STATE OF WISCONSIN
SUPREME COURT

FILED
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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

Case No. 2011AP002677- OA

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; TRAVIS THYSSEN;

Involuntary Petitioners,

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.

MOTION TO DISMISS

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 ("Proposed Intervenors"), by their Attorney Jeremy P. Levinson, hereby move the Court

for an Order dismissing the Petition in the above-captioned matter. They request that the Court issue a briefing schedule in connection with this motion.

BACKGROUND

Petitioners assert that they are nine Wisconsin residents who claim a right to (1) a declaration that the Wisconsin Legislature's "2011 Redistricting Plan" is constitutional; and (2) an Order that effectively changes 2011 Wisconsin Acts 43 and 44 so that the legislative districts they make effective in November 2012 become effective sooner, with the effect of blocking ongoing efforts to recall several Republican State Senators. The Petition attempts to package this attack on the recalls as a challenge to changes in the populations of the existing districts (created by a 2002 Redistricting Plan) wrought by nine years of shifting populations. Petitioners ask the Court to appoint a panel of three circuit court judges, purportedly pursuant to §§ 751.035 and 801.50(4m). Alternatively, Petitioners request leave to commence an Original Action.

The Petition names as respondents the members of the Wisconsin Government Accountability Board ("the GAB") and its Director and General Counsel. The GAB is the state administrative agency charged with, inter alia, the regulation and oversight of elections, campaign finance, and related matters. The Petition asks the Court to undo the GAB's conclusion that § 10 of 2011 Act 43 should be applied as written. The Act states:

SECTION 10. Initial applicability.

(1) This act first applies, with respect to regular elections, to offices filled at the 2012 general election.

(2) This act first applies, with respect to special or recall elections, to offices filled or contested concurrently with the 2012 general election.

Specifically, Petitioners ask the Court to change the fact that, because the 2012 general election will occur afterwards, currently ongoing recall efforts and any ensuing recall elections are taking place in the existing districts. Petitioners ask this Court to rewrite the law to terminate ongoing recall efforts and to protect several Republican Senators from having to face their constituents in recall elections.

To create the illusion of a genuine and legally meaningful dispute, the Petition names as "Involuntary Petitioners" the plaintiffs in a federal lawsuit, Civil Action No. 2011-CV-0562 (E.D. Wis.). That lawsuit, filed almost six months ago, challenges the Redistricting Plan as unconstitutional and in violation of federal law. The Petition requests, at this late date, that this Court reach out and take over a legal dispute well on its way to resolution in the federal court, rendering the work of the parties and the court in that case a nullity and giving Petitioners and their allies what they see as an advantageous playing field, this Court.

Movants, the Proposed Intervenors, are three committees duly registered with the GAB to circulate and offer recall petitions for filing against three Republican State Senators, and the individuals that established and registered the committees. Comprehensive efforts to obtain signatures in support of these recall efforts have been ongoing in Senate Districts 21, 23, and 29 since November 15, 2011. Movants' recall efforts were commenced and are proceeding in accordance with the relevant statutory and regulatory requirements and in conformity with the GAB's procedures, standards, and guidance.

The Petition asks the Court to change the effective date of 2011 Act Wisconsin 43 in such a manner as to invalidate currently ongoing recall efforts in the Senate Districts as they actually exist. Specifically, the Petition asks the Court to order that, despite the text of the Act, as passed

by the legislature and signed by the governor, which expressly makes the Act first effective for offices filled "at the 2012 general election" or concurrently with that election, the Act should be given effect now. If the Court were to accept Petitioners' invitation to replace the effective date set forth in the text of the law with an effective date more to Petitioners' liking, the ongoing recall efforts would presumably be deemed invalid because they would not relate to then-existing districts.

The Petition asks the Court to simply pull the rug out from under the recalls to give an advantage to incumbent Republicans subject to recall and to shield them from their own constituents. The Petitioners' broader request that the Court reach into federal court and take over questions pending in a federal lawsuit that has proceeded for almost six months, in which discovery is underway, and that is set for trial no later than February 21, 2012 is a cynical, eleventh-hour attempt to obtain a forum that at least some political partisans view as friendlier to their cause.

The Petition should be dismissed.

1. The Petition's premise is meritless. Petitioners argue that existing legislative districts, derived by a 2002 Redistricting Plan, are presently "unconstitutionally malapportioned."[1] From this, they argue that the Court should change the effective date of the 2011 Redistricting Plan because, otherwise, elections in existing districts would violate the constitution. This sweeping contention is without support in the law and attempts to manufacture a principle that is incapable of being meaningfully implemented: *Even where it can be shown that shifts in population have moved some districts away from strict equality in the*

[1] Petitioners incorrectly declare this point to be undisputed, based on their incorrect contention that the individuals they have named as "involuntary petitioners" have acknowledged it in the federal litigation.

number of residents in each, a Court may not rewrite a statute to make new districts instantly effective and elections are not to be suspended until rebalanced districts have been implemented.

The United States Supreme Court has long held that a redistricting plan following a decennial census that is valid as determined by reference to the census data is deemed valid until the next decennial census and ensuing redistricting process. States operate under the legal fiction that their plans are constitutionally apportioned throughout the decade, a presumption that is necessary to avoid constant redistricting, with accompanying costs and instability. *See, e.g*, *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 421, 126 S. Ct. 2594, 2611 (2006); *see also Mississippi State Conference of N.A.A.C.P. v. Barbour*, 2011 WL 1870222 (S.D. Miss., May 16, 2011) (collecting and discussing cases), *summarily aff'd*, *Mississippi State Conf. of the NAACP v. Barbour*, No. 11-82 (U.S. Oct. 31, 2011).

Article IV, § 3 of the Wisconsin Constitution requires that the Legislature reapportion following each decennial census precisely to rebalance the districts' populations. In 2011, the Legislature passed a Redistricting Plan that provides for the implementation of new districts to coincide with the 2012 general election. While the lawfulness and constitutionality of that plan are being litigated vigorously in the United States District Court for the Eastern District of Wisconsin, the Legislature has acted. With a trial date of "no later than February 21, 2012," the validity of the Plan will be determined well in advance of its effective date. In the meantime, no source of law provides for either changing the 2011 Plan's effective date to conflict with the Legislature's intent and the text of the statute or for effectively suspending elections until that Plan or another is made effective. And the United States Supreme Court's jurisprudence controls that no such "interim" measure is warranted.

2. The Relief sought does not follow from the putative legal issue raised in the Petition. Petitioners argue that, if the 2011 Redistricting Plan does not take effect until the 2012 General Elections, recall elections ordered and held before then in the existing districts would somehow disenfranchise certain people who in the future may or may not become constituents of a current State Senator who may face recall. Based on this dubious premise, the Petitioners ask the Court to rewrite the § 10 of the Redistricting Plan, 2011 Wisconsin Act 43, so as to give it a different effective date than that chosen by the Legislature and approved by the Governor.

Even if credited, an argument that the effective date of the Redistricting Plan means that *bona fide* (and constitutionally protected) recall efforts could impermissibly disenfranchise certain voters – is an attack on the Redistricting Plan, not the recalls. *If the Petition's premise was correct, the remedy would be to strike down the Redistricting Plan, not to suspend by judicial fiat the right of recall guaranteed by Art. 13, § 12 of Wisconsin's Constitution.*

3. Setting to one side the mismatch between complaint and demanded relief, the Petition seeks relief completely at odds with basic principles of statutory construction and the separation of powers. It does not ask the Court to sever an offensive provision from a statute. It asks the Court to rewrite a statute to reflect something different than that intended by the Legislature and approved by the Governor. The impropriety of this request is made particularly clear by the fact that a Legislative attempt to change the effective date as the Petition asks was recently undertaken – and the Legislature rejected it.[2] The Petition's request that the Court

[2] On October 31, 2011, Republican State Senator Mary Lazich introduced a bill providing that Act 43 would first apply "with respect to special and recall elections for the office of senator held on or after November 9, 2011. The bill also provides that Act 43 first applies, with respect to petitions for the recall of senators, to petitions filed on or after November 9, 2011." 2011 Senate Bill 268 *available at* https://docs.legis.wisconsin.gov/2011/proposals/sb268. This proposed legislation lacked requisite support and failed to make it out of Committee. *Id.*

assume the Legislature's core function and carry it out in a manner Petitioners deem more advantageous to their political allies is not a remedy recognized by the law.

4. Petitioners lack standing for the same reason the Petition fails to allege a cognizable claim or injury. To be sure, governing law requires that a redistricting plan take care to create districts of equal population. It is well accepted that the best that reality permits is that the determination of population balance among districts must rely on census data reflecting one moment in time and that the population is in perpetual motion. The notion that shifts between decennial censuses create a cognizable injury, render the implemented redistricting map constitutionally infirm, or give rise to a claim (especially with the timely enactment of a new plan following the next census) is devoid of merit. See paragraph 1, *supra*.

5. With irony, Petitioners contend the relief they seek will protect the right to recall provided by Article 13, § 12 of the Wisconsin Constitution. But that provision does not create an individual right to vote in a recall election for or against an official or candidate that may come to represent the voter after the election, upon the effective date of a Redistricting Plan. Among other problems with such a contention, it would mean that the constitutional recall process would be effectively suspended each decade between the time a Redistricting Plan is passed and the time the newly apportioned districts become effective for election purposes. The relief sought would undermine rather than protect the right to recall.

6. The change in law proposed by the Petition would violate Movant's due process rights under the Wisconsin and United States Constitutions. *See Elections Bd. of State of Wis. v. Wisconsin Mfrs. & Commerce*, 227 Wis.2d 650, 679-680, 597 N.W.2d 721, 735 (1999) ("a deprivation of the due process right of fair warning can occur not only from vague statutory

language, but also from unforeseeable and retroactive interpretation of that statutory language") (*applying Bouie v. City of Columbia*, 378 U.S. 347, 352, 355, 84 S. Ct. 1697 (1964)).

7. In attempting to leapfrog the majority of the judicial system, the administration of laws by a regulatory agency, and the Legislature by foisting this matter on this Court, the petition rests primarily on §§ 801.50(4m) and 751.035, Wis. Stats. The former is a subsection of a venue statute that provides as follows:

> Venue of an action to challenge the apportionment of any congressional or state legislative district shall be as provided in s. 751.035. Not more than 5 days after an action to challenge the apportionment of a congressional or state legislative district is filed, the clerk of courts for the county where the action is filed shall notify the clerk of the supreme court of the filing.

Additionally, § 751.035 provides in relevant part:

> (1) Upon receiving notice under s. 801.50 (4m), the supreme court shall appoint a panel consisting of 3 circuit court judges to hear the matter. The supreme court shall choose one judge from each of 3 circuits and shall assign one of the circuits as the venue for all hearings and filings in the matter.

Section 801.50, Wis. Stats., does not create a cause of action. It merely governs venue for an "action to challenge the apportionment of a congressional or state legislative district," specifying that the procedure laid out in § 751.035, Wis. Stats., governs. Section 751.05(1), Wis. Stats., is triggered when the Court receives "notice under s. 801.50(4m)" which requires "the clerk of courts for the county where the action [challenging apportionment] is filed [to] notify the clerk of the supreme court of the filing."

These statutes neither authorize nor permit convening a panel of circuit court judges because no state court "action to challenge the apportionment" of legislative districts has been filed. Nowhere do the statutes suggest a petition filed directly with the Supreme Court by

proponents of an apportionment plan, seeking a declaration of its validity (in contrast to challenging it), can constitute a challenge or the notice of a challenge. As a matter of law, the above-discussed statutes provide petitioners with no cause of action or basis for relief of any kind.

The Petition does not challenge the 2002 Redistricting Plan as invalid. Rather, it attacks the *current* makeup of the legislative districts caused by nine years of shifting populations *after* the 2002 Redistricting Plan took effect. This is not "an action to challenge the apportionment of any congressional or state legislative district," § 801.50(4m), Wis. Stats. As discussed above, this is not a legally meaningful challenge at all. The text of §§ 801.50(4m) and 751.035, Wis. Stats., shows that the Petition cannot warrant a three-judge panel. If the alternative were true, "challenges" such as this one would arrive like clockwork in the immediate wake of each decennial census – long before the Legislature could act on its constitutional duty to redistrict. Such allegations, however, present no claim. *See, e.g., supra, Mississippi State Conference*, 2011 WL 1870222.

8. Petitioners' alternative request that the Court grant leave for an Original Action should be denied because the validity of the Redistricting Plan is already pending before a three-judge panel in federal court in litigation that is well underway and for which a trial date approaches. Under such circumstances:

> [a]ccepting original jurisdiction would undermine principles of cooperative federalism and federal-state comity and would result in an unjustifiable duplication of effort and expense, all incurred by the taxpayers of this state. It would also have the substantial potential of creating uncertainty rather than resolution of the critical legal and political issues that surround redistricting.

Jensen et al. v. Wisconsin Elections Bd. et al., 2002 WI 13 ¶ 18, 249 Wis. 2d 706, 639 N.W.2d 537.

CONCLUSION

For the forgoing reasons, the Petition should be dismissed. Movants request that the Court issue a briefing schedule for this motion.

Dated this 30th day of November, 2011.

FRIEBERT, FINERTY & ST. JOHN, S.C.

By: _____

Jeremy P. Levinson
State Bar No. 1026359
Joseph M. Peltz
State Bar No. 1061442

Attorneys for 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

P.O. ADDRESS:
330 East Kilbourn Avenue
Two Plaza East, Suite 1250
Milwaukee, Wisconsin 53202
Phone: (414) 271-0130