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

WILLIAM WHITFORD, *et al.*,

Plaintiffs,

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

GERALD NICHOL, *et al.*,

Defendants.

DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

The issue before the Court is a legal one: have the plaintiffs offered a legal standard by which the constitutionality of an alleged partisan gerrymander can be judged? The defendants' motion for summary judgment showed that the plaintiffs' test fails as a matter of law. The plaintiffs' response has not solved the legal problems with their proposed standard. This is a question of law for the Court, not a question of political science for political scientists to decide.

The plaintiffs' standard is not a judicially discernible or judicially manageable standard for partisan gerrymandering claims. A partisan motive in the redistricting process is not illegal or unconstitutional; instead, the Supreme Court has recognized that it is an "an ordinary and lawful motive." *Vieth v. Jubelirer*, 541 U.S. 267, 286 (2004) (plurality). The challenge in developing a legal standard is determining how much partisan intent is too much. The plaintiffs' standard, however, is triggered by the mere presence of the "ordinary and lawful motive" of

partisan intent. It then shifts to the efficiency gap to prove "partisan effect." Because there is no dispute that neither of these elements measures the level of partisanship intent in the districting process, the standard does not measure how much partisan intent in the redistricting process is "too much."

The undisputed facts also show that the plaintiffs' "partisan effect" element does not measure what is required to prove a constitutional violation: the "actual discriminatory effect" of the plan. *Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (plurality opinion). Instead, the efficiency gap measures asymmetry that happens to be seen in a plan enacted with the "lawful and ordinary motive" of partisan intent. The undisputed facts show that Wisconsin recently experienced large efficiency gaps in favor of Republicans when districted with no partisan intent, comparable to the gaps in 2012 and 2014. Therefore, the efficiency gap cannot be used to prove "discriminatory effect" related to excessive partisanship in the districting process.

The defendants' motion is based on the plaintiffs' own expert reports and undisputed facts regarding the elections that have occurred in Wisconsin from the 1990s to today. It therefore does not present a "battle of the experts." The undisputed facts show that the plaintiffs have not proposed a legal standard by which partisan gerrymandering claims can be judged. The defendants' expert reports provide context for the trends seen in Simon Jackman's historical analysis, but the Court need not adopt the opinions of the defendants' experts in order to reject the plaintiffs' legal standard. Wisconsin's electoral experience under plans drawn with no partisan intent demonstrates that the plaintiffs' standard fails as a

matter of law. Regression analysis from political scientists cannot change the case law to make the plaintiffs' standard acceptable for judging partisan gerrymandering claims.

ARGUMENT

The plaintiffs' response brief makes clear that all three elements of their proposed standard (partisan intent, partisan effect, and the burden-shifting step) are inconsistent with Supreme Court precedent. In addition, the undisputed facts show that their standard does not satisfy Justice Kennedy's concerns regarding partisan gerrymandering claims. The plaintiffs fail in their attempt to manufacture genuine issues of material fact for trial. They provide no facts explaining why Wisconsin saw large pro-Republican efficiency gaps when districted by federal courts (a phenomenon also seen in other states), instead resorting to misrepresenting the research of defendants' expert Nicholas Goedert.

I. The plaintiffs' intent element is inconsistent with Supreme Court precedent.

The plaintiffs' response brief makes clear that their intent element is satisfied by the districting party intending to benefit itself and to disadvantage the opposing party. (Dkt. 68:44.) The Supreme Court has repeatedly held, however, that a partisan motive in the districting process is lawful and not the basis for a constitutional violation. The Court rejected the contention that "that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. Our cases indicate quite the contrary." *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973). In fact, "partisan districting is a lawful and common practice."

Vieth, 541 U.S. at 286 (plurality opinion). Justice Kennedy agreed that "[a] determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied." *Id.* at 307 (Kennedy, J.). The plaintiffs' proposed standard is inconsistent with precedent because their intent element is satisfied with mere "partisan districting" and the fact that "political classifications were applied."

The question in gerrymandering cases is not the mere presence of partisan motive, but "determining whether it is so substantially affected by the excess of an ordinary and lawful motive as to invalidate it." *Vieth*, 541 U.S. at 286 (plurality opinion). The plaintiffs do not dispute that their standard does not even attempt to determine whether there was "an excess of an ordinary and lawful motive." *Id.* Their "partisan intent" element does not do so because it is satisfied by the presence of any partisan intent. Their "partisan effect" element also does not do so because the plaintiffs admit they "do not offer the efficiency gap to prove that Wisconsin's Current Plan (or any other map) was drawn with the intent to achieve a partisan advantage." (Dkt. 68:7.)[1] Thus, the plaintiffs have conceded that their standard provides no way of judging whether there was "*too much* partisanship in districting." *Vieth*, 541 U.S. at 286 (plurality opinion).

[1] This is inconsistent with their complaint, which alleged that when a large efficiency gap is present, "an intent to disadvantage voters based on their political beliefs can be inferred from the severity of the gerrymander alone." (Dkt. 1 ¶ 6.) Citation is made to the ECF page number at the top of the document, not to the page number at the bottom of the page.

II. A constitutional violation requires a "discriminatory effect" caused by the allegedly unconstitutional conduct, not a "partisan effect" that occurs even when there is no discriminatory conduct.

The plaintiffs' "partisan effect" element does not solve the problems with their "partisan intent" element because it does not show the effect cause by partisanship in the districting process. An unconstitutional gerrymander is not proven by a "partisan effect." Instead, "an equal protection claim requires a showing of a discriminatory intent and a *discriminatory effect*." (Dkt. 43:16 (citing *Bandemer*, 478 U.S. at 127) (emphasis added).) The plaintiffs do not provide a way for showing the "discriminatory effect" of a districting plan. Instead, their standard measures the level of partisan asymmetry (compared to a zero efficiency gap benchmark) seen under a plan enacted with the "ordinary and lawful motive" of partisan districting.

The undisputed facts show that the efficiency gap does not measure the "discriminatory effect" produced by a redistricting plan. In Wisconsin, Democrats have experienced a large and durable disadvantage in converting statewide vote totals into legislative seats under the two preceding plans, both enacted with no partisan intent. That same disadvantage cannot be counted as a "discriminatory effect" when it also presents itself under a partisan plan. The efficiency gap treats all asymmetry as a "discriminatory effect," even asymmetry that occurs in the absence of partisan discrimination.

It is undisputed that in 2004, under a plan drawn by a court looking only to neutral districting principles, the Republicans won 60 Assembly seats with 50% statewide vote share (a 10% *EG*). (Dkt. 67 ¶ 213.) In 2012, the Republicans won 60

Assembly seats with 48.4% statewide vote share (a 13% *EG*). (Dkt. 67 ¶¶ 217, 230.) Even if one assumes the entire difference between the two results was caused solely by the Republicans' partisan intent, this assumption leads to only slightly better results: the same number of seats on 1.6% lower vote share and a 3% increase in *EG*. It is also undisputed that the 13% *EG* is not an outlier—it is only 1% larger than the 12% *EG* produced by the court-drawn plan in 2006. (Dkt. 67 ¶ 214.) The plaintiffs cannot dispute these facts because they were taken from their own expert's work, yet they attempt to count the entirety of the efficiency gap as a "discriminatory effect."

Wisconsin's experience under the court-drawn plans in the 1990s and 2000s is not just a "single data point," (Dkt. 68:22), it is the closest example of the results one could expect to see in Wisconsin from the application of neutral districting principles free of partisan intent. In addition, the pro-Republican trend spans two different plans, both the 1990s and 2000s; the plaintiffs want this Court to ignore the fact that the last pro-Democratic efficiency gap was in 1994 and that the 1998 and 2000 elections saw large efficiency gaps in favor of the Republicans. Wisconsin's experience points out a fundamental weakness in the plaintiffs' standard: the entire amount of the efficiency gap cannot be treated as a "discriminatory effect" of a partisan plan. Nor can the "durability" of an efficiency gap show the durability of the discriminatory effect: Wisconsin experienced a sustained efficiency gap that was not caused by any partisan gerrymandering.

Wisconsin's experience shows that the plaintiffs' standard fails with respect to Wisconsin. The undisputed facts also show Wisconsin's experience is not unique, which shows the standard fails for the country as a whole. Jackman found high pro-Republican efficiency gaps in Kansas, New York, Missouri, and Minnesota in the most recent elections even though these states were districted by with no partisan intent. (Dkt. 46:38–39; Dkt. 67 ¶ 189.) Further, the plaintiffs' response shows that thirteen percent of all plans Jackman analyzed (27 of 206) presented a 7% *EG* in their first election even in the absence of partisan intent. (Dkt. 68:30; Dkt. 69 ¶¶ 68–69.) Six percent of all plans (12 of 206) presented a 10% *EG* in their first election even in the absence of partisan intent. (Dkt. 68:30; Dkt. 69 ¶¶ 70–71.) These undisputed facts show that the efficiency gap is measuring an "effect" that is not attributable to discriminatory gerrymandering. The plaintiffs cannot bootstrap all asymmetry into a "discriminatory effect" where the plan was enacted with the lawful motive of partisan intent.

Attempting to count all asymmetry as a discriminatory effect is especially problematic when partisan intent is "an ordinary and lawful motive." *Vieth*, 541 U.S. at 286 (plurality opinion). It is not unconstitutional for the Republicans to enact a plan that benefits their party more than the prior court-drawn plan did. This would become unconstitutional only if there was so much of an "excess of [this] ordinary and lawful motive as to invalidate it." *Vieth*, 541 U.S. at 286 (plurality opinion). This is why the defendants are correct "that partisan intent and partisan impact should always go hand in hand," (Dkt. 68:70) and why the plaintiffs cannot

build a wall between these two elements. Partisan intent is not unlawful, unlike the intent to discriminate by race, which is unconstitutional in and of itself. *Id.* at 286; *id.* at 307 (Kennedy, J.) ("Race is an impermissible classification.")

Further, the intent element cannot be used to sidestep the problems caused by the fact that the plaintiffs' "partisan effects" element captures the effects of nonpartisan districting. The plaintiffs in *Vieth* offered a two-part test that included a "predominant intent" element, which was rejected by the entire Court as unworkable. *Id.* at 284–85 (plurality opinion); *id.* at 308 (Kennedy, J.). The entire Court also went on to reject the *Vieth* plaintiffs' "effects" prong because it would reject plans enacted by a neutral body. *Id.* at 289–90 (looking to results under election "conducted under a judicially drawn district map 'free from partisan gerrymandering'"); *id.* at 308 (Kennedy, J.) ("The plurality demonstrates the shortcomings of the … standard[] offered "by the parties before us"). The fact that these neutral plans would not have been covered by the standard due to its intent prong did not save the *Vieth* plaintiffs' effects prong.

Nor does Justice Kennedy's "tepid at best" support for partisan symmetry, (Dkt. 43:22), save the plaintiffs' standard. Combining a lawful motive with asymmetry cannot show "unconstitutional partisanship" under *LULAC*. Justice Kennedy said that "asymmetry alone is not a reliable measure of unconstitutional partisanship." *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399, 420 (2006) (Kennedy, J.). The plaintiffs' standard merely adds the lawful motive of

partisan districting or, in Justice Kennedy's words, the fact that "political classifications were applied." *Vieth*, 541 U.S. at 307 (Kennedy, J.).

The plaintiffs admit their standard does not measure the asymmetry caused by partisanship because they say "no one actually knows how symmetric the 'typical' plan designed through a bipartisan or nonpartisan process would be, in Wisconsin or anywhere else." (Dkt. 68:68.) Thus, there is no issue of fact as to the "natural" efficiency gap in Wisconsin (or in the country as a whole). The mere fact that high efficiency gaps exist in the absence of partisan intent shows that the entire amount of the efficiency gap cannot be counted as a "discriminatory effect."

III. The response brief makes clear the plaintiffs' burden shifting element is either not rebuttable or unmanageable.

The plaintiffs claim that their burden-shifting threshold involves the "constitutional value" of "partisan symmetry[] that must be balanced against other redistricting criteria and constraints." (Dkt. 68:51.) As an initial matter, partisan symmetry is not a constitutional value. The *LULAC* decision did not accept partisan symmetry as a constitutional standard, with Justice Kennedy expressing "tepid, at best" support for partisan symmetry. (Dkt. 43:22.) This contrasts with equal population of districts. The Court in *Reynolds v. Sims*, 377 U.S. 533, 577 (1964), established a constitutional principle of equal population of state legislative districts. The Court has made no such ruling with respect to partisan symmetry.

In any event, the plaintiffs' expression of the burden-shifting test reveals that it involves no balancing at all, and thus is not like the one-person, one-vote cases. Instead, this test requires a State to show that its "partisan tilt was *unavoidable*

given the state's political geography and legitimate districting criteria." (Dkt. 68:1 (emphasis added).) As phrased by the plaintiffs, this is an unrebuttable presumption. The plaintiffs' claim that their third prong is established because "[t]he Demonstration Plan shows that a map with a near-zero efficiency gap could have been drawn while still abiding at least as well with all federal and state requirements." (Dkt. 68:65.) After an election, it will always be possible to reverse-engineer a plan that has a better political result for one side while coming close in population deviation, compactness and municipal splits.

The plaintiffs avoid a true balancing of asymmetry and compliance with neutral districting principles because such a test would be unmanageable. Justice Kennedy observed that "there are yet no agreed upon substantive principles of fairness in districting." *Vieth*, 541 U.S. at 307 (Kennedy, J.). With no agreed principles, there is "no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights." *Id.* at 307–308 (Kennedy, J.) This makes the plaintiffs' burden-shifting step contrary to the procedure in the one-person, one-vote cases. That test does not require that population deviation be "unavoidable;" it requires the State to "justify the deviation" by looking to whether the plan reasonably advances state policy such as preserving the boundaries of political subdivisions. *Voinovich v. Quilter*, 507 U.S. 146, 161 (1993). The plaintiffs have offered no way of performing such a balance of the interests.

For example, the 2002 Plan enacted by the court in *Baumgart v. Wendelberger* was not "unavoidable" or "necessary." Both the Democrats and Republicans presented plans to the Court. No. 01-C-0121, 2002 WL 34127471, at *4 (E.D. Wis. May 30, 2002) *amended*, No. 01-C-0121, 2002 WL 34127473 (E.D. Wis. July 11, 2002). The Court rejected all the plans and "undertook its redistricting endeavor in the most neutral way it could conceive—by taking the 1992 reapportionment plan as a template and adjusting it for population deviations."

Id. at *7.[2] The Court concluded that its plan was the best implementation of districting principles, not that it was the only possible plan that could have been enacted. The Democrats surely could have reverse-engineered a plan following the 2002 election that matched the 2002 Plan on certain mathematical criteria and was more favorable to themselves. That would not have entitled them to a different plan if a Court drew the map, and it should not entitle them to a new plan because a duly-elected legislature of the opposite party drew one.

IV. The plaintiffs have not met Justice Kennedy's requirements for a discernible and manageable legal standard.

Although Justice Kennedy held the door open in *Vieth* to the emergence of a legal standard, he also laid down characteristics that a standard would need to meet. A plaintiff would have to show that political classifications were "applied in

[2] This also refutes the plaintiffs' contention that the 2002 Plan was a departure from the 1992 Plan. (Dkt. 68:22.)

an invidious manner or in a way unrelated to any legitimate legislative objective." *Vieth*, 541 U.S. at 307 (Kennedy, J.). And, as a prudential matter, the standard should be a "limited and precise rationale" that could "correct an established violation of the Constitution in some redistricting cases." *Id.* at 306 (Kennedy, J.) The undisputed facts show that the plaintiffs have not satisfied either of these criteria.

A. The plaintiffs' standard does not address whether partisanship was applied in an "invidious manner or in a way unrelated to any legitimate legislative objective."

The plaintiffs' standard does not even attempt to show that Wisconsin's districts were drawn in an invidious way or in a way unrelated to any legitimate legislative objective. The intent element does not measure "invidiousness" because it is satisfied by legislators acting with a lawful purpose. The effect element also does not measure invidiousness because the plaintiffs admit it only measures "partisan effect" and has no tie to partisan intent. (Dkt. 68:7.)

The standard likewise does not measure whether the plan was "unrelated to any legitimate legislative objective" because the efficiency gap is present in plans that implement only legitimate legislative objectives such as keeping communities of interest together in a district, compact districts, contiguous districts, and other objectives considered by neutral districting bodies. (*See*, *e.g.*, Dkt. 67 ¶¶ 184, 189, 201–06.) Further, the plaintiffs put forward no evidence that the current plan is unrelated to legitimate legislative objectives. They do not contend the

Demonstration Plan is better at implementing legitimate legislative objectives than the current plan, only that it is, at most, equivalent to the current plan.

B. The plaintiffs' standard is not "limited" or "precise."

The plaintiffs argue that their plan is sufficiently "limited and precise" because, of the 207 plans Jackman studied, it would jeopardize only twenty percent of plans (43 of 206) at the 7% *EG* threshold, and ten percent of plans at the 10% *EG* threshold (20 of 206). (Dkt. 68:30.) In the current round of redistricting, these numbers increase to twenty-five percent of plans (11 of 43) at the 7% *EG* threshold, and sixteen percent of plans at the 10% *EG* threshold. (Dkt. 68:30.) While this is less court involvement than what stemmed from the one-person, one-vote revolution, Justice Kenendy's concurrence in *Vieth* did not imagine court intervention on that kind of scale. 541 U.S. at 306 (Kennedy, J.).

Further, the plaintiffs make their standard "limited" only by sacrificing precision. The plaintiffs limit the number of plans encompassed by the standard by removing those plans enacted by neutral bodies. (Dkt. 68:30.) Almost eighteen percent of all plans (27 of 206) had an *EG* exceeding 7% in their first election but which featured no unified party control of districting. (Dkt. 68:30.) Almost six percent of all plans (12 of 207) had an *EG* exceeding 10% in their first election without unified party control, which increased to nine percent (5 of 43) in the latest round of redistricting. (Dkt. 68:30.)

Nor is the plaintiffs' historical analysis the upper limit of plans that could be implicated in the future. Over half of plans have had one election with an *EG*

greater than 7%, and one third have had one *EG* greater than 10%, (Dkt. 67 ¶¶ 176–77), showing the extent to which the threshold could be triggered depending on electoral conditions in the future.

The plaintiffs seem to misunderstand the problem presented by the prevalence of high efficiency gaps in the absence of partisan intent. The efficiency gap is not "precise" in detecting gerrymandering even looking backwards as in Jackman's study. Wisconsin's 2002 Plan surpassed the 7% *EG* threshold in its first election (and surpassed the 10% *EG* threshold in later elections). If Republicans had controlled the districting process in the 2000s and enacted the very plan the *Baumgart* court did, the plaintiffs' standard would detect this as a partisan gerrymander when, in fact, it would have been entirely consistent with neutral districting principles. In Jackman's historical analysis, how many plans present as partisan gerrymanders due to unified party control, but would have experienced high *EG*s even if they had been districted by neutral bodies? The plaintiffs say there is no way of knowing. (Dkt. 68:68.)

Looking forward, how many plans will be implicated as partisan gerrymanders when a party gains unified control over districting and enacts a plan that has an *EG* similar to the ones experienced under nonpartisan plans? Nine percent of plans in this current round of redistricting produced *EG*s over 10% in their first election without partisan intent. If Republicans were to win control of one of these states for the 2020 redistricting, the plaintiffs' standard will combine the lawful motive of partisan districting with the high *EG* to find a presumptively

unconstitutional partisan gerrymander, even if the plan has the same *EG*, or perhaps even a lower *EG*, than that seen in 2012 and 2014 under a plan with no partisan intent.

This shows the standard requires partisan bodies to district in a way that is more favorable to the opposing party than a court-drawn plan. In 2004, Wisconsin Republicans won 60 seats with 50% of the vote (a 10% *EG*) under a court-drawn plan. (Dkt. 67 ¶ 213.) In order to come under a 10% *EG* threshold, they would have to draw a map under which they would not win 60 seats (or 57 seats to avoid a 7% *EG* threshold). The plaintiffs are incorrect that their standard does not require a legislature to "deliberately *minimize* its plan's partisan asymmetry." (Dkt. 68:50.) The burden-shifting prong will not save a plan if the other party can reverse-engineer a plan that resembles the current plan on a few mathematical criteria.

V. The Court need not make any particular finding as to why efficiency gaps have favored Republicans in Wisconsin in order to reject the plaintiffs' legal standard.

The plaintiffs' legal standard fails regardless of whether Democratic voters have become more concentrated Wisconsin or in the country as a whole, and this Court need not make a finding as to the concentration of Democratic voters in order to reject the plaintiffs' legal standard. The key point is that high *EG*s in Wisconsin during the 1990s and 2000s (and high *EG*s seen in other states) were not caused by partisanship in districting. Thus, the plaintiffs' standard mistakenly treats effects caused by nonpartisan districting as effects caused by discrimination.

Because Wisconsin's experience in the 1990s and 2000s cannot be explained by partisan intent, the defendants in their opening brief provided context explaining that increased concentration of Wisconsin Democrats was a cause of asymmetry even under court-drawn plans. The defendants also provided context for the findings with regard for the nation as a whole because partisanship cannot explain, for example, why nine percent of plans had an election with an *EG* exceeding 10% in 2012 without any partisan motive. The defendants presented evidence as to why pro-Republican *EG*s are present even in the absence of partisanship, but they have not claimed that the nationwide trend "is entirely attributable to a change in the country's political geography." (Dkt. 68:16.)

In contrast, the plaintiffs have offered no explanation for the presence of pro-Republican *EG*s that Wisconsin experienced during the 1992 Plan and 2002 Plan. The plaintiffs cannot claim partisanship caused the trend in Wisconsin during the 1990s and the 2000s, even assuming Professor Mayer's concentration analysis is correct. Likewise, the plaintiffs offer no explanation for why the trend occurs in other states even when there is no partisanship in the districting process. For example, the plaintiffs provide no explanation for why sixteen of seventeen plans with unambiguous signs favored Republicans, why large pro-Democratic efficiency gaps became rare starting in the 1990s, and why pro-Republican efficiency gaps are more durable than pro-Democratic gaps.

A. Jackman's rebuttal report ignores Wisconsin's experience and shows a Republican advantage nationally.

The plaintiffs contend that Professor Jackman's rebuttal report shows the increase in the efficiency gap was caused by increased Republican control over districting. (Dkt. 68:16–17.) That is incorrect. First, Jackman's analysis cannot apply to Wisconsin under the 1992 and 2002 Plans because there was no partisan motive involved in those districting plans. In addition, his reply report analyzes only plans enacted with unified party control; "[t]he omitted category is any other institution responsible for districting, such as divided government, a court, or a commission." (Dkt. 63:19.) Jackman does not even use Wisconsin's experience as a "single data point" in his analysis, let alone the multiple other data points where nonpartisan plans have led to pro-Republican efficiency gaps (as recently seen in New York, Missouri, Kansas and Minnesota). His analysis omits sixty percent of nonpartisan plans in the 1990s and forty percent of nonpartisan plans in the 2010s. (Dkt. 63:18.)

Jackman's analysis actually shows an inherent pro-Republican bias in districting. His analysis purports to show "how the average efficiency gap of state house plans would have changed from the 1990s to the 2010s if the distribution of party control over redistricting had remained constant over this period." (Dkt. 68:10.) Discussing the 1990s, Jackman says that 10% of plans were designed by Republicans, 30% by Democrats, and 60% by other bodies. (Dkt. 63:18.) Therefore, his analysis shows that the average *EG* would almost reach -1% even if Democrats drew three times as many plans as Republicans, with Republicans only

drawing 10% of plans. (Dkt. 63:19.) His analysis does not show what the average *EG* would be if neutral plans were included because he decided to omit them from consideration.

B. The plaintiffs misrepresent Professor Goedert's research.

The plaintiffs simply misrepresent Professor Goedert's research when they say that his "efficiency gap models . . . reveal that if Wisconsin's 2011 map had been designed through a bipartisan or nonpartisan process, it would have favored Democrats in 2012 and 2014" and that "the typical state nationwide would have had a pro-Democratic efficiency gap in 2012 and 2014 if its map were neutrally drawn." (Dkt. 68:9.) The plaintiffs' reliance on Professor Goedert is puzzling given that his analysis of the 2012 congressional elections concluded "Democrats also underperformed under bipartisan maps, and gained only small advantages from their own maps, suggesting that their main issue is not gerrymandering, but districting itself." (Dkt. 60-2:2.) Therefore, the plaintiffs are simply wrong that his work "indicates that . . . the country's political geography is, on average, slightly tilted in a Democratic direction." (Dkt. 68:19.)

The plaintiffs reach this conclusion by misstating Goedert's research. First, the plaintiffs fail to mention that Goedert analyzed *congressional* elections in 2012 and 2014, not state legislative elections, and that he does not even claim his model applies to state legislative elections. (Dkt. 60-2; Dkt. 60-3.) The distribution of voters in congressional elections is much different than state legislative elections because of the vastly different district sizes, as is seen in Wisconsin. For purposes of

redistricting, Wisconsin's population was 5,686,986. *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 844 (E.D. Wis. 2012). Wisconsin has eight congressional districts, which would be 710,873 people each if they had equal population. *Id* at 848–849. Wisconsin has 99 Assembly districts, which each would have 57,444 if they had equal population. *See id* at 848. The plaintiffs have not explained how a model examining elections of districts with seven hundred thousand people applies to districts with fewer than sixty thousand people.

Further, Goedert's research actually shows that Democrats are disadvantaged by geography in winning congressional seats in the country as a whole. This can be seen from the very title of his article: "How Democrats won the popular vote but lost Congress in 2012." (Dkt. 60-2.) Goedert's research shows the Democrats failed to secure the seats one might expect from their vote share not only in 2012 but also in 1998, 2000, 2004, 2006, and 2008. (Dkt. 60-2, Fig. 1.)

The plaintiffs make claims about the "country as a whole" by misusing Goedert's model. First, the model does not apply to the country as a whole; by its terms, it examines only the twenty-one states that have seven or more congressional seats. (Dkt. 60:87; Dkt. 60-2:6–7.) Second, the plaintiffs purport to apply Goedert's model to a hypothetical state with the demographic characteristics of the nation as a whole. (Dkt. 68:19.) But that exercise is meaningless. The political geography of the country is determined by elections as they occur in states as they actually exist, not by a non-existent hypothetical state.

Because Goedert's models do not apply state legislative maps in general or to Wisconsin's Assembly map specifically, the plaintiffs are wrong that "a finder of fact could conclude that if a neutral institution had designed Wisconsin's district plan, the map would have slightly advantaged Democrats over the last two elections." (Dkt. 68:24.)

VI. The plaintiffs' evidence is based on counterfactuals, not on elections as they actually occurred.

The plaintiffs misunderstand the problem caused by the "counterfactual" nature of the efficiency gap evidence they present. In a case that alleges a partisan gerrymander based on Wisconsin's efficiency gap, one would think the plaintiffs would be able to (1) state what Wisconsin's actual efficiency gap was in 2012 and 2014 and (2) state the method by which it should be calculated. The precise amount and manner of calculating the efficiency gap should be clear given that the plaintiffs want the Court to establish a firm numerical threshold for presumptive unconstitutionality. Further, the precise method is important for determining when the threshold is triggered because the two methods can vary by as much as 1% even under the plaintiffs' own calculations. (Dkt. 68:39.)

The plaintiffs are not clear on what method the Court should use to calculate the efficiency gap. The plaintiffs suggest that the correct way to calculate the efficiency gap is the "full method" of "tallying wasted votes district by district." (Dkt. 68:9.) Mayer, however, did not calculate the "full method" for the legislative elections that actually occurred in Wisconsin in 2012. Instead, "he used a regression analysis to estimate what the wasted votes would have been in each district."

(Dkt. 68:15.) The plaintiffs' statement that "the purpose of Professor Mayer's analysis . . . was to compare the Current Plan with his Demonstration Plan," (Dkt. 68:61), seems to suggest that Wisconsin's efficiency gap should instead be calculated using Jackman's "simplified method." As explained in the defendant's initial brief, the simplified method, though, judges plans against a seats-to-votes relationship that has no basis in law.

A. The plaintiffs admit Mayer's efficiency gaps do not use actual election results.

In the complaint, the plaintiffs used Mayer's analysis as the basis to assert that "the Current Plan produced a pro-Republican efficiency gap of 12% in 2012." (Dkt. 1 ¶ 56.) On summary judgment, the plaintiffs contend that "[i]n 2012, the Current Plan had an efficiency gap of -11.7% using the full method." (Dkt. 68:44.) The undisputed facts show these statements are incorrect because they do not reflect the actual election that took place in 2012. Instead, they rely on a counterfactual election of 2012 in which no incumbents ran and every seat was contested.

When Mayer changed his model to better reflect the reality of incumbency, his numbers changed significantly. His Demonstration Plan now has an efficiency gap of 3.71% in favor of Republicans, an increase of 1.51% from the 2.20% gap with no incumbents. (Dkt. 64:24.) After accounting for incumbency, the Demonstration Plan is more than halfway to the 7% *EG* threshold, with one-fifth of the threshold accounted for by incumbency.

That "the professional norm . . . is to ignore incumbency," (Dkt. 68:40), does not make it acceptable, as a legal matter, to put forward an efficiency gap based on the results of elections that never occurred. Justice Kennedy in *LULAC* rejected using partisan bias based on its counterfactual nature even though it was put forward by leading political scientists. 548 U.S. at 419–20. The plaintiffs seem to think that Justice Kennedy's rejection of the specific hypotheticals and counterfactuals before the Court in *LULAC* opens the door to different types of hypotheticals and counterfactuals. This is not the case.

Further, Mayer's results highlight the manageability problems with the efficiency gap. The fact that Mayer's "no incumbent" efficiency gap was "remarkably similar to" Jackman's calculation, (Dkt. 68:15), is a bug, not a feature. Mayer calculates the 11.7% efficiency gap using a model that predicted the wrong outcome in five seats and used a seat share of 57 Republican seats. (Dkt. 54, Table 8.) His number should not be the same as Jackman's gap when they used seat shares (57 for Mayer vs. 60 for Jackman) that differ by 3%.

Lastly, Mayer's uniform swing analysis of his 2012 model (Dkt. 68:35), does not make up for the fact that he did not analyze the 2014 election at all. Justice Kennedy in *LULAC* suggested looking at the results of elections that have actually occurred. 548 U.S. at 420. Mayer's alternative counterfactuals of the 2012 election in his rebuttal report, (Dkt. 64:26), do not change the fact that he ignored an election that actually happened (and produced at 52% Republican vote share).

B. Jackman's efficiency gap is not based in the constitution.

Jackman's rebuttal report does not resolve the problems with his standard discussed in the defendants' initial brief. (Dkt. 46:44–48.) Jackman performs "sensitivity testing" designed at detecting whether the plan will change signs during its existence: "[t]he outcome of interest is whether the plan's remaining efficiency gaps have the same sign as the *EG* from the first election." (Dkt. 63:6.) There is no right to a plan that will change *EG*, particularly not in Wisconsin where the most recent nonpartisan plan was unambiguously negative.

VII. The Court should reject the plaintiffs' attempt to use partisan bias or some other standard not actually propounded by the plaintiffs.

Partisan bias does not provide a basis for a partisan gerrymandering claim. In *LULAC*, the Court rejected using partisan bias as a standard. 548 U.S. at 419–20 (plurality opinion). Further, the partisan bias allegedly present in this case (12% or 13%) is the same as the 12.5% bias present under the Texas congressional maps considered in *LULAC*, under which the Republicans would likely win 62.5% of seats (20 of 32) with 50% of the vote. *Id.* at 466 (opinion of Stevens, J.).

The Court should also reject the plaintiffs' request to develop a standard not put forward by the plaintiffs to date. First, the problems with the efficiency gap outlined above show that it cannot be incorporated into a workable standard. In addition, the Court should not adopt a standard that the defendants would not be able to contest in a dispositive motion, either as to whether the standard should be adopted as a legal matter or whether the undisputed facts meet the legal standard.

CONCLUSION

For the reasons stated in this brief and the defendants' opening brief, the Court should grant summary judgment to the defendants.

Respectfully submitted,

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