significant likelihood of undue delay and prejudice to the original parties." This interlocutory appeal followed.

II.

As a threshold matter, we have jurisdiction to entertain the Congressmen's appeal. Ordinarily, "an order completely denying intervention is immediately reviewable by way of an interlocutory appeal." *Sales v. Marshall*, 873 F.2d 115, 120 (6th Cir. 1989). Of course, this is no ordinary case; because Plaintiffs' action "challeng[es] the constitutionality of the apportionment of congressional districts," this appeal comes to us from a three-judge district court panel. 28 U.S.C. § 2284(a). In such cases, the parties "may appeal to the Supreme Court from an order granting or denying . . . an interlocutory or permanent injunction." 28 U.S.C. § 1253. The Supreme Court interprets § 1253 to extend to orders that have "the 'practical effect' of granting or denying an injunction." *Abbot v. Perez*, 138 S. Ct. 2305, 2319 (2018).

The order from which the Congressmen appeal does not have such an effect. The district court barred the Congressmen from defending Michigan's current apportionment plans; it did not rule upon the Plaintiffs' constitutional challenge to the merits of those plans. That challenge is still ongoing below, and Plaintiffs' request for injunctive relief remains pending. Therefore, § 1253 does not deprive us of jurisdiction. *Cf. Hays v. Louisiana*, 18 F.3d 1319, 1321 (5th Cir. 1994) (appeal of three-judge district court's denial of intervention "very likely was properly before" the Fifth Circuit before the court ruled on the merits).

III.

Here, as below, the Congressmen claim they are entitled to both intervention of right and permissive intervention. Because the Congressmen are entitled to permissive intervention, we address only those arguments.

Federal Rule of Civil Procedure 24(b)(1) provides that, "On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." In deciding whether to allow a party to intervene, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). "So long as the motion for intervention is timely and there is at least one common question of law or fact, the balancing of undue delay, prejudice to the original parties, and any other relevant factors is reviewed for an abuse of discretion." *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997).

The parties agree the Congressmen's motion to intervene was timely. Further, the Congressmen's motion made clear that they intended to raise common questions of law and fact. In their proposed motion to dismiss, the Congressmen argued (among other things) that Plaintiffs lacked standing to challenge Michigan's districting plans. This was the same argument that Johnson had previously raised in her own motion to dismiss. So the only remaining question is whether the district court abused its discretion in finding that the Congressmen's intervention "could create a significant likelihood of undue delay and prejudice to the original parties."

It did. At the outset, "[t]hough the district court operates within a 'zone of discretion' when deciding whether to allow intervention under Rule 24(b), the district court nevertheless 'must, except where the basis for the decision is obvious in light of the record, provide enough of an explanation for its decision to enable [us] to conduct meaningful review.'" *Kirsch v. Dean*, 733 F. App'x 268, 279 (6th Cir. 2018) (quoting *Miller*, 103 F.3d at 1248). Here, with respect to permissive intervention, the district court observed only that there was a risk of delay and prejudice in light of three factors: "the complex issues raised by the parties, the need for expeditious resolution of the case, and the massive number of citizens who share the [Congressmen's] interest in this litigation." But the court did not explain how the "complex

issues" would delay the case or prejudice Plaintiffs. It did not explain how allowing the Congressmen to intervene would frustrate an expeditious resolution. And it did not explain how the shared interests of the Congressmen and the citizens of Michigan were relevant to the delay-and-prejudice calculus. Thus, it is a challenge for us to conduct meaningful review on the permissive intervention issue based upon the district court's bare-bones order.

More to the point, though, none of the three factors cited by the district court actually weigh against permissive intervention. First, at the time the district court denied the Congressmen's motion, the legal issues in the case were not particularly novel or complex. Johnson had moved to stay the case pending the Supreme Court's decisions in *Gill* and *Benisek* and had moved to dismiss based upon Plaintiffs' alleged lack of standing. To that, the Congressmen proposed to add three issues: the justiciability of Plaintiffs' claims, the legitimate state interests justifying Michigan's current districting maps, and the doctrine of laches. While these issues do not arise in every case, they are common in redistricting cases. *See, e.g.*, *Raleigh Wake Citizen's Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 348 & n.9 (4th Cir. 2016) (justiciability); *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1307-10 (2016) (state interest); *Sanders v. Dooly Cty.*, 245 F.3d 1289, 1291 (11th Cir. 2001) (per curiam) (laches).

Indeed, once the district court worked through the standing issue—which it eventually did, holding that Plaintiffs had standing to challenge Michigan's apportionment plan on a district-by-district, but not statewide, basis—the next natural question was whether Plaintiffs' partisan gerrymandering claims were in fact justiciable. The Supreme Court has never definitively answered this question, and specifically avoided it in *Gill*, opting instead to remand for further consideration of the plaintiffs' standing. 138 S. Ct. at 1929, 1934. And, had the district court found Plaintiffs' claims justiciable, it would have almost certainly had to address Michigan's interest in maintaining its districting scheme, and may have also had to address the laches defense. Thus, the new issues that would have arisen had the Congressmen been allowed to intervene would likely have arisen anyway during the natural course of the litigation.

Second, there was little risk that allowing the Congressmen to intervene would have interfered with the court's ability to reach an expeditious resolution. Because many of the

Congressmen's defenses overlapped with Johnson's, adding the Congressmen would not have placed any unnecessary or unexpected burden upon the district court. The court could have disposed of both motions to dismiss in the same opinion. The same logic applies to Plaintiffs—because the issues were identical, Plaintiffs' responsive arguments to Johnson and the Congressmen would likely have been identical as well.

On this point, Plaintiffs' main objection is that injecting the Congressmen (and their attorney) into the case "will almost surely lead to more discovery fights, more evidentiary issues, longer trial testimony, and other case complexities that are lacking with just one defendant." They correctly point out that, if allowed to intervene, the Congressmen intend to re-litigate the standing issue already decided by the district court in light of *Gill*.

This argument misapprehends the nature of the question before us. We are not called to decide whether it would be an abuse of discretion for the district court to deny permissive intervention as the case currently stands. Rather, our question is whether it was an abuse of discretion for the district court to deny permissive intervention as the case stood in February 2018, when the Congressmen moved to intervene. At that time, no scheduling order was in place and discovery had not yet begun. The district court had not ruled on Johnson's motion to stay or her motion to dismiss. Put simply, the case was in its infancy. If the Congressmen had been allowed to intervene from the outset, they would have been allowed input into scheduling matters, and duplicative discovery and motion practice would have been unnecessary. Any delay attributable to the Congressmen's presence in the case would have been minimal at best, especially since they are all represented by the same attorney.

We fully recognize that allowing the Congressmen to intervene at this stage will require the district court to adjust the discovery and dispositive motion deadlines currently in place. And perhaps the trial, currently set for February 2019, will have to be pushed back as well. But again, this delay would not have occurred if the district court had allowed the Congressmen to intervene when they asked. And, even if the trial must be delayed, we are confident that the parties and the court can resolve this case before the March 2020 deadline.

Third, the Congressmen's interest in this litigation is different than that of Michigan's citizenry at large or its Secretary of State. This question is more pertinent to intervention of right. *See* Fed. R. Civ. P. 24(a)(2). Still, we have recognized that identity of interest is one of several "relevant criteria" under Rule 24(b), *Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 784 (6th Cir. 2007), and "[t]he fact that [a proposed intervenor's] position is being represented counsels against granting permissive intervention," *Bay Mills Indian Cmty. v. Snyder*, 720 F. App'x 754, 759 (6th Cir. 2018).

Here, the Congressmen identify several interests they seek to protect by intervening, chief among them "the relationship between constituent and representative." We need not decide whether these interests amount to "substantial legal interest[s]" to entitle them to intervention of right, *United States v. Michigan*, 424 F.3d 438, 443 (6th Cir. 2005); it is enough to say, contrary to the district court's assertion, that the Congressmen's interests differ from those of Johnson and the citizens of Michigan.

Johnson, according to the district court, seeks to "provid[e] fair and smooth administration of elections" and "protect[] the current apportionment plan and other governmental actions from charges of unconstitutionality." The contours of Michigan's district maps do not affect Johnson directly—she just ensures the maps are administered fairly and accurately. In contrast, the contours of the maps affect the Congressmen directly and substantially by determining which constituents the Congressmen must court for votes and represent in the legislature.

The district court also found that the "citizens of Michigan share a generalized interest in this litigation insofar as they have the right to vote, run for office, and otherwise participate in the 2020 election." In the Court's view, the Congressmen's interest in this litigation is "not materially distinguishable from the generalized interest shared by all citizens." Not so. As elected representatives, the Congressmen "[s]erv[e] constituents and support[] legislation that will benefit the district and individuals and groups therein." *McCormick v. United States*, 500 U.S. 257, 272 (1991). The citizens of Michigan do not share this representative interest.

Nor is it enough to say that, even though the Congressmen's interests differ from those of Johnson and the citizens of Michigan, their interests are still adequately protected by Johnson's participation in the case. As noted earlier, Johnson raised only Plaintiffs' alleged lack of standing in her initial motion to dismiss. In the Congressmen's proposed motion to dismiss, they added several defenses not mentioned by Johnson. This should have signaled to the district court that the Congressmen intended to make sure all available defenses to the apportionment plans were raised. True enough, Johnson eventually filed an answer in which she pleaded essentially the same defenses urged by the Congressmen. But her answer did not come until after the district court had denied the Congressmen's motion to intervene. Therefore, Johnson's answer could not have played a part in the district court's decision, and the court could not have known that Johnson's defenses would be the same as the Congressmen's.

We also note that the upcoming elections will bring about change in Michigan's state government. Johnson, having served two terms as Secretary of State, is not eligible to run for re-election. If the new Secretary takes office in January 2019 and decides not to further pursue the state's defense of its apportionment schemes, the district court will have to appoint someone to take the Secretary's place. And if that occurs, the Congressmen's case for intervention would be even stronger, since no other party in the case would be seeking to uphold the district maps.

We do not suggest that the uncertainty surrounding the upcoming election for Michigan Secretary of State, standing alone, entitles the Congressmen to intervene now, since we do not typically allow intervention based upon "what will transpire in the future." *Michigan*, 424 F.3d at 444 (emphasis removed). We merely point out that any delay attributable to allowing the Congressmen to intervene now is surely less than the delay that will occur if the Congressman must intervene in January 2019. Under these unique circumstances, where timeliness is a particularly weighty concern, allowing intervention now may very well prove more efficient for all involved.

Finally, we decline to affirm on the independent ground that the Congressmen failed to satisfy Rule 24(c) because they did not attach to their motion "a pleading that sets out the claim or defense for which intervention is sought." We "take[] a lenient approach to the requirements of Rule 24(c)," and Plaintiffs identify no "prejudice [that] would result from granting the motion

to intervene despite the failure to attach a pleading." *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 314 (6th Cir. 2005).

IV.

When a motion for permissive intervention under Rule 24(b) is timely, the decision is left to the discretion of the district court. *Miller*, 103 F.3d at 1248. But "[t]he existence of a zone of discretion does not mean that the whim of the district court governs." *Id.* Here, the district court provided only a cursory explanation of its reasons for denying permissive intervention, and what little justification it did provide is unsupported by the record. This amounts to an abuse of discretion, requiring us to REVERSE and REMAND to the district court for further proceedings.

DISSENT

KAREN NELSON MOORE, Circuit Judge, dissenting. The "abuse of discretion standard of review is highly deferential." *Hardyman v. Norfolk & W. Ry. Co.*, 243 F.3d 255, 267 (6th Cir. 2001). "It is more than the substitution of the judgment of one tribunal for that of another." *NLRB v. Guernsey-Muskingum Elec. Co-op., Inc.*, 285 F.2d 8, 11 (6th Cir. 1960). To reverse a district court under this standard of review, we must conclude that the district court "relie[d] on clearly erroneous findings of fact, applie[d] the wrong legal standard, misapplie[d] the correct legal standard when reaching a conclusion, or ma[d]e a clear error of judgment." *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 644 (6th Cir. 2006). None of those errors occurred here. Instead, the district court reasonably concluded that the Congressmen's efforts to intervene in this case could unduly interfere with plaintiffs' efforts to litigate their claims and denied the Congressmen's motion for permissive intervention on that ground. As this decision was not an abuse of discretion, I would affirm.

As the majority acknowledges, a district court "operates within a 'zone of discretion' when deciding whether to allow intervention under Rule 24(b)." *Kirsch v. Dean*, 733 F. App'x 268, 279 (6th Cir. 2018) (quoting *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997)). "So long as the motion for intervention is timely and there is at least one common question of law or fact," the district court has significant leeway in balancing considerations "of undue delay, prejudice to the original parties, and any other relevant factors." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997). Though we generally require district courts to explain the reasoning behind their discretionary decisions, we have also made clear that prolonged discussion is not necessary "where the basis for the decision is obvious in light of the record." *Id.*

Here, the record contains ample support for the district court's denial of the Congressmen's motion to intervene. As the district court explained in an earlier order denying Johnson's motion to stay the case, "[v]oting rights litigation is notoriously protracted," and it was critical that this case move quickly. R. 35 (Order at 2) (Page ID #613). If plaintiffs prevail on

the merits, both parties agree that a remedial plan would need to be established by March 2020 to be effective for the November 2020 election. *Id.* Yet, as the district court recognized, there exists a real risk that this case cannot be resolved by that time even if it proceeds along its regular course. *Id.* at 2–3 (Page ID #613–14). Despite the district court's airing of these concerns, the Congressmen nevertheless refused to "agree to not file duplicative briefs" or to "confer with Defendants' [sic] prior to filing any briefs." R. 39 (Reply Br. in Support of Mot. to Intervene at 7) (Page ID #653). Although the Congressmen offered "to abide by the discovery plan now in effect," *id.*, this overture rings hollow, as no discovery schedule was in place at that time. R. 53 (Case Mgmt. Order No. 1 at 1) (Page ID #939). Given the district court's concerns and the Congressmen's representations—which are "obvious in light of the record," *see Miller*, 103 F.3d at 1248—the district court had ample reason to conclude that intervention would undercut "the need for expeditious resolution of the case." *See* R. 47 (Order at 2) (Page ID #903). Eight more defendants would mean more discovery, more motions, and more time. Indeed, the district court's decision seems prescient now, as the Congressmen have informed this court that they plan to relitigate issues already decided by the district court if they are permitted to intervene, *see* D.E. 24 (Letter dated June 18, 2016))—a maneuver that would surely slow down the district-court proceedings. As district courts do not abuse their discretion by denying intervention that "would unduly delay the adjudication of the original parties' rights," *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 760 (6th Cir. 2013), the district court's decision was well within the proper bounds.

Plainly, if the majority were reviewing the Congressmen's motion in the first instance, it would have reached a different conclusion. "[T]here was little risk that allowing the Congressmen to intervene would have interfered with the court's ability to reach an expeditious resolution," the majority asserts, because "many of the Congressmen's defenses overlapped with Johnson's." Maj. Op. at 6–7. As a purely factual matter, there was less overlap between the Congressmen's proposed pre-trial motions and Johnson's than the majority suggests—a point the Congressmen have taken pains to stress before this court. *See* Reply Br. at 23–24. But more importantly, I do not see how the district court abused its discretion simply because it weighed the potential overlap in defenses less heavily than the majority would have done. We usually require a "definite and firm conviction that the trial court committed a clear error of judgment"

before we reverse a district court for abuse of discretion. *See Amernational Indus., Inc. v. Action-Tungsram, Inc.*, 925 F.2d 970, 975 (6th Cir. 1991) (quoting *Davis by Davis v. Jellico Cmty. Hosp. Inc.*, 912 F.2d 129, 133 (6th Cir. 1990)). Here, the majority requires only that it disagrees.

For the same reason, I reject the Congressmen's suggestion that a recent order granting different Congressmen's motion for permissive intervention in a different gerrymandering case before a different district court in a different jurisdiction ought to govern our review here. *See* D.E. 33 (Rule 28(j) Letter, Appendix A) (citing Order, *Ohio A. Philip Randolph Institute v. Smith*, No. 18-cv-357 (S.D. Ohio Aug. 16, 2018)). The core premise of abuse-of-discretion review is that one court may exercise its discretion differently than another. "[J]ust because some district courts have allowed [certain conduct] does not mean that it was an abuse of discretion for the district court in this case not to follow suit." *United States v. One 2011 Porsche Panamera*, 684 F. App'x 501, 508 (6th Cir. 2017).

Even apart from our deferential standard of review, the factual distinctions between *Smith* and this case render the Congressmen's reliance on *Smith* misplaced. In *Smith*, the proposed intervenors repeatedly represented that they would not "delay the[] proceedings" or "disrupt the case schedule," and that they would "not need any prolonged discovery" and would "comply with the discovery deadline." Order, *Ohio A. Philip Randolph Institute v. Smith*, No. 18-cv-357 (S.D. Ohio Aug. 16, 2018), at 8 n.1 (citation omitted). Here, by contrast, the Congressmen have made clear that they intend to reopen issues that have already been resolved, raise issues that they believe have not yet been adequately addressed, and limit their cooperation and coordination with Johnson. *See* D.E. 24 (Letter dated June 18, 2016)); Reply Br. at 23–24; R. 39 (Reply Br. in Support of Mot. to Intervene at 7) (Page ID #653). Absent the sort of assurances from the proposed intervenors that the district court received in *Smith*, it was entirely reasonable for the district court here to anticipate that the Congressmen's entrance into this case "could create a significant likelihood of undue delay and prejudice to the original parties" and to deny the Congressmen's motion on that ground. *See* R. 47 (Order at 2) (Page ID #903).

Other aspects of the majority's opinion are similarly overreaching. For instance, there is no need to consider whether the "upcoming elections" may "bring about change in Michigan's

state government." *See* Maj. Op. at 9. The majority believes that Johnson's defense *may* prove insufficient because she *may* be replaced by a new Secretary from the Democratic Party in the 2018 election who *may* decline to defend the current districting maps. But we have cautioned against such speculative musings before. *See United States v. Michigan*, 424 F.3d 438, 444 (6th Cir. 2005) ("Rather than identifying any weakness in the state's representation in the current phase of the proceedings, the proposed intervenors seem more concerned about what will transpire *in the future* . . . . While the proposed intervenors may be legitimately concerned about these future issues, they are not now, and possibly never will be, before the district court."). The majority nevertheless insists that "allowing intervention now may very well prove more efficient for all involved," as a future change in Michigan's government may entitle the Congressmen to intervene of right. Maj. Op. at 9. What would be far more efficient, of course, is to realize that the district court has not abused its ample discretion in denying the Congressmen an opportunity to intervene now and to allow the case to proceed as planned. The majority hamstrings the district court's smooth administration of this case and then offers, in consolation, that it could have been worse.

By the same token, the majority errs in suggesting that the Congressmen's interest in this case is relevant to our review under Rule 24(b). *See* Maj. Op. at 8–9. It is intervention of right under Rule 24(a), not permissive intervention under Rule 24(b), that requires the proposed intervenor to establish "a substantial legal interest in the subject matter of the case" and to prove "a potential for inadequate representation." *Michigan*, 424 F.3d at 443 (emphasis omitted). Rule 24(b), by contrast, "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation." *SEC v. U.S. Realty & Imp. Co.*, 310 U.S. 434, 459 (1940)); *see also* 7C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1911 (3d ed. 1998) ("Close scrutiny of the kind of interest the intervenor is thought to have seems especially inappropriate under Rule 24[b] since it makes no mention of interest. The rule requires only that the intervenor's claim or defense share a common question of law or fact with the main action."). Rather, "Rule 24(b) grants the district court discretionary power to permit intervention if the motion is timely and if the 'applicant's claim or defense and the main action have a question of law or fact in common.'" *Purnell v. City of Akron*, 925 F.2d 941, 950 (6th Cir. 1991) (internal citation omitted) (quoting Fed. R. Civ. P.

24(b)(2)). To the extent we have intimated otherwise in dicta, *see Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 784 (6th Cir. 2007), we have erred. The majority's discussion of Rule 24(a) factors in its Rule 24(b) analysis is therefore misplaced.

Finally, the majority oversteps when it predicts that its decision "will require the district court to adjust the discovery and dispositive motion deadlines currently in place" and may require the district court to "push[] back" the trial schedule. Maj. Op. at 7. "Federal courts have the authority to apply appropriate conditions or restrictions on an intervention," and nothing in the majority's opinion should be read to cabin that authority in this case. *Friends of Tims Ford v. Tennessee Valley Auth.*, 585 F.3d 955, 963 n.1 (6th Cir. 2009). Thus, even after reversing a district court for "denying intervention outright," we have explained that "the district court retains broad discretion in setting the precise scope of intervention" going forward. *United States v. City of Detroit*, 712 F.3d 925, 932–33 (6th Cir. 2013). "[T]he scope of intervention can be limited on a prospective basis, allowing appeal of recently issued orders and participation in new matters." *Id.* at 932. Those principles apply with equal force here, particularly given the majority's recognition that "timeliness is a particularly weighty concern" in this case. Maj. Op. at 9. The three judges overseeing this case in the district court, not we, dictate the terms of the Congressmen's intervention on remand.

All in all, the district court did not abuse its discretion in denying the Congressmen's motion to intervene under Rule 24(b). As the majority sees it differently, I respectfully dissent.

ATTACHMENT 5

2002 WL 34127471
Only the Westlaw citation is currently available.
United States District Court,
E.D. Wisconsin.

James R. **BAUMGART**, Roger M. Breske, Brian T. Burke, Charles J. Chvala, Russell S. Decker, Jon Erpenbach, Gary R. George, Richard Grobschmidt, Dave Hansen, Robert Jauch, Mark Meyer, Rodney Moen, Gwendolynne S. Moore, Kimberly Plache, Fred A. Risser, Judy Robson, Kevin W. Shibilski, Robert D. Wirch, Spencer Black, James E. Kreuser, Gregory B. Huber, each individually and as members of the Wisconsin State Senate, Intervenor–Plaintiffs,

v.

Jeralyn WENDELBERGER, chairperson of the Wisconsin Elections Board, and each of its members in his or her official capacity, John P. Savage, David Halbrooks, R.J. Johnson, Brenda Lewison, Steven V. Ponto, John C. Schober, Christine Wiseman and Kevin J. Kennedy, its executive director, Defendants,

and

Scott R. JENSEN, in his capacity as the Speaker of the Wisconsin Assembly, and Mary E. Panzer, in her capacity as the Minority Leader of the Wisconsin Senate, Intervenor–Defendants.

Scott R. JENSEN, in his capacity as the Speaker of the Wisconsin Assembly, Mary E. Panzer, in her capacity as the Minority Leader of the Wisconsin Senate, Plaintiffs,

v.

Jeralyn WENDELBERGER, chairperson of the Wisconsin Elections Board, and each of its members in his or her official capacity, John P. Savage, David Halbrooks, R.J. Johnson, Brenda Lewison, Steven V. Ponto, John C. Schober. Christine Wiseman, Kevin J. Kennedy, its executive director, Defendants,

and

James R. **BAUMGART**, Roger M. Breske, Brian T. Burke, Charles J. Chvala, Russell S. Decker, Jon Erpenbach, Gary R. George, Richard Grobschmidt, Dave Hansen, Robert Jauch, Mark Meyer, Rodney Moen, Gwendolynne S. Moore, Kimberly Plache, Fred A. Risser, Judy Robson, Kevin W. Shibilski, Robert D. Wirch, Spencer Black, James E. Kreuser, Gregory B. Huber, each individually and as members of the Wisconsin State Senate, Intervenor–Defendants.

No. 01–C–0121, 02–C–0366.
|
May 30, 2002.

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Before EASTERBROOK, Circuit Judge, STADTMUELLER, Chief District Judge, and CLEVERT, District Judge.

AMENDED MEMORANDUM OPINION AND ORDER

PER CURIAM.

***1** These consolidated actions challenge the constitutionality of the current apportionment of Wisconsin Assembly and Senate districts and seek declaratory, injunctive and other relief under the Constitution and laws of the United States, including the Fourteenth Amendment, the Fifteenth Amendment, § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 and 42 U.S.C. § 1983, as well as the laws and Constitution of the State of Wisconsin. [1] Both sets of plaintiffs ask the court to declare that the existing apportionment of the Wisconsin Senate and Assembly is unconstitutional and invalid. Moreover, they seek an order enjoining the eight members of the Wisconsin Elections Board from taking any actions related to elections under the existing apportionment plan, and an order **redistricting** the State of Wisconsin into 99 Assembly and 33 Senate Districts. As a consequence, the parties urge the court to adopt a reapportionment plan and maps that they have proffered

as a remedy for the malapportionment following the 2000 decennial census.

Chief Judge Joel M. Flaum of the Court of Appeals for the Seventh Circuit convened this panel and authorized it to hear both actions, pursuant to 28 U.S.C. § 2284, when the Wisconsin legislature failed to enact a plan of reapportionment. As a consequence, a trial on the merits was conducted on April 11 and April 12, 2002. For the reasons that follow, the court finds the existing Wisconsin Assembly and Senate districts violative of the "one person, one vote" standard articulated by *Reynolds v. Sims,* 377 U.S. 533, 555, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and will implement a reapportionment plan to remedy the defects in those districts.

PROCEDURAL HISTORY

These actions were initiated with the filing of a complaint on February 1, 2001, by a group of Wisconsin voters naming the Wisconsin Elections Board and its members as defendants. Those voters alleged that Wisconsin's federal congressional districts violated the "one-person, one vote" principle articulated in art. I, sec. 2 of the United States Constitution. [2] Two groups of state legislators then filed motions to intervene. The first, the **Baumgart** intervenors, represent the Democratic members of the Wisconsin Senate, while the second, the Jensen intervenors, represent the Republican leaders of the State Senate and State Assembly. The motions to intervene were granted in November 2001. Subsequently, several other groups and individuals filed motions to intervene. The motions of Senators Gwendolynne Moore and Gary George were granted, and the motions of the African–American Coalition for Empowerment, Citizens for Competitive Elections, and Wisconsin Manufacturers and Commerce Association were denied. However, they were named amicus curiae.

***2** On April 12, 2002, to remedy a possible jurisdictional defect, the Jensen intervenors filed a separate complaint (the "Jensen action") against the members of the Elections Board reasserting the state apportionment issues raised in the earlier case. The new filing, Case No. 02–C–0366, was assigned to Judge Clevert as a related case. Later that day, Chief Judge Flaum appointed Judges Easterbrook and Stadtmueller to the panel hearing the second case. The two cases were then consolidated, and the **Baumgart** intervenors intervened in the second action (02–C–0366).

BACKGROUND

The United States Census Bureau released its final 2000 census data on March 8, 2001, showing that Wisconsin's total population is 5,463,675. Dividing this population into ninety-nine equipopulous state assembly districts and thirty-three equipopulous senate districts would yield Assembly districts containing 54,179 persons and state senate districts containing 162,536 persons. However, populations in the existing state Senate and Assembly districts vary substantially from these numbers. For example, Senate District 6 deviates more than 22 percent from the perfect senate district numeric population, and Assembly District 18 deviates more than 26 percent from the perfect assembly district numeric population. All parties agree that as drawn, Wisconsin Senate and Assembly districts are unconstitutional.

DISCUSSION

The reapportionment of state legislative districts requires the balancing of several disparate goals. These are summarized below.

"The Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." *Reynolds v. Sims,* 377 U.S. 533, 568, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). With respect to reapportionment, population equality is the "most elemental requirement of the Equal Protection Clause." *Connor v. Fitch,* 431 U.S. 407, 409, 97 S.Ct. 1828, 52 L.Ed.2d 465 (1977). *See also Chapman v. Meier,* 420 U.S. 1, 22, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975). However, the Supreme Court has not pronounced a threshold for a constitutionally acceptable level of deviation from absolute population equality. The three-judge panel that **redistricted** the State of Wisconsin in 1982 stated that population deviations should be of the *"de minimis"* variety, which it defined as below 2 percent. *AFL–CIO v. Elections Bd.,* 543 F.Supp. 630, 634

(E.D.Wis.1982). [3] The 1992 reapportionment panel noted that because the 1990 decennial census contained errors and was out of date by the time of trial, the court not need fall for the "fallacy of delusive exactness" in fashioning a plan, and that "below one percent [deviation in voting power] there are no legally or politically relevant degrees of perfection." *Prosser v. Elections Bd.,* 793 F.Supp. 859, 865–66 (W.D.Wis.1992). [4]

***3** Although population equality is the primary goal while constructing legislative districts, it is not the only one. In the context of Congressional **redistricting** plans, the Supreme Court has observed that "court-ordered districts are held to higher standards of population equality than legislative ones," but that "slight deviations are allowed" if supported by "historically significant state policy or unique features." *Abrams v. Johnson,* 521 U.S. 74, 98, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997) (internal citations omitted).

Historically, federal courts have accepted some deviation from perfect population equality to comply with "traditional" **redistricting** criteria. These criteria include retaining previous occupants in new legislative districts, known as "core retention," *see Karcher,* 462 U.S. 725, 740, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983); avoiding split municipalities, *see id.;* drawing districts that are as contiguous and compact as possible, *see id.;* respecting the requirements of the Voting Rights Act, 42 U.S.C. § 1973; maintaining traditional communities of interest, *see AFL–CIO,* 543 F.Supp. at 636; and avoiding the creation of partisan advantage, *see Prosser,* 793 F.Supp. at 867 (noting that "[j]udges should not select a plan that seeks partisan advantage"). Avoiding unnecessary pairing of incumbents, a criterion discussed by the Supreme Court in *Karcher,* 462 U.S. at 740, was expressly rejected by the 1982 Wisconsin reapportionment panel, *see AFL–CIO,* 543 F.Supp. at 638 (stating that the panel did not consider incumbent residency in drafting its plan).

Courts in Wisconsin have accepted some deviation from perfect population equality in view of two special considerations. The first involves senate elections. In Wisconsin, state senators have four year terms. State senators from even-numbered districts run for office in years corresponding to the presidential election cycle, and state senators from odd-numbered districts are elected during midterm elections. Thus, in midterm legislative election years such as 2002, if voters are shifted from odd to even senate districts, they will face a two-year delay in voting for state senators. Delays of this nature are referred to as "disenfranchisement." *See Prosser,* 793 F.Supp. at 866.

The second consideration is the avoidance of ward boundary splits and, where possible, municipal boundary splits. Article IV, section 4 of the Wisconsin Constitution provides that assembly districts are "to be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable." At one time this language was interpreted as prohibiting the creation of Assembly districts that crossed county lines. Indeed, in 1964 the Wisconsin Supreme Court declined to divide any counties when reapportioning the state, thereby creating a maximum population deviation of 76.2%. *See Wisconsin ex rel. Reynolds v. Zimmerman,* 23 Wis.2d 606, 623 (1964). Although avoiding the division of counties is no longer an inviolable principle, respect for the prerogatives of the Wisconsin Constitution dictate that wards and municipalities be kept whole where possible. This is in accord with the decisions of two earlier Wisconsin three judge panels. The 1982 and 1992 reapportionment panels did not divide any wards in their respective reapportionment plans, and the 1992 panel rejected a proposed plan that achieved 0% population deviation by splitting wards. *See Prosser,* 793 F.Supp. at 866.

***4** With these considerations in mind, we turn to the plans submitted in these cases. A total of sixteen plans were submitted to the court. The Jensen intervenors filed nine plans (variations on a theme with different standards of population equality), the **Baumgart** intervenors three, while Senator George, the African American Coalition for Empowerment, Citizens for Competitive Elections, and Wisconsin Manufacturers and Commerce each filed one. Of the multiple plans submitted by the Jensen and **Baumgart** intervenors, the court considered only two for each group, JP1 Alternate A (Alt A) and JP1 Alternate C (Alt C) for the Jensen intervenors, and Leg Dem B and Leg Dem C for the **Baumgart** intervenors.

The two Jensen intervenor plans—Alt A and Alt C—have the lowest levels of population deviation of any of the filed plans, with maximum deviations of .97 and 1.00%, respectively. Moreover, they have the highest levels of core retention, lowest levels of disenfranchisement, and highest levels of compactness of any of the plans submitted.

On the other hand, the partisan origins of the Jensen plans are evident. First, they pair a substantial number of Democratic incumbents, while several Republican incumbent pairs are pairs in name only, with one of each retiring or running for another office. Second, it appears that the Jensen Assembly plans are designed to move a number of incumbent Democrats into strongly Republican districts and either pack Democrats into as few districts as possible or divide them among strong Republican districts. On the Senate side, the Jensen plans include questionable splits on the county level in districts with Democrat incumbents, and appear to have been designed to ensure Republican control of the Senate.

The **Baumgart** plans are riddled with their own partisan marks. Leg Dem B and Leg Dem C divide the City of Madison into six districts radiating out from the Capitol in pizza slice fashion. The Leg Dem plans have higher levels of population deviation, lower levels of core retention, higher levels of disenfranchisement, and lower levels of compactness than the Alt A and Alt C plans, in part because they renumber the Senate districts in Milwaukee County (again for presumed partisan advantage).

Senator George's plan is identical to Leg Dem C in all but the southeastern corner of the state. His plan contains a substantial level of absolute population deviation (2.67% in his amended plan), and disenfranchises more voters than any of the above plans, also due to renumbering districts in Milwaukee County.

At trial, the parties pursued two issues vigorously: what effect, if any, does § 2 of the Voting Rights Act have on creation of legislative districts in Milwaukee, and how the court should determine the relative partisan fairness of the reapportionment plans filed in this case (with each side claiming that their plan struck the proper balance of partisan fairness).

The Voting Rights Act issues are the result of demographic changes that occurred in Milwaukee County since **redistricting** in 1992. The 1992 **redistricting** panel created five African–American majority-minority districts and one African–American minority influence district, along with one Latino majority-minority district. Over the subsequent decade, demographic trends resulted in the African–American influence district becoming a majority-minority district. Those same demographic trends resulted in at least one district having a greater than 80% African–American population.

***5** Under the Supreme Court's ruling in *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), extended to single-member districts in *Growe v. Emison,* 507 U.S. 25, 40–41, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993), three things must be present to warrant the consideration of race as the primary basis for drawing districts: first, the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district"; second, the minority group must be "politically cohesive"; and third, the majority must "vote[ ] sufficiently as a bloc to enable it ... to defeat the minority's preferred candidate." 478 U.S. at 50–51.

The parties agree that the African–American community in the City of Milwaukee is large enough and compact enough to constitute a majority in several districts, and the parties share the view that African–Americans generally vote for Democrats. However, they disagree as to whether block voting occurs in the City of Milwaukee, and if so, what remedy should be applied.

The Jensen and **Baumgart** intervenors argued mutually contradictory positions with respect to whether § 2 of the Voting Rights Act should be considered in this case. The Jensen intervenors alleged that there was no evidence of block voting by whites in the City of Milwaukee, which, if correct would negate any justification under *Growe* for reliance upon race in constructing voting districts. However, the Jensen intervenors' expert, Bernard Grofman, testified by affidavit that the only way to respect communities of interest in Milwaukee is to draw district lines that create six African–American majority-minority districts, and avoid "packing" African–American votes. Indeed, the Jensen plans appear to have relied upon race as the basis for creating districts in the City of Milwaukee: a simple inspection of the Jensen plans of Milwaukee and the plans showing Milwaukee's minority population leads to the conclusion that the Jensen plans were crafted to chop the areas of Milwaukee with the highest African American populations and to balance those areas with areas of greater white population from outer sections of the City of Milwaukee.

In contrast, the **Baumgart** intervenors presented expert testimony that all of the *Gingles* criteria were present in Wisconsin in general and the City of Milwaukee in

particular, but that the Jensen plans divided the African–American population too thinly and would result in the inability of African–Americans to elect candidates of choice. The **Baumgart** intervenors' expert noted that a minority district requires an African–American voting age population of at least 60% to guarantee the election of candidates of choice, and that only their plans satisfied this criterion. Somewhat counterintuitively, the **Baumgart** intervenors' expert asserted that the court must reject the Jensen plans for failure initially to satisfy the *Gingles* factors (even though he urged the court to find that the **Baumgart** plans are consistent with *Gingles*).

***6** At the final hearing the parties debated the relative partisan impact of their plans. The Jensen intervenors contended that their plans were fair, using a "base-race" analysis, and resulted in "competitive" districts. The **Baumgart** intervenors in turn submitted that the Jensen plans were flawed because they packed the Democrats into a lesser number of districts and that the Jensen plans give the Republicans a five-seat majority in an even election.

Analysis reveals that the "base-race" method used by the Jensen intervenors is only as reliable as the elections chosen, and may be biased if special factors are present in the base-races used for the estimate. *See Prosser,* 793 F.Supp. at 868 (noting that the ground for using base-races was destroyed on cross examination, as the races chosen "were riven by special factors"). The three base-races relied upon by Jensen's expert were saturated with special factors: the 1998 gubernatorial election, paired three-time incumbent Tommy Thompson (possibly the most popular governor in Wisconsin's history) against political newcomer Ed Garvey; the 1996 secretary of state election, paired Doug LaFollette (a distant relative of Progressive icon "Fighting Bob" La Follette and former Governor Phillip La Follette) against Linda Cross; and the 2000 presidential election, perhaps the closest in this state's history. Moreover, the base-race analysis was determined merely by averaging the vote percentages for each candidate in all of the districts without considering differences in population between the districts, thus biasing the analysis in favor of underpopulated districts.

The **Baumgart** intervenors' method for analyzing political fairness was more sophisticated than the base-race method and is correct in the results found, namely, that even if the Democrats win a bare majority of votes, they will take less than 50% of the total number of seats in the Assembly. The problem with using this finding as the basis for a plan is that it does not take into account the difference between popular and legislative majorities, and the fact that, practically, there is no way to draw plans which use the traditional criteria and completely avoid this result. Theoretically, it would be possible to draw lines for Assembly districts that would assure that the party with the popular majority holds every seat in the Assembly. *See Prosser,* 793 F.Supp. at 864. However, Wisconsin Democrats tend to be found in high concentrations in certain areas of the state, and the only way to assure that the number of seats in the Assembly corresponds roughly to the percentage of votes cast would be at-large election of the entire Assembly, which neither side has advocated and would likely violate the Voting Rights Act.

Having found various unredeemable flaws in the various plans submitted by the parties, the court was forced to draft one of its own. As was done in 1992, a draft version of the plan was submitted to the parties for comment and analysis. The parties were allowed five days to analyze the draft and to comment to the court.

***7** The court undertook its **redistricting** endeavor in the most neutral way it could conceive—by taking the 1992 reapportionment plan as a template and adjusting it for population deviations. The process began with district adjustments in the southeastern corner of the state. That area was chosen for two reasons. First, Milwaukee County has experienced the state's greatest population loss over the past decade, while the region immediately to its west has experienced the greatest population growth. Thus, the greatest population deviation in the state lies within this area. Second, the parties devoted much of their trial time to discussing how their plans would affect Milwaukee County. [5]

When making the necessary changes to the boundaries of the existing districts, the court was guided by the neutral principles of maintaining municipal boundaries and uniting communities of interest. There was also an attempt to keep population deviation between districts as low as possible while respecting these principles.

As part of its efforts, the court had to decide whether to renumber the assembly districts in southeastern Wisconsin to accommodate the migration of one entire district out of Milwaukee County. And there was an attempt to

create physically compact senate districts and maintain communities of interest when making this decision.

Obviously, the process involved some subjective choices. For example, the court had to decide *which* communities to exclude from overpopulated districts and to include in underpopulated districts. Where possible, the court relied on affidavits supplied by the parties describing the natural communities of interest to direct these subjective choices. (Senator George's submissions provided particular guidance within Milwaukee County in this regard.)

Adherence to these criteria resulted in a plan containing five African–American majority assembly districts, one Latino majority assembly district, and one African–American "influence" assembly district. The racial and cultural minority populations in these districts appear sufficient to permit African–Americans and Latinos to elect candidates of choice. Hence, it was unnecessary to decide whether racially polarized voting occurs in southeastern Wisconsin (thereby necessitating the conscious creation of majority-minority districts pursuant to the Voting Rights Act).

The court's plan embodies a maximum population deviation of 1.48%, which is lower than the population deviation of the best of the **Baumgart** intervenors' plans and slightly higher than the population deviations of the Jensen intervenors' plans, and within the de minimis 2% threshold set by the *AFL–CIO* court. Presumably, because of the methodology used, the court's plan meets or exceeds the submissions of the parties and amici with respect to most traditional apportionment criteria. The average level of core retention is 76.7%, versus 73.9% for the Jensen plans and 74% for the **Baumgart** plans. The court plan splits 50 municipalities, as compared to 51 for the Jensen plans and 78 for the **Baumgart** plans. The number of voters disenfranchised with respect to Senate elections is 171,613, versus 206,428 for the Jensen plans and 303,606 for the **Baumgart** plans. District compactness levels are also higher than those for the Jensen and **Baumgart** plans, using the smallest circle and perimeter to area measures. [6] Finally, the court plan respects traditional communities of interest in the City of Milwaukee.

***8** Now, therefore,

IT IS ORDERED that the Wisconsin State legislative districts described in Chapter 4 of the Wisconsin Statutes (1999–2000) are declared unconstitutional.

IT IS FURTHER ORDERED that all elections to be held in the Wisconsin State legislative districts as described in Chapter 4 of the Wisconsin Statutes (1999–2000) are enjoined.

IT IS FURTHER ORDERED that the 99 Wisconsin State assembly districts described below are organized into 33 senate districts as follows:

I. SENATE DISTRICTS

First senate district: The combination of the 1st, 2nd and 3rd assembly districts.

Second senate district: The combination of the 4th, 5th, and 6th assembly districts.

Third senate district: The combination of the 7th, 8th, and 9th assembly districts.

Fourth senate district: The combination of the 10th, 11th, and 12th assembly districts.

Fifth senate district: The combination of the 13th, 14th, and 15th assembly districts.

Sixth senate district: The combination of the 16th, 17th, and 18th assembly districts.

Seventh senate district: The combination of the 19th, 20th, and 21st assembly districts.

Eighth senate district: The combination of the 22nd, 23rd, and 24th assembly districts.

Ninth senate district: The combination of the 25th, 26th, and 27th assembly districts.

Tenth senate district: The combination of the 28th, 29th, and 30th assembly districts.

Eleventh senate district: The combination of the 31st, 32nd, and 33rd assembly districts.

Twelfth senate district: The combination of the 34th, 35th, and 36th assembly districts.

Thirteenth senate district: The combination of the 37th, 38th, and 39th assembly districts.

Fourteenth senate district: The combination of the 40th, 41st, and 42nd assembly districts.

Fifteenth senate district: The combination of the 43rd, 44th, and 45th assembly districts.

Sixteenth senate district: The combination of the 46th, 47th, and 48th assembly districts.

Seventeenth senate district: The combination of the 49th, 50th, and 51st assembly districts.

Eighteenth senate district: The combination of the 52nd, 53rd, and 54th assembly districts.

Nineteenth senate district: The combination of the 55th, 56th, and 57th assembly districts.

Twentieth senate district: The combination of the 58th, 59th, and 60th assembly districts.

Twenty–First senate district: The combination of the 61st, 62nd, and 63rd assembly districts.

Twenty–Second senate district: The combination of the 64th, 65th, and 66th assembly districts.

Twenty–Third senate district: The combination of the 67th, 68th, and 69th assembly districts.

Twenty–Fourth senate district: The combination of the 70th, 71st, and 72nd assembly districts.

Twenty–Fifth senate district: The combination of the 73rd, 74th, and 75th assembly districts.

Twenty–Sixth senate district: The combination of the 76th, 77th, and 78th assembly districts.

Twenty–Seventh senate district: The combination of the 79th, 80th, and 81st assembly districts.

***9** Twenty–Eighth senate district: The combination of the 82nd, 83rd, and 84th assembly districts.

Twenty–Ninth senate district: The combination of the 85th, 86th, and 87th assembly districts.

Thirtieth senate district: The combination of the 88th, 89th, and 90th assembly districts.

Thirty–First senate district: The combination of the 91st, 92nd, and 93rd assembly districts.

Thirty–Second senate district: The combination of the 94th, 95th, and 96th assembly districts.

Thirty–Third senate district: The combination of the 97th, 98th, and 99th assembly districts.

II. ASSEMBLY DISTRICTS

First assembly district. All of the following territory constitutes the first assembly district:

(1) Whole county. Door County.

(2) Brown County. That part of Brown County consisting of the towns of Green Bay, Humboldt, and Scott.

(3) Kewaunee County. That part of Kewaunee County consisting of all of the following:

(a) The towns of Ahnapee, Carlton, Casco, Lincoln, Luxemburg, Montpelier, Pierce, Red River, and West Kewaunee.

(b) The villages of Casco and Luxemburg.

(c) The cities of Algoma and Kewaunee.

Second assembly district. All of the following territory constitutes the 2nd assembly district:

(1) Brown County. That part of Brown County consisting of all of the following:

(a) The towns of Bellevue, Eaton, Glenmore, Ledgeview, New Denmark, Rockland, and Wrights town.

(b) The villages of Denmark and Wrights town.

(2) Kewaunee County. That part of Kewaunee County consisting of the town of Franklin.

(3) Manitowoc County. That part of Manitowoc County consisting of all of the following:

(a) The towns of Cooperstown, Franklin, Gibson, Kossuth, Maple Grove, Mishicot, Two Creeks, and Two Rivers.

(b) The villages of Francis Creek, Kellnersville, Maribel, and Mishicot.

(c) The city of Two Rivers.

Third assembly district. All of the following territory constitutes the 3rd assembly district:

(1) Brown County. That part of Brown County consisting of the towns of Holland and Morrison.

(2) Calumet County. That part of Calumet County consisting of all of the following:

(a) The towns of Brillion, Chilton, Harrison, Stockbridge, and Woodville.

(b) The villages of Sherwood and Stock bridge.

(c) The cities of Brillion and Chilton.

(d) That part of the city of Appleton located in the county.

(e) That part of the city of Menasha located in the county.

(3) Outagamie County. That part of Outagamie County consisting of all of the following:

(a) The town of Buchanan.

(b) The villages of Combined Locks and Kimberly.

(c) That part of the village of Little Chute comprising wards 5, 6, 7, and 11.

(4) Winnebago County. That part of Winnebago County consisting of that part of the city of Appleton comprising wards 41 and 49.

Fourth assembly district. All of the following territory in Brown County constitutes the 4th assembly district:

***10** (1) The village of Allouez.

(2) That part of the village of Ashwaubenon comprising wards 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, and 12.

(3) The city of De Pere.

(4) That part of the city of Green Bay comprising ward 46.

Fifth assembly district. All of the following territory constitutes the 5th assembly district:

(1) Brown County. That part of Brown County consisting of all of the following:

(a) The towns of Hobart and Lawrence.

(b) That part of the village of Ashwaubenon comprising ward 9.

(c) That part of the city of Green Bay comprising wards 47, 48, and 49.

(2) Outagamie County. That part of Outagamie County consisting of all of the following:

(a) The towns of Black Creek, Cicero, Freedom, Kaukauna, Oneida, Osborn, Seymour, and Vandenbroek.

(b) The villages of Black Creek and Nichols.

(c) That part of the village of Little Chute comprising wards 1, 2, 4, 8, 9, 10, and 12.

(d) That part of the village of Howard located in the county.

(e) The cities of Kaukauna and Seymour.

(3) Shawano County. That part of Shawano County consisting of the town of Maple Grove.

Sixth assembly district. All of the following territory constitutes the 6th assembly district:

(1) Oconto County. That part of Oconto County consisting of all of the following:

(a) The towns of Abrams, Bagley, Brazeau, Breed, Gillett, How, Maple Valley, Morgan, Oconto Falls, Spruce, and Underhill.

(b) The village of Suring.

(c) The cities of Gillett and Oconto Falls.

(2) Outagamie County. That part of Outagamie County consisting of all of the following:

(a) The towns of Bovina, Deer Creek, Ellington, Liberty, Maine, and Maple Creek.

(b) The villages of Bear Creek and Shiocton.

(3) Shawano County. That part of Shawano County consisting of all of the following:

(a) The towns of Angelica, Belle Plaine, Grant, Green Valley, Hartland, Herman, Lessor, Morris, Navarino, Pella, Richmond, Seneca, Washington, Waukechon, and Wescott.

(b) The villages of Bonduel, Bowler, Cecil, and Gresham.

(c) The city of Shawano.

(4) Waupaca County. That part of Waupaca County consisting of all of the following:

(a) The town of Matteson.

(b) The village of Embarrass.

Seventh assembly district. All of the following territory in Milwaukee County constitutes the 7th assembly district:

(1) That part of the city of Greenfield comprising wards 1, 2, 3, 4, 5, 8, 13, 14, 15, 16, 17, 18, 19, 20, and 21.

(2) That part of the city of Milwaukee comprising wards 184, 185, 186, 187, 188, 189, 190, 193, 194, 195, 196, 197, 198, 199, and 231.

Eighth assembly district. All of the following territory in Milwaukee County constitutes the 8th assembly district: that part of the city of Milwaukee comprising wards 63, 64, 132, 133, 134, 135, 139, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 291, 292, and 293.

Ninth assembly district. All of the following territory in Milwaukee County constitutes the 9th assembly district: that part of the city of Milwaukee comprising wards 136, 137, 138, 140, 141, 142, 143, 144, 145, 146, 182, 183, 200, 217, 218, 219, 220, 221, 242, 243, 244, 245, 246, 247, 248, 294, 295, and 296.

***11** Tenth assembly district. All of the following territory in Milwaukee County constitutes the 10th assembly district:

(1) That part of the city of Glendale comprising wards 1, 6, and 12.

(2) That part of the city of Milwaukee comprising wards 1, 2, 3, 11, 13, 16, 17, 19, 41, 48, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 157, 161, 164, 165, 166, 176, 177, and 178.

Eleventh assembly district. All of the following territory in Milwaukee County constitutes the 11th assembly district: that part of the city of Milwaukee comprising wards 4, 5, 6, 7, 8, 9, 10, 12, 14, 15, 18, 20, 21, 22, 23, 26, 27, 28, 78, 79, 80, 115, 156, 158, 159, 160, 162, and 163.

Twelfth assembly district. All of the following territory constitutes the 12th assembly district:

(1) Milwaukee County. That part of Milwaukee County consisting of all of the following:

(a) That part of the city of Milwaukee comprising wards 24, 25, 74, 75, 76, 77, 83, 148, 149, 151, 152, 153, 154, 155, 264, 266, 267, 268, 269, 270, 271, 272, and 273.

(b) That part of the city of Wauwatosa comprising wards 23 and 24.

(2) Waukesha County. That part of Waukesha County consisting of that part of the city of Milwaukee comprising ward 274.

Thirteenth assembly district. All of the following territory in Milwaukee County constitutes the 13th assembly district:

(1) The village of West Milwaukee.

(2) That part of the city of Milwaukee comprising wards 37, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 282, 283, 284, 285, 288, and 289.

(3) That part of the city of Wauwatosa comprising wards 1, 2, 3, 4, 7, 10, 11, 12, 13, 14, and 15.

Fourteenth assembly district. All of the following territory constitutes the 14th assembly district:

(1) Milwaukee County. That part of Milwaukee County consisting of all of the following:

(a) That part of the city of Milwaukee comprising wards 286 and 287.

(b) That part of the city of Wauwatosa comprising wards 5, 6, 8, 9, 16, 17, 18, 19, 20, 21, and 22.

(c) That part of the city of West Allis comprising wards 16, 17, 18, 28, 30, and 32.

(2) Waukesha County. That part of Waukesha County consisting of all of the following:

(a) The village of Elm Grove.

(b) That part of the city of Brookfield comprising wards 1, 2, 3, 7, 9, 15, 23, and 24.

Fifteenth assembly district. All of the following territory in Milwaukee County constitutes the 15th assembly district:

(1) That part of the city of Milwaukee comprising wards 191 and 192.

(2) That part of the city of West Allis comprising wards 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 31, and 33.

Sixteenth assembly district. All of the following territory in Milwaukee County constitutes the 16th assembly district: that part of the city of Milwaukee comprising wards 60, 61, 62, 65, 66, 70, 71, 72, 73, 105, 106, 107, 108, 109, 110, 111, 112, 174, 175, 179, 180, 297, 298, 299, 311, 312, 313, and 314.

***12** Seventeenth assembly district. All of the following territory in Milwaukee County constitutes the 17th assembly district: that part of the city of Milwaukee comprising wards 29, 30, 31, 32, 33, 34, 35, 36, 81, 82, 84, 113, 114, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 127, 128, 167, 168, 169, 170, and 171.

Eighteenth assembly district. All of the following territory in Milwaukee County constitutes the 18th assembly district: that part of the city of Milwaukee comprising wards 67, 68, 69, 126, 129, 130, 131, 172, 173, 181, 275, 276, 277, 278, 279, 280, 281, 290, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, and 310.

Nineteenth assembly district. All of the following territory in Milwaukee County constitutes the 19th assembly district: that part of the city of Milwaukee comprising wards 39, 42, 43, 44, 45, 46, 47, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 235, 236, 237, 238, 239, 240, 241, 251, 252, and 255.

Twentieth assembly district. All of the following territory in Milwaukee County constitutes the 20th assembly district:

(1) The cities of Cudahy and St. Francis.

(2) That part of the city of Milwaukee comprising wards 216, 222, 223, 224, 225, 226, 227, 228, 230, 233, 234, 249, 250, 253, 254, 256, and 257.

Twenty-first assembly district. All of the following territory in Milwaukee County constitutes the 21st assembly district:

(1) The cities of Oak Creek and South Milwaukee.

(2) That part of the city of Milwaukee comprising wards 229 and 232.

Twenty-second assembly district. All of the following territory in Milwaukee County constitutes the 22nd assembly district:

(1) The villages of Fox Point, River Hills, Shorewood, and Whitefish Bay.

(2) That part of the city of Glendale comprising wards 2, 3, 4, 5, 7, 8, 9, 10, and 11.

(3) That part of the city of Milwaukee comprising wards 38, 40, 147, and 150.

Twenty-third assembly district. All of the following territory constitutes the 23rd assembly district:

(1) Milwaukee County. That part of Milwaukee County consisting of all of the following:

(a) The village of Brown Deer.

(b) That part of the village of Bayside located in the county.

(c) That part of the city of Milwaukee comprising wards 258, 259, 260, 261, 262, 263, and 265.

(2) Ozaukee County. That part of Ozaukee County consisting of all of the following:

(a) The village of Thiensville.

(b) That part of the village of Bayside located in the county.

(c) That part of the city of Mequon comprising wards 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21.

(3) Washington County. That part of Washington County consisting of that part of the city of Milwaukee comprising ward 262.

Twenty-fourth assembly district. All of the following territory constitutes the 24th assembly district:

(1) Washington County. That part of Washington County consisting of all of the following:

(a) The town of Germantown.

***13** (b) That part of the town of Richfield comprising wards 6, 7, 8, 11, 12, and 13.

(c) The village of Germantown.

(2) Waukesha County. That part of Waukesha County consisting of all of the following:

(a) The village of Butler.

(b) That part of the village of Menomonee Falls comprising wards 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 28, and 29.

Twenty-fifth assembly district. All of the following territory constitutes the 25th assembly district:

(1) Calumet County. That part of Calumet County consisting of all of the following:

(a) The town of Rantoul.

(b) The villages of Hilbert and Potter.

(2) Manitowoc County. That part of Manitowoc County consisting of all of the following:

(a) The towns of Cato, Centerville, Eaton, Liberty, Manitowoc, Manitowoc Rapids, Meeme, Newton, and Rockland.

(b) The villages of Cleveland, Reedsville, St. Nazianz, Valders, and Whitelaw.

(c) The city of Manitowoc.

Twenty-sixth assembly district. All of the following territory in Sheboygan County constitutes the 26th assembly district:

(1) That part of the town of Sheboygan comprising ward 2.

(2) The village of Kohler.

(3) The city of Sheboygan.

(4) That part of the city of Sheboygan Falls comprising ward 10.

Twenty-seventh assembly district. All of the following territory constitutes the 27th assembly district:

(1) Calumet County. That part of Calumet County consisting of all of the following:

(a) The towns of Brothertown, Charlestown, and New Holstein.

(b) The city of New Holstein.

(c) That part of the city of Kiel located in the county.

(2) Fond du Lac County. That part of Fond du Lac County consisting of all of the following:

(a) The towns of Calumet, Forest, and Marshfield.

(b) The villages of Mount Calvary and St. Cloud.

(3) Manitowoc County. That part of Manitowoc County consisting of all of the following:

(a) The town of Schleswig.

(b) That part of the city of Kiel located in the county.

(4) Sheboygan County. That part of Sheboygan County consisting of all of the following:

(a) The towns of Greenbush, Herman, Mosel, Plymouth, Rhine, Russell, and Sheboygan Falls.

(b) That part of the town of Sheboygan comprising wards 1, 3, 4, 5, 6, and 7.

(c) The villages of Elkhart Lake, Glenbeulah, and Howards Grove.

(d) The city of Plymouth.

(e) That part of the city of Sheboygan Falls comprising wards 1, 2, 3, 4, 5, 6, 7, 8, and 9.

Twenty-eighth assembly district. All of the following territory constitutes the 28th assembly district:

(1) Burnett County. That part of Burnett County consisting of all of the following:

(a) The towns of Anderson, Daniels, Dewey, Grantsburg, La Follette, Lincoln, Meenon, Roosevelt, Siren, Trade Lake, West Marshland, and Wood River.

(b) The villages of Grantsburg, Siren, and Webster.

(2) Polk County. That part of Polk County consisting of all of the following:

***14** (a) The towns of Alden, Apple River, Balsam Lake, Black Brook, Bone Lake, Clam Falls, Clayton, Clear Lake, Eureka, Farmington, Garfield, Georgetown, Laketown, Lincoln, Lorain, Luck, Milltown, Osceola, St. Croix Falls, Sterling, and West Sweden.

(b) The villages of Balsam Lake, Centuria, Clayton, Clear Lake, Dresser, Frederic, Luck, Milltown, and Osceola.

(c) The cities of Amery and St. Croix Falls.

(3) St. Croix County. That part of St. Croix County consisting of all of the following:

(a) That part of the town of Somerset comprising wards 1, 3, 4, and 5.

(b) The village of Somerset.

Twenty-ninth assembly district. All of the following territory constitutes the 29th assembly district:

(1) Dunn County. That part of Dunn County consisting of all of the following:

(a) The towns of Lucas, Menomonie, and Stanton.

(b) The village of Knapp.

(c) The city of Menomonie.

(2) Pierce County. That part of Pierce County consisting of all of the following:

(a) The towns of Gilman and Spring Lake.

(b) The village of Elmwood.

(c) That part of the village of Spring Valley located in the county.

(3) St. Croix County. That part of St. Croix County consisting of all of the following:

(a) The towns of Baldwin, Cady, Cylon, Eau Galle, Emerald, Erin Prairie, Forest, Glenwood, Hammond, Kinnickinnic, Pleasant Valley, Richmond, Rush River, Springfield, Stanton, Star Prairie, and Warren.

(b) The villages of Baldwin, Deer Park, Hammond, Roberts, Star Prairie, Wilson, and Woodville.

(c) That part of the village of Spring Valley located in the county.

(d) The cities of Glenwood City and New Richmond.

Thirtieth assembly district. All of the following territory constitutes the 30th assembly district:

(1) Pierce County. That part of Pierce County consisting of all of the following:

(a) The towns of Clifton, Diamond Bluff, Oak Grove, River Falls, Trenton, and Trimbelle.

(b) The village of Ellsworth.

(c) The city of Prescott.

(d) That part of the city of River Falls located in the county.

(2) St. Croix County. That part of St. Croix County consisting of all of the following:

(a) The towns of Hudson, St. Joseph, and Troy.

(b) That part of the town of Somerset comprising ward 2.

(c) The village of North Hudson.

(d) The city of Hudson.

(e) That part of the city of River Falls located in the county.

Thirty-first assembly district. All of the following territory constitutes the 31st assembly district:

(1) Jefferson County. That part of Jefferson County consisting of all of the following:

(a) The towns of Cold Spring, Concord, Farmington, Hebron, Palmyra, and Sullivan.

(b) The villages of Johnson Creek, Palmyra, and Sullivan.

(2) Walworth County. That part of Walworth County consisting of all of the following:

(a) The towns of Lafayette, La Grange, Spring Prairie, Sugar Creek, and Troy.

(b) The city of Elkhorn.

***15** (3) Waukesha County. That part of Waukesha County consisting of all of the following:

(a) The towns of Eagle, Ottawa, and Summit.

(b) The villages of Dousman, Eagle, and Oconomowoc Lake.

(c) hat part of the city of Oconomowoc comprising wards 7, 8, 9, 10, 11, 12, and 13.

Thirty-second assembly district. All of the following territory constitutes the 32nd assembly district:

(1) Kenosha County. That part of Kenosha County consisting of the town of Wheat land.

(2) Walworth County. That part of Walworth County consisting of all of the following:

(a) The towns of Bloomfield, Darien, Delavan, Geneva, Linn, Lyons, Sharon, and Walworth.

(b) The villages of Darien, Fontana–on–Geneva Lake, Sharon, Walworth, and Williams Bay.

(c) That part of the village of Genoa City located in the county.

(d) The cities of Delavan and Lake Geneva.

Thirty-third assembly district. All of the following territory in Waukesha County constitutes the 33rd assembly district:

(1) The towns of Delafield and Geneses.

(2) That part of the town of Mukwonago comprising wards 1, 2, 4, 5, 6, 7, 8, 9, and 10.

(3) That part of the town of Waukesha comprising wards 3, 7, and 8.

(4) The villages of Chenequa, Hartland, Nashotah, North Prairie, and Wales.

(5) The city of Delafield.

(6) That part of the city of Pewaukee comprising ward 7.

(7) That part of the city of Waukesha comprising wards 8, 10, 11, 12, 13, 14, and 15.

Thirty-fourth assembly district. All of the following territory constitutes the 34th assembly district:

(1) Whole county. Vilas County.

(2) Oneida County. That part of Oneida County consisting of all of the following:

(a) The towns of Crescent, Enterprise, Hazelhurst, Lake Tomahawk, Minocqua, Monico, Newbold, Pelican, Piehl, Pine Lake, Schoepke, Stella, Sugar Camp, Three Lakes, and Woodruff.

(b) The city of Rhinelander.

Thirty-fifth assembly district. All of the following territory constitutes the 35th assembly district:

(1) Whole county. Lincoln County.

(2) Langlade County. That part of Langlade County consisting of all of the following:

(a) The towns of Ackley, Ainsworth, Antigo, Elcho, Neva, Norwood, Parrish, Peck, Rolling, Summit, Upham, and Vilas.

(b) The city of Antigo.

(3) Marathon County. That part of Marathon County consisting of all of the following:

(a) The towns of Halsey, Hamburg, Harrison, and Hewitt.

(b) The village of Athens.

(4) Oneida County. That part of Oneida County consisting of the towns of Cassian, Little Rice, Lynne, Nokomis, and Woodboro.

Thirty-sixth assembly district. All of the following territory constitutes the 36th assembly district:

(1) Whole counties. Florence County, Forest County, and Menominee County.

(2) Langlade County. That part of Langlade County consisting of all of the following:

(a) The towns of Evergreen, Langlade, Polar, Price, and Wolf River.

***16** (b) The village of White Lake.

(3) Marathon County. That part of Marathon County consisting of all of the following:

(a) The town of Elderon.

(b) The village of Elderon.

(c) That part of the village of Birnamwood located in the county.

(4) Marinette County. That part of Marinette County consisting of all of the following:

(a) The towns of Amberg, Athelstane, Beecher, Dunbar, Goodman, Lake, Middle Inlet, Niagara, Pembine, Porterfield, Silver Cliff, Stephenson, Wagner, and Wausaukee.

(b) The villages of Crivitz and Wausaukee.

(c) The city of Niagara.

(5) Oconto County. That part of Oconto County consisting of the towns of Doty, Lakewood, Mountain, Riverview, and Townsend.

(6) Shawano County. That part of Shawano County consisting of all of the following:

(a) The towns of Almon, Aniwa, Bartelme, Birnamwood, Hutchins, Red Springs, and Wittenberg.

(b) The villages of Mattoon and Wittenberg.

(c) That part of the village of Birnamwood located in the county.

Thirty-seventh assembly district. All of the following territory constitutes the 37th assembly district:

(1) Dane County. That part of Dane County consisting of all of the following:

(a) The towns of Albion, Christiana, and Deerfield.

(b) The villages of Deerfield and Rochdale.

(c) That part of the village of Cambridge located in the county.

(2) Jefferson County. That part of Jefferson County consisting of all of the following:

(a) The towns of Aztalan, Jefferson, Koshkonong, Lake Mills, Milford, Oakland, Sumner, Waterloo, and Watertown.

(b) That part of the town of Ixonia comprising wards 1, 3, and 4.

(c) That part of the village of Cambridge located in the county.

(d) The cities of Fort Atkinson, Jefferson, Lake Mills, and Waterloo.

Thirty-eighth assembly district. All of the following territory constitutes the 38th assembly district:

(1) Columbia County. That part of Columbia County consisting of that part of the city of Columbus located in the county.

(2) Dodge County. That part of Dodge County consisting of all of the following:

(a) The towns of Ashippun, Clyman, Elba, Emmet, Hustisford, Lebanon, Lowell, Portland, and Shields.

(b) The villages of Clyman, Hustisford, Lowell, and Reeseville.

(c) That part of the city of Watertown located in the county.

(d) Dodge County. That part of Dodge County consisting of that part of the city of Columbus located in the county.

(3) Jefferson County. That part of Jefferson County consisting of all of the following:

(a) That part of the town of Ixonia comprising ward 2.

(b) That part of the city of Watertown located in the county.

(4) Waukesha County. That part of Waukesha County consisting of all of the following:

(a) The town of Oconomowoc.

(b) The village of Lac La Belle.

(c) That part of the city of Oconomowoc comprising wards 1, 2, 3, 4, 5, and 6.

Thirty-ninth assembly district. All of the following territory constitutes the 39th assembly district:

***17** (1) Columbia County. That part of Columbia County consisting of that part of the village of Randolph located in the county.

(2) Dodge County. That part of Dodge County consisting of all of the following:

(a) The towns of Beaver Dam, Burnett, Calamus, Chester, Fox Lake, Herman, Hubbard, Leroy, Lomira, Oak Grove, Rubicon, Trenton, Westford, and Williams town.

(b) The villages of Brownsville, Iron Ridge, Kekoskee, Lomira, and Neosho.

(c) That part of the village of Randolph located in the county.

(d) The cities of Beaver Dam, Fox Lake, Horicon, Juneau, and Maxville.

Fortieth assembly district. All of the following territory constitutes the 40th assembly district:

(1) Outagamie County. That part of Outagamie County consisting of all of the following:

(a) The town of Hottonia.

(b) The village of Hortonville.

(c) That part of the city of New London located in the county.

(2) Shawano County. That part of Shawano County consisting of that part of the city of Marion located in the county.

(3) Waupaca County. That part of Waupaca County consisting of all of the following:

(a) The towns of Bear Creek, Caledonia, Dayton, Dupont, Farmington, Harrison, Helvetia, Iola, Larrabee, Lebanon, Lind, Little Wolf, Mukwa, Royalton, St. Lawrence, Scandinavia, Union, Waupaca, Weyauwega, and Wyoming.

(b) The villages of Big Falls, Iola, Ogdensburg, and Scandinavia.

(c) The cities of Clintonville, Manawa, Waupaca, and Weyauwega.

(d) That part of the city of Marion located in the county.

(e) That part of the city of New London located in the county.

Forty-first assembly district. All of the following territory constitutes the 41st assembly district:

(1) Whole county. Green Lake County.

(2) Fond du Lac County. That part of Fond du Lac County consisting of all of the following:

(a) The towns of Alto, Metomen, and Ripon.

(b) The villages of Brandon and Fair water.

(c) The city of Ripon.

(3) Marquette County. That part of Marquette County consisting of all of the following:

(a) The towns of Crystal Lake, Mecan, Neshkoro, and Newton.

(b) The village of Neshkoro.

(4) Waupaca County. That part of Waupaca County consisting of all of the following:

(a) The town of Fremont.

(b) The village of Fremont.

(5) Waushara County. That part of Waushara County consisting of all of the following:

(a) The towns of Aurora, Bloomfield, Coloma, Dakota, Leon, Marion, Mount Morris, Poysippi, Richford, Saxeville, Springwater, Warren, and Wautoma.

(b) The villages of Coloma, Lohrville, Redgranite, and Wild Rose.

(c) The city of Wautoma.

(d) That part of the city of Berlin located in the county.

Forty-second assembly district. All of the following territory constitutes the 42nd assembly district:

(1) Adams County. That part of Adams County consisting of all of the following:

(a) The towns of Dell Prairie and New Haven.

***18** (b) That part of the city of Wisconsin Dells located in the county.

(2) Columbia County. That part of Columbia County consisting of all of the following:

(a) The towns of Caledonia, Fort Winnebago, Lewiston, Marcellon, Newport, and Wyocena.

(b) The villages of Pardeeville and Wyocena.

(c) The city of Portage.

(d) That part of the city of Wisconsin Dells located in the county.

(3) Marquette County. That part of Marquette County consisting of all of the following:

(a) The towns of Buffalo, Douglas, Harris, Montello, Moundville, Oxford, Packwaukee, Shields, and Westfield.

(b) The villages of Endeavor and Oxford.

(c) The city of Montello.

(4) Sauk County. That part of Sauk County consisting of all of the following:

(a) The towns of Baraboo, Delton, Fairfield, and Greenfield.

(b) The villages of Lake Delton and West Baraboo.

(c) The city of Baraboo.

(d) That part of the city of Wisconsin Dells located in the county.

Forty-third assembly district. All of the following territory constitutes the 43rd assembly district:

(1) Dane County. That part of Dane County consisting of that part of the city of Edgerton located in the county.

(2) Jefferson County. That part of Jefferson County consisting of that part of the city of Whitewater located in the county.

(3) Rock County. That part of Rock County consisting of all of the following:

(a) The towns of Avon, Beloit, Center, Fulton, Janesville, Lima, Milton, Newark, Plymouth, Porter, Rock, and Spring Valley.

(b) The villages of Footville and Orfordville.

(c) The city of Milton.

(d) That part of the city of Edgerton located in the county.

(4) Walworth County. That part of Walworth County consisting of all of the following:

(a) The town of Whitewater.

(b) That part of the city of Whitewater located in the county.

Forty-fourth assembly district. All of the following territory in Rock County constitutes the 44th assembly district: that part of the city of Janesville comprising wards 1, 2, 3, 4, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25.

Forty-fifth assembly district. All of the following territory constitutes the 45th assembly district:

(1) Rock County. That part of Rock County consisting of all of the following:

(a) The towns of Bradford, Clinton, Harmony, Johnstown, La Prairie, and Turtle.

(b) The village of Clinton.

(c) The city of Beloit.

(d) That part of the city of Janesville comprising wards 5, 6, and 12.

(2) Walworth County. That part of Walworth County consisting of the town of Richmond.

Forty-sixth assembly district. All of the following territory in Dane County constitutes the 46th assembly district:

(1) The towns of Cottage Grove, Dunkirk, Pleasant Springs, Rutland, and Sun Prairie.

(2) That part of the town of Dunn comprising wards 1 and 7.

(3) The village of Cottage Grove.

(4) That part of the village of Oregon comprising wards 2, 3, and 4.

***19** (5) The cities of Stoughton and Sun Prairie.

Forty-seventh assembly district. All of the following territory constitutes the 47th assembly district:

(1) Columbia County. That part of Columbia County consisting of all of the following:

(a) The towns of Arlington, Columbus, Courtland, Dekorra, Fountain Prairie, Hampden, Leeds, Lodi, Lowville, Otsego, Pacific, Randolph, Scott, Springvale, and West Point.

(b) The villages of Arlington, Cambria, Doylestown, Fall River, Friesland, Poynette, and Rio.

(c) The city of Lodi.

(2) Dane County. That part of Dane County consisting of all of the following:

(a) The towns of Bristol, Dane, Mazomanie, Medina, Roxbury, Vienna, Windsor, and York.

(b) The villages of Dane, DeForest, and Marshall.

(3) Sauk County. That part of Sauk County consisting of all of the following:

(a) The town of Merrimac.

(b) The village of Merrimac.

Forty-eighth assembly district. All of the following territory in Dane County constitutes the 48th assembly district:

(1) The town of Blooming Grove.

(2) That part of the town of Dunn comprising wards 2, 3, 4, 5, and 6.

(3) The village of McFarland.

(4) The city of Monona.

(5) That part of the city of Madison comprising wards 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 33, 55, and 56.

Forty-ninth assembly district. All of the following territory constitutes the 49th assembly district:

(1) Whole county. Grant County.

(2) Iowa County. That part of Iowa County consisting of all of the following:

(a) That part of the village of Livingston located in the county.

(b) That part of the village of Montfort located in the county.

(c) That part of the village of Muscoda located in the county.

(3) Lafayette County. That part of Lafayette County consisting of all of the following:

(a) The town of Benton.

(b) The village of Benton.

(c) That part of the village of Hazel Green located in the county.

(d) That part of the city of Cuba City located in the county.

(4) Richland County. That part of Richland County consisting of all of the following:

(a) The towns of Dayton, Eagle, Orion, and Richwood.

(b) The village of Boaz.

Fiftieth assembly district. All of the following territory constitutes the 50th assembly district:

(1) Whole county. Juneau County.

(2) Monroe County. That part of Monroe County consisting of all of the following:

(a) The towns of Clifton and Glendale.

(b) The village of Kendall.

(3) Richland County. That part of Richland County consisting of all of the following:

(a) The towns of Marshall, Richland, Rockbridge, Westford, and Willow.

(b) That part of the village of Cazenovia located in the county.

(c) The city of Richland Center.

(4) Sauk County. That part of Sauk County consisting of all of the following:

(a) The towns of Dellona, Excelsior, Freedom, Ironton, La Valle, Reedsburg, Washington, Westfield, Winfield, and Woodland.

***20** (b) The villages of Ironton, La Valle, Lime Ridge, Loganville, North Freedom, and Rock Springs.

(c) That part of the village of Cazenovia located in the county.

(d) The city of Reedsburg.

Fifty-first assembly district. All of the following territory constitutes the 51st assembly district:

(1) Iowa County. That part of Iowa County consisting of all of the following:

(a) The towns of Arena, Brigham, Clyde, Dodgeville, Eden, Highland, Linden, Mifflin, Mineral Point, Moscow, Pulaski, Ridgeway, Waldwick, and Wyoming.

(b) The villages of Arena, Avoca, Barneveld, Cobb, Highland, Hollandale, Linden, Rewey, and Ridge way.

(c) That part of the village of Blanchardville located in the county.

(d) The cities of Dodgeville and Mineral Point.

(2) Lafayette County. That part of Lafayette County consisting of all of the following:

(a) The towns of Argyle, Belmont, Blanchard, Darlington, Elk Grove, Fayette, Gratiot, Kendall, Lamont, Monticello, New Diggings, Seymour, Shullsburg, White Oak Springs, Willow Springs, and Wiota.

(b) The villages of Argyle, Belmont, and Gratiot.

(c) That part of the village of Blanchardville located in the county.

(d) The cities of Darlington and Shullsburg.

(3) Richland County. That part of Richland County consisting of all of the following:

(a) The towns of Buena Vista and Ithaca.

(b) The village of Lone Rock.

(4) Sauk County. That part of Sauk County consisting of all of the following:

(a) The towns of Bear Creek, Franklin, Honey Creek, Prairie du Sac, Spring Green, Sumpter, and Troy.

(b) The villages of Plain, Prairie du Sac, Sauk City, and Spring Green.

Fifty-second assembly district. All of the following territory in Fond du Lac County constitutes the 52nd assembly district:

(1) The towns of Eldorado, Friendship, and Taycheedah.

(2) The village of North Fond du Lac.

(3) The city of Fond du Lac.

Fifty-third assembly district. All of the following territory constitutes the 53rd assembly district:

(1) Dodge County. That part of Dodge County consisting of that part of the city of Waupun located in the county.

(2) Fond du Lac County. That part of Fond du Lac County consisting of all of the following:

(a) The towns of Byron, Empire, Fond du Lac, Lamartine, Oakfield, Rosendale, Springvale, and Waupun.

(b) The villages of Oakfield and Rosendale.

(c) That part of the city of Waupun located in the county.

(3) Winnebago County. That part of Winnebago County consisting of all of the following:

(a) The towns of Algoma, Black Wolf, Nekimi, Nepeuskun, Omro, Oshkosh, Rushford, and Utica.

(b) The city of Omro.

(c) That part of the city of Oshkosh comprising wards 3, 4, 5, 6, 7, and 9.

Fifty-fourth assembly district. All of the following territory in Winnebago County constitutes the 54th assembly district: that part of the city of Oshkosh comprising wards 1, 2, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, and 33.

***21** Fifty-fifth assembly district. All of the following territory in Winnebago County constitutes the 55th assembly district:

(1) That part of the town of Menasha comprising wards 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13.

(2) The city of Neenah.

(3) That part of the city of Appleton comprising wards 38 and 39.

(4) That part of the city of Menasha located in the county.

Fifty-sixth assembly district. All of the following territory constitutes the 56th assembly district:

(1) Outagamie County. That part of Outagamie County consisting of all of the following:

(a) The towns of Center, Dale, Grand Chute, and Greenville.

(b) That part of the city of Appleton comprising wards 30, 31, and 32.

(2) Winnebago County. That part of Winnebago County consisting of all of the following:

(a) The towns of Clayton, Neenah, Poygan, Vinland, Winchester, Winneconne, and Wolf River.

(b) That part of the town of Menasha comprising wards 1 and 2.

(c) The village of Winneconne.

Fifty-seventh assembly district. All of the following territory in Outagamie County constitutes the 57th assembly district:

(1) That part of the village of Little Chute comprising ward 3.

(2) That part of the city of Appleton comprising wards 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 33, 34, 35, 36, and 37.

Fifty-eighth assembly district. All of the following territory in Washington County constitutes the 58th assembly district:

(1) The towns of Addison, Jackson, and West Bend.

(2) That part of the town of Hartford comprising ward 5.

(3) That part of the town of Polk comprising wards 1, 2, 3, 4, 6, and 7.

(4) That part of the town of Trenton comprising wards 3 and 4.

(5) The villages of Jackson and Slinger.

(6) The city of West Bend.

Fifty-ninth assembly district. All of the following territory constitutes the 59th assembly district:

(1) Dodge County. That part of Dodge County consisting of all of the following:

(a) The town of Theresa.

(b) The village of Theresa.

(2) Fond du Lac County. That part of Fond du Lac County consisting of all of the following:

(a) The towns of Ashford, Auburn, Eden, and Osceola.

(b) The villages of Campbellsport and Eden.

(3) Ozaukee County. That part of Ozaukee County consisting of all of the following:

(a) The towns of Belgium and Fredonia.

(b) That part of the town of Saukville comprising ward 1.

(c) The villages of Belgium and Fredonia.

(4) Sheboygan County. That part of Sheboygan County consisting of all of the following:

(a) The towns of Holland, Lima, Lyndon, Mitchell, Scott, Sherman, and Wilson.

(b) The villages of Adell, Cascade, Cedar Grove, Oostburg, Random Lake, and Waldo.

(5) Washington County. That part of Washington County consisting of all of the following:

(a) The towns of Barton, Farmington, Kewaskum, and Wayne.

***22** (b) The village of Kewaskum.

Sixtieth assembly district. All of the following territory constitutes the 60th assembly district:

(1) Ozaukee County. That part of Ozaukee County consisting of all of the following:

(a) The towns of Cedarburg, Grafton, and Port Washington.

(b) That part of the town of Saukville comprising wards 2, 3, 4, 5, and 6.

(c) The villages of Grafton and Sackville.

(d) That part of the village of Newburg located in the county.

(e) The cities of Cedarburg and Port Washington.

(f) That part of the city of Mequon comprising ward 2.

(2) Washington County. That part of Washington County consisting of all of the following:

(a) That part of the town of Trenton comprising wards 1, 2, 5, 6, and 7.

(b) That part of the village of Newburg located in the county.

Sixty-first assembly district. All of the following territory in Racine County constitutes the 61st assembly district:

(1) That part of the town of Mount Pleasant comprising ward 22.

(2) The villages of North Bay and Wind Point.

(3) That part of the city of Racine comprising wards 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 27, 33, and 34.

Sixty-second assembly district. All of the following territory in Racine County constitutes the 62nd assembly district:

(1) That part of the town of Mount Pleasant comprising wards 1, 2, 3, 4, 5, 7, 10, 11, 12, 14, 16, 17, 18, 19, 20, 21, and 23.

(2) The villages of Elmwood Park and Sturtevant.

(3) That part of the city of Racine comprising wards 8, 21, 23, 24, 25, 26, 28, 29, 30, 31, and 32.

Sixty-third assembly district. All of the following territory in Racine County constitutes the 63rd assembly district:

(1) The towns of Caledonia, Dover, Norway, Raymond, Rochester, and Yorkville.

(2) That part of the town of Mount Pleasant comprising wards 6, 8, 9, 13, and 15.

(3) The villages of Rochester and Union Grove.

Sixty-fourth assembly district. All of the following territory in Kenosha County constitutes the 64th assembly district:

(1) That part of the town of Somers comprising ward 8.

(2) That part of the city of Kenosha comprising wards 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 21, 22, 29, 31, and 32.

Sixty-fifth assembly district. All of the following territory in Kenosha County constitutes the 65th assembly district:

(1) That part of the town of Bristol comprising ward 6.

(2) The village of Pleasant Prairie.

(3) That part of the city of Kenosha comprising wards 5, 6, 16, 17, 18, 23, 24, 25, 26, 27, 28, 30, 33, and 34.

Sixty-sixth assembly district. All of the following territory constitutes the 66th assembly district:

(1) Kenosha County. That part of Kenosha County consisting of all of the following:

(a) The towns of Brighton, Paris, Randall, and Salem.

(b) That part of the town of Bristol comprising wards 1, 2, 3, 4, 5, 7, and 8.

***23** (c) That part of the town of Somers comprising wards 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, and 12.

(d) The villages of Paddock Lake, Silver Lake, and Twin Lakes.

(e) That part of the village of Genoa City located in the county.

(2) Racine County. That part of Racine County consisting of all of the following:

(a) The town of Burlington.

(b) That part of the city of Burlington located in the county.

(3) Walworth County. That part of Walworth County consisting of that part of the city of Burlington located in the county.

Sixty-seventh assembly district. All of the following territory constitutes the 67th assembly district:

(1) Barron County. That part of Barron County consisting of all of the following:

(a) The towns of Dallas, Dovre, and Sioux Creek.

(b) The village of Dallas.

(c) That part of the village of New Auburn located in the county.

(2) Chippewa County. That part of Chippewa County consisting of all of the following:

(a) The towns of Anson, Arthur, Auburn, Birch Creek, Bloomer, Cleveland, Colburn, Cooks Valley, Eagle Point, Estella, Goetz, Howard, Lake Holcombe, Ruby, Sampson, Tilden, and Woodmohr.

(b) The village of Cadott.

(c) That part of the village of New Auburn located in the county.

(d) The cities of Bloomer, Chippewa Falls, and Cornell.

(3) Dunn County. That part of Dunn County consisting of all of the following:

(a) The towns of Colfax, Elk Mound, Grant, Hay River, New Haven, Otter Creek, Red Cedar, Sand Creek, Sheridan, Sherman, Spring Brook, Tainter, Tiffany, and Wilson.

(b) The villages of Boyceville, Colfax, Downing, Elk Mound, Ridgeland, and Wheeler.

Sixty-eighth assembly district. All of the following territory constitutes the 68th assembly district:

(1) Chippewa County. That part of Chippewa County consisting of all of the following:

(a) The towns of Hallie, Lafayette, and Wheaton.

(b) That part of the city of Eau Claire located in the county.

(2) Eau Claire County. That part of Eau Claire County consisting of all of the following:

(a) The towns of Lincoln, Ludington, Seymour, and Union.

(b) That part of the town of Washington comprising wards 9 and 13.

(c) The village of Fall Creek.

(d) That part of the city of Altoona comprising wards 8, 12, and 13.

(e) That part of the city of Eau Claire comprising wards 1, 7, 8, 9, 10, 11, 12, 13, 14, 19, 22, 23, 29, 34, 35, 36, and 37.

Sixty-ninth assembly district. All of the following territory constitutes the 69th assembly district:

(1) Chippewa County. That part of Chippewa County consisting of all of the following:

(a) The towns of Delmar, Edson, and Sigel.

(b) The village of Boyd.

(c) The city of Stanley.

(2) Clark County. That part of Clark County consisting of all of the following:

(a) The towns of Beaver, Butler, Colby, Eaton, Foster, Fremont, Grant, Green Grove, Hendren, Hewett, Hixon, Hoard, Longwood, Loyal, Lynn, Mayville, Mead, Mentor, Pine Valley, Reseburg, Seif, Sherman, Sherwood, Thorp, Unity, Warner, Washburn, Weston, Withee, Worden, and York.

***24** (b) The villages of Curtiss, Granton, and Withee.

(c) That part of the village of Dorchester located in the county.

(d) That part of the village of Unity located in the county.

(e) The cities of Greenwood, Loyal, Neillsville, Owen, and Thorp.

(f) That part of the city of Abbotsford located in the county.

(g) That part of the city of Colby located in the county.

(3) Eau Claire County. That part of Eau Claire County consisting of the town of Wilson.

(4) Marathon County. That part of Marathon County consisting of all of the following:

(a) The towns of Brighton, Cleveland, Eau Pleine, Frankfort, Hull, McMillan, Spencer, and Wien.

(b) The villages of Edgar, Fenwood, Spencer, and Stratford.

(c) That part of the village of Dorchester located in the county.

(d) That part of the village of Unity located in the county.

(e) That part of the city of Abbotsford located in the county.

(f) That part of the city of Colby located in the county.

(5) Taylor County. That part of Taylor County consisting of the town of Taft.

(6) Wood County. That part of Wood County consisting of the town of Lincoln.

Seventieth assembly district. All of the following territory constitutes the 70th assembly district:

(1) Marathon County. That part of Marathon County consisting of that part of the city of Marshfield located in the county.

(2) Portage County. That part of Portage County consisting of all of the following:

(a) The towns of Carson, Dewey, Eau Pleine, Hull, Linwood, and Sharon.

(b) That part of the town of Grant comprising ward 3.

(c) That part of the town of Plover comprising wards 1 and 4.

(d) The village of Junction City.

(e) That part of the village of Milladore located in the county.

(3) Wood County. That part of Wood County consisting of all of the following:

(a) The towns of Arpin, Auburndale, Cameron, Cary, Cranmoor, Dexter, Hansen, Hiles, Marshfield, Milladore, Port Edwards, Remington, Richfield, Rock, Rudolph, Seneca, Sherry, Sigel, and Wood.

(b) The villages of Arpin, Auburndale, Hewitt, Rudolph, and Vesper.

(c) That part of the village of Milladore located in the county.

(d) The cities of Nekoosa and Pittsville.

(e) That part of the city of Marshfield located in the county.

Seventy-first assembly district. All of the following territory constitutes the 71st assembly district:

(1) Portage County. That part of Portage County consisting of all of the following:

(a) The towns of Almond, Amherst, Belmont, Buena Vista, Lanark, New Hope, Pine Grove, and Stockton.

(b) That part of the town of Plover comprising wards 2 and 3.

(c) The villages of Almond, Amherst, Amherst Junction, Nelsonville, Park Ridge, Plover, and Whiting.

(d) The city of Stevens Point.

(2) Waushara County. That part of Waushara County consisting of all of the following:

(a) The towns of Deerfield, Hancock, Oasis, Plainfield, and Rose.

***25** (b) The villages of Hancock and Plainfield.

Seventy-second assembly district. All of the following territory constitutes the 72nd assembly district:

(1) Adams County. That part of Adams County consisting of all of the following:

(a) The towns of Adams, Big Flats, Colburn, Easton, Jackson, Leola, Lincoln, Monroe, New Chester, Preston, Quincy, Richfield, Rome, Springville, and Strongs Prairie.

(b) The village of Friendship.

(c) The city of Adams.

(2) Marquette County. That part of Marquette County consisting of all of the following:

(a) The town of Springfield.

(b) The village of Westfield.

(3) Portage County. That part of Portage County consisting of that part of the town of Grant comprising wards 1 and 2.

(4) Wood County. That part of Wood County consisting of all of the following:

(a) The towns of Grand Rapids and Saratoga.

(b) The villages of Biron and Port Edwards.

(c) The city of Wisconsin Rapids.

Seventy-third assembly district. All of the following territory constitutes the 73rd assembly district:

(1) Whole county. Douglas County.

(2) Burnett County. That part of Burnett County consisting of the towns of Blaine, Jackson, Oakland, Rusk, Sand Lake, Scott, Swiss, Union, and Webb Lake.

(3) Washburn County. That part of Washburn County consisting of all of the following:

(a) The towns of Bass Lake, Brooklyn, Casey, Chicog, Crystal, Evergreen, Frog Creek, Gull Lake, Minong, Springbrook, Stinnett, and Trego.

(b) The village of Mining.

Seventy-fourth assembly district. All of the following territory constitutes the 74th assembly district:

(1) Whole counties. Ashland County, Bayfield County, and Iron County.

(2) Sawyer County. That part of Sawyer County consisting of all of the following:

(a) The towns of Bass Lake, Couderay, Edgewater, Hayward, Hunter, Lenroot, Ojibwa, Radisson, Round Lake, Sand Lake, Spider Lake, and Winter.

(b) The villages of Couderay, Radisson, and Winter.

(c) The city of Hayward.

Seventy-fifth assembly district. All of the following territory constitutes the 75th assembly district:

(1) Barron County. That part of Barron County consisting of all of the following:

(a) The towns of Almena, Arland, Barron, Bear Lake, Cedar Lake, Chetek, Clinton, Crystal Lake, Cumberland, Doyle, Lakeland, Maple Grove, Maple Plain, Oak Grove, Prairie Farm, Prairie Lake, Rice Lake, Stanfold, Stanley, Sumner, Turtle Lake, and Vance Creek.

(b) The villages of Almena, Cameron, Haugen, and Prairie Farm.

(c) That part of the village of Turtle Lake located in the county.

(d) The cities of Barron, Chetek, Cumberland, and Rice Lake.

(2) Polk County. That part of Polk County consisting of all of the following:

(a) The towns of Beaver, Johnstown, and McKinley.

(b) That part of the village of Turtle Lake located in the county.

(3) Washburn County. That part of Washburn County consisting of all of the following:

***26** (a) The towns of Barronett, Bashaw, Beaver Brook, Birchwood, Long Lake, Madge, Sarona, Spooner, and Stone Lake.

(b) The village of Birchwood.

(c) The cities of Shell Lake and Spooner.

Seventy-sixth assembly district. All of the following territory in Dane County constitutes the 76th assembly district:

(1) That part of the town of Madison comprising wards 2, 3, 4, and 6.

(2) That part of the city of Fitchburg comprising wards 1, 2, 3, 4, and 6.

(3) That part of the city of Madison comprising wards 48, 50, 58, 59, 60, 65, 66, 67, 68, 69, 72, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, and 94.

Seventy-seventh assembly district. All of the following territory in Dane County constitutes the 77th assembly district:

(1) The village of Shorewood Hills.

(2) That part of the city of Madison comprising wards 45, 46, 47, 61, 62, 63, 64, 70, 71, 73, 74, 75, 76, 77, 78, 79, 80, 81, 95, 96, and 97.

(3) That part of the city of Middleton comprising wards 2, 3, and 4.

Seventy-eighth assembly district. All of the following territory in Dane County constitutes the 78th assembly district:

(1) That part of the town of Madison comprising wards 1, 5, 7, 8, 9, 10, and 11.

(2) The village of Maple Bluff.

(3) That part of the city of Madison comprising wards 14, 15, 21, 31, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 49, 51, 52, 53, 54, and 57.

Seventy-ninth assembly district. All of the following territory in Dane County constitutes the 79th assembly district:

(1) The towns of Blue Mounds, Cross Plains, Middleton, Springdale, Vermont, and Verona.

(2) The villages of Blue Mounds and Mount Horeb.

(3) The city of Verona.

(4) That part of the city of Fitchburg comprising wards 5, 7, 8, 9, 10, 11, and 12.

(5) That part of the city of Madison comprising wards 82, 83, 98, and 99.

(6) That part of the city of Middleton comprising wards 1, 5, 6, 7, and 9.

Eightieth assembly district. All of the following territory constitutes the 80th assembly district:

(1) Whole county. Green County.

(2) Dane County. That part of Dane County consisting of all of the following:

(a) The towns of Montrose, Oregon, Perry, and Primrose.

(b) That part of the village of Oregon comprising wards 1, 5, 6, 7, and 8.

(c) That part of the village of Belleville located in the county.

(d) That part of the village of Brooklyn located in the county.

(3) Lafayette County. That part of Lafayette County consisting of all of the following:

(a) The town of Wayne.

(b) The village of South Wayne.

(4) Rock County. That part of Rock County consisting of all of the following:

(a) The towns of Magnolia and Union.

(b) The city of Evansville.

Eighty-first assembly district. All of the following territory in Dane County constitutes the 81st assembly district:

(1) The towns of Berry, Black Earth, Burke, Springfield, and Westport.

(2) The villages of Black Earth, Cross Plains, Mazomanie, and Waunakee.

***27** (3) That part of the city of Madison comprising wards 9, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, and 30.

(4) That part of the city of Middleton comprising ward 8.

Eighty-second assembly district. All of the following territory in Milwaukee County constitutes the 82nd assembly district:

(1) The village of Greendale.

(2) The city of Franklin.

(3) That part of the city of Greenfield comprising wards 6, 7, 9, 10, 11, and 12.

Eighty-third assembly district. All of the following territory constitutes the 83rd assembly district:

(1) Racine County. That part of Racine County consisting of all of the following:

(a) The town of Waterford.

(b) The village of Waterford.

(2) Walworth County. That part of Walworth County consisting of all of the following:

(a) The town of East Troy.

(b) The village of East Troy.

(c) That part of the village of Mukwonago located in the county.

(3) Waukesha County. That part of Waukesha County consisting of all of the following:

(a) The town of Vernon.

(b) That part of the town of Mukwonago comprising ward 3.

(c) The village of Big Bend.

(d) That part of the village of Mukwonago located in the county.

(e) The city of Muskego.

Eighty-fourth assembly district. All of the following territory constitutes the 84th assembly district:

(1) Milwaukee County. That part of Milwaukee County consisting of the village of Hales Corners.

(2) Waukesha County. That part of Waukesha County consisting of all of the following:

(a) That part of the town of Waukesha comprising wards 6, 9, 10, 11, and 12.

(b) The city of New Berlin.

(c) That part of the city of Waukesha comprising wards 25 and 26.

Eighty-fifth assembly district. All of the following territory constitutes the 85th assembly district:

(1) Marathon County. That part of Marathon County consisting of all of the following:

(a) The towns of Berlin, Easton, Maine, Norrie, Plover, Texas, and Wausau.

(b) The village of Brokaw.

(c) That part of the village of Rothschild comprising wards 1, 2, 3, and 4.

(d) The cities of Schofield and Wausau.

(2) Shawano County. That part of Shawano County consisting of the villages of Aniwa and Eland.

Eighty-sixth assembly district. All of the following territory constitutes the 86th assembly district:

(1) Marathon County. That part of Marathon County consisting of all of the following:

(a) The towns of Bergen, Bevent, Cassel, Day, Emmet, Franzen, Green Valley, Guenther, Knowlton, Kronenwetter, Marathon, Mosinee, Reid, Rib Falls, Rib Mountain, Rietbrock, Ringle, Stettin, and Weston.

(b) The villages of Hatley, Marathon City, and Weston.

(c) That part of the village of Rothschild comprising wards 5 and 6.

(d) The city of Mosinee.

(2) Portage County. That part of Portage County consisting of all of the following:

(a) The town of Alban.

(b) The village of Rosholt.

***28** (3) Shawano County. That part of Shawano County consisting of all of the following:

(a) The towns of Fairbanks and Germania.

(b) The village of Tiverton.

Eighty-seventh assembly district. All of the following territory constitutes the 87th assembly district:

(1) Whole counties. Price County and Rusk County.

(2) Marathon County. That part of Marathon County consisting of the towns of Bern, Holton, and Johnson.

(3) Sawyer County. That part of Sawyer County consisting of all of the following:

(a) The towns of Draper, Meadowbrook, Meteor, and Weirgor.

(b) The village of Exeland.

(4) Taylor County. That part of Taylor County consisting of all of the following:

(a) The towns of Aurora, Browning, Chelsea, Cleveland, Deer Creek, Ford, Goodrich, Greenwood, Grover, Hammel, Holway, Jump River, Little Black, McKinley, Maplehurst, Medford, Molitor, Pershing, Rib Lake, Roosevelt, and Westboro.

(b) The villages of Gilman, Lublin, Rib Lake, and Stetsonville.

(c) The city of Medford.

Eighty-eighth assembly district. All of the following territory in Brown County constitutes the 88th assembly district: that part of the city of Green Bay comprising wards 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, and 36.

Eighty-ninth assembly district. All of the following territory constitutes the 89th assembly district:

(1) Brown County. That part of Brown County consisting of all of the following:

(a) The town of Pittsfield.

(b) That part of the town of Suamico comprising wards 1, 2, 3, 4, 5, 6, 8, 9, and 10.

(c) That part of the village of Pulaski located in the county.

(2) Marinette County. That part of Marinette County consisting of all of the following:

(a) The towns of Beaver, Grover, Peshtigo, and Pound.

(b) The villages of Coleman and Pound.

(c) The cities of Marinette and Peshtigo.

(3) Oconto County. That part of Oconto County consisting of all of the following:

(a) The towns of Chase, Lena, Little River, Little Suamico, Oconto, Pensaukee, and Stiles.

(b) The village of Lena.

(c) That part of the village of Pulaski located in the county.

(d) The city of Conto.

(4) Shawano County. That part of Shawano County consisting of that part of the village of Pulaski located in the county.

Ninetieth assembly district. All of the following territory in Brown County constitutes the 90th assembly district:

(1) That part of the town of Suamico comprising ward 7.

(2) That part of the village of Howard located in the county.

(3) That part of the city of Green Bay comprising wards 25, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44, and 45.

Ninety-first assembly district. All of the following territory constitutes the 91st assembly district:

(1) Whole counties. Buffalo County and Trempealeau County.

(2) Jackson County. That part of Jackson County consisting of all of the following:

***29** (a) The town of Springfield.

(b) The village of Taylor.

(3) Pepin County. That part of Pepin County consisting of all of the following:

(a) The towns of Durand, Frankfort, Pepin, Stockholm, Waterville, and Waubeek.

(b) The villages of Pepin and Stockholm.

(c) The city of Durand.

(4) Pierce County. That part of Pierce County consisting of all of the following:

(a) The towns of Ellsworth, El Paso, Hartland, Isabelle, Maiden Rock, Martell, Salem, and Union.

(b) The villages of Bay City, Maiden Rock, and Plum City.

Ninety-second assembly district. All of the following territory constitutes the 92nd assembly district:

(1) Clark County. That part of Clark County consisting of the towns of Dewhurst and Levis.

(2) Eau Claire County. That part of Eau Claire County consisting of all of the following:

(a) The towns of Bridge Creek and Fairchild.

(b) The village of Fairchild.

(c) The city of Augusta.

(3) Jackson County. That part of Jackson County consisting of all of the following:

(a) The towns of Adams, Albion, Alma, Bear Bluff, Brockway, City Point, Cleveland, Curran, Franklin, Garden Valley, Garfield, Hixton, Irving, Knapp, Komensky, Manchester, Melrose, Millston, North Bend, and North field.

(b) The villages of Alma Center, Hixton, Melrose, and Merrill an.

(c) The city of Black River Falls.

(4) Monroe County. That part of Monroe County consisting of all of the following:

(a) The towns of Adrian, Angelo, Byron, Grant, Greenfield, Lafayette, La Grange, Lincoln, Little Falls, New Lyme, Oakdale, Scott, Sparta, and Tomah.

(b) The villages of Oakdale, Warrens, and Wyeville.

(c) The cities of Sparta and Tomah.

Ninety-third assembly district. All of the following territory constitutes the 93rd assembly district:

(1) Dunn County. That part of Dunn County consisting of the towns of Dunn, Eau Galle, Peru, Rock Creek, and Weston.

(2) Eau Claire County. That part of Eau Claire County consisting of all of the following:

(a) The towns of Brunswick, Clear Creek, Drammen, Otter Creek, and Pleasant Valley.

(b) That part of the town of Washington comprising wards 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, and 12.

(c) That part of the city of Altoona comprising wards 1, 2, 3, 4, 5, 6, 7, 9, 10, and 11.

(d) That part of the city of Eau Claire comprising wards 2, 3, 4, 5, 6, 15, 17, 18, 20, 21, 25, 26, 27, 28, 30, 31, 32, 33, 38, and 39.

(3) Pepin County. That part of Pepin County consisting of the towns of Albany and Lima.

(4) Pierce County. That part of Pierce County consisting of the town of Rock Elm.

Ninety-fourth assembly district. All of the following territory constitutes the 94th assembly district:

(1) La Crosse County. That part of La Crosse County consisting of all of the following:

(a) The towns of Bangor, Barre, Burns, Campbell, Farmington, Greenfield, Hamilton, Holland, Medary, Onalaska, and Washington.

***30** (b) That part of the town of Shelby comprising wards 2 and 3.

(c) The villages of Bangor, Holmen, and West Salem.

(d) That part of the village of Rockland located in the county.

(e) The city of Onalaska.

(2) Monroe County. That part of Monroe County consisting of all of the following:

(a) The towns of Leon and Portland.

(b) The village of Melvin.

(c) That part of the village of Rockland located in the county.

Ninety-fifth assembly district. All of the following territory in La Crosse County constitutes the 95th assembly district:

(1) That part of the town of Shelby comprising wards 1, 4, 5, and 6.

(2) The city of La Crosse.

Ninety-sixth assembly district. All of the following territory constitutes the 96th assembly district:

(1) Whole counties. Crawford County and Vernon County.

(2) Monroe County. That part of Monroe County consisting of all of the following:

(a) The towns of Jefferson, Ridgeville, Sheldon, Wellington, Wells, and Wilton.

(b) The villages of Cashton, Norwalk, and Wilton.

(3) Richland County. That part of Richland County consisting of all of the following:

(a) The towns of Akan, Bloom, Forest, Henrietta, and Sylvan.

(b) The village of Yuba.

(c) That part of the village of Viola located in the county.

Ninety-seventh assembly district. All of the following territory in Waukesha County constitutes the 97th assembly district:

(1) That part of the town of Waukesha comprising wards 1, 2, 4, and 5.

(2) That part of the city of Waukesha comprising wards 1, 2, 3, 4, 5, 6, 7, 9, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, and 38.

Ninety-eighth assembly district. All of the following territory in Waukesha County constitutes the 98th assembly district:

(1) The town of Brookfield.

(2) That part of the town of Lisbon comprising wards 4, 5, 6, and 7.

(3) The village of Pewaukee.

(4) That part of the village of Sussex comprising ward 12.

(5) That part of the city of Brookfield comprising wards 4, 5, 6, 8, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, and 22.

(6) That part of the city of Pewaukee comprising wards 1, 2, 3, 4, 5, 6, 8, 9, and 10.

Ninety-ninth assembly district. All of the following territory constitutes the 99th assembly district:

(1) Dodge County. That part of Dodge County consisting of that part of the city of Hartford located in the county.

(2) Washington County. That part of Washington County consisting of all of the following:

(a) The town of Erin.

(b) That part of the town of Hartford comprising wards 1, 2, 3, 4, and 6.

(c) That part of the town of Polk comprising ward 5.

(d) That part of the town of Richfield comprising wards 1, 2, 3, 4, 5, 9, and 10.

(e) That part of the city of Hartford located in the county.

(3) Waukesha County. That part of Waukesha County consisting of all of the following:

***31** (a) The town of Merton.

(b) That part of the town of Lisbon comprising wards 1, 2, 3, 8, 9, 10, 11, and 12.

(c) The villages of Lannon and Merton.

(d) That part of the village of Menominee Falls comprising wards 18, 24, 25, 26, and 27.

(e) That part of the village of Sussex comprising wards 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11.

All Citations

Not Reported in F.Supp.2d, 2002 WL 34127471

Footnotes

1 The complaint also sought reapportionment of Wisconsin's congressional districts, as the 2000 census resulted in Wisconsin losing one of its nine seats in congress. However, during the pendency of this case, the Wisconsin Legislature passed, and Governor Scott McCallum signed, a bill reapportioning the congressional districts, and the congressional portion of this case became moot on April 11, 2002 (the day on which the trial in the state legislative portion of this case began).

2 Case No. 01–C–0121 was randomly assigned to Senior District Judge John W. Reynolds. Pursuant to 28 U.S.C. § 2284, Chief Judge Flaum named Circuit Judge Frank H. Easterbrook and Chief District Judge J.P. Stadtmueller to a three-judge panel to hear the case. The case was subsequently reassigned, pursuant to General L.R. 3.1, to District Judge C.N. Clevert.

3 In contrast, Congressional **redistricting** may create a much more rigorous standard for “de minimis” population deviations. *See Vieth v. Pennsylvania,* No. 1:CV–01–2439, 2002 U.S. Dist. LEXIS 6188 at *15 (M.D. Penn. April 8, 2002) (finding plan creating Congressional districts unconstitutional because the most- and least-populous districts differed in population by nineteen persons.)

4 The *Prosser* Court noted that the parties refer to both the maximum deviation, which is the difference in population between the least and the most populous district divided by the mean population of all districts, as well as the average by which the districts deviate from the average population.

5 The population shifts in the area necessitated the elimination of one assembly district in Milwaukee County and the creation of one assembly district in the high-growth area west of the county.

6 The court's plan is also superior to all plans submitted by amici with respect to the traditional **redistricting** criteria.