UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, et al.,

Plaintiffs,

TAMMY BALDWIN, et al.,

Intervenor-Plaintiffs,

vs.

Case No. 11-CV-562
JPS-DPW-RMD

MICHAEL BRENNAN, et al.,

Defendants,

F. JAMES SENSENBRENNER, JR., et al.,

Intervenor-Defendants.

VOCES DE LA FRONTERA, INC., et al.,

Plaintiffs,

vs.

Case No. 11-CV-1011
JPS-DPW-RMD

MICHAEL BRENNAN, et al.,

Defendants.

REPLY BRIEF IN SUPPORT OF MOTION BY INTERVENOR-DEFENDANTS FOR JUDGMENT ON THE PLEADINGS DISMISSING ALL CLAIMS OF PLAINTIFFS' SECOND AMENDED COMPLAINT RELATING TO 2011 WISCONSIN ACT 44, CREATING CONGRESSIONAL DISTRICTS
(No. 11-CV-562)

INTRODUCTION

The movants have asked the Court to terminate the challenges to Wisconsin's Congressional districting statute now, without trial, because these political gerrymandering claims do not state claims upon which relief can be granted. Two different three-judge district courts in Chicago recently dismissed similar challenges to Illinois' 2011 Congressional and legislative redistricting statutes for failure to state claims. *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 1:11-cv-5065, 2011 U.S. Dist. LEXIS 126278 (N.D. Ill. Nov. 1, 2011) (dismissing initial complaint); *id.*, 2011 U.S. Dist. LEXIS 144302 (Dec. 15, 2011) (dismissing amended complaint and action); *Radogno v. Ill. State Bd. of Elections*, No. 1:11-cv-4884, 2011 U.S. Dist. LEXIS 134520 (N.D. Ill. Nov. 22, 2011) (dismissing complaint); *League of Women Voters v. Quinn*, No. 1:11-cv-5569, 2011 U.S. Dist. LEXIS 125531 (N.D. Ill. Oct. 28, 2011) (dismissing complaint). Though this Court has asked the parties to be attentive to developments in the Illinois redistricting cases, the plaintiffs have tried their best to ignore these decisions, which carefully (and currently) apply the Supreme Court case law that governs this case, too. Indeed, the plaintiffs' "analysis" of the *Fair Map* case goes no further than to say that "to acknowledge their decision, however, is not to agree with it." (Pls.' Br., Dkt. #105, at 14.) This sort of response to recent persuasive authority requires little reply.

The movants, therefore, will show here why the "standard" that the plaintiffs propose is not workable.

The plaintiffs also argue that this motion should be postponed for treatment as a summary judgment motion because—they assert incorrectly—it goes beyond the pleadings. In order to keep attention focused where it belongs, on the legal inadequacy of the claims, the movants will hold their treatment of these quibbles until the end of this brief.

ARGUMENT

I. The Plaintiffs Bear the Burden of Pleading a Workable Standard for their Political Gerrymandering Claim.

The plaintiffs acknowledge that, because of the holdings of *Vieth* and *LULAC*, they "tread uphill." (Pls.' Br. 3.) They must propose a workable standard for the Court to apply to their claim, a task at which all previous plaintiffs in their situation have failed.[1] This shows not, as the plaintiffs would have it, that the requirement to plead a workable standard in a political gerrymandering case is a kind of Catch-22, but that any proposed standards like those that the Supreme Court has already said will not do are non-starters.[2] As the plaintiffs recognize, Justice Kennedy, whose vote controlled both cases, rejected the standards proposed by the *LULAC* plaintiffs and reaffirmed that, to survive dismissal at the pleadings stage, plaintiffs are held to the pleading rule that "a successful claim attempting to identify unconstitutional acts of partisan gerrymandering must . . . show a burden, as measured by a reliable standard, on the complainants' representational rights." 548 U.S. at 418. His opinions in *Vieth* and *LULAC* require plaintiffs, in order to avoid dismissal at this stage, to set out in their complaint a workable standard for relief for a claim of political gerrymandering. *E.g.*, *Fair Map*, 2011 U.S. Dist. LEXIS 126278, at *31 ("Justice Kennedy concluded that a complaint will fail to state a claim if the plaintiffs cannot articulate a justiciable standard.") (citing *Vieth*, 541 U.S. at 313). The

[1] The plaintiffs' reliance on *Cox v. Larios*, 542 U.S. 947, 949 (2004) (Stevens, J., concurring) (Pls.' Br. 14), is quite misleading. *Larios* was a summary affirmance of a district court decision, not a holding on the merits of anything. 542 U.S. at 947. The plaintiffs ascribe to "the Court" their interpretation of Justice Stevens' sentiments in his concurrence, joined by only one other Justice. A summary affirmance by the Supreme Court is nothing more than a decision not to hear an appeal. Thus, "[s]ummary actions . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977); *see also Edelman v. Jordan*, 415 U.S. 651, 671 (1974). The *Larios* affirmance cannot undo *Gaffney* and subsequent cases. Much less can it neuter the later *LULAC*, which rejected the application of the underlying *Larios* decision that the plaintiffs here attempt. 548 U.S. at 422–23 ("The [district court] *Larios* holding and its examination of the legislature's motivations were relevant only in response to an equal-population violation, something appellants have not established here.").

[2] Thus, the plaintiffs' literary model is not, as they suggest, Yossarian, but Sisyphus.

plaintiffs cite no opposing authority, because none exists. After their half-hearted plea that this Court ignore the decisions "dismissing gerrymandering claims at an early stage of litigation" (Pls.' Br. 14), the plaintiffs effectively concede that they must articulate a standard by trying, unsuccessfully, to do so.

II. The Plaintiffs' Proposed Political Gerrymandering Standard Fails.

The standard proposed by the plaintiffs fails to stay on the very "narrow path" that they themselves recognize they must navigate. (Pls.' Br. 16 (quoting *Radogno*, 2011 U.S. Dist. LEXIS 134520, at *16).) Their proposal would create an absolute "safe harbor" (Pls.' Br. 4) for a statute that causes only exactly enough people to become part of a different Congressional district than the one in which they previously resided as is necessary to achieve population equality under the new census.

The plaintiffs build their standard around the trope of "moving" no more people than "necessary" between Congressional districts. It bears recalling that redistricting plans do not "move" people. *See Shaw v. Reno*, 509 U.S. 630, 646 (1993). They draw lines on a map—replacing those a prior legislature drew in different places on the same map nine or 10 years earlier. That earlier line-drawing by the body constitutionally charged with the task was the only source of legitimacy for the old boundaries. Actual movements of population between the districts, along with deaths and births, destroy that legitimacy and require the legislature to draw new lines. In doing so, it has a free hand. The plaintiffs make no effort to say what makes the old lines sacrosanct. Indeed, nothing in the United States Constitution requires that the new Congressional districts be 80% or 90% identical to the old ones or gives any voter in Whitefish Bay the right to forever live in the 5th Congressional District, rather than to find his or her village now located in the 4th. That voter has only the right, under the Equal Protection Clause,

to live in a district where his or her vote for a Member of the House carries the same weight as the vote of every other voter in the state. Act 44 satisfies that equality requirement. How it does so raises no legitimate constitutional question.[3]

The plaintiffs would call unconstitutional any redistricting statute that "moved significantly more people than [reasonably] necessary to achieve ideal population" if "no traditional redistricting criteria can justify the excess movement." (Pls.' Br. 18.) This showing would evidently be enough to shift the burden to the defendants to show that the "excess movement" either was "necessitated by shifts in other districts," *id*. (in which case one would have thought that the statute had not "moved significantly more people than [reasonably] necessary"), or else was "justified by traditional redistricting criteria," *id.* (which, whatever those criteria might be, must apparently be devoid of any whiff of politics). If the defendants succeed, the burden shifts back to the plaintiffs to show that these explanations are "either unfounded or pretextual." (*Id.*) Conveniently, "experts" could "objectively establish[]," the plaintiffs seem to assume, both the requisite calculations and the "legitima[cy of the legislature's] objectives." (*Id.* at 18 n.7.) Amazingly, the plaintiffs claim that their plan "is neither arbitrary nor difficult" in its application. (*Id.* at 16.) The proposed standard would turn *every* redistricting statute into grist for the litigation mills. Moreover, it does not withstand analysis, because it fails in the same ways that other proposed standards have before the Supreme Court.

[3] In vouching for the existence of additional requirements, the plaintiffs rely on a district court case dealing with a challenge to Section 5 preclearance requirements. (Pls.' Br. 10 (quoting *LaRoque v. Holder*, No. Civ. 10-0561, 2011 U.S. Dist. LEXIS 147064, *115-16 (D.D.C. Dec. 22, 2011)).) *LaRoque* does not involve redistricting or political gerrymandering. Interestingly, however, in the very paragraph cited by the plaintiffs, the court includes partisan concerns among the traditional, proper motivations for districting. 2011 U.S. Dist. LEXIS 147064, at *115 ("Voting districts are explicitly designed to protect certain communities of interest, whether *partisan*, issue-oriented, or any of a number of other characteristics.") (emphasis added). Consistent with *Gaffney* and other cases, the court seems to regard partisan motivations as indispensible to the principles the plaintiffs claim to value.

A. The Proposed Standard Is Not Administrable; Similarly Unmanageable Standards Have Been Rejected by the Supreme Court.

Despite its so-called objectivity, this standard is not manageable, for it suffers from the same defects as other plans rejected in *Vieth*. Of initial importance, the true "safe harbor" provided is exceedingly narrow, limited to cases of zero "unnecessary" district shifting from a previous plan.[4] As the plaintiffs recognize in a footnote, *every* Congressional redistricting plan will have some such shifting. (Pls.' Br. 18 n.7 ("[I]t is expected that there will need to be somewhat more transfer of population than the bare minimum.").) The inquiry will immediately devolve, then, into consideration of the "reasonable necessity" of other "legitimate" criteria.

Glaringly, the standard fails to identify which factors are "traditional redistricting criteria" and are thus among the "other legitimate factors" that the plaintiffs in their *prima facie* case must show do not justify the plan, or what level of population deviation would be "reasonable" where these as-yet-unidentified criteria explain them, or how failings of the criteria would be weighed against a relative lessening in the shifting of Congressional district boundaries among populations. (*Id.* at 18 & n.7.) What are these criteria? How are they to be weighed? The plaintiffs' solution to these intractable problems is to trust figures "that can be objectively established by expert testimony." (*Id.* at 18 n.7.)[5] In most redistricting disputes, as in this one,

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[4] The plaintiffs' description of their standard alternatively as a "safe harbor" (Pls.' Br. 4) and, elsewhere, as a "burden-shifting analysis" (*id.* at 16) is itself confusing. Safe harbors and burden-shifters are two analytically distinct interpretations of a given rule. *See* Stephanie Cirkovich, *Abandoning the Ten Percent Rule and Reclaiming One Person, One Vote*, 31 Cardozo L. Rev. 1823, 1835–36 (2010) (discussing differing applications of the "ten percent rule" for legislative redistricting after *Brown v. Thomson*, 462 U.S. 835 (1983)). The plaintiffs offer a true safe harbor only for Congressional redistricting plans that hit the nail on the head by changing the districts of the exact same number of people as required for equality under the new census. Missing the target by a single person turns the safe harbor into a pitched battle over whether "traditional redistricting criteria" wholly explain a map.

[5] In identifying examples of some possible "factors," the plaintiffs quote a portion of *Shaw v. Reno*, 509 U.S. 630 (1993), that contradicts their current position. (Pls.' Br. 10 n.5.) The actual quotation from that case regarding "traditional districting principles" is that "these criteria are important not because they are constitutionally required – *they are not* – but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines." *Shaw*, 509 U.S. at 647 (internal citations omitted, emphasis added). But race

however, experts from each side will certainly disagree on the measures for those principles, the "reasonable" influence of whatever factors are considered and, fundamentally, *which* factors should be considered as justifying moving boundaries so that people end up in new districts.

Further, the proposed standard stacks a companion step of unguided analysis onto its *prima facie* phase. Not only must certain legitimate objectives be used to determine what amount of territorial shift (as measured by affected population) is reasonably necessary beyond zero-excess movement, but these (presumably same) "traditional redistricting criteria" must also be shown not to justify "movement" beyond that reasonably necessary amount. (*Id.* at 18.) Because of the puzzle-like nature of redistricting, no one can simply point to some subset of all boundary shifting that was politically-motivated, while admitting that the remainder arose from other principles. Such an attempt would be as futile as attempting to remove the eggs from a baked cake, for the effects of political and non-political motivations are often indistinguishable. *See, e.g.*, *Vieth*, 541 U.S. at 359 ("[I]t is not surprising that 'traditional' districting principles have rarely, if ever, been politically neutral.") (Breyer, J., dissenting) (citations omitted). And this would just be to find that a *prima facie* case exists, at which time the defendants would take a turn at invoking various "traditional redistricting criteria" to justify the plan.

While parading the flag of objectivity, then, this standard leaves the state of play no more workable than tests that the Supreme Court has already rejected. The standard leaves the door open, at various stages, to unwieldy weighing of various criteria much less firm than the ideal population of a Congressional district. Simply put, it is not administrable.

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is not politics, as *Shaw* recognized: "[N]othing in our 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, which always has reserved the strictest scrutiny for discrimination on the basis of race—would seem to compel the opposite conclusion." *Id.* at 650 (internal citations omitted); *accord Vieth*, 541 U.S. at 293–94 (Scalia, J., plurality opinion).

Specifically, the proposed standard does little more than reconfigure an old standard previously rejected by the Supreme Court in *Vieth*. Its emphasis on the reasonableness of excess shifting of Congressional district boundaries strongly resembles Justice Powell's pursuit of "fairness" in his totality-of-the-circumstances approach in *Davis v. Bandemer*, with both focusing on whether boundaries were drawn solely for partisan ends to the exclusion of all neutral factors. 478 U.S. at 161 (concurring in part, dissenting in part). *Vieth* rejected this approach. 541 U.S. at 291. The plaintiffs' reliance on "reasonable necessity" in determining what level of population movement is not excessive with reference to traditional principles, as well as the need to "justify" any excessive movements by referring to such principles, echoes Justice Powell. Further, the plaintiffs stress that their Complaint alleges that Act 44 effects "an unfair electoral advantage." (Pls.' Br. 6.) This is the "same flabby goal" of "fairness" invoked by Justice Powell. *Vieth*, 541 U.S. at 298 (rejecting burden-shifting approach akin to Justice Powell's standard). His test considered "all other neutral factors relevant to the fairness of redistricting" and evidence of "population disparities." *Bandemer*, 478 U.S. at 161, 173.

The plaintiffs merely put this latter criterion first among equals, referring to "necessary" boundary changes along with "traditional redistricting criteria" in the first step of their framework. Moreover, the plaintiffs would require analysis of these criteria up to three times in every case (if the zero-excess safe harbor is indeed implausible): first, by the plaintiff to show that the shifts of district lines were beyond those reasonably necessary under as-yet-unestablished principles (Pls.' Br. 18 & 17); second, by the plaintiff to show that no "traditional redistricting criteria can justify the excess movement" (*id.* at 18); and third, by the defendant to show that the excess movement was "either necessitated by shifts in other districts or justified by

traditional redistricting criteria." (*Id.*) The unwieldy analysis does not become simpler by repetition.

Significantly, these plaintiffs are not the first to try to update Justice Powell's standard by couching it in a burden-shifting analysis. Justice Souter proposed just such a framework in his *Vieth* dissent. His framework began with requirements for a *prima facie* case:

> A plaintiff who got this far would have shown that his State intentionally acted to dilute his vote, having ignored reasonable alternatives consistent with traditional redistricting principles. I would then shift the burden to the defendants to justify their decision by reference to objectives other than naked partisan advantage. They might show by rebuttal evidence that districting objectives could not be served by the plaintiff's hypothetical district better than by the district as drawn, or they might affirmatively establish legitimate objectives better served by the lines drawn than by the plaintiff's hypothetical.

Vieth, 541 U.S. at 351 (Souter, J., dissenting).

The plaintiffs repeat much of this language. More specifically, Justice Souter broke his analysis of a *prima facie* case down into five elements, namely that a plaintiff must: (1) identify "a cohesive political group to which he belonged, which would normally be a major party," *id.* at 347; (2) show that his district "paid little or no heed to those traditional districting principles whose disregard can be shown straightforwardly: contiguity, compactness, respect for political subdivisions, and conformity with geographic features," *id.* at 347-48; (3) show "specific correlations between the district's deviations from traditional districting principles and the distribution of the population of his group," *id.* at 349; (4) present a hypothetical plan that "packed" or "cracked" less and "deviated less from traditional districting principles than the actual district," *id.* at 349; and (5) show intentional packing or cracking. Of these, the first is presumably a precondition of the plaintiffs' test. The second, third, and fourth of the Souter criteria simply break down the concept of "traditional redistricting principles" that the plaintiffs

leave undifferentiated at several stages of the burden-shifting analysis. Thus, the tests are overwhelmingly similar. Any differences do nothing to make the standard more workable.

A majority of the Court recognized the fundamental problems with Justice Souter's approach, focusing on its inexact application of "traditional redistricting principles":

> While this five-part test seems eminently scientific, upon analysis one finds that each of the last four steps requires a quantifying judgment that is unguided and ill suited to the development of judicial standards: *How much* disregard of traditional districting principles? *How many* correlations between deviations and distribution? *How much* remedying of packing or cracking by the hypothetical district? . . . At step two, for example, Justice Souter would require lower courts to assess whether mapmakers paid "little or no heed to . . . traditional districting principles." What is a lower court to do when, as will often be the case, the district adheres to some traditional criteria but not others? Justice Souter's only response to this question is to evade it: "It is not necessary now to say exactly how a district court would balance a good showing on one of these indices against a poor showing on another, for that sort of detail is best worked out case by case." But the devil lurks precisely in such detail.

Id. at 296 (Scalia, J., plurality opinion) (internal citations omitted); *see also id.* at 308 (Kennedy, J., concurring) ("The plurality demonstrates the shortcomings of the other standards that have been considered to date."). These concerns are amplified here, where the analysis of "traditional redistricting principles" is not broken down into analytical elements, a step Justice Souter took because "[i]t is common sense . . . to break down a large and intractable issue into discrete fragments as a way to get a handle on the larger one." *Id.* at 353. Even his standard failed. The plaintiffs simply leave the problem as they and Justice Souter found it: large and intractable.

B. The Proposed Standard Is Arbitrary and Ignores Established Constitutional Law, Including the Discussion of Standards in *LULAC*.

Besides being unmanageable, the proposed standard is arbitrary. The narrow true safe harbor that the proposed standard imagines would threaten to prevent plaintiffs from making

out even a *prima facie* claim in especially egregious cases, while labeling as potentially unconstitutional much less objectionable plans. For instance, if a future legislature were to move 20,000 persons from a heavily Democratic- or Republican-leaning portion of a southeastern Wisconsin Congressional district (the 4th or 5th, for example) that had in the previous decade become unconstitutionally overpopulated by 20,000 people, into a non-contiguous, newly under-populated 7th District, for partisan benefit, such a statute would be beyond reproach. The "safe harbor" in the plaintiffs' proposal would protect the statute, and no consideration of other principles would even be contemplated as long as zero-excess population movement was achieved. Further, if population changes were not large enough in the subsequent decade, the next redistricting would be unable to reverse this districting airlift without abandoning the plaintiffs' safe harbor. Meanwhile, a legislature crafting a perfectly reasonable plan that nevertheless did not achieve zero-excess movement would be unable to avoid litigation.

Second, the standard would arbitrarily entrench existing districting maps, whether drawn by courts or by legislatures, and even where such previous maps were drawn for partisan (or bipartisan) political reasons. The legislature would be strongly encouraged to do nothing but nibble at the fringes of districts to satisfy minimal population deviation in changing a map. That is, since the second step of the plaintiffs' framework would only allow a state to meet its burden "by establishing that the movement of more people than numerically necessary was either necessitated by shifts in other districts or justified by traditional redistricting criteria" (Pls.' Br. 18), the defendants will have to disclaim and disprove *any consideration of political advantage at all* to return the burden to the plaintiffs. Thus, the proposal would incongruously allow for *more* politically-motivated decision-making when boundary shifts affect *fewer* total individuals, than when they affect more. Indeed, when more than a certain number are affected, no political

considerations could be taken. The only reason for this is the preference of the plaintiffs' standard for an existing plan over any substantial change. No doubt, legislatures would fear the cost, embarrassment, and lost time of protracted litigation that would inevitably result from any plan—however neutral, however altruistically based upon "traditional redistricting principles"—that went beyond the population deviation needs by any amount, for fear that some consideration of politics would make the statute unconstitutional under the proposed standard. In adopting such a rule, courts would force state legislatures to act timidly in undertaking their redistricting responsibilities and reverse the constitutional preference for legislative over judicial districting. There is no constitutional basis for such a strong preference for an existing plan's lines. Nor should courts curtail the duties constitutionally ascribed to state legislatures in order to achieve such stasis.

Third, the unstated goal of the proposed standard is to expunge political considerations—partisan, bipartisan, and incumbent-protecting politics alike, presumably—entirely from the redistricting process. But, as the plaintiffs themselves note (*id.* at 17), partisan considerations are perfectly legitimate and proper parts of the redistricting process entrusted to the legislative branches. *Vieth*, 541 U.S. at 285 ("The Constitution clearly contemplates districting by political entities, see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics.") (Scalia, J., plurality); *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("The reality is that districting inevitably has and is intended to have substantial political consequences."); *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999); *Easley v. Cromartie*, 532 U.S. 234, 242 (2001). Therefore, the plaintiffs must articulate "a standard by which judges may reliably and objectively sort the 'routine' use of partisanship in redrawing district lines from that which is excessive to the point of violating the Equal Protection Clause." *Radogno*, 2011 U.S.

Dist. LEXIS 134520, at *9. The proposed standard aims not to prevent *excessive* political gerrymandering but to sniff out even the slightest hint of politics and, therefore, is not "judicially discernible in the sense of being relevant to some constitutional violation." *Vieth*, 541 U.S. at 288. Rather, the standard is at odds with long-established doctrine and goes far beyond an attempt to curb excess political gerrymandering.

Finally, the proposed standard is particularly inappropriate in light of *LULAC*, the substance of which the plaintiffs simply ignore. This omission comes despite *LULAC*'s explicit focus on "whether appellants' claims offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution," 548 U.S. at 414, the very objective for the plaintiffs here. The *LULAC* Court found that a standard striking down redistricting plans in the middle of a decade—when, by definition, *no redistricting at all* was required—undertaken for the acknowledged purpose of partisan advantage, was not viable. 548 U.S. at 416–20. The "sole-intent standard" offered in *LULAC* was more clear-cut than the standard proposed here, yet it failed. The proposed standard here appears to bar categorically *any* mid-decennial redistricting (since at such times no shifts between districts are necessary), despite *LULAC*'s recognition that "[t]he text and structure of the Constitution and our case law indicate there is nothing inherently suspect about a legislature's decision to replace mid-decade" an existing plan. 548 U.S. at 418–19. The only alternative interpretation is that the proposal would leave mid-decade political redistricting to one side, unconstrained, even while imposing stringent limitations on the required redistricting at the opening of a decade. By comparison, *LULAC* critically noted that "[u]nder appellants' theory, a highly effective partisan gerrymander that coincided with decennial redistricting would receive less scrutiny than a bumbling, yet solely partisan, mid-decade redistricting," an arbitrary result. *Id.* at 419. The converse result of

favoring mid-decade redistricting is as arbitrary, and is likewise nowhere to be found in the Constitution.

III. The First Amendment Does Not Provide a Proper Basis for a Political Gerrymandering Claim.

The Supreme Court has never recognized that political gerrymandering claims under the First Amendment are even theoretically justiciable. The *Vieth* plurality dismissed the notion out of hand. 541 U.S. at 294. The reasons to disregard the plaintiffs' inclusion of this alternative basis are sufficiently explained in the movants' opening brief. (Br. in Supp. of Mot. for J. on Pleadings 21–23.) No basis in law exists for such a claim, and it should be dismissed.

The plaintiffs attempt to distinguish the cited case law—presumably including *Vieth* itself—by noting that some such decisions featured involvement by minority-party individuals. (Pls.' Br. 20–21 (citing *Kidd v. Cox*, No. 1:06-cv-997, 2006 U.S. Dist. LEXIS 29689 (N.D. Ga. May 16, 2006)).) Even taking as true for purposes of these motions the plaintiffs' assertion that here "the exclusion of the Democratic congressional delegation was absolute" (*id.* at 21), this is a distinction without a difference. The plaintiffs attempt to state a gerrymandering claim under the First Amendment based on the purported burdensome *effects* of redistricting, not on the process for drawing the districts. (Compl. ¶¶ 65–67; Pls.' Br. 19–21.) In *Kidd* and elsewhere, the First Amendment basis for such claims failed because those effects do not implicate any recognized First Amendment right. *See, e.g.*, *Kidd*, 2006 U.S. Dist. LEXIS 29689, at *58–59. Of course, no constitutional right exists for a party, or its Congressional delegation, to have some baseline level of input in redistricting, and the plaintiffs elsewhere rightly note that "[t]hat contrast, bilateral versus unilateral, is not sufficient to state a gerrymandering claim." (Pls.' Br. 9.) The plaintiffs also assert that "presenting one's views to the electorate requires money, which a candidate guaranteed *to lose* will be unable to raise and

use for protected speech." (*Id.* at 21.) The plaintiffs have not alleged that any member of Wisconsin's current Congressional delegation is "guaranteed to lose," and the notion that a law that draws districts in which one party has little chance of winning (say, a Republican in Wisconsin's 4th) violates free speech is a ludicrous stretch.

IV. There Is No Basis for Converting the Motion into One for Summary Judgment.

In this action, the plaintiffs claim that the provisions of Act 44 are unconstitutional, largely by contrasting certain of its provisions with the districts created by legislation in 2002. Yet, the plaintiffs (and the intervenor-plaintiffs) assert that the movants' opening brief, simply by citing to Act 44 and the statute it replaced, and explaining similarities and differences between them—*by references to the text of the statutes*—costs the movants their ability to seek a judgment on the pleadings. There is no basis for this contention.

The movants' citations to Act 44, to the previously existing 2009–10 Wis. Stat. § 3, as well as, a very few times, to population changes and the 2010 populations of two municipalities are entirely consistent with this Court's consideration of a motion for judgment on the pleadings, for courts "may take judicial notice of documents in the public record . . . without converting a motion to dismiss into a motion for summary judgment." *Pugh v. Tribune Co.*, 521 F.3d 686, 691 n.2 (7th Cir. 2008) (considering publicly reported stock prices in affirming dismissal of case). Both statutes are public records, as are 2000 and 2010 census data.

The plaintiffs themselves attached Act 44 to the Complaint, thereby incorporating it under Fed. R. Civ. P. 10(c) and making its consideration especially proper. And, like the Complaint, Act 44's preamble refers to the statute it replaces. Likewise, each of the statutes and sources of data mentioned in the opening brief were referred to in the Complaint and are "central to the plaintiffs' claim"; thus, their consideration by the Court in dismissing the Act 44 claims on

the pleadings is proper. *Hecker v. Deere & Co.*, 556 F.3d 575, 582 (7th Cir. 2009) (noting that the Seventh Circuit "has been relatively liberal in its approach to the rule" that such documents can be considered, and collecting cases); *Brownmark Films, LLC v. Comedy Partners*, No. 10-cv-1013, 2011 U.S. Dist. LEXIS 72684, *14–15 (E.D. Wis. July 6, 2011) (considering videos in dismissing copyright case with prejudice under Rule 12(b)(6)).

Moreover, the opening brief does not purport to state any facts about the persons or processes involved in the drafting of Act 44 or otherwise to reflect its drafters' intentions. The enacted statute, as a matter of law, draws districts as described in Section I.B. of that brief. What the plaintiffs call factual assertions were offered to point to matters of public record that show why claims such as those made by the plaintiffs have never found justiciable standards and why it would be particularly difficult to place Act 44 on the unconstitutional side of any standard the plaintiffs might seek to devise.[6] Finally, even if this Court were to conclude that anything in the opening brief goes beyond the bounds of a motion on the pleadings, by referring to matters in the Complaint or public records, it should disregard those matters, rather than converting the motion.

CONCLUSION

The Court should dismiss all claims that implicate Act 44. Nothing in these claims necessitates the completion of discovery before granting the pending motions. There is no basis for converting the motion to one for summary judgment, and the plaintiffs have failed to identify any workable standard by which this Court could measure claims of political gerrymandering under any provision of the Constitution.

[6] Indeed, the plaintiffs would require explanations of inconsistency with certain purportedly traditional criteria to support a *prima facie* claim under the very standard they now propose. It would be particularly odd for them to seek conversion based on references to population data, when their own proposed standard for avoiding dismissal *on the pleadings* purports to value minimal population movement above all else. The plaintiffs point to movants' recognition of the "sheer complexity" of analyzing Act 44 as evidence of the need for discovery (Pls.' Br. 15), but the "complexity" is that of the provisions of Act 44 and prior law, not of any "facts" to be discovered.

Respectfully submitted,

FOLEY & LARDNER LLP

Dated this 17th day of January, 2012.

s/ Thomas L. Shriner, Jr.

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