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DEC 06 2011

**CLERK OF SUPREME COURT
OF WISCONSIN**

**STATE SUPREME COURT
STATE OF WISCONSIN**

Appeal No. 2011AP002677-OA

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.

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EXHIBIT 1

TIMELINE

- June 10, 2011 Involuntary Petitioners' Complaint, U.S. District Court for the Eastern District of Wisconsin, Case No. 11-CV-562, Docket No. 1 (*See Ex. 2 attached, exhibits omitted*)
- June 15, 2011 Letter from the Court to Chief Judge Easterbrook requesting three-judge panel, Docket No. 3 (*See Ex. 3 attached*)
- July 25, 2011 Correspondence regarding redistricting legislation and related maps, Docket No. 15 (*See Ex. 4 attached, exhibits omitted*)
- August 4, 2011 States' Motion to Dismiss Amended Complaint, Docket Nos. 16, 18 (*See Ex. 5 attached*)
- August 9, 2011 Correspondence: Governor signed redistricting legislation, Docket No. 20 (*See Ex. 6 attached*)
- August 23, 2011 Response to Motion to Dismiss Amended Complaint, Docket No. 21 (*See Ex. 7 attached*)
- September 6, 2011 States' Reply, Docket No. 22 (*See Ex. 8 attached, exhibit omitted*)
- September 21, 2011 Order designating three-judge panel: Circuit Judge Diane Wood, Northern District of Illinois Judge Robert Dow, Jr., and Judge J.P. Stadtmueller, Docket No. 24 (*See Ex. 9 attached*)
- October 21, 2011 Order denying States' Motion to Dismiss Amended Complaint, Docket No. 25 (*See Ex. 10 attached*)
- October 21, 2011 Notice of Hearing Scheduling Conference set for October 24, 2011 at 8:30 a.m. by telephone, Docket No. 26 (*See Ex. 11 attached*)
- October 24, 2011 Minute Entry for Scheduling Conference on October 24, 2011, Docket No. 27 (*See Ex. 12 attached*)
- November 2, 2011 Stipulated Scheduling and Discovery Order, Docket No. 28 (*See Ex. 13 attached*)
- November 4, 2011 State's Answer to Amended Complaint and Affirmative Defenses, Docket No. 29 (*See Ex. 14 attached*)
- November 10, 2011 Motion to Intervene -- Sean P. Duffy, Thomas E. Petri, Reid J. Ribble, Paul D. Ryan, Jr., and F. James Sensenbrenner, Docket Nos. 32, 34 (*See Ex. 15 attached*)

November 14, 2011 Scheduling Order entered by the three-judge panel, Docket No. 35 (*See* Ex. 16 attached)

November 15, 2011 Order setting schedule for the Motion to Intervene, Docket No. 36 (*See* Ex. 17 attached)

November 15, 2011 Motion to Consolidate Cases filed by Voces De La Frontera, Inc. et al., U.S. District Court for the Eastern District of Wisconsin, Case No. 11-CV-1011, Docket No. 37 (*See* Ex. 18 attached)

November 17, 2011 Response to the Motion to Intervene, Docket No. 41 (*See* Ex. 19 attached)

November 17, 2011 Motion to Intervene -- Tammy Baldwin, Ronald Kind, and Gwendolynne S. Moore, Docket No. 44 (*See* Ex. 20 attached)

November 18, 2011 Reply to Opposition to Motion to Intervene, Docket No. 46 (*See* Ex. 21 attached)

November 18, 2011 Motion to Add Party and Amend Caption, Docket No. 47 (*See* Ex. 22 attached)

November 21, 2011 Order granting Motions to Intervene, Docket No. 49 (*See* Ex. 23 attached)

November 21, 2011 Motion to Compel Disclosure, Docket Nos. 50, 52, 53 (*See* Ex. 24 attached, exhibits omitted)

November 21, 2011 Petitioners, Dennis Clinard, et al. Petition for Appointment of Three-Judge Panel Pursuant to Wis. Stat. §§ 751.035 and 801.50(4m) or, in the Alternative, for Leave to Commence an Original Action Seeking Declaratory Judgment and Other Relief in the State of Wisconsin Supreme Court Case No. 11-AP-2677

November 22, 2011 Order granting Motion to Consolidate Cases, Docket No. 55 (*See* Ex. 25 attached)

November 22, 2011 Order granting Motion to Add Parties, Docket No. 56 (*See* Ex. 26 attached)

November 22, 2011 Second Amended Complaint, Docket No. 58 (*See* Ex. 27 attached, exhibits omitted)

November 28, 2011 Response to Motion to Compel Disclosure, Docket No. 59 (*See* Ex. 28 attached)

November 28, 2011	Petitioners-Plaintiffs filed Summons and Complaint for Declaratory and Other Relief and Appointment of Three-Judge Panel Pursuant to Wis. Stat. §§ 751.035 and 801.50(4m) in the Waukesha County Circuit Court, Case No. 11-CV-3995
November 30, 2011	Order Motion to Compel Disclosure, Docket No. 61 (<i>See Ex. 29 attached</i>)
November 30, 2011	Wisconsin State Assembly and Wisconsin State Senate's Rule 7(h) Expedited Non-Dispositive Motion to Quash Subpoena, Docket Nos. 63, 64 (<i>See Ex. 30 attached, exhibit omitted</i>)
November 30, 2011	States' Amended Answer to Second Amended Complaint, Docket No. 66 (<i>See Ex. 31 attached</i>)
December 2, 2011	Petitioners, Dennis Clinard, et al. Voluntary Withdrawal of Petition in the State of Wisconsin Supreme Court Case No. 11-AP-2677

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EXHIBIT 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CINDY BARBERA, CARLENE
BECHEN, EL VIRA 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,

Plaintiffs,

Civil Action

File No. _____

(Three-judge panel requested)

v.

Members of the Wisconsin Government Accountability
Board, each only in his official capacity:
MICHAEL BRENNAN, DAVID DEININGER,
GERALD NICHOL, THOMAS CANE,
THOMAS BARLAND, and GORDON MYSE, and
KEVIN KENNEDY, Director and General Counsel for the
Wisconsin Government Accountability Board,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

The plaintiffs, for their complaint in this matter under 42 U.S.C. § 1983 and 28 U.S.C. § 2284(a), requiring a three-judge panel, allege that:

SUMMARY

This is an action for a declaratory judgment and for injunctive relief, involving the rights of the plaintiffs under the U.S. Constitution and the Wisconsin Constitution and the apportionment of the 33 Senate districts and 99 Assembly districts in the State of Wisconsin. Those districts, established by a three-judge panel of this Court by order in 2002, have been rendered unconstitutional by the 2010 census. This case arises under the U.S. Constitution,

Article I, Section 2, and the Fifth and Fourteenth Amendments, Sections 1, 2 and 5, under 42 U.S.C. §§ 1983 and 1988, under the Voting Rights Act, 42 U.S.C. § 1973, and under article IV, section 3 of the Wisconsin Constitution.

JURISDICTION

1. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3) and (4), 1357 and 2284 to hear the claims for legal and equitable relief arising under the federal and state constitutions. It also has general jurisdiction under 28 U.S.C. §§ 2201 and 2202, the Declaratory Judgments Act, to grant the declaratory relief requested by the plaintiffs.

2. This action challenges the constitutionality of the judicially-mandated apportionment of Wisconsin's legislative districts, found in chapter 4 of the Wisconsin Statutes, but only as ordered by the U.S. District Court for the Eastern District of Wisconsin in *Baumgart v. Wendelberger*, Nos. 01-121 and 02-366, 2002 WL 34127471 (E.D. Wis. May 30, 2002) (*per curiam*) (three-judge panel), *amended by* 2002 WL 34127473 (E.D. Wis. July 11, 2002). The current state legislative district boundaries were based on the 2000 census of the state's population, now superseded by the 2010 census.

3. Accordingly, 28 U.S.C. § 2284(a) requires that a district court of three judges be convened or reconvened to hear the case. In 1982, 1992 and 2002, three-judge panels convened pursuant to 28 U.S.C. § 2284 resolved complaints like this one, developing redistricting plans for the state legislature in the absence of valid plans adopted by the legislature and enacted with the Governor's approval.

VENUE

4. The venue for this case is properly in this Court under 28 U.S.C. §§ 1391(b) and (e). At least one of the defendants resides in the Eastern District of Wisconsin. In addition, nine of the individual plaintiffs reside and vote in this district.

PARTIES

Plaintiffs

5. The plaintiffs are citizens, residents and qualified voters of the United States of America and the State of Wisconsin, residing in various counties and legislative districts:

a. Alvin Baldus, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of Menomonie, Dunn County, Wisconsin, with his residence in the 67th Assembly District and 23rd Senate District as those districts were established by this Court in 2002.

b. Cindy Barbara, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the City of Madison, Dane County, Wisconsin, with her residence in the 79th Assembly District and 27th Senate District as those districts were established by this Court in 2002.

c. Carlene Bechen, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the Village of Brooklyn, Dane County, Wisconsin, with her residence in the 80th Assembly District and the 27th Senate District as those districts were established by this Court in 2002.

d. Elvira Bumpus, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the City of Racine, Racine County, Wisconsin, with her residence in the 62nd Assembly District and 21st Senate District as those districts were established by this Court in 2002.

e. Ronald Biendsei, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of Middleton, Dane County, Wisconsin, with his residence in the 79th Assembly District and 27th Senate District as those districts were established by this Court in 2002.

f. Leslie W. Davis, III, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the City of Stoughton, Dane County, Wisconsin, with his residence in the 46th Assembly District and 16th Senate District as those districts were established by this Court in 2002.

g. Brett Eckstein, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the Village of Sussex, Waukesha County, Wisconsin, with his residence in the 99th Assembly District and 33rd Senate District as those districts were established by this Court in 2002.

h. Georgia Rogers, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the Village of Waunauke, Dane County, Wisconsin, with her residence in the 62nd Assembly District and the 21st Senate District as those districts were established by this Court in 2002.

i. Richard Kresbach, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the Village of Wales, Waukesha County, Wisconsin, with his residence in the 33rd Assembly District and the 11th Senate District as those districts were established by this Court in 2002.

j. Rochelle Moore, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the City of Kenosha, Kenosha County, Wisconsin, with her residence in the 64th Assembly District and the 22nd Senate District as those districts were established by this Court in 2002.

k. Amy Risseuw, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the Town of Menasha, Outagamie County,

Wisconsin, with her residence in the 3rd state Assembly District and 19th Senate District as those districts were established by this Court in 2002.

l. Judy Robson, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the City of Beloit, Rock County, Wisconsin, with her residence in the 44th Assembly District and 15th Senate District as those districts were established by this Court in 2002. Ms. Robson, then a State Senator, was a plaintiff in *Baumgart v. Wendelberger*, 2002 WL 34127471. She has filed a motion under Rule 60(b), Fed. R. Civ. P., for relief from the judgment in that case, asking the Court to provide substantially the same relief requested in this complaint.

m. Jeanne Sanchez-Bell, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the City of Kenosha, Kenosha County, Wisconsin, with her residence in the 65th Assembly District and 22nd Senate District as those districts were established by this Court in 2002.

n. Cecelia Schliepp, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the Village of Hartland, Waukesha County, Wisconsin, with her residence in the 99th Assembly District and the 33rd Senate District as those districts were established by this Court in 2002.

o. Travis Thyssen, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the Town of Grand Chute, Outagamie County, Wisconsin, with his residence in the 56th Assembly District and the 19th Senate District as those districts were established by this Court in 2002.

Defendants

6. Michael Brennan, resident of Marshfield, Wisconsin; David Deininger, resident of Monroe, Wisconsin; Gerald Nichol, resident of Madison, Wisconsin; Thomas Cane, resident of

Wausau, Wisconsin; Thomas Barland, resident of Eau Claire, Wisconsin; and, Gordon Myse resident of Appleton, Wisconsin, each personally and individually but only in his official capacity, are all members of the Wisconsin Government Accountability Board (“G.A.B.”). Kevin Kennedy, resident of Dane County, Wisconsin, in his official capacity, is the Director and General Counsel for the G.A.B.

a. The G.A.B. is an independent agency of the State of Wisconsin under section 15.60 of the Wisconsin Statutes. The G.A.B. has “general authority” over and the “responsibility for the administration of ... [the state’s] laws relating to elections and election campaigns,” Wis. Stat. § 5.05(1) (2009-10), including the election every two years of Wisconsin’s representatives in the state Assembly and every four years its representatives in the state Senate.

b. Among its statutory responsibilities, the G.A.B. must notify each county clerk by the second Tuesday in May of an election year, under Wis. Stat. §§ 10.01(2)(a) and 10.72, of the date of the primary and general elections and the offices to be filled at those elections by the voters. The G.A.B. is also required to transmit to each county clerk a certified list of candidates for whom the voters of that county may vote. Wis. Stat. § 7.08(2).

c. The G.A.B. issues certificates of election under Section 7.70(5) of the Wisconsin Statutes to the candidates elected to serve in the state Senate and state Assembly. The G.A.B. also provides support to local units of government and their public employees, including the county clerks in each of Wisconsin’s 72 counties, in administering and preparing for the election of members of the Wisconsin legislature. For purposes of the state’s election law, the counties and their clerks act as agents for the state and for the G.A.B.

FACTS / CONSTITUTIONAL PROVISIONS

7. The Due Process Clause of the Fifth Amendment provides that “[n]o person shall ... be deprived of life, liberty, or property, without due process of law.”

8. The Equal Protection Clause of the Fourteenth Amendment provides, in pertinent part:

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.

This provision guarantees to the citizens of each state the right to vote in state elections, guaranteeing as well that the vote of each citizen shall be equally effective with the vote of any and every other citizen.

9. In addition, article IV, section 3, of the Wisconsin Constitution requires that the legislature “apportion” the state’s senate and assembly districts following each federal census “according to the number of inhabitants.”

10. The U.S. Constitution and the Wisconsin Constitution require that the members of the Wisconsin legislature be elected on the basis of equal representation. State Senate and Assembly districts must be virtually equal in population based on the number of inhabitants according to the April 2010 Census.

11. From and since 2002—based on the official results of the 2000 census and a certified statewide population total then of 5,363,675—the state has been divided into 33 Senate districts and 99 Assembly districts. The state legislative districts were created by this Court with relatively equal populations. *See* ¶ 2 *supra*. In 2002, each Senate district contained a population of approximately 162,536 residents, and each Assembly district contained a population of

approximately 54,179. A copy of chapter 4 of the Wisconsin Statutes, reflecting these facts and embodying the Court's 2002 order, is attached as Exhibit A.

12. The 2002 state legislative elections, every subsequent biennial legislative election, including the November 2, 2010 election, and other elections have been conducted under the district boundaries judicially-established in 2002. The next regular state legislative primary election is scheduled for September 11, 2012, and the next regular state legislative general election is scheduled for November 6, 2012.¹

13. The Bureau of the Census, U.S. Department of Commerce, conducted a decennial census in 2010 of Wisconsin and of all the other states under Article I, Section 2, of the U.S. Constitution.

14. Under 2 U.S.C. §§ 2a and 2c and 13 U.S.C. § 141(c), the Census Bureau on December 21, 2010 announced and certified the actual enumeration of the population of Wisconsin at 5,686,986 as of April 1, 2010, a slight population increase from the 2000 census. A copy of the Census Bureau's Apportionment Population and Number of Representatives, by state, is attached as Exhibit B.

15. Based on the April 2010 Census, the precise ideal population for each Senate District in Wisconsin is 172,333 and for each Assembly District 57,444 (each a slight increase from 2000).

16. On March 9, 2011, the Census Bureau released Wisconsin's official population, population growth and related data for the last decade. A copy of the Census Bureau's official

¹ To comply with the Military and Overseas Election Act, the September 11, 2012 primary may be moved to an earlier date. See 42 U.S.C. § 1973ff. State Senate Bill 116 and Assembly Bill 161, pending before the Wisconsin legislature, would move the partisan primary from the second Tuesday in September to the second Tuesday in August.

population data for Wisconsin is attached as Exhibit C. This data reveal substantial disparity among Wisconsin's 33 existing Senate districts and 99 existing Assembly districts:

a. The 2010 census populations in Wisconsin's Senate districts range from a low of 152,758 (19,575 fewer than the ideal population, the 6th Senate District) to a high of 197,821 (25,488 more than the ideal population, the 27th Senate District). Thus, the total population deviation, from the most populous to the least populous Senate District, is 45,063 persons.

b. The 2010 census populations in Wisconsin's Assembly districts range from a low of 48,387 (9,057 fewer than the ideal population, the 18th Assembly District) to a high of 76,116 (18,672 more than the ideal population, the 79th Assembly District). Thus, the total population deviation, from the most populous to the least populous Assembly District, is 27,729 persons.

17. This facial and uncontradicted malapportionment of state legislative districts dilutes the voting strength of the plaintiffs residing in relatively overpopulated districts: the weight or value of each voter in a relatively overpopulated district is, by definition, less than that of any voter residing in a relatively under-populated district.

18. Article IV, section 3, of the Wisconsin Constitution gives the legislature the primary responsibility for enacting a constitutionally valid plan for the state's legislative districts.

a. For the last three decades, however, the legislature has not met that responsibility. Instead, the judicial branch at least initially has established district boundaries to ensure the constitutional guarantees for citizens and voters.

b. The legislature elected in November 2010 convened for the first time on January 4, 2011. No legislation for redistricting has been introduced, let alone debated, adopted and signed into law by the Governor.

19. Under §§ 10.01(2)(a) and 10.72(1), Wis. Stat., the G.A.B. must notify the county clerks by May 8, 2012 of the offices, including representatives in the state legislature, that the electors in each county will fill by voting in the primary and general elections. In addition, candidates for state Senate and state Assembly can begin circulating their petitions for nomination on June 1, 2012 and must file their petitions with the G.A.B. on or before July 10, 2012, pursuant to section 10.72(3)(c), Wis. Stat.²

CLAIMS FOR RELIEF

20. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 19 above.

21. A state statute or, in the absence of a state statute, a judicial order that enforces or effects district populations and boundaries that discriminate against citizens in highly populous legislative districts, by definition preferring voters in less populous legislative districts, violates the Due Process and Equal Protection Clauses and the state constitution. The 2010 census rendered the state's 2002 legislative districts unconstitutional, which harms or threatens to harm the plaintiffs' constitutional rights.

22. Shifts in population and population growth have rendered the 33 Senate districts and 99 Assembly districts judicially established in 2002 no longer "apportioned ... according to the number of inhabitants" as required by the state constitution and guaranteed by the federal constitution.

² If the partisan primary is moved to August (or earlier), *see supra* at n.1, all other dates, including nomination paper circulation and filing, and the G.A.B.'s deadline to notify clerks, will also be moved to earlier dates.

- a. The population variations between and among the districts are substantial.
- b. The plaintiffs who reside in the 11th, 16th, 22nd and 27th Senate districts, among others, based on the existing district lines, are particularly underrepresented in comparison with the residents of other districts.
- c. The plaintiffs who reside in the 3rd, 46th, 56th, 79th and 99th Assembly districts, among others, based on the existing district lines, are particularly underrepresented in comparison with the residents of other districts.

23. If not otherwise enjoined or directed, the G.A.B. will have no choice but to carry out its statutory responsibilities for the upcoming 2012 fall legislative elections based on the 33 Senate and 99 Assembly unconstitutional districts because there are no other statutorily—or judicially—established legislative districts.

24. The legislative boundaries established in 2002 discriminate against citizens in the most highly populous legislative districts—including, but not limited to, Senate Districts 10, 11, 16, 22 and 27, and Assembly Districts 3, 29, 30, 46, 56, 79 and 99—and prefer citizens in the least populous districts in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution and the Wisconsin Constitution.

25. The boundaries and the populations they define, unless modified, violate the principle of “one person, one vote” and do not guarantee that the vote and representation in the Wisconsin legislature for every citizen is equivalent to the vote and representation of every other citizen.

26. In the absence of the Wisconsin legislature and Governor enacting constitutionally-permissible legislative districts, the fall 2012 elections conducted under the

G.A.B.'s supervision will violate the rights of the plaintiffs (and others) under the Due Process and Equal Protection Clauses and under the Wisconsin Constitution.

27. The malapportionment of the state's legislative districts harms or threatens to harm the plaintiffs in concrete ways and, regardless of district population, every other citizen. Until valid redistricting occurs, they cannot know in which Senate or Assembly district they will reside and vote, nor do they have the ability to hold their representatives to the legislature prospectively accountable for their conduct in office. The absence of a valid redistricting plan means, among other things, that:

a. Citizens who desire to influence the views of members of the Wisconsin legislature or candidates for the Senate and Assembly are not able to communicate their concerns effectively as citizens because members of the legislature or legislative candidates may not be held accountable to those citizens as voters in the next election;

b. Potential candidates for the legislature will not be able to come forward until they know the borders of the districts in which they, as residents of the district, could seek office;

c. Citizens who desire to communicate with and contribute financially to a candidate for the legislature who may or will represent them, a right guaranteed by the First Amendment, are hindered from doing so until districts are correctly reapportioned; and,

d. Citizens rights are compromised because of the inability of candidates to campaign effectively and provide a meaningful election choice.

RELIEF SOUGHT

WHEREFORE, the plaintiffs ask that the Court:

1. Immediately request that Hon. Frank H. Easterbrook, Chief Judge of the U.S. Court of Appeals for the Seventh Circuit, designate two other judges to form a three-judge panel under 28 U.S.C. § 2284(a);

2. Declare the apportionment of Wisconsin's 33 Senate districts and 99 Assembly districts, established by this Court in 2002 based on the 2000 Census, unconstitutional and invalid and the maintenance of those districts for the September 2012 primary election and November 6, 2012 general election a violation of plaintiffs' federal and state constitutional rights;

3. Enjoin the defendants and the G.A.B.'s employees and agents, including the county clerks in each of Wisconsin's 72 counties, from administering, preparing for and in any way permitting the nomination or election of members of the Wisconsin legislature from the unconstitutional Senate districts and unconstitutional Assembly districts that now exist in Wisconsin for the September 2012 primary election and November 6, 2012 general election;

4. In the absence of a constitutional state law, adopted by the Wisconsin legislature and signed by the Governor in a timely fashion, establish a judicial plan of apportionment to make the state's Senate districts and Assembly districts substantially equal in population and to otherwise meet the requirements of the U.S. Constitution and statutes and the Wisconsin Constitution and statutes;

5. Award the plaintiffs their costs, disbursements, and reasonable attorneys' fees incurred in bringing this action; and,

6. Grant such other relief as the Court deems proper.

Dated: June 10, 2011.

GODFREY & KAHN, S.C.

By: s/ Rebecca Kathryn Mason

Rebecca Kathryn Mason

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EXHIBIT 3

*United States District Court
Eastern District of Wisconsin
208 U. S. Courthouse*

Chambers of
CHARLES N. CLEVERT, JR.
Chief U. S. District Judge

517 E. Wisconsin Ave.
Milwaukee, WI 53202-4581
(414) 297-1585

June 15, 2011

Honorable Frank Easterbrook
Chief Judge, 7th Cir. Court of Appeals
Everett McKinley Dirksen
United States Courthouse
219 S. Dearborn St., Room 2746
Chicago, IL 60604

Re: *Alvin Baldus, et al. v. Michael Brennan et al.*
Case No. 11-CV-562

Dear Judge Easterbrook:

The enclosed complaint for declaratory and injunctive relief was filed on June 10, 2011, pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2284(a). As a consequence, I ask that you appoint a three judge panel to hear and decide the matter.

Further, please note that the plaintiffs' Civil Cover Sheet (JS 44) indicates that this case is related to Case Number 01-CV-121 and that a motion for relief from judgment was filed in that matter on June 9, 2011.

Sincerely,

/s/ C. N. Clevert, Jr.

C. N. CLEVERT, JR.
U. S. District Judge

EXHIBIT 4



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July 25, 2011

VIA ELECTRONIC FILING

Hon. J.P. Stadtmueller
United States District Court for the
Eastern District of Wisconsin
517 East Wisconsin Avenue
Milwaukee, WI 53202-4500

Baldus et al. v. Brennan et al.
Case No. 11-CV-562

Dear Judge Stadtmueller:

For the Court's convenience, we have attached to this letter the text of the redistricting legislation as well as the maps of the 2011 Congressional, Wisconsin Senate, and Wisconsin Assembly districts resulting from this legislation:

1. Exhibit 1 – Senate Bill 148 (addressing state legislative districts) (209 pages)
2. Exhibit 2 – Senate Amendment 2 to SB 148 (amending assembly districts 8 & 9) (8 pages)
3. Exhibit 3 – Senate Bill 149 (addressing Congressional districts) (46 pages)
4. Exhibit 4 – Map to Senate Bill 148 (2011 state assembly map) (2 pages)
5. Exhibit 5 – Map to Senate Amendment 2 to SB 148 (amended assembly districts 8 & 9) (2 pages)
6. Exhibit 6 – Map to Senate Bill 149 (2011 state senate map) (2 pages)
7. Exhibit 7 – Map to Senate Bill 149 (2011 Congressional map) (2 pages)

All counsel of record will receive a copy of this letter and exhibits through the court's electronic filing system.

Hon. Charles N. Clevert
July 25, 2011
Page 2

GODFREY & KAHN, S.C.

/s/ Rebecca Kathryn Mason

Rebecca Kathryn Mason

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EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CINDY BARBERA,
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, and TRAVIS
THYSSEN,

Plaintiffs,

v.

Case No. 11-C-00562

Members of the Wisconsin Government
Accountability Board, each only in his official
capacity: MICHAEL BRENNAN, DAVID
DEININGER, GERALD NICHOL, THOMAS
CANE, THOMAS BARLAND, and
TIMOTHY VOCKE,¹ and KEVIN
KENNEDY, Director and General Counsel
for the Wisconsin Government
Accountability Board,

Defendants.

DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

The defendants, the Members of the Wisconsin Government Accountability
Board ("GAB"), Michael Brennan, David Deininger, Gerald Nichol, Thomas Cane,

¹Timothy Vocke was appointed to the Government Accountability Board on
June 17, 2011, replacing Gordon Myse—one of the original named defendants.
Plaintiffs have substituted Mr. Vocke in the caption of their most recent pleadings.
Pursuant to Fed. R. Civ. P. 25(d), such substitution is automatic, but should be
presented to the Court. Defendants seek such automatic substitution here.

Thomas Barland, and Timothy Vocke,² each in his official capacity only, and Kevin Kennedy, in his official capacity as Director and General Counsel for the GAB only, by their attorneys, J.B. Van Hollen, Attorney General, and Maria S. Lazar, Assistant Attorney General, hereby move this Court for a dismissal of the amended complaint in this action pursuant to Fed. R. Civ. P. 12(b)(1) (lack of subject matter jurisdiction) and Fed. R. Civ. P. 12(b)(6) (failure to state a claim upon which relief can be granted) as to the Third Claim. In the alternative, movants request that this Court defer to the State judiciary or that the Court abstain from taking this matter.

For the reasons more fully set forth in the accompanying Brief in Support of Motion to Dismiss Amended Complaint, the movants request that the Court grant their Motion to Dismiss this action in its entirety.

Dated this 4th day of August, 2011.

J.B. VAN HOLLEN
Attorney General

s/Maria S. Lazar
MARIA S. LAZAR
Assistant Attorney General
State Bar #1017150

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²See footnote 1, *supra*.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CINDY BARBERA,
CARLENE BECHEN, ELVIRA BUMPUS,
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DEININGER, GERALD NICHOL, THOMAS
CANE, THOMAS BARLAND, and
TIMOTHY VOCKE,¹, and KEVIN
KENNEDY, Director and General Counsel
for the Wisconsin Government
Accountability Board,

Defendants.

DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS AMENDED
COMPLAINT AND REPLY TO RESPONSE TO PENDING MOTION TO DISMISS

¹Timothy Vocke was appointed to the Government Accountability Board on June 17, 2011, replacing Gordon Myse—one of the original named defendants. Plaintiffs have substituted Mr. Vocke in the caption of their most recent pleadings. Pursuant to Fed. R. Civ. P. 25(d), such substitution is automatic, but should be presented to the Court. Defendants seek such automatic substitution here.

INTRODUCTION

Following the defendants' Motion to Dismiss the original Complaint, the plaintiffs have filed an Amended Complaint; yet, interestingly—and somewhat ironically—this Amended Complaint has been filed before the legislative boundaries set by the State Legislature have been approved by the Governor and signed into law. In the original Complaint, the plaintiffs decried the “fact” that the State Legislature would never act in time for the Spring 2012 elections. In the Amended Complaint, the plaintiffs complain that the State Legislature acted too promptly albeit prior to local, municipal redistricting.

Regardless, the Amended Complaint fails to deflect the main argument raised in the original Motion to Dismiss: the United States Supreme Court has held that redistricting legislation lies first in the hands of a state's legislature and then in that state's judiciary. *See Grove v. Emison*, 507 U.S. 25, 33 (1993) and *Miller v. Johnson*, 515 U.S. 900, 915 (1995).

The plaintiffs' anticipatory Amended Complaint must be dismissed because this Court lacks subject matter jurisdiction—how can this Court issue any orders, declarations, or injunctions regarding two bills which, as of the date of the Amended Complaint, had *not* been passed into law? Again, there is no present harm—there is no redistricting law which can be declared constitutional or not as of the date of the Amended Complaint. Parties cannot “jump ahead” and file advisory request complaints in order to be the first lawsuit filed. There is a proper time to file an action. The Amended Complaint was prematurely filed and should not be allowed to stand.

Moreover, while mentioned in passing in their Amended Complaint, the plaintiffs disregard the fact that the *one* law which was passed before they filed the Amended Complaint (2011 Wisconsin Act 39 which goes into effect on August 9, 2011) establishes the proper means and venue for legal challenges to redistricting legislation, and that venue is not in this federal court.

What the plaintiffs are attempting to do, by filing this lawsuit, then immediately amending the Complaint following the passage of redistricting maps (but prior to their enactment into law) and then ignoring the redistricting challenge venue law, is to ensure that they are allowed to pick the forum they prefer. Such forum-shopping is not permissible. That being the case, and solely if this Court declines to dismiss this action, the defendants ask for this Court's deferral of this matter, or in the alternative, ask that this Court abstain from taking this matter.

Finally, the Third Claim in the Amended Complaint ("Legislative Districts Unnecessarily Disenfranchise 300,000 Wisconsin Citizens") is directly contrary to established law and, as a matter of law, should be dismissed for failing to state a claim upon which relief may be granted regardless of whether the entire action is dismissed or not.

THE LAW

Pursuant to Fed. R. Civ. P. 12(b)(1), a defendant may file a motion to dismiss for "lack of subject-matter jurisdiction." The burden of proof for such a motion rests with the party who asserts federal jurisdiction. *United Phosphorus*,

Ltd. v. Angus Chemical Co., 322 F.3d 942, 946 (7th Cir. 2003). In this case, the plaintiffs bear that burden.

In the case of a Fed. R. Civ. P. 12(b)(6) motion for failure to state a claim upon which relief may be granted, the complaint itself must be examined. It need not spell out in excruciating detail all relevant facts, but it must allege sufficient facts to raise the plaintiffs' right to relief above mere speculation. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Accordingly, a claim, or the entire complaint, should be dismissed "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief." *Id.*, 550 U.S. at 558.

For the purposes of this Motion to Dismiss only, the allegations in the Amended Complaint shall be treated as if they are true. *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 463 (7th Cir. 2010).

STATEMENT OF THE CASE AND OF THE FACTS

Every ten years, pursuant to the United States Constitution, a national census is taken by the Bureau of Census, the United States Department of Commerce, to determine the population of each state. U.S. Const. art. I, § 2. (Amended Complaint, dated July 21, 2011, ["Amended Complaint"], ¶ 14). These decennial census are then used, in part, to determine the apportionment of both state and federal governmental districts in each state.

The defendant Government Accountability Board (“GAB”) is an independent agency of the State of Wisconsin, which first began work in January 2008.² Wis. Stat. § 15.60 (Amended Complaint, ¶ 6(a)). It is the obligation of the GAB to oversee and administer Wisconsin’s laws “relating to elections and election campaigns[.]” Wis. Stat. § 5.05(1). (Amended Complaint, ¶ 6(a)). As part of the GAB’s statutory responsibilities, it is to notify each county clerk by the second Tuesday in May of an election year of the date of the primary and general elections and which offices are to be filled in those elections. Wis. Stat. §§ 10.01(2)(a) and 10.72. (Amended Complaint, ¶ 6(b)). The GAB has other election-related, statutory duties. *See* Wis. Stat. §§ 7.08(2) and 7.70(5). (Amended Complaint, ¶ 6(a)-(c)).

The first date listed in the Amended Complaint by which the GAB is to perform some of its statutory, election-related duties is the second Tuesday of May of an election year—or May 8, 2012. (Amended Complaint, ¶ 6(b)). The Court may take judicial notice, pursuant to Fed. R. Evid. 201, that that date is indeed May 8, 2012—more than eleven months from the date the initial Complaint was filed and more than ten months from the date the Amended Complaint was filed.

²The Court may take judicial notice, pursuant to Fed. R. Evid. 201, that the GAB was established in 2008, pursuant to 2007 Wisconsin Act 1, and was not in existence during the previous lawsuits each decade. “In ruling on a 12(b)(6) motion, a district court may take judicial notice of matters of public record without converting the 12(b)(6) motion into a motion for summary judgment.” *Anderson v. Simon*, 217 F.3d 472, 474-75 (7th Cir. 2000); *General Electric Capitol Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1080 (7th Cir. 1997).

On December 21, 2010, the Bureau of Census announced and certified the population for the State of Wisconsin, showing a slight population increase. (Amended Complaint, ¶ 15).

The plaintiffs concede that “[t]he state legislature has the primary responsibility . . . to enact a constitutionally-valid plan establishing the boundaries for the state’s eight Congressional districts.” (Amended Complaint, ¶ 22).

The plaintiffs seek to have the not-as-yet legally enacted redistricting maps declared unconstitutional and, in the absence of adoption of constitutional redistricting maps, to have this Court establish a judicial redistricting map.

ARGUMENT

MOTION TO DISMISS AMENDED COMPLAINT

I. THIS ACTION MUST BE DISMISSED BECAUSE THE COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION BECAUSE THE REDISTRICTING BILLS HAVE NOT YET BEEN ENACTED INTO LAW.

In order to have standing such that a party may raise a claim, “a plaintiff must allege 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.’” *Deida*, 192 F. Supp. 2d at 904 (quoting *Tobin for Governor v. Ill. State Bd. of Elections*, 268 F.3d 517, 527 (7th Cir. 2001)). In order to assess whether a matter is “ripe,” the Court must “evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.”

Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n, 149 F.3d 679, 687 n.3 (7th Cir. 1998) (quoting *Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967)).

“The basic rationale of the ripeness doctrine ‘is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative [or legislative] policies, and also to protect the agencies [or, in this case, the State Legislature] from judicial interference until an administrative decision has been formalized [or, in this case, new legislative boundaries have been set] and its effects felt in a concrete way by the challenging parties.’” *Patel v. City of Chicago*, 383 F.3d 569, 572 (7th Cir. 2004). This is apropos in the given circumstance. Here, dismissing the case for a lack of ripeness will prevent this Court from entanglement in an abstract disagreement and from requiring decisions which may never become necessary.

This is the classic case of premature adjudication: the plaintiffs don't even attempt to hide the fact that *no* redistricting laws have been signed into law. They brush that off as an insignificant—and slightly inconvenient—fact.

However, it is not insignificant *or* inconvenient. It is a *fact*. A party may not commence a legal challenge to a law that does not yet exist. Thus, the “ripeness” argument made in the preceding Motion to Dismiss³ is still viable especially because a party may not challenge the constitutionality of a bill before it is enacted into a law. *Goodland v. Zimmerman*, 243 Wis. 459, 468, 10 N.W.2d 180 (1943).

³*Ernst & Young v. Depositors Economic Protection Corp.*, 45 F.3d 530, 538 (1st Cir. 1995) (“Courts should always be hesitant to answer hypothetical questions.”)

See also *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶ 8, ___ Wis. 2d ___, 798 N.W.2d 436. This is precisely what the plaintiffs are attempting to do here. The sole reason for this “immediate,” anticipatory Amended Complaint is to prevent 2011 Wisconsin Act 39 from taking effect which would establish the legal procedure by which this challenge should be made. As noted below, such blatant, self-serving conduct should not be rewarded; indeed, plaintiffs should be required to follow the laws and to file their challenge, if any still exist after the redistricting laws are finally signed into law, in the State Supreme Court.

In a case with remarkably similar facts (a federal lawsuit seeking declaratory and injunctive relief initiated before the proposed redistricting plans were sent to the Governor for approval), a federal court granted the defendants’ motion to dismiss on the grounds that the plaintiffs had “alleged no immediate harm, and their claims are contingent on future uncertainties, [and the] case [was] not ripe for review.” *Carter v. Virginia State Board of Elections*, 2011 WL 1637942 (W.D. Va. April 29, 2011) at *2. The *Carter* court continued and stated “as the Constitution leaves states with the primary responsibility for the apportionment of state legislative districts, *Grove v. Emison*, 507 U.S. 25, 24 [sic] (1993), it would be repugnant to principles of federalism and the separation of powers to interfere with the General Assembly’s or governor’s prerogatives now.” *Id.* (emphasis added). (That court even opined that the complaint could also have been dismissed for failure to state a claim upon which relief could be granted). *Id.* at *2 n.3.

Just like in *Carter*, the instant case should be dismissed at this time for lack of subject matter jurisdiction. Quite simply, there are no laws which may be adjudged unconstitutional or not and, thus, no laws upon which declarations or injunctions may properly be based.

II. THE COURT SHOULD DEFER THIS MATTER TO THE STATE JUDICIARY, OR, IN THE ALTERNATIVE, SHOULD ABSTAIN FROM TAKING ANY ACTION.

- A. This Court should defer action to allow the State judiciary to respond to any legal challenges to the newly passed legislation which establishes the legislative boundaries.

The State Constitution vests the primary responsibility to redistrict legislative boundaries every ten years upon the State Legislature. Wis. Const. art. IV, § 3; U.S. Const. art. I, § 2; *Grove*, 507 U.S. at 34 (“We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.”) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)). That is the body which is given the “first chance” to insure that the new population data is properly assessed and new boundaries are established to protect Wisconsin citizens’ right to vote and to have equal representation. “Simply because an election law has become unconstitutional does not necessarily mean a federal court should step in to rewrite it, however.” *Arrington v. Elections Board*, 173 F. Supp. 2d 856, 860 (E.D. Wis. 2001).

There may be times where the State Legislature—for whatever reason—is not able to timely act. Upon that inability to timely establish boundaries, the state

judiciary is the next venue for resolution. It is only after such state judicial review that the federal courts should step into the fray.

That is precisely the case here: the State Legislature has acted (or will, upon the Governor's signature) and has even established a procedure which statutorily codifies the United States Supreme Court preference that the state judiciary is to be the first avenue of recourse for any constitutional challenges to redistricting legislation. *See* 2011 Wisconsin Act 39.

Federal courts have been advised to respect the state's rights to establish its own legislative boundaries—by the Legislature and *then* the state judiciary. “In the reapportionment context, the [United States Supreme] Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself.” *Grove*, 507 U.S. at 33 (emphasis in original). Here, the State Legislature has completed redistricting plans which may soon be signed into law. Even without 2011 Wisconsin Act 39, the state judiciary is the next appropriate venue for any constitutional challenges.

“Absent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it.” *Id.* at 34; *Branch v. Smith*, 538 U.S. 254, 261 (2003). “Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions.” *Miller v. Johnson*, 515 U.S. 900, 915 (1995). “It is well settled that ‘reapportionment is primarily the

duty and responsibility of the State.” *Id.* (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)).

Pursuant to the United State Supreme Court’s dictates, first set forth in 1965 in *Scott v. Germano*, 381 U.S. 407 (1965) (*per curiam*), that state legislatures and judiciaries are to have the primary redistricting responsibilities, it is appropriate that this Court defer any action in this case and allow the State judiciary to fulfill its duties.

The State and Federal Constitutions require that a redistricting plan be established in advance of the next election, it does not require that there be time for an appeal of such a plan. State agencies are to adopt a constitutional plan “within ample time . . . to be utilized in the [upcoming] election[.]” *Germano*, 381 U.S. at 409. The Constitution “does not require appellate review of the plan prior to the election, and such a requirement would ignore the reality that States must often redistrict in the most exigent circumstances—during the brief interval between completion of the decennial federal census and the primary season for the general elections in the next even-numbered year.” *Grove*, 507 U.S. at 35.

Accordingly, it is proper for this Court to defer any action in this case until Spring of 2012, if at all, to allow the state judiciary to follow the statutory process set forth in 2011 Wisconsin Act 39 as well as the dictates enumerated in *Grove*.

B. In the alternative, it is appropriate for this Court to abstain from taking this matter.

A motion to dismiss based upon abstention principles also “raises the question of whether a court should exercise subject matter jurisdiction.” *Miller Brewing Co. v. Ace U.S. Holdings, Inc.*, 391 F. Supp. 2d 735, 739 (E. D. Wis. 2005). The Amended Complaint and “other materials relating to the exercise of jurisdiction” may be considered without converting the motion to dismiss into one for summary judgment. *Id.* Typically, the doctrine of abstention is “an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.” *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976) (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959)). However, when an action—such as the present case—is brought under the Federal Declaratory Judgment Act, “the Supreme Court has developed a separate abstention doctrine under which district courts may more easily abstain from exercising jurisdiction.” *Miller Brewing Co.*, 391 F. Supp. 2d at 739. The Supreme Court has interpreted that Act’s language indicating that the courts “may” declare the rights and other legal relations “as granting district courts discretion as to whether to exercise jurisdiction under the statute.” *Id.*; *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286-88 (1995).

Accordingly, here, there is every reason that this Court should *decline* to exercise its jurisdiction and require the plaintiffs to file their action in the appropriate State court following the procedures set forth in 2011 Wisconsin Act 39.

In *Grove*, the United States Supreme Court held that a federal district court had erred by not deferring to a state court's attempts to redistrict following a decennial census. *Grove*, 507 U.S. at 32. The Court in *Grove* further explained when a federal court should abstain from exercising jurisdiction when a state court has concurrent jurisdiction, stating that it has "found abstention necessary, for example, when the federal action raises difficult questions of state law bearing on important matters of state policy, or when federal jurisdiction has been invoked to restrain ongoing state criminal proceedings." *Id.* While in this case there is, as of yet, no concurrent state action regarding redistricting, that is solely because the plaintiffs have expressly chosen to disregard the dictates of 2011 Wisconsin Act 39.

There is no dispute that this Court would have the jurisdiction to hear this matter and to appoint a panel of judges to establish legislative boundaries should it determine that the legislative boundaries set by the Wisconsin Legislature are not constitutionally-valid if there is no state court challenge filed pursuant to 2011 Wisconsin Act 39. However, just because a federal court has the discretion to so act, it does not necessarily follow that the Court need do so in each case. *Arrington*, 173 F. Supp. at 860. The United States Supreme Court's abstention doctrines must be taken into account. Abstention is premised upon the theory that "federal courts may decline to exercise their jurisdiction, in otherwise "exceptional circumstances," where denying a federal forum would clearly serve an important countervailing interest, for example, where abstention is warranted by considerations of 'proper constitutional adjudication,' 'regard for federal-state

relations,' or 'wise judicial administration.'" *Quakenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (citations omitted).

Here, by allowing the State judiciary to take certain actions, this Court would be following constitutional mandates and would show a proper regard for federal-state relations. It is only appropriate, as the Supreme Court in the line of cases originating with *Grove* has held, that States be the arbiters of their own internal redistricting plans—be it by their Legislature *or* by their judiciary.

The plaintiffs have chosen to disregard a state statute and have run to another forum in an anticipatory attempt to remove a constitutionally-based mandate from the hands of the State judiciary. Accordingly, should this Court not immediately dismiss this action in its entirety or not defer to the State judiciary, it should abstain from taking any action until it becomes apparent that the State judiciary will not timely perform its duties pursuant to 2011 Wisconsin Act 39.

III. 2011 WISCONSIN ACT 39 SETS FORTH THE PROCEDURE FOR CHALLENGING THE CONSTITUTIONALITY OF REDISTRICTING PLANS.

The newly enacted 2011 Wisconsin Act 39 establishes the procedure for legal challenges to redistricting maps. The plaintiffs expressly recognize that this law has been passed and the procedure it establishes, but they assert that the State Legislature does not have the authority to have that law enforced. (Response Brief at 9-10).

In a strikingly similar case in North Carolina, that state's legislature enacted new redistricting plans and, on the same date, enacted a statute which provided for

venue to lie exclusively in one county. *Stephenson v. Bartlett*, 595 S.E.2d 112, 115 (N.C. 2004). The court there, finding that there wasn't an ongoing case regarding redistricting, held that there was no vested right in venue in another county for cases filed after the law was enacted. *Id.*, 595 S.E.2d at 116-17. It also questioned whether there was any such vested right, but declined to opine on that point. *Id.*, 595 S.E.2d at 116. That court stated that the North Carolina legislature was within its rights to establish venue for redistricting challenges because “[v]enue is a procedural matter, and, . . . the General Assembly has the constitutional authority to establish rules of procedure” *Id.*, 595 S.E.2d at 118 (citation omitted).

That is precisely what the Wisconsin State Legislature has done here: it has established rules of civil procedure for the courts of the state. It has done so in a manner which mirrors the *Grove v. Emison* preference that state judiciaries be the second avenue of choice for redistricting after a state legislature has either acted or failed to act.

It is not clear whether the plaintiffs are challenging 2011 Wisconsin Act 39 itself as being unconstitutional (and if so, they have to do more than the implied references in their Response), but the law—as are all laws—is presumed

constitutional,⁴ and no challenges have yet been made to its validity. If the plaintiffs put the cart before the horse in filing their initial Complaint without waiting to see if a redistricting plan would be enacted, they have done so even more here where they are implicitly challenging the constitutionality of 2011 Wisconsin Act 39 without making such a legal challenge.

Here, 2011 Wisconsin Act 39 was enacted on July 25, 2011 and shall be published on August 8, 2011, thus, making its effective date August 9, 2011. Disregarding the United States Supreme Court precedence and preference for state judiciary oversight of redistricting challenges and then by filing this anticipatory Amended Complaint before the laws complained of have been enacted or given effect, it is patently clear that plaintiffs are attempting to circumvent 2011 Wisconsin Act 39 and the will of the State Legislature. This Amended Complaint is moot until the redistricting laws are given effect—and by that date, 2011 Wisconsin Act 39 will be the law of Wisconsin. The plaintiffs should not be entitled to file a premature constitutional challenge solely in order to evade a law which was duly enacted and signed.

What the plaintiffs have done here falls within the exceptions to the “first filed” rule. The general maxim is that the courts give priority to the first filed

⁴See *Almendarez-Torres v. U.S.*, 523 U.S. 224, 238 (1998) (the canon of “constitutional doubt” is “followed out of respect for Congress, which [the courts] assume legislates in the light of constitutional limitations.”) and *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (“As a general rule, legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.”) (quoting *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961)).

lawsuit. However, this “rule is not meant to be rigid, mechanical or inflexible, but is to be applied in a manner that best serves the interests of justice.” *Barnett v. Alabama*, 171 F. Supp. 2d 1292, 1296 (S.D. Ala. 2001) (regarding challenges to the constitutionality of redistricting plans). The federal courts have held that there “is not a mandate directing wooden application of the rule without regard to rare or extraordinary circumstances, inequitable conduct, bad faith, or forum shopping.” *EEOC v. Univ. of Pa.*, 850 F.2d 969, 972 (3d Cir. 1988). Here, almost all of these exceptions apply. When, if ever, does a plaintiff file a challenge to the constitutionality of law *before* it is enacted—and if they do so file, there can be no dispute that legally their action is without merit. This is the very definition of rare and extraordinary. Moreover, by filing before there is a law, the plaintiffs are inequitably trying to evade the effect of another law which has already been passed and signed. There is no doubt that this is patent forum-shopping at its worst. Finally, with respect to bad faith, the defendants leave that for this Court to determine.

If the plaintiffs file their challenge to the redistricting laws in the time-appropriate fashion, *i.e.*, after the laws are enacted, 2011 Wisconsin Act 39 will dictate how such challenges should be made.

Accordingly, this Court should abstain from taking this legal challenge.

IV. THE PLAINTIFFS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED WITH RESPECT TO THEIR THIRD CLAIM, THUS, THAT CLAIM MUST BE DISMISSED.

The Seventh Circuit, building upon *Twombly*, has established “two easy-to-clear hurdles” for a federal complaint. *Tamayo v. Blagojevich*, 526 F.3d 1074, 1084 (7th Cir. 2008). They are as follows:

First, the complaint must describe the claim in sufficient detail to give the defendant fair notice of what the claim is and the grounds upon which it rests. Second, its allegations must plausibly suggest that the plaintiff has a right to relief, raising that possibility above a “speculative level”; if they do not, the plaintiff pleads itself out of court.

Id. (quoting *Equal Employment Opportunity Commission v. Concentra Health Services, Inc.*, 496 F.3d 773, 776 (7th Cir. 2007) (citations omitted)).

Here, the Third Claim in the Amended Complaint seeks relief for “legislative districts [which] unnecessarily disenfranchise 300,000 Wisconsin citizens.” (See Amended Complaint, ¶¶ 39-44). In essence, the plaintiffs are complaining that some individuals’ right to vote for their representatives will be postponed. (Amended Complaint, ¶ 41). However, “the right to vote, *per se*, is not a constitutionally protected right.” *Rodriquez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) (quoting *San Antonio Independent School Dist. v. Rodriquez*, 411 U.S. 1, 35 n.78 (1973)). In particular, the United States Supreme Court has “previously rejected claims that the Constitution compels a fixed method of choosing state or local officers or representatives.” *Rodriquez*, 411 U.S. at 8. “The Constitution provides that States may prescribe ‘[t]he Times, Places and Manner of holding Elections for Senators and Representatives,’ Art. I, § 4, cl. 1, and the Court

therefore has recognized that States retain the power to regulate their own elections.” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). This falls within those powers.

This very scenario has been addressed in other federal and state courts as well, with none holding that a postponement of an election following redistricting was a deprivation of a citizen’s right to vote. *Mader v. Crowell*, 498 F. Supp. 226, 231 (M.D. Tenn. 1980) (“[t]he temporary disenfranchisement of these voters violates neither the equal protection clause nor any other constitutional provision.”); *Pate v. El Paso County, Texas*, 337 F. Supp. 95, 96 (W.D. Tex. 1970), *aff’d*, 400 U.S. 806 (1970); *In re Reapportionment of the Colorado General Assembly*, 647 P.2d 191, 198 (Col. 1982) (*en banc*); *State Elections Board v. Bartolomei*, 434 N.E.2d 74, 78 (Ind. 1982) (“this impingement upon the right to vote is the natural and unavoidable consequence of redistricting and maintaining a system of staggered terms of office for members of the same governmental body”); and *People ex rel. Snowball v. Pendegast*, 31 P. 103, 105 (Cal. 1892) (“[u]ndoubtedly these [delays] are inconvenient and deplorable results, but it must be assumed that they were foreseen and deliberately accepted by the framers of the constitution.”). Thus, courts have considered such postponements the “inevitable consequences of redistricting[.]” *Republican Party of Oregon v. Keisling*, 959 F.2d 144, 145 (9th Cir.), *cert. denied*, 504 U.S. 914 (1992).

In reality, “it would be a practical impossibility to redistrict without depriving some voters of the right to vote for a legislative representative for a

period of 2 years.” *Pick v. Nelson*, 528 N.W.2d 309, 317-18 (Neb. 1995). That being the case, there is no legal merit—thus no claim stated by the Third Claim in the Amended Complaint.

Accordingly, the Third Claim in the Amended Complaint must be dismissed in its entirety for failing to state a claim upon which relief may be granted.

REPLY TO PLAINTIFFS' RESPONSE TO INITIAL MOTION TO DISMISS

While the original Motion to Dismiss has been rendered moot, there are a few arguments in the plaintiffs' Response Brief to that Motion which require a reply as the arguments are based upon the Amended Complaint and not the initial Complaint. Despite repeated references to the “now-overtaken Motion to Dismiss,” the plaintiffs do not confine their Response to that Motion.

V. THE PLAINTIFFS MISREPRESENT WHAT THE 2001 CASE HELD WITH RESPECT TO STANDING.

It is true that the court in *Baumgart v. Wendelberger*, E.D. Wis. Case Nos. 01-C-121 and 02-C-366 (also referred to as “*Arrington v. Elections Board*”) held that there was standing for that court to proceed as of November 2001, when it declined to dismiss the case for lack of ripeness. *Arrington*, 173 F. Supp. 2d at 866-67. However, the plaintiffs fail to note that the court then stayed all substantive proceedings until February 1, 2002—the year of the next election. *Id.*, 173 F. Supp. 2d at 867. The dissent, aptly noting that his fellow judges were implying that there would not be a real controversy before February 2002, argued

that the majority was actually holding the case until it became ripe and that that was inappropriate. *Id.*, 173 F. Supp. 2d at 869.

VI. THE PLAINTIFFS MISREAD THE MENTION OF ONE-PARTY CONTROL.

The defendants' hat was not hung on the fact that merely because one political party held both the Legislative and Executive branches that a constitutionally valid legislative redistricting plan was guaranteed. (Response at 5). Rather, that fact was referenced in support of the argument—which has since been proven 98% true—that it was more likely than not that a redistricting plan would be passed and enacted into law unlike prior decades. The defendants have never contended that standing for constitutional challenges only exists if there are splits in the legislative and executive branches.

To the contrary, the sole point being made was that *a* plan was likely to be enacted. And, should the Governor sign the two Bills, that will indeed be the case.

CONCLUSION

Based upon the foregoing, this Court lacks jurisdiction to hear this action due to lack of subject matter jurisdiction. In addition, this Court should follow the dictates of the United States Supreme Court and the procedure set forth in 2011 Wisconsin Act 39 and defer this matter to the Wisconsin State Supreme Court. In the alternative, this Court could abstain from taking this case at all—leaving it to the State judiciary.

Finally, the plaintiffs have failed to state a claim upon which relief can be granted with respect to the Third Claim. Accordingly, this action should be dismissed in its entirety. Or, at the very least, the Third Claim should be dismissed with prejudice.

Therefore, the defendants respectfully request that the Court grant their Motion and dismiss the Amended Complaint in its entirety.

Dated this 4th day of August, 2011.

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EXHIBIT 6



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August 9, 2011

Hon. J.P. Stadtmueller
United States District Court for the
Eastern District of Wisconsin
517 East Wisconsin Avenue
Milwaukee, WI 53202-4500

Baldus et al. v. Brennan et al.
Case No. 11-CV-562

Dear Judge Stadtmueller:

Earlier today, the Governor signed the Congressional and legislative redistricting legislation. That is a matter of public record, and the court can take judicial notice of it. Upon publication, it will be the law—subject to challenge on the federal and state constitutional and statutory grounds described in detail in the plaintiffs' amended complaint.

The state on August 4, 2011 filed a motion to dismiss the amended complaint based, in part, on the fact that the Governor had not yet signed the legislation. It now bears his signature.

Under the local rules, the plaintiffs will file a brief in response to the motion to dismiss the amended complaint on or before August 25, 2011.

All counsel of record will receive a copy of this letter through the court's electronic filing system.

GODFREY & KAHN, S.C.

/s/ Rebecca Kathryn Mason

Rebecca Kathryn Mason

RKM:aeg

6674149_1

EXHIBIT 7

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

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,

Plaintiffs,

v.

Civil Action
File No. 11-cv-562
(Three-judge panel/request
pending)

Members of the Wisconsin Government Accountability
Board, each only in his official capacity:
MICHAEL BRENNAN, DAVID DEININGER,
GERALD NICHOL, THOMAS CANE,
THOMAS BARLAND, and TIMOTHY VOCKE, and
KEVIN KENNEDY, Director and General Counsel for the
Wisconsin Government Accountability Board,

Defendants.

**BRIEF IN RESPONSE TO DEFENDANTS'
MOTION TO DISMISS AMENDED COMPLAINT**

Whatever the authority or the ambition of the state legislature, it does not extend to the federal rules of civil procedure, the statutes defining federal jurisdiction, or the U.S. Constitution. Nor does the legislature have the power to shield its own legislation from review by the federal courts, let alone mandate the plaintiffs' choice of forum.

On August 9, 2011, the Governor signed into law the Congressional and legislative redistricting legislation that is the subject of the plaintiffs' amended complaint. 2011 Wis. Act 43; 2011 Wis. Act 44. Since the landmark decision in *Baker v. Carr*, 369 U.S. 186 (1962), the federal courts—including, at least three times, this Court—have been the appropriate forum

for adjudicating federal constitutional and statutory rights in redistricting. The state would change that, whether by invoking a curious new state statute or the abstention doctrine. Yet, there is no state court proceeding to which this Court can or should defer. Even were there, moreover, it would not change the plaintiffs' substantive or procedural rights.

On August 4, 2011, the state filed a motion to dismiss the amended complaint based on the lack of subject matter jurisdiction and, with respect to just one of the six claims, a failure under Rule 12(b)(6). The Court should deny the motion to dismiss and permit this case to proceed under 28 U.S.C. § 2284 because, in the words of the statute, it is an “action ... challenging the constitutionality of the apportionment of congressional districts or ... [a] statewide legislative body.”

I. THE PLAINTIFFS HAVE STATED A CLAIM FOR RELIEF.

The state contends that the claim involving the disenfranchisement of 300,000 citizens should be dismissed.¹ The disenfranchisement claim in the amended complaint is not “merely” a claim that the right to vote has been postponed—from four to six years through the law’s designation of new senate district numbers. Rather, the amended complaint asserts that the massive statutory deprivation of the right to vote in at least one election has occurred unnecessarily and in such *extraordinary* numbers that it is a wholesale denial of voting rights and a violation of equal protection.

According to the state, it would be practically impossible to redistrict without depriving—for a period of at least two years—some voters of the right to vote for a state senator every four years. *See* Defendants’ Brief in Support of Motion to Dismiss Amended Complaint and Reply to Pending Motion to Dismiss (“Def. Br.”), 19-20. Although cases on which the state

¹ The defendants have not challenged any other substantive claim in the Amended Complaint, in effect conceding that each of the remaining allegations states a claim upon which relief may be granted.

relies recognize that disenfranchisement at times may be unavoidable, those same cases hold that any such disenfranchisement must be limited, employed only to the extent absolutely necessary. *See, e.g., Pick v. Nelson*, 528 N.W.2d 309, 317-18 (Neb. 1995); *In re Reapportionment of Colorado General Assembly*, 647 P.2d 191, 198 (Colo. 1982); *State Election Bd. v. Bartolomei*, 434 N.E.2d 74, 78 (Ind. 1982).

More importantly, however, the state fails to acknowledge that *this* Court already has unambiguously concluded that a legislatively-drawn redistricting plan is fatally flawed if it unnecessarily disenfranchises citizens. *Republican Party v. Elections Bd.*, 585 F. Supp. 603, 605-06 (E.D. Wis.) (Bauer, Evans, & Gordon, JJ.), *vacated on other grounds*, 469 U.S. 1081 (1984). This Court has recognized that the temporary disenfranchisement of citizens is “constitutionally tolerated” only when it is an “absolute necessity” or when it is “unavoidable.” *Id.* at 606 (citations omitted). The subsequent federal redistricting cases here also have highlighted efforts to limit the number of disenfranchised voters. *See Prosser v. Elections Bd.*, 793 F. Supp. 859, 871 (W.D. Wis. 1992); *Baumgart v. Wendelberger*, Case Nos. 01cv121 and 02cv366, 2002 WL 34127471, at *7 (E.D. Wis. May 30, 2002), *amended by* 2002 WL 34127473 (E.D. Wis. July 11, 2002).²

As the amended complaint asserts, the 2011 redistricting legislation goes well beyond the “absolutely necessary” and “unavoidable.” There are at least two districts (Senate Districts 2 and 32) where only a few, if any, citizens needed to be moved. Yet tens of thousands of citizens were moved from even-numbered districts into odd-numbered districts, unnecessarily delaying (and, thereby, denying) the right to vote for two years. *See* Am. Compl. ¶ 42(a). Similarly, three

² The state’s failure to even refer to this Court’s 1984 decision—on the only substantive argument it makes in its brief—is inexplicable. It relies instead on a handful of state court decisions, characterizing them as “established law.” Def. Br. at 3. Ironically, the 1984 federal district court decision here, ignored by the state, cited with approval the same 1982 Colorado decision now cited by the state as established law.

districts (Senate Districts 12, 14 and 24) needed to add citizens to meet the equal population requirement, but tens of thousands were actually removed from the districts and placed in odd-numbered districts, unnecessarily disenfranchising them. *Id.*, ¶ 42(b). Finally, four districts (Senate Districts 16, 20, 22, and 28) needed to lose population, but the legislation unnecessarily moved tens of thousands of additional people from these even-numbered districts into odd-numbered districts. *Id.*, ¶ 42(c).

The state cannot seriously contend that it would have been a practical impossibility to redistrict without so massively depriving so many of the right to vote. The legislation in no way suggests that the disenfranchisement of the vast majority of these citizens was either “absolutely necessary” or “unavoidable.” Indeed, the state appears to have gone out of its way to affirmatively disenfranchise hundreds of thousands—supporting, not incidentally, the gerrymandering claim that is also part of the amended complaint. *See id.*, ¶¶ 55-61. The 1984 legislation, found unconstitutional by this Court, disenfranchised almost 175,000 citizens. This legislation dramatically exceeds that total in its effect.

The redistricting legislation is fatally flawed because it unnecessarily disenfranchises citizens, and the state’s motion to dismiss this claim should be denied. The state’s only other arguments, at this stage of the case, are procedural and equally unavailing.

II. THE PUBLISHED LEGISLATION IS NOW LAW, ELIMINATING THE STATE’S RIPENESS CHALLENGE.

Notwithstanding the state’s suggestion that the ripeness doctrine “prevent[s] this Court from entanglement in an abstract disagreement,” the state’s new law is just that, the law. It is hardly “abstract” or “hypothetical.” Def. Br. at 7. The right to federal judicial review of the state’s new legislative and Congressional districts embodied in Chapters 3 and 4, Wis. Stat., should not be open to serious debate—especially on “subject matter” jurisdiction grounds.

Here, the state first moved to dismiss the initial complaint, arguing that it was a virtual certainty that the unified legislative and executive branches of state government *would* adopt redistricting legislation. *See, e.g.*, Defendants' Brief In Support of Their Motion to Dismiss (filed June 30, 2011) at 19. Upon the legislation's adoption, the plaintiffs immediately filed the amended complaint that challenges—on a range of grounds—the validity of the new districts. The state's prediction proved true. Yet the state now contends that the amended complaint was “premature” and “anticipatory.” Def. Br. at 2.

When the state asked “how can this Court issue any orders, declarations, or injunctions regarding two bills ... which ... had *not* been passed into law?,” the state knew full well that the bills *would* become law because the bills had been presented to the Governor on August 2, 2011, two days before the state filed its motion to dismiss the amended complaint. Def. Br. at 2; *see* Bill History of SB 148 and SB 149; Wis. Const. art. V, § 10(1) and (3).³ The state knew full well both the fact that the Governor would sign the redistricting legislation and the precise day he would do that—on August 9, 2011. Yet it filed the motion to dismiss and supporting brief despite those facts. Protests that the Governor might not sign the law were, at best, always disingenuous (and now that the Governor has signed the law, moot).

The state erroneously asserts that the plaintiffs are attempting to prevent the new state venue statute, 2011 Act 39, from taking effect. Def. Br. at 8. It is a perplexing claim. The plaintiffs did not ask this Court to enjoin the Governor from signing any of the three redistricting bills, nor have they asked the Court to prevent the secretary of state from publishing the laws once enacted. Based (at least in part) on the expressed confidence of the defendants in their first motion to dismiss, the plaintiffs operated under the safe (and now validated) presumption that the

³ Even had the Governor not signed the bills, they would have become law automatically. *See* Wis. Const. art. V, § 10(3).

legislation would become law. Now challenging its substance, the plaintiffs contend the law violates the federal and state constitutions.

The defendants' reliance on a 1943 state decision to support their contention—that a party cannot challenge a bill before it is enacted into law—is both moot and misplaced. *Id.* at 7-8 (citing *Goodland v. Zimmerman*, 243 Wis. 459, 468, 10 N.W.2d 180 (1943) (other citation omitted)). In *Goodland*, the legislature passed a bill establishing the State Bar of Wisconsin, the Governor vetoed the bill, the Senate overrode the veto and the Assembly concurred in the veto override. The plaintiffs sued to prevent the secretary of state from publishing the law, and a circuit court granted the injunction.

The Wisconsin Supreme Court reversed, concluding that the legislative process was not completed until the enactment had been published and, because its publication had been enjoined, there was no law for the court to review. *Id.* at 466. Once the legislative process had been completed, however, the Supreme Court recognized, a court may then consider whether the law enacted is valid. *Id.* at 470-71 (citing *Marbury v. Madison*, 5 U.S. 137, (1803)). (In fact, the court explained that it would review the law, once published, upon its own motion. 243 Wis. at 476.)

The new legislative and Congressional districts are law. The state even has conceded that once the Governor signed the two redistricting bills, the boundaries would be established by law. Def. Br. at 10. He has. They are. The secretary of state has published the laws. Wis. Stat. §§ 14.38(10), 35.095(3)(b) (2009-10); 2011 Wisconsin Acts 43 and 44, Legal Notice, Wis. State J., Aug. 23, 2011, at A4. The legislative process having been completed, any court may now consider whether that law is valid. 243 Wis. at 470-71; *Marbury*, 5 U.S. 137.

Moreover, arguments about timing ignore reality. Under 2011 Act 39, any changes to Wisconsin's legislative districts will have a trickle-down effect, compelling municipalities to alter and re-draw their ward and district boundaries. The state will need local district boundaries in place no later than November 15, 2011 to meet its statutory requirements for the April 2012 elections. *See* Wis. Stat. § 10.06(1). Accordingly, the review of the constitutional and statutory validity of the redistricting statute is in no way premature; it is incumbent upon the federal judiciary to evaluate the significant constitutional and statutory infirmities of the law before they govern Wisconsin's April 2012 elections.

III. THE STATE CANNOT DICTATE THE BOUNDARIES OF FEDERAL JURISDICTION.

The state is not circumspect in its assertion of authority. The new state venue statute, it declares, “establishes the proper means and venue for legal challenges to redistricting legislation, and that venue is not in this federal court.” Def. Br. at 3. Accordingly, the state would have this Court “*require* the plaintiffs to file their action ...” in state court. *Id.* at 12 (emphasis added).

To be sure, this new law on its face dictates the venue for redistricting litigation brought in state court. *See* 2011 Wisconsin Act 39, § 28 (establishing venue before a three-judge panel and instructing clerks for the county where any state redistricting challenge has been filed to notify the clerk of the Supreme Court).⁴ However, this statute neither requires nor authorizes the state courts to take jurisdiction over federal litigation. Nor could it. Yet, the state contends this new statute “establish[es] the legal procedure by which *this* challenge should be made.” Def. Br. at 8 (emphasis added). That is a remarkable proposition.

⁴ Whether the legislature may establish procedures for state courts is not at issue in this lawsuit—although it raises its own separation of powers questions. Interestingly, the “strikingly similar” case on which the state relies has very little in common with the present case. The North Carolina Supreme Court concluded that an action *in state court* filed *after* a law establishing a three-judge panel was enacted must be heard by a three-judge panel, as established by the state's law. *Stephenson v. Bartlett*, 595 S.E.2d 112 (N.C. 2004). Here, the action was filed in federal court, prior to the legislature's enactment of 2011 Wisconsin Act 39.

The federal courts, under federal law, determine their jurisdiction—not state legislatures. Indeed, since at least 1908, federal law has provided for the adjudication by three-judge courts of redistricting litigation and a direct appeal to the U.S. Supreme Court. *See* S. Rep. 94-204, at 2 (1975) *reprinted in* 1976 U.S.C.C.A.N. 1988, 1989. The legislature certainly can attempt to establish rules “for the courts of the state,” Def. Br. at 15, but it *cannot* attempt to establish federal rules of civil procedure. While the “will of the Legislature” in passing 2011 Act 39 may well be transparent, it cannot usurp federal jurisdiction over claims involving rights guaranteed under the U.S. Constitution and statutes.

IV. ABSTENTION IS NOT ONLY INAPPROPRIATE, IT IS IMPERMISSIBLE.

The parties already have briefed the abstention issue. (*See* Defendants’ Brief in Support of Their Motion to Dismiss at 21-24; Plaintiffs’ Brief in Response to Defendants’ Motion to Dismiss at 8-10). There is little need for more extensive discussion here.

In the redistricting context, the U.S. Supreme Court has never required federal district courts to automatically abstain when there is a pending state court action and, instead, has directed federal courts to retain jurisdiction and set a deadline for the state to adopt valid district boundaries, provided that the state can do so with ample time for the plan to be utilized. *Scott v. Germano*, 381 U.S. 407, 409 (1965); *Grove v. Emison*, 507 U.S. 25, 33-34 (1993). Importantly, these cases involved state courts actively reviewing or creating district boundaries. *See, e.g., Grove*, 507 U.S. at 42 (“The District Court erred in not deferring to the state court’s efforts to redraw Minnesota’s state legislative and federal congressional districts.”).

The plaintiffs are not aware of any authority—and the defendants cite none—for the state’s contention that a federal court should abstain (or even defer) when there is no action pending in state court (nor any authority that would have this Court “require” the plaintiffs to

re-file their lawsuit in state court). *See* Def. Br. at 12. Accordingly, even were there state court proceedings actively reviewing or redrawing the new statutory boundaries, abstention would not be the appropriate course of action for this Court.

To re-state the obvious, there is no pending state court challenge. The state actually concedes: “There is no dispute that this Court would have the jurisdiction to hear this matter ... should it determine that the legislative boundaries set by the Wisconsin Legislature are not constitutionally-valid *if* there is no state court challenge....” *Id.* at 13. Yet, it appears to be lost on the state that there is, in fact, no pending state court challenge. The state courts cannot assert jurisdiction *sua sponte*. Notably, the last time the state courts engaged in redistricting was almost 50 years ago. *See* A. Clark Hagensick, “Wisconsin,” in *Reapportionment Politics: The History of Redistricting in the 50 States*, 348 (Leroy Hardy, Alan Heslop, and Stuart Anderson eds. 1981). Judicial legislative plans were last implemented by the state supreme court in *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551 (1964).

Moreover, even were there a pending state court challenge, this court need not abstain: federal courts have the authority to review and enjoin boundaries drawn by a state legislative or judicial branch or legislation upheld by a state court. Federal courts may move forward with redistricting litigation even concurrently with state court proceedings if the federal court is concerned that the state will fail to adopt a plan in a timely fashion. *See Branch v. Smith*, 538 U.S. 254, 260, 266 (2003).

Even focusing on cases outside the redistricting context, abstention is not appropriate here. The state appears to be advocating that this Court employ *Burford* abstention, which is appropriate “only where there are difficult questions of state law bearing on policy problems whose importance transcends the result in the case.” *Ryan v. State Bd. of Elections*, 661 F.2d

1130, 1135 (7th Cir. 1981) (addressing the abstention doctrine credited to *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)) (other citations omitted). However, *Burford* abstention applies to cases involving state regulatory issues where a federal court decision would interfere with a state program. 661 F.2d at 1135-36. There are no state regulatory issues at issue here—only constitutional and statutory rights.

In addition, even were this court to (mis)apply the *Burford* abstention doctrine, contrary to the state's assertion, this case does not merely involve “difficult questions of state law bearing on important matters of state policy....” Def. Br. at 13. The legislative and Congressional districting laws violate the plaintiffs' rights under the U.S. Constitution and the Voting Rights Act. With regard to the Congressional boundaries, a state court could not even begin to decide the case on state grounds because no such grounds exist.

As for the state legislative boundaries, the plaintiffs' federal constitutional and statutory concerns are the principle and principal concerns raised in the amended complaint. *See* Am. Compl., ¶¶ 27-33 (alleging the 2011 boundaries violate redistricting criteria); ¶¶ 39-44 (alleging the unnecessary disenfranchisement of 300,000 violates the one person, one vote principle guaranteed by the U.S. Constitution); ¶¶ 54-61 (challenging the partisan gerrymandering as against the U.S. Constitution); ¶¶ 62-70 (raising violations of the federal Voting Rights Act).

The state would have this Court take the unprecedented step of abstaining from or deferring its review of the 2011 statutes—just in case a party files an action challenging them, sometime, somewhere, in state court. The plaintiffs have chosen to sue in federal court to vindicate federal rights (and related state rights). It is their right to do so, precisely as other plaintiffs have done in the past in this Court.

CONCLUSION

The defendants' motion to dismiss should be denied. This Court has already concluded that the unnecessary disenfranchisement of 300,000 citizens—the only substantive claim addressed in the state's motion to dismiss—is a fatal flaw for any legislative redistricting. The state's assertion that some disenfranchisement is unavoidable does not excuse the gratuitous disenfranchisement of so many.

The state's procedural claims should also be rejected. The ripeness claims are no longer valid. The Governor signed the Congressional and legislative bills into law on August 9. The state has no support for its contention that a state statute can, in effect, establish new federal rules of civil procedure. Finally, any claim that this Court should abstain or defer to the state courts when the primary issues raised in the litigation are federal—especially when no action is pending in the state courts—cannot prevail.

The 2011 statutory boundaries are the law, governing for the moment any elections in Wisconsin. The plaintiffs have asked this Court to convene a three-judge panel to evaluate the law's significant constitutional and statutory flaws. This Court should deny the defendants' request for dismissal, convene the panel of judges, and set a schedule for judicial review.

Dated: August 23, 2011.

GODFREY & KAHN, S.C.

By: s/Rebecca Kathryn Mason

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EXHIBIT 8

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CINDY BARBERA,
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, and
TRAVIS THYSSEN,

Plaintiffs,

v.

Case No. 11-C-00562

Members of the Wisconsin Government
Accountability Board, each only in his
official capacity: MICHAEL BRENNAN,
DAVID DEININGER, GERALD NICHOL,
THOMAS CANE, THOMAS BARLAND,
and TIMOTHY VOCKE, and KEVIN
KENNEDY, Director and General
Counsel for the Wisconsin Government
Accountability Board,

Defendants.

DEFENDANTS' REPLY BRIEF IN SUPPORT OF
MOTION TO DISMISS AMENDED COMPLAINT

The plaintiffs make much ado about the status of the redistricting legislation and the proper court to hear redistricting challenges. However, they neglect to note that their original Complaint—which aggressively asserted that *no* redistricting legislation had been passed or was *likely* to be passed in sufficient time—was filed in an attempt to force an issue which was moot. They further neglect to note that

their Amended Complaint—which now complains that the redistricting legislation had been *too* hastily passed—was, in fact, filed before that legislation had been signed into law, but conveniently before the new statutory procedure for challenges to redistricting legislation—which had been signed into law—became effective.

Redistricting is the primary responsibility of the individual States and is to be accomplished first through the Legislature and then the state judiciary. The Wisconsin Legislature has passed redistricting laws for the first time in decades and has also codified a process to enable the state judiciary to resolve redistricting challenges. Therefore, abstention, resting upon the principles of federalism, comity and judicial efficiency, is appropriate in this matter.

All in all, taking a cynical view,¹ one could say that all of these efforts are an attempt to provide an end-run around the United States Supreme Court's directives in *Grove v. Emison*, 507 U.S. 25, 33 (1993), and *Miller v. Johnson*, 515 U.S. 900, 915 (1995), as well as the statutory dictates of the Wisconsin Legislature regarding the State's preferred venue for hearing such challenges. Regardless, the facts are clear if the Court does not abstain—the Complaint was filed prior to any redistricting legislation and should properly have been dismissed and the Amended Complaint, filed before the redistricting legislation was signed into law, should also be dismissed.

¹Judge Easterbrook in his dissent in *Arrington v. Elections Board*, 173 F. Supp. 2d 856, 869 (E.D. Wis. 2001), “uncharitably” wondered if that suit was filed to enable the plaintiffs “to be first in the queue for attorneys’ fees in the event litigation becomes necessary.” Judge Easterbrook further noted that “reserving a place in line is not a proper reason to invoke the judicial power.” *Id.*

ARGUMENT

I. ABSTENTION IS APPROPRIATE, OR, ALTERNATIVELY,
THE COURT MAY DEFER OR STAY THE MATTER.

Abstention is appropriate in three circumstances, two of which potentially apply here. *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800, 814 (1976). “Abstention is appropriate ‘in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.’” *Id.* (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189 (1959)).² “Abstention is also appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.” *Colorado River*, 424 U.S. at 814.³ Put quite simply, “[i]n the reapportionment context, the [United States Supreme] Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself.” *Grove*, 507 U.S. at 33 (emphasis in original).

The *Grove* case also relies upon *Scott v. Germano*, 381 U.S. 407 (1965), which is directly applicable to the instant case. In *Germano*, a federal district court

²This is known as “Pullman-type abstention.” *Ryan v. State Board of Elections*, 661 F.2d 1130, 1136 (7th Cir. 1981) (referring to the decision in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941)).

³This is known as “Burford-type abstention.” *Ryan*, 661 F.2d at 1135 (referring to the decision in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)).

attempted to take on the task of drawing redistricting maps for the State of Illinois, even though the maps had been challenged in state court. The Illinois Supreme Court agreed that the current Senate districts were invalid, but anticipated that the legislature would adopt a new, valid plan by the end of its session. If not, the Illinois Supreme Court stated that it would retain jurisdiction to ensure that the upcoming general elections would be conducted pursuant to a constitutional plan. Under the circumstances, the Court held that abstention was the proper course of action for the federal judiciary. Discussing *Germano*, the *Grove* Court stated:

Today we renew our adherence to the principles expressed in *Germano*, which derive from the recognition that the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts. See U.S. Const., Art. I, 2.

Grove, 507 U.S. at 34.

Germano is further significant because the “new” legislative maps were not yet before Illinois’ highest court and, in fact, had not yet been adopted. Instead, the mere expectation that the state’s highest court would act was enough to overturn a district court attempt to become involved in the process. Abstention makes even more sense in the instant case, because Wisconsin’s Legislature has adopted maps, the Legislature has created an efficient process for state court review, and there is ample time for the state court process to resolve the issue. The fact that there is no current state court action is no more an impediment here than the absence of new maps and a specific challenge to those maps was in *Germano*.

Thus, the rule to be applied here—as dictated by *Grove*—is that this Court should either abstain from acting in this case or defer to a state court action to be filed by a date certain unless the plaintiffs can establish that the state judiciary cannot resolve this redistricting dispute in a timely manner. Plaintiffs have produced no evidence that the state judiciary will fail to exercise judicial review of the redistricting laws in a timely fashion such that federal jurisdiction should be exercised. Absent such a showing, *Grove* requires federal courts to leave reapportionment in the hands of the state judiciary.

There is no dispute that the state judiciary now has the primary responsibility to resolve redistricting challenges. The state Legislature has passed a law which expedites such legal challenges through original actions before the State Supreme Court. *See* 2011 Wisconsin Act 39. The state Legislature has taken the necessary steps to see that redistricting occurs through one of the two preferred avenues. This promotes judicial efficiency and upholds the principles underlying the *Grove* decision.

Should there be an adverse decision to the plaintiffs in the State Supreme Court on a federal constitutional ground, the plaintiffs have the right to petition the United States Supreme Court for certiorari. Again, judicial efficiency is promoted, which taken together with federalism concerns, are the principal advantages to the abstention doctrine.

Plaintiffs appear to be contending that the *Grove* preference for state judiciary action is only to have been followed if the state Legislature had not acted.

That is flatly contradictory to *Grove*. Here, the State Supreme Court should be the body to review the redistricting laws for their conformity with state and federal constitutional directives. The Wisconsin Legislature was expeditious in passing redistricting legislation—something not accomplished for decades—and the plaintiffs are using that as a basis for arguing that the state judiciary is no longer part of the redistricting process. Federal courts are to—must—abstain from reapportionment challenges where, as here, the state court options have not been exhausted. This is the very definition of abstention.

If a state court action is not filed by the time this motion to dismiss the Amended Complaint is heard (and the case is not dismissed outright), the defendants respectfully urge the Court to abstain, defer or stay the matter for a time sufficient to allow for some party to file an appropriate action with the Wisconsin State Supreme Court so as to effectuate the dictates and preferences set forth in *Grove*.

II. THE FACT THAT THE LEGISLATION WAS ENACTED INTO LAW *AFTER* THE AMENDED COMPLAINT WAS FILED DOES NOT ELIMINATE A NEED TO DISMISS ON GROUNDS OF RIPENESS.

Again, the plaintiffs' fail to properly focus on the timing of the enactment of the redistricting legislation which is, in fact, vitally important. The new laws were not signed by the Governor until August 9, 2011—twenty days *after* the Amended Complaint was filed and five days *before* the motion to dismiss the Amended Complaint was filed.

Jurisdiction in the courts is based on the facts *as they exist when the complaint is filed* not as the facts will be in a few days, a week or a month. *Keene Corp. v. U.S.*, 508 U.S. 200, 207 (1993) (“the jurisdiction of the Court depends upon the state of things at the time of the action brought”) (quoting *Mollan v. Torrance*, 9 Wheat. 537, 539, 6 L.Ed. 154 (1824) (Marshall, C.J.)). That is precisely the reason that the plaintiffs’ arguments lack focus: they fail to take into account the basic tenets of jurisdiction. In other words, you actually have to have jurisdiction *when* you file. And, that, simply put, is not the case here.

Contrary to plaintiffs’ statements, the new law was *not* just that, “the law” when the Amended Complaint was filed. The new laws were putative and subject to the Governor’s veto pen or line-item veto. The Governor was the only person who knew exactly when, and if, they would be signed and in what form that law would ultimately take. Regardless, we keep circling back to the key issue: there were *no* redistricting laws in place when the Amended Complaint was filed. A party may not “find” jurisdiction after the fact. Based solely upon that fact, the proper procedure is for the Court to dismiss this action in its entirety.

Accordingly, the defendants’ references to *Goodland v. Zimmerman*, 243 Wis. 459, 468, 10 N.W.2d 180 (1943), and *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶ 8, 334 Wis. 2d 70, 798 N.W.2d 436, were not moot and misplaced. These cases were cited for the express purpose of showing that there is a proper time to file a lawsuit challenging the constitutionality of a law—and that time is after the law has been enacted, published, and takes effect. The plaintiffs are

indeed correct that the new redistricting laws are *now* law. However, that event took place after both the Complaint and Amended Complaint were filed. This is not a mere technicality—it is a jurisdictional defect which cannot be corrected absent the filing of an entirely new action.

Moreover, the plaintiffs' references to limited state court intervention is not significant, nor does it provide any authoritative, legal precedence. It is true that the last time the state judiciary actually drew legislative boundaries was in 1964. *See State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551 (1964). However, in the 1970's, the state Legislature redistricted on its own only after deadlines were placed upon it by the state judiciary. *See* A. Clarke Hagensick, "Wisconsin," in *Reapportionment Politics: The History of Redistricting in the 50 States*, at 351 (1981).⁴

And, finally, in the 2001 case before this Court, the Court in November 2001, declined to dismiss the case for lack of ripeness, but rather stayed all substantive proceedings until February 1, 2002—the year of the next election. *Arrington*, 173 F. Supp. 2d at 866-67. In fact, in *Arrington*, all parties who took a position argued that there was a justiciable case or controversy; it was the court which raised the question. *Id.* at 859. Furthermore, none of the parties objected to the matter being stayed in federal court for almost a year.

⁴A copy of the Introduction and essay "Wisconsin" is attached hereto as Exhibit A.

Additionally, it was the Wisconsin State Supreme Court which declined to hear an original action regarding the 2000 decennial census because that case was filed too late—it was filed January 2002 (the year of the election) and the federal court already had convened a three judge panel and recommenced the federal litigation. *Jensen v. Wisconsin Elections Board*, 2002 WI 13, ¶ 22, 249 Wis. 2d 706, 639 N.W.2d 537. The court even noted that had its “jurisdiction been invoked earlier, the public interest might well have been served by our hearing and deciding this case.” *Id.*, ¶ 17.

It is worthy of further note that the plaintiffs fail to respond to *Carter v. Virginia State Board of Elections*, 2011 WL 1637942 (W.D. Va. April 29, 2011), a case cited by defendants. In that case, a federal court granted the defendants’ motion to dismiss on the grounds that the plaintiffs had “alleged no immediate harm, and their claims are contingent on future uncertainties, [and the] case [was] not ripe for review” when the federal lawsuit seeking declaratory and injunctive relief was initiated before the proposed redistricting plans were sent to the Governor for approval. *Id.* at *2. That is quite similar to the case here.

Simply put, the facts at the time of the Complaint (and even the Amended Complaint) do not support the legal action: there were no laws against which the plaintiffs may assert unconstitutionality. Accordingly, this action must be dismissed.

III. ALTERNATIVELY, THE DISENFRANCHISEMENT CLAIM SHOULD BE DISMISSED AS A MATTER OF LAW.

If, arguendo, this Court does not dismiss the Amended Complaint in its entirety, or abstain, defer or stay the matter, the Third Claim should be dismissed as a matter of law.

The defendants have not “failed” to take into consideration or acknowledge that “unnecessary” disenfranchisement may not withstand judicial scrutiny. However, the plaintiffs themselves fail to fully read the case they assert “unambiguously” concludes that unnecessary disenfranchisement is a fatal flaw. (Response brief at 3). In *Republican Party of Wisconsin v. Elections Board*, 585 F. Supp. 603 (E.D. Wis. 1984), *vacated and remanded for dismissal of complaint*, *Wisconsin Elections Board v. Republican Party of Wisconsin*, 469 U.S. 1081 (1984), the court outlines when a redistricting plan’s disenfranchisement is “constitutionally tolerated.”

The temporary disenfranchisement of citizens is constitutionally tolerated under either of two related theories. Due to the complexities of the reapportionment process, a temporary loss of voting rights (the cases speak of a ‘delay’ in the right to vote) is tolerated when it is an ‘absolute necessity’ or when it is ‘unavoidable’. A temporary delay in voting within a staggered-team [sic] structure, is an ‘absolute necessity’ and is ‘unavoidable’ when it is caused by the enactment of a new plan that is passed to correct a constitutionally-defective districting system. For this reason, partial temporary disenfranchisement is tolerated when a State, or as occurred here, when a Court orders that a new districting plan be followed. Thus, the temporary disenfranchisement that occurred in Wisconsin under the ‘82 Court Plan (the result, of course, would have been the same if the Legislature had acted in ‘82) did not run afoul of the Constitution.

Republican Party, 585 F. Supp. at 606 (citations omitted).

Here, this case is precisely as that covered in the *Republican Party* case: the disenfranchisement is temporary in a staggered-term system, and as such, by definition in that case, is both an “absolute necessity” and is “unavoidable.” This case sets forth the standards of law to be followed by the Courts when a State enacts a redistricting plan that disenfranchises voters by causing delays in their votes. *See State Elections Board v. Bartolomei*, 434 N.E.2d 74, 78 (Ind. 1982) (“this impingement upon the right to vote is the natural and unavoidable consequence of redistricting and maintaining a system of staggered terms of office for members of the same governmental body”).

There are no allegations in the Amended Complaint that the temporary disenfranchisement was due to “a form of invidious discrimination specifically directed at depriving” certain voters of their right to vote, which would have been a basis upon which relief could possibly be granted. *Pick v. Nelson*, 247 Neb. 487, 497-98 (Neb. 1995). Thus, what remains is purely a question of law—and the plaintiffs have not cited any authority for the proposition that temporary disenfranchisement due to redistricting alone is unconstitutional. To the contrary, “[u]ndoubtedly these [delays] are inconvenient and deplorable results, but it must be assumed that they were foreseen and deliberately accepted by the framers of the constitution.” *People ex rel. Snowball v. Pendegast*, 31 P. 103, 105 (Cal. 1892).

As a matter of law, this Court can and should find that the redistricting legislation disenfranchisement of voters is temporary, and by the terms of the plaintiffs’ case (*Republican Party*) was, thus, an unavoidable, absolute necessity.

Finally, despite the statement made by the plaintiffs (Response brief at 2, n.1), the defendants are not conceding that the other remaining causes of action in the Amended Complaint state claims upon which relief may be granted. Rather, the defendants referenced only the disenfranchisement claim in the motion as it was one which could possibly be resolved without converting the motion to dismiss into a motion for summary judgment. Should this action not be dismissed, the defendants expressly reserve any and all rights to challenge the entirety of the Amended Complaint.

IV. THE PLAINTIFFS INSERT NEW ARGUMENTS, BASED UPON FACTS NOT IN THE RECORD, IN THEIR RESPONSE BRIEF.

Interestingly, the plaintiffs for the first time assert that “[t]he state will need local district boundaries in place no later than November 15, 2011 to meet its statutory requirements for the April 2012 elections.” (Response brief at 7). This allegation is not included in the Complaint or Amended Complaint, but is now put forward as a “fact” upon which the plaintiffs argue that their action is ripe.

A response brief, in general, and more particularly in the context of a motion to dismiss is no place in which to assert facts not set forth in the pleadings to date. *Thomason v. Nachtrieb*, 888 F.2d 1202, 1205 (7th Cir. 1989) (“It is a basic principle that the complaint may not be amended by the briefs in opposition to a motion to dismiss . . .”). Had the plaintiffs wished to bring new facts to the attention of the Court, they could have done so in their Amended Complaint as allowed under

Fed. R. Civ. P. 15(c). *Perry v. Village of Arlington Heights*, 186 F.3d 826, 830 (7th Cir. 1999).

Therefore, this argument has no bearing on the discussion and should be disregarded by the Court.

V. THE DEFENDANTS ARE NOT CREATING NEW FEDERAL RULES OF CIVIL PROCEDURE.

It must be borne in mind that, based upon the 2010 decennial census, the State Legislature has passed redistricting laws which have now been duly enacted. Under “the elementary principles of federalism and comity embodied in the full faith and credit statute,” courts are obligated to treat them as being legal. *Grove*, 507 U.S. at 35-36. This is because “[a]n enacted plan would have the virtue of political legitimacy.” *Prosser, et al. v. State Elections Board, et al.*, 793 F. Supp. 859, 867 (W.D. Wis. 1992). Thus, the initial threshold is different than if there were no enacted plans.

Next, defendants are not disputing that federal courts may be an appropriate forum to hear challenges to redistricting legislation, however, this statement disregards the United States Supreme Court’s jurisdictional preference as set forth in *Grove*: the State Legislature, the state courts, and *then* the federal courts. *Grove*, 507 U.S. at 33. *See also Jensen*, 249 Wis. 2d 706, ¶ 22 (due to the late filing with the State Supreme Court, that Court declined to take jurisdiction, but stated that “we recognize and agree that the institutions of state government are primary

in matters of redistricting, and federalism requires deference to state high courts for their resolution”).

Additionally, the defendants do not dispute that this Court has been the forum in redistricting cases twice,⁵ however, that is solely because there was no legislation drawing new redistricting maps in 1980, 1990, or 2000. When there is no legislation which provides new redistricting maps, it is appropriate that there be some judicial intervention. But, that judicial intervention is not necessarily solely to be found in the federal courts. As this Court, itself, has noted, “[s]imply because an election law has become unconstitutional does not necessarily mean a federal court should step in to rewrite it, however.” *Arrington*, 173 F. Supp. 2d at 860.

Even the case cited by plaintiffs to support their contention that this Court *may* move forward is relevant only in cases where a State Legislature has *failed* to act and adopt a plan in a timely fashion. *Branch v. Smith*, 538 U.S. 254, 261 (2003). “Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions.” *Miller*, 515 U.S. at 915. “It is well settled that ‘reapportionment is primarily the duty and responsibility of the State.’” *Id.* (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)).

That being the case, in a case such as this one, where the Legislature has passed redistricting plans (which have now been signed into law), the federal court

⁵There was also a third federal court action (*Prosser, et al. v. State Elections Board, et al.*, 793 F. Supp. 859 (W.D. Wis. 1992)), in the Western District of Wisconsin, which the defendants presume the plaintiffs were referring to at the start of their Response Brief, as the third instance *this* Court has heard these challenges.

should refrain from acting to give these parties and any other interested parties in the State of Wisconsin an opportunity to avail themselves of the state judiciary's guidance. There is still sufficient time in which such a state court action could be commenced.

The new law setting forth the venue procedures for judicial review of redistricting legislation (2011 Wisconsin Act 39) is not a "curious new statute." In years past, the state procedure for such challenges fell within the purview of the State Supreme Court's original action jurisdiction. *Jensen*, 249 Wis. 2d 706, ¶ 17 ("There is no question but that this matter [redistricting challenge with no legislative plan] warrants this court's original jurisdiction; any reapportionment or redistricting case is, by definition, *publici juris*, implicating the sovereign rights of the people of this state. See *Petition of Heil*, 230 Wis. 428, 443, 284 N.W. 42 (1939)").

Even without 2011 Wisconsin Act 39, the state judiciary is the next appropriate venue for any constitutional challenges. The State Supreme Court itself—following the last decennial census and the 2001 case before this Court—attempted to create a distinct procedure by which such challenges should be made. See *Jensen*, 249 Wis. 2d 706, ¶ 24. But, in the end, the State Supreme Court stopped mid-way and issued no new procedural rules. Wis. Sup. Ct. Order No. 02-03 (Jan. 30, 2009).

2011 Wisconsin Act 39 codifies the State Supreme Court's jurisdiction and sets up a means by which three circuit court judges will be the final arbiters in such cases. Thus, this law keeps the redistricting process within the State judiciary and

allows for a more fair and deliberative process by the State itself. This is in keeping with the federal preference that state courts consider redistricting even when legislation has been passed.

CONCLUSION

Based upon the foregoing, this Court lacks jurisdiction to hear this action due to lack of subject matter jurisdiction. Moreover, the plaintiffs have failed to state a claim upon which relief can be granted with respect to the Third Claim. Accordingly, this action should be dismissed in its entirety. Or, at the very least, the Third Claim should be dismissed with prejudice. In the alternative, this Court should follow the dictates of the United States Supreme Court and the procedure set forth in 2011 Wisconsin Act 39 and abstain, defer or stay this matter to the Wisconsin State Supreme Court.

Therefore, the defendants respectfully request that the Court grant their motion and dismiss the Amended Complaint in its entirety or provide such other appropriate relief.

Dated this 6th day of September, 2011.

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EXHIBIT 9

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

September 21, 2011

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

Plaintiffs,)

v.)

Members of the Wisconsin Government)
Accountability Board, each only in his official)
capacity: MICHAEL BRENNAN, DAVID)
DEININGER, GERALD NICHOL, THOMAS CANE,)
THOMAS BARLAND, and GORDON MYSE, and)
KEVIN KENNEDY, Director and General Counsel)
for the Wisconsin Government Accountability Board,)

Defendants.)

No. 11-C-562

Judge J.P. Stadtmueller

ORDER

The complaint in this case challenges the constitutionality of a legislative apportionment. Judge J.P. Stadtmueller, to whom the case was assigned in the district court, has notified me under 28 U.S.C. §2284(b)(1) that §2284(a) requires a three-judge district court. I designate Circuit Judge Diane P. Wood and District Judge Robert M. Dow, Jr., of the Northern District of Illinois, as the additional members of the three-judge court.



Frank H. Easterbrook, Chief Judge
United States Court of Appeals
for the Seventh Circuit

EXHIBIT 10

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF 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
Accountability Board, each only in his official
capacity:*

MICHAEL BRENNAN, DAVID DEININGER,
GERALD NICHOL, THOMAS CANE,
THOMAS BARLAND, TIMOTHY VOCKE, and
KEVIN KENNEDY, *director and general counsel
for the Wisconsin Government Accountability
Board,*

Defendants.

Case No. 11-CV-562

**ORDER
DENYING
DEFENDANTS'
MOTION TO
DISMISS**

October 21, 2011

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

PER CURIAM. 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, respectively. (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 (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.'")))).

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.

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 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. v. 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)).¹ 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.

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

¹Regrettably, 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.

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,

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

EXHIBIT 11

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF 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,
and CINDY BARBERA

v.

Members of the Wisconsin Government
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MICHAEL BRENNAN, DAVID DEININGER,
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DR. KEVIN KENNEDY,
Director & General Counsel for the Wisconsin
Government Accountability Board

NOTICE

Case No. 11-CV-562
Judges Wood, Dow and
Stadtmueller

Type of case:

CIVIL

CRIMINAL

Take notice that a proceeding in this case has been set for the place, date, and time set forth below:

PLACE: Federal Courthouse 517 East Wisconsin Avenue Milwaukee, Wisconsin	COURTROOM NO. 425
	DATE AND TIME: MON 10/24/11 at 8:30 AM

TYPE OF PROCEEDING:

TELEPHONE SCHEDULING/STATUS CONFERENCE

The court will initiate the call. Because the hearing will be conducted via telephone, counsel must notify the court as soon as practicable at (414) 297-1122 (if after hours, leave a voice mail message), of the direct number at which they may be reached. Neither cell phones nor calls made over a speaker phone may be used, as both technologies are incompatible with the court's sound/teleconferencing equipment.

JON W. SANFILIPPO
Clerk of Court

October 21, 2011
DATE

s/ Nancy A. Monzingo
(By) Deputy Clerk

EXHIBIT 12

COURT MINUTES OF STATUS CONFERENCE

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, *and*
CINDY BARBERA,

Plaintiffs,

v.

CASE NO. 11-CV-0562

*Members of the Wisconsin Government
Accountability Board, each only in his official capacity:
MICHAEL BRENNAN, DAVID DEININGER,
GERALD NICHOL, THOMAS CANE,
THOMAS BARLAND, TIMOTHY VOCKE, and
KEVIN KENNEDY, director and general counsel
for the Wisconsin Government Accountability Board,*

Defendants.

**THREE JUDGE PANEL,
DIANE WOOD, Circuit Judge,
ROBERT DOW, District Judge, and
J. P. STADTMUELLER, District Judge,
PRESIDING**

DATE:	October 24, 2011	TIME SCHEDULED:	8:30 a.m.
COURT DEPUTY/CLERK:	Zachary Willenbrink	TIME CALLED:	8:34 a.m.
COURT REPORTER:	Sheryl Stawski	TIME FINISHED:	8:47 a.m.
PURPOSE:	Status Conference		
PLAINTIFF BY:	Brady C. Williamson (appearing by phone) Rebecca K. Mason (appearing by phone)		
DEFENDANT BY:	Steve Means (appearing by phone, on behalf of Maria S. Lazar)		

Notes:

- 8:34 a.m. Appearances: Judges Wood and Dow appear by phone; Plaintiffs' attorneys, Brady Williamson and Rebecca Mason, appear by phone; Defendants' attorney, Steve Means, appears by phone
- 8:35 Court recounts history of case, discusses time constraints and need to adjudicate this case by February or March
- 8:36 Plaintiffs agree that the case should be adjudicated by March 15, 2012, at the latest; note that partisan primary will likely be moved up; request that answer be filed within 14 days; state that there will likely need to be discovery and testimony
- 8:38 Defendants agree that the Court's suggested timing; note that Ms. Lazar is absent and currently unreachable
- 8:39 Judge Wood asks how long discovery will take
- 8:39 Defendant responds that there is likely a great deal of discovery needed; Plaintiff states that there will need to be expert witnesses called
- 8:39 Judge Dow states that he has nothing to add at this point
- 8:40 Plaintiff requests that Court set a date
- 8:40 Court suggests that Plaintiff set up meeting with Defendants to establish a joint scheduling order, which takes into account expert witnesses; Court also suggests the parties attempt to reach an agreed-upon set of facts; Court also states that major discovery disputes should be avoided, and notes case in Northern District of Illinois (11-CV-5065)—a situation the Court would like to avoid
- 8:43 Court states that, if the case is going to go to trial, the Court suggests either March 19 or March 26 for a trial date; the Court will not set that date today, though, and would like the parties to agree upon a date after Ms. Lazar becomes available; Court states that the first action that the parties should complete is creation of a joint scheduling order
- 8:45 Plaintiffs and Defendants agree that they will do so
- 8:45 Court reiterates that the parties are responsible for creation of a joint scheduling order, which shall be due by the end of this week
- 8:46 Plaintiff asks whether electronic filing will be sufficient, or whether paper copies will be required to certain judges
- 8:46 Judge Stadtmueller states that electronic copies are sufficient for his chambers; Judge Wood and Judge Dow both agree to review filings electronically, unless there is some difficulty in accessing those documents, in which case the judges' chambers will contact the parties to coordinate the submission of paper copies
- 8:46 Judge Stadtmueller states that, should the parties have any logistical questions or problems, they should contact Zach Willenbrink, the clerk assigned to this case in Judge Stadtmueller's chambers
- 8:47 Court stands in recess

EXHIBIT 13

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

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

Plaintiffs,

Civil Action
File No. 11-cv-562
(Three-judge panel)

v.

Members of the Wisconsin Government Accountability
Board, each only in his official capacity:
MICHAEL BRENNAN, DAVID DEININGER,
GERALD NICHOL, THOMAS CANE,
THOMAS BARLAND, and TIMOTHY VOCKE, and
KEVIN KENNEDY, Director and General Counsel for the
Wisconsin Government Accountability Board,

Defendants.

STIPULATED SCHEDULING AND DISCOVERY ORDER

The parties—having met and conferred, pursuant to Rule 26(f), Fed. R. Civ. P., and to the Court's directive at the initial scheduling conference on October 24, 2011—have agreed in lieu of a discovery plan pursuant to Rule 26(f)3 to the expedited scheduling and discovery framework embodied in this order. This schedule reflects the state's anticipated enactment of a statute to conduct the partisan primary on Tuesday, August 14, 2012, requiring petition signatures for ballot access to be filed no later than June 1, 2012 and circulated no sooner than April 15, 2012.

Based on that,

IT IS HEREBY ORDERED, pursuant to Rule 16(b), that the practice and procedure in this three-judge Court empanelled pursuant to 28 U.S.C. § 2284 shall be in accordance with the Federal Rules of Civil Procedure and the Rules of the Federal District Court for the Eastern District of Wisconsin, except as modified below:

1. Pleadings.

Defendants' Answer to the Amended Complaint shall be filed on or before Friday, November 4, 2011. The plaintiffs shall have ten business days from the receipt of the Answer to further amend their complaint, without leave of the Court, and the defendants shall have five business days from the receipt of any subsequent Amended Complaint to file an Amended Answer.

2. Discovery.

The parties shall serve initial disclosures pursuant to Rule 26(a)(1) on each other, simultaneously, on or before Wednesday, November 16, 2011.

Interrogatories, Requests to Admit and Requests for Production under Rules 33, 34 and 36 shall be served at any time after Wednesday, November 16, 2011, but no later than 25 days before the close of discovery provided below. Responses to Interrogatories and Requests to Admit and compliance with Requests for Production shall be served within 20 days after service of written discovery. Any motion to compel production of any materials or to protect any materials subject to discovery shall be filed within five business days of the service of any discovery request or the receipt of any discovery response deemed by a party to be inadequate. The movant's brief shall be filed with the motion, any response brief within five business days of the receipt of the motion and brief, and replies within three business days of receipt of the responsive brief.

Discovery on any non-party may be served at any time pursuant to the Federal Rules of Civil Procedure.

Expert reports shall be exchanged, simultaneously, on or before Wednesday, December 14, 2011. Expert rebuttal reports shall be exchanged, simultaneously, no later than Friday, January 13, 2012. Any party wishing to depose another party's expert may do so between Tuesday, January 17, and Friday, February 3, 2012.

Depositions of parties or non-parties may be taken at any time on or before Monday, February 6, 2012.

All discovery shall be completed on or before Monday, February 6, 2012.

3. *Service.*

Electronic service through the Electronic Case Filing system shall be sufficient notice of case filings. However, courtesy copies of filings shall be provided, in hard copy form, to opposing counsel of record by 12:00 p.m. CST on the day after such filing.

4. *Stipulated Facts.*

The parties shall file a Stipulated Statement of Facts on or before Monday, February 6, 2012, which may be subsequently amended. Each party shall file a Statement of Contested Facts and a Statement of Contested Issues of Law—and may file a supporting brief—on or before Monday, February 13, 2012, which may be subsequently amended.

5. *Trial.*

This matter shall be tried to the three-judge panel on a date to be set by the Court but commencing no later than Tuesday, February 21, 2012. The Court shall not entertain any alternative statewide redistricting plans at this initial trial. Rather, should there be a determination that the redistricting statute is invalid, the Court may schedule a separate hearing to determine the need for and substance of any appropriate judicial remedy or remedies.

6. *Deadlines.*

Any of the time limits established in this stipulated order may be amended by stipulation and order or, for cause shown, after notice and a hearing.

Dated: November ___, 2011.

BY THE COURT

Hon. _____

7001412_3

EXHIBIT 14

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CINDY BARBERA,
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, and
TRAVIS THYSSEN,

Plaintiffs,

v.

Case No. 11-C-00562
(Three Judge Panel)

Members of the Wisconsin Government
Accountability Board, each only in his official
capacity: MICHAEL BRENNAN, DAVID
DEININGER, GERALD NICHOL, THOMAS
CANE, THOMAS BARLAND, and TIMOTHY
VOCKE, and KEVIN KENNEDY, Director and
General Counsel for the Wisconsin Government
Accountability Board,

Defendants.

DEFENDANTS' ANSWER AND AFFIRMATIVE DEFENSES TO FIRST
AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

The defendants, the Members of the Wisconsin Government Accountability Board ("GAB"), Michael Brennan, David Deininger, Gerald Nichol, Thomas Cane, Thomas Barland, and Timothy Vocke, each in his official capacity only, and Kevin Kennedy, in his official capacity as Director and General Counsel for the GAB only, by their attorneys, J.B. Van Hollen, Attorney General, and Maria S. Lazar, Assistant Attorney General, and for their Answer and Affirmative Defenses to the plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief, dated July 21, 2011, hereby state as follows:

ANSWER

The un-numbered summary paragraphs set forth at the beginning of the First Amended Complaint constitute plaintiffs' characterization of their lawsuit and contain legal conclusions to which a responsive pleading is not required, and/or are allegations which are repeated below in the paragraphs of the First Amended Complaint. Nonetheless, defendants respond to those summary paragraphs here.

This is an action for a declaratory judgment and for injunctive relief, involving the rights of the plaintiffs under the U.S. Constitution and the Wisconsin Constitution and the now legislatively-mandated configure of the eight congressional districts, 33 senate districts and 99 assembly districts in the State of Wisconsin for 2012 and beyond. These districts – established by the state legislature in legislation adopted on July 19 and 20, 2011, to be signed by the Governor – are unconstitutional.

Answer to First Summary Paragraph: Defendants STATE that the allegations of the first summary paragraph refer to the allegations set forth in the First Amended Complaint and that the First Amended Complaint speaks for itself and DENY any characterization of the First Amended Complaint contrary to its express terms. Defendants DENY that the legislative and congressional districts established by the State Legislature, in legislation adopted on July 19 and 20, 2011, and signed by Governor Walker on August 9, 2011, are unconstitutional.

This case arises under the U.S. Constitution, Article I, Section 2, and the First, Fifth and Fourteenth Amendments, Sections 1, 2 and 5; under 42 U.S.C. §§ 1983 and 1988; under the Voting Rights Act, 42 U.S.C. § 1973; and, under article IV, sections 3 through 5 of the Wisconsin Constitution. This amended complaint supersedes the complaint filed on June 10, 2011, before the adoption by the legislature of new state legislative and Congressional district boundaries. The plaintiffs file it as of right under Rule 15, Fed. R. Civ. P.

Answer to Second Summary Paragraph: Defendants ASSERT that the first sentence of the second summary paragraph contains purported statements of law and/or legal conclusions in response to which no answer is required. Defendants further ADMIT the last two sentences of the second paragraph.

The plaintiffs seek a declaratory judgment that:

- The redistricting legislation adopted violates the constitutional requirements that legislative districts be substantially equal in population while maintaining contiguity, compactness, communities of interest, and core district populations and that they be based upon county, precinct, town or ward lines;
- The legislation violates the state constitution in that it disenfranchises nearly 300,000 citizens by unnecessarily extending, for them, the time between elections of state senators from four to six years;
- The Congressional redistricting legislation violates the constitutional requirement that districts be compact and preserve communities of interest;
- Both the Congressional and legislative redistricting legislation violate the First and Fourteenth Amendments in that the districts reflect deliberate, systematic and impermissible partisan gerrymandering and impinge upon freedom of association by penalizing voters and elected representatives solely because of their political affiliation and beliefs;
- The legislation violates the statutory and constitutional prohibitions against using race as a predominant factor in creating district boundaries; and
- The Congressional and legislative redistricting legislation cannot be justified as furthering any legitimate state interest and is, therefore, unconstitutional.

Answer to Third Summary Paragraph: Defendants STATE that the allegations of the third summary paragraph refer to the allegations set forth in the First Amended Complaint and that the First Amended Complaint speaks for itself. Defendants further DENY any characterization of the First Amended Complaint contrary to its express terms. Defendants further DENY all allegations that the redistricting legislation is unconstitutional or that it violates any state or federal constitutional provisions and DENY that the plaintiffs are entitled to any declaratory relief.

Upon such declarations, the plaintiffs request injunctive relief prohibiting any elections from being conducted under the Congressional and state legislative boundaries created by the legislature. Plaintiffs further request that in the event valid boundaries are not enacted in sufficient time for the 2012 candidate qualifying period and elections according to the statutory schedule, the Court formulate and implement Congressional and state legislative districts that comport with constitutional and statutory requirements.

Answer to Fourth Summary Paragraph: Defendants DENY that the plaintiffs are entitled to any injunctive relief. Defendants further STATE that, because the new redistricting

boundaries comport with constitutional and statutory requirements, there is no legal basis upon which the Court may formulate or implement new Congressional and legislative districts.

JURISDICTION

1. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3) and (4), 1357 and 2284 to hear the claims for legal and equitable relief arising under the federal constitution and federal law and supplemental jurisdiction under 28 U.S.C. § 1367 to hear claims under the state constitution and state law. It also has general jurisdiction under 28 U.S.C. §§ 2201 and 2202, the Declaratory Judgments Act, to grant the declaratory relief requested.

Answer to ¶ 1: Based upon this Court's Decision and Order dated October 24, 2011, and without waiving any rights thereof to appeal, defendants ADMIT the allegations set forth in ¶ 1.

2. This action challenges the constitutionality of the legislatively-adopted boundaries for the state's Congressional and legislative districts, found in chapters 3 and 4 of the Wisconsin Statutes. While these Congressional and state legislative district boundaries are based on the 2010 census, they nevertheless are unconstitutional and violate state and federal law.

Answer to ¶ 2: Defendants DO NOT DENY plaintiffs' characterization of their First Amended Complaint, but rather, put plaintiffs to their proof thereon. Defendants further DENY that the new Congressional and state legislative district boundaries are unconstitutional or that they violate state or federal law. Defendants DENY any and all further allegations.

3. Accordingly, 28 U.S.C. § 2284(a) requires that a district court of three judges be convened or reconvened to hear the case. In 1982, 1992 and 2002, three-judge panels convened pursuant to 28 U.S.C. § 2284 resolved complaints like this one, developing redistricting plans for the state legislature in the absence of valid plans enacted into law.

Answer to ¶ 3: Defendants ASSERT that a district court of three judges has already been empanelled to hear this case. Defendants further ADMIT that three-judge panels were convened in 1982, 1992, and 2002 to resolve complaints regarding redistricting plan in the

absence of any such legislatively created and enacted plans. Finally, defendants ASSERT that there are valid, constitutional redistricting plans already enacted by the State Legislature.

VENUE

4. Venue is properly in this Court under 28 U.S.C. § 1391(b) and (e). At least one of the defendants resides in the Eastern District of Wisconsin. In addition, at least nine of the individual plaintiffs reside and vote in this district.

Answer to ¶ 4: Defendants lack information or knowledge sufficient to form a belief as to the truth of the allegations set forth in ¶ 4, and therefore DENY the same and put plaintiffs to their proof thereon.

PARTIES

Plaintiffs

5. The plaintiffs are citizens, residents and qualified voters of the United States and the State of Wisconsin, residing in various counties and Congressional and legislative districts (as now re-established by the legislation adopted by the state legislature). Regardless of their place of residence, their rights are harmed or threatened with harm by political district boundaries that violate federal and state law.

a. Alvin Baldus, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of Menomonie, Dunn County, Wisconsin, with his residence in the 3rd Congressional District, 67th Assembly District and 23rd Senate District as those districts have been established by the Wisconsin legislature.

b. Cindy Barbera, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the City of Madison, Dane County, Wisconsin, with her residence in the 2nd Congressional District, 78th Assembly District and 26th Senate District as those districts have been established by the legislature.

c. Carlene Bechen, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the Village of Brooklyn, Dane County, Wisconsin, with her residence in the 2nd Congressional District, 80th Assembly District and the 27th Senate District as those districts have been established by the legislature.

d. Elvira Bumpus, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the City of Racine, Racine

County, Wisconsin, with her residence in the 1st Congressional District, 66th Assembly District and 22nd Senate District as those districts have been established by the legislature.

e. Ronald Biendseil, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of Middleton, Dane County, Wisconsin, with his residence in the 2nd Congressional District, 79th Assembly District and 27th Senate District as those districts have been established by the legislature.

f. Leslie W. Davis III, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the City of Stoughton, Dane County, Wisconsin, with his residence in the 2nd Congressional District, 46th Assembly District and 16th Senate District as those districts have been established by the legislature.

g. Brett Eckstein, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the Village of Sussex, Waukesha County, Wisconsin, with his residence in the 5th Congressional District, 22nd Assembly District and 38th Senate District as those districts have been established by the legislature.

h. Gloria Rogers, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the City of Racine, Racine County, Wisconsin, with her residence in the 1st Congressional District, 64th Assembly District and the 22nd Senate District as those districts have been established by the legislature.

i. Richard Kresbach, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the Village of Wales, Waukesha County, Wisconsin, with his residence in the 1st Congressional District, 99th Assembly District and the 33rd Senate District as those districts have been established by the legislature.

j. Rochelle Moore, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the City of Kenosha, Kenosha County, Wisconsin, with her residence in the 1st Congressional District, 64th Assembly District and the 22nd Senate District as those districts have been established by the legislature.

k. Amy Risseeuw, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the Town of Menasha, Outagamie County, Wisconsin, with her residence in the 8th Congressional District, 3rd state Assembly District and 1st Senate District as those districts have been established by the legislature.

l. Judy Robson, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the City of Beloit, Rock County, Wisconsin, with her residence in the 2nd Congressional District, 31st Assembly District and 11th Senate District as those districts have been established by the legislature. Ms. Robson, then a State Senator, was a plaintiff in *Baumgart v. Wendelberger*, Nos. 01-121 and 02-366, 2002 WL 34127471 (E.D. Wis. May 30, 2002), amended by 2002 WL 34127473 (E.D. Wis. July 11, 2002), the case in which this Court established legislative districts in the absence of a valid redistricting statute adopted in 2002 by the state legislature. She has filed a motion under Rule 60(b), Fed. R. Civ. P., for relief from the judgment in that case, asking the Court to provide substantially the same relief requested in this amended complaint.

m. Jeanne Sanchez-Bell, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the City of Kenosha, Kenosha County, Wisconsin, with her residence in the 1st Congressional District, 65th Assembly District and 22nd Senate District as those districts have been established by the legislature.

n. Cecelia Schliepp, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the Town of Erin, Washington County, Wisconsin, with her residence in the 5th Congressional District, 22nd Assembly District and the 8th Senate District as those districts have been established by the legislature.

o. Travis Thyssen, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the Town of Grand Chute, Outagamie County, Wisconsin, with his residence in the 8th Congressional District, 56th Assembly District and the 19th Senate District as those districts have been established by the legislature.

Answer to ¶ 5: Defendants lack information or knowledge sufficient to form a belief as to the truth of the allegations set forth in ¶¶ 5(a) through (o), and therefore, DENY the same, and put plaintiffs to their proof thereon.

Defendants

6. Michael Brennan, resident of Marshfield, Wisconsin; David Deininger, resident of Monroe, Wisconsin; Gerald Nichol, resident of Madison, Wisconsin; Thomas Cane, resident of Wausau, Wisconsin; Thomas Barland, resident of Eau Claire, Wisconsin; and, Timothy Vocke, resident of Rhinelander, Wisconsin, each named as a defendant personally and individually but only in his official capacity, are all members of the Wisconsin Government Accountability Board ("G.A.B."). Kevin Kennedy, resident

of Dane County, Wisconsin, also named only in his official capacity, is the Director and General Counsel for the G.A.B.

a. The G.A.B. is an independent state agency under section 15.60 of the Wisconsin Statutes. The G.A.B. has “general authority” over and the “responsibility for the administration of ... [the state’s] laws relating to elections and election campaigns,” Wis. Stat. § 5.05(1) (2009-10), including the election every two years of Wisconsin’s representatives in the assembly and every four years its representatives in the senate. It also has general responsibility for the administration of laws involving the election, every two years, of the eight members of the Wisconsin Congressional delegation.

b. Among its statutory responsibilities, the G.A.B. must notify each county clerk by the second Tuesday in May of an election year, under Wis. Stat. §§ 10.01(2)(a) and 10.72, of the date of the primary and general elections and the offices to be filled at those elections by the voters. The G.A.B. also transmits to each county clerk a certified list of candidates for whom the voters of that county may vote. Wis. Stat. § 7.08(2).

c. The G.A.B. issues certificates of election under section 7.70(5) of the Wisconsin Statutes to the candidates elected to serve in the senate and assembly and in the U.S. House of Representatives. The G.A.B. also provides support to local units of government and their public employees, including the county clerks in each of Wisconsin’s 72 counties, in administering and preparing for the election of members of the legislature and the U.S. House of Representatives. For purposes of the state’s election law, the counties and their clerks are agents for the state and for the G.A.B.

Answer to ¶ 6: Defendants DENY that the First Amended Complaint states a claim against any defendant in his personal or individual. Defendants ADMIT the remaining allegations in ¶ 6.

Answer to ¶ 6(a): Defendants STATE that the GAB is an independent agency of the State of Wisconsin under Wis. Stat. § 15.60. Defendants ASSERT that the statutes referenced in the remaining allegations of ¶ 6(a) speak for themselves and DENY any characterization of such statutes contrary to their express terms. Defendants ADMIT the remaining allegations in ¶ 6(a).

Answer to ¶ 6(b): Defendants ASSERT that the statutes referenced in ¶ 6(b) speak for themselves and DENY any characterization of such statutes contrary to their express terms.

Defendants ASSERT that Wis. Stat. § 10.06(1)(f) is the provision which sets forth the notification deadlines. Defendants further ASSERT that new legislation has been passed by the Legislature, and is awaiting the Governor's signature, which would alter the date of the primary election for 2012.

Answer to ¶ 6(c): Defendants ASSERT that the statutes referenced in the first sentence of ¶ 6(c) speak for themselves and DENY any characterization of such statutes contrary to their express terms. Defendants ADMIT the remaining allegations in ¶ 6(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS / FACTS

7. The federal constitution requires that the members of Congress be elected from districts with equal populations. The state constitution requires that state legislative districts be "substantially equal" in population, and both Congressional and legislative districts must ensure continuity, compactness and, to at least a limited extent, competitiveness.

Answer to ¶ 7: Defendants ASSERT that the federal and Wisconsin Constitutions speak for themselves and DENY any characterization of such constitutions contrary to their express terms.

8. The U.S. Constitution, in Article I, Section 2, provides, in part, that "Representatives shall be apportioned among the several states ... according to their respective numbers. "It further provides that "[t]he House of Representatives shall be composed of members chosen every second year by the people of the several states" These provisions, as construed by the U.S. Supreme Court, establish a minimum constitutional guarantee of "one-person, one-vote."

Answer to ¶ 8: Defendants ASSERT that the federal Constitution speaks for itself and DENY any characterization of such constitution contrary to its express terms.

9. The Due Process Clause of the Fifth Amendment provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law."

Answer to ¶ 9: Defendants ASSERT that the Due Process Clause of the Fifth Amendment referenced in ¶ 9 speaks for itself and DENY any characterization of such Clause contrary to its express terms.

10. The Equal Protection Clause provides, in pertinent part:

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.

This provision guarantees to the citizens of each state, among other rights, the right to vote in state and federal elections, guaranteeing as well that the vote of each citizen shall be equally effective with the vote of any and every other citizen.

Answer to ¶ 10: Defendants ASSERT that the Equal Protection Clause of the Fourteenth Amendment referenced in ¶ 10 speaks for itself and DENY any characterization of such Clause contrary to its express terms.

11. Article IV, section 3, of the Wisconsin Constitution requires that the legislature “apportion and district anew” its senate and assembly districts following each federal census “according to the number of inhabitants.”

Answer to ¶ 11: Defendants ASSERT that article IV, § 3, of the Wisconsin Constitution speaks for itself and DENY any characterization of such provision contrary to its express terms.

12. The state constitution also requires that legislative districts be “bounded by county, precinct, town or ward lines, [] consist of contiguous territory and be in as compact form as practicable.” Wis. Const. art. IV, § 4. The constitution further requires that state senators “shall be chosen” by the voters every four years.

Answer to ¶ 12: Defendants ASSERT that the Wisconsin Constitution speaks for itself and DENY any characterization of such document contrary to its express terms.

13. Pursuant to 2 U.S.C. § 2a, the President transmits to Congress, based on the decennial census, “the number of persons in each State” and “the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives” Under 2 U.S.C. § 2c, “there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established”

Answer to ¶ 13: Defendants ASSERT that the United States Code speaks for itself and DENY any characterization of such document contrary to its express terms.

14. The Bureau of the Census, U.S. Department of Commerce, conducted a decennial census in 2010 of Wisconsin and of all the other states under Article I, Section 2, of the U.S. Constitution.

Answer to ¶ 14: Defendants ADMIT ¶ 14.

15. Under 2 U.S.C. §§ 2a and 2c and 13 U.S.C. § 141(c), the Census Bureau on December 21, 2010 announced and certified the actual enumeration of the population of Wisconsin at 5,686,986 as of April 1, 2010, a slight population increase from the 2000 census. A copy of the Census Bureau's Apportionment Population and Number of Representatives, by state, is attached as Exhibit A.

Answer to ¶ 15: Defendants ADMIT that on December 21, 2010, the Census Bureau announced and certified the actual enumeration of the population of Wisconsin at 5,686,986 as of April 1, 2010, which is an amount greater than the 2000 census. Defendants ADMIT the authenticity of the document attached as Exhibit A. Defendants DENY each and every remaining allegation contained in ¶ 15.

Legislative Districts

16. Based on the April 2010 census, the precise ideal population for each senate district in Wisconsin is 172,333 and for each assembly district 57,444 (each a slight increase from 2000).

Answer to ¶ 16: Defendants STATE that based on the April 2010 census, zero population deviation among each of Wisconsin's 33 Senate Districts is 172,333 and zero population deviation among Wisconsin's 99 Assembly Districts is 57,444. Defendants DENY any and all remaining allegations in ¶ 16.

17. Article IV, section 3, of the Wisconsin Constitution gives the legislature the primary responsibility for enacting a constitutionally-valid plan for legislative districts. The Governor soon will sign into law new legislative district boundaries incorporated in the legislation, Senate Bills 148 and 149, approved by the legislature on July 19 and 20, 2011.

a. The 2010 census populations in the newly adopted senate districts range from a low of 171,722 (611 fewer than the ideal population, the 18th Senate District) to a high of 172,798 (465 more than the ideal population, the 30th Senate District). Thus, the total population deviation, from the most populous to the least populous district, is 1,076 persons.

b. The 2010 census populations in newly adopted assembly districts range from a low of 57,220 (224 fewer than the ideal population, the 1st Assembly District) to a high of 57,658 (214 more than the ideal population, the 45th Assembly District). Thus, the total population deviation, from the most populous to the least populous district, is 438 persons.

Answer to ¶ 17: Defendants ASSERT that the Wisconsin Constitution speaks for itself and DENY any characterization of such document contrary to its express terms. Defendants ADMIT that the Governor signed 2011 Wisconsin Acts 43 and 44 into law on August 9, 2011, and that these Acts incorporated the new legislative district boundaries contained in Senate Bills 148 and 149, which had been approved by each house of the State Legislature on July 19 and 20, 2011.

Answer to ¶¶ 17(a-b): Defendants ADMIT ¶¶ 17(a) and (b).

18. The redistricting legislation was drafted on behalf of the majority party's leadership in the assembly and senate and first released to the public on July 8, 2011.

Answer to ¶ 18: Defendants ASSERT that the redistricting legislation was drafted by the State Legislature, and that the legislation was released to the public on July 8, 2011. Defendants DENY the remaining allegations in ¶ 18.

19. The public aspects of the redistricting process were completed in just 12 days:

a. On July 13, 2011, the legislature held the first and only public hearing to take testimony on the redistricting legislation.

b. The Senate Judiciary Committee adopted the redistricting proposal, with minor amendments, and companion legislation on July 15, 2011.

c. The senate approved the amended legislative redistricting proposal and companion legislation on July 19, 2011, and the assembly approved them on

July 20, 2011. They await the Governor's signature. A copy of the amendment to redistricting legislation is attached as Exhibit B. (Copies of the original proposals were provided to this Court as Exhibits I and 2 attached to correspondence from defendants' counsel on July 14, 2011.)

Answer to ¶ 19: Defendants ADMIT that Senate Bills 148 and 149 were passed by the Senate and Assembly on July 19 and 20, 2011, which was 12 days after the release of such bills to the public on July 8, 2011. Defendants DENY each and every remaining allegation contained in ¶ 19.

Answer to ¶ 19(a): Defendants ADMIT ¶ 19(a).

Answer to ¶ 19(b): Defendants ADMIT that the Senate Judiciary Committee adopted S.B. 148, S.B. 149, and S.B. 150 on July 15, 2011, but DENY each and every remaining allegation contained in ¶ 19(b).

Answer to ¶ 19(c): Defendants ADMIT the first sentence of ¶ 19(c), but STATE that the Governor signed the redistricting bills, 2011 Wisconsin Acts 43 and 44, into law on August 9, 2011.

20. At all times relevant to the redistricting process, state law established the procedures for redistricting under which local governments were first required to draw local political and ward boundaries. Wis. Stat. §§ 5.15(1)(b) and 59.10(3)(b) (2009-10). However, a companion bill, also passed on July 19 and 20, now requires local communities to draw or re-draw their local political boundaries to conform with state legislative redistricting, making it impossible for the new districts "to be bounded by county, precinct, town or ward lines ..." as the state constitution requires. A copy of this legislation is attached as Exhibit C.

Answer to ¶ 20: Defendants ASSERT that the statutes referenced in the first sentence of ¶ 20 speak for themselves. Defendants further DENY any characterization of such statutes contrary to their express terms. Defendants DENY that the "companion legislation" makes it impossible for the new districts to be "bounded by county, precinct, town or ward lines" as the Wisconsin Constitution requires.

Congressional Districts

21. Based on the April 2010 Census, the precise ideal population for each Congressional District in Wisconsin is 710,873.

Answer to ¶ 21: Defendants ASSERT that as of April 1, 2010, the population of Wisconsin was 5,686,986, which equates to 710,873.25 for each of Wisconsin's eight Congressional Districts. Defendants further DENY each and every remaining allegation contained in ¶ 21.

22. The state legislature has the primary responsibility – under Article I, Sections 2 and 4, and the Fourteenth Amendment, section 2, of the U.S. Constitution and under 2 U.S.C. § 2c – to enact a constitutionally- valid plan establishing the boundaries for the state's eight Congressional districts.

Answer to ¶ 22: Defendants ASSERT that the federal Constitution and the United States Code speak for themselves. Defendants further DENY any characterization of such documents contrary to their express terms.

23. On July 19 and 20, the Wisconsin legislature adopted Congressional district boundaries based on the 2010 census. Congressional redistricting resulted from the same legislative process and schedule described in ¶¶ 18 and 19 above.

Answer to ¶ 23: Defendants ADMIT the first sentence of ¶ 23 and restate their answers to ¶¶ 18 and 19, above. Defendants DENY any and all remaining allegations contained in ¶ 23.

24. The new Congressional districts have minimal total population deviations.

Answer to ¶ 24: Defendants ASSERT that each of the eight newly drawn Congressional Districts has a population deviation, based on the total Wisconsin population of 5,686,986 divided by eight, of less than one. Defendants further DENY each and every remaining allegation in ¶ 24.

CLAIMS FOR RELIEF

25. While the new political districts contain small population deviations, the district boundaries violate the U.S. and Wisconsin constitutional and statutory requirements that each district be compact, preserve the core population of prior districts, and preserve communities of interest – while still containing equal population.

Answer to ¶ 25: Defendants DENY ¶ 25.

26. The legislatively-adopted redistricting boundaries impermissibly discriminate against the plaintiffs in the political process, and the use of those boundaries for elections in 2012 and beyond will deny the plaintiffs the opportunity for fair and effective representation in their state government and in their Congressional districts.

Answer to ¶ 26: Defendants DENY ¶ 26.

FIRST CLAIM

Legislative Boundaries Unconstitutionally Sacrifice Redistricting Principles

27. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 26 above.

Answer to ¶ 27: Defendants incorporate their responses to ¶¶ 1 through 26 of the First Amended Complaint, above, as though fully set forth herein.

28. Although population equality is a primary constitutional goal in establishing legislative districts, it is not the only constitutional or statutory goal.

Answer to ¶ 28: Defendants ASSERT that ¶ 28 contains purported statements of law in response to which no answer is required.

29. The federal and state constitutions require that legislative districts be apportioned with equal populations while the state constitution also ensures that the districts are compact, preserve core populations from prior districts, and preserve communities of interest. The state constitution also requires that legislative districts be based on districts first drawn by local units of government.

Answer to ¶ 29: Defendants ASSERT that the federal and Wisconsin Constitutions speak for themselves. Defendants further DENY any characterization of such constitutions contrary to their express terms.

30. Whether or not the population deviations in the new legislative districts are acceptable in a vacuum, the new districts wholly and impermissibly ignore other redistricting requirements.

a. They are not geographically compact-in fact, significantly less so than the 2002 boundaries. Legislative districts have taken bizarre shapes, especially compared to their 2002 counterparts, including but not necessarily limited to Assembly Districts 6, 34, 37, 43, 45, 62, 64, 70, 87 and 93 and Senate Districts 8, 21 and 24. *See* Exhibit D, comparing the Racine/Kenosha districts to their 2002 counterparts.

b. They do not preserve core populations from prior districts. Based on the 2010 census, 323,026 individuals needed to move assembly districts; the new legislation moves 2,357,592 individuals – two million more than necessary – into new assembly districts. (In contrast, the 2002 boundaries retained 76.7 percent of the core populations from the prior district.) For example:

i. According to the 2010 census, AD 81 was required to lose only 3,907 individuals to meet the ideal population; the new legislation removes 57,932 individuals from and adds 53,984 individuals to the district.

ii. The 2010 census disclosed that AD 33 should have been reduced by 2,016 individuals; the new legislation removes 54,763 individuals from the district and adds 52,868 individuals from other districts.

iii. Based on the 2010 census, AD 62 needed to gain only 1,558 individuals to meet the ideal population; the new legislation removes 50,983 individuals from the district and adds 52,442 individuals from other districts.

iv. AD 37 was required to lose 1,521 individuals, according to the 2010 census; the new legislation removes 52,142 individuals from the district and adds 50,684 individuals.

v. AD 76 needed to lose 4,103 individuals to meet the ideal population; the new legislation removes 54,583 individuals and adds 50,653 individuals.

c. Similarly, the 2010 census disclosed that 231,341 individuals needed to shift senate districts; the new legislation, however, moves 1,205,216 individuals. These unnecessary changes to the core populations include but are not limited to:

i. According to the 2010 census results, SD 22, bordered on the east by Lake Michigan, had 7,686 individuals more than the ideal population; the new legislation adds 66,837 individuals from a different district and removes 74,586 individuals from the existing district.

ii. The 2010 census revealed SD 21, which used to border SD 22 to the north, needed to increase by 5,598 individuals; the new legislation adds 72,431 individuals to the district and removes 66,842 from its core 2002 population.

iii. SD 17, bordered on the west by Minnesota and on the south by Illinois, did not need to lose any of its population; the 2010 census disclosed that its population was only 58 individuals above the ideal population-statistically insignificant. The new legislation nonetheless adds 19,666 new individuals to the district and removes 19,507 individuals from the 2002 district.

iv. Like its neighboring district, SD 32 runs along the Mississippi River on the western border of the state. This district also did not need to be changed as the 2010 census disclosed its population at 46 individuals above the ideal population. The new legislation, however, adds 3,458 individuals to the district and removes 3,715.

v. Also bordered by the Mississippi River to the west and SD 32 to the south, SD 31 was 1,034 over the ideal population, according to the 2010 census. The new legislation nevertheless adds 50,132 individuals and removes 51,161 from its 2002 population.

vi. SD 7 is in the City of Milwaukee and borders Lake Michigan to the east. According to the 2010 census, SD 7 also did not need to change; it was only 330 below the ideal population. However, the new legislative proposal adds 13,741 individuals to the district and removes 13,321 from the 2002 district population.

Answer to ¶ 30: Defendants DENY ¶ 30.

Answer to ¶¶ 30(a-c): Defendants DENY all sub-parts of ¶ 30 in their entirety.

31. The new legislative districts do not preserve communities of interest and instead needlessly divide cities and other local government units. For example:

a. The boundaries unnecessarily fracture the "Clark Square" neighborhood in Milwaukee by drawing the district boundary between the 8th and 9th Assembly Districts along Cesar Chavez Drive.

b. The assembly and senate districts in Racine and Kenosha Counties unnecessarily fracture the communities. The City of Racine is split into six different assembly districts, including one that stretches into the City of Kenosha (AD 64) and another that stretches west to Wind Lake and the Racine County line (AD 62). The legislation also ignores the traditional and historical representation afforded to the two counties, combining the cities into one senate district while another senate district is spread across the rural parts of both counties. While communities of interest are fractured, communities that have little in common are combined. Residents of Racine have little in common with, and rely on very different government services compared to, for example, the residents of Wind Lake.

c. In the Fox Valley, the City of Appleton, a majority of which has traditionally been contained within one assembly district (AD 57), was split in half with the northern half of the city now in the 56th Assembly District, which stretches west beyond the Outagamie County line and to the Winnebago County line. Residents of the City of Appleton have little in common with residents of, for example, Norwegian Bay on Lake Poygan.

d. The City of Beloit has traditionally and historically been contained within one assembly district (AD 45). The legislation splits the city in half with the western part of the city falling within AD 45 and the eastern portion within AD 31. This also places the City of Beloit in separate senate districts (SD 15 on the west and SD 16 on the east). The residents of the City of Beloit, which has the highest unemployment rate in the state, have very little in common with residents of, for example, Lake Geneva.

e. In Milwaukee County, three assembly districts that had historically been contained within Milwaukee County are now stretched from the edge of that county well into Waukesha County.

Answer to ¶ 31: Defendants DENY ¶ 31.

Answer to ¶ 31(a-e): Defendants DENY all sub-parts of ¶ 31 in their entirety. Further, defendants put plaintiffs to their proof regarding the allegations made in the sub-parts of ¶ 31.

32. If not otherwise enjoined or directed, the G.A.B. will carry out its statutory responsibilities involving the 2012 state legislative elections based on the impermissibly-drawn boundaries, which will harm the plaintiffs by violating their constitutional rights.

Answer to ¶ 32: Defendants DENY ¶ 32.

33. In the absence of the legislatively-enacted and constitutionally-permissible districts, any elections conducted under the G.A.B.'s supervision will deprive the individual plaintiffs of their civil rights under color of state law in violation of 42 U.S.C. §§ 1983 and 1988.

Answer to ¶ 33: Defendants DENY ¶ 33.

SECOND CLAIM

The Legislation Does Not Recognize Local Government Boundaries

34. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 33 above.

Answer to ¶ 34: Defendants incorporate their responses to ¶¶ 1 through 33 of the First Amended Complaint, above, as though fully set forth herein.

35. The state constitution requires that, to the extent possible, wards and municipalities be kept whole within legislative district boundaries. It mandates that they be "bounded" by lines drawn for local political units. The new districts are not bound by county, precinct, town or ward lines already established by local governments. Some are unnecessarily divided. The legislation splits significantly more counties, municipalities and wards than the 2002 boundaries. The districts in Racine, Kenosha, Appleton, Beloit and Milwaukee, discussed above in paragraphs 31a through e, are examples of these divides.

Answer to ¶ 35: With respect to the first two sentences of ¶ 35, defendants ASSERT that the Wisconsin Constitution speaks for itself and defendants DENY any characterization of the constitution contrary to its express terms. Defendants DENY each and every remaining allegation in ¶ 35.

36. In creating district boundaries, the legislation ignores local boundaries already established by local government boundaries and in the process of being established violating the state constitution. Instead, the legislature changed the state law in an attempt to force local municipalities to make their districts conform to the state's plan, violating the state constitution. *See* Exhibit C; *supra*, ¶ 20.

Answer to ¶ 36: Defendants DENY ¶ 36.

37. If not otherwise enjoined or directed, the G.A.B. will carry out its statutory responsibilities involving the 2012 state legislative elections based on the impermissibly-drawn boundaries, which will harm the plaintiffs by violating their constitutional rights.

Answer to ¶ 37: Defendants DENY ¶ 37.

38. In the absence of the legislatively-enacted and constitutionally-permissible districts, any elections conducted under the G.A.B.'s supervision will deprive the individual plaintiffs of their civil rights under color of state law in violation of 42 U.S.C. §§ 1983 and 1988.

Answer to ¶ 38: Defendants DENY ¶ 38.

THIRD CLAIM

Legislative Districts Unnecessarily Disenfranchise 300,000 Wisconsin Citizens

39. Plaintiffs incorporate by reference the allegations to paragraphs 1 through 38 above.

Answer to ¶ 39: Defendants incorporate their responses to ¶¶ 1 through 38 of the First Amended Complaint, above, as though fully set forth herein.

40. State senators are elected to four-year terms. Senators from even-numbered districts are elected in years corresponding to the presidential election cycle; senators in odd-numbered districts are elected during mid-term elections.

Answer to ¶ 40: Defendants ADMIT ¶ 40.

41. In 2012, if voters are shifted from odd to even senate districts, they will face a two-year delay in electing their state senator. They are disenfranchised, unnecessarily and unconstitutionally, by being deprived of the opportunity to vote, as the state constitution requires, every four years for a senator to represent them.

Answer to ¶ 41: Defendants DENY ¶ 41.

42. The districts adopted by the state legislature unconstitutionally disenfranchise at least 299,533 citizens.

a. In two even-numbered senate districts (SD 2 and SD 32), although the 2010 census disclosed that only a few individuals (if any) needed to be moved, thousands of individuals were unnecessarily moved into odd-numbered districts. For example, Senate District 2 needed to gain 286 individuals, yet 19,859 individuals were moved out of the district and into Senate District I (which needed to *lose* 8,656 individuals).

b. In other even-numbered senate districts (SD 12, SD 14 and SD 24), although the 2010 census disclosed that the districts needed an increase in population, thousands of individuals were unnecessarily moved out of those districts and into odd-numbered districts. For example, Senate District 14 needed to gain 3,554 individuals, yet 33,046 were unnecessarily moved to Senate District 27 (which needed to *lose* 25,541 individuals).

c. In other senate districts (SD 16, SD 20, SD 22 and SD 28), although the 2010 census disclosed that the districts needed some decrease in population, the populations of these districts were decreased in substantially larger numbers than necessary to achieve equal population. For example, Senate District 22 needed to lose only 7,686 individuals and, instead, 72,431 individuals were moved out of the district and into Senate District 21 (which needed to gain only 5,598 individuals).

d. Finally, although Senate District 10 needed to lose 20,314 individuals, 19,360 of the individuals who were moved out of the district were moved into Senate District 31, which needed to *lose* 1,034 individuals.

Answer to ¶ 42: Defendants DENY ¶ 42. Defendants further ASSERT that 164,843 of the citizens who reside in territory that has shifted from even to odd numbered Senate Districts have had the opportunity to vote for the office of State Senator during 2011.

Answer to ¶¶ 42(a-d): Defendants DENY all sub-parts of ¶ 42 in their entirety.

43. If not otherwise enjoined or directed, the G.A.B. will carry out its statutory responsibilities involving the 2012 state legislative elections based on the impermissibly-drawn boundaries, which will harm the plaintiffs by violating their constitutional rights.

Answer to ¶ 43: Defendants DENY ¶ 43.

44. In the absence of the legislatively-enacted and constitutionally-permissible districts, any elections conducted under the G.A.B.'s supervision will deprive the individual plaintiffs of their civil rights under color of state law in violation of 42 U.S.C. §§ 1983 and 1988.

Answer to ¶ 44: Defendants DENY ¶ 44.

FOURTH CLAIM

Congressional Districts Are Not Compact and Fail to Preserve Communities of Interest.

45. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 44 above.

Answer ¶ 45: Defendants incorporate their responses to ¶¶ 1 through 44 of the First Amended Complaint, above, as though fully set forth herein.

46. The federal and state constitutions require that political districts be compact and preserve communities of interest.

Answer to ¶ 46: Defendants ASSERT that the federal and Wisconsin Constitutions speak for themselves and further DENY any characterization of such constitutions contrary to their express terms.

47. The compactness of a district refers both to the shape of the district as well as to the ability of citizens to relate to each other and their elected representative and the ability of the representative to relate to his or her constituents.

Answer to ¶ 47: Defendants ASSERT that ¶ 47 contains purported statements of law in response to which no answer is required. Further answering defendants DENY any and all allegations contained therein.

48. The Congressional Districts fail to meet constitutional standards of compactness.

a. The 7th Congressional District unnecessarily spans a vast area—from Superior in the northwest to just north of Madison in the south and east into Forest County.

b. The 3rd Congressional District similarly and unnecessarily spans from the far southwest corner of the state north almost to the Twin Cities and west to the center of the state.

c. The large expanse covered by these districts results in districts that are difficult and quite costly for residents to effectively communicate with their

representative in Congress and for the elected member to effectively communicate with his or her constituents.

Answer to ¶ 48: Defendants DENY ¶ 48.

Answer to ¶¶ 48(a-c): Defendants DENY all sub-parts of ¶ 48 in their entirety. Further, defendants put plaintiffs to their proof regarding the allegations made in the sub-parts of ¶ 48.

49. A related principle is that communities of interest be preserved. A “community of interest” refers to local government units and tribal boundaries and also includes considerations of a citizen’s ethnicity, cultural affinity and traditional geographical boundaries, historical political representation, and the community’s need for government services.

Answer to ¶ 49: Defendants ASSERT that ¶ 49 contains purported statements of law and/or legal conclusions in response to which no answer is required. Further answering defendants DENY any and all allegations contained therein.

50. Fracturing communities of interest adversely affects the ability of citizens to relate to each other and to their representatives.

Answer to ¶ 50: Defendants ASSERT that ¶ 50 contains purported statements of law and/or legal conclusions in response to which no answer is required. Further answering defendants DENY any and all allegations contained therein.

51. The Congressional Districts created by the legislature impermissibly divide communities of interest:

a. Fox Valley Area: The new legislation unnecessarily fractures the Fox Valley area. The City of Appleton is split between the 8th and 6th Congressional Districts, and the Cities of Neenah and Menasha are separated from the remaining Fox Valley municipalities.

b. Milwaukee Area: Milwaukee County is now fractured into four separate districts, compared with the 2002 boundaries where the county was represented by only three members of Congress.

Answer to ¶ 51: Defendants DENY ¶ 51.

Answer to ¶ 51(a-b): Defendants DENY all sub-parts of ¶ 51 in their entirety. Further, defendants put plaintiffs to their proof regarding the allegations made in the sub-parts of ¶ 51.

52. If not otherwise enjoined or directed, the G.A.B. will carry out its statutory responsibilities involving the 2012 Congressional elections based on the impermissibly-drawn boundaries, which will harm the plaintiffs by violating their constitutional rights.

Answer to ¶ 52: Defendants DENY ¶ 52.

53. In the absence of the legislatively-enacted and constitutionally-permissible districts, any elections conducted under the G.A.B.'s supervision will deprive the individual plaintiffs of their civil rights under color of state law in violation of 42 U.S.C. §§ 1983 and 1988.

Answer to ¶ 53: Defendants DENY ¶ 53.

FIFTH CLAIM

Congressional and Legislative Districts Constitute Unconstitutional Gerrymandering

54. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 53 above.

Answer to ¶ 54: Defendants incorporate their responses to ¶¶ 1 through 53 of the First Amended Complaint, above, as though fully set forth herein.

55. The Equal Protection Clause and the First Amendment require that all citizens have an equally effective opportunity to elect their representatives and prohibit vote dilution in the form of partisan gerrymandering that substantially disadvantages voters of one party in their opportunity to influence the political process.

Answer to ¶ 55: Defendants ASSERT that the Equal Protection Clause, of the Fourteenth Amendment, and the First Amendment speak for themselves and further DENY any characterization of such Amendments contrary to their express terms.

56. The majority's legislative leadership deliberately and systematically created Congressional and legislative districts to give their political party an unfair

electoral advantage in an attempt to preserve their political majorities and minimize the electoral prospects for the minority party. For example:

a. For the last decade and more, Wisconsin's statewide partisan elections have been close, with four of the last five statewide Presidential and gubernatorial elections slightly favoring the Democratic candidates. Applying the election results from these five recent elections to the new political boundaries, however, would give Republicans 54 seats in the 99-seat assembly.

b. Using the results from 2004, when the Presidential election results were virtually even, under the new boundaries Republicans would have won 58 assembly seats.

Answer to ¶ 56: Defendants DENY ¶ 56.

Answer to ¶ 56(a-b): Defendants DENY all sub-parts of ¶ 56 in their entirety.

57. The new Congressional and legislative districts will, consistently and impermissibly, degrade the influence of minority party voters on the political process as a whole. Under the legislation, Democrats have little chance of attaining and retaining a majority in either the senate or the assembly, or in the Congressional delegation, giving them little ability to overcome minority status at any point over the next decade.

Answer to ¶ 57: Defendants DENY ¶ 57.

58. The legislation places incumbents in shared legislative districts in a way that will likely result in the loss of at least five Democratic seats, with four additional Democratic incumbents able to retain a seat only if they move to an adjacent Democratic-leaning district. In contrast, no Republican incumbent will lose a seat and only two Republican incumbents would need to move to an adjacent, open Republican-leaning district. Under these boundaries, the assembly may go from a 59-39 Republican majority to a 64-34 Republican majority in 2012.

Answer to ¶ 58: Defendants DENY ¶ 58.

59. Plaintiffs in districts held by Democrats have been-and, as a result of the new legislation, will continue to be-denied fair representation in the state legislature and Congress in 2012 and beyond.

a. The minority party was denied a fair chance to participate in the redistricting process.

b. The minority party in the state legislature has been similarly denied access to the political process throughout the 2011-12 legislative term. Plaintiffs

and other Wisconsin residents also have been precluded from meaningful participation in the legislative process. As a result, plaintiffs have been unable to fully participate in the public debate on which the political system depends.

Answer to ¶ 59: Defendants DENY ¶ 59.

Answer to ¶¶ 59(a-b): Defendants DENY all sub-parts of ¶ 59 in their entirety. Further, defendants put plaintiffs to their proof regarding the allegations made in the sub-parts of ¶ 59.

60. If not otherwise enjoined or directed, the G.A.B. will carry out its statutory responsibilities involving the 2012 state legislative elections based on the impermissibly-drawn boundaries, which will harm the plaintiffs by violating their constitutional rights.

Answer to ¶ 60: Defendants DENY ¶ 60.

61. In the absence of the legislatively-enacted and constitutionally-permissible districts, any elections conducted under the G.A.B.'s supervision will deprive the individual plaintiffs of their civil rights under color of state law in violation of 42 U.S.C. §§ 1983 and 1988.

Answer to ¶ 61: Defendants DENY ¶ 61.

SIXTH CLAIM

Legislative Districts Unconstitutionally Use Race As A Predominant Factor

62. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 61 above.

Answer to ¶ 62: Defendants incorporate their responses to ¶¶ 1 through 61 of the First Amended Complaint, above, as though fully set forth herein.

63. The Voting Rights Act, 42 U.S.C. § 1973, precludes a state from minimizing the opportunities for minority groups to participate in the political process. Among other things, it precludes "packing" minorities into legislative districts and from fracturing minorities into several districts to dilute their influence.

Answer to ¶ 63: Defendants ASSERT that the Voting Rights Act speaks for itself and DENY any characterization of such document contrary to its express terms.

64. Federal law requires newly-drawn districts to reflect communities of interest along with race. Federal law further requires state legislatures to establish districts, where possible, with the minority citizens comprising a numerical majority of the citizen voting age population.

Answer to ¶ 64: The allegations in ¶ 64 constitute legal conclusions to which a responsive pleading is not required.

65. Although the new legislative boundaries establish minority-majority and minority influence districts, they do so by unnecessarily shifting populations, fracturing communities that have historically been represented by the same representative, and combining new communities without regard for any factors other than, on their face, race.

Answer to ¶ 65: Defendants DENY ¶ 65.

66. Under the new legislation, African Americans have less opportunity than other members of the electorate to participate in the political process:

a. Racial bloc voting is pervasive in the City of Milwaukee among both majority and African American groups.

b. African Americans comprise a sufficiently large and geographically compact group to constitute a majority of the voting age population in at least seven assembly districts.

c. The new legislation creates only six assembly districts where a majority of the voting age population is African American.

d. At least one additional assembly district comprised of a majority of African Americans of voting age population can be established in the City of Milwaukee without violating constitutional requirements.

e. The failure to create at least seven assembly districts with minority-majority populations violates section 2 of the Voting Rights Act of 1965 and the Fourteenth Amendment.

Answer to ¶ 66: Defendants DENY ¶ 66.

Answer to ¶ 66(a): Defendants lack knowledge or information sufficient to form a belief as to the truth of the matters asserted in ¶ 66(a) and, therefore, DENY the same.

Answer to ¶ 66(b): Defendants DENY ¶ 66(b).

Answer to ¶ 66(c): Defendants ADMIT that the new legislation creates six Assembly Districts where a majority of the voting age population is African American. Defendants further DENY any and all remaining allegations contained in ¶ 66(c).

Answer to ¶ 66(d): Defendants DENY ¶ 66(d).

Answer to ¶ 66(e): Defendants DENY ¶ 66(e).

67. Under the new legislation, Latinos have less opportunity than other members of the electorate to participate in the political process:

a. Racial bloc voting is pervasive in the City of Milwaukee among majority and Latino groups.

b. Latino populations comprise a large and geographically compact group.

c. The new legislation fails to create any district with sufficient Latino voting age citizen population.

d. The new legislation's failure to draw a district with sufficient Latino voting age citizen population violates section 2 of the Voting Rights Act of 1965.

Answer to ¶ 67: Defendants DENY ¶ 67.

Answer to ¶ 67(a): Defendants lack knowledge or information sufficient to form a belief as to the truth of the matters asserted in ¶ 67(a) and, therefore, DENY the same.

Answer to ¶ 67(b): Defendants DENY ¶ 67(b).

Answer to ¶ 67(c): Defendants DENY ¶ 67(c).

Answer to ¶ 67(d): Defendants DENY ¶ 67(d).

68. The new legislation unconstitutionally ignores nonracial bases of identity.

a. The new Racine-Kenosha senate district includes populations that belong to the same race but otherwise have little common communities of interest.

b. In Milwaukee, by shifting existing districts based solely on race and ignoring other redistricting principles, the legislative districts include populations that belong to the same race but otherwise have little else in common.

Answer to ¶ 68: Defendants DENY ¶ 68.

Answer to ¶ 68(a-b): Defendants DENY all sub-parts of ¶ 68.

69. Other legislative boundaries also unnecessarily shift populations and fracture Native American communities that have historically been represented by the same representative. For example:

a. Members of the Oneida Nation have historically been represented by one member of the assembly and one member of the senate. Under the 2002 boundaries, members of the Oneida Nation were primarily within Assembly District 5 and Senate District 2. Under the new legislation, members of the Oneida Nation have been fractured and now reside in at least two assembly districts. As a result, members of the Oneida Nation are now spread among multiple districts, lessening their political influence.

b. Members of the Stockbridge-Munsee and Menominee tribes have historically been represented by one member of the assembly and one member of the senate. Under the 2002 boundaries, members of these tribes were in Assembly District 36 and Senate District 12. The new legislation divides the tribes between the 36th and 6th Assembly Districts, which also places the members in different senate districts (12th and 2nd, respectively). As a result, members of the Stockbridge-Munsee and Menominee tribes are now spread among three assembly districts and two senate districts, lessening their political influence.

c. Members of the Forest County Potawatomi have historically been represented by one member of the assembly and one member of the senate. Under the 2002 boundaries, members of the tribe were in Assembly District 36 and Senate District 12. Under the new legislation, members of the Forest County Potawatomi are divided between the 36th and 34th Assembly Districts, lessening their political influence.

Answer to ¶ 69: Defendants DENY ¶ 69.

Answer to ¶ 69(a): Defendants lack knowledge or information sufficient to form a belief as to the truth of the matters asserted in the first two sentences of ¶ 69(a), and therefore DENY the same and put plaintiffs to their proof thereon. Defendants DENY the remaining allegations of ¶ 69(a).

Answer to ¶ 69(b): Defendants lack knowledge or information sufficient to form a belief as to the truth of the matters asserted in the first two sentences of ¶ 69(b), and therefore DENY the same and put plaintiffs to their proof thereon. Defendants DENY the remaining allegations of ¶ 69(b).

Answer to ¶ 69(c): Defendants lack knowledge or information sufficient to form a belief as to the truth of the matters asserted in the first two sentences of ¶ 69(c), and therefore DENY the same and put plaintiffs to their proof thereon. Defendants DENY the remaining allegations of ¶ 69(c).

70. If not otherwise enjoined or directed, the G.A.B. will carry out its statutory responsibilities involving the 2012 state legislative elections based on the impermissibly-drawn boundaries, which will harm the plaintiffs by violating their constitutional rights.

Answer to ¶ 70: Defendants DENY ¶ 70.

71. In the absence of the legislatively-enacted and constitutionally-permissible districts, any elections conducted under the G.A.B.'s supervision will deprive the individual plaintiffs of their civil rights under color of state law in violation of 42 U.S.C. §§ 1983 and 1988.

Answer to ¶ 71: Defendants DENY ¶ 71.

SEVENTH CLAIM

New Congressional and Legislative Districts Are Not Justified By Any Legitimate State Interest

72. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 71 above.

Answer to ¶ 72: Defendants incorporate their responses to ¶¶ 1 through 71 of the First Amended Complaint, above, as though fully set forth herein.

73. The Equal Protection Clause allows some deviation from population equality in political boundaries if the deviations are based on established redistricting policies.

Answer to ¶ 73: Defendants ASSERT that the Equal Protection Clause of the Fourteenth Amendment speaks for itself and DENY any characterization of such Clause contrary to its express terms.

74. The legislature failed to take into account the well-established principles of compactness, maintaining communities of interest, and preserving core populations from prior districts in establishing new district boundaries.

Answer to ¶ 74: Defendants DENY ¶ 74.

75. The legislature failed to take into account the state constitution's requirement of basing legislative districts on municipal, ward and other local government boundaries.

Answer to ¶ 75: Defendants DENY ¶ 75.

76. Because the new legislation ignores established redistricting obligations, the state had no justification for any population deviation whatsoever; the population deviations – although modest – are greater than necessary because they do nothing to preserve communities of interest, preserve core populations, and are not based on local boundaries.

Answer to ¶ 76: Defendants DENY ¶ 76.

77. There is no legitimate state interest that justifies the new Congressional and legislative districts.

Answer to ¶ 77: Defendants DENY ¶ 77.

78. If not otherwise enjoined or directed, the G.A.B. will carry out its statutory responsibilities involving the 2012 state legislative elections based on the impermissibly-drawn boundaries, which will harm the plaintiffs by violating their constitutional rights.

Answer to ¶ 78: Defendants DENY ¶ 78.

79. In the absence of the legislatively-enacted and constitutionally-permissible districts, any elections conducted under the G.A.B.'s supervision will deprive the individual plaintiffs of their civil rights under color of state law in violation of 42 U.S.C. §§ 1983 and 1988.

Answer to ¶ 79: Defendants DENY ¶ 79.

AFFIRMATIVE DEFENSES

1. Plaintiffs have failed to state a claim for which relief may be granted as a matter of law.
2. Plaintiffs have failed to set forth a basis upon which they are entitled to declaratory or injunctive relief as there has been no violation of either the Wisconsin or Federal Constitution through the enactment of the new redistricting boundaries.
3. The new redistricting legislation directly advances state and/or governmental interests and it is not more extensive than necessary to serve those interests.
4. The redistricting Acts are presumed to be valid, *Davis v. Grover*, 166 Wis. 2d 501, 520, 480 N.W.2d 460 (1992), and the burden is on the challenger to prove beyond a reasonable doubt that they are unconstitutional. *State v. Chvala*, 2004 WI App 53, ¶ 9, 271 Wis. 2d 115, 678 N.W.2d 880; *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 46, 205 N.W.2d 784 (1973). It is not enough that a challenger establish doubt as

to an act's constitutionality nor is it sufficient that a challenger establish the unconstitutionality of an act is a possibility. *Id.* If any doubt exists, it must be resolved in favor of constitutionality. *State ex rel. Thomson v. Giessel*, 265 Wis. 558, 564, 61 N.W.2d 903 (1953).

5. The State Constitution vests the State Legislature with the authority to reapportion the legislative boundaries every ten years. Wis. Const. art. IV, § 3; U.S. Const. art. I, § 2; *Grove v. Emison*, 507 U.S. 25, 34 (1993). "In the reapportionment context, the [United States Supreme] Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself." *Grove*, 507 U.S. at 33 (emphasis in original). Here, the State Legislature has completed redistricting plans which have been signed into law. Even without 2011 Wisconsin Act 39 (which established the state court procedure to challenge redistricting maps), the state judiciary is the next appropriate venue for any constitutional challenges. Pursuant to the United States Supreme Court's dictates, first set forth in 1965 in *Scott v. Germano*, 381 U.S. 407 (1965) (*per curiam*), state legislatures and judiciaries are to have the primary redistricting responsibilities.

6. "Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Miller v. Johnson*, 515 U.S. 900, 915 (1995). "It is well settled that 'reapportionment is primarily the duty and responsibility of the State.'" *Id.* (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)). The State Legislature has broad power and vast discretion to make policy decisions as to the drawing of redistricting maps after a decennial census.

7. The legislative and congressional districts created in the new legislation do not unconstitutionally sacrifice redistricting principles.

8. The legislative and congressional districts satisfy the requirement that they be as geographically compact as is practicable. Wis. Const. art. IV, § 4; *Wisconsin State AFL-CIO v. Elections Board*, 543 F. Supp. 630, 634 (E.D. Wis. 1982) (“The constitutional requirement of compactness is not absolute . . .”).

9. The legislative districts created in the new legislation, to the extent possible, recognize local government boundaries. “While maintaining the integrity of county lines may be a desirable objective, [the Courts] believe its general incompatibility with population equality makes it only a consideration of secondary importance.” *Wisconsin State AFL-CIO*, 543 F. Supp. at 635.

10. The plaintiffs’ claims of “disenfranchisement” do not form the basis for a claim for relief through the invalidation of the redistricting maps. Courts have considered such postponement in the ability to vote in a staggered term system as the “inevitable consequences of redistricting[.]” *Republican Party of Oregon v. Keisling*, 959 F.2d 144, 145 (9th Cir.), *cert. denied*, 504 U.S. 914 (1992). See *Mader v. Crowell*, 498 F. Supp. 226, 231 (M.D. Tenn. 1980) (“[t]he temporary disenfranchisement of these voters violates neither the equal protection clause nor any other constitutional provision”); *In re Reapportionment of the Colorado General Assembly*, 647 P.2d 191, 198 (Col. 1982) (*en banc*); *State Elections Board v. Bartolomei*, 434 N.E.2d 74, 78 (Ind. 1982) (“this impingement upon the right to vote is the natural and unavoidable consequence of redistricting and maintaining a system of staggered terms of office for members of the same governmental body”); and *People ex rel. Snowball v. Pendegast*, 31 P. 103, 105 (Cal. 1892) (“[u]ndoubtedly these [delays] are inconvenient and deplorable results, but it must be assumed that they were foreseen and deliberately accepted by the framers of the constitution”).

11. Additionally, 164,843 of the citizens who reside in territory that has shifted from even to odd numbered Senate Districts have had the opportunity to vote for the office of State Senator during 2011, thereby reducing by more than half the number of citizens whose opportunity to vote for the office of State Senator may be postponed. The opportunity to vote for the office of State Senator in odd numbered districts may arise prior to 2014 in the event of additional special elections or recalls, thereby further reducing the number of citizens whose opportunity to vote for the office of State Senator may be postponed.

12. There is no basis for plaintiffs' claims that the congressional and legislative districts unlawfully dilute votes or have been created as a form of partisan gerrymandering to substantially disenfranchise votes of one party in order to influence the political system. Moreover, without conceding that there was a partisan basis for the new district boundaries, "[t]he fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness." *Burns v. Richardson*, 384 U.S. 73, 89, n.16 (1966). Finally, and of more import, the claim of political gerrymandering in a congressional redistricting plan is non-justiciable because there are no judicially discernable and manageable standards for adjudicating such a claim. *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality). Accordingly, the Fifth Cause of Action should be dismissed as a matter of law.

13. The redistricting maps do not violate any provisions of the Voting Rights Act.

14. The legislative districts do not unconstitutionally use race as a predominant factor.

15. Assuming, *arguendo*, that the new redistricting legislation is susceptible to two constructions, by one of which constitutional questions arise and by the other of which such questions are avoided, the courts are required to adopt the latter construction and to interpret the

redistricting legislation so as not to render it unconstitutional or void. *Basinas v. State*, 104 Wis. 2d 539, 546, 312 N.W.2d 483 (1981); *State ex rel. Harvey v. Morgan*, 30 Wis. 2d 1, 13, 139 N.W.2d 585 (1966).

WHEREFORE, defendants, the Members of the Wisconsin Government Accountability Board, Michael Brennan, David Deininger, Gerald Nichol, Thomas Cane, Thomas Barland, and Timothy Vocke, and Kevin Kennedy, Director and General Counsel, demand judgment as follows:

1. Denying the declaratory relief sought by plaintiffs.
2. Denying the injunctive relief sought by plaintiffs.
3. Dismissing the First Amended Complaint on its merits and with prejudice.
4. Awarding defendants their costs and reasonable attorneys' fees.
5. Such other and further relief as the Court may deem appropriate.

Dated this 4th day of November, 2011.

J.B. VAN HOLLEN
Attorney General

s/Maria S. Lazar
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EXHIBIT 15

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF 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, et
al.,

Plaintiffs,

vs.

Case No. 11-CV-562

Members of the Wisconsin Government
Accountability Board, each only in his official
capacity:

MICHAEL BRENNAN, DAVID DEININGER,
GERALD NICHOL, THOMAS CANE,
THOMAS BARLAND, TIMOTHY VOCKE,
and KEVIN KENNEDY, director and general
counsel for the Wisconsin Government
Accountability Board,

Defendants.

**MOTION TO INTERVENE OF F. JAMES SENSENBRENNER, JR., THOMAS E.
PETRI, PAUL D. RYAN, JR., REID J. RIBBLE, AND SEAN P. DUFFY**

F. James Sensenbrenner, Jr., Thomas E. Petri, Paul D. Ryan, Jr., Reid J. Ribble,
and Sean P. Duffy (collectively, the "Proposed Intervenor-Defendants"), by their undersigned
counsel, move the Court for leave to intervene as defendants in this action and to file the
accompanying [Proposed] Answer-in-Intervention. In support of this motion, and as more fully
set forth in the supporting memorandum filed herewith, the Proposed Intervenor-Defendants
state as follows:

BASIS FOR MOTION

1. The Proposed Intervenor-Defendants are entitled to intervene in this action as a matter of right, pursuant to Fed. R. Civ. P. 24(a), because they have an interest in this action. The Proposed Intervenor-Defendants are all citizens of Wisconsin and are all of Wisconsin's incumbent Republican Members of the United States House of Representatives. By virtue of their elected positions and their current intentions to seek re-election in November 2012, they have a direct interest in the proper redistricting of Wisconsin's Congressional districts.

2. This motion is timely, the Proposed Intervenor-Defendants possess an interest related to the subject matter of this action, the disposition of this action threatens to impair or impede that interest, and none of the current parties to this action adequately represents the interests of the Proposed Intervenor-Defendants. More specifically, the Proposed Intervenor-Defendants assert their interests in this action only as to issues arising from the Congressional-redistricting legislation enacted as 2011 Wisconsin Act 44. Conversely, they do not assert any interest as to issues arising from the distinct state legislative-redistricting legislation enacted as 2011 Wisconsin Act 43.

3. Intervention by the Proposed Intervenor-Defendants will allow all interested parties to participate in one action concerning the redistricting of Wisconsin's Congressional districts and will avoid the risk of inconsistent results, which may result from the filing of separate lawsuits.

4. Alternatively, permissive intervention is proper, pursuant to Fed. R. Civ. P. 24(b), based upon the commonality of issues between this action and the Proposed Intervenor-Defendants' rights and interests relating to redistricting. The Proposed Intervenor-Defendants seek to advance one or more of the same legal positions in support of the constitutionality and propriety of Act 44 as those advanced by the existing defendants.

5. Permissive intervention will not unduly delay or prejudice any of the current parties to the action because the Proposed Intervenor-Defendants seek to have facts considered and issues decided that have already been raised by the existing parties and which are already subjects of this litigation, and because the Proposed Intervenor-Defendants are prepared to litigate in accordance with the current schedule of proceedings.

RELIEF REQUESTED

The Proposed Intervenor-Defendants request that this Court enter an order granting their motion for leave to intervene and to file their proposed answer-in-intervention.

FOLEY & LARDNER LLP

Dated this 10th day of November, 2011.

s/ Thomas L. Shriner, Jr.

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Defendants F. James Sensenbrenner, Jr.,
Thomas E. Petri, Paul D. Ryan, Jr., Reid J.
Ribble, and Sean P. Duffy

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF 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, et
al.,

Plaintiffs,

vs.

Case No. 11-CV-562

Members of the Wisconsin Government
Accountability Board, each only in his official
capacity:

MICHAEL BRENNAN, DAVID DEININGER,
GERALD NICHOL, THOMAS CANE,
THOMAS BARLAND, TIMOTHY VOCKE,
and KEVIN KENNEDY, director and general
counsel for the Wisconsin Government
Accountability Board,

Defendants.

**BRIEF IN SUPPORT OF MOTION TO INTERVENE OF
F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI, PAUL D. RYAN, JR.,
REID J. RIBBLE, AND SEAN P. DUFFY**

INTRODUCTION

F. James Sensenbrenner, Jr., Thomas E. Petri, Paul D. Ryan, Jr., Reid J. Ribble, and Sean P. Duffy (collectively, the "Proposed Intervenor-Defendants" or "movants") seek to intervene in this action in order to protect their interests. The Proposed Intervenor-Defendants are all of Wisconsin's incumbent Republican Members of the United States House of

Representatives.¹ In this lawsuit, the plaintiffs challenge the constitutionality or legality under federal law of 2011 Wisconsin Acts 43 and 44, which relate to the boundaries of Wisconsin's state legislative districts and Congressional districts, respectively. As current Members of Congress from Wisconsin, the Proposed Intervenor-Defendants have a direct interest in ensuring that the constitutionality of the currently effective, fairly, and properly drawn Congressional districts is upheld. As a result, their intervention pursuant to Fed. R. Civ. P. 24(a) or, alternatively, Fed. R. Civ. R. 24(b), is appropriate.

ARGUMENT

I. THE MOVANTS HAVE A RIGHT TO INTERVENE IN THIS ACTION BECAUSE ITS RESOLUTION WILL DIRECTLY AFFECT THEIR RIGHTS.

The Proposed Intervenor-Defendants have a right to intervene in the present action because its disposition may impair or impede their ability to protect their interests.

Rule 24(a) of the Federal Rules of Civil Procedure sets forth the requirements for intervention as a matter of right:

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who: . . . (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

The United States Court of Appeals for the Seventh Circuit has interpreted this rule to require granting intervention as a matter of right where (1) the motion to intervene is timely, (2) the

¹ In 2002, the last time a three-judge panel was designated to resolve a complaint regarding Congressional redistricting in Wisconsin, all of Wisconsin's then-incumbent Republican Members of the House of Representatives – including three of the movants here, F. James Sensenbrenner, Jr., Thomas E. Petri, and Paul D. Ryan, Jr. – moved to intervene as parties under Fed. R. Civ. P. 24(a). In granting the motion, the Court found that the intervening Congressmen “ha[d] satisfied the requirements of intervention pursuant to Fed. R. Civ. P. 24(a).” Order Granting Motion to Intervene, *Arrington v. Wendelberger*, No. 01-C-121 (E.D. Wis. Feb. 13, 2002).

intervenors have an interest related to the subject matter of the action, (3) disposition of the action threatens to impair that interest, and (4) the existing parties fail to represent the interest of the intervenors adequately. *See, e.g., Ligas v. Maram*, 478 F.3d 771, 773 (7th Cir. 2007). Each of these elements is satisfied here.

A. This Motion Is Timely.

First, the motion is timely made. Whether a motion to intervene “was made in a timely fashion is determined by reference to the totality of the circumstances.” *Shea v. Angulo*, 19 F.3d 343, 348 (7th Cir. 1994). Courts consider factors such as how long the intervenors knew of their interest in the case, the extent of prejudice to the existing parties arising from any delay in bringing the motion, the extent of prejudice to the intervenors if the motion is denied, and any unusual circumstances. *Id.* at 349. Of these, the most important factor is “whether the delay in moving for intervention will prejudice the existing parties to the case.” *Nissei Sangyo America, Ltd. v. United States*, 31 F.3d 435, 439 (7th Cir. 1994) (quoting 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1916 (2d ed. 1986)).

As the Seventh Circuit has noted, “we do not necessarily put potential intervenors on the clock at the moment the suit is filed or even at the time they learn of its existence.” *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995) (finding 19-month delay after awareness of action timely for intervention). A review of the brief history of this case shows that this motion is timely. The original complaint was filed on June 10, 2011. At that time, the legislation now challenged had not yet been passed by the Legislature, nor had it even been proposed. Thus, much of the time since the filing of the complaint in June has been spent in presenting and resolving issues of jurisdiction, standing, and ripeness of the claims for review. The existing defendants filed a motion to dismiss on such grounds on June 30. After the Legislature passed 2011 Wisconsin Acts 43 and 44 – but before the Governor approved them – the plaintiffs filed an amended complaint on July 21, which was the subject of a renewed motion to dismiss and briefing on the ripeness issues. The membership of this three-judge panel was

designated less than two months ago. Moreover, only within the last three weeks, on October 21, has the Court resolved the pending issues by denying the motion to dismiss. With this in mind, this motion is certainly timely.

Even more importantly, none of the existing parties can argue that he or she has been prejudiced by delay in bringing this motion for intervention. This litigation is in its infancy. No discovery has been taken by any party, and the stipulated scheduling and discovery order was only filed on November 2. Moreover, the movants are prepared to litigate in conformity with the dates set forth in the November 2 order, including that order's stipulation that a trial commence no later than February 21, 2012. Further, that order includes the statement that the "Court shall not entertain any alternative statewide redistricting plans" at that trial. Consistent with that limitation, the movants support the constitutionality of Act 44, the current Congressional redistricting law, so they will not propose any alternative redistricting plans, unless and until this Court were to find Act 44 invalid.

In contrast, the movants would be substantially prejudiced should this motion be denied. They support Act 44. The plaintiffs have challenged this statute, along with the separate Act 43 that redistricted the Wisconsin Legislature. Under the scheduling and discovery order, this Court will commence a trial no later than February 21 that will determine whether Act 44 will stand. Given the election-year urgencies for action and decision, it is clear that the result of that trial will play a substantial role in determining the course of the elections faced by the movants in 2012. It is highly unlikely that sufficient time will remain after the trial of this case for the movants to bring a separate action to protect their rights. Only in this action can they, as a practical matter, assert and protect their rights.

As further discussed below, the movants are five of the eight representatives of the citizens of Wisconsin in the House of Representatives; therefore, they possess substantial interests in the issues now before this Court. It only recently became clear that this Court would determine the merits of these issues. Should the movants be precluded from now becoming parties to this action, they will be harmed by their inability to protect their interests as

representatives of their respective districts. The movants believe that Act 44 is valid, but a decision undermining the current Congressional redistricting plan would necessarily lead to imposition of a new plan — by judicial decree or renewed legislative action — that would either help or hinder the individual movants' prospects for re-election and, regardless, would necessarily change their campaigning plans and needs. Given the circumstances of the present matter, the motion is timely.

B. The Proposed Intervenor-Defendants Have a Direct and Legally Protectable Interest in this Action.

Under Rule 24(a), those seeking intervention as a matter of right must claim an “interest” in the subject of the action. As the Seventh Circuit has recently noted, open questions remain regarding the proper interpretation of the word “interest.” *City of Chicago v. Fed'l Emergency Mgmt. Agency*, No. 10-3544, 2011 U.S. App. LEXIS 20952, at * 9 (7th Cir. Oct. 17, 2011) (noting circuit split on issue of whether intervenor must have Article III-standing where existing parties remain in case); *see also Security Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1380 (7th Cir. 1995) (“The ‘interest’ required by Rule 24(a)(2) has never been defined with particular precision.”). Despite this uncertainty, courts within this circuit have long found that one seeking to intervene under Rule 24(a)(2) “must demonstrate a ‘direct, significant legally protectable interest.’” *Clorox Co. v. S.C. Johnson & Son, Inc.*, 627 F. Supp. 2d 954, 961 (E.D. Wis. 2009) (quoting *Am. Nat'l Bank v. City of Chicago*, 865 F.2d 144, 146 (7th Cir. 1989)). The movants have such an interest.

Recent cases have stressed the reason for this limitation: “the effects of a judgment in or a settlement of a lawsuit can ramify throughout the economy, inflicting hurt difficult to prove on countless strangers to the litigation. Remoteness of injury is a standard ground for denying a person the rights of a party to a lawsuit.” *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 571 (7th Cir. 2009); *see also City of Chicago v. Fed'l Emergency Mgmt. Agency*, 2011 U.S. App. LEXIS 20952, at * 11 (discussing remoteness as an essential limit on scope of

intervention as a matter of right). There is no remoteness problem here. The universe of individuals with an interest like that of the movants is necessarily limited – by the current population distribution in the United States and Article I, section 2 of the Constitution, as amended by the Section 2 of the Fourteenth Amendment – to a possible total of eight persons who represent Wisconsin in the House of Representatives. No great flood of litigants threatens to intervene in this action should this Court recognize the particular interests of the movants here.

Instead, the present litigation takes direct aim at those specific seats currently held by the movants. Their interests will be directly, rather than tangentially, affected by its outcome. Likewise, the significance of the interests at stake for the movants cannot be overstated. This Court's resolution of this case will determine whether the current legislatively-drawn districts will stand, or whether the movants will need to make re-election and campaigning decisions based upon some differently drawn lines. The redistricting process has had potential or actual effects upon — and depending on the decisions of this Court will continue to affect — the movants' eligibility to seek re-election from their current districts, as well as their decisions on how and when to campaign and how and when to seek volunteer and voter support. Finally, the decisions rendered in this action will inevitably have an effect on the likelihood of success of the movants in elections to be held in 2012 and thereafter. In short, this case has thrown into some doubt who the respective movants' constituents will be for purposes of the 2012 elections, as well as their ability to continue to serve those constituents in the House beginning in 2013. These direct and substantial interests must be legally protected by the Court in this action.

C. The Proposed Intervenor-Defendants' Ability to Protect Their Interests Would Be Impaired or Impeded in Their Absence.

As to Rule 24(a)'s third requirement, the nature and urgency of redistricting litigation show that disposition of this matter in the movants' absence would impair or impede their ability to protect the interests discussed above. An interest is considered impaired under Rule 24(a) "when the decision of a legal question would, as a practical matter, foreclose the

rights of the proposed intervenor in a subsequent proceeding.” *Shea*, 19 F.3d at 347. The movants are current Members of the House who support Act 44’s duly-enacted redistricting plan, and the amended complaint takes aim at the viability of the movants’ wishes to continue to serve the citizens in their respective districts. The decision rendered in this action will necessarily have a substantial impact upon their interests. Given the inexorability of the election calendar that impels this Court to act with dispatch, if the movants’ voices as to the constitutionality and propriety of Act 44 are not heard in this action, they may well never be heard. Thus, if this motion to intervene is denied, their ability to protect their interests judicially will be foreclosed.

D. The Proposed Intervenor-Defendants’ Interests Are Not Adequately Represented by the Existing Parties to this Action.

Finally, while the claims asserted in this action have made clear that the movants’ interests are in jeopardy, the briefing of certain preliminary issues by the parties and the Court’s decision to deny the defendants’ motion to dismiss have highlighted the failure of any of the current parties to represent the movants’ interests adequately. Those seeking intervention as of right must only show “that the representation ‘may be’ inadequate and ‘the burden of making that showing should be treated as minimal.’” *Ligas*, 478 F.3d at 774 (quoting *Trbovich v. United Mine Works of America*, 404 U.S. 528, 538 n.10, 92 S. Ct. 630 (1972)).

This minimal burden is easily met here. None of the existing parties are incumbent Members of Congress; in fact, none appear to be incumbent legislators or prospective candidates for legislative office in either the federal or the state government. The plaintiffs are 15 individual Wisconsin citizens who allege that they fear negative effects from the adopted legislative and Congressional boundaries. The existing defendants are the six members of the Wisconsin Government Accountability Board, in their official capacities only, and the director and general counsel of the GAB. These defendants hold positions created by state law, were appointed members of the state’s election-supervising agency by the current or the previous Governor, and were confirmed by one of the houses of the Legislature. None of these existing

parties represents the stated, substantial interests of the movants: they are not concerned with which districts the movants will reside in at the time of the 2012 election, and they are not concerned with the effects of the present litigation on the viability or logistics of incumbent Congressional candidates' re-election campaigns.

Rather, each of the existing parties has interests significantly different from, or opposed to, the movants'. No one is better positioned than the movants to determine the adequacy of this representation. As courts and commentators have noted, "[t]here is good reason in most cases to suppose that the applicant is the best judge of the representation of his own interest and to be liberal in finding that one who is willing to bear the cost of separate representation may not be adequately represented by the existing parties." *Cooper Technologies, Co. v. Dudas*, 247 F.R.D. 510, 515 (E.D. Va. 2007) (quoting 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1908 (2d ed. 1986)). Here, the existing parties are simply interested in different things than the movants are interested in. They cannot be expected to pursue arguments protecting the movants' interests as vigorously as the movants themselves will pursue them, once they are made parties.

Indeed, the proceedings to date have focused almost exclusively on the state-legislative redistricting issues arising from Act 43, while virtually ignoring the Congressional redistricting issues under Act 44 that affect the movants' interests. This is unsurprising. The existing pleadings, as well as the briefing on the motions to dismiss, strongly suggest that the focus and passions of the existing parties are directed mostly at the redistricting of Assembly and Senate districts, with substantially less attention being given to the comparatively simple claims based upon the Congressional redistricting legislation.

Thus, it seems likely, based on the existing parties' positions to date, that the Congressional redistricting issues could be dragged along through protracted litigation without any party satisfactorily addressing the interests and concerns of the movants, which go to the core of their representation of Wisconsin citizens in Congress.

II. ALTERNATIVELY, THE COURT SHOULD ALLOW THE PROPOSED INTERVENOR-DEFENDANTS TO INTERVENE PERMISSIVELY UNDER RULE 24(b).

Even if the Court were to determine that the movants are not entitled to intervene as of right, they should be permitted to intervene permissively, under the terms of Rule 24(b)(1): “On timely motion, the court may permit anyone to intervene who: . . . (B) has a claim or defense that shares with the main action a common question of law or fact.” Like a motion under Rule 24(a), a Rule 24(b) motion must be timely made. However, the inquiry as a whole is simpler than under Rule 24(a)(2), and inquiry into “interest” and “impair or impede” requirements is not necessary. *Flying J*, 578 F.3d at 573. Instead, in considering whether to grant a motion for permissive intervention, courts look for something *similar* between the would-be intervenor and at least one existing party: “In the typical permissive-intervention case, a third party wants to join a lawsuit to advocate for the same outcome as one of the existing parties.” *Bond v. Utreras*, 585 F.3d 1061, 1070 (7th Cir. 2009) (citing *Horne v. Flores*, 129 S. Ct. 2579, 2591 (2009)).

A. The Motion to Intervene Is Timely.

For the reasons already discussed, this motion is timely.

B. The Proposed Intervenor-Defendants Seek to Advance Common Questions of Fact and Law.

While seeking to protect distinct interests unique to their positions as incumbent Members of Congress, the movants would advocate one or more of the same affirmative defenses advanced by the existing defendants in their Answer and Affirmative Defenses filed on November 4. As stated above, the movants would advocate for the constitutionality and validity of Act 44, the Congressional redistricting legislation passed by the Legislature. The movants’ proposed Answer-in-Intervention would, like the answer filed by the existing defendants, seek to

demonstrate the plaintiffs' failure to show any basis for a holding that Act 44 is unconstitutional. The interests of the movants differ significantly from those of the existing defendants, and they would advocate and stress different and additional arguments. Nevertheless, the underlying facts would be identical to those raised by the existing defendants, and the movants' legal theories are likely to be closely connected with those underlying the defendants' answer.

C. Permissive Intervention Would Not Cause Any Delay or Prejudice.

Granting permission to the movants to intervene under Rule 24(b) will not cause delay or prejudice to any existing party. The movants are fully aware that time is of the essence for the parties and the Court, and time's inexorable nature has the same effect upon them and their interests. This Court has only recently decided preliminary issues of ripeness, no discovery has been taken, and a schedule has only just been set. The movants are prepared to litigate in conformity with the existing schedule. Moreover, they are filing a single motion to intervene and intend to litigate as if they were a single intervenor, so that their involvement will not prove unwieldy. *City of Chicago v. Fed'l Emergency Mgmt. Agency*, 2011 U.S. App. LEXIS 20952, at *15 (granting intervention to six airlines who intended to act as single litigant). No delay whatsoever will befall any of the parties by reason of movants' involvement, nor will the parties suffer any prejudice to their rights.

Further, judicial economy considerations counsel in favor of granting the motion. Allowing intervention will assure that all interested parties are gathered in one action and that all issues will be properly and fully addressed. Both the Court and the public would benefit from the movants' involvement as to the issues arising from the Amended Complaint relating to Act 44. The movants do not seek to become involved in this action in any way with respect to Act 43.

CONCLUSION

Proposed Intervenor-Defendants Sensenbrenner, Petri, Ryan, Ribble, and Duffy respectfully request that the Court enter an order granting their motion to intervene and permitting them to file their proposed answer-in-intervention.

FOLEY & LARDNER LLP

Dated this 10th day of November, 2011.

s/ Thomas L. Shriner, Jr.

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Attorneys for Proposed Intervenor-
Defendants F. James Sensenbrenner, Jr.,
Thomas E. Petri, Paul D. Ryan, Jr., Reid J.
Ribble, and Sean P. Duffy

EXHIBIT 16

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF 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,
and CINDY BARBERA,

Plaintiffs,

v.

Members of the Wisconsin Government
Accountability Board, each only in his official
capacity: MICHAEL BRENNAN,
DAVID DEININGER, GERALD NICHOL,
THOMAS CANE, THOMAS BARLAND, and
TIMOTHY VOCKE, and
KEVIN KENNEDY, Director and General
Counsel for the Wisconsin Government
Accountability Board,

Defendants.

Case No. 11-CV-562-JPS

**SCHEDULING
AND DISCOVERY
ORDER**

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

The parties – having met and conferred, pursuant to Rule 26(f), Fed.
R. Civ. P., and in accordance with the Court's directive at the initial
scheduling conference on October 24, 2011 – have agreed, in lieu of a
discovery plan pursuant to Rule 26(f)(3), to the expedited scheduling and

discovery framework embodied in this order. This schedule reflects the state's anticipated enactment of a statute to conduct the partisan primary on Tuesday, August 14, 2012, requiring petition signatures for ballot access to be filed no later than June 1, 2012, and circulated no sooner than April 15, 2012. Based on that,

IT IS HEREBY ORDERED, pursuant to Rule 16(b), that the practice and procedure in this three-judge court, empaneled pursuant to 28 U.S.C. § 2284, shall be in accordance with the Federal Rules of Civil Procedure and the Rules of the Federal District Court for the Eastern District of Wisconsin, except as modified below:

1. Pleadings.

Defendants' Answer to the Amended Complaint shall be filed on or before Friday, **November 4, 2011**. The plaintiffs shall have ten business days from the receipt of the Answer to further amend their complaint, without leave of the Court, and the defendants shall have five business days from the receipt of any subsequent Amended Complaint to file an Amended Answer.

2. Discovery.

The parties shall serve initial disclosures pursuant to Rule 26(a)(1) on each other, simultaneously, on or before Wednesday, **November 16, 2011**.

Interrogatories, Requests to Admit and Requests for Production under Rules 33, 34 and 36 shall be served at any time after Wednesday, **November 16, 2011**, but no later than 25 days before the close of discovery provided below. Responses to Interrogatories and Requests to Admit and compliance with Requests for Production shall be served within 20 days after service of written discovery. Any motion to compel production of any materials or to

protect any materials subject to discovery shall be filed within five business days of the service of any discovery request or the receipt of any discovery response deemed by a party to be inadequate. The movant's brief shall be filed with the motion, any response brief within five business days of the receipt of the motion and brief, and replies within three business days of receipt of the responsive brief.

Discovery on any non-party may be served at any time pursuant to the Federal Rules of Civil Procedure.

Expert reports shall be exchanged, simultaneously, on or before Wednesday, **December 14, 2011**. Expert rebuttal reports shall be exchanged, simultaneously, no later than Friday, **January 13, 2012**. Any party wishing to depose another party's expert may do so between Tuesday, **January 17, 2012**, and Friday, **February 3, 2012**.

Depositions of parties or non-parties may be taken at any time on or before Monday, **February 6, 2012**.

All discovery shall be completed on or before Monday, **February 6, 2012**.

3. Service.

Electronic service through the Electronic Case Filing system shall be sufficient notice of case filings. However, courtesy copies of filings shall be provided, in hard copy form, to opposing counsel of record by 12:00 p.m. CST on the day after such filing.

4. Stipulated Facts.

The parties shall file a Stipulated Statement of Facts on or before Monday, **February 6, 2012**, which may be subsequently amended. Each

party shall file a Statement of Contested Facts and a Statement of Contested Issues of Law – and may file a supporting brief – on or before Monday, **February 13, 2012**, which may be subsequently amended.

5. Trial.

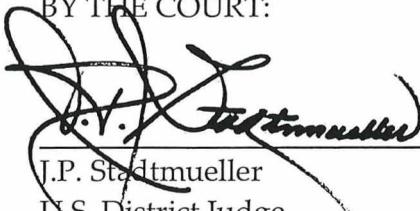
This matter shall be tried to the three-judge panel on a date to be set by the Court but commencing no later than Tuesday, **February 21, 2012**. The Court shall not entertain any alternative statewide redistricting plans at this initial trial. Rather, should there be a determination that the redistricting statute is invalid, the Court may schedule a separate hearing to determine the need for and substance of any appropriate judicial remedy or remedies.

6. Deadlines.

Any of the time limits established in this stipulated order may be amended by stipulation and order or, for cause shown, after notice and a hearing.

Dated at Milwaukee, Wisconsin, this 14th day of November, 2011.

BY THE COURT:



J.P. Stadtmueller
U.S. District Judge

EXHIBIT 17

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF 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,
and CINDY BARBERA,

Plaintiffs,

v.

Members of the Wisconsin Government
Accountability Board, each only in his official
capacity: MICHAEL BRENNAN, DAVID
DEININGER, GERALD NICHOL, THOMAS
CANE, THOMAS BARLAND, and
TIMOTHY VOCKE, and
KEVIN KENNEDY, Director and General
Counsel for the Wisconsin Government
Accountability Board,

Defendants.

Case No. 11-CV-562-
JPS-DPW-RMD

ORDER

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

On November 10, 2010, Wisconsin's incumbent Republican Members of the United States House of Representatives—James Sensenbrenner, Thomas Petri, Paul Ryan, Reid Ribble, and Sean Duffy—jointly filed a motion to intervene in this case. (Docket #32). They argue that they have a right to intervene, primarily because their re-election efforts will be affected by the

Court's decision on whether to uphold the redrawn legislative districts, which the plaintiffs challenge. (Br. in Supp. Mot. to Int., 4-5).

Before making a decision on the motion at hand, the Court requests that the current named parties supply the Court with short briefs on the issue, either consenting or objecting to the potential intervenors' motion. After those briefs have been submitted, the potential intervenors shall have the opportunity to reply. Given the need to expedite this case, the Court sets a clipped schedule for this briefing.

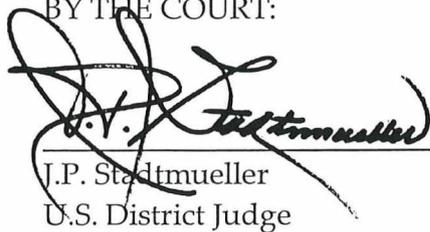
Accordingly,

IT IS ORDERED that the plaintiffs and the defendants file briefs, not to exceed five pages, responding to the motion to intervene; these briefs shall be filed no later than noon, on Thursday, **November 17, 2011**; and

IT IS FURTHER ORDERED that movants file a joint brief, not to exceed five pages, in reply to the response briefs of the current parties; this brief shall be filed no later than noon, on Friday, **November 18, 2011**. If movants do not wish to file a reply brief, they must provide notice to the Court by the deadline provided for submission of the reply brief.

Dated at Milwaukee, Wisconsin, this 15th day of November, 2011.

BY THE COURT:



J.P. Stadtmueller
U.S. District Judge

EXHIBIT 18

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, et. al.,

Plaintiffs,

vs.

Case No.: 11-C-562

MICHAEL BRENNAN, et. al.,

Defendants.

VOCES DE LA FRONTERA, INC., et. al.,

Plaintiffs,

vs.

Case No.: 11-C-1011

MICHAEL BRENNAN, et. al.,

Defendants.

**NOTICE OF MOTION AND MOTION TO CONSOLIDATE
CASES PURSUANT TO RULE 42(a), FRCP**

THE PLAINTIFFS IN CASE No. 11-C- 1011 HEREBY MOVE THE COURT, pursuant to Rule 42(a) of the Federal Rules of Civil Procedure and Civil L.R. 42.1 to consolidate the above captioned cases currently pending in the United States District Court for the Eastern District of Wisconsin.

The grounds for this Motion are that each of the foregoing cases have been filed seeking declaratory judgment and injunctive relief to redress violations of the voting rights of the Plaintiffs caused by the same legislative redistricting plan adopted by the Legislature of

Wisconsin on July 20, 2011, and signed by the Governor of Wisconsin on August 9, 2011. Both cases name the same seven Defendants who are charged under state law with the duty to administer the state's laws relating to elections. Furthermore, all of the claims in Case No. 11-C-1011 are identical to certain claims alleged in Case No. 11-C-562. Accordingly, the two cases involve substantial common questions of fact and law regarding the lawfulness of the redistricting plan adopted by the State of Wisconsin. Additionally, consolidation will result in substantial savings of time and effort as both cases involve important factual and legal issues that must be resolved by the fall legislative elections of 2012, which will commence with a primary election date of August 14, 2012. See e.g. *Star Insurance Co. v. Risk Marketing Group, Inc.*, 561 F.3d 656, 660 (7th Cir. 2009). Finally, Counsel for the Plaintiffs in Case No. 11-C-1011 has been authorized to represent to the Court that all other parties concur in the motion for consolidation. To facilitate this process, Counsel for the Defendants in both cases has filed an appearance, notwithstanding the fact that an Answer is not yet due. The Plaintiffs in Case No. 11-C-1011 are prepared to participate in the case in accordance with the scheduling Order entered on November 14, 2011. Thus, all parties agree that consolidation is appropriate under the circumstances of these cases and consolidation will not cause any inconvenience, delay, confusion, or prejudice to any party nor will it cause a delay in the current scheduling Order.

Dated at Milwaukee, Wisconsin, this 15th day of November, 2011.

LAW OFFICE OF PETER EARLE, LLC

/s/ Peter G. Earle

PETER G. EARLE

One of the Attorneys for the Plaintiffs
in Case No. 11-C-1011

WI State Bar No.: 1012176

839 North Jefferson Street, Suite 300
Milwaukee, WI 53202

(414) 276-1076

Re:

Voces de la Frontera, Inc., et al. v. Members of the Wisconsin Government Accountability Board, et al. Case No.: 11-C-1011 (Eastern District of Wisconsin) and
Alvin Baldus, et al. v. Members of the of the Wisconsin Government Accountability Board, et al.
Case No.: 11-C-562 (Eastern District of Wisconsin)

CERTIFICATE OF SERVICE BY E-FILING

The undersigned attorney of record in Case No. 11-C-1011 hereby certifies that on the 15th day of November, 2011, he electronically filed a copy of the above captioned **NOTICE OF MOTION AND MOTION TO CONSOLIDATE CASES PURSUANT TO RULE 42(a), FRCP** using the ECF System for the Eastern District of Wisconsin which will send notification of such filings to counsel of record in each case

s/Peter G. Earle

PETER G. EARLE
WI State Bar No.: 1012176

EXHIBIT 19

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF 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, and CINDY
BARBERA,

Plaintiffs,

Civil Action
File No. 11-CV-562

v.

Members of the Wisconsin Government
Accountability Board, each only in his official
capacity: MICHAEL BRENNAN, DAVID
DEININGER, GERALD NICHOL, THOMAS
CANE, THOMAS BARLAND, TIMOTHY
VOCKE, and KEVIN KENNEDY, Director and
General Counsel for the Wisconsin Government
Accountability Board,

Defendants.

Three-judge panel
28 U.S.C. § 2284

**PLAINTIFFS' BRIEF IN RESPONSE TO
ELECTED OFFICIALS' MOTION TO INTERVENE**

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November 17, 2011

The amended complaint challenges the constitutionality of two state laws establishing the boundaries of Wisconsin's legislative (Act 43) and congressional (Act 44) districts for 2012 and beyond. That complaint already has withstood a procedural and substantive challenge from defendants, members of the state agency that administers its elections. Those defendants, sued only in their official capacity, have been represented from the outset by the Wisconsin Department of Justice. Appropriately so—state law, state boundaries, state agency.

Five Congressmen now seek to intervene to help the state defend the state's law based on their "particular interests" as Congressmen. Their motion no doubt is the first in what may well be a long line of intervention motions—on one "side" or the other—by political candidates and parties, interest groups, and other organizations, each of which has an equal stake in the outcome because this litigation, like redistricting itself, literally affects everyone in the state. With its decision on this motion, the Court will either implicitly encourage wholesale intervention or draw the line where precedent and practicality require. Plaintiffs oppose this motion, and they will oppose any subsequent motion to intervene by any prospective party for any reason.¹

ARGUMENT

The movants cannot establish their right to intervene under Rule 24(a)(2), nor can they give this Court a credible reason they should be allowed to intervene under Rule 24(b).

I. THE MOVANTS CANNOT ESTABLISH A RIGHT TO INTERVENE.

To intervene as of right, a party must demonstrate: (1) timeliness, (2) a direct, significant, and legally protectable interest relating to the action, (3) potential impairment of that interest if the action is resolved without them, and (4) lack of adequate representation by existing parties. *Reid L. v. Ill. State Bd. of Educ.*, 289 F.3d 1009, 1017 (7th Cir. 2002); *Reich v.*

¹ The three incumbent Congresspersons from the other party no doubt will file a motion to intervene. Plaintiffs oppose that as well. They have no objection to the consolidation with this case of the separate action filed by Voces de la Frontera, Inc. (No. 11-CV-1011).

ABC/York-Estes Corp., 64 F.3d 316, 322 (7th Cir. 1995). The movants' failure to show any one element requires that the motion be denied. *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985).

Plaintiffs stipulate that the motion is timely. They stipulate as well that the movants have an interest—no less and no more an interest, however, than any other citizen. There is no property right in a congressional seat, nor any constitutionally-protected interest in political advantage or success. In addition, the movants cannot demonstrate that the state, defending its own laws, will not adequately represent their interest, however they characterize it.

The Congressmen assert a “legally protectable” interest in their “prospects for re-election” and “their campaigning plans and needs.” Mov. Br. 5. In other words, the movants appear as representatives not of the people but of themselves—their re-election “prospects,” their “plans,” their “needs.” The movants' interest in preserving their seats, although direct and (to them) uniquely significant, is not legally protectable or capable of being impaired.

“The existence of ‘impairment’ depends on whether the decision of a legal question involved in the action would as a practical matter foreclose rights of the proposed intervenors in a subsequent proceeding.” *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 204 (7th Cir. 1982). If the Congressmen had a vested property right in their seats, that interest might be impaired by this litigation. Indeed, the amended complaint is cast as a threat to “the viability of the movants' wishes to continue to serve the citizens in their respective districts.” Mov. Br. 7. But susceptibility to challenge in a political office, inherent in democracy, is not impairment for intervention purposes. The resolution of this litigation will not foreclose the movants' rights, because incumbents have no right to their seats—at least no more than any Wisconsin resident age 25 or older and a citizen for at least seven years. U.S. Const. art. I, § 2.

Even if the movants articulated how their interest *as voters* could be impaired, the motion still should fail. The movants have to show “potential impairment of that interest *if the action is*

resolved without the intervenor.” *Reid L.*, 289 F.3d at 1017 (emphasis added). By their own admission, the only value added by the movants to this case involves their reelection prospects.

Intervention of right also requires that the movants show inadequate representation by the existing parties. Even if that burden is “minimal,” *Meridian Homes*, 683 F.2d at 205, the Congressmen cannot meet it. When defendants and proposed intervenors “have the same ultimate objective,” to show inadequate representation the intervenors “must demonstrate . . . that some conflict exists.” *Id.* Here, there is no conflict. The movants and defendants share the same goal—to preserve the new district boundaries. “[T]he interests of the original party and of the intervenor are identical,” and the adequacy of representation “is presumed.” *Solid Waste Agency. v. United States Army Corps of Eng’rs*, 101 F.3d 503, 508 (7th Cir. 1996).

The Congressmen do not concede, of course, that their interests coincide with those of defendants. Rather, they argue, the Court’s very “decision to deny the defendants’ motion to dismiss [has] highlighted the failure of any of the current parties to represent the movants’ interests adequately.” Mov. Br. 7. Hardly; if an adverse result said anything about adequacy of representation, half of the bar would be inadequate in any given case. The named parties, according to the movants, “are not concerned with the effects of the present litigation on the viability or logistics of incumbent Congressional candidates’ re-election campaigns.” *Id.* at 8. Nor should they be.

In addition, the movants fail to acknowledge the fact that defendants are represented by the State of Wisconsin and its Department of Justice. The Attorney General has a constitutional and statutory duty to defend the statutes. *See Wis. Stat. § 165.25(1)* (2009-10); *State Pub. Intervenor v. Wis. Dep’t of Natural Res.*, 115 Wis. 2d 28, 37, 339 N.W.2d 324 (1983). That alone makes intervention both unwarranted legally and unwise practically. Indeed, it forecloses the motion. The Attorney General’s defense carries a presumption of adequacy. “Adequacy can be presumed when the party on whose behalf the applicant seeks intervention is a governmental

body or officer charged by law with representing the interests of the proposed intervenor.” *Keith*, 764 F.2d at 1270. Notwithstanding the “failure” of the state’s motion to dismiss, the Attorney General hardly provides inadequate representation. Whether or not the Congressmen shared the same political affiliation as the Attorney General, whether or not the Congressmen helped elect him, he has a statutory and constitutional duty to represent them—and every other citizen—adequately. Since “there [i]s nothing to indicate that the attorney general [i]s planning to throw the case,” the motion should “properly . . . be[] denied on the ground that the state’s attorney general [i]s defending the statute and that adding another defendant would simply complicate the litigation.” *Flying J., Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009). Precisely.

II. PERMISSIVE INTERVENTION SHOULD BE DENIED.

Permissive intervention under Rule 24(b) is “entirely discretionary” except for two requirements: “(1) a common question of law or fact, and (2) independent jurisdiction.” *Security Ins. Co. v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995). Both elements may be satisfied here, but they would be for virtually any intervenor. Although leave to intervene can be granted, it should not be. “When intervention of right is denied for the proposed intervenor’s failure to overcome the presumption of adequate representation by the government, the case for permissive intervention disappears.” *Menominee Indian Tribe v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996). Rule 24(b) is “just about economy in litigation.” *City of Chicago v. FEMA*, No. 10-3544, 2011 U.S. App. LEXIS 20952, at *18 (7th Cir. Oct. 17, 2011). Denying the motion will not spawn further litigation, but granting it will open wide the doors for prospective intervenors; economy in litigation is preserved only by denial.

This motion carries with it no limiting principle. Only eight citizens (the Congressmen and their three Democratic counterparts), in the movants’ view, share their “particular interest” in “how and when to campaign and how and when to seek volunteer and voter support.” Mov.

Br. 6. Not so. Any person thinking about challenging these eight incumbents has the same interest. And the interests are not limited to federal campaigns. All state elected officials, and any person thinking of challenging a state elected official—indeed, any person considering voting—have the same interests. Any political party, political organization, interest group, organization or—in the wake of *Citizens United*—corporation has the same interest.

It is no solace to say that these movants are prepared “to litigate as if they were a single intervenor.” Mov. Br. 10. Where does the Court draw the line? These five yes but the three other Congressmen no? The Republican Party yes but the Democratic or Independent Party no? The Sierra Club yes but the National Rifle Association no? The interests here are far broader and ecumenical than the “logistics of incumbent Congressional candidates’ re-election campaigns.” *Id.* at 8. To argue otherwise misses the point of *Baker v. Carr*, 369 U.S. 186 (1962), and the long subsequent line of “one person-one vote” decisions.²

CONCLUSION

Intervention is designed to accommodate “two competing policies”: “resolving all related issues in one lawsuit” and “keeping a single lawsuit from becoming unnecessarily complex, unwieldy or prolonged.” *Shea v. Angulo*, 19 F.3d 343, 349 (7th Cir. 1994). Here these “competing policies’ are not in competition at all.” *Id.* This Court, by denying the motion, will allow all issues to be resolved in a single, streamlined litigation. The motion should be denied.

Dated: November 17, 2011.

s/ Rebecca Kathryn Mason

Rebecca Kathryn Mason
State Bar No. 1055500

7104233_5

² The Congressmen, in a footnote, recall that ten years ago three of them successfully moved to intervene in the redistricting case before that three-judge panel. Mov. Br. 2 n.1. They did. The footnote does not recall, however, that there was no statute to defend there. See *Arrington v. Elections Board*, 173 F. Supp. 2d 856, 858 (E.D. Wis. 2001). The state had failed to adopt legislation, leaving the responsibility to the court. While it may have made sense to permit intervention then, giving the court a range of proposals to consider as a remedy, there is no similar need now—at least not yet. Plaintiffs do not oppose *amicus* status for the Congressmen or their ability to resubmit their motion should it be necessary for the Court to consider competing redistricting plans.