No. _____

In The
Supreme Court of the United States

LEAGUE OF WOMEN VOTERS
OF CHICAGO, ET AL.,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In upholding the principle of "one person, one vote" in legislative redistricting, this Court has adopted a special rule for the redistricting of state and local legislatures, holding that a population discrepancy between districts of 10 percent or less is presumptively valid. At the same time, this Court also allowed challenges to such a discrepancy if the policies behind it are not "free from any taint of arbitrariness or discrimination." In *Cox v. Larios*, 542 U.S. 947 (2004), this Court summarily affirmed a three-judge court's decision to set aside a Georgia redistricting plan on just such a basis. However, the Court has never defined or clarified what kind of "arbitrariness" or "discrimination" such a challenge must allege. In this case the Seventh Circuit has held that to state a claim at the pleading stage, a challenge must allege systematic partisan gerrymandering against an identifiable group of voters – similar to the kind of claim that might violate the Fourteenth Amendment as set forth *Davis v. Bandemer,* 478 U.S. 109 (1986). Petitioners contend that the Seventh Circuit's rule would effectively require plaintiffs to allege an independent constitutional violation separate and apart from the discrepancy itself – and thereby effectively create a safe harbor for these so-called minor deviations. The questions presented are:

QUESTIONS PRESENTED – Continued

1. What kind of "arbitrariness" or "discrimination" do plaintiffs have to allege to rebut the presumption of validity when the population discrepancy is 10 percent or less?

2. Given that modern digital technology can produce thousands of maps that divide the population equally, are states and localities still entitled to a presumptive right to a 10 percent discrepancy?

PARTIES TO THE PROCEEDING

Petitioners League of Women Voters of Chicago, Stephanie Crowell, Ignazia Angela Daidone, Jim Ignatowski, Amelia Kabat, and Lynn Seermon were Plaintiffs and Appellants below.

Respondent City of Chicago was Defendant and Appellee below.

RULE 29.6 DISCLOSURE

No parent or publicly owned corporation owns 10 percent or more of the stock in League of Women Voters of Chicago, a not-for-profit corporation.

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PETITION FOR A WRIT OF CERTIORARI

League of Women Voters of Chicago, Stephanie Crowell, Ignazia Angela Daidone, Jim Ignatowski, Amelia Kabat, and Lynn Seermon respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this matter.

OPINIONS BELOW

The decision of the Court of Appeals, reported at 757 F.3d 722, is reprinted in the Appendix at App. 1-12. The district court's opinion, reported at 965 F. Supp. 2d 1007, is reprinted at App. 13-33.

JURISDICTION

The Seventh Circuit Court of Appeals entered a final judgment in this case on July 9, 2014. App. 1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Facts

After the 2010 census, the City of Chicago adopted an ordinance dividing its population into 50 single-member aldermanic wards. The 2010 census determined the population of Chicago to be 2,695,598 persons. Divided equally the population of each ward should be 53,912. In 2011, a committee of the City Council conducted extensive public hearings for a fair districting plan. Citizen groups proposed various maps, which divided the wards equally by population.

On January 17, 2012, Mayor Rahm Emanuel filed a "call" for a special meeting of the City Council

in two days to adopt a plan to redistrict the wards. The plan was not made public until 9:30 a.m. on the morning of January 19, 2012, just a half hour before the City Council was to meet. At 10:00 a.m., the Council convened and without debate immediately approved a plan that did not divide the wards equally and that no one in the public had previously seen.

The population discrepancies are significant throughout many wards. The discrepancy between over-populated wards like the 43rd ward in Lincoln Park and under-populated wards like the 5th Ward in Hyde Park range as high as 8.7 percent. Many wards depart from the statistical average by several thousands of persons. Thirteen of the wards are at least 4 percent above or below the average. Half of the 50 wards are at least 3 percent above or below it. If the deviations are rounded off to the nearest whole number, 28 of the wards deviate from the average by 4 percent.

In seeking to justify a plan that had such discrepancies, the City Council floor leader, Alderman Pat O'Connor, stated: "All we could do is strive to have the largest number of City Council members available so that we would not have a referendum – and that's what we've achieved."

The plan passed by a vote of 41 to 8. In saying that the plan can only be explained by the need to get 41 votes, O'Connor was referring to a state law, namely, 65 Ill. Comp. Stat. 20/21-36. That law does not require 41 votes for the plan to become law but

allows one-fifth of the Council, or ten of the fifty members, to petition to let the voters to choose the appropriate plan. So, O'Connor's statement refers to the necessity of getting 41 votes to block any ten aldermen from letting plaintiffs and other voters decide.

The plan was designed to oust at least two independent aldermen – aldermen who did not reliably vote with the Council majority. These aldermen were Robert Fioretti, who represented the Second Ward, and Nicholas Sposato, who represented the Thirty-Sixth Ward. The wards of these independents were redrawn to a greater degree than any other city wards. The Second Ward represented by Fioretti disappeared entirely from the city's South Side and was moved to the North Side. The old Second Ward was now dismembered and divided among five other wards. Fioretti effectively lost 100 percent of his constituents. The Thirty Sixth Ward was also reshaped to an unusual degree. Sposato lost approximately 80 percent of his constituents.

The new map creates fifty wards which are not only unequal in population but which are bizarre shapes that do not meet the traditional redistricting goal of "compactness." The map also fragments some of the city's best-known neighborhood into multiple wards. For example, the Back of the Yards community is divided up among five wards, and the Logan Square community is divided among five wards as well.

II. The Proceedings

On April 2, 2013, the Plaintiff League of Women Voters of Chicago and various individual citizens of Chicago sued to challenge the City's redistricting plan in the United States District Court for the Northern District of Illinois, Eastern Division. Plaintiffs alleged that the population discrepancies set out above failed the principle of "one person, one vote," in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Plaintiffs invoked the jurisdiction of the federal court pursuant to 28 U.S.C. §§ 1331 and 1343 as to the claim under the Fourteenth Amendment. Plaintiffs also brought various state law claims.

Plaintiffs also challenged the City's decision to implement the plan several years in advance of the 2015 elections.

On August 26, 2013, the United States District Court granted the defendant City of Chicago's motion to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim. App. 13-33. The district court denied the City of Chicago's motion to dismiss under Rule 12(b)(1) for lack of standing. App. 19.

Plaintiffs had filed various claims under Illinois constitutional and statutory law over which the District Court declined to exercise supplemental jurisdiction. App. 33. On September 5, 2013, the District Court set out a judgment in a separate document dismissing all claims. App. 34-35.

On September 9, 2013, plaintiffs in the original action filed a notice of appeal from the final judgment pursuant to 28 U.S.C. § 1291. Plaintiffs did not file an appeal from their claims under the Illinois Constitution or Illinois statutory law.

On July 9, 2014, the United States Court of Appeals for the Seventh Circuit entered the opinion and judgment affirming the judgment of the United States District Court. App. 1-12.

Plaintiffs petition this Court for a writ of certiorari to review only that portion of the judgment of the United States Court of Appeals for the Seventh Circuit that relates to the claim that the map's population discrepancies violate the Equal Protection Clause of the Fourteenth Amendment.

REASONS FOR GRANTING THE PETITION

I. The Court should exercise its supervisory jurisdiction to make clear to lower courts that political discrimination or other selective incumbent protection is not a legitimate basis for deviations from the principle of "one person, one vote."

While requiring strict population equality in U.S. Congressional districts, this Court has historically given more leeway to States and local governments in drawing their own legislative districts. *See Brown v. Thomson,* 462 U.S. 835 (1983). As this Court has explained, "some deviations from population equality

may be necessary to permit the States to pursue other legitimate objectives such as maintaining the integrity of various political subdivisions and providing for compact districts of contiguous territory." *Id.* at 842 (1983) (quoting *Reynolds v. Sims,* 377 U.S. 533, 578 (1964)) (internal brackets and quotation marks omitted). While *Brown* says that deviations up to 10 percent are *prima facie* constitutional, this is not a "safe harbor"; where the map is drawn in an "arbitrary" or "discriminatory" manner, federal courts have continued to allow challenges to such deviations from equality. This Court set forth the principles guiding such challenges in *Roman v. Sincock*:

> In our view the problem does not lend itself to any such uniform formula, and it is neither practicable nor desirable to establish rigid mathematical standards for evaluating the constitutional validity of a state legislative apportionment scheme under the Equal Protection Clause. Rather, the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations *only* as may occur in recognizing certain factors that are *free from any taint of arbitrariness or discrimination*.

377 U.S. 695, 710 (1964) (emphasis added).

Yet the application of these principles has continued to divide the lower courts – which in this area

of law are usually three-judge district courts. *See* 28 U.S.C. § 2284(a). Many courts have allowed for the possibility of challenges to deviations of 10 percent but have been vague or non-specific as to what kind of "arbitrariness" or "discrimination" would sustain a challenge. *See, e.g., Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996). With the Seventh Circuit's decision here, there are now two leading cases in direct conflict with each other as to the kind of "arbitrariness" or "discrimination" required for a successful challenge: the instant decision, which gives free rein to the use of population discrepancies for political reprisals, and the decision in *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (three-judge court), *summarily affirmed sub nom. Cox v. Larios*, 542 U.S. 947 (2004), which does not. Accordingly, this Court should take certiorari to give more guidance to the lower courts – and to set out the standards for deciding these challenges, which will continue to arise.

In *Larios v. Cox*, the three-judge district court held that even a "minor deviation" of 9.98 percent must have a legitimate objective and be "free from any taint of arbitrariness or discrimination." *Id*. at 1340-42. After a trial, the court found at least two separate grounds for striking down a Georgia plan with such population discrepancies: (1) that the plan protected the legislative influence of rural and city areas at the expense of suburban areas; and (2) the plan protected *some* incumbents but discriminated against others. *Larios*, 300 F. Supp. 2d at 1341-42. As further basis for striking down the plan, the court

found that the deviations failed to serve any legitimate state interest or goal.

By contrast, the Seventh Circuit takes the directly opposite position. Indeed, without taking any evidence, the Court upheld dismissal at the pleading stage. In approving a Chicago ward map with deviations of up to 8.7 percent, and upholding a dismissal of plaintiffs' challenge under Rule 12(b)(6) without a trial or any evidence, the Seventh Circuit found it perfectly legitimate for the City Council of Chicago to use the 10 percent deviation to protect *some* incumbents – the 41 who voted for the plan – and do away with the ward boundaries of independent aldermen who did not vote with the Council majority and had critical or different views. So far as the Seventh Circuit is concerned, political reprisal is a good enough reason for a deviation from "one person, one vote" because in the Seventh Circuit's view of political life, someone has to end up "at the short end of the proverbial stick." *See* App. 8.

The Seventh Circuit reached this view with full awareness that plaintiffs were relying not just on the three-judge court's decision in *Larios v. Cox* (hereinafter "*Larios*"), but the decision of this Court in *Cox v. Larios* (hereinafter "*Cox*"), summarily affirming the lower court and in particular the concurring opinion in that summary ruling:

> The League also claimed that the new map – designed by Democratic aldermen – targeted two other Democratic aldermen from the

> Second and Thirty-Sixth Wards who "have shown political independence from the City Council majority." The League alleged that the City Council majority drew the 2015 map to "oust" these aldermen from their respective districts. Citing Justice Stevens' concurrence in the summary affirmance of *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.) (per curiam), summarily aff'd, 542 U.S. 947 (2004), they argue that political discrimination alone can serve to rebut the presumption of constitutional validity for maps with deviations below ten percent.

App. 6-7.

The Seventh Circuit then rejects this argument from the concurrence in *Cox*. With reasoning that mirrors that of the dissent filed in *Cox*, the Seventh Circuit supports in effect the idea of a safe harbor:

> Redistricting is an inherently political process; indeed, the Supreme Court has noted that "politics and political considerations are inseparable from districting and apportionment. . . . The reality is that districting inevitably has and is intended to have substantial political consequences." As in any election or redistricting scheme, there are bound to be winners and losers. Simply alleging that two aldermen – who were of the same party as those seeking to "oust" them – were at the short end of the proverbial stick is not enough to overcome a presumptively constitutional map and establish a prima facie violation of voters' equal protection rights.

App. 8 (quoting *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973)) (internal brackets, ellipsis, and citations omitted).

While it may be unnecessary to say, plaintiffs did not "simply" allege that the two aldermen were at the short end of the stick. They alleged that the unequal deviation was necessary to protect 41 of the incumbent aldermen in the Council majority and to punish those who are independents. As plaintiffs sufficiently allege and would have shown at trial the plan was not just "tainted" but conceived with this arbitrary and discriminatory motive.

Significantly, while the Seventh Circuit places weight on the "fact" that the two aldermen who were to be purged are of the same political party – as if to show these political differences cannot be so great – there is no such "fact" in the record at all. Indeed, as plaintiffs had stated to the Court, the City Council is officially non-partisan. The Democratic Party does not nominate aldermanic candidates, as the Court apparently believes. Furthermore, most people in Chicago know that there is a historic and often bitter divide between "regulars" and "independents" – a divide that has been recognized by the Seventh Circuit in prior litigation – and the Court's erroneous belief that the Council members hold office as Democrats shows the danger of making these decisions about political animus at a pleading stage.

Perhaps aware of the direct conflict with *Larios,* the Court tries to distinguish the claim in that case

as one of unconstitutional political gerrymandering that might independently violate the Fourteenth Amendment, whether there was a disparity or not. The Court therefore asserts while political gerrymandering may have affected "voters' rights" in *Larios,* it does not affect "voters' rights" here. It is unclear why the Court thinks so, and it gives no explanation. In fact, the City Council map affects voters' rights in the same way as the map in *Larios* – that is, it denies them an equal right to vote, and by roughly the same percent of discrepancy or deviation. Furthermore, as explained hereafter, while noting that there may have been partisan gerrymandering, the court in *Larios* did not base its decision on partisan gerrymandering but, *inter alia*, on evidence that the map protected some incumbents at the expense of others, just as the City Council map in this case does.

In *Larios*, as noted above, the court struck down the plan for two separate reasons: first, a bias in favor of rural areas and inner cities at the expense of growing suburbs; and second, a "policy of protecting incumbents . . . not applied in a neutral or consistent way." *Larios*, 300 F. Supp. 2d at 1347. To be sure, some kinds of incumbent protection can be legitimate – "at least in the limited form of avoiding contests between incumbents." *See Bush v. Vera*, 517 U.S. 952, 964 (1996) (quotation marks and brackets omitted); *Karcher v. Daggett*, 462 U.S. 725, 740 (1983); *see also Larios*, 300 F. Supp. 2d at 1347. The reason *Larios* struck down the plan in that case was that the incumbent protection scheme favored some over others.

But that's exactly what the Seventh Circuit upheld on the ground that someone has to get the short end of the proverbial stick – whatever that means – and it might as well be based on political speech and expression. The Court pointed out there was no partisan gerrymandering against an identifiable group and that is the apparent basis for its distinction of *Larios*. But the *Larios* court made clear that it was not relying on a partisan gerrymandering claim against an identifiable group, or a claim of gerrymandering that might independently violate the Fourteenth Amendment. Indeed, the court in *Larios* denied that the plaintiffs in that case could even make such a plausible claim and stated:

> [I]t is clear that, according to the strict standard set by *Davis v. Bandemer*, 478 U.S. 109 (1986), the plaintiffs could not establish a claim of unconstitutional partisan gerrymandering. *Id.* at 127 (requiring proof of "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group," such that the plaintiffs have "essentially been shut out of the political process").
>
> However, the Supreme Court's recognition of the politics inherent in districting arose in the context of political gerrymandering. *See Gaffney*, 412 U.S. at 751-52. Today, we have no occasion to consider the limits of partisan gerrymandering, but rather the very different set of considerations invoked by a claim that the one person, one vote principle has

> been violated. The value at issue today is an individualized and personal one, and therefore the offense to Equal Protection that occurred in this case is more readily apparent than in a claim involving gerrymandering. The Supreme Court has recognized the difference by placing greater restrictions on deviations from one person, one vote than on gerrymandering. . . .
>
> We need not resolve the issue of whether or when partisan advantage alone may justify deviations in population, because here the redistricting plans are plainly unlawful. In the state legislative plans at issue in this case, partisan interests are bound up inextricably with the interests of regionalism and incumbent protection.

300 F. Supp. 2d at 1351.

Plaintiffs in this case alleged just such an inconsistent and discriminatory scheme of incumbent protection. Instead the Seventh Circuit has required them to allege just what the court in *Larios* said they need not allege: intentional and actual discrimination against an identifiable group and presumably of a kind that would meet the strict standard of *Davis v. Bandemer*. This in effect means that the 10 percent rule is a safe harbor, unless the state or locality violates the Constitution in some other way.

Surely plaintiffs made all the necessary allegations of an inconsistent scheme of incumbent protection. They alleged that the reason for the discrepancies came from the need to cut a deal with 41

aldermen who would be willing to sign off on the boundaries. Plaintiffs alleged in paragraphs 59, 60 and 62 as follows:

> 59. However, City Council members individually made public statements that the real and specific "objective" of the deviations was to draw ward boundaries that would secure the votes of 41 City Council incumbents.
>
> 60. The approval of 41 City Council members was necessary under 65 ILCS 20/21-36 to ensure that the question of redistricting – specifically, a choice between two competing plans – would not be left to a referendum by the voters.
>
> * * *
>
> 62. The City Council floor leader, Alderman Pat O'Connor, effectively acknowledged that the real objective of the deviation from one person, one vote as follows: "All we could do is strive to have the largest number of City Council members available so that we would not have a referendum – and that's what we've achieved."

The Seventh Circuit brushed aside all of this at the pleading stage by finding that O'Connor meant something else:

> The League argues that this statement, standing alone, demonstrates that the map was created arbitrarily. Yet this statement suggests nothing of the sort. Alderman O'Connor was simply stating a fact: in order

> to prevent a referendum from occurring, it was necessary to obtain the proper majority of votes. One alderman's statement can hardly be said to establish that the whole City Council acted arbitrarily in designing the map.

App. 6 (internal citation omitted).

One statement may not prove it, but at the pleading stage, plaintiffs have alleged a scheme. Plaintiffs sufficiently alleged: (1) this was the floor leader's explanation for the deviations; and (2) the deviations were ways of making 41 aldermen happy. It was a selective incumbent protection scheme for 41 of the 50 aldermen, and that scheme had priority over a fair and equal right representation plan. Whatever "arbitrary" means it should apply to an allegation that the population discrepancies were necessary only to get 41 aldermen to sign on and had no other legitimate purpose.

At any rate plaintiffs certainly alleged political score settling, such as led to the *Larios* decision. In paragraphs 51 and 52, plaintiffs specifically identified two independent aldermen who were political targets: the aldermen from the Second and Thirty-Sixth Wards, Robert Fioretti and Nick Sposato, respectively.

In other words, plaintiffs alleged exactly what bothered the *Larios* court: an inconsistent incumbent protection scheme that may not amount to unconstitutional gerrymandering under *Davis v. Bandemer*

but which establishes that the deviation was not "free from any taint of arbitrariness or discrimination."

Finally, the Seventh Circuit's decision is notably in conflict with *Larios* by stating that the court would not consider evidence that the plan departed from traditional redistricting criteria. *Larios* did consider such evidence. *See Larios*, 300 F. Supp. 2d at 1331-34. But the Seventh Circuit will not permit plaintiffs to show that the population discrepancies do not relate to or advance any legitimate state goal and even ignore or conflict with traditional redistricting principles.

> Finally, the League asserts that the new map departs from traditional redistricting criteria. But, as explained above, the League fails to allege how any of these "grotesque shapes and boundaries" harm voters. The suggestion that a map that is not compact or genuinely contiguous violates equal protection principles simply misstates the law . . .
>
> The use of traditional redistricting criteria is not a basis for an equal-population violation, but rather a defense to be used in defending a redistricting decision once the plaintiff has made out a prima facie case.

App. 9.

By contrast, the three-judge court in *Larios* did receive and consider such evidence during the trial as part of the plaintiffs' case. After all, the presumption of validity is a presumption that in varying from

population equality the state or locality is pursuing "legitimate considerations incident to the effectuation of a rational state policy." *See Reynolds*, 377 U.S. at 579; *Brown*, 462 U.S. at 842 (citing *Reynolds* in defining 10 percent presumption in order to permit "States to pursue legitimate objectives"). Indeed, in order to show a map is not "free" of the "taint" of "arbitrariness," one would think plaintiffs could show that the plan *is* "arbitrary," in that it violates principles of "compactness," or "contiguity," or preservation of political boundaries or communities. The Seventh Circuit's approach denies plaintiffs even the right to show "arbitrariness," and thereby turns a presumption that the state is acting legitimately into an absolute safe harbor. If there is no legitimate objective for these population discrepancies, there is no legitimate reason for the presumption.

There are still two more City Council elections before this unequal and discriminatory map will be revised after the next census. It is also likely that there will be many more challenges as states and localities test whether the 10 percent deviation really is a safe harbor in all but name, after this brush-off of *Larios* and *Cox*. For that reason, plaintiffs respectfully submit that this Court should accept this petition for certiorari to review the Seventh Circuit's decision and to clarify for lower courts when or in what circumstances a state or locality can depart from the principle of one person, one vote.

II. The Seventh Circuit's decision presents at least two important and unresolved questions of law: what plaintiffs have to show specifically to rebut the presumption of validity; and whether the presumption itself has become an anachronism and should be reconsidered in the current state of digital technology.

As set forth above, the Seventh Circuit has set forth a new and very specific pleading standard for challenging deviations of less than 10 percent – one that would bar such claims at the pleading stage unless plaintiffs can allege partisan gerrymandering that would independently violate the rights of voters under the Equal Protection Clause even if there was no deviation at all. Until now, decisions as to the validity of a deviation have always been based on an evidentiary record, and the creation of this pleading rule will effectively insulate every case of a deviation at or near 10 percent from judicial review.

Furthermore, as should be evident from the above, there is a need for more guidance from this Court as to what constitutes "arbitrariness" and what constitutes "discrimination" as those terms were used in the Court's decision in *Roman*, which lower courts have been trying to apply. The Seventh Circuit's attempt to fashion a new pleading rule for these cases may well take hold and would be in conflict with this Court's summary affirmance of *Larios*.

Finally, the application of the right judicial standard is now so unsettled that this Court may

wish to revisit whether there should be any such rule of 10 percent or at least a percent of such magnitude. Maybe at the time of *Gaffney*, it was onerous for states and localities to draw maps that were perfectly equal *and* preserved compactness and contiguity, but in this digital age, it is possible to draw thousands of maps of various shapes and configurations that divide districts and wards equally within thresholds of 0.0001 percent. *See* Don Peck & Caitlin Casey, *The Nation in Numbers: Packing, Cracking, and Kidnapping*, ATLANTIC MONTHLY, Jan./Feb. 2004, at 50, 50-51 ("By 2001 . . . mappers were able to specify a desired outcome or outcomes [such as] the number of people in a district . . . and have the program design a potential new district instantly. [Geographic Information Systems] allow redistricters to create hundreds of rough drafts easily and quickly, and to choose from among them maps that are both politically and aesthetically appealing."). With so many permutations available to serve any imaginable legitimate purpose, the case for a presumption as high as 10 percent has become harder to make than it was forty or fifty years ago.

In *Baldus v. Wisconsin Government Accountability Board*, a three-judge court offered this observation:

> And indeed, it is an interesting question whether deviations that might have been acceptable in an earlier time ought to be tolerated now that . . . it is possible for a computer to draw not one, but an unlimited

> number of districts with the perfect number of voting inhabitants.

849 F. Supp. 2d 840, 848 (E.D. Wis. 2012). Likewise, the court in *Larios* raised but did not decide "whether the mere use of a 10% population window renders Georgia's state legislative plans unconstitutional." 300 F. Supp. 2d at 1341. Of course a ruling to end the presumption is not necessary to reverse the outcome here. However, it may well be that continuing a 10 percent presumption and policing the good faith use of it is no longer an appropriate use of limited judicial resources. If there is a good faith reason for a departure from strict population equality, a state or locality should have the right to establish it; but the burden should be on the state or locality, and there should not be an open invitation to state and local drafters to exploit a 10 percent loophole for any obscure and unstated reason that they like. Nor should the courts presume good faith given the digital technology that is now available for producing the modern legislative map. It is hard to believe that in the current age those states and localities still using the 10 percent threshold are complying with their obligation to make an "honest and good faith effort" to "construct districts . . . as nearly of equal population as is practicable." *See Reynolds*, 377 U.S. at 577. The anachronistic loophole of 10 percent is now wasting the time of the courts and has outlived its usefulness.

CONCLUSION

For the reasons set forth above, petitioners request that this Court issue a writ of certiorari to review the decision of the Seventh Circuit in this case.

Dated: October 7, 2014

Respectfully submitted,

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In the
United States Court of Appeals
for the Seventh Circuit

No. 13-2977

LEAGUE OF WOMEN VOTERS
OF CHICAGO, et al.,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 1:13-cv-02455 –
Sharon Johnson Coleman, *Judge*.

ARGUED APRIL 7, 2014 – DECIDED JULY 9, 2014

Before WOOD, *Chief Judge*, and KANNE and SYKES, *Circuit Judges*.

KANNE, *Circuit Judge*. In 2012, Chicago's City Council voted on and adopted a new ward map to take effect in 2015. The League of Women Voters of Chicago and fourteen Chicago citizens (collectively "the League") filed this action challenging the re-districting. The League alleged that the 2015 map

failed to adhere to equal-population principles established under the Equal Protection Clause of the Fourteenth Amendment. The League also asserted that the City prematurely implemented the 2015 boundaries, which infringed upon their right to vote under the Fourteenth Amendment. The district court granted the City's 12(b)(6) motion for failure of the League to state a claim. For the following reasons, we affirm.

I. BACKGROUND

Following the 2010 census, and pursuant to state law, the City of Chicago sought to reapportion its fifty aldermanic wards. 65 ILCS 20/21-36. Beginning in 2011, the City Council conducted hearings to solicit the views of citizens regarding the redrawing of ward boundaries. Under state law, the Council was required to garner the approval of forty-one aldermen in order to prevent a referendum on the redistricting plan. 65 ILCS 20/21-39; 65 ILCS 20/21-40. On January 19, 2012, the Council approved the redistricting plan by a vote of forty-one to eight.

According to the 2010 census, the City's population was 2,695,598, which, if divided equally, would result in 53,912 people in each ward. The wards created by the 2015 map deviate from the average population per ward by a maximum of 8.7 percent.

The League filed this action challenging the redistricting ordinance. Only Counts I and III are at

issue in this appeal.[1] In Count I, they alleged that the new ordinance was implemented prematurely and deprived constituents of their right to equal protection under the Fourteenth Amendment.

In Count III, the League claimed that the maximum deviations of 8.7 percent between the wards violated the Equal Protection Clause of the Fourteenth Amendment. They alleged that the 2015 map was arbitrary, that it politically discriminated against "independent" aldermen, and that it departed from traditional redistricting criteria. The League also alleged that the Second and Thirty-Sixth Wards were redrawn to a greater degree than others in an attempt to oust the aldermen of these wards who demonstrated political independence from the City Council majority.

Following the City's 12(b)(6) motion, the district court dismissed both Counts I and III for failure to state a claim. As for Count I, the court held that the League had not alleged permanent disenfranchisement nor a change to election law; at most, the League had claimed temporary disenfranchisement, which does not give rise to equal protection concerns.

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[1] The League also asserted that the plan unlawfully created classifications of citizens without any rational basis in violation of the Equal Protection Clause of the Fourteenth Amendment. Additionally, the League made state statutory claims, which the district court dismissed without prejudice because it declined to exercise supplemental jurisdiction. The League does not pursue these claims on appeal.

Moreover, the court noted that reacting to the concerns of future constituents is simply part of the political process.

The court also dismissed the equal-population claim, finding that the League failed to meet its burden to show a prima facie case of unconstitutionality. The court, citing *Brown v. Thomson,* 462 U.S. 835, 842 (1983) noted that a maximum population deviation below 10 percent is considered minor and insufficient to establish a prima facie case that requires justification by the state. The court further found that the League's complaint did not allege that the map targeted an objectively defined group and preserved the voting rights of minorities. Finally, the court found that disfavoring certain aldermen over others is an inherent part of the political process and an inevitable result of redistricting.

II. Analysis

A. Standard of Review

We review a 12(b)(6) dismissal *de novo* and construe all allegations and any reasonable inferences in the light most favorable to the plaintiff. *Killingsworth v. HSBC Bank Nevada, N.A.,* 507 F.3d 614, 618 (7th Cir. 2007). And while a complaint does not need "detailed factual allegations" to survive a 12(b)(6) motion to dismiss, it must allege sufficient facts to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007).

B. One Person, One Vote

The Equal Protection Clause principle of "one person, one vote" requires that officials be elected from voting districts with substantially equal populations. *Reynolds v. Sims,* 377 U.S. 533, 577 (1964). Thus, "one man's vote in a[n] . . . election is to be worth as much as another's." *Wesberry v. Sanders,* 376 U.S. 1, 8 (1964). To achieve this result, the government must "make an honest and good-faith effort to construct its districts as nearly of equal population as is practicable," but mathematical precision is not required. *Gaffney v. Cummings,* 412 U.S. 735, 743 (1973) (internal quotation marks omitted).

The Supreme Court has held that a maximum population deviation greater than ten percent "creates a prima facie case of discrimination and therefore must be justified by the state." *Brown,* 462 U.S. at 842-43. But when a maximum deviation is less than ten percent, the deviation is considered minor and the plaintiffs cannot "establish a violation of the Equal Protection Clause from population variations alone." *White v. Regester,* 412 U.S. 755, 764 (1973); *see also Daly v. Hunt,* 93 F.3d 1212, 1220 (4th Cir. 1996). Thus, a plan with a minor maximum population deviation will be presumed to be constitutionally valid absent a showing of "arbitrariness or discrimination." *Roman v. Sincock,* 377 U.S. 695, 710 (1964). To overcome the presumption, the League makes three allegations of arbitrariness or discrimination.

1. Alderman O'Connor's Statement

First, the League points to a statement made by Alderman Patrick O'Connor who claimed that the map was created in order "to have the largest number of City Council members available so that we would not have a referendum." The League argues that this statement, standing alone, demonstrates that the map was created arbitrarily. Yet this statement suggests nothing of the sort. Alderman O'Connor was simply stating a fact: in order to prevent a referendum from occurring, it was necessary to obtain the proper majority of votes. 65 ILCS 20/21-39; 65 ILCS 20/21-40. One alderman's statement can hardly be said to establish that the whole City Council acted arbitrarily in designing the map. At most, the statement reflects that Alderman O'Connor wanted this bill to pass into law, a proposition that required a substantial majority of votes.

2. "Independent" Aldermen

The League also claimed that the new map – designed by Democratic aldermen – targeted two other Democratic aldermen from the Second and Thirty-Sixth Wards who "have shown political independence from the City Council majority." The League alleged that the City Council majority drew the 2015 map to "oust" these aldermen from their respective districts. Citing Justice Stevens' concurrence in the summary affirmance of *Larios v. Cox,* 300 F. Supp. 2d 1320 (N.D. Ga.) (per curiam), summarily aff'd, 542 U.S.

947 (2004), they argue that political discrimination alone can serve to rebut the presumption of constitutional validity for maps with deviations below ten percent.[2]

Larios involved redistricting that was tainted by two prohibited considerations: (1) the redistricting sought "to allow rural and inner-city Atlanta regions of the state to hold on to their legislative influence" at the expense of Republican-leaning areas; and (2) the deviations "were created to protect incumbents in a wholly inconsistent and discriminatory way." *Larios,* 300 F. Supp. 2d at 1342. But *Larios* is inapplicable.

The district court's concern in *Larios* was that the *voters*' ability to elect their representatives was significantly diminished, not that individual Democratic or Republican representatives were immune from the political process. It noted that voters with

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[2] We note that *Larios* did not fully address whether a state body's political motivations may serve to establish an equal-population violation. As the Supreme Court has indicated, "Even in addressing political motivation as a justification for an equal-population violation, . . . *Larios* does not give clear guidance. The panel explained it 'need not resolve the issue of whether or when partisan advantage alone may justify deviations in population' because the plans were 'plainly unlawful' " and all political motivations were intertwined with clearly rejected objectives. *League of United Latin Am. Citizens v. Perry,* 548 U.S. 399, 423 (2006), citing *Larios,* 300 F. Supp. 2d at 1352. Moreover, a summary affirmance means that the Supreme Court agreed with the judgment "but not necessarily the reasoning by which it was reached." *Mandel v. Bradley,* 432 U.S. 173, 176 (1977) (quotation omitted).

particular ideologies were being disfavored: "Republican-leaning districts [were] vastly more overpopulated as a whole than Democratic-leaning districts." *Id.* at 1331. Such is not the case here.

The Constitution "guarantees the opportunity for equal participation by all *voters* in the election of [their representatives]." *Reynolds,* 377 U.S. at 566 (emphasis added). It is not meant to insulate individual politicians from the threat of political reprisal once redistricting occurs. The fact remains that the equal-population requirement is meant to protect "an *individual's* right to vote." *Id.* at 568 (emphasis added).

Redistricting is an inherently political process; indeed, the Supreme Court has noted that "[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." *Gaffney,* 412 U.S. at 753; *see also Larios,* 300 F. Supp. 2d at 1354 ("a redistricting process need not be free of politics in order to be constitutional."). As in any election or redistricting scheme, there are bound to be winners and losers. Simply alleging that two aldermen – who were of the same party as those seeking to "oust" them – were at the short end of the proverbial stick is not enough to overcome a presumptively constitutional map and establish a prima facie violation of voters' equal protection rights.

3. Traditional Redistricting Criteria

Finally, the League asserts that the new map departs from traditional redistricting criteria. But, as explained above, the League fails to allege how any of these "grotesque shapes and boundaries" harm voters. The suggestion that a map that is not compact or genuinely contiguous violates equal protection principles simply misstates the law, for "compactness or attractiveness has never been held to constitute an independent federal constitutional requirement." *Gaffney,* 412 U.S. at 752 n. 18.

The use of traditional redistricting criteria is not a basis for an equal-population violation, but rather a *defense* to be used in defending a redistricting decision once the plaintiff has made out a prima facie case. "Any number of consistently applied legislative policies might *justify* some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." *Karcher v. Daggett,* 462 U.S. 725, 740 (1983) (emphasis added); *see Larios,* 300 F. Supp. 2d at 1349-50 (finding that the defendant made no attempt "to *justify* the population deviations because of compactness, contiguity, respecting the boundaries of political subdivisions, or preserving the cores of prior districts." (emphasis added)). The Court continued in *Karcher,* "As long as the criteria are nondiscriminatory, these are legitimate objectives that on a proper showing could justify minor population deviations." *Id.*(internal citation omitted); *see also Shaw v. Reno,*

509 U.S. 630, 647 (1993) ("traditional districting principles such as compactness, contiguity, and respect for political subdivisions" are "important not because they are constitutionally required – *they are not* . . . – but because they are objective factors that may serve to *defeat* a claim that a district has been gerrymandered." (emphasis added) (internal citation omitted)).

The "one person, one vote" principle seeks to prevent one district from becoming so overpopulated, or underpopulated, that it leads to significant disparities in voting strength amongst others. *See Reynolds,* 377 U.S. at 562-564. Whether certain wards appear to be "bizarre or uncouth," as the League alleges, is not enough to establish a prima facie case for an equal protection violation. Rather, had the League made out a prima facie case, the City could use traditional redistricting criteria to show that the deviations are nonetheless constitutional. The League has not done so and therefore their equal protection claim must fail.

C. Early Implementation

The League also claims that the City has implemented the new boundaries prematurely, which results in a denial of equal protection under the Fourteenth Amendment. They base this assertion on various letters and statements from individual aldermen to show that the City has enacted a widespread policy of early implementation. And although the complaint admits that the Council "has not expressly approved

by resolution or ordinance the right of City Council members to begin representing [constituents] on the basis of the new ward boundaries[,]" the League nonetheless claims that the City has already put the 2015 plan into practice.

The allegation, although framed otherwise, is essentially a *Monell* claim, seeking to invoke the rule that prohibits municipal agencies from implementing policies that cause constitutional injuries under 42 U.S.C. § 1983.[3] But the City cannot be liable under section 1983 for respondeat superior. Rather, "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell v. Dept. of Soc. Servs. of N.Y.C.,* 436 U.S. 658, 694 (1978). There are only three ways in which a municipality can be held liable under section 1983. There must be: (1) an express policy that would cause a constitutional deprivation if enforced; (2) a common practice that is so widespread and well settled that it constitutes a custom or practice; or (3) an allegation that the constitutional injury was caused by a person with final policymaking authority. *Estate of Sims v. Cnty. of Bureau,* 506 F.3d 509, 515 (7th Cir. 2007).

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[3] Though the district court did not address this issue, "we may affirm a judgment on any ground the record supports and the appellee has not waived." *Barton v. Zimmer, Inc.,* 662 F.3d 448, 454-55 (7th Cir. 2011).

The League has conceded that the City has not implemented this change by way of "a formal ordinance or resolution" and has not alleged that any one individual with policymaking authority has caused the deprivation. Accordingly, they must allege a common, unwritten practice put in place by the City that nonetheless has the force of law. They fail to do so. The League relies on a few incidents wherein individual aldermen have taken or refused action based on the 2015 map. But this does not establish an impermissible custom or practice. "Misbehaving employees are responsible for their own conduct; units of local government are responsible only for their policies rather than misconduct by their workers." *Waters v. City of Chi.,* 580 F.3d 575, 581 (7th Cir. 2009). This minimal correspondence by individual aldermen is a far reach from proving a policy "so permanent and well settled as to constitute a custom or usage with the force of law." *Baskin v. City of Des Plaines,* 138 F.3d 701, 704-05 (7th Cir. 1998). Accordingly, the League has failed to allege a violation of their constitutional rights.

III. CONCLUSION

The League failed to allege any facts that would entitle them to relief under the Equal Protection Clause. For the foregoing reasons, we AFFIRM the district court's decision to dismiss the claims.

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

LEAGUE OF WOMEN VOTERS OF CHICAGO, JODI BIANCALANA, BRUCE CROSBY, WILLIAM K. CROSBY, STEPHANIE CROWELL, IGNAZIA ANGELA DIADONE, JIM IGNATOWSKI, GERALD A. JUDGE, AMELIA KABAT, ERNIE LUKASIK, KEITH MCDONALD, ROBERT MCKAY, LYNN SEERMON, PATRICIA SWINDLE, AND ALONSO ZARAGOZA, Plaintiffs, v. TIMOTHY WOLF, et al., [sic] Defendants.	No. 13 cv 2455 Judge Sharon Johnson Coleman

Memorandum Opinion and Order

(Filed Aug. 16, 2013)

Plaintiffs, League of Women Voters and fourteen of their members (collectively "LWV" or "plaintiffs") filed a seven-count Complaint alleging constitutional and state law violations arising from the defendant City of Chicago's ("City") new redistricting plan for the 2015 aldermanic elections. Plaintiffs assert that

the City has deprived plaintiffs of their right to vote and have acted ultra vires of state law through the de facto implementation of the new ward map before the 2015 election. Plaintiffs also assert that the new ward map itself is unconstitutional as a violation of the "one person, one vote" principle, and the new ward map as drawn violates state law. The City moves to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) for lack of standing and for failure to state a claim upon which relief can be granted. This Court heard arguments on the motion on July 15, 2013. For the reasons stated below, the motion is denied as to standing and granted for failure to state a claim.

Background

League of Women Voters of Chicago is a nonpartisan political organization that encourages informed and active participation in government. The individual plaintiffs are Chicago residents and LWV members. The City of Chicago is a municipal corporation. Pursuant to 65 Ill. Comp. Stat. 20/21-37, the City enacted an ordinance to redistrict the fifty aldermanic wards following the decennial census in 2010. Divided equally among the 50 wards, the population of each ward should be 53,912 based on the 2010 census results that City population was 2,695,598.

In 2011, a City Council Committee was convened to conduct hearings, receive and consider proposed redistricting plans. On January 17, 2012, Rahm

Emanuel, Mayor of the City of Chicago, called a special meeting of the City Council on January 19, 2012, to consider and vote on an ordinance amending Title II, Section 8 of the Municipal Code regarding ward boundaries. The proposed ordinance was made public a half hour before the meeting. The City Council approved the proposed ordinance without a floor debate by 41-8 vote. The new map has deviations in population of up to 8.7 percent in population. Plaintiffs also allege that several of the new wards have "grotesque shapes and boundaries," particularly the Second and Thirty-Sixth Wards, and fragments neighborhoods into multiple wards.

Plaintiffs seek a preliminary and permanent injunction preventing the City from implementing the new ward boundaries prior to the 2015 election. Plaintiffs also seek a preliminary and permanent injunction preventing implementation of the January 19, 2012, Ordinance and directing the City to develop and adopt a redistricting plan that is in compliance with 65 Ill. Comp. Stat. 20/21-36 with respect to each of the fifty wards.

Legal Standard

Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of a complaint for lack of subject matter jurisdiction. Standing is an essential jurisdictional requirement; "[i]n essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or particular issues."

Apex Digital, Inc. v. Sears, Roebuck & Co., 572 F.3d 440, 443 (7th Cir. 2009). As with a Rule 12(b)(6) motion, the district court must "accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiff." *St. John's United Church of Christ v. City of Chicago,* 502 F.3d 616, 625 (7th Cir. 2007) (quoting *Long v. Shorebank Dev. Corp.,* 182 F.3d 548, 554 (7th Cir. 1999)). However, when a defendant challenges subject-matter jurisdiction, the plaintiff bears the burden of establishing jurisdiction. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

Federal Rule of Civil Procedure 8(a)(2) sets forth the basic pleading requirement that a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). Rule 8 does not require the plaintiff to plead particularized facts, but the factual allegations in the complaint must be enough to raise a plausible right to relief above the speculative level. *See Arnett v. Webster,* 658 F.3d 742, 751-52 (7th Cir. 2011). In order to survive dismissal, plaintiff must plead "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 1949 (2009). When ruling on a motion to dismiss brought pursuant to Rule 12(b)(6), courts accept all well-pleaded allegations in the complaint as true, *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (7th Cir. 2004), and draw all reasonable inferences in favor of the plaintiff. *Pisciotta v. Old Nat. Bancorp,* 499 F.3d 629, 633 (7th Cir. 2007).

Discussion

I. Standing: Rule 12(b)(1)

Under Article III of the U.S. Constitution, federal courts are limited to hearing "Cases" and "Controversies." Standing is therefore a jurisdictional prerequisite to bringing a lawsuit. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.,* 528 U.S. 167, 180 (2000). To establish standing, "a plaintiff must show that he is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Summers v. Earth Island Inst.,* 129 S. Ct. 1142, 1149, 173 L.Ed. 2d 1 (2009).

Here, plaintiff League of Women Voters is asserting standing as an organization through some of its members (the fourteen individual plaintiffs). An organization has standing when: (1) any of its members has standing, (2) the lawsuit involves interests "germane to the organization's purpose," and (3) neither the claim asserted nor the relief requested requires an individual to participate in the lawsuit. *Sierra Club v. Franklin County Power of Ill., LLC,* 546 F.3d 918, 924 (7th Cir. 2008). Plaintiffs bear the burden of establishing standing. *Pollack v. United States DOJ,* 577 F.3d 736, 739 (7th Cir. 2009).

In this case, only the first element of organizational standing is at issue, i.e., whether any named

member has standing in his/her own right. The City effectively concedes that League of Women Voters has organizational standing for Counts I and II by admitting that plaintiff Ignazia Angela Diadone has standing. However, there is no such concession as to whether any individual plaintiff members of LWV have standing to sue on Counts III-VI.[1] The allegations related to redistricting in Counts III-VI are based on *Equal Protection* arguments relating to the population distribution and shape and contours of the new wards. The Complaint contains a paragraph that states, "Biancalana, Crowell, Diadone, Ignatowski, Judge, Kabat, Lukasik, McDonald, Seermon, and Zaragoza are in wards with more than 53,912 persons according to the census taken in 2010, and accordingly have less than an equal right to vote." (Compl. Dkt. #1, at ¶ 20). The Complaint also alleges that its

[1] Plaintiffs' argument in their response brief treats the issue of standing as a foregone conclusion and, rather than articulate how any of the individual plaintiffs meets the standing requirement, they simply assert that the complaint states that the actions of defendants violate the rights of LWV Chicago members and cite to another LWV lawsuit in which the court found organizational standing. However, in that case, *League of Women Voters v. Quinn,* No. 11-cv-5569, 2011 U.S. Dist. LEXIS 125531, at *4 (N.D.Ill. Oct. 27, 2011), the defendants dropped their challenge to standing in their reply brief thereby conceding the issue and the court found organizational standing sufficiently pled when LWV asserted that they had members in every legislative district and the injury at issue was a violation of their *First Amendment* right to speak. Further, plaintiffs reference only Counts I and II in their argument in support of standing.

members, Lynn Seermon, and Alonso Zaragoza, live in the Second and Thirty-Six Wards under the current map, but will be in different districts under the 2015 map. (Compl. Dkt. #1, at ¶¶ 17, 19). These allegations are sufficient to support standing in Counts III-VI that relate to population deviation and the shape of the new wards at this stage of the proceeding. Therefore, this Court denies the City's motion to dismiss pursuant to *Rule 12(b)(1)* for lack of standing.

II. Failure to State a Claim: Rule 12(b)(6)

1. Early Implementation: Counts I and II

In Count I, plaintiffs allege the mid-term implementation of the redistricting plan is a denial of Equal Protection under the *Fourteenth Amendment.* LWV alleges that the City has begun using the 2015 ward map to make decisions and react to constituents in a de facto early implementation of the 2015 redistricting plan that denies constituents representation by the aldermen for whom they voted and effectively denies their right to vote. The City denies that the City Council has implemented the 2015 map. The City also moves to dismiss Count I for failure to state a claim, arguing that LWV does not allege a pervasive policy that violates the right to vote or intentionally discriminates against a protected class.

The first step in evaluating a claim that a law or a government action violates the *Equal Protection Clause* is to determine the appropriate standard of review. *See Dunn v. Blumstein,* 405 U.S. 330, 335

(1972). Here, plaintiffs assert that the burden on the right to vote as alleged here requires something more than rational basis review, though they stop short of arguing for the application of strict scrutiny. They point to *Burdick v. Takushi,* 504 U.S. 428 (1992), as authority for applying a more stringent standard of review to right to vote claims.

In *Burdick,* the Supreme Court affirmed a judgment holding that a prohibition on write-in voting, taken as part of the state's comprehensive election scheme, did not impermissibly burden the right to vote. *Id.* at 442. The court stated that the appropriate standard for evaluating a claim that a state law burdens the right to vote is set forth in *Anderson v. Celebrezze,* 460 U.S. 780, 788, 75 L.Ed. 2d 547, 103 S. Ct. 1564 (1983). Therefore, "[a] court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the *First* and *Fourteenth Amendments* that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick,* 504 U.S. at 434 (quoting *Anderson,* 460 U.S. at 788).

LWV also analogizes *Tully v. Edgar,* 171 Ill. 2d 297, 664 N.E.2d 43, 215 Ill. Dec. 646 (1996), in support of its argument for applying a higher standard of review. In *Tully,* the plaintiffs challenged a Public Act that changed the process of selecting trustees to the

board of the state university from an elective process to an appointive process. *Id.* at 299. Applying a strict scrutiny standard, the court nullified the provision of the Act that immediately removed the sitting trustees from office as violating the Illinois Constitution. *Id.* at 312. Here, however, plaintiffs are not facing a permanent disenfranchisement similar to the situation in *Tully,* nor are they challenging an election law, as in *Burdick*. LWV are essentially alleging that certain voters are disenfranchised because the boundaries of their ward have been redrawn and some City Council members are using the 2015 ward map to inform their decisions and respond to constituents.

Without conceding that city council members have begun using the new ward map, the City contends that rational basis review applies here because this situation is similar to the temporary disenfranchisement that occurs when reapportionment is combined with a staggered system of elections. *See e.g., Donatelli v. Mitchell,* 2 F.3d 508 (3d Cir. 1993). This Court agrees.[2]

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[2] At oral argument on this motion, plaintiffs argued that *Baldus v. Members of the Wisconsin Government Accountability Board, et al.,* 849 F. Supp. 2d 840, 850 (E.D. Wis. 2012), limited the holding in *Donatelli* and is controlling authority. The Court notes that *Baldus* is a district court decision, though a three-judge panel selected by the Seventh Circuit Court of Appeals decided the case. *Baldus* refers to *Donatelli* and *Republican Party of Oregon* for the proposition that "some degree of temporary disenfranchisement in the wake of redistricting is seen as inevitable, and thus presumptively constitutional, so long as no

(Continued on following page)

In *Donatelli,* the Third Circuit Court of Appeals confronted the question of whether the plaintiffs' right to vote for a state senator under Pennsylvania law had been infringed because they had been "assigned" a senator who was not elected by their district, or any significant portion of it. *Id.* The court held that the claim had no constitutional basis and numerous courts have concluded that temporary disenfranchisement, of the kind experienced by the *Donatelli* plaintiffs, resulting from the combined effect of reapportionment and a staggered election system meets the rational basis test and therefore does not violate the *Equal Protection Clause. Id.* at 518.

Courts consistently apply rational basis review to temporary disenfranchisement from reapportionment claims and none that this Court has found nor any cited by plaintiffs have found an *Equal Protection Clause* violation. *See, e.g., Republican Party of Oregon v. Keisling,* 959 F.2d 144, 145-46 (9th Cir. 1992) ("[I]n the context of reapportionment, a temporary dilution of voting power that does not unduly burden a particular group does not violate the equal protection clause."). "The state decision-makers need not actually articulate the purpose or rationale supporting

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particular group is uniquely burdened." 849 F. Supp. 2d at 852. The court goes on to state that when deciding how much disenfranchisement is too much, courts should look at the facts of the case before it. *Baldus* found that the temporary disenfranchisement of 300,000 Wisconsin voters did not violate the Equal Protection Clause. *Id.* at 852-53.

the classification; nor does the state have any obligation to produce evidence to sustain the rationality of its decision." *Donatelli,* 2 F.3d at 515. Classifications subject to rational basis review are accorded a strong presumption of validity. *Id.*

Here, as in *Donatelli,* nothing in the Complaint suggests that plaintiffs' access to the electoral process is restricted or that they will not be able to vote in the next regularly scheduled election. Plaintiffs argument that the right to vote continues for the length of an elected term seems to suggest that it is the right to have the *same elected official* rather than merely a representative elected by someone for the duration of the term. By extension that interpretation of the right to vote means that anyone whose chosen candidate lost has been impermissibly disenfranchised until the next election. This reading of the right to vote is not borne out by the case law – *Tully* holds that voters cannot be *permanently* disenfranchised; *Jackson v. Ogilvie,* 426 F.2d 1333 (7th Cir. 1970), holds that voters have a right to have elected positions filed when they become vacant; *Judge v. Quinn,* 612 F.3d 537 (7th Cir. 2010), holds that the governor had a duty to issue a writ of election to fill the senate vacancy left by President Barack Obama. However, no court has found a violation of equal protection where there is a temporary disenfranchisement.

Plaintiffs admit that no official action implementing the 2015 map has taken place, but instead they point to a few incidents of individual aldermen taking or refusing action based on the new map. Plaintiffs

argue that, "the City's decision to implement the new map imposes real limitations on the aldermen's power to be responsive, and on their ability to represent their constituents' interests effectively." (Resp. Br. Dkt. #24, at 21). Yet, there is no indication that aldermen are prevented from acting according to the current map. Aldermen are sitting in wards that in some instances have new boundaries for the 2015 election. They are aware of the new boundaries because they voted on the new plan, and thus are also aware that they will have new constituents in the 2015 election. It is the nature of the political process that some elected officials may consider it politically beneficial to be responsive to their constituents under the new map. This Court is not and should not be in a position of reviewing decisions of individual aldermen to ensure that they are serving their current constituents. LWV fails to state a claim for violation of the right to vote under the *Equal Protection Clause.*

Count II alleges that de facto implementation of the new ward map, is an *ultra vires* act that the City has no authority to do under state law. Specifically, plaintiffs allege that the City has violated 65 Ill. Comp. Stat. 20/21-38, which states in relevant part: "All elections of aldermen shall be held from the existing wards until a redistricting is had as provided for in this article." The City moves to dismiss Count II for failure to state a claim because the factual allegations do not support an inference that the City has not complied with 65 Ill. Comp. Stat. 20/21-38 since nothing in the statute governs how aldermen

conduct City business once they are elected. The City further argues that the allegation that the 2011 aldermanic election results are nullified by the early implementation of the 2015 ward map in violation of the Illinois Constitution is a legal conclusion and therefore fails to state a claim.

Plaintiffs' claim that early implementation violates the Illinois Constitution's equal protection clause fails for the same reason that its U.S. Constitutional claim fails in Count I. With respect to whether the alleged early implementation of the new map is an *ultra vires* act, that claim survives dismissal. The Complaint adequately alleges that some alderman have chosen to act based on the new map without any basis for doing so under state statute and thus this claim is sufficiently stated.

2. The New Ward Map: Counts III-VI

a. Counts III and VI

Count III alleges a violation of the one person, one vote principle of the Equal Protection Clause articulated in *Reynolds v. Sims,* 377 U.S. 533, 568, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), because the redistricting plan divides the fifty wards unequally. Specifically, plaintiffs assert that under the new ward boundaries the population deviations between "low" population and "high" population are as high as 8.7 percent and there is no practical reason for failing to enact a more equal plan. Count IV asserts that the plan also violates the Illinois statute that provides

the population of Chicago's fifty wards "be as nearly equal as practicable." 65 ILCS 20/21-36. The City moves to dismiss Counts III and IV on the basis that they fail as a matter of law because courts have held redistricting plans with maximum population deviations of less than 10% as prima facie valid. The City also asserts that Count IV fails for the additional reason that Illinois has upheld a Chicago redistricting plan with a maximum population deviation of 45%, citing *Miller v. City of Chicago,* 348 Ill. 34, 180 N.E. 627 (1932).[3]

"Plaintiffs have the initial burden to show (1) the existence of a population disparity that (2) could have been reduced or eliminated by (3) a good-faith effort to draw districts of equal proportion." *Baldus,* 849 F. Supp. 2d at 850 (citing *Karcher v. Daggett,* 462 U.S. 725, 730, 103 S. Ct. 2653, 77 L. Ed. 2d 133 (1983)). If plaintiffs meet this initial burden, then the burden shifts to the City to show that "each significant variance between districts was necessary to achieve some legitimate goal." *Id.*

The Supreme Court has held that "an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations that are insufficient to make out a *prima facie*

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[3] The equality of population or one person, one vote principle is interpreted with the same parameters whether under the Illinois Constitution or the U.S. Constitution. *Schrage v. The State Board of Elections,* 88 Ill. 2d 87, 100, 430 N.E. 2d 483, 58 Ill. Dec. 451 (1981).

case." *Brown v. Thomson,* 462 U.S. 835, 842, 103 S. Ct. 2690, 77 L. Ed. 2d 214 (1983). However, plaintiffs may still challenge a reapportionment scheme with deviations below 10%, but they bear a greater burden to show a violation of their voting rights. *Baldus,* 849 F. Supp. 2d at 850. Some courts have treated reapportionment plans with 10% or greater population deviations as presumptively valid, which may nevertheless be unconstitutional if the drafting process is arbitrary, discriminatory, or otherwise unsupported by traditional redistricting criteria. *Id.* (collecting cases).

Here, LWV concedes that the population deviation in the 2015 plan is less than 10% and therefore is presumptively valid.[4] LWV attempts to overcome this presumption by alleging that that [sic] the City adopted this plan simply to obtain the necessary votes to keep the issue of redistricting from requiring a referendum by the voters and that the City rejected other maps that would have preserved minority voting rights equally well while dividing the wards equally by population. (Compl. Dkt. #1, at ¶¶ 103-104). There are no allegations in the Complaint that show the 2015 plan targets an objectively defined group. Instead, LWV alleges the new plan favors certain incumbent alderman over others. Yet, virtually any reapportionment scheme will naturally make it easier for some alderman to be reelected and for some it will

[4] LWV admits in the Complaint that the maximum deviation between "low" and "high" population wards is 8.7%.

be more difficult given the change in their constituency. Moreover, LWV admits that the 2015 plan preserves minority voting rights and thus no objectively identifiable group has been singled out.

"The Supreme Court has expressly rejected the argument that the possibility of drafting a 'better' plan alone is sufficient to establish a violation of the one person, one vote principle." *Daly v. Hunt,* 93 F.3d 1212, 1221 (4th Cir. 1996) (citing *Gaffney v. Cummings,* 412 U.S. 735, 740-41, 37 L. Ed. 2d 298, 93 S. Ct. 2321 (1973)). *Gaffney v. Cummings,* which involved deviation rates under 10%, instructs that judicial involvement in the inherently political and legislative process of apportionment "must end at some point, but that point constantly recedes if those who litigate need only produce a plan that is marginally 'better' when measured against a rigid and unyielding population-equality standard. The point is that such involvements should never begin." 412 U.S. at 750-51. In *Gaffney,* cited by both plaintiffs and the City and discussed elsewhere in this opinion, the Supreme Court found it unnecessary to even address the "state interest" argument given the plaintiff's failure to establish a prima facie case due to the low deviation rate. *Gaffney,* 412 U.S. at 740. Moreover, the Supreme Court has held that a legislature that creates categories that neither affect fundamental rights nor proceed along suspect lines, need not "actually articulate at any time the purpose or rationale supporting its classification." *Heller v. Doe,* 509 U.S. 312, 320, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993)

(quoting *Nordlinger v. Hahn,* 505 U.S. 1, 15, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992)). This Court finds that the Complaint fails to state a claim for a constitutional violation based on a *de minimus* population deviation. Accordingly, this Court dismisses Counts III and IV.

b. Counts V and VI

In Counts V and VI, the allegations relate to the shape of the ward boundaries as arbitrary and capricious in violation of the Equal Protection Clause (Count V) and as insufficiently compact in violation of the state law requirement in 65 Ill. Comp. Stat. 20/21-36 that the fifty wards of the City of Chicago be composed of territory that is compact and contiguous (Count VI). Plaintiffs provide the new Second Ward as an example. The City moves to dismiss both Counts V and VI for lack of specificity. The City also moves to dismiss Count V for failure to state a claim because that Count fails to allege that the government action was motivated by a discriminatory purpose and had a discriminatory effect.

LWV presents a novel argument for an Equal Protection violation. Although the allegations in Count V are bare conclusions of the sort ordinarily insufficient to survive a motion to dismiss and this Court could dismiss it for that reason alone, it bears more explanation. It seems to this Court that LWV is attempting to plead a different kind of political gerrymandering; one not based on the political affiliations of

constituents, but instead based on the supposed effort to draw ward lines in order to disfavor certain incumbent alderman [sic]. Thus, plaintiffs are asserting the disadvantaging of certain alderman [sic] as opposed to dilution of voters' political voice.

In *Davis v. Bandemer,* 478 U.S. 109, 119-127, 92 L. Ed. 2d 85, 106 S. Ct. 2797 (1986), the Supreme Court established the framework for political gerrymandering claims. The Supreme Court defined "political gerrymander" as not just line-drawing (*i.e.,* the drawing of election district lines in a fashion intended to achieve certain advantageous political affect) but also as other political action that affects electoral processes so as to advantage some citizens over others. *Id.* at 115. *Davis* also sets forth the characteristics of unconstitutional political gerrymandering: (1) intentional discrimination against an identifiable group; and (2) actual discriminatory effect on that group. *Id.* at 127; *see also Duckworth v. State Administration Board of Election Laws,* 332 F.3d 769, 774 n.2 (4th Cir. 2003).

In *Duckworth v. State Administration Board of Election Laws,* the Fourth Circuit Court of Appeals discussed discriminatory political effect as it has been addressed in the Supreme Court:

> The Supreme Court has said that contiguousness represents one of the principles of apportionment, along with compactness and respect for political subdivisions. *See Shaw v. Reno,* 509 U.S. 630, 647, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993). But the Court has also

> said that 'these criteria are important not because they are constitutionally required – *they are not,* but because they are objective factors that may serve to *defeat* a claim that a district has been gerrymandered[.]' *Id.* at 647 (emphasis added). Thus, the Court, though noting that these factors – as *principles* of apportionment – represent valid state interest in apportionment, has never said that *lack* of such factors could be probative of discriminatory political effect. 332 F.3d at 778.

Although plaintiffs here do not express the allegations in the Complaint as political gerrymandering, a fair reading of the Complaint suggests that they are complaining that political motivations are the driving force behind the 2015 redistricting plan, including the shape and contiguity of the new wards. Plaintiffs have not alleged either intentional discrimination against an identifiable group or actual discriminatory effect on that group. The political motivation alleged, to favor certain incumbent alderman and to disadvantage certain "independent" aldermen, does not by itself implicate the Equal Protection Clause.

In addition to the political motivation for the plan, plaintiffs have alleged that in passing the 2015 redistricting plan the City has not enacted a plan with the lowest deviation rate practicable and unnecessarily has divided neighborhoods, and, at least with respect to the Second Ward, failed to adhere to compactness. As a result of the political motivations, plaintiffs complain that the maximum deviation rate

was not as low as it could have been and some neighborhoods have been divided, yet these allegations do not alone amount to a violation of the Equal Protection Clause of the Fourteenth Amendment. This Court has already addressed the issue of the population deviation. Similar to the pleading in *Cecere v. The County of Nassau, et al.,* 274 F. Supp. 2d 308, 316 (E.D.N.Y. 2003), there are no factual allegations in the complaint here to support an inference that the division of neighborhoods or the *de minimus* population deviation violates Equal Protection. In the drawing of any map, mathematical equality is one factor among several that affects the contours of districts. Furthermore, there are no allegations in the Complaint to support an inference of intentional discrimination of an identifiable group and actual discriminatory effect on that group stemming from the new map. With respect to the allegations that the ward boundaries are "arbitrary and capricious" and without "rational relationship" to "any legitimate state purpose", those allegations are simply conclusions insufficient to overcome a motion to dismiss. Accordingly, this Court dismisses Count V of the Complaint.

The foregoing analysis however does not mean that plaintiffs have failed to articulate in Count VI a state law claim based on the boundaries of, at least, the Second Ward. "Federal courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the States and not the federal courts to

conduct apportionment in the first place." *Voinovich v. Quilter,* 507 U.S. 146, 156 (1993). This Court has dismissed all of the federal claims in the Complaint and thus declines to entertain the remaining state law claims in Count II and Count VI. 28 U.S.C. § 1367(c)(3).

Conclusion

For the reasons stated herein, this Court dismisses the Complaint.

Date: August 16, 2013

Entered: /s/ Sharon Johnson Coleman
United States District Judge

UNITED STATES DISTRICT COURT
for the
Northern District of Illinois

The League of Women Voters of Chicago, et al *Plaintiff*	)	
v.	)	Civil Action No. 13 C 2455
City of Chicago *Defendant*	)	

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($_____), which includes prejudgment interest at the rate of _____%, plus postjudgment interest at the rate of _____%, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)* _____.

X other: Defendant City of Chicago's motion to dismiss [19] is granted. This Court has dismissed all of the federal claims in the Complaint and thus declines to entertain the remaining state law claims in Count II and Count VI. 28 U.S.C. § 1367(c)(3).

This action was *(check one)*:

☐ tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision was reached.

X decided by Judge Sharon Johnson Coleman on a motion to dismiss

Date: Sep 5, 2013 Thomas G. Bruton, Clerk of Court

/s/ Robbie T. Hunt

Signature of Clerk or Deputy Clerk