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.

---

[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.

---

[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

---

[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-

---

[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]

---

[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

---

[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.

---

[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

---

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

---

[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]

---

[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]

---

[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]

---

[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

---

[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,

---

[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.

---

[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

---

[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

---

[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

---

[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

---

[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

---

[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,

---

[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

---

[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

---

[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'

---

[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).

---

[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

---

[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

---

[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:

---

[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

---

[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

---

[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]

---

[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]

---

[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

---

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

---

[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

---

[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

---

[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.

---

[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.

---

[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

---

[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

---

[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

---

[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

---

[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

---

[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

---

[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

---

[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

---

[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

---

[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:

---

[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.

---

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"

---

[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

---

[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.

---

[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.

---

[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

---

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

---

[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.

---

[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.

---

[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

---

[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

---

[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

---

[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]

---

[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

---

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

---

[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

---

[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

---

[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

---

[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.

---

[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'

---

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.

BELL GIFTOS ST. JOHN LLC

/s/ Kevin St. John
Kevin St. John, SBN 1054815
5325 Wall Street, Suite 2200
Madison, WI 53718-7980
Ph. 608-216-7990
Fax 608-216-7999
Email: kstjohn@bellgiftos.com

Attorneys for Wisconsin State Assembly

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