

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

THE WISCONSIN ASSEMBLY DEMOCRATIC	)	
CAMPAIGN COMMITTEE	)	
	)	
Plaintiff,	)	Three Judge Panel Requested
	)	28 U.S.C. 2284(a)
v.	)	
	)	
BEVERLY R. GILL, JULIE M. GLANCEY,	)	
ANN S. JACOBS, JODI JENSEN, DEAN KNUDSON,	)	Case No. 18-cv-763
and MARK L. THOMSEN,	)	
	)	
Defendants.	)	

NOW COMES Plaintiff, the Wisconsin Assembly Democratic Campaign Committee (the “Assembly Democrats”), by its undersigned attorneys, and complains of Defendants Beverly R. Gill, Julie M. Glancey, Ann S. Jacobs, Jodi Jensen, Dean Knudson, and Mark L. Thomsen, not personally, but solely in their official capacities as members of the Wisconsin Elections Commission, as follows:

INTRODUCTION

1. The Assembly Democrats seek both a declaratory judgment that the Wisconsin State Assembly district plan adopted in 2011 (Act 43, or the “Current Plan”) violates the First and Fourteenth Amendments of the United States Constitution and an order permanently enjoining the implementation of the Current Plan in the 2020 election. The Plan imposes severe burdens on the Assembly Democrats’ First Amendment associational rights. Because of the Current Plan, the Assembly Democrats have experienced serious “difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives).” *Gill v. Whitford*, 138 S. Ct. 1916, 1918 (2018) (Kagan, J., concurring). These harms are onerous

enough to trigger strict scrutiny for the Current Plan, which it cannot survive. The Current Plan's pursuit of partisan advantage is not a compelling—or even a legitimate—governmental interest. And the Current Plan's valid nonpartisan goals can all be met by a map that treats the major parties fairly, meaning that the Plan is not narrowly tailored to achieve these aims.

2. In rulings not disturbed by the Supreme Court, the *Whitford* trial court has already held that the Current Plan was *intended* to entrench the Republican Party in power in the State Assembly for the entire decade, *see Whitford v. Gill*, 218 F. Supp. 3d 837, 890-98 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018); that the Plan had the *effect* of producing a large and durable pro-Republican partisan asymmetry, *see id.* at 898-910; and that there was no legitimate *justification* for this intentional and highly effective discrimination, *see id.* at 910-27. As a direct result of the Plan's deliberate, severe, persistent, and unwarranted pro-Republican skew, the Assembly Democrats have been impaired in the performance of virtually all of their associational functions. They have found it harder to raise money. Fewer volunteers have joined their campaigns. They have encountered more resistance among independent voters while campaigning. Recruitment of candidates has become more difficult. And condemned to the legislative minority for the whole decennial cycle, the Assembly Democrats have not been able to enact their preferred policies.

3. Contemporaneous evidence generated by the Current Plan's own drafters as well as empirical evidence developed by experts demonstrate that these burdens on the Assembly Democrats' associational rights are unnecessary. The Plan's authors designed several provisional maps that complied with traditional criteria as well as the Current Plan but were significantly less asymmetric. *See id.* at 921-24. Professor Kenneth Mayer's Demonstration Plan also surpassed the Current Plan's performance along its nonpartisan dimensions while achieving a near-zero

skew. *See id.* at 924-27. And another map generated by a computer algorithm without consideration of partisan data (the “computer-generated map”) does even better compared to the Current Plan in nonpartisan terms, while exhibiting an asymmetry of *exactly* zero. Under any of these maps, the Current Plan’s drafters would still have accomplished their legitimate nonpartisan objectives, while not unconstitutionally burdening the Assembly Democrats’ associational rights.

4. This Court should therefore invalidate the Current Plan. “By placing” the Assembly Democrats “at an enduring electoral disadvantage,” the Current Plan “weakens [their] capacity to perform all [their] functions” and therefore violates the First and Fourteenth Amendments. *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring). To cure this violation, the Court should require the Current Plan’s replacement with a balanced map that neither aims to, nor does, burden the Assembly Democrats’ associational rights.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(a)(3) and (4), and 2284. It also has jurisdiction under 28 U.S.C. §§ 2201 and 2202, the Declaratory Judgments Act, to grant the declaratory relief requested.

6. Pursuant to 28 U.S.C. § 2284(a), a three-judge panel should be convened to hear this case.

7. Venue is proper in this judicial district under 28 U.S.C. § 1391(b). At least one of the Defendants resides in the Western District of Wisconsin. In addition, essentially all of the events or omissions giving rise to this claim occurred in this district.

PARTIES

8. The Assembly Democrats are a legislative campaign committee under Wis. Stat. § 11.0401-04. Their members are thirty-five sitting Democratic representatives in the Wisconsin State Assembly. The Assembly Democrats also have a staff that currently includes an executive director, a finance director, a deputy finance director, a political director, and a deputy political director.

9. The Assembly Democrats work to elect Democrats to the Wisconsin State Assembly. They support both incumbent Democratic representatives and new Democratic candidates for Assembly seats. Their goal is a Democratic majority in the Assembly, able to fight for and pass Democratic policy priorities. To this end, the Assembly Democrats conduct an array of party activities. They solicit and receive contributions as a campaign committee. They recruit new Democratic candidates to run for the Assembly. They provide Democratic candidates with advice and resources on strategy, targeting, fundraising, messaging, and media planning. They cooperate extensively with grassroots volunteers and likeminded organizations. They try to appeal to, and earn the votes of, all Wisconsin voters. And ultimately, they aim to translate electoral success into enacted policies that reflect Democratic values and benefit all Wisconsinites.

10. Defendants Beverly Gill, Julie M. Glancey, Ann S. Jacobs, Jodi Jensen, Dean Knudson, and Mark L. Thomsen are all members of the Wisconsin Elections Commission and are named solely in their official capacity as such. The Wisconsin Elections Commission is a state agency under Wis. Stat. § 15.61, which has “general authority” over and “responsibility for the administration of . . . [the State’s] laws relating to elections and election campaigns,” Wis.

Stat. § 5.05(1), including the election every two years of Wisconsin's representatives in the Assembly.

BACKGROUND

The Current Plan Was Intended to Entrench Republicans in Power

11. As the *Whitford* trial court has already found, “one purpose of Act 43 was to secure the Republican Party’s control of the state legislature for the decennial period.” *Whitford*, 218 F. Supp. 3d at 890; *see also id.* at 896 (“[O]ne of the purposes of Act 43 was to secure Republican control of the Assembly under any likely electoral scenario for the remainder of the decade, in other words to entrench the Republican Party in power.”). Overwhelming evidence supports the court’s finding.

12. For instance, the Current Plan’s drafters “develop[ed] a composite partisan score that accurately reflected the political makeup of population units.” *Id.* at 890. The drafters verified that their measure correlated extremely highly with the output of a regression model created by their hired expert, political science professor Keith Gaddie. *See id.* at 891. The drafters then used their measure to design and assess a series of Assembly maps.

13. These maps “often bore names that reflected the level of partisan advantage achieved,” such as “assertive” and “aggressive.” *Id.* For each map, the drafters produced a spreadsheet that “collected the partisan scores, by district” and included “a corresponding table that listed the number of ‘Safe’ Republican seats, ‘Lean’ Republican seats, ‘Swing’ seats, ‘Safe’ Democratic seats, and ‘Lean’ Democratic seats.” *Id.* The maps steadily increased the number of predicted Republican seats, from 49 in the “Current Map,” to 52 in “Joe’s Basemap Basic,” to 56 in “Joe’s Basemap Assertive,” and to 59 in the “Team Map” (also known as the “Final Map”). *See id.* at 891-93.

14. After completing these maps, the drafters sent them to Professor Gaddie, “who created a visual ‘S’ curve for each map.” *Id.* at 892. These “S” curves “allowed a non-statistician, by mere visual inspection, to assess the partisan performance of a particular map under all likely electoral scenarios.” *Id.* For example, the “S” curve for the Team Map “demonstrate[d] that this map would allow the Republicans to maintain a comfortable majority under likely voting scenarios; their statewide vote share could fall to 48%, and they still would preserve a 54 seat majority in the Assembly.” *Id.* at 894.

15. The Team Map underwent further scrutiny in two additional documents. “In the Tale of the Tape, the drafters compared the partisan performance of the Team Map directly to the then Current Map,” highlighting that the Team Map was expected to yield ten additional Republican seats. *Id.* at 893. And in “summary.xlsx,” “[t]he drafters divided the new Team Map districts into six categories of partisan performance.” *Id.* Among others, five districts were labeled “Statistical Pick Up[s],” fourteen districts were “GOP seats strengthened a lot,” eleven districts were “GOP seats strengthened a little,” and in four districts Democrats were “weakened.” *Id.* at 893-94.

16. After the Team Map was finalized, the drafters sent a memorandum to each Republican incumbent (but not to any Democrat). These memoranda “detailed what percentage of the population in the old and new districts voted for Republican candidates in representative statewide and national elections held since 2004.” *Id.* at 894. One of the drafters also met individually with each Republican incumbent (but not with any Democrat) to discuss the changes made to his or her district. *Id.*

17. Just before the Team Map was finally unveiled to the public, one of the drafters made a presentation to the Republican caucus. He told the caucus: “The maps we pass will

determine who's here 10 years from now.” *Id.* “We have an opportunity and an obligation to draw these maps that Republicans haven’t had in decades.” *Id.*

The Current Plan Has Exhibited a Large and Durable Pro-Republican Partisan Asymmetry.

18. As the *Whitford* trial court also found, “[i]t is clear that the drafters got what they intended to get.” *Id.* at 898. The Current Plan in fact “secured for Republicans a lasting Assembly majority” by “allocating votes among the newly created districts in such a way that, in any likely electoral scenario, the number of Republican seats would not drop below 50%.” *Id.*

19. In the 2012 election, “Republicans garnered 48.6% of the vote, but secured 60 seats in the Assembly.” *Id.* at 899. “In 2014, Republicans increased their vote percentage to 52 and secured 63 Assembly seats.” *Id.* And in 2016, Republican candidates again won 52% of the statewide Assembly vote, which translated into 64 Assembly seats.

20. When these election results are converted into measures of partisan asymmetry, the metrics confirm the enormous Republican advantage under the Current Plan. The Plan exhibited partisan biases of -12.6%, -11.6%, and -12.7%, respectively, in 2012, 2014, and 2016. In other words, had these elections been perfectly tied, Republicans would have won between 61.6% and 62.7% of the seats in the Assembly. Similarly, the Plan exhibited efficiency gaps of -13.3%, -9.6%, and -10.7% in 2012, 2014, and 2016. That is, votes for Democratic Assembly candidates were wasted at a rate from 9.6 to 13.3 percentage points higher than the rate at which Republican votes were wasted. *Id.* at 905. These efficiency gaps are “particularly high by historical levels.” *Id.* at 861. In fact, the Plan’s “average [efficiency gap] ranked fifth out of the 206 plans” in a dataset encompassing state house maps from 1972 to the present. *Id.*

21. That the Current Plan has produced historically large asymmetries in three straight elections itself establishes “the durability of Act 43’s pro-Republican [skew].” *Id.* at 909.

The Plan's durability is corroborated by analysis of how plans' initial efficiency gaps are related to the average efficiency gaps they display over their lifetimes. This analysis shows that "Republicans' ability to translate their votes into seats will continue at a significantly advantageous rate throughout the decennial period." *Id.* The Plan's durability is also confirmed by sensitivity testing, or swinging the expected statewide vote by several points in each party's direction and then calculating what each party's performance would be in each district if it shifted by the same margin as the statewide vote. There is "consensus . . . that some type of [sensitivity testing is] the accepted method of testing how a particular map would fare under different electoral conditions." *Id.* at 899 n.255. This testing indicates that "under any *likely* electoral scenario, the Republicans would maintain a legislative majority." *Id.* at 899.

No Legitimate Justification Exists for the Current Plan's Large and Durable Partisan Asymmetry

22. The *Whitford* trial court further found that no legitimate justification exists for the Current Plan's large and durable partisan asymmetry. Wisconsin's political geography and the drafters' efforts to comply with traditional districting criteria, in particular, "simply do[] not explain adequately the sizeable disparate effect seen . . . under Act 43." *Id.* at 911. At least three types of alternative maps support the court's conclusion.

23. First, the Current Plan's own authors "produced several statewide draft plans that performed satisfactorily on legitimate districting criteria without attaining the drastic partisan advantage demonstrated . . . in Act 43." *Id.* at 926. For example, "in the drafters' initial two draft plans," Joe's Basemap Basic and Joe's Basemap Assertive, "the drafters expected Republican candidates to win 52 and 56 seats, respectively," compared to 59 in the Team Map. *Id.* at 922.

24. Second, Professor Mayer's Demonstration Plan proved that "it is very possible to draw a map with much less of a partisan bent than Act 43 and, therefore, that Act 43's large

partisan effect is not due to Wisconsin's natural political geography." *Id.* at 926. The Demonstration Plan matched or exceeded the Current Plan on every federal and state redistricting criterion. It had a total population deviation below 1%, the same number of majority-minority districts, somewhat more compact districts, and somewhat fewer political subdivision splits. *See id.* at 924. The Demonstration Plan's efficiency gap, however, was fully ten percentage points lower than that of the Current Plan. *See id.*

25. And third, the computer-generated map, yielded by a computer algorithm without considering partisan data, performs even better in terms of nonpartisan criteria when compared to the Current Plan. This map has more equally populated districts than the Current Plan, has the same number of majority-minority districts, splits fewer counties and municipalities, has more compact districts on average, and pairs fewer incumbents. Its efficiency gap, though, is exactly zero when calculated using the drafters' own partisan composite.

The Current Plan Has Severely Burdened the Assembly Democrats' Associational Rights

26. Through its intentional, large, durable, and unjustified pro-Republican asymmetry, the Current Plan has severely burdened the Assembly Democrats' associational rights. In districts where Democratic voters are "cracked" to ensure Republican candidates' victories, the Assembly Democrats' ability to perform their associational functions is impaired by the reality that no matter what they do, Democratic defeat is highly probable. In districts where Democratic voters are "packed" to guarantee Democratic candidates' victories by enormous margins, the Assembly Democrats also have a reduced incentive to conduct their associational activities since these activities are unnecessary to win the seats. And in all districts, cracked, packed, or otherwise, the Assembly Democrats' associational efforts are hamstrung by the fact that the Current Plan was designed to prevent them from obtaining a legislative majority

(absent a pro-Democratic wave of unprecedented size) and thus achieving their most important organizational objective.

27. With respect to fundraising, because of the Current Plan, the Assembly Democrats and likeminded organizations have had more difficulty soliciting and receiving campaign contributions in past elections. Democratic Assembly candidates were outraised by Republican Assembly candidates in 2012 (\$3.0 million compared to \$4.8 million) and in 2014 (\$2.5 million compared to \$4.5 million). The Wisconsin Democratic Party was also outraised by the Wisconsin Republican Party in 2012 (\$1.7 million compared to \$4.2 million) and in 2014 (\$3.4 million compared to \$7.1 million).

28. With respect to volunteer activity, because of the Current Plan, the Assembly Democrats and likeminded organizations have had more difficulty attracting volunteers to Democratic campaigns in past elections. According to the Cooperative Congressional Election Study, significantly fewer Wisconsin Democrats have attended political meetings, erected political signs, and worked for political campaigns in this decennial cycle compared to in the previous decade.

29. With respect to independent voters, because of the Current Plan, the Assembly Democrats have had more difficulty winning support from them in past elections. The Democratic share of the statewide Assembly vote has been lower in this decennial cycle than in any previous decade since at least the 1970s.

30. With respect to Assembly candidates, because of the Current Plan, the Assembly Democrats have had more difficulty recruiting them to run for office in past elections. The Assembly Democrats could not find suitable candidates for twenty-nine districts in 2014—the largest number of seats uncontested by Democratic candidates since at least 1972. On multiple

occasions, the Assembly Democrats identified highly qualified potential candidates, but they declined to run for office because of their inability to compete effectively.

31. With respect to their policy objectives, because of the Current Plan, the Assembly Democrats and likeminded organizations have had more difficulty accomplishing them since the Plan's adoption. According to a political science measure that captures all of a state's laws on a single ideological axis, Wisconsin public policy has become strikingly more conservative since the Plan was implemented. This shift is attributable to the Plan's massive pro-Republican skew, which has resulted in many more conservative Assembly members compared to what a symmetric map would have yielded. *See Devin Caughey et al., Partisan Gerrymandering and the Political Process: Effects on Roll-Call Voting and State Policies*, 16 Election L.J. 453 (2017).

32. Lastly, all of these burdens on the Assembly Democrats' associational rights have already lasted for the better part of a decade, and are likely to continue even into the next redistricting cycle. Because of the durability of the Current Plan's pro-Republican skew, Republicans are highly probable to retain a majority of the Assembly after the 2020 election, absent this Court's intervention. Republicans will thus again control the redistricting process in the Assembly, and will have the opportunity to perpetuate their advantage—and their violation of the Assembly Democrats' rights—for another ten years.

COUNT I – BURDEN ON RIGHT TO ASSOCIATION

33. The Assembly Democrats incorporate and re-allege paragraphs 1-32 of this Complaint as paragraphs 1-32 of this Count I.

34. Party members, party officials, party organizations, and other party supporters enjoy the First Amendment associational rights “to affiliate in a political party and carry out that organization's activities and objects.” *Whitford*, 138 S. Ct. at 1939 (Kagan, J., concurring); *see*

also Vieth, 541 U.S. at 314 (Kennedy, J., concurring in the judgment) (noting “the First Amendment interest of not burdening or penalizing citizens because of . . . their association with a political party”). Moreover, “what is true for party members” is “doubly true for party officials and triply true for the party itself (or for related organizations)” like the Assembly Democrats. *Whitford*, 138 S. Ct. at 1938 (Kagan, J., concurring).

35. “By placing a state party at an enduring electoral disadvantage,” a partisan gerrymander “weakens its capacity to perform all its functions” and thus burdens these associational rights. *Id.*; see also *Common Cause v. Rucho*, ___ F. Supp. 3d ___, 2018 WL 4087220, at *96 (M.D.N.C. Aug. 27, 2018) (“partisan gerrymandering implicates First Amendment precedent dealing with . . . burden[s on] political speech or association”). Specifically, a partisan gerrymander causes “difficulties” for party supporters in conducting associational activities such as “fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives).” *Whitford*, 138 S. Ct. at 1938 (Kagan, J., concurring).

36. A partisan gerrymander is not automatically unconstitutional if it burdens party supporters’ associational rights. Rather, “the rigorousness of [the] inquiry into the propriety of a state election law depends upon the extent to which [it] burdens First and Fourteenth Amendment rights.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); see also *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (a court “must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments”). “[W]hen those rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance.” *Burdick*, 504 U.S. at 434 (internal quotation marks omitted). “But when a state election law provision imposes only reasonable,

nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Id.* (internal quotation marks omitted); *see also Common Cause*, 2018 WL 4087220, at *96 (noting that “‘sliding-scale’ scrutiny” applies to “state election regulations” such as district plans).

37. The Current Plan is unlawful under this well-established framework. First, it imposes severe burdens on the Assembly Democrats’ associational rights. By subjecting the Assembly Democrats to an exceptionally large and durable pro-Republican partisan asymmetry, the Plan deters them from, and hinders them in, raising funds, attracting volunteers to their campaigns, appealing to unaffiliated voters, finding strong candidates to run for the Assembly, and realizing their policy goals for Wisconsin. All of these activities have a sharply reduced likelihood of success because of the Plan’s enormous and persistent pro-Republican skew. The Assembly Democrats thus have a diminished ability to perform these vital functions.

38. The Current Plan cannot survive the strict scrutiny that follows from the severe burdens it imposes on the Assembly Democrats’ associational rights. The Plan’s pursuit of partisan advantage is not even a legitimate—let alone a compelling—governmental interest. *See Crawford v. Marion Cty. Elections Bd.*, 553 U.S. 181, 203 (2008) (observing that if “partisan considerations” are “the only justification” for an election law, that law is unconstitutional). And the Plan’s valid nonpartisan goals (equal population, compliance with the Voting Rights Act, respect for county and municipality boundaries, and compactness) can be achieved to at least the same degree by an Assembly map that treats the major parties symmetrically. Indeed, both the computer-generated map and Professor Mayer’s Demonstration Plan *exceed* the Current Plan’s performance on these nonpartisan criteria while attaining almost perfect partisan symmetry. *See Common Cause*, 2018 WL 4087220, at *96 (holding that a North Carolina congressional map’s

“express partisan favoritism excludes it from the class of ‘reasonable, politically neutral’ electoral regulations that pass First Amendment muster” (quoting *Burdick*, 504 U.S. at 438)).

39. Accordingly, the Current Plan deprives the Assembly Democrats of their civil rights under color of state law in violation of 42 U.S.C. §§ 1983 and 1988.

RELIEF REQUESTED

WHEREFORE, the Assembly Democrats respectfully request that this Court:

40. Declare the Current Plan, established by Act 43, unconstitutional and invalid, and the maintenance of these districts for any primary, general, special, or recall election a violation of the Assembly Democrats’ constitutional rights;

41. Enjoin Defendants and the Wisconsin Elections Commission’s employees and agents, including the county clerks in each of Wisconsin’s 72 counties, from administering, preparing for, and in any way permitting the nomination or election of members of the State Assembly from the unconstitutional districts that now exist;

42. In the absence of a state law establishing a constitutional district plan for the Assembly districts, adopted by the Legislature and signed by the Governor in a timely fashion, establish a redistricting plan that meets the requirements of the U.S. Constitution and federal statutes and the Wisconsin Constitution and state statutes;

43. Award the Assembly Democrats their reasonable attorneys’ fees, costs, and litigation expenses incurred in bringing this action; and

44. Grant such further relief as the Court deems just and proper.

Dated at Madison, Wisconsin, this 14th day of September, 2018.

By: /s/ Lester A. Pines.

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