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December 5, 2011

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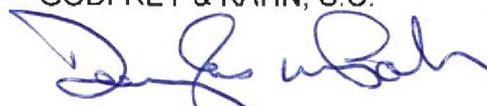
CLERK OF SUPREME COURT
OF WISCONSIN**BY HAND DELIVERY**A. John Voelker
Acting Clerk
Wisconsin Supreme Court
110 E. Main Street, Suite 215
Madison, WI 53703-1688*Clinard v. Brennan*
Case No. 2011AP2677-OA

Dear Mr. Voelker:

Enclosed for filing are an original and 12 copies of the "Involuntary Petitioners' Combined Motion: To Dismiss Petition With Prejudice or, in the Alternative, to Dismiss Themselves as Parties and to Stay Petitioners' Waukesha County Circuit Court Action." We are also enclosing an additional copy to be file stamped and returned to our messenger.

We are serving the counsel and parties identified in the Court's orders of November 30 and December 1, 2011—also by hand delivery.

GODFREY & KAHN, S.C.



Douglas M. Poland

DMP:aeg
Enclosurescc: Maria S. Lazar (w/encl.)
J.B. Van Hollen (w/encl.)
Eric M. McLeod (w/encl.)
Kevin J. Kennedy (w/end.)
Joseph L. Olson (w/end.)
Jeremy P. Levinson (w/encl.)
Waukesha County Clerk of Circuit Court (w/encl.)

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STATE SUPREME COURT
STATE OF WISCONSIN

FILED

DEC 05 2011

Appeal No. 2011AP002677-OA

CLERK OF SUPREME COURT
OF WISCONSIN

DENNIS CLINARD, ERIN M. DECKER, LUONNE A. DUMAK,
DAVID A. FOSS, LaVONNE J. DERKSEN, PAMELA S. TRAVIS,
JAMES L. WEINER, JEFF L. WAKSMAN, and KEVIN CRONIN,

Petitioners,

and

ALVIN BALDUS, CINDY BARBERA, CARLENE BECHEN,
ELVIRA BUMPUS, RONALD BIENDSEIL, LESLIE W. DAVIS III,
BRETT ECKSTEIN, GLORIA ROGERS, RICHARD KRESBACH,
ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON,
JEANNE SANCHEZ-BELL, CECELIA SCHLIEPP, and
TRAVIS THYSSEN,

Involuntary Petitioners,

THE COMMITTEE TO RECALL WANGGAARD, RANDOLPH
BRANDT, THE COMMITTEE TO RECALL MOULTON, JOHN KIDD,
THE COMMITTEE TO RECALL SENATOR PAM GALLOWAY,
NANCY STENCIL, and RITA PACHAL,

Petitioner Intervenors,

v.

MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL,
THOMAS CANE, THOMAS BARLAND and TIMOTHY VOCKE
each in his official capacity as a member of the WISCONSIN
GOVERNMENT ACCOUNTABILITY BOARD, and KEVIN
KENNEDY, Director and General Counsel for the WISCONSIN
GOVERNMENT ACCOUNTABILITY BOARD,

Respondents.

**INVOLUNTARY PETITIONERS' COMBINED MOTION:
TO DISMISS PETITION WITH PREJUDICE OR, IN THE
ALTERNATIVE, TO DISMISS THEMSELVES AS PARTIES
AND TO STAY PETITIONERS' WAUKESHA COUNTY
CIRCUIT COURT ACTION**

The “involuntary petitioners,”¹ parties here not by choice and without a jurisdictional basis, by their counsel, move the Court to enter a series of orders that restore due process, recognize the federal litigation pending now for six months, and impose accountability by ending an abuse of process. To those ends, the involuntary petitioners ask that the Court:

- Dismiss with prejudice, now, the claims filed by petitioners—Dennis Clinard, Erin M. Decker, Luonne A. Dumak, David A. Foss, LaVonne J. Dersksen, Pamela S. Travis, James L. Weiner, Jeff L. Waksman, and Kevin Cronin—including those filed in the Waukesha County Circuit Court destined for this Court;
- Stay any proceedings in the Waukesha County Circuit Court (Case No. 11-CV-03995) pending decisions by this Court;
- Notwithstanding any other relief provided by the Court, dismiss the “involuntary petitioners” from the case; and
- Impose an appropriate penalty under Wis. Stat. § 809.83, including dismissal with prejudice.

GROUNDS

In support of the motions, involuntary petitioners will submit the memorandum and appendix required by the Court’s November 30 and December 1 orders, and they further state that:

¹ Alvin Baldus, Cindy Barbera, Carlene Bechen, Ronald Biendseil, Elvira Bumpus, Leslie W. Davis, III, Brett Eckstein, Richard Kresbach, Rochelle Moore, Amy Risseeuw, Judy Robson, Gloria Rogers, Jeanne Sanchez-Bell, Cecelia Schliepp, and Travis Thyssen.

1. Almost six months ago, “involuntary petitioners” as plaintiffs filed a civil rights case in the U.S. District Court for the Eastern District of Wisconsin (*Baldus et al. v. Brennan et al.*, No. 11-CV-562) under 28 U.S.C. § 2284, challenging the redistricting of the state’s legislative and congressional districts now embodied in Wisconsin Acts 43 and 44. The federal courts addressed the same constitutional disputes in 1982, 1992, and 2002 without any state court involvement.

2. The three-judge panel hearing that case has set a trial date for February 2012, denied the state’s motion to dismiss in an eight-page decision that reached the merits of one claim, adjudicated discovery disputes, and set an expedited schedule to resolve the very issues raised by the petitioners. That includes the “recall” questions of law now three times raised by the petitioners—first in this Court, then in an initial complaint in the Waukesha County Circuit Court and, late on Friday, in an amended complaint in Waukesha County.

3. The federal court expressly rejected the jurisdictional arguments made by the state there—and by the petitioners here—that state courts by legislative fiat somehow have exclusive jurisdiction over redistricting: “Wisconsin simply cannot strip litigants of their ability to

seek redress under federal statutes, in federal courts, for violations of the federal Constitution.” That expressly includes “cases where the redress being sought is related to the state’s redistricting.” *Baldus et al. v. Brennan et al.*, No. 11-CV-562, 2011 WL 5040666, at *3, slip op. (E.D. Wis. Oct. 21, 2011) (denying motion to dismiss amended complaint). *See* Exhibit A, attached.

4. Until now, not once, during the six months of federal litigation, has anyone approached the three-judge panel in federal court or any judge in any court in this state to raise the questions strewn through their petition here and in their serial Waukesha County Circuit Court complaints.

5. The petition here and the new complaints below were improvidently filed and without any reasonable basis, best demonstrated by the petitioners’ own procedural conduct. Whatever the foundation for naming the Government Accountability Board and its members as respondents, there was no foundation for naming “involuntary petitioners” as parties.

6. The sole question raised in the petitioners’ amended complaint, filed on December 2, 2011, in Waukesha County, inevitably will

be appealed to this Court if it has not already been decided by the federal court. Permitting that case to continue will only cause further delay.

7. The bases for the relief requested in this motion are grounded in state and federal law and in basic legal principles (all described in the memorandum) including: the Supremacy Clause; federal-state comity; laches and estoppel, Wis. Stat. §§ 802.06, and 803.03; the plain language of the “redistricting statute” (Wis. Stat. §§ 751.0356, 801.50(4m)) relied upon for jurisdiction by the petitioners; the decisions by this Court in *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, 249 Wis. 2d 706, 639 N.W.2d 537 (Feb. 12, 2002), and by the U.S. Supreme Court in *Mississippi State Conf. of N.A.A.C.P. v. Barbour*, No. 11-cv-159, 2011 WL 1870222 (S.D. Miss. May 16, 2011), *summarily aff’d*, No. 11-82 (U.S. Oct. 31, 2011).

8. In the *Barbour* case, the U.S. Supreme Court affirmed the district court’s ruling that elections held before 2012 could indeed be conducted under district lines established in 2002. In fact, nine recall elections already have been conducted in this state under the 2002 district lines—without objection by anyone.

RELIEF REQUESTED

WHEREFORE, for the reasons stated above and in their memorandum, “involuntary petitioners” respectfully request in accordance with Wis. Stat. § 809.14 that this Court enter orders dismissing with prejudice petitioners’ claims, including those filed in the Waukesha County Circuit Court; staying any proceedings in the Waukesha County Circuit Court pending decisions by this Court; imposing an appropriate penalty against the petitioners and their counsel under Wis. Stat. § 809.83; and, notwithstanding any other relief provided by the Court, dismissing “involuntary petitioners” from the case.

Dated: December 5, 2011.

GODFREY & KAHN, S.C.

By:



Douglas M. Poland
State Bar No. 1055189
Rebecca Katherine Mason
State Bar No. 1055500

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EXHIBIT A

Westlaw

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Slip Copy, 2011 WL 5040666 (E.D. Wis.)
(Cite as: 2011 WL 5040666 (E.D. Wis.))

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Wisconsin.

Alvin **BALDUS**, Carlene Bechen, Elvira Bumpus,
Ronald Biendsei, Leslie W. Davis, III, Brett Eckstein,
Georgia Rogers, Richard Kresbach, Rochelle Moore,
Amy Risseeuw, Judy Robson, Jeanne Sanchez-Bell,
Cecelia Schliepp, Travis Thyssen, Cindy Barbera,
Plaintiffs,

v.

Members of the Wisconsin Government Accountabil-
ity Board, each only in his official capacity: Michael
BRENNAN, David Deininger, Gerald Nichol, Tho-
mas Cane, Thomas Barland, Timothy Vocke, and
Kevin Kennedy, director and general counsel for the
Wisconsin Government Accountability Board, De-
fendants.

No. 11-CV-562.
Oct. 21, 2011.

Brady C. Williamson, Rebecca K. Mason, Godfrey &
Kahn SC, Madison, WI, for Plaintiffs.

Maria S. Lazar, Wisconsin Department of Justice
Office of the Attorney General, Madison, WI, for
Defendants.

Before WOOD, Circuit Judge, DOW, District Judge,
and STADTMUELLER, District Judge.

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

PER CURIAM.

*1 The plaintiffs, a group of Wisconsin citizens whose voting rights may be affected by Wisconsin's now-approved redistricting law, have brought this suit against the defendants, all of whom are associated with the administration of Wisconsin's Government Accountability Board. (Docket # 12). The Government Accountability Board is a non-partisan body with general authority over implementation of the state's laws relating to elections and campaigns; it administers Wisconsin's elections of state assembly and senate members every two and four years, re-

spectively. (Am.Compl.¶ 6(a) (citing Wis. Stat. § 5.05(1))).

The plaintiffs, in their Amended Complaint, challenge Wisconsin's redistricting law as depriving them of their civil rights under color of state law, in violation of Title 42 of the United States Code, Sections 1983 and 1988. (Am.Compl.¶¶ 33, 38, 44, 53, 61, 71, 79).

The defendants have filed a motion to dismiss the Amended Complaint, in which they argue:

- (1) that the matter is not ripe for review and that the plaintiffs lack standing, because they filed the Amended Complaint before Wisconsin's governor signed the redistricting bill into law (Def.'s Br. in Supp., 6–9);
- (2) that the Court should defer action or abstain from taking action in this case, until Wisconsin's judiciary responds to any challenges to the redistricting law (Def.'s Br. in Supp. 9–14);
- (3) that the Court lacks jurisdiction to hear this case, because the 2011 Wisconsin Act 39 requires that any person challenging Wisconsin's redistricting law must first bring their challenge in Wisconsin's state courts (Def.'s Br. in Supp. 14–17); and
- (4) that, as to their third claim, the plaintiffs have failed to state a claim upon which relief can be granted (Def.'s Br. in Supp. 18–20).

For the reasons discussed below, the Court is obliged to deny the Defendants' Motion to Dismiss the Amended Complaint.

RIPENESS AND STANDING

The defendants' first argument fails because the Court finds that the matter is ripe for review and that the plaintiffs have standing to challenge the redistricting law. The doctrine of ripeness is intended “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements ... until [a decision] has been formalized.” Patel v. City of Chicago, 383 F.3d 569, 572

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(7th Cir.2004) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148–49).

Here, the plaintiffs' claims are ripe because a decision has been formalized. The governor has approved the redistricting law, and the Court can now rule on challenges to that law without "entangling" itself in "abstract" matters. Thus, the plaintiffs' challenge is ripe for review.

As for the matter of standing, the defendants argue only that the plaintiffs' Amended Complaint did not allege "actual or imminent" claims because they filed their Amended Complaint before the governor approved the redistricting law. (Def.'s Br. in Supp. 6–9 (citing Deida v. City of Milwaukee, 192 F.Supp.2d 899, 904 (E.D.Wis.2002) (quoting Tobin for Governor v. Ill. State Bd. of Elections, 268 F.3d 517, 527 (7th Cir.2001) (internal citations omitted)) (stating that a party has standing when she alleges that "she has suffered (1) an 'actual or imminent ... invasion of a legally protected interest' (2) caused by the defendant that (3) 'a favorable decision is likely to redress.' "))).

*2 The Court disagrees, finding that the plaintiffs have standing under their Amended Complaint because the Amended Complaint states claims that were imminent at the time of filing. Though the plaintiffs filed their Amended Complaint before the governor approved the law—and, thus, before any actual invasion of a legally protected interest—the governor's approval was imminent when the plaintiffs filed their complaint. At that juncture, the governor had been presented the redistricting bill passed by both houses of Wisconsin's Legislature. Additionally, the Wisconsin legislative and executive branches were controlled entirely by members of a single party, making it unlikely that the governor would veto or otherwise depart from the bill presented to him. And, time has confirmed that imminency: less than a month after the plaintiffs filed the Amended Complaint, Governor Walker signed the redistricting bill into law in the exact form that the Legislature had passed. Therefore, the Court finds that the approval of the law was imminent. Accordingly, the plaintiffs have standing to challenge the redistricting law on the basis of their Amended Complaint.

ABSTENTION AND DEFERRAL

The defendants' second argument also fails given

the fact that there are no actions pending in the Wisconsin courts that challenge the recently enacted redistricting law. Federal courts should abstain or defer action on challenges to state redistricting efforts when the state's own governing bodies have not yet concluded their reform efforts or when challenges to those efforts are pending in the state's courts. See, e.g., Branch v. Smith, 538 U.S. 254, 261 (2003), Grove v. Emison, 507 U.S. 25, 34 (1993), Chapman v. Meier, 420 U.S. 1, 27 (1975). The courts should defer or abstain in such cases to avoid "intrusion on the most vital of local functions." Miller v. Johnson, 515 U.S. 900, 915 (1995).

Here, though, the Court has no reason to abstain or defer, because it does not risk intruding upon the functions of Wisconsin's governing bodies. Wisconsin's legislative and executive branches have already concluded their redistricting efforts. Their efforts were complete when the governor signed the redistricting bill as passed by the Legislature, making it a law. Thus, the Court's review of the plaintiffs' claims will not interfere with any legislative redistricting efforts. Furthermore, its review will not intrude upon any judicial branch activity because there are no challenges to the redistricting efforts currently pending in Wisconsin's courts.

LACK OF JURISDICTION

The Court also finds no merit to the defendants' third argument because a state may not define the contours of the jurisdiction of federal courts. In this regard, the defendants argue that the recently-enacted law, 2011 Wisconsin Act 39, requires that any challenge to Wisconsin's redistricting efforts be brought in Wisconsin's courts.

The Supremacy Clause of the United States Constitution makes the laws of the United States superior to the laws of the individual states. U.S. CONST. ART. VI, cl. 2. As a result, Wisconsin simply cannot strip litigants of their ability to seek redress under federal statutes, in federal courts, for violations of the federal Constitution. To do so would hold the laws of the state as superior to the laws of the United States.

*3 The laws of the United States provide litigants with the right to bring a suit in federal court seeking redress for the violation of their civil rights under the United States Constitution. 42 U.S.C. §§ 1983, 1988. Wisconsin's law would strip the state's

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citizens of that federally-granted right, though, in cases where the redress being sought is related to the state's redistricting.

Thus, if Wisconsin's law were construed to bar the plaintiffs' access to the federal court, it would conflict with the law of the United States and would have to give way to the laws of the United States—the supreme laws of the land. U.S. CONST. ART. VI, cl. 2. Therefore, the 2011 Wisconsin Act 39 does not—and cannot—prevent this Court from hearing this case.

FAILURE TO STATE A CLAIM

Finally, the Court turns to the defendants' substantive argument on plaintiffs' third claim for relief, and determines that the plaintiffs' Amended Complaint states a claim upon which relief can be granted. Therefore, the Court will not dismiss the plaintiffs' claim.

In evaluating the defendants' motion to dismiss, the Court must accept the plaintiffs' allegations in the Amended Complaint as true. Bonte v. U.S. Bank, N.A., 624 F.3d 461, 463 (7th Cir.2010). To avoid dismissal, the Amended Complaint must allege sufficient facts to show that the plaintiffs' right to relief is more than merely speculative. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

The defendants argue that the plaintiffs fail to state a claim since “the right to vote, *per se*, is not a constitutionally protected right,” and, thus, the Court cannot grant relief to the plaintiffs on their claim that the redistricting law disenfranchises 300,000 Wisconsin citizens. (Def.'s Br. in Supp. 18 (quoting Rodriguez v. Popular Democratic Party, 457 U.S. 1, 8 (1982) (internal quotations omitted))). The defendants are correct that the states can regulate elections, and even postpone the ability of some citizens to vote; but, the defendants fail to adequately acknowledge the principle that a redistricting plan cannot unnecessarily disenfranchise voters. See Republican Party of Wisconsin v. Elections Bd., 585 F.Supp. 603, 606 (E.D.Wis.1984) (allowing temporary disenfranchisement only in two situations: when it is an “absolute necessity” or when it is “unavoidable”) *vacated and remanded for dismissal of complaint, Wisconsin Elections Bd. b. Republican Party of Wisconsin, 469 U.S. 1081 (1984)*.

The defendants incorrectly criticize the plaintiffs for “fail[ing] to fully read” the case on which they rely for the proposition that a redistricting plan cannot unnecessarily disenfranchise voters. (Def.'s Reply, 10 (criticizing plaintiffs for failing to read Republican Party of Wisconsin, 585 F.Supp. at 606)).^{FN1} In fact, though, it seems that the defendants, themselves, may have failed to read that case in full: in Republican Party of Wisconsin, this Court found that the temporary disenfranchisement of 173,976 voters was “unnecessary,” and, therefore, constituted a fatal flaw in the state's 1983 redistricting law. *Id.*, at 605. As such, the Court declared that law unconstitutional. *Id.*, at 606.

^{FN1}. Regrettably, the Court is obliged to note that the tone of the briefs submitted by both parties skirt the line of being intemperate and unduly combative. Thus, despite the contentious political nature of this litigation, the court fully expects that, as officers of the court, counsel will conduct themselves professionally as this case moves forward, and avoid the temptation to resort to vitriolic grandstanding as a substitute for sound legal argument.

*4 Taken as true, the plaintiffs have alleged sufficient facts to show that their claim to relief is more than speculative. The plaintiffs' Amended Complaint alleges that Wisconsin's redistricting law will result in the unnecessary disenfranchisement of 300,000 voters. (Am.Compl.¶¶ 39–44). That number vastly exceeds the 173,976 voters that were disenfranchised under the 1983 redistricting law, which persuaded the three-judge panel to find a constitutional violation. If the plaintiffs are correct that the redistricting law disenfranchises 300,000 voters, then their claim for relief appears much more than speculative at this stage of the proceedings.

Therefore, because the Court must accept that allegation as true, it finds that the plaintiffs have stated a claim upon which relief may be granted.

CONCLUSION

For the foregoing reasons, the Court must deny the defendants' motion to dismiss.

Accordingly,

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(Cite as: 2011 WL 5040666 (E.D.Wis.))

IT IS ORDERED that the Defendants' Motion to Dismiss Amended Complaint (Docket # 16) be and the same is hereby **DENIED**.

E.D.Wis.,2011.
Baldus v. Brennan
Slip Copy, 2011 WL 5040666 (E.D.Wis.)

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