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

WILLIAM WHITFORD, *et al.*,

Plaintiffs,

v. Case No. 15-cv-421-bbc

GERALD NICHOL, *et al.*,

Defendants.

DEFENDANTS' TRIAL BRIEF

INTRODUCTION

The Supreme Court has been unable to devise a legal standard for judging when ordinary and lawful partisan districting turns into unconstitutional partisan gerrymandering. The plaintiffs try to solve this problem by offering a standard that ignores gerrymandering as traditionally understood: the creation of strangely-shaped districts in disregard of traditional districting to benefit one political party. Instead, their proposed standard captures (1) any partisan districting that (2) has a disparate impact as measured by the efficiency gap (or *EG*).

The plaintiffs' proposal falls short of providing a standard for judging partisan gerrymanders for multiple reasons. The low bar set by the plaintiffs' intent element—the mere presence of the lawful motive of partisanship—

means their test hinges entirely on the efficiency gap. The efficiency gap measures only a discrepancy between political parties' ability to convert their statewide vote shares into seats in the legislature. It has no basis in the Constitution because there is no requirement that political parties be able to convert statewide vote totals into legislative seats with equivalent ease; in fact, the Supreme Court recognizes this will often not be the case given the nature of single-member districting.

Nor does the presence of a large efficiency gap show extreme gerrymandering calling for court intervention. Large efficiency gaps occur when there was no partisanship in the districting process, both nationwide and here in Wisconsin. The plaintiffs are attempting to take a nationwide trend that has seen Republicans gain an advantage in winning legislative seats and turn it into a "discriminatory effect" of gerrymandering. Under the plaintiffs' own evidence, this trend began in the middle of the 1990's, both nationally and in Wisconsin. It started in spite of partisanship in districting rather than because of it—in the 1990's, Democrats controlled districting in three times as many states as Republicans nationally, and Wisconsin was districted by the federal court. *Prosser v. Elections Bd.*, 793 F. Supp. 859 (W.D. Wis. 1992).

Wisconsin's experience captures that trend. In the 1970's and 1980's, the Democrats won a majority of seats in the Assembly, often winning more

than 60 seats. As the *Prosser* court said, "Democrats dominate both houses, with 58 representatives in the assembly and 19 senators." *Id.* at 863. The court then instituted a plan it thought would "create[] the least perturbation in the political balance of the state." *Id.* at 871. By the end of the plan, however, the Assembly's political make-up would be turned on its head. In 1994, the Republicans won control of the Assembly for the first time in over twenty-five years and would increase their seats to 56 by the year 2000.

Wisconsin's experience under the *Prosser* plan and the subsequent plan from *Baumgart v. Wendelberger*[1] shows why the efficiency gap should not be part of a constitutional test for gerrymandering. From 1998 through 2010, Wisconsin had an average *EG* of –7.5 (with yearly *EG*s of –7.5, –6, –7.5, –10, –12, –5 and –4) when districted by federal courts. When Republicans won control of state government in 2010, though, the plaintiffs would have their plan judged against a baseline of zero *EG*, with the plan being presumed unconstitutional when it has *EG*s consistent with court-drawn plans.

In addition, as a legal matter, the plaintiffs have the burden of proving that a plan deviates sufficiently from traditional districting principles to warrant court intervention. In *Vieth v. Jubelirer*, 541 U.S. 267 (2004), Justice

[1] No. 01-C-0121, 2002 WL 34127471, at *4 (E.D. Wis. May 30, 2002), *amended*, No. 01-C-0121, 2002 WL 34127473 (E.D. Wis. July 11, 2002).

Kennedy and the dissenters all thought a plaintiff would have to show a radical departure from normal districting principles in order to succeed.

The plaintiffs have attempted to avoid the question of whether Act 43 departs from traditional districting principles because this is a burden the plaintiffs cannot meet. Act 43 is in line with prior Wisconsin plans on traditional districting principles including equal population, compactness, municipal splits, majority-minority districts, and disenfranchisement. Act 43 fares better on population deviation than the 1992 *Prosser* plan and the 2002 *Baumgaurt* plan. Act 43 is almost identical in compactness to the *Baumgart* plan: its mean compactness under the smallest circle measure (the "Reock" test) is 0.02 below the *Baumgart* plan (0.39 to 0.41), and its mean compactness under the perimeter-to-area measure (the "Polsby-Popper" test) is only 0.01 away from the *Baumgart* plan (0.28 to 0.29 score). Act 43 contains 62 municipal splits, right between the 50 splits in the *Baumgart* plan and the 72 splits in the *Prosser* plan. Further, the plaintiffs' Demonstration Plan also does not show Act 43 departs from normal districting because it merely matches Act 43 on some districting criteria.

The evidence will show that Act 43 is not an unconstitutional gerrymander under both the law and the facts.

ARGUMENT AND EVIDENCE

Many of the issues with the plaintiffs' case have been briefed on the motion to dismiss and motion for summary judgment. This brief does not repeat every detail, but rather seeks to identify the legal and factual problems with the plaintiffs' case and the evidence at trial relevant to those weaknesses.

I. The plaintiffs will be able to meet the intent element as they present it, but the evidence will not show anything more than normal partisan districting.

A. The ease with which the plaintiffs' proposed intent element is satisfied means the substance of their prima facie case turns solely on the EG.

It is well established that partisan intent in districting is lawful. A majority of the Court in *Vieth* rejected the notion that partisan intent is unconstitutional. The plurality held that "partisan districting is a lawful and common practice." *Vieth*, 541 U.S. at 286. Justice Kennedy agreed that "[a] determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied." *Id.* at 307 (Kennedy, J., concurring). Justice Breyer said "political considerations will likely play an important, and proper, role in the drawing of district boundaries." *Id.* at 358 (Breyer, J., dissenting). This was not a new concept; it goes back to *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973), at least.

The plaintiffs' intent element therefore functions solely as a manner of distinguishing between plans drawn by one party and those enacted by courts, nonpartisan commissions, or divided government. While it serves this minimal purpose, it does not differentiate between acceptable partisan districting and unconstitutional partisan gerrymandering or, in the words of the *Vieth* plurality, answer the question of "how much is too much." 541 U.S. at 298–99 (plurality opinion). This means the efficiency gap must accomplish that task which, as will be discussed below, is something it cannot do.

The plaintiffs rely on *Davis v. Bandemer*, 478 U.S. 109, 127 (1986), for their intent standard. First, *Bandemer* is no longer good law. *Vieth*, 541 U.S. at 305 (plurality opinion); *id.* at 317 (Kennedy, J., concurring). If there is some question on that point, however, the plaintiffs cannot pick and choose between the parts of *Bandemer* they like (the intent element) and the parts they do not like (everything else). The *Bandemer* intent prong was coupled with a high bar for succeeding on a claim because "a low threshold for legal action would invite attack on all or almost all reapportionment statutes." 478 U.S. at 133. Further, the *Bandemer* Court explicitly rejected the theory underlying the efficiency gap when it summarized case law as "rest[ing] on a conviction that the mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the

representatives of its choice does not render that scheme constitutionally infirm." *Id.* at 131.

B. The evidence in this case will not show partisan intent beyond that present in any partisan redistricting.

The evidence in this case will not show partisan intent beyond that which would normally be expected when a political body draws district lines. The individuals who drew the draft maps, legislative staffers Adam Foltz and Tad Ottman and consultant Joseph Handrick, used a partisan score to evaluate the partisanship of districts in potential plans.[2] This is not illegal or even shocking. Instead, courts assume that legislatures are doing exactly this sort of thing even without evidence of it. The *Bandemer* plurality thought "it most likely that whenever a legislature redistricts, those responsible for the legislation will know the likely political composition of the new districts and will have a prediction as to whether a particular district is a safe one for a Democratic or Republican candidate or is a competitive district that either candidate might win." 478 U.S. at 128 (plurality opinion). Nor was this a new insight in 1986— *Bandemer* was referencing the *Gaffney* decision from 1973.

[2] The defendants expect the plaintiffs to attack the credibility of these witnesses based on statements in *Baldus v. Brennan*, 849 F. Supp. 2d 840 (E.D. Wis. 2012). Those statements were based on deposition testimony only because the witnesses never testified at trial. This will be the first time they testify in full and not solely on snippets of deposition testimony.

Instead, the evidence will show that the Legislature, through its staff, drew districts intending to comply with (and actually complying with) equal population, compactness, and other traditional principles, while also looking to the likely partisan makeup of potential districts. There is nothing unconstitutional about considering partisanship along with other districting factors.

There will be no evidence based on the "understanding that a district's peculiar shape might be a symptom of an illicit purpose in the line-drawing process." *Vieth*, 541 U.S. at 321 (Stevens, J., dissenting). There will be no evidence of districts that "loom[] like a dragon descending on Philadelphia from the west, splitting up towns and communities throughout Montgomery and Berks Counties." *Id.* at 349 (Souter, J., dissenting). Nor will there be evidence of tactics like "the peculiar mix of single-member districts" in *Bandemer*, 478 U.S. at 116, the rampant pairing of incumbents of a minority party, *Radogno v. Ill. State Bd. of Elections*, No. 1:11-CV-04884, 2011 WL 5868225, at *4 (N.D. Ill. Nov. 22, 2011), or other similar partisan tactics.

C. The evidence will not show an intent to prevent the minority party from gaining control throughout the life of the plan.

The evidence at trial will not support a finding that the Legislature intended Act 43 to keep the Republican Party in power for the entire decade. Discovery has shown that some of the facts as assumed in the summary

judgment record are incorrect. The partisan score used by the legislative staff was a simple average of statewide races from 2004 through 2010. While Professor R. Keith Gaddie devised a regression model, the staff used their average of statewide races because Gaddie told them it correlated well with his regression.

Foltz, Ottman, and Handrick will not testify that they had confidence that their partisanship score would predict the election results for ten years into the future. The evidence will show that actual election results fall well above and below the partisan score. Far from being a crystal ball to predict future elections, the legislative staff's partisan score was similar to a method offered by the Democrats in *Prosser* but rejected by the court: an average of eleven statewide races dating back to 1982. 793 F. Supp. at 868. Nor would one think that the simple average could predict the results of races far into the future. *See id*. at 868 ("The plaintiffs argue that 1982 is too long ago, and they have a point, and that 11 [elections] is a small sample . . . and this is also a point.") In any event, a backward-looking average of races from 2004 to 2010 becomes less and less useful, let alone predictive or determinative, as years pass. For this November's elections, the data in the average is six to twelve old, and it will be ten to sixteen years old by 2020.

The difficulty of predicting the future is shown by *Vieth*. The *Vieth* plaintiffs alleged that the Pennsylvania congressional plan was "rigged to

guarantee that thirteen of Pennsylvania's nineteen congressional representatives will be Republicans." *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 546 (M.D. Pa. 2002). In fact, as the defendants' experts point out, the Democrats subsequently won a majority of Pennsylvania's congressional seats in 2006 and 2008, despite the allegedly "rigged" districts.

II. The efficiency gap should not be part of a test for partisan gerrymandering.

A. The efficiency gap has no basis in the Constitution.

Because the plaintiffs' proposed intent element will be present in practically every partisan districting situation, the real substance of their prima facie case turns entirely on the efficiency gap. As Justice Kennedy said in *Vieth*, "classifying by race is almost never permissible" but it is "a more complicated question when the inquiry is whether a generally permissible classification has been used for an impermissible purpose." 541 U.S. at 315 (Kennedy, J., concurring). With political classifications, a law can be found unconstitutional only "by the subsidiary showing that the classification as applied imposes unlawful burdens." *Id.* The efficiency gap is not an "unlawful burden" because it is based on a principle—that the two major political parties should be able to translate their statewide vote totals into legislative seats with equal ease—that is not found in the Constitution

In the decisions on the motion to dismiss and on summary judgment, this Court ruled plaintiffs' theories were not definitively foreclosed by precedent. In order to receive relief, however, the plaintiffs must show that relief is actually supported by precedent. Existing precedent, however, cuts against using the efficiency gap. The Constitution "guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups." *Vieth*, 541 U.S. at 288 (plurality opinion). As the *Bandemer* plurality said, "the mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm." 478 U.S. at 131 (plurality opinion).

The plaintiffs' proposed standard is actually more radical than the standard rejected in *Vieth*. The *Vieth* plaintiffs proposed a "majority of votes into a majority of seats" test, not proportional representation; yet the Court rejected their test because it was based on the *principle* of proportional representation. While the plaintiffs can claim their test is not proportionality-based, their test is based on a relationship between vote share and seat share because plans are judged against a test of how well they deliver seats based on a 2 to 1 proportion of seats to votes for every percentage point above 50%. This test expects seats to have a hyper-proportional relation to vote share and finds that plans are

"discriminatory" if they do not provide the requisite seat share. If a standard based on proportional representation is not grounded in the Constitution, then *a fortiori* a standard based on hyper-proportional representation is not, either.

The Court's statements regarding partisan symmetry in *LULAC v. Perry*, 548 U.S. 399 (2006), did not change the law. Justice Kennedy said that he would not "altogether discount[] its utility in redistricting planning and litigation" but concluded that "asymmetry alone is not a reliable measure of unconstitutional partisanship." *Id.* at 420 (Kennedy, J.). The plaintiffs have merely offered one form of asymmetry (*EG*) paired with the mere "conclusion that political classifications were applied." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring). Justice Souter, joined by Justice Ginsburg, merely would not "rule out the utility of a criterion of symmetry as a test." *Id.* at 483 (Souter, J., concurring in part and dissenting in part). The plaintiffs do not use partisan symmetry as merely one factor; it is their touchstone of constitutionality.

B. The plaintiffs are using zero efficiency gap as a constitutional standard even if there is leeway allowed.

The plaintiffs incorrectly assert that by giving leeway around a zero efficiency gap (and its corresponding seats-to-votes relationship), their standard is not based in hyper-proportional representation. By using zero

efficiency gap as the standard by which plans are judged, however, the plaintiffs are making that the constitutional norm.

An analysis of the one-person, one-vote cases on which the plaintiffs claim to base their standard show this to be the case. The Court established "that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). In one-person, one-vote cases, courts judge plans against equal population because the constitution requires apportionment by equal population; the leeway granted around true population equality is simply an accommodation to reality.

If plans are now to be judged by how far they depart from a zero efficiency gap, there must be a holding, like *Reynolds*, that the Constitution requires districting to a zero efficiency gap. There is no basis to prevent states from deviating from some norm (whether that be population equality or *EG*) within some margin of error unless the norm has a foundation in the Constitution. This is where the plaintiffs' case falls apart—there is no right to a districting plan that conforms to a zero efficiency gap.

The lawfulness of partisanship in districting distinguishes partisan gerrymandering cases from racial discrimination cases like *City of Mobile v. Bolden*, 446 U.S. 55 (1980). Perhaps there would be a reason for treating all

disparate impact (even that present in neutral plans) as unlawful if this were a race discrimination case because the intent to discriminate by race is unlawful in and of itself. *Vieth*, 541 U.S. at 286 (plurality opinion); *id.* at 315 (Kennedy, J., concurring). There is no authority for doing so, though, with the lawful motive of partisanship.

C. Even assuming some basis in the Constitution, the efficiency gap does not measure an "unlawful burden."

The efficiency gap merely compares each party's "wasted votes" in an election. While it purports to be a measure of "cracking" and "packing" of a party's supporters, it simply assumes that all excess votes in a seat won is evidence of "packing" and all votes cast for losing candidates is "cracking." It makes no account for the fact that "political groups that tend to cluster (as is the case with Democratic voters in cities) would be systematically affected by what might be called a 'natural' packing effect." *Vieth*, 541 U.S. at 289 (plurality opinion). Further, losses in close races are treated as "cracking," treating parties that do not win competitive races as victims of gerrymandering regardless of why they lost those races.

Wisconsin's experience under the *Prosser* and *Baumgart* plans illustrates why the efficiency gap is a poor measure of an alleged discriminatory effect. From 1998 through 2010, Wisconsin had an average *EG* of –7.5 (with yearly *EG*s of –7.5, –6, –7.5, –10, –12, –5 and –4). (Dkt. 125

¶¶ 251–56.) The efficiency gap does not measure the effect *attributable to Act 43* when similar *EG*s were already present in a court-drawn plan. Act 43's EGs of –13 and –10 are in line with the 2004 and 2006 *EG*s of –10 and –12. The plaintiffs are asking this Court to rule Act 43 unconstitutional because Republicans won 60 Assembly seats with 48.4% vote share in 2012. (Dkt. 125 ¶ 257.) This is not much different from 2004, when Republicans won 60 Assembly seats with 50% statewide vote. (Dkt. 125 ¶ 253.)

There is no authority for limiting a partisan body to enacting districts with a partisan advantage equal to that seen under a neutral plan, let alone requiring partisan bodies to enact plans that are even less favorable than a neutral plan would be. Four of seven elections prior to Act 43 exceeded a 7% *EG*, meaning a simple updating of the prior court plans would most likely exceed the threshold for presumptive unconstitutionality.

The plaintiffs treat Wisconsin's history as some sort of anomaly, but in fact it was part of a trend in American politics that began in the mid-1990's. Wisconsin experienced this change through two plans enacted with no partisanship—going from 58 Democratic seats in 1990 to 60 Republican seats in 2010. (Dkt. 125 ¶ 233.) The plaintiffs' expert Professor Simon Jackman found that "[t]he distribution of *EG* measures trends in a pro–Republican direction through the 1990s, such that by the 2000s, EG measures were more likely to be negative (Republican efficiency over Democrats)." (Dkt. 1-3:46.)

This trend started during a time when Republicans controlled few states and thus is not attributable to partisanship (and clearly was not in Wisconsin).

The defendants' experts Nicholas Goedert and Sean Trende will explain the changes in American politics that have led to the pro-Republican bias in converting statewide vote shares into legislative seats, both at the state and congressional level. The Republicans gained control of the Wisconsin Assembly in 1994 for the first time in over twenty-five years. That same year, Republicans gained control of Congress for the first time in forty-two years. Since that time, Republicans have had an advantage in winning legislative seats at both levels. Sean Trende specifically shows how this happened in Wisconsin—the Democrats were dramatically weakened in much of the state (thus losing the ability to win seats in those areas) but maintained their statewide vote share by increasing their votes in already-strong areas like Milwaukee and Madison (where the votes do not help win additional seats).

The plaintiffs' own experts show significant natural packing of Democrats in Wisconsin. Using Professor Mayer's baseline partisanship model (which assumes no incumbents and all seats contested), the Democrats win 78.0% of the Assembly vote in the City of Madison and 77.9% of the Assembly vote in the City of Milwaukee. (Dkt. 125 ¶ 178.) Mayer calculates the Democrats would win 303,406 votes in these two cities (20.87% of their statewide vote total of 1,454,117). When federal courts have drawn

heavily-Democratic districts in these cities, it is seen as the simple application of traditional districting criteria. According to plaintiffs, though, once Republicans control the districting process, these districts are "packing" which Republicans must offset elsewhere in the state to lower the *EG*.

The evidence at trial will show that the plaintiffs' alleged measures of concentration, the Isolation Index and Global Moran's I, are not used by political scientists to measure concentration of partisans. Further, Professor Mayer had never calculated these statistics before he was retained in this case—he had to rely on modules provided by counsel or found on the internet. In any event, the trial will show why these numbers are essentially meaningless because they analyze the distribution of Republicans in all wards in the State, thus counting the relatively few Republicans in Democratic strongholds as evidence of Republican "clustering."

D. The plaintiffs' use of the efficiency gap poses a host of manageability problems.

The efficiency gap poses a number of problems that prevent it from being part of a judicially manageable standard. While this brief cannot address them all, these include:

- The plaintiffs offer two different versions of the efficiency gap that differ. If the efficiency gap is to be used as a numerical threshold, which one of these methods is to be used?
- How should courts handle the power of incumbency? Professor Mayer's calculations of the efficiency gap under Act 43 changed

from –11.69% to –14.15% after factoring in incumbency. His calculations of the efficiency gap under the Demonstration Plan changed from –2.20% to –3.89% after factoring in incumbency. Mayer's partisan baseline shows the Republicans should have won 57 seats—they won 60 in 2012 and 63 in 2014.

- The efficiency gap is sensitive to voters' decisions in close races. In Wisconsin, each seat accounts for 1% of seat share. Republicans won five seats by small margins in 2012. Why treat these as examples of "cracking" rather than competitive contests decided by candidate quality, issues emphasized, the quality of campaigns and other factors of political campaigns?

- The efficiency gap does not measure party control of the legislature. Wisconsin experienced negative *EG*s throughout the 2000s, but the majority party did change. *EG* is therefore not connected to Justice Breyer's concern about entrenched minorities. *Vieth*, 541 U.S. at 360 (Breyer, J., dissenting). In any event, Republicans are not a minority party in Wisconsin when they have won the last three elections for Governor and the statewide vote in two of the last three elections for the Assembly.

- A uniform standard for the efficiency gap cannot be applied across all states. Each state differs in its geography, the number of seats in its legislature, and the relative strength of the two political parties. Wisconsin saw high *EG*s under court plans while other states might not. In addition, there were high positive *EG*s in Rhode Island and Vermont. These scores may not have anything to do with gerrymandering, but rather the weakness of the Republican Party in these states.

- The plaintiffs' threshold is based on the likelihood that a plan's *EG* will switch signs. The durability of the plan's sign is significantly affected by the underlying geography; this is why Wisconsin has seen uniformly negative *EG*s even under court plans. The durability of an *EG* is not a measure of the level of partisanship in the districting process.

- It is far from clear how a legislature would draw districts if the plaintiffs' test were the law. Must they apply a regresion model to predict the future *EG*s? What if those models do not accurately predit the future? The only answer seems to be to not use any

> partisanship in districting or to specifically target a zero *EG*, which simply highlights the problems with the standard.

Given all of these issues, the efficiency gap should not be part of a legal standard for judging partisan gerrymandering claims.

III. The plaintiffs' standard is not a "limited and precise" test.

The plaintiffs' proposed standard is not limited because it identifies unconstitutional gerrymandering in a striking number of cases. It is not precise because it is both over-inclusive and under-inclusive. Large efficiency gaps frequently occur in the absence of partisanship, showing the test is not a reliable measure of effects caused by partisanship. Further, the test will miss actual gerrymandering in which a party disregards districting principles but simply cannot craft a map with a high efficiency gap (usually by Democrats in states with large amounts of wasted votes due to natural packing).

A. The test is not limited because it sweeps in a large number of plans.

The plaintiffs' test is not "limited" and goes well beyond what Justice Kennedy and even the dissenting Justices in *Vieth* and *LULAC* indicated they would entertain. Large efficiency gaps are fairly common. In Professor Jackman's study encompassing 206 plans, he found that 34% of plans (70 in total) had an initial *EG* above 7%. (Dkt. 125 ¶ 121.) Of these 70 plans, 43 plans had unified partisan control over districting while 27 did not. (Dkt. 125

¶ 121.) Thus, nearly 21% of all plans (43 of 206) would be presumptively unconstitutional under the plaintiffs' standard. (Dkt. 125 ¶ 121.)

Even increasing the threshold to 10% does not solve the problem. Jackman found that 15% of all plans (32 of 206) had an *EG* above 10% in their first election. (Dkt. 125 ¶ 121.) Of these 32 plans, 20 of them also had unified party control. (Dkt. 125 ¶ 121.) Thus, 10% of all plans (20 of 206) would be presumptively unconstitutional at a 10% level. (Dkt. 125 ¶ 121.)

These numbers, however, are based on the *EG*s that plans happened to experience in their first elections. As Nicholas Goedert will explain at trial, the implications the standard would have in the future could different from what has been seen in the past. What *EG* presents itself first in the cycle is merely a matter of chance. Jackman found that 53% of all plans had one election with an *EG* of 7% or above, showing that over half of plans could be swept in depending on the circumstances of the first election.

B. The test is not precise because it detects gerrymandering where it does not exist and misses gerrymandering where it does exist.

Perhaps even more problematic is the fact that high efficiency gaps occur relatively frequently with no partisan intent. Jackman finds that 13% of plans (27 of 206) show the alleged symptom of gerrymandering (a 7% or higher *EG* in the first election) without the presence of the actual disease. (Dkt. 125 ¶ 121.) Almost 6% of plans (12 of 206) have had 10% *EG* in their

first election with no partisan intent. (Dkt. 125 ¶ 121.) In each of these states, the exact same plan would be deemed presumptively unconstitutional if it had been enacted by a partisan body. How many of the plans that exceeded the threshold and had unified party control would have also exceeded the threshold under neutral districting? The plaintiffs do not know, but simply want the courts to deem them presumptively unconstitutional.

In addition, the plaintiffs' test is likely to miss instances of gerrymandering. Sean Trende will provide examples of districting that was considered to be gerrymandering by neutral observers, but which did not result in high *EG*s. Because Democratic gerrymandering often consists of attempting to offset their disadvantage due to natural packing, it often does not result in a large *EG*. Should it be acceptable for Democrats to, for example, "divide the City of Madison into six districts radiating out from the Capitol in pizza slice fashion," *Baumgart*, 2002 WL 34127471, *4, if it helps Democrats counteract natural packing? Under the plaintiffs' standard, this type of gerrymandering would be left undisturbed.

IV. The plaintiffs' burden shifting procedure fails under the law and the facts.

A. Under the precedent, the plaintiffs should have the burden of showing that Act 43 radically departs from traditional districting.

The plaintiffs' standard is actually a radical redefinition of gerrymandering because it ignores the traditional understanding of gerrymandering—the drawing of irregular districts. The plaintiffs' standard goes well beyond anything Justice Kennedy or even the dissenting justices in *Vieth* would have allowed, who would have required plaintiffs to show a departure from traditional districting criteria.

In *Vieth*, Justice Kennedy stated that a plaintiff would have to prove that political classifications "were applied in an invidious manner or in a way unrelated to any legitimate legislative objective." 541 U.S. at 307 (Kennedy, J. concurring). Justice Stevens would have ruled for one plaintiff on the district of her residence "if no neutral criterion can be identified to justify the lines drawn, and if the only possible explanation for a district's bizarre shape is a naked desire to increase partisan strength" because "no rational basis exists to save the district from an equal protection challenge." *Id.* at 339 (Stevens, J., dissenting). Justice Souter, joined by Justice Ginsburg, would have allowed district-by-district claims in which, among other things, "a plaintiff would need to show that the district of his residence

. . . paid little or no heed to those traditional districting principles whose disregard can be shown straightforwardly: contiguity, compactness, respect for political subdivisions, and conformity with geographic features like rivers and mountains" *Id.* at 347–48 (Souter, J., dissenting.) Justice Breyer likewise would have required, absent entrenchment, a showing by *a plaintiff* that "the boundary-drawing criteria depart radically from previous or traditional criteria." *Id.*, 541 U.S. at 366 (Breyer, J., dissenting).

The plaintiffs' approach must be rejected when there is no authority for it in partisan gerrymandering cases, even in dissent.

B. The evidence at trial will show Act 43 is consistent with, and not a radical departure from, traditional criteria as evidenced by comparison with past plans.

Partisan gerrymandering claims have foundered because there is a "lack of comprehensive and neutral principles for drawing electoral boundaries." *Vieth*, 541 U.S. at 306-07 (Kennedy, J., concurring). The *Vieth* plurality, however, noted "other goals" for maps that included "contiguity of districts, compactness of districts, observance of the lines of political subdivision, protection of incumbents of all parties, cohesion of natural racial and ethnic neighborhoods, compliance with requirements of the Voting Rights Act of 1965 regarding racial distribution, etc." *Id.* at 284 (plurality opinion). Justice Souter noted "contiguity, compactness, respect for political subdivisions, and conformity with geographic features like rivers and

mountains" as some traditional considerations. *Vieth*, 541 U.S. at 347–48 (Souter, J., dissenting, joined by Ginsburg, J.).

The plaintiffs have steadfastly avoided an attack on Act 43 based on these criteria, likely because such an attack will fail.

Act 43 is superior to the two prior court-drawn plans and the Demonstration Plan based on population deviation. Act 43 has a population deviation of 0.76%, whereas the *Prosser* plan had a deviation of 0.91%, the *Baumgart* plan had deviation of 1.59%, and the plaintiffs' Demonstration Plan has deviation of 0.86%. (Dkt. 125 ¶¶ 199-201, 226.)

On compactness, Act 43 is in line with both the *Baumgart* plan and the Demonstration Plan. Using the smallest circle or Reock test, Act 43 has a mean of 0.39. (Dkt. 125 ¶ 221.) This is only slightly off the *Baumgart* plan's score of 0.41 and the Demonstration Plan's 0.41. (Dkt. 125 ¶¶ 221, 226.) Using the perimeter-to-area or Polsby-Popper score, Act 43 has a mean of 0.28 while the *Baumgart* plan had a mean of 0.29. (Dkt. 125 ¶ 221.) Professor Mayer did not calculate a perimeter-to-area score for the Demonstration Plan.

Regarding the splitting of political subdivisions, Act 43 is in line with the prior court-drawn plans and the Demonstration Plan. Act 43 splits 62 municipalities (cities, towns and villages), in the middle of recent plans: twelve more than *Baumgart* (50) but ten less than *Prosser* (72).

(Dkt. 125 ¶ 221.) It is worth pointing out that districting involves competing considerations—the *Baumgart* plan achieved the lowest number of municipal splits, but did so by accepting more population deviation. The Demonstration plan splits 64 municipalities. (Dkt. 125 ¶ 226.) Act 43's splits seven more counties than the *Baumgart* plan (58 versus 51) but it is in line with the Demonstration Plan's 55 county splits. (Dkt. 125 ¶¶ 221, 226.) Further, there is no evidence of a "radical departure" given that the number of counties split has steadily increased over the past plans.

Act 43 has survived a challenge based on disenfranchisement—when voters are shifted between state senate districts and must wait six years to vote. *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 852 (E.D. Wis. 2012). The plaintiffs have not offered any evidence on what the disenfranchisement would be under the Demonstration Plan, likely because it was not considered when drafting the plan.

Lastly, Act 43 was drawn considering the impact that new districts would have on the pairing of incumbents. There is no evidence that the Republican-controlled Legislature specifically targeted Democrats for pairings. *See*, *e.g.*, *Radogno*, 2011 WL 5868225, at *4 (plaintiffs' test included element that "[m]ore than two-thirds of incumbent pairings pit minority-party incumbents against each other"). The Demonstration Plan, in contrast, was drawn without regard for the residences of incumbents and

thus results in substantially more pairing than Act 43, including some districts that have three incumbents in them.

A gerrymander historically has meant drawing outlandishly-shaped districts in disregard of normal districting principles. Act 43 is comparable on traditional districting criteria to the two most recent court-drawn plans and does not have bizarrely-shaped districts that can be explained only by partisanship. The Demonstration Plan cannot prove Act 43 fails to comply with traditional districting because it is merely equivalent to Act 43.

V. The Plaintiffs lack standing to bring their statewide claim.

While the defendants understand the court's ruling that the plaintiffs have standing to bring this case, standing must be proven at every stage, including trial. The plaintiffs admit their injury is not specific to their individual rights to vote; they "do not complain about the treatment of particular voters in a specific district or region." (Dkt. 40:2.) Instead, their injury is based on an abstract notion of favoring "public policies espoused by the Democratic Party." (Dkt. 1:6 ¶ 15.) This concept is self-defeating, and no trial evidence will establish the plaintiffs' standing.

Article III standing requires an "injury in fact" that is "concrete and particularized." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). For the injury to suffice, a plaintiff must "be 'directly' affected apart from their "'special interest' in th[e] subject." *Id.* at 563. There also must be causation

and redressability. *Id.* at 560–61. The plaintiffs "bear[] the burden of establishing these elements" at each stage of the case. *Id.* at 561. None are present here.

At the motion to dismiss stage, this Court observed a match between what the Plaintiffs allege (an interest in statewide performance by Democratic candidates) and the statewide scope of the claim. (Dkt. 43:13.) A plaintiff, however, cannot establish standing by simply asserting an interest in the statewide performance of a political party. "[T]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Sierra Club v. Morton,* 405 U.S. 727, 734–35 (1972). A plaintiff must be directly affected apart from his special interest in the subject. *Lujan*, 504 U.S. at 563.

Caring about statewide policies is an example of what does *not* confer standing: it is just a "special interest" in the subject. *Lujan*, 504 U.S. at 563. There is no statewide Assembly vote and the plaintiffs vote in particular districts for particular representatives. The plaintiffs' theory that having more Democrats in office will mean that more Democratic-supported policies may be enacted is a political goal, not a "direct" injury to them. (Dkt. 1:6 ¶ 15.) Further, being a Democrat does not mean agreeing on all public policies given that "the two major political parties are both big tents that contain

within them people of significantly different viewpoints." *Baldus*, 849 F. Supp. 2d at 851.

The plaintiffs likewise cannot establish causation and redressability. A causal connection cannot depend on "independent action of some third party not before the court." *Lujan*, 504 U.S. at 560-561 (citation omitted). Redress of an injury must be "'likely,' as opposed to merely 'speculative.'" *Id.* at 561 (citation omitted). The plaintiffs' theory depends on acts by others—the candidates that decide to run, the voters in other districts who decide whether to support the Democratic candidate, and the ultimate composition of the Legislature that may or may not support policies the plaintiffs say they like. These speculative acts by other people break the causal chain needed for standing and make it speculative whether relief will redress the alleged injury. *Lujan*, 504 U.S. at 560–561.

In *Vieth*, even dissenting justices questioned statewide standing. Justice Stevens said there was none based on the rule in racial gerrymandering cases from *United States v. Hays*, 515 U.S. 737 (1995). *Vieth v. Jubelirer*, 541 U.S. 267, 327 (2004). Justice Souter, joined by Justice Ginsburg, called for district-by-district challenges. *Id.* at 347 (citing *Hays* for its proposition "requiring residence in a challenged district for standing"). Granting standing for statewide challenges goes against both the general law

of standing and the positions of Justices who would entertain partisan gerrymandering claims.

CONCLUSION

The fundamental legal problems with the Plaintiffs' case remain, and no trial evidence will change that. Even if a claim were to exist, it should be dismissed by the Court because the evidence at trial will show that Act 43 comports with traditional districting criteria.

Dated this 16th day of May, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

s/Brian P. Keenan
BRIAN P. KEENAN
Assistant Attorney General
State Bar #1056525

ANTHONY D. RUSSOMANNO
Assistant Attorney General
State Bar #1076050

Attorneys for Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0020 (BK)
(608) 267-2238 (AR)
(608) 267-2223 (Fax)
keenanbp@doj.state.wi.us
russomannoad@doj.state.wi.us