No. _____

In The
Supreme Court of the United States

LEAGUE OF WOMEN VOTERS OF ILLINOIS,

Appellant,

v.

PAT QUINN, in his official capacity as Governor of the State of Illinois, et al.,

Appellees.

On Appeal From The United States District Court For The Northern District Of Illinois

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. In conducting apportionment does the state burden or "counter" speech when the state removes citizens from one district to another based on the past expression by those citizens of particular viewpoints and to ensure those viewpoints will be checked and balanced in the resulting districts?

2. Do this court's decisions in *Citizens United* and *Arizona Free Enterprise* prohibit the state from intentionally increasing the expression of one viewpoint and decreasing the expression of another viewpoint to ensure "competitive elections" through legislative redistricting?

3. Does the state violate the right of citizens to hear and receive views without government interference when it intentionally removes from a district willing speakers affiliated with a particular party so as to ensure an equal balance of speech within that district?

PARTIES TO THE PROCEEDING

This jurisdiction statement is filed on behalf of the appellant, the League of Women Voters of Illinois, who was the plaintiff in the district court.

The following parties were defendants in the district court: Pat Quinn, in his official capacity as Governor of the State of Illinois; and William M. McGuffage, Judith C. Rice, Bryan A. Schneider, Charles W. Scholz, Jesse R. Smart, Harold D. Byers, Ernest C. Gowen, and Betty J. Coffrin, in their official capacities as members of the Illinois State Board of Elections.

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JURISDICTION

The judgment of the three-judge district court was entered on October 28, 2011. Plaintiff-Appellant League of Women Voters of Illinois (LWV-IL) filed a motion to reconsider on November 6, 2011. The three-judge district court denied the motion on November 16, 2011. The notice of appeal was filed on November 28, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253, which provides for direct appeal to the Court from any order denying a permanent injunction "in any suit required by an Act of Congress to be heard and determined by a district court of three judges." This suit was before a three-judge district court pursuant to 28 U.S.C. § 2284, which provides for such a court in an "action challenging the constitutionality of . . . the apportionment of any statewide legislative body."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment of the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Article IV, Section 3 of the Illinois Constitution of 1970:

> SECTION 3. LEGISLATIVE REDISTRICTING
>
> (a) Legislative Districts shall be compact, contiguous and substantially equal in population. Representative Districts shall be compact, contiguous, and substantially equal in population.
>
> (b) In the year following each Federal decennial census year, the General Assembly by law shall redistrict the Legislative Districts and the Representative Districts.
>
> If no redistricting plan becomes effective by June 30 of that year, a Legislative Redistricting Commission shall be constituted not later than July 10. The Commission shall consist of eight members, no more than four of whom shall be members of the same political party.
>
> The Speaker and Minority Leader of the House of Representatives shall each appoint to the Commission one Representative and one person who is not a member of the General Assembly. The President and Minority

Leader of the Senate shall each appoint to the Commission one Senator and one person who is not a member of the General Assembly.

The members shall be certified to the Secretary of State by the appointing authorities. A vacancy on the Commission shall be filled within five days by the authority that made the original appointment. A Chairman and Vice Chairman shall be chosen by a majority of all members of the Commission.

Not later than August 10, the Commission shall file with the Secretary of State a redistricting plan approved by at least five members.

If the Commission fails to file an approved redistricting plan, the Supreme Court shall submit the names of two persons, not of the same political party, to the Secretary of State not later than September 1.

Not later than September 5, the Secretary of State publicly shall draw by random selection the name of one of the two persons to serve as the ninth member of the Commission.

Not later than October 5, the Commission shall file with the Secretary of State a redistricting plan approved by at least five members.

An approved redistricting plan filed with the Secretary of State shall be presumed valid, shall have the force and effect of law

and shall be published promptly by the Secretary of State.

The Supreme Court shall have original and exclusive jurisdiction over actions concerning redistricting the House and Senate, which shall be initiated in the name of the People of the State by the Attorney General.

3. Section 5 of the General Assembly Redistricting Act of 2011:

Sec. 5. Findings and declarations. In enacting this redistricting plan, the General Assembly finds and declares all of the following:

(a) In establishing boundaries for Illinois Legislative and Representative Districts ("Districts"), the following redistricting principles were taken into account:

(1) each of the Districts contained in the General Assembly Redistricting Act of 2011 was drawn to be substantially equal in population, so that as nearly as practicable, the total population deviation between Districts is zero;

(2) each of the Districts contained in the General Assembly Redistricting Act of 2011 was drawn to be consistent with the United States Constitution;

(3) each of the Districts contained in the General Assembly Redistricting Act of 2011 was drawn to be consistent with the federal Voting Rights Act, where applicable;

(4) each of the Districts contained in the General Assembly Redistricting Act of 2011 was drawn to be compact and contiguous, as required by the Illinois Constitution;

(5) each of the Districts contained in the General Assembly Redistricting Act of 2011 was drawn to be consistent with the Illinois Voting Rights Act of 2011, where applicable; and

(6) each of the Districts contained in the General Assembly Redistricting Act of 2011 was drawn taking into account the partisan composition of the District and of the plan itself.

(b) In addition to the redistricting principles set forth in subsection (a), each of the Districts contained in the General Assembly Redistricting Act of 2011 was drawn to reflect a balance of the following redistricting principles: the preservation of the core or boundaries of the existing Districts; the preservation of communities of interest; respect for county, township, municipal, ward, and other political subdivision boundaries; the maintenance of incumbent-constituent relationships and tracking of population migration; proposals or other input submitted by members of the public and stakeholder groups; public hearing testimony; other incumbent requests; respect for geographic features and natural or logical boundaries; and other

redistricting principles recognized by state and federal court decisions.

(c) For purposes of legislative intent, the General Assembly adopts and incorporates herein, as if fully set forth, the provisions of House Resolution 385 of the Ninety-Seventh General Assembly and Senate Resolution 249 of the Ninety-Seventh General Assembly.

10 ILCS 91/5.

STATEMENT

This case presents a challenge under the First Amendment to the admitted use of "partisan composition" by the State of Illinois in conducting redistricting for the state General Assembly in 2011. *See* General Assembly Redistricting Act of 2011, 10 ILCS 91/1 *et seq*. Appellant LWV-IL contends that the State's decision to consider the "partisan composition" of each house and senate legislative district in order to ensure "competitive" elections is an unlawful government attempt to "balance" election-related or campaign-related speech in violation of the First Amendment.

The Illinois Constitution of 1970 provides that "in the year following each Federal decennial census year, the General Assembly by law shall redistrict the Legislative and Representative Districts." Ill. Const., art. IV, § 3(b). Illinois has 59 Legislative (or "Senate") districts and 118 Representative (or

"House") districts. Each Senate District is composed of two House districts.

The Illinois redistricting process occurred through the spring and early summer of 2011. Public hearings were held throughout the State. However, the draft map being considered was not made public at the hearings until the weekend before the General Assembly voted its approval and adjourned at the end of May 2011. On June 3, 2011, Appellee Governor Patrick Quinn signed the General Assembly Redistricting Act of 2011. The Act incorporates narrative discussions of each district. 10 ILCS 91/10-15.59. The Act states, "each of the districts . . . was drawn taking into account the partisan composition of the District and of the [redistricting] plan itself." 10 ILCS 91/5(a)(6).

Illinois has a reputation and history for gerrymandering. As stated by the three-judge court in a related case, "Like a periodic comet, once every ten years this Court sees a challenge to the redistricting of Illinois's state legislative districts." *Radogno v. Ill. State Bd. of Elections*, No. 1:11-cv-4884, 2011 U.S. Dist. LEXIS 122053, at *3 (N.D. Ill. Oct. 21, 2011) (*Radogno I*). The public hearings throughout the state were held in response to this perception of gerrymandering. Furthermore, in the wake of the arrest of former Governor Rod Blagojevich for attempting to sell an appointment to the United States Senate, then-Lieutenant Governor Quinn appointed an independent body, the Illinois Reform Commission, to investigate political corruption in the state, including

the practice of gerrymandering. Illinois Reform Commission, 100-Day Report, at p. 1 (Apr. 28, 2009). The Commission issued a report in April 2009 that stated, "The Commission's investigation into Illinois' redistricting process revealed a system rife with unfairness, inefficiency and self interest." *Id.* at p. 53. The Commission further states: "Behind closed doors, political operatives scrutinize the voting history of constituents to draw boundaries intended to protect incumbents or draw 'safe' districts for either Democratic or Republican parties." *Id.* at p. 48.

The Illinois Constitution directs the General Assembly to form legislative districts that are "compact, contiguous and substantially equal in population." Ill. Const. Art. IV, § 3. The Illinois Constitution does not authorize any other criteria for determining district boundaries. It does not authorize the General Assembly to consider "partisan composition."

To deter gerrymandering, the Constitution does authorize the creation of a Legislative Redistricting Commission whenever the General Assembly fails to put a redistricting plan into effect by June 30 of the year following the U.S. Census. *Id.* at § 3(b). Effectively, this means that the occasion for such a Commission arises whenever no single party holds both the office of Governor and a majority in each legislative house. The Constitution provides that the Senate President and Minority Leader and the House Speaker and Minority Leader may each appoint two members to the Commission.

If the eight-member Commission is unable to agree on a legislative redistricting plan, the Constitution establishes a method by which one party or the other – by use of a lottery – can pick the ninth member for the tie-breaking vote. Due to the hostility of the parties, the Commissions appointed after the 1980, 1990, and 2000 censuses each failed to achieve a bipartisan or neutral agreement. In 1981, the Democrats won the lottery, resulting in a Democratic-sponsored map. In 1991, the Republicans won the lottery, resulting in a Republican-sponsored map. In 2001, the Democrats won the lottery and put in place a Democratic-sponsored map.

Perhaps not surprisingly given their role in the most recent gerrymandering, the Democrats maintained control of the House, the Senate, and the Governor's seat after the 2010 elections. Consequently, the Democrats were free to put in place a Democratic-sponsored map, without any concession to the Republicans. However, in light of the arrest and ultimate conviction of Governor Blagojevich, and in response to enormous criticism of past gerrymandering, the Governor and Democratic legislative leaders contended that they were not engaging in one-sided gerrymandering. While admitting that the "partisan composition" of each District would be considered, the Governor and Democratic legislative leaders explained such consideration as being part of an effort to create "competitive" districts or to have "competitive" elections that would be "fair" to both parties. In May 2011, in a public hearing of a House Committee,

while defending the consideration of the "partisan composition" of the new districts, House Majority Leader Barbara Flynn Currie stated: "So in my view, this is a competitive map. It's a fair map." Illinois House of Representatives, Special Committee on Redistricting, Public Hearing, at p. 7 (May 22, 2011). She also stated, "Yes, partisanship does play a role in drawing of the House and Senate districts, but while we believe this plan is politically fair, we don't deny that partisan concerns from time to time play a role." *Id.* at p. 6. Upon signing the map, the Governor again stated, "This map is fair [and] maintains competitiveness within congressional districts." *Governor signs congressional map drawn to help Democrats*, Chicago Tribune, (June 24, 2011), http://articles.chicagotribune.com/2011-06-24/news/chi-governor-signs-congressional-map-drawn-to-help-democrats-20110624_1_map-gop-congressmen-congressional-seats (accessed January 25, 2012).

On July 20, 2011, a mix of citizen-voters, Republican state legislators, and others brought an eight-count complaint challenging the redistricting plan under the federal Voting Rights Act of 1965, the First and Fourteenth Amendments of the U.S. Constitution, the Illinois Voting Rights Act of 2011, and the Illinois Constitution. *Radogno I*, 2011 U.S. Dist. LEXIS 122053, at *5. The Illinois Republican Party intervened as a plaintiff.

In a series of opinions issued on October 21, November 22, and December 7, 2011, the three-judge district court dismissed or granted summary

judgment to defendants on each of the claims in that case. *See generally, Radogno I*; *Radogno v. Ill. State Bd. of Elections*, 2011 U.S. Dist. LEXIS 134520 (N.D. Ill. Nov. 22, 2011) (*Radogno II*); and *Radogno v. Ill. State Bd. of Elections*, 2011 U.S. Dist. LEXIS 140559, at *4 (N.D. Ill. Dec. 7, 2011) (*Radogno III*). Most relevant to the instant case are the *Radogno* plaintiffs' claims under the First and Fourteenth Amendments.

The *Radogno* plaintiffs' First Amendment count set forth claims that partisan gerrymandering denied them both freedom of expression and freedom of association. *Radogno I*, 2011 U.S. Dist. LEXIS 122053, at *20. However, both claims were based on their allegations that the redistricting plan burdened their ability to elect their preferred candidate. *Id.* at *21. On October 21, 2011, the court dismissed their freedom of expression claim, holding that there was no "connection between the alleged burden imposed on Plaintiffs' ability to elect their preferred candidate and a restriction on their freedom of political expression." *Id.* In the same opinion, the court dismissed the freedom of association claim because the redistricting plan "has no effect on Plaintiffs' ability to field candidates for office, participate in campaigns, vote for their preferred candidate, or otherwise associate with others for common political beliefs." *Id.* at *22-*23 (internal quotation omitted).

The *Radogno* plaintiffs' Fourteenth Amendment count alleged that the redistricting plan unlawfully burdened their representational rights. *Id.* at *16 (quoting *League of United Latin American Citizens v.*

Perry, 548 U.S. 399, 126 S. Ct. 2594, 165 L. Ed. 2d 609 (2006) (*LULAC*)) (noting that this must be the basis of an equal protection challenge to gerrymandering). On October 21, 2011, the district court dismissed that count without prejudice. The court reasoned that there was no justiciable standard to determine when the plaintiffs' representational rights under the Fourteenth Amendment had been unduly burdened, but gave plaintiffs leave to amend to develop a workable standard. *Id.* at *18. The court found that plaintiffs' attempt at re-pleading failed and dismissed the claim with prejudice on November 22. *Radogno II*, 2011 U.S. Dist. LEXIS 134520, at *4.

On August 16, 2011, the Appellants brought this complaint against Governor Quinn and the members of the State Election Board. The complaint raises a single count under 42 U.S.C. § 1983 that the redistricting plans are unlawful content-based regulations of speech since they apportion voters based on their expression of their political views as Democrats and Republicans. Such an apportionment unlawfully regulates the time, place, and manner of LWV-IL members' speech and "counters" their speech by removing them or their fellow party members into other districts. In addition, such an apportionment unlawfully denies the right of LWV-IL members to hear and receive views free of government control. Appellant LWV-IL does not claim any burden on their "representational rights" or rights to vote under the Fourteenth Amendment. Rather, LWV-IL claims that any burden on their speech rights makes the plan

unlawful since the admitted use of "partisan composition" to balance election-related speech was completely illegitimate under the First Amendment. The complaint does not ask the courts to redraw the map. In fact, it expresses the view that redrawing the map is not a proper function of the court. Instead, LWV-IL seeks an order that the General Assembly must establish a redistricting process free of partisan considerations, similar to that in the states of California, Iowa, and New Jersey. LWV-IL contends that the court has equitable jurisdiction to fashion a remedy that requires a neutral process rather than review and redraw particular maps.

The original complaint challenged the redistricting plans both as set out in the General Assembly Redistricting Plan of 2011 and the Illinois Congressional Redistricting Act of 2011, 10 ILCS 77/1 *et seq*. On September 1, 2011, LWV-IL filed an amended complaint dropping the challenge to the Illinois Congressional Redistricting Act of 2011. This amendment allowed LWV-IL to move to assign the case as a related case to the three-judge district court that was considering *Radogno*, which was still pending at the time. The district court granted LWV-IL's motion and reassigned the case without consolidating it with *Radogno*.

Appellees moved to dismiss the LWV-IL complaint both for lack of standing and on the ground that a constitutional challenge to partisan redistricting was precluded under *Vieth v. Jubelirer*, 541 U.S. 267 (2004). The district court found that LWV-IL did

have standing to assert the First Amendment rights of LWV-IL members and denied that portion of Appellees' motion to dismiss.

However, while acknowledging that LWV-IL may well believe it has a "cutting edge" theory under the First Amendment, the district court granted the motion to dismiss LWV-IL's complaint for failure to state a claim. The court stated that the consideration of "partisan composition" so as to encourage "competitive elections" did not have any effect on speech. The court stated that even if the State moved LWV-IL members into districts based on political viewpoint, sought to balance speech, or attempted to control the views LWV-IL members would hear and receive, the LWV-IL members remained free to speak and run for office, albeit in different districts to which they had been removed because of speech or political affiliation they had previously made known. Therefore, the court found no violation of the First Amendment.

On November 10, 2011, Appellant LWV-IL moved the court to reconsider its decision, arguing that the court failed to apprehend LWV-IL's injury allegations. The court denied the motion on November 16, shortly before the final dismissal of *Radogno*. Appellant LWV-IL filed this appeal on November 28, 2011.

ARGUMENT

The First Amendment issue raised in this direct appeal under 28 U.S.C. § 2284 is substantial – one

never before presented on the merits to this Court in a legislative redistricting case. Relying on *Citizens United v. FEC*, 130 S. Ct. 876 (2010), and *Arizona Free Enterprise Club v. Bennett,* 131 S. Ct. 2806 (2011), LWV-IL challenges Appellees' admitted use of redistricting to "balance" the expression of viewpoints in election campaigns. The "findings and declarations" section of the General Assembly Redistricting Act of 2011 states that "each of the districts . . . was drawn taking into account the partisan composition of the District and of the [redistricting] plan itself." 10 ILCS 91/5(a)(6). The State leaders and Governor stated that the purpose of such consideration was to achieve "fairness" and "competitive" elections because such evening of the playing field in terms of campaigning would "serve the public well." Appellees admit that they had such a purpose. It is their defense that they considered partisan composition not to benefit the Democratic party, but in response to public concern regarding competitive elections.

Appellees are right to think that it would be inappropriate to gerrymander districts on the basis of partisan composition with the goal of benefitting the Democrats. But, this complaint was not brought on behalf of Republican voters. The crux of the complaint is not that the Democrats attempted to improve their political position, regardless of whether that is true. Instead, LWV-IL complains that its members' rights to free speech were abridged merely by Appellees' consideration of partisan composition to determine legislative district boundaries.

As this Court has frequently held, the First Amendment permits such abridgment or regulation of speech if reasonably carried out for "an important or substantial government interest" not related to the content of the speech. *See United States v. O'Brien,* 391 U.S. 367 (1968); *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989). Acceptable "important or substantial" government interests include compactness, contiguity, community, equality of population, and other considerations that are not based on political speech or viewpoint. But, in cases involving content-based regulation of "high value" political speech, the Court applies strict scrutiny and requires the State to set forth a compelling purpose for the regulations. *See, e.g., Citizens United,* 130 S. Ct. at 898. In each of the three ways described below, Appellees distorted and sought to control public debate by achieving a desired balance of partisan speech in each legislative district. Indeed, in this case, Appellees admit that is what they are trying to do. The State's desire to even the playing field in this way is not even a legitimate – much less a compelling – purpose for regulating speech based on political viewpoint. *See Arizona Free Enterprise Club v. Bennett, supra,* at 2825-26.

The district court cast aside, with little analysis, LWV-IL's claim that the State's consideration of partisan composition in any way affected LWV-IL members' speech rights. The court perfunctorily disposed of the question as follows:

> Under the redistricting plan, are LWV's members being in any way prohibited from running for office, expressing their political views, endorsing and campaigning for their favorite candidates, voting for their preferred candidate, or otherwise influencing the political process through their expression? The answer is no.

LWV-IL, 2011 U.S. Dist. LEXIS 125531, at *10. Beyond this, the court provided little more than the obviously truthful statement that "Illinois's redistricting plan does not prohibit LWV's members from engaging in any . . . 'vital' expressive act." LWV-IL does not quibble with this statement, but argues instead that redistricting for "competitive" elections abridges LWV-IL members' speech for purposes of the First Amendment in three ways.

First, it places certain LWV-IL members into new districts to take part in State-designed "competitive" election campaigns because of their party affiliation, i.e., the views they are likely to express during such campaigns. In so doing, Appellees are regulating the time, place and manner in which LWV-IL members can debate the issues and campaign for or against candidates in legislative elections based upon the views that LWV-IL members are likely to express. If too many LWV members are affiliated with a political party whose campaign Appellees want to offset, the State will move the LWV members elsewhere in order to encourage "competitive" elections. It is true that any redistricting "abridges" in the literal sense of limiting the scope of speech by placing citizens in

districts and regulating the place if not the time and manner in which they can speak out or campaign for representatives of their choosing. However, here, Appellees do so with the expressed intent of balancing political viewpoints, thus subjecting their actions to strict scrutiny.

One need not equate a legislative district with a "public forum" as that term is normally used in First Amendment jurisprudence to see at least an analogy to "public forum" cases. It would be unlawful for the State to create a public forum for debate and then to admit or exclude persons from that public forum for debate on the basis of their political views or party affiliation. Similarly, the government should not be handing out tickets for admission into a district for campaigning based upon one's political views.

Second, the State is abridging speech in a different sense by "countering" the speech of LWV-IL members. In ostensibly acting to ensure competitive campaigns, the State relocates citizens to new or different districts with the specific purpose of countering or offsetting speech in favor of one political party with speech from the other. LWV-IL members are affected by this phenomenon whether they are relocated to a new district or remain in the same district they were in before redistricting. For instance, in a hypothetical district where LWV-IL members were affiliated with the dominant party in 2010, State Appellees admit that they attempted to remove those affiliated with the dominant party from the district and move those affiliated with the weaker party into

the district. In so doing, the State: (1) countered the speech of LWV-IL members that wished to participate in a campaign in the district by removing them from that district; (2) countered the members' speech who remained in the district by moving opposing voices into the district in order to "balance" the district's politics; and (3) countered the members' speech who remained in the district by removing the voices of members who are politically aligned with them.

To be sure, the LWV members can go on speaking – and will – but in other districts, over different candidates, and with a different group of citizens. In a literal or physical sense, they can go on speaking. Nonetheless, as this Court held in *Arizona Free Enterprise Club's Freedom Club,* such "countering" of speech is a "burden" on speech. 131 S. Ct. at 2818. In that case, Arizona defended a law that allowed it to give more money to a publicly-funded candidate if a privately-funded opponent raised money over a certain threshold. The Arizona law did not prohibit the privately-funded opponent's speech. In fact, the privately-funded candidate was not even a plaintiff. The law did not prohibit the privately-funded candidate's supporters from speaking in favor of the candidate either. Nonetheless, the Court found that the Arizona law countered, and therefore burdened, the speech of those supporting the privately-funded candidate. In the same way, just as the supporters of a privately-funded candidate who is too successful in fundraising may not have their speech "countered" by the State, so an LWV member who is too successful in

making her political party dominant in a district may not be removed to another district to give the other side a chance. Just as in *Arizona Free Enterprise Club's Freedom Club,* that countering is an impermissible "burden" on her speech.

If Appellees have the right to "even the playing field," it is a warning to activists, as LWV-IL members tend to be, that if they are too successful – if their candidate wins by too big a margin – Appellees have the right to remove them from the district. There is a danger in registering too many Democrats, or too many Republicans. It may trigger by some unascertainable standard the removal of such persons. Whatever LWV-IL members may do to change the political character of a district, the State of Illinois reserves the right to undo it. If LWV-IL members go too far or solicit voters too successfully, the State of Illinois will intervene. This seems at least as great a burden on speech as the Arizona law challenged by a non-candidate group. In any event, it is most definitely subject to strict scrutiny under the case law of this Court. *See, e.g., Citizens United*, 130 S. Ct. at 898.

Third and finally, the State is abridging speech by seeking to fix the "balance" of speech that the State believes it is in the best interests of LWV-IL members to hear and receive. The State does so by removing "willing speakers" affiliated with the dominant party out of old districts and into new districts where they will be engaged in different campaigns. The District Court below ignored LWV-IL's references to the right to hear and receive the speech of others.

See LWV-IL, 2011 U.S. Dist. LEXIS 125531, at *10-*11. But this Court has repeatedly upheld the existence of such a right, beginning with its declaration in *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143 (1943). In that case, the Court struck down a no-solicitation law in part on the grounds that it restricted the speech of the plaintiff, a Jehovah's Witness that was going door to door in the community to distribute religious literature. But, the Court also recognized that "[t]he right of freedom of speech and press . . . embraces the right to distribute literature *and necessarily protects the right to receive it.*" *Id.* (emphasis supplied, internal citation omitted); *cf. LWV-IL*, 2011 U.S. Dist. LEXIS 125531, at *10-*11 (distinguishing *City of Struthers* on the grounds that it did involve an actual restriction on the plaintiff's speech, in the form of door-to-door solicitation).

Since *City of Struthers*, this Court has repeatedly recognized that there is a First Amendment right of the listener not to endure such censorship of views that the State believes the listener should hear and receive. *See Kleindienst v. Mandel,* 408 U.S. 753, 762 (1975) (holding that the First Amendment encompasses the "right to receive information and ideas"); *Stanley v. Georgia,* 394 U.S. 479, 480 (1965) ("The Constitution protects the right to receive information and ideas"); *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965) ("The right of freedom of speech . . . [includes] not only the right to utter or to print, but . . . the right to receive, the right to read . . . "[.]); *Lamont v. Postmaster General,* 381 U.S. 308 (1965) ("The

dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them."). Indeed, this Court has recognized that the rights of the listener are distinct from, and at times stronger than, the right of the speakers themselves. *See Virginia State Board of Pharmacy et al. v. Virginia Citizens Council,* 425 U.S. 748, 756-57 & 762-65 (1976) (noting that the "commercial" nature of the price of pharmaceuticals may vary based on whether it is analyzed from the perspective of the pharmacist or the consumer receiving the information); *see also Red Lion Broadcasting Co. v. Federal Communications Commission,* 395 U.S. 367, 390 (1969) ("[It] is the right of the viewers and listeners not the right of the broadcasters which is paramount.").

Moreover, the Court has applied the right to hear and receive the speech of others without government interference to election campaigns. *See, e.g., First National Bank of Boston v. Belotti,* 435 U.S. 765, 783 (1978) ("[The] First Amendment . . . afford[s] the public access to discussion, debate and the dissemination of information and ideas."). This makes sense because "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation" of our system of government. *Buckley v. Valeo,* 424 U.S. 1, 14 (1976). Given the doctrine laid out by the Court in *Martin* and its progeny, it is clear that the State cannot remove citizens from that discussion because "too many" may be on the wrong side of the issue or "too many" such members may be

questioning the qualifications of a candidate nominated by a particular party. If the willing speakers are removed in an incidental manner by the application of neutral criteria, then there is no unreasonable burden on First Amendment rights. But a redistricting law that is designed to remove willing speakers on the basis of their affiliations with one party or another is a law that burdens the First Amendment rights of those LWV-IL members who would be hearing and receiving that political speech, and should be subject to strict scrutiny. *See Virginia State Bd. of Pharmacy*, 425 U.S. at 756 ("Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both.").

By seeking to achieve "competitive balance," the General Assembly Redistricting Act of 2011 inevitably and necessarily removes party activists from legislative districts on the basis of their party affiliation. Those party activists canvass, phone bank, ask for money, and urge LWV-IL members to vote for their favored candidate. Such targeted removal necessarily affects the "contacts," the button-holing, the signage and the balance of campaign-related appeals that LWV-IL members hear and receive. When Appellees are burdening or disfavoring some political speech in this manner just because of its content, the Court should apply the same strict scrutiny to that action that it applied in *Citizens United* and *Arizona Free Enterprise.* The First Amendment gives no right to these State Appellees to determine the views that

LWV-IL members should hear and receive, even if they remain free to speak themselves.

In short, no matter how one evaluates the harm to LWV-IL members in this case, the problem is that the Appellees, while purportedly attempting to ensure "competitive" elections that are "fair" to both parties and "serve the public well," are self-evidently trying to ensure elections where both sides are able to have competitive appeals. That is, by pulling out voters affiliated with a dominant party and putting in voters affiliated with the minority party, they are trying to restrict the voices on behalf of the dominant party and pumping up the volume of voices on behalf of the opposition. In other words, they are doing just what the Court prohibited in *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), and again in *Citizens United*. As this Court stated, the State may not seek to restrict the speech of some elements of our society in order to enhance the relative voice of others. *Citizens United,* 130 S.Ct. at 904 (quoting *Buckley*, 424 U.S. at 48). This is not a proper role of government under the First Amendment. *Citizens United,* 130 S.Ct. at 898 ("Premised on a mistrust of governmental power, the First Amendment stands against attempts to disavow certain subjects or viewpoints."). The three-judge district court did not deny that *Citizens United* and *Arizona Free Enterprise* prohibit such conduct, if the State actually regulated speech, but found that *Vieth* controlled the outcome here.

But *Vieth* does not control. LWV-IL does not claim a "dilution" of the right to vote or a voting-related injury like those alleged in *Vieth* and *LULAC*. LWV-IL does not claim any impact on the "representational" rights of its members. It does not invoke the Fourteenth Amendment. In challenging this redistricting plan for its interference with campaign-related speech, LWV-IL does not even allege that its members will actually vote, or that the right to vote as such is impaired. Rather LWV-IL alleges by drawing districts to balance political viewpoints, Appellees have restricted the First Amendment rights of LWV-IL members to speak in the new districts without regard to the viewpoints they are likely to express – and have restricted their right to listen without regard to the viewpoints they are likely to hear and receive.

Democracy is a form of communication. *See Buckley v. Valeo,* 424 U.S. 1, 14 (1976) ("[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation" of our system of government). Redistricting attempts to disrupt the existing patterns of communication – not as a by-product of pursuing some neutral criterion, like equality of population, but with the deliberate purpose of changing the kind of viewpoints being expressed. It may be a laudable thing to even the sides in terms of speech. It may be a good thing to tamp down partisanship in this way. But, as this Court has stated, under the First Amendment it is not a legitimate role

of the State to ensure campaigning is "competitive" and "fair" to both sides as in a game:

> Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election – a dangerous enterprise and one that cannot justify burdening protected speech. The dissent essentially dismisses this concern, but it needs to be taken seriously; we have, as noted, held that it is not legitimate for the government to equalize electoral opportunities in this manner. And such basic intrusion by the government into the debate over who should govern goes to the heart of First Amendment values.
>
> "Leveling the playing field" can sound like a good thing. But in a democracy, campaigning for office is not a game. It is a critically important form of speech. The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom – the "unfettered interchange of ideas" – not whatever the State may view as fair.

Arizona Free Enterprise, 131 S. Ct. at 2826 (internal quotes and citations omitted).

Indeed, the intrusion here is more "basic" and more systematic than that in *Arizona Free Enterprise*. It is an admitted attempt to replace the "unfettered interchange of ideas" with Appellees' own judgment as to how to line up the interchange.

Gaffney v. Cummings, 412 U.S. 735 (1973), to which the District Court refers, does say that there is no bar under the *Equal Protection Clause* to the State's consideration of "fairness" to the political parties in a redistricting scheme. But in that case, which involved only the right to *vote,* there was no claim under the First Amendment, or any allegation that the state was trying to balance speech. Given this Court's opinions in *Buckley v. Valeo, supra*, or *Citizens United, supra,* it does not make sense to extend a "political fairness" principle as in *Gaffney* to justify a "balancing" of First Amendment speech.

Nothing in *Vieth v. Jubelirer,* 541 U.S. 267 (2004), precludes the application of the First Amendment to a redistricting plan that is an attempt to balance speech. The District Court is simply wrong that the plurality in *Vieth* rejected a First Amendment claim. The plurality did no such thing. There was no First Amendment claim before the Court in *Vieth.* Indeed, the plurality in *Vieth* was explicit on that point. "Only an equal protection claim is before us in the present case – perhaps for the very good reason that a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in gerrymandering." *Id.* at 294 (emphasis in original). Rather than reject a First Amendment claim, the plurality was commenting that a First Amendment claim might seek more draconian relief than the partisans on both sides may wish. This statement may be more properly taken as the plurality's comment on the partisanship of Democrats who sue

Republicans, and vice versa, but want to keep *some* right to gerrymander for themselves. Unlike such litigants, however, the LWV-IL is not pursuing any partisan interest. Nor is it seeking any particular "balance" to be devised under some constitutional standard. It may be true that the plurality in *Vieth* was skeptical of the use of the First Amendment to assert "representational rights," i.e., a First Amendment right to a balance between the parties. In this case, however, LWV-IL asserts no such "representational rights." LWV-IL is asserting the traditional and core First Amendment right of speech. To protect that core right, LWV-IL *does* seek to eliminate "all consideration" of political affiliation, when redistricting is used to balance speech explicitly by consideration of "partisan composition." For this purpose, a simple judicial standard is at hand: to quote the plurality in *Vieth,* "no consideration" means no consideration. The LWV-IL is seeking the "justiciable" standard that no political party launching a gerrymandering case has ever sought before – for the good reason that the two principal parties want to protect the gerrymandering that goes on in states where those parties are in control. LWV-IL does not seek a decision by the court as to which districts are tainted and which are not. The state law at issue says that the General Assembly explicitly considered "partisan composition" to balance campaign-related speech in every single district and in the redistricting plan as a whole. Consequently, the redistricting plan as a whole must be struck down.

The issue of a remedy is not before this Court on this appeal from the district court's decision granting Appellees' motion to dismiss. However, to be clear, LWV-IL does not believe it appropriate for this Court or the district court to develop a fair map in response to this suit. Rather, LWV-IL seeks relief to change or de-politicize the process by which the map is created. The federal courts have broad equitable authority to fashion a remedy to redress constitutional violations. *Swann v. Charlotte-Mecklenberg Bd. of Educ.,* 42 U.S. 1, 15 (1971). The most appropriate remedy for the violations here is for the district court to order the State of Illinois to develop a process that includes procedural safeguards to ensure that there is no consideration of "partisan composition" in the development of redistricting. The proposed relief should be tailored to the constitutional harm. The State of Illinois itself should develop such a plan, but redistricting procedures with such safeguards already exist in California, Iowa, and New Jersey. Such a procedure need not restrict the appropriate consideration of community of interest and other neutral criteria by some neutral party.

CONCLUSION

The application of *Citizens United* and *Arizona Free Enterprise* to this alleged State attempt to balance speech raises substantial questions of First Amendment law which only this Court can resolve. The opinion of the District Court should not be allowed to stand. The District Court is in error in claiming that the State's attempt to balance the political views citizens are likely to express or hear and receive in the re-drawn districts does not involve First Amendment speech. The District Court is in error when it fails to consider that placing citizens in districts based on their political viewpoints is necessarily a content-based regulation of the speech they are likely to express. It is in error when it claims that the State is not burdening or countering the speech of LWV-IL members when the State moves them intentionally to new districts to ensure an "even playing field" in terms of speech likely to be expressed for or against the major political parties. It is in error when it does not even discuss the right of citizens to hear and receive views without State interference, despite the State's removal of willing speakers on behalf of one viewpoint to new and different districts in order to ensure elections in which the two parties and their supporters will be in some rough parity in their ability to make campaign-related appeals. LWV-IL alleges in its complaint that Appellees attempted to balance speech in every legislative district – an attempt acknowledged by the Appellees at least for purpose of their motion to dismiss for failure to state

a claim. Since the First Amendment issue must now be decided on the merits in one way or another by resolution of this appeal, which may be invoked as precedent hereafter, Appellant LWV-IL respectfully submits this case should be set for appropriate briefing and oral argument.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

THE LEAGUE OF WOMEN VOTERS, Plaintiffs, vs PAT QUINN, in his official capacity as Governor, of the State of Illinois, and WILLIAM M. McGUFFAGE, JUDITH C. RICE, BRYAN A. SCHNEIDER, CHARLES W. SCHOLZ, JESSE R. SMART, HAROLD D. BYERS, ERNEST C. GOWEN and BETTY J. COFFRIN in their Official capacities as members of the Illinois State Board of Elections, Defendants.	NO. 1:11-cv-5569 Judge Elaine E. Bucklo Judge Diane S. Sykes Judge Philip P. Simon

OPINION AND ORDER

(Filed Oct. 28, 2011)

This is the second of two cases filed in this district challenging the Illinois General Assembly's most recent redistricting of the state's legislative districts. This one is brought by the League of Women Voters (LWV) who claim that their First Amendment rights have been violated by the redistricting plan. The

Defendants – the Governor and individual members of the Illinois State Board of Elections – have now moved to dismiss. Because the redistricting plan in no way burdens the exercise of First Amendment rights of LWV or its members, Defendants' Motion to Dismiss the Amended Complaint [DE 17] will be granted.

BACKGROUND

Just like the first redistricting challenge brought by Christine Radogno, the Minority leader of the Illinois Senate, and others (1:11-cv-4884), this case challenges the General Assembly Redistricting Act of 2011, which cemented Illinois's proposed new map of 118 House districts and 59 Senate districts. After the first challenge to the redistricting plan had already been filed, LWV initiated this case. LWV's original complaint challenged both the redistricting plan for Illinois's General Assembly seats and the redistricting plan for Illinois's federal seats in the House of Representatives. Since that complaint was sufficiently related to the redistricting challenge brought by Radogno, this case was reassigned to us so that it could be handled by the same three-judge panel handling the Radogno case. This reassignment was on the condition, however, that LWV file an amended complaint limited only to the redistricting plan for Illinois's General Assembly seats. That Amended Complaint was filed on September 1, 2011, and Defendants filed their motion to dismiss a week later.

Defendants' motion originally challenged LVW's [sic] standing to assert a First Amendment challenge on behalf of its individual members. Defendants did not pursue that challenge further in their reply brief, however, and for good reason, as LVW's [sic] associational standing is sufficiently well established in the Amended Complaint. Moreover, all parties now agree that Governor Pat Quinn should be dismissed as a Defendant. The only issue now before us is thus whether LVW's [sic] Amended Complaint states a cognizable claims [sic] against the remaining Defendants.

DISCUSSION

LWV's Amended Complaint raises a single count based on a discrete legal theory: Illinois's redistricting plan is unconstitutional because it is a content-based restriction on LWV members' First Amendment rights of expression. LWV argues that by "adopt[ing] a redistricting scheme based on partisan speech and other content-based expressive activity," the Defendants have implemented an unconstitutional content-based restriction on speech "without any safeguards to ensure the least possible regulation or abridgment of protected speech and expressive activity." [DE 11 at 2.]

LVW [sic] contends that the redistricting plan explicitly "took account of the 'partisan composition' of the new districts," and the plan is therefore "based on the content of partisan speech or viewpoints of

residents." [DE 11 at 7.] The redistricting plan thus "unlawfully abridge[s] or regulate[s] expressive activity" of LWV's members because it is "attempting to control or influence the kinds of views, opinions and speech that members of the League of Women Voters of Illinois and other state residents placed in those districts are likely to express or hear and receive." [DE 11 at 7, 9.] Precisely how the redistricting plan accomplishes this feat, however, is entirely unclear from the Amended Complaint.

LWV correctly acknowledges that this is a novel legal theory for redistricting cases. It grows out of two new Supreme Court holdings, *Citizens United v. Federal Election Comm'n,* 558 U.S. ___, 130 S.Ct. 876 (2010) and *Arizona Free Enterprise Club's Freedom Club v. Bennett,* ___ U.S. ___, 131 S. Ct. 2806 (2011), which – according to LWV – "significantly strengthen the limiting effect of the First Amendment on government regulation of electoral matters." [DE 26 at 3.]

In LWV's view, *Citizens United* and *Arizona Free Enterprise* "foreclose the use of 'viewpoint based' redistricting to control, adjust or influence electoral speech or partisan activity in state legislative campaigns on First Amendment grounds." [DE 26 at 6.] According to LWV, by considering "the 'partisan composition' of a district in redrawing its lines," the redistricting plan is "*countering* the expression by LWV-IL members and other citizens who expressed views tilting their districts too far to one side or the other." [DE 26 at 12.] Under *Citizens United*

and *Arizona Free Enterprise*, this viewpoint-based gerrymandering violates the First Amendment because Illinois "may not 'seek to restrict the speech of some elements of our society in order to enhance the relative voice of others.'" [DE 26 at 3 (quoting *Citizens United*).] Illinois's attempt "to balance or control electoral speech" is therefore – the argument goes – "a violation of the First Amendment because it seeks to control 'the marketplace of ideas.'" [DE 26 at 2.] As LWV summarizes its position, "the government is regulating electoral speech for a purpose that the Supreme Court has condemned as unlawful in both *Citizens United* and *Arizona Free Enterprise*. . . ." [DE 26 at 7.]

It is of course true that the First Amendment broadly protects political expression in order to foster the uninhibited exchange of ideas among the citizenry. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). In *Buckley,* for example, a law that capped a candidate's expenditure of personal funds to finance a political campaign was found to burden the candidate's First Amendment right to engage in unfettered political speech. *Id*; *see also Davis v. Federal Election Comm'n*, 554 U.S. 724, 741 (2008) (finding unconstitutional a law that "imposes a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech").

The problem with LWV's argument, however, is that it brushes aside a critical first step to bringing a content-based First Amendment challenge: the challenged law must actually restrict some form of

protected expression. It seems a rather obvious point. *See*, *e.g.*, *Meese v. Keene*, 481 U.S. 465, 480-82 (U.S. 1987) (reversing a district court finding that the Foreign Agents Registration Act's use of the term "political propaganda" violated the First Amendment because, in "the absence of any direct abridgment of speech," the Act "placed no burden on protected expression"); *Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1104 (10th Cir. 2006) ("To qualify as a content-based 'regulation of speech,' a statute must restrict speech or expressive conduct in the first place."); *Asociación de Educación Privada de P.R., Inc. v. Echevarría-Vargas*, 385 F.3d 81, 84-85 (1st Cir. 2004) (a law requiring disclosure of information about changes in school textbooks was not a content-based restriction because it "[did] not purport to address the content of speech; nor [did] it purport to regulate speech at all"); *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999) ("As a threshold requirement for the application of the First Amendment, the government action must abridge or restrict protected speech.").

This threshold requirement was obviously met in both *Citizens United* and *Arizona Free Enterprise,* as well as in *Buckley* and *Davis*, as those cases all stand for the proposition that a law may not burden campaign expenditures – long recognized as a form of *speech* – unless it is justified by a compelling state interest. It would therefore be correct to say that *Citizens United* and *Arizona Free Enterprise* "significantly strengthen the limiting effect of

the First Amendment on government regulation of" ***campaign contributions***. But LWV advertises these cases as applying more broadly: they "significantly strengthen the limiting effect of the First Amendment on government regulation of ***electoral matters***." [DE 26 at 3 (emphasis added).]

To which we ask: what does "government regulation of electoral matters" even mean? The way LWV has framed the issue, "electoral matters" is apparently supposed to represent some sort of protected form of expression on par with campaign expenditures. Indeed, LWV repeatedly invokes similarly vague phrases as if they were well recognized categories of expression under the First Amendment. In addition to "electoral matters," LWV also states that the redistricting plan implicates "electoral speech or partisan activity" [DE 26 at 6], "election-related speech" [DE 26 at 8], "electoral debate" [DE 26 at 10], and "free electoral debate" that the redistricting plan "seeks to control or distort" [DE 26 at 14].

Whatever these phrases mean, none of them even begins to satisfy the threshold requirement for a content-based First Amendment challenge here: a showing that the redistricting plan is preventing LWV's members from engaging in expressive activities. Under the redistricting plan, are LWV's members being in any way prohibited from running for office, expressing their political views, endorsing and campaigning for their favorite candidates, voting for their preferred candidate, or otherwise influencing

the political process through their expression? The answer is no.

LWV's summary of its members' alleged injuries is similarly vague about the speech or expression actually being burdened by the redistricting plan:

> The viewpoint based redistricting here places distinct burdens on First Amendment rights of LWV-IL members and other citizens. First, it "counters" the views expressed by some LWV-IL members – whether they be Republicans in districts that are too Republican or Democrats in districts that are too Democratic. Second, it interferes with the kind of debate they would hear and receive if the government did not interfere at all. *See Martin v. City of Struthers, Ohio*, 319 U.S. 141. Sometimes the only contested elections take place in the party primaries. There is a different "interchange of ideas" in a district strongly consisting of adherents to one party's views – in one-sided or strongly Democratic or Republican districts, the content of the debate can be quite different, with more competitive primary elections than districts where there is an even balance.

[DE 26 at 18.]

Once again, nothing in this summary indicates that the redistricting plan actually restricts expression. Indeed, LWV's citation to *City of Struthers* is instructive. That case struck down an Ohio city ordinance that prohibited knocking on doors while leafleting, finding that the "freedom to distribute

information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society" that it qualifies as a protected form of expression under the First Amendment. *City of Struthers*, 319 U.S. at 146-147. Illinois's redistricting plan does not prohibit LWV's members from engaging in any similarly "vital" expressive act.

On the contrary, LWV's challenge looks much more like the challenge proposed and rejected in *Walker*. In that case the plaintiff brought a content-based First Amendment challenge to Utah's referendum requirement, which required a super-majority vote for certain types of ballot questions. Plaintiff's theory, as summarized by the Tenth Circuit, was that "every structural feature of government that makes some political outcomes less likely than others – and thereby discourages some speakers from engaging in protected speech – violates the First Amendment." *Walker*, 450 F.3d at 1100. The court affirmed the dismissal of this theory because while "[t]he First Amendment ensures that all points of view may be heard[,] it does not ensure that all points of view are equally likely to prevail." *Id*. at 1101.

Similarly here, LWV seems to believe that since the redistricting plan makes "some political outcomes less likely than others," the speech of its members is burdened or discouraged. We fail to see how. The redistricting plan does not prevent any LWV member from engaging in any political speech, whether that be expressing a political view, endorsing and campaigning for a candidate, contributing to a candidate,

or voting for a candidate. And while it is true that the redistricting plan undoubtedly means that one party is more likely to be victorious in any given district, the First Amendment, to repeat, "does not ensure that all points of view are equally likely to prevail."

Note, moreover, the ramifications of LVW's theory: redistricting plans could never take partisanship into consideration without violating the First Amendment. This is an untenable position, as the Supreme Court has long emphasized that some "burdening" of partisan viewpoints is an inevitable part of drawing district lines. *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("[p]olitics and political considerations are inseparable from districting and apportionment . . . The reality is that districting inevitably has and is intended to have substantial political consequences"). Indeed, the implications of LVW's [sic] argument is exactly what the plurality opinion in *Vieth v. Jubelirer*, 541 U.S. 267 (2004) warned against and rejected: "a First Amendment claim [for political gerrymandering], if it were sustained, would render unlawful all consideration of political affiliation in districting, just as it renders unlawful all consideration of political affiliation in hiring for non-policy-level government jobs." *Vieth*, 541 U.S. at 294 (plurality).

In the end, we have no doubt that LWV thinks it is on the cutting edge of redistricting law, presenting a novel legal theory based on a creative and nuanced reading of recent Supreme Court cases. We read those

cases much differently. Therefore, LWV's Amended Complaint will be dismissed with prejudice.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss Amended Complaint [DE 17] is **GRANTED**. Plaintiff's Amended Complaint is **DISMISSED WITH PREJUDICE**.

SO ORDERED.

ENTERED: October 27, 2011

s/ Elaine E. Bucklo
ELAINE E. BUCKLO, JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

s/ Diane S. Sykes
DIANE S. SYKES, JUDGE
UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

s/ Philip P. Simon
PHILIP P. SIMON, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LEAGUE OF WOMEN VOTERS OF ILLINOIS, *Plaintiff*, v. PAT QUINN, in his official capacity as Governor of the State of Illinois, and WILLIAM M. McGUFFAGE, JUDITH C. RICE, BRYAN A. SCHNEIDER, CHARLES W. SCHOLZ, JESSE R. SMART, HAROLD D. BYERS, ERNEST C. GOWEN AND BETTY J. COFFRIN in their Official capacities as Members of the Illinois State Board of Elections, *Defendants*.	Case No. 11-CV-5569

NOTICE OF APPEAL

(Filed Nov. 28, 2011)

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NOTICE IS HEREBY GIVEN that, pursuant to 28 U.S.C. § 1253, Plaintiff League of Women Voters of Illinois hereby appeals to the United States Supreme Court from this Court's Memorandum Opinion and Order filed and entered on October 28, 2011, granting Defendants' motion to dismiss Plaintiff's Amended Complaint, and from this Court's Minute Order entered on November 16, 2011, denying the Plaintiff's motion under Fed. R. Civ. P. 59(e) to alter or amend the judgment.

Dated: November 28, 2011

By: /s/ Thomas Geoghegan

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[Certificate Of Service Omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

LEAGUE OF WOMEN VOTERS OF ILLINOIS, *Plaintiff,* v. PAT QUINN, in his official capacity as Governor of the State of Illinois, and WILLIAM M. McGUFFAGE, JUDITH C. RICE, BRYAN A. SCHNEIDER, CHARLES W. SCHOLZ, JESSE R. SMART, HAROLD D. BYERS, ERNEST C. GOWEN AND BETTY J. COFFRIN in their Official capacities as Members of the Illinois State Board of Elections, *Defendants.*	Case No. 11-cv-5569 Hon. Elaine E. Bucklo Hon. Diane S. Sykes Hon. Philip P. Simon

FIRST AMENDED COMPLAINT

1. In violation of the First Amendment, the defendant Governor and the Illinois General Assembly have placed Illinois residents into new state legislative districts based at least in part on the partisan viewpoints and opinions such residents are likely to express or that they are likely to hear and receive. The redistricting principles set out in House

Resolution 385 and Senate Resolution 249 state that each new district "was drawn taking into account the partisan composition of the District and of the Plan itself." The General Assembly and Governor have unlawfully selected residents to speak, debate, assemble and vote in these districts based upon their political viewpoints and opinions, without safeguards against the misuse of such criteria to regulate or abridge First Amendment rights for partisan ends. The legislative leaders and Governor claim that they have sought to establish "competitive" state legislative districts. However, there can be a partisan use of "competitiveness" – pursued in some districts and ignored in others – that makes the political system of the State as a whole less responsive to shifts in public opinion. While the League of Women Voters of Illinois supports the idea that "competitiveness" can be a goal, it seeks to bar any redistricting plan that seeks to create a particular balance of viewpoints, without appropriate safeguards against any possible abridgment or curtailment, for partisan ends, of First Amendment expressive activity.

2. Accordingly, since the Governor and General Assembly have adopted a redistricting scheme based on partisan speech and other content-based expressive activity, without any safeguards to ensure the least possible regulation or abridgment of protected speech and expressive activity, plaintiff LWV of Illinois seeks to enjoin the implementation of the 2011 redistricting plan. LWV of Illinois seeks an order requiring the state to replace the redistricting plan,

by using an impartial decision-making process to create a new map that either dispenses with content-based criteria or uses them in a neutral and transparent manner, helping ensure such abridgement may only be conducted to serve a legitimate non-partisan government purpose.

PARTIES

3. Plaintiff League of Women Voters of Illinois (LWV of Illinois) is a membership-based organization with members residing in nearly every legislative district and throughout the State of Illinois. The LWV of Illinois and its members seek to promote public debate and to inform and educate residents of the state on the issues of the day and political and civic affairs.

4. Defendant Patrick Quinn is Governor of the State of Illinois and is sued here in his official capacity.

5. Defendants William M. McGuffage, Judith C. Rice, Bryan A. Schneider, Charles W. Scholz, Jesse R. Smart, Harold D. Byers, Ernest C. Gowen, and Betty J. Coffrin are the individual members of the Illinois State Board of Elections and are sued here in their official capacities.

JURISDICTION AND VENUE

6. Plaintiff LWV of Illinois invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1343 for this claim under 42 U.S.C. §1983 for violation of the First Amendment. In addition, plaintiff LWV of Illinois seeks a district court of three judges pursuant to 28 U.S.C. §2284, which provides for such a district court of three judges when an action is filed to challenge the apportionment of any statewide legislative body.

FACTS

Constitutional Scheme for Legislative Redistricting

7. Article IV, sections 1, 2 and 3 of the Illinois Constitution directs the Illinois General Assembly, in the year following the decennial census, to form 59 Senate and 118 Legislative Districts that are "compact, contiguous and substantially equal in population."

8. The Illinois Constitution does not authorize any other criteria for redistricting other than these objective content-neutral criteria.

9. Article IV, section 3 of the Illinois Constitution also authorizes, when necessary, creation of a Legislative Redistricting Commission. The Commission is composed of eight members, with no more than four representing any political party. The Speaker and Minority Leader of the House each appoint one House member and one non-legislator; the Senate President

and Minority Leader similarly each appoint one member of the Senate and one non-legislator to the Commission.

10. If the Commission is unable to agree on a legislative redistricting plan, the Constitution establishes a method by which one group or another may break the deadlock by lottery.

11. The purpose of the Commission is to encourage the principal parties to reach consensus rather than take their chances in a lottery, and to provide a means of decision if consensus is not possible.

Illinois' Historical Practice of Political Gerrymandering

12. Attempts to achieve a bipartisan or neutral agreement failed to work after the censuses in 1980, 1990, and 2000.

13. In 1981 the Democrats won the lottery resulting in a Democratic-sponsored map.

14. In 1991, the Republicans won the lottery resulting in a Republican-sponsored map.

15. In 2001, in the last round of redistricting prior to the redistricting challenged in this action, the Democrats won the lottery and put in place the Democratic-sponsored map.

16. Political gerrymandering in Illinois has received substantial public criticism.

17. In 2009, the current Governor established the Illinois Reform Commission to investigate and make recommendations to reform the substantial political corruption in the state.

18. On April 28, 2009, the Illinois Reform Commission issued a report that singled out the State's history of gerrymandering: "The Commission's investigation into Illinois' redistricting process revealed a system rife with unfairness, inefficiency and self interest. Specifically, the Commission finds that the State's redistricting process yielded gerrymandered legislative maps and deprives Illinois voters of fair representation. In some cases, our disfigured expansive districts leave representatives hundreds of miles away from their constituents."

19. In the current redistricting process, no lottery took place since the Democratic Party controls both chambers of the General Assembly and the Governor is a Democrat.

20. Consequently, the General Assembly conducted redistricting without the limited and often ineffective safeguards of the Illinois Constitution to ensure that there is a bipartisan agreement on a map that does not favor one political group over another.

Illinois' Use of Content-Based Restrictions in the 2011 Redistricting

21. On June 3, 2011, Governor Quinn signed the state legislative redistricting plan into law as

Public Act 097-0006, known as "The General Assembly Redistricting Act of 2011."

22. This law consists of tract and district designations with no explanation of the criteria used to create them.

23. However, the State Senate and the House both set forth the principles used in this year's redistricting along with the descriptions of the state legislative districts in Senate Resolution 249 and House Resolution 385, respectively.

24. These resolutions state that criteria other than contiguity, compactness and equality in population were used.

25. As set out in the Senate and House resolutions, the General Assembly also took into account the "partisan composition" of the new districts.

26. For example, Senate Resolution 249 states: "Each of the districts contained in the 2011 General Assembly Redistricting Plan was drawn taking into account the partisan composition of the District and of the Redistricting Plan itself."

27. House Resolution 385 states that each district "was drawn taking into account the partisan composition of the District and of the Redistricting Plan itself."

28. These resolutions were expressly incorporated into Public Act 97-0006.

29. At hearings before the House Redistricting Committee, the chair of the Committee, Majority Leader Barbara Flynn Currie, stated repeatedly that partisan concerns played a role.

30. Specifically, the Majority Leader stated: "Yes, partisanship does play a role in the drawing of the House and Senate districts, but while we believe this plan is politically fair, we don't deny partisan concerns play a role."

31. Furthermore, the Majority Leader stated that in several instances, individual legislators were involved in drawing the lines or boundaries of the districts they currently represent.

32. On June 3, 2011, the Governor signed into law the Legislative Redistricting Act of 2011, without making any changes.

33. On June 3, 2011, upon signing the Legislative Redistricting Act of 2011, the Governor stated that the new state legislative districts were "competitive."

34. While Democratic leaders contend that the maps are competitive, Republican leaders have denied that the maps created under House Resolution 385 and Senate Resolution 249 are "competitive" or constitute anything but traditional partisan gerrymandering.

Illinois' Use of Content-Based Restrictions Cannot be Justified and Harms Plaintiff's Members

35. Every redistricting plan establishing single-member districts creates a regulation of the time, place, and manner of partisan political speech, and places residents into specific legislative districts.

36. Legislative districts are public forums.

37. As such, every redistricting plan is necessarily a regulation or abridgment of political speech in a public forum and constitutes necessarily some abridgment or limitation of expressive activity protected by the First Amendment.

38. While some abridgment of expressive activity is necessary to establish single-member districts, redistricting based on the content of partisan speech or viewpoints of residents, for a partisan purpose, creates an undue, unnecessary or unjustified abridgment of First Amendment rights, which is not narrowly tailored with appropriate safeguards to serve a legitimate state interest.

39. As set out in the resolutions cited above, the General Assembly took account of the "partisan composition" of the new districts and necessarily created legislative maps that placed residents into districts based on expressive criteria in a manner that was not narrowly tailored with safeguards to serve a legitimate state interest, rather than a particular partisan end.

40. By considering the partisan composition of the districts and the political competitiveness of election campaigns in such districts, the General Assembly is unlawfully attempting to control or influence the kinds of views, opinions and speech that members of the League of Women Voters of Illinois and other state residents placed in those districts are likely to express or hear and receive. Further, the General Assembly is doing so in a manner that is not narrowly tailored with appropriate safeguards to serve a legitimate state interest.

41. Because of the General Assembly's use of the aforementioned methods to control or influence the kind of views that the League of Women Voters of Illinois, its members, and other state residents are likely to hear and receive, there is a significant risk that the General Assembly will become less accountable and responsive to changes in public opinion and less under popular control.

42. Furthermore, such methods of redistricting increase the power and influence of legislative leaders over individual legislators elected by residents of the State, since such individual legislators perceive that legislative leaders can determine significantly their chances for reelection.

43. By increasing the power and influence of legislative leaders of both major parties, such methods of redistricting have an inherent tendency to limit the accountability of legislators to the residents exercising their First Amendment right to petition

such representatives for the redress of grievances or otherwise to make known their views.

44. Furthermore, to the extent that viewpoint-based redistricting can limit the accountability of legislators to residents, it limits the ability of residents, including the members of LWV of Illinois, to use the political process to eliminate this method of redistricting by majority rule.

45. Given the risk of such irreparable injury to the political process, and the abridgment of the core political speech that LWV of Illinois, its members, and Illinois residents are likely to hear and receive, there is no reason to allow a redistricting scheme to abridge their expressive activity, except where the government can demonstrate that it has created such districts using methods narrowly tailored to pursue a legitimate state goal and not a partisan end.

Content-Based Restrictions Are Not Necessary to Enforce the Voting Rights Act

46. In general, any redistricting plan that is based on speech, opinions, or beliefs of residents is neither a necessary nor appropriate means for compliance with the Voting Rights Act of 1967, 42 U.S.C. § 1973, absent safeguards to ensure against misuse for unrelated partisan ends.

47. First, the General Assembly can appropriately use contiguity, compactness and other objective

factors to assure that redistricting does not dilute existing minority rights.

48. In addition, the General Assembly can appropriately consider community of interest, socio-economic status, and linguistic ties to achieve the same purpose.

49. Finally, where necessary to ensure achievement of a legitimate government interest, such as the goal of minority representation, speech-related or content-based criteria may be used, provided that such an abridgment is narrowly tailored with appropriate safeguards. An appropriate safeguard would be afforded by the use of a neutral and independent, non-partisan decision making process in drawing legislative districts.

COUNT I

(42 U.S.C. § 1983 – Violation of First Amendment)

50. Plaintiff LWV of Illinois incorporates paragraphs 1 through 49 above.

51. Plaintiff LWV of Illinois represents members living in nearly every legislative district of the State.

52. By such acts as set forth above, and by the use of content-based redistricting principles that are set out by legislative fiat, the defendant Governor and Board members have begun to implement or will implement redistricting plans that place residents

and LWV of Illinois members into state legislative districts based on the partisan viewpoints of such residents and LWV of Illinois members.

53. By such acts as set forth above, the defendant Governor and Board members have begun to implement or will implement redistricting plans that unlawfully abridge or regulate expressive activity of residents.

54. Accordingly, by such acts as set forth above, the defendant Governor and Board members have begun to act and will act under color of law within the meaning of 42 U.S.C. §1983 to abridge or unlawfully limit the First Amendment rights of residents of this State, by adopting and implementing a redistricting plan that is neither based on neutral, non-speech criteria, nor on content-based criteria narrowly tailored with appropriate safeguards to serve only a legitimate state purpose.

55. By such acts as set forth above, the defendant Governor and Board members have unlawfully acted under color of law, within the meaning of 42 U.S.C. §1983, to deny or deprive members of LWV of Illinois of their rights under the First Amendment.

56. Furthermore, where the defendant Governor and Board members have unlawfully acted under color of law within the meaning of 42 U.S.C. §1983 to deny or deprive other residents of their rights under the First Amendment, LWV of Illinois may bring this action to assert the rights of such residents.

57. Because the use of partisan criteria as set out in the House and Senate resolutions is not discrete and leaves no practical way to sever the lawful from the unlawful parts of the redistricting plan, plaintiff LWV of Illinois seeks an order under 42 U.S.C. §1983 directing the defendant Governor to develop a new process that uses an impartial decision maker or body to propose a redistricting plan created by the application of neutral or content-neutral "principles," or by the application of content-based criteria only to the extent deemed necessary to serve a legitimate state purpose.

58. Such an impartial decision maker or body could be selected by the unanimous consent of ex officio members of the Legislative Redistricting Commission provided by Article IV, section 3 of the Illinois Constitution, or if that is not possible, by action of this Court.

WHEREFORE plaintiff LWV of Illinois prays this Court to:

A. Declare under 42 U.S.C. §1983 and 28 U.S.C. §2201 that by the use of content-based redistricting principles as set out herein and the failure to demonstrate appropriate safeguards to ensure such content-based discrimination was narrowly tailored to serve a legitimate state interest, the defendant Governor and General Assembly have approved, and the members of the State Board of Elections will implement, state legislative maps that deny or abridge the First Amendment

rights of the members of plaintiff LWV of Illinois and other residents.

B. Enjoin the defendant Governor and defendant members of the Illinois State Board of Elections, pursuant to 42 U.S.C. § 1983, from implementing the new state legislative maps produced under the aforesaid redistricting principles.

C. Direct the defendant Governor to consult with the General Assembly leadership as appropriate and to develop a new process for developing new state legislative districts through the selection of an impartial decision-maker or body by the ex officio members of the Legislative Redistricting Commission provided under Article IV, section 3 of the Illinois Constitution, or to use some other appropriate process that will ensure the least possible infringement on the First Amendment rights of plaintiff LWV of Illinois, its members, and other Illinois residents based on their political views, opinions, or beliefs.

D. Direct that any process developed under the preceding paragraph have safeguards to avoid dilution of minority voting rights under Section 2 of the Voting Rights Act, 42 U.S.C. §1973, *et seq*.

E. Direct that any such process developed by the defendant Governor and approved by the Court be submitted for approval by the Illinois General Assembly.

F. Grant such other relief as may be appropriate including awarding to plaintiff LWV of Illinois its legal fees and costs.

Dated: September 1, 2011

By: /s/ Michael P. Persoon
Michael P. Persoon

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

LEAGUE OF WOMEN VOTERS OF ILLINOIS, *Plaintiff*, v. PAT QUINN, in his official capacity as Governor, of the State of Illinois, and WILLIAM M. McGUFFAGE, JUDITH C. RICE, BRYAN A. SCHNEIDER, CHARLES W. SCHOLZ, JESSE R. SMART, HAROLD D. BYERS, ERNEST C. GOWEN and BETTY J. COFFRIN in their Official capacities as Members of the Illinois State Board of Elections, *Defendants*.	Case No. 11-cv-5569 Hon. Elaine E. Bucklo Hon. Diane S. Sykes Hon. Philip P. Simon

PLAINTIFF LWV-IL's OPPOSITION TO STATE DEFENDANTS' MOTION TO DISMISS UNDER RULE 12(b)(6), F.R.CIV.P

Relying on *Citizens United v. Federal Election Commission,* 558 U.S. ___, 130 S.Ct. 876 (2010), and *Arizona Free Enterprise Club's Freedom Club v. Bennett,* U.S. ___, 131 S. Ct. 2806 (June 27, 2010), plaintiff League of Women Voters of Illinois (LWV-IL)

challenges the State defendants' use of redistricting to "balance" or control viewpoints in state legislative campaigns as a violation of the First Amendment. Illinois House Resolution 385 and Senate Resolution 249, which set out the principles of redistricting, state, respectively: "Each of the districts contained in the 2011 General Assembly Redistricting Plan was draw [sic] taking into account the partisan composition of the District and of the Districting Plan itself." The entire districting scheme is tainted by consideration of the partisan views of those moved in and out of the districts.

State legislative leaders such as House Majority Leader Barbara Flynn Currie and Governor Quinn defend this approach and say they were seeking to have "competitive" and "fair" elections. However, under the First Amendment, the Illinois scheme to take account of each District's "partisan composition" and to have "competitive" elections – even if sincere – is not a legitimate government purpose. That is the clear message of the Supreme Court in both *Citizens United* decided in 2010 and in *Arizona Free Enterprise Club's Freedom Club* decided a few months ago.

Any government attempt to balance or control electoral speech, even for the sake of a "competitive" election, is a violation of the First Amendment because it seeks to control "the marketplace of ideas." *See Arizona Free Enterprise Club's Freedom Club,* 131 S. Ct. at 2825-26. In drawing up particular districts, the government may not "seek to pull out some types of voters and add others because it may not seek to

restrict the speech of some elements of our society in order to enhance the relative voice of others . . . ". *Citizens United,* 130 S. Ct. at 904. Such balancing of partisan activity in electoral campaigns violates the First Amendment for it interferes with the "unfettered exchange of ideas." *Arizona Free Enterprise,* 131 S. Ct. at 2826.

Unlike gerrymandering cases cited by the State defendants, the plaintiff LWV-IL does not claim a "dilution" of the right to vote, or any violation of the right to vote under the Fourteenth Amendment. It brings *no* claim about voting or a voting-related injury as in *Vieth v. Jubelier,* 541 U.S. 267 (2004) or *League of United Latin American Citizen v. Perry,* 548 U.S. 399 (2005). LWV-IL presents instead a First Amendment claim that has never been considered in light of the important and new Supreme Court holdings in *Citizens United* and *Arizona Free Enterprise*, which significantly strengthen the limiting effect of the First Amendment on government regulation of electoral matters.

Significantly, Justice Kennedy, who was the crucial and deciding fifth vote in both *Vieth* and *LULAC,* has urged that the First Amendment may well be the relevant constitutional bar to viewpoint based redistricting. *Vieth,* 541 U.S. at 314 (Kennedy, J. concurring). "After all," he wrote, "these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of

political views." *Id. See also League of United Latin American Citizens v. Perry,* 548 U.S. at 418 (Kennedy, J., joined by Souter, J., and Ginsburg, J.)

LWV-IL has standing to bring this claim because its members have First Amendment rights to participate in the electoral process without government interference to balance, screen, or filter the kind of speech they are likely to hear and receive – i.e., to influence the "open marketplace of ideas." *See Citizens United,* 130 S. Ct. at 884. Plaintiff LWV-IL respectfully submits that the State defendants' motion to dismiss under Rule 12(b)(6) for failure to state a claim be denied. Plaintiff agrees, however, that it is appropriate to remove Governor Quinn as an individual defendant to this lawsuit.

STATEMENT OF FACTS

Like other states, Illinois uses a single member districting scheme and redraws district lines every ten years to reflect changes in population. The Illinois Constitution states that such redistricting shall be based on three neutral criteria – population equality, compactness, and contiguity. However, Illinois has had a history of "one-party" control over redistricting and a reputation for gerrymandering. On April 28, 2009, the Governor's Illinois Reform Commission issued a report that tied such partisan or viewpoint based redistricting with political corruption in the State. "The Commission's investigation into Illinois' redistricting process revealed a system rife with

unfairness, inefficient and self interest." Illinois Reform Commission 100-Day Report, p. 53. The Commission also stated: "Behind closed doors, political operatives scrutinize the voting history of constituents to draw boundaries intended to protect incumbents or draw 'safe' districts for either the Democratic or Republican parties." *Id.* at 48.

Following the report of the Illinois Reform Commission, the General Assembly faced political pressure to open up the redistricting process. Hearings were held throughout the state for months. However, the draft map being considered was not made public at the hearings until the weekend before the General Assembly voted to approve the new map and then adjourned. The General Assembly Redistricting Act of 2011 was signed into law on June 3, 2011. The Act creates 59 state Senate districts and 118 state legislative districts.

In developing the new districts described in the Act, the State Senate and the House set forth the principles used by the General Assembly in such redistricting. Both Senate Resolution and House Resolution 385 state that in the case of each district, the legislative chamber took account of the "partisan composition" of the district. For example Senate Resolution 249 states: "Each of the districts contained in the 2011 General Assembly Redistricting Plan was drawn taking into account the partisan composition of the District and of the Redistricting Plan itself."

The Governor and House Majority Leader and others defended the districts being drawn up based on "partisan composition" and stated that it was the goal or intent to have "fair" or "competitive" elections. For example, House Majority Leader Barbara Flynn Currie stated: "[This map] will serve the citizens of Illinois well over the next ten years. It's a competitive map. It's a fair map." She further stated: "My own sense is that this is a politically competitive map." In April 2011, Governor Quinn made a public statement calling for a "competitive map" as a condition for his approval. In June 2011, Governor Quinn signed the Act and stated that the new districts were "competitive". In short, while not denying the consideration of the partisan composition of the voters, the defendant legislative leaders and Governor contend that they had the laudable purpose of creating a "fair" and "competitive" map.

At the same time, on at least one occasion, Majority Leader Currie stated that redistricting in this case had a partisan purpose inconsistent with these statements. Specifically she said: "Yes, partisanship does play a role in drawing of the House and Senate Districts, but while we believe this plan is politically fair, we don't deny partisan concerns played a role."

ARGUMENT

I. State defendants have no legitimate role in seeking to "balance" or "control" electoral speech or partisan activity in state legislative campaigns.

Under *Citizens United* and *Arizona Free Enterprise,* the Illinois redistricting scheme violates the First Amendment because the State defendants have no legitimate role in seeking to "balance" or "control" electoral speech or partisan activity in state legislative campaigns. These cases foreclose the use of "viewpoint based" redistricting to control, adjust or influence electoral speech or partisan activity in state legislative campaigns on First Amendment grounds. *See Citizens United,* 130 S. Ct. at 898 ("Premised on a mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.") House Resolution 385 and Senate Resolution 249 make clear that the map makers considered the "partisan composition" of every single district, stating that each district "was drawn taking into account the partisan composition of the District and of the Redistricting Plan itself." The state legislative leaders like Barbara Flynn Currie as well as the Governor have stated on the record they just wanted the map to be "competitive" and "fair." However, only a few months ago, in *Arizona Free Enterprise, supra,* the Supreme Court rejected such State interference as illegal and illegitimate under the First Amendment. The Court stated:

> "Leveling the playing field" can sound like a good thing But in a democracy, campaigning for office is not a game. The First Amendment embodies our choice as a Nation that, whenever it comes to such speech, the guiding principle is freedom – the 'unfettered interchange of ideas' – not whatever the State may view as fair.

Arizona Free Enterprise, 131 S. Ct. at 2826 (citation omitted).

Both *Citizens United* and *Arizona Free Enterprise* have a clear message – a state government may not seek to control or balance partisan activity in elections. Under the First Amendment, government cannot set out to "equalize" speech – and of course it cannot use redistricting to drown out one view or the other. This principle goes back to *Buckley v. Valeo.* Indeed, it goes back even farther to cases like *Tornillo v. Florida,* 418 U.S. 241 (1974). But recently, in striking down laws related to the electoral process, the Supreme Court has given this doctrine special force. In *Citizens United,* the Court stated the principle as follows: "The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.* at 904, quoting *Buckley v. Valeo,* 424 U.S 1, 48-49 (1974).

In seeking "fair" or "competitive" elections, the State defendants defend a scheme to do that very thing. Not just in some districts but in every district, the redistricting plan pulls out some citizens and puts

in others to ensure the elections will be "fair" or "competitive" or balanced. Republicans and newspaper editorials may scoff at the truth of the claimed purpose, but even if it is true, it is unlawful. On a district by district basis, it is an attempt to suppress "the relative voice" of one partisan viewpoint and enhance the "relative voice" of another. *See Citizens United, supra* The goal may be "equality" of speech, but on a district by district basis, to achieve such "equality," it is necessary for Illinois to "tone down" some speech and "amplify" other speech, to meet the goal of a "fair" or "competitive" election. The result is a government jiggering of the balance of views in every district in the state.

On this Rule 12(b)(6) motion to dismiss, this Court must assume that the government is in fact trying to suppress some speech or favor other speech on a district by district basis. See Compl. ¶¶ 21-34. Furthermore, the state legislative leaders and Governor admit that they are considering the partisan balance in each district and that they are seeking to have "fair" and "competitive" elections. There is more than enough in this complaint to find that at least for purpose of a Rule 12(b)(6) motion, the government is regulating electoral speech for a purpose that the Supreme Court has condemned as unlawful in both *Citizens United* and *Arizona Free Enterprise* – as well as *Buckley v. Valeo* and cases before.

To offer a "short and plain statement" of LWV-IL's complaint: the State defendants have set out to equalize speech, control speech, or tilt in favor of one

type of speech over another, in order to have "fair" or "competitive" elections. The First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office." *Eu v. San Franciso* [sic] *County Democratic Central Comm.,* 489 U.S. 214, 223 (1989) (internal quotes omitted). When a case concerns election-related speech – as the state's rigging of the balance of views does here – the First Amendment applies with special force. *See, e.g. Buckley v. Valeo,* 424 U.S. at 53. "Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction further a compelling interest and is narrowly tailored to achieve that interest." *Citizens United,* 130 S. Ct. at 898.

But far from being a compelling purpose, it is not even a legitimate state purpose to regulate or balance speech to have "fair" and "competitive" elections. *See Arizona Free Enterprise,* supra. In the Arizona case, the Supreme Court struck down a state law that sought only to *enhance* speech through a matching fund scheme. *See Arizona Free Enterprise,* 131 S. Ct. at 2819 (explaining that the government's establishment of a *benefit* to publicly-funded candidates imposed a "markedly more significant burden" than the contribution caps struck down in *Davis v. Federal Election Comm'n,* 554 U.S. 724). Arizona increased money to candidates who took public funding if their privately financed opponents raised money above a certain threshold.

Though the Arizona law did not restrict or reduce the speech of the privately funded candidate, *see id.* at 2817 (observing that the speech of the candidates and independent expenditure groups that brought the suit was not directly capped), the Court found this attempt to "even the playing field" to be unlawful under the First Amendment. The Court states:

> We have repeatedly rejected the argument that the government has a compelling state interest in "leveling the playing field" that can justify undue burdens on political speech. *See, e.g., Citizens United,* 558 U.S., at, 130 S.Ct., at 904-905.
>
> . . . .
>
> "Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election," *Davis, supra,* at 742, 128 S.Ct. 2759 – a dangerous enterprise and one that cannot justify burdening protected speech. The dissent essentially dismisses this concern, see *post,* at 2843 – 2844, but it needs to be taken seriously; we have, as noted, held that it is not legitimate for the government to attempt to equalize electoral opportunities in this manner. And such basic intrusion by the government into the debate over who should govern goes to the heart of First Amendment values.

Arizona Free Enterprise, 131 S. Ct. at 2825-26.

The Illinois scheme is at least as illegitimate as that struck down in *Arizona Free Enterprise*. At least the Arizona law did not seek to enhance a particular candidate's speech because of the particular partisan content of the message. But the redistricting scheme used here – as set out in the House and Senate resolutions and statements of legislative leaders – does try to balance the partisan viewpoints, the speech that citizens are likely to give or to hear and receive.

Finally, as even defendants seem to recognize, plaintiff LWV-IL is presenting a claim quite different from the voting rights equal protection claims considered in *Vieth v. Jubelier* and *LULAC v. Perry*. Plaintiff LWV-IL does *not* allege a dilution of the right to vote, as in *Vieth* or *LULAC v. Perry*. For purpose of this case, it is admitted that citizens are able to cast *votes*. Indeed, in some respects, this case is virtually the opposite of *Vieth* or *Perry* since the LWV-IL members do not seek to ensure that the state provide an equal opportunity for Democrats and Republicans to be elected. Nor does plaintiff LWV-IL seek to ask this Court to draw a map that is "fair" to Republicans and Democrats. Rather, it is sufficient if this Court requires that State defendants use a process based on neutral criteria – population equality, contiguity and compactness – to draw district lines. Certainly nothing in *Vieth* or *Perry* permits or authorizes under the First Amendment the use of "partisan composition" to affect electoral debate.

Contrary to the claim of State defendants, the LWV-IL does not allege that gerrymandering will lead

to certain electoral outcomes. LWV-IL is focused on the injury to speech. See Compl. at ¶¶ 1, 40, and 45. LWV-IL alleges the "abridgment of the core political speech that LWV of Illinois, its members and Illinois residents are likely to hear and receive." Compl. at ¶ 45. That easily distinguishes this case from those cited by State defendants – cases in which the harm was infringement on the right to achieve political success or win elective office. *See Republican Party of N. Carolina v. Martin* (4th Cir. 1992); *Washington v. Finlay,* 664 F.2d 913, 927-28 (4th Cir. 1981). Defendants also quote a number of lower district court cases cursorily suggesting that gerrymandering *per se* is not concerned with First Amendment speech. But every one of these cases was decided before *Citizens United* and *Arizona Free Enterprise,* which have clearly established that a law or regulation may unconstitutionally affect a plaintiff's ability to participate in the political process where it burdens speech by deliberately gaming the playing field. Finally, as stated in the Introduction, Justice Kennedy, the fifth and deciding vote in both *Vieth* and *Perry,* has pointedly stated that the First Amendment may well apply to such partisan gerrymandering, if such a claim under the First Amendment is brought. Plaintiff LWV-IL has brought such a claim.

II. The use of redistricting by State defendants to control or balance electoral speech unlawfully burdens the First Amendment rights of LWV-IL members and others.

The First Amendment states "Congress shall make no law . . . abridging freedom of speech . . . ". Before turning to the harms of viewpoint redistricting, LWW-IL [sic] notes that any single member representation scheme – in contrast to a system of electing legislators "at large" – involves some "abridgment" of speech. The very choice to divide up the State of Illinois into single member House and Senate districts "abridges" or diminishes or reduces the scope of speech in electoral campaigns. LWV-IL agrees that such "abridgment" – the kind involved in single member districting – is perfectly lawful under the First Amendment. But it is lawful on the assumption that the State is using neutral criteria, like equality of population, compactness of districts and similar factors. Regulation of even political speech may be lawful if the regulation is based on neutral criteria to promote a legitimate state purpose. *See United States v. O'Brien,* 391 U.S. 367 (1968). A single member scheme, for example, promotes accountability of individual legislators to specific groups of citizens in a local district and helps promote local interests. However, even such a neutral "time, place, and manner" regulation must be both "reasonable" and "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989). Here, however, the regulation was

explicitly justified with reference to the content of the views of the districts' members.

Redistricting based on the content of political speech is not a legitimate means and achieving equality in the amount of electoral speech is not a legitimate state purpose. *See Arizona Free Enterprise*.[1] Furthermore, as alleged in the complaint, such a scheme makes individual legislators more accountable to the legislative leaders who can determine their chances for re election by the way they divide up the districts. In that respect, such redistricting enhances the power of Illinois legislative leaders and reduces the accountability of individual legislators to their constituents. For that reason, it is in conflict with the very purpose of single member districting – to increase accountability of legislators to constituents and not to their party leaders.

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[1] It is not only in the campaign finance cases that the Court has found a content-based restraint on speech by the government to be a burden, even where it did not directly foreclose speech. In *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974) (cited by *Buckley v. Valeo,* 424 U.S. at 50), the Court was presented with the claim that a statute guaranteeing equal space in newspapers to reply to criticism violated the First Amendment. Rejecting the defense that the statute "did not prevent[] the *Miami Herald* from saying anything it wished," and thus did not amount to a speech restriction, the Court stated that this argument "beg[ged] the core question." Striking down the Florida law as unconstitutional, the Court observed that a governmental restraint "need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers."

In *Arizona Free Enterprise,* the Court struck down a law that simply gave a publicly funded candidate additional money to engage in speech. *Id.* at 2817. Significantly, the law did not actually restrict the privately financed candidate from speaking in any way. However, the state's participation in *countering* a particular point of view was identified by the Court as an unlawful burden on First Amendment rights.

Likewise, when the State defendants consider the "partisan composition" of a district in redrawing its lines, and do so to equalize speech, then they are *countering* the expression by LWV-IL members and others citizens who expressed views tilting their districts too far to one side or the other. If too many LWV-IL members or other citizens register as Republicans in one district, the State defendants claim the right to "consider partisan composition" and move in Democratic voters to *counter* the views they are likely to express. That is the logic of such redistricting: if LWV-IL members and other citizens are too persuasive, or register with a particular party, the State defendants claim the right to counter that point of view. Indeed, the State defendants are committed to countering expressive activity that is too successful or that may create an "imbalance" or lack of "fairness" or "competition" in state legislative campaigns.

The fact that the redistricting scheme is not so blatant or crude as other methods does not make it lawful. For example, the State defendants could leave the district lines just as they were in 2001 and give

orders for Republicans to physically move out of their residences in these districts and for Democrats to come into replace them. To be sure, no government would dream of attempting such forced relocation, but just redrawing district lines around people without moving them accomplishes a similar goal. Likewise, the State defendants could not condition the right to hold rallies on the agreement of the sponsors to ensure an equal number of Democrats and Republicans. As Defendant's own case law shows, it would not matter if these rallies were in a public forum or not: it would be equally unlawful under the First Amendment. *See Protect Marriage Ill. v. Orr,* 463 F.3d 604, 606 (7th Cir. 2006) (observing that although the ballot is not a traditional public forum, the state would still be prohibited from imposing ballot access restrictions "jiggered in a way that discriminates against particular advocates or viewpoints."); *see also Georges v. Carney,* 691 F.2d 297, 301 (7th Cir. 1982) (observing that although neutral procedural restrictions on the use of the ballot do not ordinarily implicate free speech rights, the "case would be different" if state action were potentially viewpoint-discriminatory.) The State defendants simply cannot take measures to achieve equality of speech.

Another analogy is the "no solicitation" rule struck down in *Martin v. Struthers,* 319 U.S. 141 (1943). As set out in the complaint, plaintiff LWV members have a right to hear and receive views – to educate themselves on the issues in a campaign – without government interference. If the government

is using redistricting to balance viewpoints, it is interfering with the kinds of views citizens are likely to hear and receive. It is seeking to keep out too many Democrats or too many Republicans from "soliciting" their support to one side or the other.

Perhaps by balancing viewpoints, the State defendants may hope to have candidates "moderate" their views or seek out the "center [sic]. But that in itself is a government attempt to stifle other ways of looking at the world. If the government in a systematic and intentional way seeks to make opposing positions equally respectable, it is a burden or interference with the First Amendment right identified in *Arizona Free Enterprise Club* – the right of every citizen to take part in an "unfettered interchange of ideas." That is why it is not a legitimate state purpose to amplify some points of view and reduce the volume of others, as the Court denounced in *Citizens United.* It places a burden on this right – a burden that has been denounced by writers like Milton, Mill or Meikeljohn, all of whom agree that a government filter on the views citizens hear and receive in electoral debate is a burden upon the right to flourish as autonomous and independent citizens. The Supreme Court has now shown that absent a legitimate purpose, any burden on this right to take part in the "open marketplace of ideas" is prohibited.

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

LEAGUE OF WOMEN VOTERS OF ILLINOIS, *Plaintiff*, v. PAT QUINN, in his official capacity as Governor, of the State of Illinois, and WILLIAM M. McGUFFAGE, JUDITH C. RICE, BRYAN A. SCHNEIDER, CHARLES W. SCHOLZ, JESSE R. SMART, HAROLD D. BYERS, ERNEST C. GOWEN and BETTY J. COFFRIN in their Official capacities as Members of the Illinois State Board of Elections, *Defendants*.	Case No. 11-cv-5569 Hon. Elaine E. Bucklo Hon. Diane S. Sykes Hon. Philip P. Simon

Plaintiff LWV-IL's Motion to Reconsider

Pursuant to Fed. R. Civ. P. 59(e), plaintiff League of Women Voters of Illinois ("LWV"), by its undersigned counsel, moves to reconsider this Court's order and opinion of October 28, 2011 dismissing this action and to alter its judgment. Plaintiff LWV respectfully files this motion because it believes the Court failed to apprehend LWV's three allegations of First

Amendment injury: (1) the First Amendment right of LWV members to hear and receive election speech without government control or screening of the speech they are likely to hear and receive; (2) the government's relocation of LWV members and other citizens to other districts to "counter" or offset the speech they are likely to express based on their party registration; and (3) the content-based admission of LWV members into or their exclusion from legislative districts which are in the nature of public forums. In support of this motion, plaintiff LWV states as follows:

The Right to Hear and Receive Views

1. The Court stated that it was dismissing this action because "the redistricting plan in no way burdens the exercise of the First Amendment rights of LWV or its members . . . " In its opinion, the Court stated that the "threshold requirement of a content based First Amendment challenge" is a "showing that the redistricting plan is preventing LWV's members from engaging in expressive activities." Opinion, page 1.

2. However, the Court's opinion fails to address whether plaintiff LWV's members and other citizens have a First Amendment right to hear and receive election-related speech without intentional government interference as to the political content of the speech. The case law is overwhelming that even without engaging in speech themselves, LWV members have a right to hear and receive the opinions of

citizens who would be "willing speakers" but are relocated to other districts because of the content of their political views. They have a First Amendment right to hear and receive election-related speech without the admitted government attempt here to screen or filter or control the content of the views they are likely to hear and receive.

3. Without specifically addressing this First Amendment right to hear and receive speech, this Court distinguished *Martin v. Struthers,* 319 U.S. 141, 143 (1943) because the Jehovah Witness in that case could claim her own speech was being restricted. Yet that celebrated case also declares a right under the First Amendment to hear and receive the views of others. "The right of freedom of speech and press . . . embraces the right to distribute literature *and necessarily protects the right to receive it.*" *Id* (emphasis supplied).

4. Since *Martin,* the U.S. Supreme Court has repeatedly declared a right to hear and receive the opinions of others – even when the parties bringing the First Amendment claim are perfectly free to speak for themselves. This right to hear and receive the speech applies in particular to election campaigns. *See, e.g., First National Bank of Boston v. Belotti,* 435 U.S. 765, 783 (1978) ("First Amendment . . . afford[s] the public access to discussion, debate, and the dissemination of information and ideas."). The Supreme Court has recognized that the rights of the listener are distinct from, and at times stronger than, the rights of the speaker. *See Virginia State*

Board of Pharmacy et al. v. Virginia Citizens Council, 425 U.S. 748 (1976). Without question, then, there is a First Amendment right of citizens to challenge government efforts to screen or filter the views that they hear and receive. *Kleindienst v. Mandel,* 408 U.S. 753, 762 (1975) (First Amendment encompasses "right to receive information and ideas"); *see Stanley v. Georgia* 394 U.S. 557, 564 (1969) ("the Constitution protects the right to receive information and ideas"); *Griswold v. Connecticut* 381 U.S. 479, 480 (1965) ("The right of freedom of speech . . . including not only the right to utter or to print, but . . . the right to receive, the right to read . . . "); *Lamont v. Postmaster General,* 381 U.S. 301, 308 (1965) ("The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them."); *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 390 (1969) ("(it) is the right of the viewers and listeners, not the right of the broadcasters which is paramount . . . ").

5. Because this Court's opinion states or implies there is no such right or fails to account for it, the plaintiff LWV respectfully requests that the Court reconsider its decision. In this redistricting plan, the State defendants are relocating "willing speakers" from "District A" to "District B," at least in part to affect the views that plaintiff LWV members hear and receive. These "willing speakers" are the candidates, or potential candidates of the disfavored party. They are the party activists who canvass, go door to door, and urge their neighbors to vote for one party or the

other. They are the ordinary registered Democrats or Republicans who may just give money, which is now deemed by the U.S. Supreme Court to be a form of speech. All of these persons are being relocated at least in part because of the content of their political views.

6. To be clear – LWV's injury is *not* that redistricting makes some "political outcomes" more likely than others. LWV complains that the State defendants are trying to restrict the *speech* that they are likely to hear and receive by "balancing" the speech of the two parties in order to have "competitive" elections.

The Right to Be Free of Government Attempts to "Counter" Election Related Speech

7. By moving LWV members out of one district and into another – all because of their party registration – the State defendants are seeking to "counter" or "balance" their speech with more speech from persons of the opposing party. Plaintiff LWV alleges that this is the same "countering" of speech which the U.S. Supreme Court found to be an unlawful burden on speech of candidates in *Arizona Free Enterprise Club Freedom's Club v. Bennett,* 564 U.S. ___ (10-283) (June 27, 2011). First Amended Complaint paragraph 1, Opposition to Motion to Dismiss pp. 6-8, 10-12. Plaintiff LWV relied heavily on this case as the most recent and controlling decision on regulating election speech.

The Right Not to Be Excluded from a Public Forum Because of the Content of a Citizen's Views

8. Neither did the Court address the allegation in the First Amended Complaint (paragraphs 38 and 39) that a legislative district is in the nature of a public forum. Since that is so, the State defendants may not condition admission in or exclusion from this forum based on their speech or expression. The Court's opinion states that plaintiff LWV members have suffered no restriction of speech – but the State defendants have restricted or inhibited them from speaking in elections in districts at least in part because of the content of their views.

9. *Gaffney v. Cummings,* 412 U.S. 735 (1973), to which this Court refers, addresses only an equal protection claim under the Fourteenth Amendment. There is not a shred of a First Amendment or speech claim in this 1973 case. It is also unimaginable that after *Buckley v. Valeo,* 424 U.S. 1 (1976) or *Citizens United v FEC,* 558 U.S. 08-205 (2010) this Supreme Court would ever extend a "political fairness" principle as in *Gaffney* to justify a "balancing" of First Amendment speech.

10. Nothing in *Vieth v. Jubelier,* 541 U.S. 267 (2004) precludes the application of the First Amendment to a redistricting plan which is an admitted attempt to "balance" election related speech to have "competitive" campaigns. There was no allegation in *Vieth* of an attempt to control protected First Amendment speech. There is no holding or *stare*

decisis principle that should keep this Court from applying the current law as set forth in *Citizens United* and *Arizona Free Enterprise* to the State defendants' "balancing" of speech in this case. This Court should not defer its proper role as the "court of first instance" to apply the law as it now exists in light of these decisions.

WHEREFORE, for all the reasons set forth above, plaintiff LWV respectfully requests that the Court alter the judgment and reconsider its opinion of October 28, 2011, and address in particular whether the plaintiff LWV has a right to hear and receive views of willing speakers moved to other districts because of the content of their views.

Date: November 10, 2011

Respectfully submitted,

s/ Thomas Geoghegan

One of the Attorneys
for Plaintiff League of
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UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois •
CM/ECF LIVE, Ver 4.2
Eastern Division

League of Women Voters of Illinois

Plaintiff,

v.

Pat Quinn, et al.

Defendant.

Case No.: 1:11-cv-05569
Honorable Elaine E. Bucklo

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Wednesday, November 16, 2011:

MINUTE entry before Honorable Elaine E. Bucklo:Plaintiff's motion for reconsideration [36] is denied.Mailed notice(mpj,)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHRISTINE RADOGNO, in her official capacity as Minority Leader of the Illinois Senate, THOMAS CROSS, in his official capacity as Minority Leader of the Illinois House of Representatives, ADAM BROWN, in his official capacity as a state representative from the 101st Representative District and individually as a registered voter, VERONICA VERA, CHLOE MOORE, JOE TREVINO, ANGEL GARCIA, ELIDIA MARES, EDWIN TOLENTINO, and THE ILLINOIS REPUBLICAN PARTY,	NO. 1:11-cv-04884
Plaintiffs,	Judge Elaine E. Bucklo
vs	Judge Diane S. Sykes
ILLINOIS STATE BOARD OF ELECTIONS, RUPERT BORGSMILLER, Executive Director of) the Illinois State Board of Elections, HAROLD D. BYERS, BRYAN A. SCHNEIDER, BETTY J.	Judge Philip P. Simon

COFFRIN, ERNEST C.)
GOWEN, WILLIAM F.)
McGUFFAGE, JUDITH C.)
RICE, CHARLES W.)
SCHOLZ, JESSE R. SMART,)
all named in their official)
capacities as members of the)
Illinois State Board of Elec-)
tions, AFRICAN AMERICANS)
FOR LEGISLATIVE REDIS-)
TRICTING, and LATINO)
COALITION FOR FAIR)
REPRESENTATION,)
Defendants.)

OPINION AND ORDER

* * *

Counts 3 and 4

Counts 3 and 4 bring claims for political gerrymandering under the First and Fourteenth Amendments, respectively.

We'll first address the standing issue raised by these two counts before turning to the murky world of the merits of political gerrymandering claims. Plaintiff Radogno is the Minority Leader of the Illinois Senate and brings her claims only in her official capacity. Plaintiff Cross is the Minority Leader of the Illinois House and also brings his claims only in his official capacity. Plaintiff Brown is a state representative from what is currently the 101st Representative District. His claims are alleged in both his official

capacity and individually as a registered voter and citizen living in what would be District 96, if the new redistricting plan is upheld. (Brown's individual standing to challenge District 96 – the subject of Count 6 – is discussed below.)

Plaintiffs' Response brief did not address the challenge to the official-capacity standing of Brown. Plaintiffs did respond to the challenges to Radogno and Cross, though they are not particularly specific as to which counts they believe Radogno and Cross have standing to assert. Nevertheless, all of their arguments on this issue really revolve around the political gerrymandering claims, so it makes sense to address the challenge to the standing of Radogno and Cross here. [*See* DE 40 at 12 ("[T]he Redistricting Plan . . . systematically and unequally burdens the ability of Leaders Cross and Radogno to carry out their constitutionally prescribed duty of representing the interests of their caucuses and Republican voters throughout the State.").]

The standing analysis for political gerrymandering claims is complicated by the largely unresolved status of political gerrymandering claims in general. That is, even if such claims are theoretically viable – which we discuss more below – it is not particularly clear who would have standing to bring them. In *Vieth v. Jubelirer*, 541 U.S. 267 (2004), for example, Justice Stevens suggested that the standing analysis for racial and political gerrymander claims should be the same, which would require that plaintiffs bringing political gerrymander claims be registered voters

who reside in the challenged districts. *Vieth*, 541 U.S. at 328 (Stevens, J., dissenting). Justices Souter and Ginsburg proposed the same analysis. *Vieth*, 541 U.S. at 347 (Souter, J., dissenting).

Moreover, the standing analysis for Radogno and Cross to bring these claims is further complicated by the limited circumstances under which legislators have standing in their official capacity. Under the standard set in *Raines v. Byrd*, 521 U.S. 811 (1997), a legislator-plaintiff only has official-capacity standing when actions "deprive individual legislators of something to which they are personally entitled . . . [like] the 'effectiveness of their votes.'" *Alaska Legislative Council v. Babbitt*, 181 F.3d 1333, 1337 (D.C. Cir. 1999) (citing *Raines*). But when a legislator only alleges an "abstract dilution of institutional legislative power," that is insufficient to confer any official-capacity standing. *Raines*, 521 U.S. at 826.

In this case, Plaintiffs allege that the redistricting plan burdens their ability "to carry out their constitutionally prescribed duty of representing the interests of their caucuses and Republican voters throughout the State." This allegation seems more like an "abstract dilution of institutional legislative power" that would not confer any official-capacity standing under *Raines*. However, given the unsettled question of who has standing to bring a political gerrymandering claims, and giving Plaintiffs the benefit of the doubt under notice pleading, we find their allegations sufficient to meet the *Raines*-standard solely for the political gerrymandering counts.

Now on to the merits of the political gerrymandering claims. For reasons of expediency and simplicity, we'll start with Count 4 of Plaintiff's Amended Complaint, which claims that the redistricting map passed by Democrats is an unconstitutional political gerrymander in violation of Republicans' equal protection rights under the Fourteenth Amendment. The caselaw addressing political gerrymandering claims under the Equal Protection Clause is foggy at best. The two most recent decisions on the issue from the Supreme Court – *Vieth* and *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006) – are cobbled-together plurality opinions that place district courts in the untenable position of evaluating political gerrymandering claims without any definitive standards. *See LULAC*, 548 U.S. at 512 (Scalia, J., concurring in part and dissenting in part) (the Court's political gerrymandering jurisprudence "provides no guidance to lower court judges and perpetuates a cause of action with no discernible content").

The two critical questions raised – and left basically unanswered – by *Vieth* and *LULAC* are: 1) Are political gerrymandering claims justiciable as equal protection claims under the Fourteenth Amendment? 2) If so, is there a manageable and reliable standard of fairness by which to evaluate these claims?

In *Vieth*, a district court sitting with a three-judge panel granted a motion to dismiss the plaintiffs' political gerrymandering claims. On direct appeal to the Supreme Court, a four-justice plurality opinion

affirmed this dismissal, concluding that political gerrymandering claims are nonjusticiable political questions because no judicially discernible and manageable standard for adjudicating such claims exists. *Vieth*, 541 U.S. at 305-06 (plurality). Justice Kennedy concurred with the plurality in so much as he agreed that plaintiffs' political gerrymandering claims had to be dismissed, but he would not "foreclose all possibility of judicial relief if some limited and precise rationale were found to" decide political gerrymandering claims in the future. *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring).

The plurality judgment of the Court in *Vieth* thus appears to be that political gerrymandering claims are justiciable, but subject to dismissal because no definitive standard yet exists to judge them. This leaves lower courts evaluating political gerrymandering claims in a difficult position. Justice Scalia invited lower courts to treat Justice Kennedy's opinion "as a reluctant fifth vote against justiciability at district and statewide levels – a vote that may change in some future case but that holds, for the time being, that this matter is nonjusticiable." *Vieth*, 541 U.S. at 305 (plurality).

Two years later, *LULAC* did little to clarify the issues for lower courts. In another plurality opinion, the Court punted on the question of justiciability – finding that the issue was not before it – but held that plaintiffs' claims must nevertheless be dismissed because of "the absence of any workable test for judging partisan gerrymanders." *LULAC*, 548 at 420

(plurality). As summarized by Justice Kennedy, writing for the plurality: "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." *LULAC*, 548 at 418 (plurality) (emphasis added). *See also Vieth*, 541 at 307-08 (Kennedy, J., concurring) (concurring in dismissal of political gerrymandering claims because "there are yet no agreed upon substantive principles of fairness in districting, we have 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").

In the wake of these two cases, some courts have read *Vieth* to mean that political gerrymandering claims are simply not justiciable. *Lulac of Texas v. Texas Democratic Party*, 651 F. Supp. 2d 700, 712 (W.D. Tex. 2009) (*Vieth* held "political gerrymandering to be non-justiciable"); *Miller v. Cunningham*, 512 F.3d 98, 102 (4th Cir. 2007) (same); *Meza v. Galvin*, 322 F. Supp. 2d 52, 58 (D. Mass. 2004) (*Vieth* concluded "that political gerrymandering cases are non-justiciable").

Other courts and commentators have reached the conclusion that "partisan gerrymanders are justiciable yet unsolvable." David Schultz, *The Party's Over: Partisan Gerrymandering and the First Amendment*, 36 Cap. U. L. Rev. 1, 1 (Fall 2007). *See*, *e.g.*, *Kidd v. Cox*, 2006 WL 1341302, at *15 (N.D. Ga. 2006) ("[T]he Court cannot ascertain from the materials submitted

what manageable or politically-neutral standards might exist in this case that would make a political gerrymandering dispute based on the Equal Protection Clause justiciable."); *Shapiro v. Berger*, 328 F. Supp. 2d 496, 504 (S.D.N.Y. 2004) (dismissing political gerrymandering claim because Plaintiff had "not suggested any manageable standard under which I could evaluate such a claim if one had been advanced").

On our reading of *Vieth* and *LULAC*, political gerrymandering claims are justiciable *in principle*, but also currently unsolvable. This means that Plaintiffs' political gerrymandering claim based on the Equal Protection Clause may be justiciable, but only if they articulate a workable standard of fairness by which to assess that claim and make allegations sufficient to give rise to a plausible inference that the redistricting plan violates the standard. Plaintiffs have not stated any such standard in their Amended Complaint. Indeed, since the Supreme Court was unable on two occasions to agree on any standard, it may be an exercise in futility. Nevertheless, Plaintiffs will be given leave to amend Count 4 of their Amended Complaint in order to attempt to provide a "workable test" or a "reliable standard" for judging partisan gerrymanders under the Equal Protection Clause of the Fourteenth Amendment.

As noted, the preceding substantive analysis all applies to political gerrymandering claims brought under the Equal Protection Clause of the Fourteenth Amendment. But in Count 3, Plaintiffs also allege a

political gerrymandering claim under the First Amendment, a claim that grows out of a theory offered by Justice Kennedy in his *Vieth* concurrence. He wrote:

> The First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering. After all, these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views. Under general First Amendment principles those burdens in other contexts are unconstitutional absent a compelling government interest. . . . First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights.

Vieth, 541 U.S. at 314 (Kennedy, J., concurring) (citations omitted).

The four-justice plurality opinion in *Vieth* rejected the idea that the First Amendment could be used to bring political gerrymandering claims because "a First Amendment claim, if it were sustained, would

render unlawful *all* consideration of political affiliation in districting, just as it renders unlawful *all* consideration of political affiliation in hiring for non-policy-level government jobs." *Vieth*, 541 U.S. at 294 (plurality). Nevertheless, Plaintiffs read Justice Kennedy's concurrence as an opening for political gerrymandering claims under the First Amendment, and they thus allege in Count 3 that the redistricting plan "systematically and intentionally unfairly burdens the rights to political expression and expressive association of voters who vote Republican because of their political views" and that this is done without a "compelling reason." [DE 21 at 22.]

So from Plaintiffs' viewpoint, because the redistricting plan means that Republican voters in some districts are less likely to be successful in electing their preferred candidate, these voters' First Amendment rights of expression and association have been violated. Even assuming that this claim is justiciable – something of a big assumption, as the previous section demonstrates – we find it unpersuasive.

It is of course true that the First Amendment protects political expression and political association, particularly in the context of campaigns for political office. *Citizens United v. Fed. Election Comm'n*, ___ U.S. ___, 130 S.Ct. 876, 898 (2010) ("The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.") (internal quotations omitted). But what is the connection between the alleged burden imposed on Plaintiffs' ability to elect their preferred candidate

and a restriction on their freedom of political expression? There is none. As another court rejecting these sorts of claims explained: "Plaintiffs are every bit as free under the new [redistricting] plan to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise influence the political process through their expression." *Kidd*, 2006 WL 1341302, at *17. Plaintiffs' freedom of expression is simply not burdened by the redistricting plan. It may very well be that Plaintiffs' ability to *successfully elect* their preferred candidate is burdened by the redistricting plan, but that has nothing to do with their First Amendment rights. *See*, *e.g.*, *Washington v. Finlay*, 664 F.2d 913, 927-28 (4th Cir. 1981) ("The first amendment's protection of the freedom of association and of the rights to run for office, have one's name on the ballot, and present one's views to the electorate do not also include entitlement to success in those endeavors.").

Nor does the redistricting plan inhibit Plaintiffs' freedom of association. It is true that fielding candidates for political office and participating in campaigns are acts of political association and thus receive First Amendment protection. *See Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) (noting freedom of association includes the freedom "to select a standard bearer who best represents the party's ideologies and preferences") (internal quotations omitted). But the redistricting plan at issue here "has no effect on Plaintiffs' ability to field candidates for office, participate in campaigns, vote

for their preferred candidate, or otherwise associate with others for the advancement of common political beliefs." *Kidd*, 2006 WL 1341302, at *17. It thus does not restrict in any way Plaintiffs' freedom of association under the First Amendment.

In the end, the Amended Complaint does not allege a cognizable claim for political gerrymandering under the First Amendment. We entirely endorse the conclusion reached by *Kidd*:

> [B]ased on our review of First Amendment jurisprudence in the election context, we find the deleterious effects of political gerrymandering on the ability of a political party and its voters to elect a member of the party to a seat in the state legislature implicates no recognized First Amendment right. The party and its voters remain free to associate with whom they please, field candidates of their choice, campaign, vote, and express their political views. What Plaintiffs demand is the right to have their views represented in state government by the representative of their choice. We decline to recognize such a right under the First Amendment.

Kidd, 2006 WL 1341302, at *19. Count 3 of Plaintiffs' Amended Complaint will therefore be dismissed with prejudice.

* * *

SO ORDERED.

ENTERED: October 21, 2011

/s/ Elaine E Bucklo
s/ Elaine E. Bucklo
ELAINE E. BUCKLO, JUDGE
UNITED STATES DISTRICT
COURT NORTHERN
DISTRICT OF ILLINOIS

s/ Diane S. Sykes
DIANE S. SYKES, JUDGE
UNITED STATES COURT
OF APPEALS
SEVENTH CIRCUIT

s/ Philip P. Simon
PHILIP P. SIMON,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT
NORTHERN DISTRICT
OF INDIANA