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.

INVOLUNTARY PETITIONERS' APPENDIX – VOLUME II

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7190432_1

EXHIBIT 20

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CINDY BARBERA, CARLENE BECHEN, ELVIRA BUMPUS, RONALD BIENSDEIL,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-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, and TIMOTHY VOCKE and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants.

MOTION TO INTERVENE OF TAMMY BALDWIN, GWENDOLYNNE MOORE AND RONALD KIND

Tammy Baldwin, Ronald Kind and Gwendolynne Moore (hereinafter collectively "Proposed Intervenor-Plaintiffs"), by their attorneys, Lawton & Cates S.C., hereby move the Court for leave to intervene as plaintiffs in the instant action pursuant to Federal Rules of Civil Procedure 24(a) and to file the accompanying [Proposed] Complaint-in-Intervention. As support for their motions, the Proposed Intervenor-Plaintiffs state:

SUPPORT FOR MOTION

1. Proposed Intervenor-Plaintiffs are entitled to intervene in the instant action as a matter of right as parties claiming an interest. Fed. R. Civ. P. 24 (a)(1). Proposed Intervenor-Plaintiffs are all adult citizens of the State of Wisconsin and are all of Wisconsin's incumbent Democratic Members of the United States House of Representatives, representing three of Wisconsin's Congressional districts. As a result of their elected positions as Representatives who are running or may run for re-election to those positions in 2012, the Proposed Intervenor-Plaintiffs have a direct interest in the proper redistricting of Wisconsin's Congressional districts.

2. On November 10, 2011, the Wisconsin's Republican Members of the House of Representatives, F. James Sensenbrenner, Jr., Thomas E. Petri, Paul D. Ryan, Jr., Reid J. Ribble and Sean P. Duffy, (hereinafter collectively, "Republicans") timely filed a Motion to Intervene and Proposed Answer-in-Intervention, supporting the constitutionality of Act 44 without taking a position as to the claims regarding Act 43.

3. The Republicans' motion and accompanying brief describe why their intervention should be granted as a matter of right pursuant to Federal Rule of Civil Procedure 24 (a) and, alternatively, why permissive intervention is proper under Federal Rule of Civil Procedure 24 (b). The Republicans base their motion on their positions as incumbent Members of the United States House of Representatives. The Proposed-Intervenor Plaintiffs do not wish to use the Court's time to restate entirely the arguments made by the Proposed Intervenor-Defendants in their supporting brief, stating why incumbent Members of the House of Representatives should be granted leave to intervene, and will therefore briefly restate the arguments here.

2. This motion is timely and properly brought as the Proposed Intervenor-Plaintiffs have an interest in the matter which is the subject of this litigation, the disposition of this action

may impair or impede their interest, and because none of the current parties or parties with pending motions to intervene adequately represents the interest of the Proposed Intervenor-Plaintiffs. The Proposed Intervenor-Plaintiffs, like the Proposed Intervenor-Defendants, assert interests only arising out of and pertaining to the Congressional redistricting legislation of 2011 Wisconsin Act 44. Again, like the Proposed Intervenor-Defendants, and as reflected in the [Proposed] Intervenor-Complaint-in-Intervention, the Proposed Intervenor-Plaintiffs claim no interests as to issues arising out of the state legislative-redistricting legislation, 2011 Wisconsin Act 43.

3. Given the pending motion by the Proposed Intervenor-Defendants, intervention by the Proposed Intervenor-Plaintiffs will permit interested parties to participate in one action concerning the redistricting of Wisconsin's Congressional districts and the legality thereof. Any potential remedy in this action that affects the Republican Congressional districts of the Proposed Intervenor-Defendants will inevitably and necessarily affect the Congressional districts of the Proposed Intervenor-Plaintiffs. This will avoid the risk of inconsistent or incompatible results from multiple actions.

4. As an alternative, the Proposed Intervenor-Plaintiffs qualify for permissive intervention. Fed. R. Civ. P. 24 (b)(1)(B). There exists a commonality of issues between this issue and rights of the Proposed Intervenor-Plaintiffs related to redistricting. Proposed Intervenor-Plaintiffs seek to advance one or more of the same legal positions challenging the constitutionality and legality of Act 44 as those advanced by the current plaintiffs.

5. Permissive intervention by the Proposed Intervenor-Plaintiffs will not unduly delay any proceeding nor prejudice any current parties or parties with currently pending motions to intervene because the Proposed Intervenor-Plaintiffs seek to litigate facts and issues that have

already been raised by the parties in this action and because Proposed Intervenor-Plaintiffs are prepared to litigate in accordance with any and all scheduling orders that have been or will be issued by this Court.

6. Furthermore, Proposed Intervenor-Plaintiffs assert that their intervention is only necessary and proper if this Court grants the motion of the Proposed Intervenor-Defendants and file their Proposed Answer-in-Intervention. The Proposed Intervenor-Plaintiffs and Proposed Intervenor-Defendants are all incumbent Members of the United States House or Representatives who claim an interest in the disposition of the issues raised in this action by virtue of their positions and the fact they are running or might run for re-election in 2012.

7. While the Proposed Intervenor-Plaintiffs, the Democrats, agree with the allegations of the Plaintiffs in this action and assert that 2011 Wisconsin Act 44 is unconstitutional, the Proposed Intervenor-Defendants, the Republicans, seek to uphold the law. The Proposed Intervenor-Plaintiffs make this motion and seek leave to intervene only because equity demands that, should the Proposed Intervenor-Defendants, the Republicans, be permitted to intervene to support the legislation, the Democrats must be given the same opportunity to oppose the legislation. Both sides are claiming the same interest in the subject matter, albeit with opposing goals. Should one party be permitted to intervene, both should be. Conversely, should this Court deny the motion of the Proposed Intervenor-Defendants, the Proposed Intervenor-Plaintiffs reserve the right to withdraw this motion.

RELEF REQUESTED

The Proposed Intervenor-Plaintiffs respectfully request that this Court enter an order granting their motion to intervene and to file the Proposed Complaint-in-Intervention.

Dated this 17th day of November, 2011

LAWTON & CATES, S.C.

/s/ P. Scott Hassett

P. Scott Hassett, SBN 1013921
Daniel S. Lenz, SBN 1082058
10 E. Doty St., Suite 400
P. O. Box 2965
Madison, WI 53701-2965
(608) 282-6200
(608) 282-6252 facsimile

Attorneys for Proposed Intervenor-Plaintiffs,
Tammy Baldwin, Ronald Kind and
Gwendolynne Moore

EXHIBIT 21

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, et al.,

Plaintiffs,

vs.

Civil Action No. 11-CV-562

MICHAEL BRENNAN, et al.,

Defendants.

REPLY BRIEF IN SUPPORT OF MOTION TO INTERVENE OF F. JAMES SENSENBRENNER, JR., ET AL.

FOLEY & LARDNER LLP
Thomas L. Shriner, Jr.
Wisconsin Bar No. 1015208
Kellen C. Kasper
Wisconsin Bar No. 1081365
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202-5306
414.297.5601 (TLS)
414.297.5783 (KCK)
414.297.4900 (facsimile)

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

The plaintiffs' opposition brief argues that the Republican House Members ("movants") do not have any right to intervene as defendants in this action, and that the Court should not, in its discretion, permit them to intervene. The arguments fall short on each score. The plaintiffs fail to rebut the movants' showing that their interests are direct, threatened by this litigation, and not adequately represented by existing parties.

I. THE MOVANTS HAVE ASSERTED INTERESTS THAT ARE ADEQUATE AND SPECIFIC TO THEM.

The plaintiffs argue that the movants, despite being incumbent members of the House, have "no less and no more an interest . . . than any other citizen." (Pls.' Br. 3.) The plaintiffs step back from this implausible statement in the rest of their brief, allowing that the "movants' interest . . . , although direct and (to them) uniquely significant, is not legally protectable or capable of being impaired." (*Id.*) The plaintiffs actually argue only that the movants lack an interest of a type they have never claimed — a property right. But Rule 24(a)(2) recognizes and protects many other types of interest, "for the rule does not require that the intervenor prove a property right, whether in the constitutional or any other sense." *United States v. City of Chicago*, 870 F.2d 1256, 1260 (7th Cir. 1989) (overturning denial of intervention as of right where promotion exam "created an expectation sufficient to qualify under Rule 24(a)(2)"). Indeed, the plaintiffs themselves have not asserted and could not establish that they have a property interest at stake. Simply, the movants' interests are not only "direct and . . . uniquely significant," but as legally protectable and as at risk of impairment as any can be in redistricting cases.

The movants' interests are just as consequential as they were when the incumbent Republican members of the House (including three of the current movants) successfully intervened as of right in 2002. The plaintiffs try to distinguish that litigation

from this by referring to the existence now and the non-existence then of enacted districting legislation (Pls.' Br. 5, n.2), but that is truly a distinction without a difference. The interests that were sufficient to intervene as of right in 2002 to advocate for a particular judicial plan are sufficient now to defend a valid statutory plan.

II. THE MOVANTS ARE NOT ADEQUATELY REPRESENTED.

As discussed in the movants' first brief and their proposed answer, the existing parties do not adequately represent the movants' interests. The complaint discusses at great length and in some detail its claims regarding the perceived harms of Act 43. (*See* Compl. 13-20, 22-28.) But, as to Act 44, the complaint is paper-thin and comparatively brief. (*Id.* at 20-24, 27-28.) Further, under the rationales of both the plurality opinion of Justice Scalia and the concurring opinion of Justice Kennedy in *Vieth v. Jubelirer*, 541 U.S. 267, 271, 306 (2004), no judicially manageable standards could exist for any claim asserted as to Act 44 (a position that the movants are eager to demonstrate). Yet, in the five months since this litigation began, no serious attention has been focused on these weak Act 44 claims. The parties have, rather, devoted their attention (and the Court's) almost entirely to Act 43 issues.

Nor does the involvement of the Attorney General in representing the defendants "foreclose" the motion to intervene, as the plaintiffs suggest. (Pls.' Br. 3.) At most, this may create a presumption of adequacy if identical interests are at stake. *Utah Assoc. of Counties v. Clinton*, 255 F.3d 1246, 1255 (10th Cir. 2001) (finding that intervenors met "minimal burden" of showing inadequacy where the "public interest the government is obligated to represent may differ from the would-be intervenor's particular interest"). The movants have met their burden of rebutting any possible presumption.

The plaintiffs' brief attempts to paint the movants' assertion on this point as stemming solely from the Court's denial of the motion to dismiss, a mundane "adverse result," in the plaintiffs' words. (Pls.' Br. 3.) The movants' first brief did not rest on the bare result of the Court's order of October 21, but on the content and focus of the briefing in advance of that decision, and the resulting focus of the decision's discussion itself. To repeat, the movants state:

> 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.

(Br. in Supp. of Mot. to Intervene 8.) The movants are, naturally, especially well-positioned to notice this deficiency and act upon it. Given the expedited nature of this litigation, they do not have time to wait and see whether the existing parties will act in greater accord with the movants' interests in the future, nor to wait to see whether the defendants will at some point "throw the case," as the plaintiffs seem to suggest they should. (Pls.' Br. 4.) To be clear, the movants have never suggested that the defense will be "thrown," but that is hardly the test of adequacy of existing representation. The interests of the defendants and the movants are not identical, the representation of movants' interests has been neither vigorous nor effective, and time is short.

III. NO FLOOD OF EQUALLY WORTHY LITIGANTS EXISTS; THUS, ALTERNATIVELY, THE COURT SHOULD GRANT PERMISSIVE INTERVENTION.

Besides having the right to intervene for the explained reasons, the movants should, alternatively, be permitted to intervene under Rule 24(b). Not only do the

movants meet the comparatively simple requirements of that provision, but their involvement will serve to sharpen the Act 44 issues before the Court, permitting a timely resolution, as required both by their interests and the election calendar.

The heart of the plaintiffs' argument seems to be their fear of an endless stream of other intervenors. (Pls.' Br. 1 (stating the "motion no doubt is the first in what may well be a long line of intervention motions").) This is not much of an argument, certainly not where the only proposed intervenors to date are these moving Republican House Members themselves – and the remaining three Wisconsin members of the House who filed their intervention motion on November 17. The argument, further, fails to give either the Court or the movants much credit for good sense.

Significantly, the possibility of additional intervention motions — whether or not meritorious — is not a criterion to be considered in assessing entitlement to intervene under either subsection of Rule 24. Rather, the right way to deal with "too many" parties in a case is by using the Court's ample Rule 16 powers to manage the case, particularly the broad authority granted under Rule 16(c)(2)(L)-(P). There is, indeed, no reason why the present movants would not work with the existing parties to achieve agreement on such measures, without the need for the Court even to invoke those powers. The current movants have every bit as much incentive as existing parties to stipulate to matters that need not be proved, to avoid duplication among the defendants with respect to arguing legal points, and so forth.

The plaintiffs portray the pool of potential intervenors as virtually limitless. Putting aside the fact that such as-yet-unidentified would-be intervenors would likely not have a sufficiently direct interest to qualify them to intervene of right, as the

movants here do, it is a particular stretch to advance the argument that the plaintiffs make in the context of discussing permissive intervention.

Likewise, it is very odd that the plaintiffs, whose "interest" in this case arises only from their status as voters who have designated themselves to bring this challenge, would object to the involvement of officeholders who have established the seriousness of their interest in the subject matter by offering themselves for election, in many cases repeatedly, and who intend to do so again next year. The movants do not have and have never claimed a property interest in continuing in their offices, but they have a real and substantial interest in upholding the current law, which allows them and any who might choose to contest the seats in the House with them to begin to put together campaigns for election, free of the uncertainty that the plaintiffs' challenge has created.

Beyond showing that the movants' position surely shares common questions of law and fact with existing defenses of Act 44 for Rule 24(b) purposes, the movants' proven electoral histories, and their commitment of resources here, evince a special interest in resolving the plaintiffs' challenge efficiently. That is, the continued pendency of this litigation – much of the complication of which comes from the challenge to the separate Act 43 – is directly contrary to the movants' interest in resolving Act 44 issues with dispatch. Their ability to defend their particular interests will surely help, rather than hinder, this Court in executing its duties.

Dated this 18th day of November, 2011.

s/ Thomas L. Shriner, Jr.
Thomas L. Shriner, Jr.
Wisconsin Bar No. 1015208

EXHIBIT 22

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CINDY BARBERA, CARLENE BECHEN, RONALD BIENDSEI, ELVIRA BUMPUS, LESLIE W. DAVIS III, BRETT ECKSTEIN, RICHARD KRESBACH, ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON, GEORGIA ROGERS, 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 TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants.

Civil Action
File No. 11-cv-562

Three-judge panel
28 U.S.C. § 2284

PLAINTIFFS' MOTION TO ADD PLAINTIFFS AND AMEND THE CAPTION

Plaintiffs, by and through their attorneys, hereby move the Court pursuant to Fed. R. Civ. P. 15(a)(1)(B) and the Court's Scheduling and Discovery Order, to add eight named-plaintiffs listed below to the second amended complaint, and amend the caption of the second amended complaint to include the eight named-plaintiffs and correct two original named-plaintiffs' names.

In support of their motion, plaintiffs state as follows:

1. Plaintiffs are filing a timely second amended complaint pursuant to Fed. R. Civ. P. 15(a)(1)(B) and the Court's Scheduling and Discovery Order.

2. The second amended complaint reflects the addition of eight-named plaintiffs, including:

a. Ron Boone, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the Village of Twin Lakes, Kenosha County, Wisconsin;

b. Vera Boone, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the Village of Twin Lakes, Kenosha County, Wisconsin;

c. Evanjelina Cleereman, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the City of Milwaukee, Milwaukee County, Wisconsin;

d. Sheila Cochran, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the City of Milwaukee, Milwaukee County, Wisconsin;

e. Maxine Hough, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the Town of East Troy, Walworth County, Wisconsin;

f. Clarence Johnson, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the City of Milwaukee, Milwaukee County, Wisconsin;

g. Richard Lange, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of South Range, Douglas County, Wisconsin; and

h. Gladys Manzanet, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the City of Milwaukee, Milwaukee County, Wisconsin.

3. The names of two original named-plaintiffs, Ronald Biendei and Georgia Rogers, should be changed to Ronald Biendseil and Gloria Rogers.

4. The caption in this action, as reflected on the second amended complaint, should be amended to read as follows:

ALVIN BALDUS, CINDY BARBERA, CARLENE BECHEN, RONALD BIENDSEIL, RON BOONE, VERA BOONE, ELVIRA BUMPUS, EVANJELINA CLEEREMAN, SHEILA COCHRAN, LESLIE W. DAVIS III, BRETT ECKSTEIN, MAXINE HOUGH, CLARENCE JOHNSON, RICHARD KRESBACH, RICHARD LANGE, GLADYS MANZANET, ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON, GLORIA ROGERS, 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 TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants.

For the foregoing reasons, plaintiffs respectfully request that the Court grant plaintiffs' Motion to Add Plaintiffs and Amend the Caption.

Dated: November 18, 2011.

GODFREY & KAHN, S.C.

By: *s/ Rebecca Kathryn Mason*

Rebecca Kathryn Mason
State Bar No. 1055500
Wendy K. Arends*
One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53701-2719
608-257-3911
rmason@gklaw.com

Attorneys for Plaintiffs

**Admission to the United States District Court for the Eastern District of Wisconsin is pending.*

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EXHIBIT 23

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, 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, and CINDY BARBERA,

Plaintiffs,

TAMMY BALDWIN, GWENDOLYNNE MOORE, and RONALD KIND,

Intervenor-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,

F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI, PAUL D. RYAN, JR., REID J. RIBBLE, and SEAN P. DUFFY,

Intervenor-Defendants.

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

ORDER

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

By its November 15, 2011 order (Docket #36), the Court requested that the original parties to this case file briefs responding to the intervenor-defendants' motion to intervene (Docket #32). Shortly thereafter, Wisconsin's incumbent Democratic Congress Members filed a motion to intervene as intervenor-plaintiffs. (Docket #44). The plaintiffs filed a brief opposing the intervention of the Republican Congress Members, and also indicating that they would oppose the intervention of any additional parties, including that of the Democratic Congress Members. (Docket #41). The defendants, on the other hand, supported the intervention of the Republican Congress Members, but have not had an opportunity to respond to the Democratic Congress Members' motion to intervene. The Court does not believe that any such response is necessary, though, as both parties' Congress Members are identically situated as incumbents, differing only in their support for the defendants or plaintiffs. Thus, the Court will make its decision on both sets of intervenors' motions on the briefs that have been submitted to the Court. Ultimately, the Court will grant both intervening parties' motions, allowing them to intervene in this case.[1]

Fed. R. Civ. P. 24(a)(2) allows a party to intervene as a matter of right if the applicant can demonstrate that: "(1) the application is timely; (2) the applicant has an 'interest' in the property or transaction which is the subject of the action; (3) disposition of the action as a practical matter may impede or impair the applicant's ability to protect that interest; and (4) no existing party adequately represents the applicant's interest." *Security Ins. Co. of*

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[1]Given the similarity of both intervening parties' situations and arguments in favor of intervention, unless the context requires otherwise, the Court will address both parties jointly simply as the "intervenors." The Court's discussion of the law and its decision apply equally to both intervenors' motions.

Hartford v. Schipporeit, 69 F.3d 1377, 1380 (7th Cir. 1995) (internal citations omitted); *see also Ligas v. Maram*, 478 F.3d 771, 773 (7th Cir. 2007). Even if a party is unable to intervene as a matter of right, though, the Court may still permit that party to intervene if the intervening party "has a claim or defense that shares with the main action a common question of law or fact," and files a timely motion to intervene. Fed. R. Civ. P. 24(b). Typically, this standard is met if the motion is filed timely and the intervening party is advocating "for the same outcome as one of the existing parties"—a much lower "interest" standard than that required to intervene as a matter of right. *Bond v. Utreras*, 585 F.3d 1061, 1070 (7th Cir. 2009) (citing *Horne v. Flores*, 129 S. Ct. 2579, 2591 (2009)).

The plaintiffs argue that the intervenors cannot intervene as a matter of right. (Pl.'s Resp. Mot. Int. 1–4). Essentially, the plaintiffs argue that the intervenors do not have an adequate interest to establish a right to intervene. (Pl.'s Resp. Mot. Int. 2). Plaintiffs make the obvious point that the intervenors do not have a right to maintain their seat, but are rather similarly situated to all other Wisconsin residents who would be eligible to run for a congressional seat. (Pl.'s Resp. Mot. Int. 2).

Thus, while the Court believes that the intervenors have come very near to establishing their ability to intervene as a matter of right, by satisfying the remaining three factors of the analysis, the Court is ultimately unsure that the intervenors have satisfied the interest requirement. As such, the Court will not grant their motion to intervene as a matter of right.

Nonetheless, the Court exercises its discretion and will grant the intervenors' motion to permissively intervene. As discussed above, the Court may permit parties to intervene where their motion is timely and they have

demonstrated some alignment of interest with another party in the outcome of the case. Fed. R. Civ. P. 24(b). The plaintiffs have stipulated that the intervenors' motion is timely. (Pl.'s Resp. Mot. Int. 2).

Thus, the only question remaining is whether the intervenors have demonstrated an interest that satisfies the lower Rule 24(b) requirements. *Bond*, 585 F.3d at 1070. The Court finds that each set of intervenors has such an interest. While, in the eyes of the law, the intervenors may have no greater interest than the average citizen-of-age in the outcome of this case, as a matter of logic, the intervenors are much more likely to run for congressional election and thus have a substantial interest in establishing the boundaries of their congressional districts. In the case of the Republican intervenors, that interest is aligned with the interest of the original defendants in the outcome of this case, while the interest of the Democrat intervenors is aligned with that of the original plaintiffs. In addition to their similar interests, though, the Court also notes that both sets of intervenors have an additional interest in focusing arguments on the issues relating to Act 44, which they do not believe the original defendants have adequately addressed in their filings to date. The Court finds that these interests are strong enough to permit intervention.

The plaintiffs argue that the Court should not permit that intervention, though, because it will open the floodgates and enable many other parties to intervene; the Court does not believe that problem weighs against permitting intervention in this instance. If additional parties move to intervene, their arguments would be subject to the same scrutiny faced by the intervenors: the need to establish an adequate interest. In addition, depending on when they file and the nature of their interests, any additional proposed

intervenors may face objections on the grounds of timeliness and the adequacy of representation of those interests by the existing parties and intervenors. Moreover, such hypothetical intervenors may also find themselves unable to intervene as a matter of right, and would, instead, be left to request to intervene permissively. At the same time, given the Court's broad discretion over whether to grant such motions, the Court will not be *required* to permit intervention by those additional parties. *See, e.g., Perry v. Schwarzenegger*, 630 F.3d 898, 903 (9th Cir. 2011), *City of Herriman v. Bell*, 590 F.3d 1176, 1184 (10th Cir. 2010), *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 343–46 (6th Cir. 2007), *South Dakota ex rel. Barnett v. United States Dep't of Interior*, 317 F.3d 783, 787–88 (8th Cir. 2003).

Exercising that discretion, the Court will adequately be able to sort out potential intervenors, allowing some to intervene and requiring that others participate only as *amicus curiae*. In fact, in the prior redistricting case, *Arrington v. Elections Board*, the court allowed Wisconsin's Congress Members and several state representatives to intervene, but required that interest groups such as the African-American Coalition for Empowerment and the Wisconsin Builders Association participate only as *amicus curiae*. (*See, e.g.*, Case No. 01-CV-0121, Docket #113, #194). As the *Arrington* court's decision was ultimately successful in allowing interested parties to participate, while still controlling the tide of potential intervenors, the Court will follow that example.

Embarking on a similar course, the Court exercises its discretion and will grant the intervenors' motions to intervene permissively. Because the Court has already issued a scheduling order setting this case for trial, it

expects the intervenors (and any future intervening parties) to comply with that order (Docket #35).

Accordingly,

IT IS ORDERED that the intervenor-defendants' motion to intervene (Docket #32) be and the same is hereby **GRANTED**;

IT IS FURTHER ORDERED that the intervenor-plaintiffs' motion to intervene (Docket #44) be and the same is hereby **GRANTED**.

Dated at Milwaukee, Wisconsin, this 21st day of November, 2011.

BY THE COURT:

J.P. Stadtmueller
U.S. District Judge

EXHIBIT 24

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CINDY BARBERA, CARLENE BECHEN, RONALD BIENDSEIL, RON BOONE, VERA BOONE, ELVIRA BUMPUS, EVANJELINA CLEEREMAN, SHEILA COCHRAN, LESLIE W. DAVIS III, BRETT ECKSTEIN, MAXINE HOUGH, CLARENCE JOHNSON, RICHARD KRESBACH, RICHARD LANGE, GLADYS MANZANET, ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON, GLORIA ROGERS, JEANNE SANCHEZ-BELL, CECELIA SCHLIEPP, TRAVIS THYSSEN,[1]

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.

Civil Action
File No. 11-CV-562

Three-judge panel
28 U.S.C. § 2284

PLAINTIFFS' NOTICE OF MOTION AND MOTION TO COMPEL DISCLOSURE
Rule 37(a)(3)(A), Fed. R. Civ. P.

NOTICE OF MOTION AND MOTION

TO: Assistant Attorney General Maria S. Lazar
Wisconsin Department of Justice
17 W. Main Street
Madison, Wisconsin 53703

[1] On November 18, 2011, plaintiffs filed their Second Amended Complaint and a complementary Motion to Amend the Caption.

PLEASE TAKE NOTICE that, pursuant to Fed. R. Civ. P. 26(a) and 37(a)(3)(A), plaintiffs, by their counsel, Godfrey & Kahn, S.C., move this Court for an order compelling defendants to disclose the name, address, and telephone number of each individual likely to have discoverable information that may be used to support their position in this matter. This motion is supported by the Brief in Support of Plaintiffs' Motion to Compel Disclosure, the Declaration of Rebecca Kathryn Mason in Support of Plaintiffs' Motion to Compel Disclosure, and the Civil Local Rule 37 Certification to Accompany Plaintiffs' Motion to Compel Disclosure, all filed concurrently.

GROUNDS

1. This Court's Scheduling and Discovery Order, dated November 14, 2011 ("Scheduling Order"), required the parties to exchange initial Rule 26 disclosures simultaneously on or before November 16, 2011. Plaintiffs and defendants exchanged their disclosures on November 16 at 4:00 p.m. *See* Declaration of Rebecca Kathryn Mason ("Mason Decl."), ¶ 2, Ex. A, B. Defendants' disclosures were incomplete, however, to the point of being valueless. They supplied generic categories of individuals but failed to disclose the names, addresses, and telephone numbers mandated by the Federal Rules—excepting only the names of Government Accountability Board staff members who, they acknowledged, know nothing about the genesis of the statutes at issue.

2. Rule 26(a)(1)(A)(i) requires each party to provide "the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment." Plaintiffs' disclosures complied with the rule; defendants' disclosures, on their face, did not.

3. Defendants' disclosures of "individuals" pursuant to Rule 26(a)(1)(A)(i) appeared as follows:

> Defendants assert that the Government Accountability Board ("GAB") did not prepare, edit, or in any other way draft the redistricting maps for the new boundaries which were . . . signed into law (2011 Wisconsin Acts 43 and 44) by the Governor on August 9, 2011. GAB and the individual defendants have been sued because of their statutory responsibility to implement the districts that are now the law of the State. The defendants had no communications with the Legislature . . . .
>
> Based on the foregoing, the defendants make the following initial disclosures in accordance with the Court's Scheduling Order dated November 14, 2011:
>
> 1. Defendant Kevin J. Kennedy (GAB Director and General Counsel), Nathaniel E. Robinson (GAB Division Administrator, Elections Division), and other [GAB] staff members or contracted employees, including but not limited to, Ross Hein, Sarah Whitt, David Grassel, Ann Oberle, and David Meyer, with respect to the implementation of the new redistricting maps.
>
> 2. Individuals from the Legislature, and/or its various bodies, or those individuals on the Legislature's behalf, who were involved in drawing the redistricting maps . . . , including without limitation, those individuals who reviewed the 2010 decennial census and assisted in determining the appropriate, constitutional boundaries for the state and Congressional districts as memorialized in Acts 43 and 44.
>
> 3. Individuals from the Legislature, and/or its various bodies, or those individuals on the Legislature's behalf, who were involved in reviewing census and population data from the 2010 decennial census to insure minimum population deviation for the new districts.
>
> . . . .
>
> 9. Individuals from the Legislature, and/or its various bodies, or those individuals on the Legislature's behalf, who assisted the Legislature to insure that the new districts reflected communities of interest

along with race and that, where possible, minority citizens comprising a numerical majority of the citizen voting age population.

10. Individuals who reside in, or are familiar with, challenged districts and/or pre-existing districts with respect to facts about those districts that are relevant to the constitutionality of the new redistricting maps.

11. Experts retained on behalf of the Legislature, and/or its various bodies, who assisted in preparing the redistricting maps.

12. Experts to be retained on behalf of the defendants who will assist in defending against the allegations in the First Amended Complaint.

13. Other individuals whose identity will become known through further discovery.

4. Defendants violated Rule 26(a)(1)(A)(i) because they did not provide any names, addresses, or telephone numbers with respect to 11 of the 12 generic categories of individuals listed in their initial disclosures.

5. They acknowledged, as they must, that "individuals . . . or those individuals on the Legislature's behalf . . . ," planned, developed, and devised the redistricting plans, yet they failed to disclose the names of those individuals. Mason Decl., ¶ 2, Ex. B at 2-4.

6. They acknowledged, as they must, reports and other materials involved in the complex redistricting process, but they fail to identify the names of the individuals who authored and drafted those materials. *Id.* at 5.

RELIEF REQUESTED

WHEREFORE, plaintiffs respectfully request that this Court enter an order (1) compelling defendants to supply the name, address, and telephone number of all individuals likely to have discoverable information that they may use to support their defense; (2) precluding defendants from using any information or witness they do not disclose in compliance with such

an order "to supply evidence on a motion, at a hearing, or at a trial," Fed. R. Civ. P. 37(c)(1); and (3) awarding plaintiffs their costs and fees under Rule 37(a)(5)(A).

Dated: November 21, 2011.

GODFREY & KAHN, S.C.

By: *s/ Rebecca Kathryn Mason*

Rebecca Kathryn Mason
State Bar No. 1055500
Wendy K. Arends*
One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53701-2719
608-257-3911
rmason@gklaw.com

Attorneys for Plaintiffs

**Admission to the United States District Court for the Eastern District of Wisconsin is pending.*

7125914_3

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CINDY BARBERA, CARLENE BECHEN, RONALD BIENDSEIL, RON BOONE, VERA BOONE, ELVIRA BUMPUS, EVANJELINA CLEEREMAN, SHEILA COCHRAN, LESLIE W. DAVIS III, BRETT ECKSTEIN, MAXINE HOUGH, CLARENCE JOHNSON, RICHARD KRESBACH, RICHARD LANGE, GLADYS MANZANET, ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON, GLORIA ROGERS, JEANNE SANCHEZ-BELL, CECELIA SCHLIEPP, TRAVIS THYSSEN,[1]

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.

Civil Action
File No. 11-CV-562

Three-judge panel
28 U.S.C. § 2284

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL DISCLOSURE

The discovery process in this case has not begun well. Pursuant to the Court's scheduling order, plaintiffs on November 16, 2011 gave defendants their initial Rule 26 disclosures listing—by name, address and telephone number—each individual likely to have discoverable information. *See* Declaration of Rebecca Kathryn Mason ("Mason Decl."), ¶ 2, Ex. A. In return, defendants gave plaintiffs two pages of generic statements about nameless "individuals" working

[1] On November 18, 2011, plaintiffs filed their Second Amended Complaint and a complementary Motion to Amend the Caption.

in or with the legislature on redistricting. They identified by name only the defendants' staff members who, the state maintains, "had no communications with the Legislature . . . ." *Id.* ¶ 2, Ex. B.

The Rule does not limit initial disclosures to the names of parties who might have discoverable information. It encompasses anyone who might have discoverable information. Yet defendants, represented by the team of lawyers at the Department of Justice ("DOJ"), who also represent the legislature daily, profess to have no knowledge of the individuals and experts who devised the redistricting statute. The Court should compel counsel's compliance with the mandatory requirements of Rule 26.

BACKGROUND

Five months after plaintiffs' complaint, and only three months before trial, defendants contend that they are unable to identify *any* individuals knowledgeable in virtually every subject area relevant to this litigation. Defendants' "disclosures" ignore the explicit language of Rule 26(a)(1)(A)(i). Plaintiffs' counsel has conferred in good faith with counsel for defendants, whose explanations are at best implausible and inconsistent with the boilerplate disclosures they *have* made. Plaintiffs request that this Court compel defendants to do what Rule 26(a) and this Court's November 14 Scheduling and Discovery Order required them to have done five days ago: disclose the name, address, and telephone number of each individual likely to have discoverable information that defendants may use to support their defenses.

This action challenges the constitutionality of the congressional, senate, and assembly districts adopted by the legislature and signed by the Governor on August 9, 2011. Defendants are each sued in their official capacity as members of the Wisconsin Government Accountability Board ("GAB"), the state agency charged with administering elections; they are represented by Attorney General J.B. Van Hollen, Assistant Attorney General Maria S. Lazar, and DOJ.

Plaintiffs and defendants simultaneously exchanged initial disclosures on November 16, 2011, the deadline set in the Scheduling and Discovery Order. *See* Mason Decl., ¶ 2.

In a preface, defendants state: the GAB "did not prepare, edit, or in any other way draft the redistricting maps" and "had no communications with the Legislature, prior to the enactment of the new redistricting maps." Mason Decl., ¶ 2, Ex. B at 1-2. But someone did. Defendants merely note 12 categories of anonymous individuals likely to have discoverable information. Only one of these categories—individuals at GAB who could address "the implementation of the new redistricting maps"—lists any names. *Id.* at 2. The remaining 11 describe only the *kinds* of individuals likely to have discoverable information, including those "from the Legislature, and/or its various bodies" who "were involved in reviewing population and other data . . ." and those "who assisted the Legislature to prevent unnecessary and unconstitutional voter dilution of minority voters." *Id.* at 2-4.

On November 17, 2011, the day after the 4:00 p.m. exchange of disclosures, plaintiffs' counsel notified the Assistant Attorney General by hand-delivered letter that defendants' disclosures were noncompliant. Mason Decl., ¶ 3, Ex. C. Plaintiffs' counsel also e-mailed a copy of the correspondence to the Assistant Attorney General. Plaintiffs requested that defendants provide the identity of the individuals described in their disclosures by 10:00 a.m. on Monday, November 21, 2011. *Id.* Counsel spoke twice on November 18 and again on November 21 and were unable to reach agreement. *Id.* ¶ 5. In a November 18, 2011 e-mail, the Assistant Attorney General stated that she represents "not the party or parties who drew this map," and not "the 'state,'" "but the GAB." *Id.* ¶ 7. That, of course, begs the question.

Five months after the start of litigation, she said, defendants "are in the initial phases of discovery," and their disclosures "were based upon the knowledge and documents in the GAB's possession or control." *Id.* A party's "possession or control" is not the Rule's focus.

DOJ explained that defendants would be "attempting to learn the names of individuals who fit the categories . . . listed" and would amend their disclosures when appropriate. *Id.* Defendants have failed to amend their disclosures.

LEGAL STANDARD/DISCUSSION

Federal Rule of Civil Procedure 26(a)(1)(A)(i) provides, without ambiguity, that

> a party must, without awaiting a discovery request, provide to the other parties . . . the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment[.]

For purposes of a motion to compel, an "incomplete disclosure . . . must be treated as a failure to disclose." Fed. R. Civ. P. 37(a)(4).

On granting a motion to compel, "the court must, after giving an opportunity to be heard," order payment of "the movant's reasonable expenses incurred in making the motion, including attorney's fees." Fed. R. Civ. P. 37(a)(5)(A). When a party "fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1); *see also Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 742 (7th Cir.1998) ("[T]he sanction of exclusion is automatic and mandatory unless the sanctioned party can show that its violation of Rule 26(a) was either justified or harmless."). Other available sanctions include "payment of the reasonable expenses, including attorney's fees, caused by the failure," as well as "any of the orders listed in Rule 37(b)(2)(A)(i)-(vi)." Fed. R. Civ. P. 37(c)(1). Before moving to compel disclosure, a party must have "in good faith conferred or attempted to confer" with the other side "in an effort to obtain [the disclosure] without court action." Fed. R. Civ. P. 37(a)(1).

Rule 26(a)(1)(A)(i) places only one qualification on the individuals to be identified in the mandatory disclosures: that they be "likely to have discoverable information . . . that the disclosing party may use to support its claims or defenses." The rule says nothing about the relationship between the "individual" and the "disclosing party," because there need not be any relationship. The Federal Rules do not limit a party's disclosure obligations to employees or other individuals with whom it has a direct lawyer-client relationship, especially when a party's counsel has direct knowledge of the information.

Although *documents* outside the disclosing party's "possession, custody, or control" may not need to be identified, Fed. R. Civ. P. 26(a)(1)(A)(ii), no comparable limitation exists with respect to people. Even accepting at face value DOJ's transparent position that it represents not "the state" but "only" the GAB, that distinction does not relieve defendants of their obligation to identify all individuals—including state employees and consultants unaffiliated with the GAB—likely to have discoverable information.

A party "must make its initial disclosures based on the information then reasonably available to it," and it "is not excused from making its disclosures because it has not fully investigated the case." Fed. R. Civ. P. 26(a)(1)(E). "Before making its disclosures, a party has the obligation under subdivision (g)(1) to make a reasonable inquiry into the facts of the case." Fed. R. Civ. P. 26, advisory committee's note to 1993 amendments. The issues, events, and individuals relevant to this litigation fall within a known and circumscribed universe. Counsel cannot avoid identifying those people whose role in the development and passage of the state's new districts make them a *likely* source of discoverable information.

Attorneys with DOJ cannot be suggesting that individuals "from the Legislature, and/or its various bodies" are somehow inaccessible to them or unknown to them; even if they were, that is no obstacle to providing their names. Furthermore, defendants' position is inconsistent

with their own document description, which includes documents and expert reports "in the possession of the Legislature, and/or its various bodies, which were utilized to draft the 2011 redistricting maps." Mason Decl., ¶ 2, Ex. B at 5. "All of the documents listed" by defendants, they concede, "are in the possession of counsel for defendants." *Id.* Somehow, despite in fact saying they have the documents used by the legislature in redistricting, defendants seem unable to provide the identity of those individuals who played any role in the drafting. The names that defendants failed to provide are without doubt "reasonably available" to them and must be disclosed.

Defendants' disclosures do not even approach the line of good faith and reasonableness. Plaintiffs filed their original complaint on June 10, 2011, two months before the new districts were signed into law and more than five months before this motion. This action is set for trial three months from now. At the Court's direction, the parties agreed to an expedited discovery framework in recognition of the unforgiving timetable for the elections whose administration hinges on the resolution of this litigation. Plaintiffs cannot be expected to wait until defendants' "investigation" yields a list of names already known to counsel that defendants were required to disclose from the outset.

The parties and their counsel owe each other a duty of good faith and candor. This litigation addresses the constitutionality of state statutes defining the democratic process. Defendants' counsel know who developed and drafted the statutes. They know the names, addresses and telephone numbers of those in the legislature and those third parties hired by the legislature, some in Wisconsin and some not, who did the work. Legislative immunity may become an issue here but, whatever its reach, it does not infect the mere identification of potential witnesses. Defendants' counsel cannot feign ignorance.

CONCLUSION

Plaintiffs request that this Court enter an order (1) compelling defendants to supply the name, address, and telephone number of all individuals likely to have discoverable information that they may use to support their defense; (2) precluding defendants from using any information or witness they do not disclose in compliance with such an order "to supply evidence on a motion, at a hearing, or at a trial," Fed. R. Civ. P. 37(c)(1); and (3) awarding plaintiffs their costs and fees under Rule 37(a)(5)(A).

Dated: November 21, 2011.

GODFREY & KAHN, S.C.

By: *s/ Rebecca Kathryn Mason*

Rebecca Kathryn Mason
State Bar No. 1055500
Wendy K. Arends*
One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53701-2719
608-257-3911
rmason@gklaw.com

Attorneys for Plaintiffs

**Admission to the United States District Court for the Eastern District of Wisconsin is pending.*

7126033_3

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CINDY BARBERA, CARLENE BECHEN, RONALD BIENDSEIL, RON BOONE, VERA BOONE, ELVIRA BUMPUS, EVANJELINA CLEEREMAN, SHEILA COCHRAN, LESLIE W. DAVIS III, BRETT ECKSTEIN, MAXINE HOUGH, CLARENCE JOHNSON, RICHARD KRESBACH, RICHARD LANGE, GLADYS MANZANET, ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON, GLORIA ROGERS, JEANNE SANCHEZ-BELL, CECELIA SCHLIEPP, TRAVIS THYSSEN,[1]

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.

Civil Action
File No. 11-cv-562

Three-judge panel
28 U.S.C. § 2284

DECLARATION OF REBECCA KATHRYN MASON IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL DISCLOSURE

I, Rebecca Kathryn Mason, declare, under penalty of perjury and pursuant to 28 U.S.C. § 1746, that the following is true and correct:

[1] On November 18, 2011, plaintiffs filed their Second Amended complaint and a complementary Motion to Amend the Caption.

1. I am an attorney with the law firm of Godfrey & Kahn, S.C., and I am admitted to practice in the State of Wisconsin and in the U.S. District Court for the Eastern District of Wisconsin. I represent plaintiffs in the above-captioned matter.

2. At approximately 4:00 p.m. on November 16, 2011, plaintiffs and defendants simultaneously exchanged initial disclosures pursuant to Rule 26(a)(1) and this Court's November 14, 2011 Scheduling and Discovery Order. A copy of plaintiffs' initial disclosures is attached as **Exhibit A** and a copy of defendants' initial disclosures is attached as **Exhibit B**.

3. On November 17, 2011, I notified Assistant Attorney General Maria S. Lazar, counsel for defendants, by hand-delivered letter that defendants' disclosures were noncompliant. I also forwarded the letter to Ms. Lazar via e-mail. A copy of the letter is attached as **Exhibit C**.

4. In my letter, I informed Ms. Lazar that if plaintiffs did not receive adequate disclosures by 10:00 a.m. on November 21, 2011, plaintiffs would have no choice but to file a motion to compel because the Scheduling and Discovery Order required a prompt response to noncompliant discovery.

5. I spoke twice with Ms. Lazar on November 18, 2011 and again on November 21, 2011. We attempted to reach an agreement concerning defendants' non-compliance with their disclosure obligations under Rule 26(a)(1). However, we were unable to reach an agreement.

6. After we spoke on November 18, Ms. Lazar responded to my letter in an e-mail at approximately 1:50 p.m. on November 18, 2011.

7. Ms. Lazar's email addressed the information we discussed during our telephone conversations on November 18. In the e-mail Ms. Lazar explained that she represents "not the party or parties who drew this map but the" Government Accountability Board, and that "the 'state'" is not a party. Ms. Lazar further stated that defendants "are in the initial phases of discovery" and that their disclosures "were based upon the knowledge and documents in the

GAB's position or control." She stated that defendants would be "attempting to learn the names of individuals who fit the categories . . . listed" and would amend their disclosures "once we do." Ms. Lazar reasserted these same positions during our telephone conversations on November 21.

Dated this 21st day of November, 2011.

s/ Rebecca Kathryn Mason

Rebecca Kathryn Mason
State Bar No. 1055500
GODFREY & KAHN, S.C.
One East Main Street, Suite 500
Post Office Box 2719
Madison, WI 53701-2719
Phone: 608-257-3911
Fax: 608-257-0609
Email: rmason@gklaw.com

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EXHIBIT 25

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, 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, and CINDY BARBERA,

Plaintiffs,

TAMMY BALDWIN, GWENDOLYNNE MOORE, and RONALD KIND,

Intervenor-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,

F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI, PAUL D. RYAN, JR., REID J. RIBBLE, and SEAN P. DUFFY,

Intervenor-Defendants.

Case No. 11-CV-0562
JPS-DPW-RMD

VOCES DE LA FRONTERA, INC., RAMIRO VARA, OLGA VARA, JOSE PEREZ, and ERICA RAMIREZ,

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-1011
JPS-DPW-RMD

ORDER

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

On November 15, 2011, the plaintiffs in *Voces de la Frontera, et al. v. Brennan, et al.*, Case No. 11-CV-1011, moved to consolidate their case with *Baldus, et al. v. Brennan, et al.*, Case No. 11-CV-0562. (Case No. 11-CV-1011, Docket #7). Both cases involve challenges to Wisconsin's recently-enacted legislative redistricting law, and were filed against the same group of defendants, individuals affiliated with Wisconsin's Government Accountability Board. (*See* Case No. 11-CV-0562, Docket #12; Case No. 11-CV-1011, Docket #1).

The Court may consolidate cases that "involve a common question of law or fact," and the Court will do so in this case. Fed. R. Civ. P. 42(a)(2). The two cases share common questions of both law and fact. As mentioned above, both cases were filed against the same seven defendants. Additionally, all of the plaintiffs' claims in *Voces de La Frontera*, Case No. 11-CV-1011, are identical to certain claims alleged by the plaintiffs in *Baldus*, Case No. 11-CV-0562. (*Compare* Case No. 11-CV-0562, Am. Compl. ¶¶ 62–71, *with* Case No. 11-CV-1011, Compl. ¶¶ 27–33). Because the cases share common questions of both law and fact, the Court may consolidate them. Fed. R. Civ. P. 42(a)(2).

The Court also agrees with the *Voces de la Frontera* plaintiffs that consolidation is a wise course. (Case No. 11-CV-1011, Mot. to Consol., at 2). As the *Voces de la Frontera* plaintiffs correctly point out, consolidation will result in substantial time savings, due to the shared nature of issues in the cases. *Id.* As this case involves important questions relating to the legality of Wisconsin's voting districts in the upcoming elections, time is of the essence and, therefore, the Court strongly favors consolidation of the cases to most expeditiously move them through the trial process.

Finally, all of the parties to both actions have consented to the consolidation of these cases. The common state defendants have consented to the consolidation by letter (Case No. 11-CV-1011, Docket #8; Case No. 11-CV-0562, Docket #39), as have the intervenor-defendants (Case No. 11-CV-0562, Docket #40) and the intervenor-plaintiffs (Case No 11-CV-0562, Docket #50); the *Baldus* plaintiffs have given their consent to the *Voces de la Frontera* plaintiffs (Case No. 11-CV-1011, Mot. to Consol., at 2).

For these reasons, the Court feels comfortable not only in its assessment that it *may* consolidate these cases, but also in its determination that consolidation is the wisest course of action and is generally favored by the parties. Therefore, the Court will grant the *Voces de la Frontera* plaintiffs' motion to consolidate. (Case No. 11-CV-1011, Docket #7).

Accordingly,

IT IS ORDERED that the motion to consolidate filed by the plaintiffs in Case No. 11-CV-1011 (Case No. 11-CV-0562, Docket #37; Case No. 11-CV-1011, Docket #7) be and the same is hereby **GRANTED**; and

IT IS FURTHER ORDERED that *Voces de la Frontera, et al. v. Brennan, et al.*, Case No. 11-CV-1011, be and the same is hereby consolidated and joined with *Baldus, et al. v. Brennan, et al.*, Case No. 11-CV-0562, for purposes of trial.

Dated at Milwaukee, Wisconsin, this 22nd day of November, 2011.

BY THE COURT:

J.P. Stadtmueller
U.S. District Judge

EXHIBIT 26

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, 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, CINDY BARBERA, RON BOONE, VERA BOONE, EVANJELINA CLEERMAN, SHEILA COCHRAN, MAXINE HOUGH, CLARENCE JOHNSON, RICHARD LANGE, and GLADYS MANZANET

Plaintiffs,

TAMMY BALDWIN, GWENDOLYNNE MOORE and RONALD KIND,

Intervenor-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,

F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI, PAUL D. RYAN, JR., REID J. RIBBLE, and SEAN P. DUFFY,

Intervenor-Defendants.

Case No. 11-CV-0562
JPS-DPW-RMD

VOCES DE LA FRONTERA, INC., RAMIRO VARA, OLGA VARA, JOSE PEREZ, and ERICA RAMIREZ,

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-1011
JPS-DPW-RMD

ORDER

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

The plaintiffs filed a motion to amend their complaint by adding parties and correcting the spelling of the names of previously-named parties. (Docket #47). The Court has already granted this motion in part, correcting the spelling of several parties' names by text-only order. (Text-Only Order, 11/21/11). The Court will now grant the remainder of the plaintiffs' motion.

Under the Court's Scheduling Order, the plaintiffs were given ten business days after receiving the defendants' answer to amend their complaint without leave of Court. (Sch. Ord. ¶ 1). The plaintiffs' motion to amend their complaint to add parties was made within that ten-day period and, therefore, the plaintiffs are entitled to do so. (*See* Docket #29 (filed November 4, 2011), Docket #47 (filed November 18, 2011)). According to the Scheduling Order, the defendants shall now have five business days from their receipt of the plaintiffs' amended complaint to file an amended answer. (Sch. Ord. ¶ 1).

Accordingly,

IT IS ORDERED that the plaintiffs' motion to amend their complaint to add parties (Docket #47) be and the same is hereby **GRANTED**.

Dated at Milwaukee, Wisconsin, this 22nd day of November, 2011.

BY THE COURT:

J.P. Stadtmueller
U.S. District Judge

EXHIBIT 27

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CINDY BARBERA, CARLENE BECHEN, RONALD BIENDSEIL, RON BOONE, VERA BOONE, ELVIRA BUMPUS, EVANJELINA CLEEREMAN, SHEILA COCHRAN, LESLIE W. DAVIS III, BRETT ECKSTEIN, MAXINE HOUGH, CLARENCE JOHNSON, RICHARD KRESBACH, RICHARD LANGE, GLADYS MANZANET, ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON, GLORIA ROGERS, 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 TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants.

Civil Action
File No. 11-cv-562

Three-judge panel
28 U.S.C. § 2284

SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, for their second amended complaint, under 42 U.S.C. § 1983 and 28 U.S.C. § 2284(a)—and, as a matter of course under Rule 15(a)(1)(B), Fed. R. Civ. P. and the Court's Scheduling and Discovery Order—allege that:

SUMMARY

This is an action for a declaratory judgment and for injunctive relief, involving the rights of plaintiffs under the U.S. Constitution and the Wisconsin Constitution and the

statutorily-mandated configuration of the eight congressional districts, 33 senate districts and 99 assembly districts in the State of Wisconsin for 2012 and beyond. These districts—reflected in legislation adopted on July 19 and 20, 2011, Wisconsin Acts 43 and 44, and signed by the Governor 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 second amended complaint supersedes the complaint filed on June 10, 2011, and the amended complaint filed on July 21, 2011.

Plaintiffs seek a declaratory judgment that:

- The redistricting law in Act 43 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;
- Act 43 violates the Equal Protection Clause and the Wisconsin 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 statute in Act 44 violates the constitutional requirement that districts be compact and preserve communities of interest;
- Both the congressional and legislative redistricting laws violate the First and Fourteenth Amendments in that the districts reflect deliberate, systematic and impermissible partisan gerrymandering and impinge upon freedom of association and expression by penalizing voters and elected representatives solely because of their political affiliation and beliefs;
- The law in Act 43 violates the statutory and constitutional prohibitions against using race as a predominant factor in creating district boundaries;
- The congressional and legislative redistricting laws violate the Equal Protection Clause because they cannot be justified as furthering any legitimate state interest and are, therefore, unconstitutional; and

- Any special or recall elections cannot be conducted under Act 43 because plaintiffs would be deprived of equal protection and their right to mandate legislative elections and participate in them pursuant to the state constitution.

Upon such declarations, plaintiffs request injunctive relief prohibiting any elections, including recall or special elections, from being conducted under the boundaries created by the new statutes. 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.

JURISDICTION[1]

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 U.S. Constitution and federal law and supplemental jurisdiction under 28 U.S.C. § 1367 to hear claims under the Wisconsin 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.

2. This action challenges the constitutionality of the statutorily-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.

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

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[1] On October 21, 2011, this Court denied the defendants' motion to dismiss the amended complaint on procedural and substantive grounds. *See* Dkt. #25.

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 14 of the individual plaintiffs reside and vote in this judicial district.

PARTIES

Plaintiffs

5. 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 Acts 43 and 44). 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 law.

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 law.

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 law.

d. 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 law.

e. Ross Boone, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the Village of Twin Lakes, Kenosha County, Wisconsin, with his residence in the 1st Congressional District, 61st Assembly District and the 21st Senate District as those districts have been established by law.

f. Vera Boone, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the Village of Twin Lakes, Kenosha County, Wisconsin, with her residence in the 1st Congressional District, 61st Assembly District and the 21st Senate District as those districts have been established by law.

g. 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 law.

h. Evanjelina Cleereman, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the City of Milwaukee, Milwaukee County, Wisconsin, with her residence in the 4th Congressional District, 8th Assembly District and 3rd Senate District as those districts have been established by law.

i. Sheila Cochran, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the City of Milwaukee, Milwaukee County, Wisconsin, with her residence in the 4th Congressional District, 17th Assembly District and the 4th Senate District as those districts have been established by law.

j. 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 law.

k. 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 8th Senate District as those districts have been established by law.

l. Maxine Hough, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the Town of East Troy, Walworth County, Wisconsin, with her residence in the 1st Congressional District, 32nd Assembly District and the 11th Senate District as those districts have been established by law.

m. Clarence Johnson, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the City of Milwaukee, Milwaukee County, Wisconsin, with his residence in the 4th Congressional District, 22nd Assembly District and the 8th Senate District as those districts have been established by law.

n. 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 law.

o. Richard Lange, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of South Range, Douglas County,

Wisconsin, with his residence in the 7th Congressional District, 73rd Assembly District and 25th Senate District as those districts have been established by law.

p. Gladys Manzanet, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the City of Milwaukee, Milwaukee County, Wisconsin, with her residence in the 4th Congressional District, 9th Assembly District and 3rd Senate District as those districts have been established by law.

q. 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 law.

r. 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 law.

s. 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 law.

t. 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 law.

u. 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 law.

v. 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 law.

w. 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 law.

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, under Wis. Stat. §§ 10.01(2)(a), 10.06(1)(f), 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.

CONSTITUTIONAL AND STATUTORY PROVISIONS / FACTS

7. The U.S. Constitution requires that the members of Congress be elected from districts with equal populations. The Wisconsin 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.

8. The U.S. Constitution, in Article 1, 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."

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."

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, including state recall and special elections, guaranteeing as well that the vote of each citizen shall be equally effective with the vote of any and every other citizen.

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."

12. The Wisconsin 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. It further requires that state senators "shall be chosen" by the voters every four years. It also gives citizens, in article XIII, section 12, the right to "petition for the recall of any incumbent elective officer…." and upon a recall election, the person receiving the "highest number of votes in the recall election shall be elected for the remainder of the term."

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...."

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.

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.

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).

17. Article IV, section 3, of the Wisconsin Constitution gives the legislature the primary responsibility for enacting a constitutionally-valid plan for legislative districts. On August 9, 2011, the Governor signed into law Act 43 creating new legislative district boundaries.

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 the 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.

18. Act 43 specifically and explicitly provides that it shall first apply "…. with respect to regular elections, to offices filled at the 2012 general election," and "…. with respect to special or recall elections, to offices filled or contested concurrently with the 2012 general election."

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

20. 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 were signed into law on August 9, 2011. A copy of Acts 43 and 44 are attached as Exhibit B. (Copies of the original proposals were provided to this Court as Exhibits 1 and 2 attached to correspondence from defendants' counsel on July 14, 2011. *See* Dkt. #11.)

21. 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. Stats. §§ 5.15(1)(b) and 59.10(3)(b) (2009-10). However, a companion bill, also passed on July 19 and 20, and signed into law on July 25, 2011, 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 statute is attached as Exhibit C.

Congressional Districts

22. Based on the April 2010 census, the precise ideal population for each congressional district in Wisconsin is 710,873.

23. 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.

24. On July 19 and 20, the Wisconsin legislature adopted Act 44, signed by the Governor, that created congressional district boundaries based on the 2010 census. Congressional redistricting resulted from the same legislative process and schedule described in paragraphs 19 and 20 above.

25. The new congressional districts have minimal total population deviations.

CLAIMS FOR RELIEF

26. 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 populations.

27. The statutory boundaries impermissibly discriminate against plaintiffs in the political process, and the use of those boundaries for special elections, recall elections, and other elections in 2012 and beyond will deny plaintiffs equal protection and the opportunity for fair and effective representation in their state government and in their congressional districts.

FIRST CLAIM

Legislative Boundaries Unconstitutionally Sacrifice Redistricting Principles

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

29. The federal and state constitutions require that legislative districts be apportioned with equal populations.

30. Any deviation from exact population equality must be justified by the applicable state interest and policy.

31. Wisconsin's traditional redistricting principles, set forth in the state's constitution, statutes and federal case law, require legislative districts to be compact, preserve core populations from prior districts, and preserve county and other political subdivision boundaries and communities of interest. The state constitution also requires that legislative districts be based on districts first drawn by local units of government.

32. The new legislative districts wholly and impermissibly ignore Wisconsin's traditional and mandatory redistricting principles.

a. They are not geographically compact—in fact, significantly less so than the 2002 boundaries established by this Court. 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, e.g.,* Exhibit D, comparing the Racine/Kenosha districts to their 2002 counterparts.

b. The 2011 assembly districts do not preserve core populations from prior districts. Based on the 2010 census, 323,026 individuals needed to move assembly districts; the new statute moves 2,357,592 individuals—two million more than necessary—into new assembly districts. As a result, the 2011 districts retain only 59 percent of the core population from the 2002 districts—in fact, in districts currently held by Democrats, only 49 percent of the core population is retained. (In contrast, the 2002 boundaries retained 76.7 percent of the core populations from the prior districts.) 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 statute removes 57,932 individuals from the district and adds 53,984 individuals.

ii. The 2010 census disclosed that AD 33 should have been reduced by 2,016 individuals; the new statute 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 reach the ideal population; the new statute 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 statute removes 52,142 individuals from the district and adds 50,684 individuals.

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

c. Many of the 2011 state senate districts also do not preserve core populations from prior districts. The 2010 census disclosed that 231,341 individuals needed to shift senate districts; the new statute, 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 statute adds 66,837 individuals from a different district and removes 74,586 individuals from the existing district.

ii. The 2010 census revealed that SD 21, which used to border SD 22 to the north, needed to increase by 5,598 individuals; the new statute 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 and legally insignificant. The new statute 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 statute, 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 individuals greater than the ideal population, according to the 2010 census. The new statute 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 statute adds 13,741 individuals to the district and removes 13,321 from the 2002 district population.

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

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

ii. 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 statute 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 some communities of interest are fractured, other communities that have little in common are combined.

iii. In the Fox Valley, the City of Appleton, a majority of which has traditionally been contained within one assembly district (AD 57), is 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.

iv. The City of Beloit has been contained traditionally and historically within one assembly district (AD 45). Act 43 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 11 on the east). The residents of the City of Beloit, which often has the highest unemployment rate in the state, have very little in common with residents of, for example, Lake Geneva.

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

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

i. 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 statute, 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, and otherwise fracturing communities of interest.

ii. 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 statute 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, and otherwise fracturing communities of interest.

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

34. In the absence of the statutorily- 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.

SECOND CLAIM

The Legislation Does Not Recognize Local Government Boundaries

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

36. The Wisconsin Constitution requires that, to the extent possible, counties, municipalities and wards be kept whole within legislative district boundaries. It mandates that they be "bounded" by lines drawn for and by local political units.

37. Although population equality is the primary goal of redistricting, Wisconsin's constitutional requirement of respecting political subdivisions—especially in light of the state's historically broad application of this requirement—remains a significant consideration and cannot be unnecessarily ignored; county and political subdivision divisions should be minimal.

38. The 2011 legislative districts unconstitutionally fail to minimize the splitting of counties and political subdivisions, ignoring Wisconsin's long-established policy to maintain their integrity.

39. The new districts are not bound by county, precinct, town or ward lines already established by local governments. In addition, the statute splits significantly more counties, municipalities and wards than the 2002 boundaries. The districts in Racine, Kenosha, Appleton, Beloit and Milwaukee, discussed above in paragraphs 32a through e, are examples of these impermissible divisions.

40. In creating district boundaries, the statute ignores local boundaries already established by local government and in the process of being established. Instead, the new law forces local municipalities to make their districts conform to the state's plan, violating the Wisconsin Constitution. *See* Exhibit C; *supra*, ¶ 21.

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

42. In the absence of the statutorily- 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.

THIRD CLAIM

Legislative Districts Unnecessarily Disenfranchise 300,000 Wisconsin Citizens[2]

43. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 42 above.

44. State senators are elected to staggered 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 presidential mid-term elections.

45. In 2012, if voters are shifted from even to odd 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 Wisconsin Constitution requires, every four years for a senator to represent them.

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[2] This Court already has determined that these allegations state a claim for relief. *See supra* p. 3 n.1.

46. 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 1 (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 moved out of the district were moved into Senate District 31, which needed to *lose* 1,034 individuals.

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

48. In the absence of the statutorily- 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.

FOURTH CLAIM

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

49. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 48 above.

50. The federal and state constitutions require that political districts be compact and preserve communities of interest, including core populations that historically have been in the same district.

51. 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.

52. 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 from the Minnesota boarder in the west to Florence County in the east.

b. The 3rd Congressional District similarly and unnecessarily spans 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 new 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.

d. Act 44 unnecessarily shifts congressional district populations to satisfy partisan political goals.

53. 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, but is not limited to, considerations of a citizen's ethnicity, cultural affinity and traditional geographical boundaries, historical political representation, and the community's need for government services.

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

55. The congressional districts created by Act 44 impermissibly divide communities of interest:

a. Fox Valley Area: The new statute 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 established by this Court where the county was represented by only three members of Congress.

56. 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 plaintiffs by violating their constitutional rights.

57. In the absence of the statutorily- 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.

FIFTH CLAIM

Congressional and Legislative Districts Constitute Unconstitutional Gerrymandering

58. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 57 above.

59. The Equal Protection Clause and the First Amendment require that all citizens have an equally effective opportunity to elect representatives of their choice 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.

60. The new districts violate the requirements of the Equal Protection Clause and First Amendment because the districts are not justified by neutral or applicable state interests, and constitute an impermissible partisan gerrymander.

a. Act 43 explicitly eliminates the statutory provision that sets forth the legislature's justification for failing to attain precise population equality through the legislature's "good faith effort to apportion the legislature giving due consideration to the

need for contiguity and compactness of area, the maintenance of the integrity of political subdivisions and of communities of interest, and competitive legislative districts."

b. The partisan effects of Acts 43 and 44 evince a systematic and deliberate effort by the Republican legislative leadership to draw districts with a distinct partisan advantage for Republican officials and candidates to the exclusion of Wisconsin's redistricting principles—including compactness, and preservation of local boundaries, communities of interest and core populations of prior districts. For example, although on average the assembly districts retain approximately 59 percent of the core populations of prior districts, the average core population retention for districts held by Republican officials is actually 64 percent, while the average core population retention for districts held by Democratic officials is just 49 percent.

61. The intent of the majority in enacting Acts 43 and 44 is to deny plaintiffs and other citizens inclined to vote for Democratic candidates fair representation in the state legislature and congress in 2012 and beyond, including any special or recall elections.

a. The minority party in the state legislature was denied a fair chance to participate in the hurried and largely secret redistricting process described in paragraphs 19 and 20.

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

c. 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.

62. The effect of Acts 43 and 44 is to give the Republican majority an unfair electoral advantage, disproportionate to its historical success, in an attempt to preserve their political majorities and minimize the prospects for the minority party. For example:

a. For the last decade and more, Wisconsin's 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 nevertheless would win 58 assembly seats.

63. The statute 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 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.

64. Under these boundaries, and as a direct effect of partisan gerrymandering, the assembly may go from a 59-39 Republican majority to a 64-34 Republican majority in 2012.

65. 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 Acts 43 and 44, 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. This infringes upon plaintiffs' freedoms of association and expression, including campaigning and voting.

66. The new districts will impair the minority party's association and expression rights as well by limiting the ability to recruit candidates, and it will deter potential candidates from exercising their right to run for office by making a Democratic candidacy futile. The new districts also will deter potential Democratic voters from casting ballots that, by definition, are likely to be meaningless.

67. A political candidate with less chance of winning an election will usually receive less in campaign contributions, a form of political speech, than a candidate with a greater chance of winning. Accordingly, the new districts impair the ability of Democratic candidates or donors to raise campaign contributions and thereby engage in political speech.

68. The legislature's districting is arbitrary and discriminatory.

69. The legislature's districting implicates First Amendment rights and is not narrowly tailored to achieve a compelling state interest.

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

71. In the absence of the statutorily- 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.

SIXTH CLAIM

Legislative Districts Violate the Federal Voting Rights Act

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

73. 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 fracturing minorities into several districts to dilute their influence.

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

75. 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 communities without regard for any factors other than, on their face, race.

76. Under the new statute, African Americans, including but not limited to Sheila Cochran and Clarence Johnson, have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

a. Racial bloc voting is pervasive in the City of Milwaukee among both majority and African American groups. Majority bloc voting is almost invariably sufficient to defeat the minority's preferred candidate.

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 statute, however, creates only six assembly districts where a majority of the voting age population is African American.

d. It is possible to create a redistricting plan that will provide more African Americans a more equal opportunity to elect candidates of their choice.

e. 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 and statutory requirements.

f. The statute's 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.

77. Under the new statute, Latinos, including but not limited to Evanjelina Cleereman and Gladys Manzanet, have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice:

a. Racial bloc voting is pervasive in the City of Milwaukee among both majority and Latino groups. Majority bloc voting is almost invariably sufficient to defeat the minority's preferred candidate.

b. Latino populations comprise a sufficiently large and geographically compact group to elect at least one legislator of their choice, yet the statute fails to create any district with sufficient Latino voting age citizen population.

c. It is possible to create a redistricting plan that will provide Latinos a more equal opportunity to elect at least one legislator of their choice.

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

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

79. In the absence of the statutorily- 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. §§ 1973, 1983 and 1988.

SEVENTH CLAIM

Legislative Districts Unconstitutionally Use Race As A Predominant Factor

80. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 79 above.

81. The Equal Protection Clause prohibits a state from using race as the predominant basis for splitting voters into districts to the exclusion of other redistricting criteria.

82. The legislative process and information available to the legislature at the time Act 43 was passed, and the demographics of the 2011 legislative districts, demonstrate that race was the predominant factor in the drawing of certain legislative districts.

a. The new Racine-Kenosha senate district includes populations that belong to the same race, but otherwise does not take into consideration communities of interest.

b. In Milwaukee, by shifting existing districts based predominantly 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 and do not take into consideration communities of interest.

83. The statute unconstitutionally considered race as the predominant factor to the exclusion of Wisconsin's traditional redistricting principles.

84. The legislature's race-based districting is not narrowly tailored to achieve a compelling state interest.

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

86. In the absence of the statutorily- 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.

EIGHTH CLAIM

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

87. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 86 above.

88. The Equal Protection Clause allows some deviation from precise population equality in political boundaries if the deviations are based on established redistricting policies and compelling state interests.

89. The state 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.

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

91. Because the new law 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 retain compactness, preserve communities of interest, preserve core populations, and are not based on local boundaries.

92. There is no apolitical state interest that justifies the new congressional and legislative districts.

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

94. In the absence of the statutorily- 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.

NINTH CLAIM

Any Special or Recall Elections Cannot Be Conducted Under Act 43

95. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 94 above.

96. Defendants have approved a guideline (attached as Exhibit E) that, consistent with the mandate of Act 43, any special or recall elections scheduled before the fall 2012 general elections shall be conducted under the boundaries established by this Court in 2002 and in effect since then.

97. Any effort to conduct special or recall elections under the boundaries established by Act 43 would violate that policy, and pending the resolution of this litigation, disrupt the status quo and the electoral boundaries of a decade established by this Court. It will deprive plaintiffs of equal protection and their constitutional right to participate in legislative elections pursuant to recall.

98. The constitutionality of the 2011 legislative districts is at issue in this lawsuit. Defendants challenged only one substantive claim in their motion to dismiss plaintiffs' first amended complaint, thereby (at least tacitly) recognizing that the other allegations state a claim upon which relief may be granted.

99. In rejecting defendants' motion to dismiss, this Court recognized the unconstitutionality of potentially disenfranchising, unnecessarily, nearly 300,000 Wisconsin citizens.

100. The challenged 2011 districts cannot serve as districts for any future elections, whether regular, special or recall elections, unless and until this Court rules on the constitutionality of the districts.

101. The 2002 districts, therefore, are the only legal, valid and proper districts for any election prior to final disposition in this case.

RELIEF SOUGHT

WHEREFORE, plaintiffs ask that the Court:

1. Declare Wisconsin's eight congressional districts, as established by Act 44, unconstitutional and invalid and the maintenance of those districts for the 2012 primary election and November 6, 2012 general election a violation of plaintiffs' federal and state legal rights;

2. Declare Wisconsin's 33 Senate Districts and 99 Assembly Districts, established by Act 43, unconstitutional and invalid and the maintenance of those districts for the 2012 primary election and November 6, 2012 general election—and any recall or special elections before then—a violation of plaintiffs' federal and state legal rights;

3. Enjoin 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 U.S. House of Representatives or of the state legislature from the unconstitutional districts that now exist in Wisconsin for the 2012 primary election and November 6, 2012 general election—and any recall or special elections before then;

4. In the absence of constitutional state laws, adopted by the legislature and signed by the Governor in a timely fashion, establish a judicial redistricting plan to make the state's congressional and legislative districts substantially equal in population, and, in addition, meet the requirements of the U.S. Constitution and statutes and the Wisconsin Constitution and statutes;

5. Declare as unconstitutional and enjoin the conduct of any special or recall elections under Act 43 prior to November 6, 2012;

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

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

Dated: November 18, 2011.

GODFREY & KAHN, S.C.

By: *s/ Rebecca Kathryn Mason*

Rebecca Kathryn Mason
State Bar No. 1055500
Wendy K. Arends*
One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53701-2719
608-257-3911
rmason@gklaw.com

Attorneys for Plaintiffs

**Admission to the United States District Court for the Eastern District of Wisconsin is pending.*

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EXHIBIT 28

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

ALVIN BALDUS, 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, CINDY BARBERA, RON BOONE, VERA BOONE, EVANJELINA CLEERMAN, SHEILA COCHRAN, MAXINE HOUGH, CLARENCE JOHNSON, RICHARD LANGE, and GLADYS MANZANET,

Plaintiffs,

Case No. 11-CV-00562
JPS-DPW-RMD

TAMMY BALDWIN, GWENDOLYNNE MOORE and RONALD KIND,

Intevenor-Plaintiffs,

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,

F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI, PAUL D. RYAN, JR., REID J. RIBBLE, and SEAN P. DUFFY.

Intevenor-Defendants.

VOCES DE LA FRONTERA, INC., RAMIRO VARA, OLGA VARA,

JOSE PEREZ, and ERICA RAMIREZ,

Plaintiffs,

v.

Case No. 11-CV-1011
JPS-DPW-RMD

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.

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO COMPEL DISCLOSURE

NOW COME the defendants by their attorneys, J.B. Van Hollen, Attorney General, and Maria S. Lazar, Assistant Attorney General, and Reinhart Boerner Van Deuren s.c., and submit the following Response to Plaintiffs' Motion to Compel Disclosure, filed on November 21, 2011.

Introduction

The plaintiffs complain that defendants did not disclose those individuals who might have discoverable information the *plaintiffs* might use in their case. Specifically, they assert that the defendants "cannot avoid identifying those people whose role in the development and passage of the state's new districts make them a likely source of discoverable information." (Plaintiffs' Brief in Support of Motion to Compel Disclosures, dated November 21, 2011 ["Brief in Support"] at 5 (emphasis removed)). The applicable rule, however, says the defendants need only disclose those individuals who have information the *defendants* might use. The point of

initial disclosures is to provide information the disclosing party may use to support its claims or defenses. It is not to provide information that the receiving party might use. That is what discovery is for. It could hardly be otherwise—at the "initial disclosure" stage the disclosing party cannot know what information its opponents might wish to use to support their claims.

If anything, this dispute arose because the defendants disclosed more than was necessary. In addition to specific individuals who have information the defendants will use to support the defense of this case, the defendants also disclosed a much broader category of individuals, to wit: those people who have information generally related to redistricting. The defendants, however, have not yet determined whether individuals in those categories have any information they might use to support their defense of this case.

From the defendants' perspective, this case is simply about whether the new district lines comply with Constitutional requirements. It has nothing to do with *why* the legislature adopted those lines. Which makes those who had a "role in the development and passage of the state's new districts" – the individuals the plaintiffs complain were not disclosed – superfluous. Perhaps the information those individuals possess may become relevant, depending on what arguments the plaintiffs develop, but the defendants have no obligation to forecast how the plaintiffs' case might evolve.

In any event, the Plaintiffs' Motion to Compel no longer accurately describes the state of the defendants' disclosures. After further analysis, and discussions with the plaintiffs to address their concerns, the defendants supplemented their initial disclosures (as described below).

Background

The defendants learned of plaintiffs' discontent with the Initial Disclosures by letter dated November 17, 2011, which was first seen on November 18, 2011. (Affidavit of Maria S. Lazar

in Support of Defendants' Response to Plaintiffs' Motion to Compel Disclosures, dated November 28, 2011 ["Lazar Affid."], at ¶¶ 3-6) The parties then held substantial discussions to determine the source of that discontent and whether the concerns warranted a supplemental disclosure. (*Id.* at ¶¶ 6-9). Defendants reminded plaintiffs that, contrary to the assertions in their letter, the defendants had in fact listed specific names in the Initial Disclosures. (*Id.* at ¶ 6). Defendants also offered to list some of the names identified in the plaintiffs' Initial Disclosures. (*Id.* at ¶¶ 7, 9). And they informed the plaintiffs they had not yet retained any experts. (*Id.* at ¶ 7). The defendants also offered to informally assist the plaintiffs in learning the identity of individuals with information useful to the plaintiffs' case. (*Id.*). The plaintiffs would not be assuaged.

The plaintiffs filed their Motion to Compel on November 21, 2011, but promised to withdraw it if the defendants amended their Initial Disclosures. (*Id.* at ¶ 10). Defendants re-examined their Initial Disclosures and added addresses and telephone numbers for their employees and staff, and also added names to the categories of people who had information about the general topic of redistricting.[1] (*Id.* at ¶ 12; *see* Lazar Affid. Exh. C). In addition, because the defendants retained an expert on November 23, 2011, they added Professor Gaddie to their disclosures. (*Id.* at ¶¶ 12-13). The defendants emailed their Amended Initial Disclosures at noon on Friday November 25, 2011 to all counsel along with a request that the plaintiffs withdraw their Motion to Compel. (*Id.* at 13). To date, that Motion has not been withdrawn.

In fact, this afternoon, at approximately 2:15 p.m., the plaintiffs sent another letter in which they offered to "withdraw the motion to compel without prejudice upon [our] confirmation that [we] do not intend to use these anonymous individuals as witnesses or refer to

[1]All of the names added to the categories were already known to the plaintiffs (they were included in their initial disclosures).

their work, including reports and analysis." (*Id.* at ¶ 14; *see* Lazar Affid. Exh. D). However, the plaintiffs further note that "they and their work will remain subject to [the plaintiffs'] discovery, of course, but through [the defendants'] Rule 26 supplemented disclosures, [we] in effect have removed them from [our] list of potential witnesses and exhibits." (*Id.*).

The defendants declined that offer. (*Id.* at ¶ 15; *see* Lazar Affid. Exh. E). Thus, this Response was filed today.

Argument

The Initial And Amended Disclosures Meet The Requirements Of The Federal Rules Of Civil Procedure.

The defendants provided all of the required information, and more. The individuals listed on the Initial Disclosures are those individuals who work for or with the defendants. They are the individuals who, in addition to experts (some not yet retained), have information the defendants will use in this case. The Amended Initial Disclosures identify Professor Gaddie as an expert (he was not listed on the original Initial Disclosures because he had not yet been retained). They also list individuals who assisted the Legislature in drafting the maps at issue in this case, even though the defendants do not presently intend to call them as witnesses. Thus, the defendants have disclosed more than the Federal Rule requires.

The plaintiffs' objections (and motion) are based on the mistaken assumption that the defendants will use the same types of information to defend the case as the plaintiffs want to use to prosecute it. That is to say, the plaintiffs' motion reveals that they believe the process of developing the redistricting maps, and the legislators' motivations, have something to say about the maps' constitutionality. That information, however, has nothing to do with this case:

The legislators' intentions or motivations in adopting 2011 Wisconsin Acts 43 and 44 ("Acts 43 and 44") are nothing but a curiosity when the maps' constitutionality is the issue.

"We assume that the legislature's intent is expressed in the statutory language. . . . It is the enacted law, not the unenacted intent, that is binding on the public." *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. This is true because a statute is constitutional so long as there is any sound reason for its enactment: "Governmental action only fails rational basis scrutiny if no sound reason for the action can be hypothesized." *Board of Trustees v. Garrett*, 531 U.S. 356, 367 (2001).[2] That standard means that individuals with information regarding intent or motivation are not necessary to this case. Thus, the defendants do not presently anticipate using their information at trial, and so did not list such individuals in their Initial Disclosures.

Parties need only disclose the names of individuals who have information the disclosing party – not the receiving part – might use. According to Fed. R. Civ. P. 26(a)(1)(A)(i), parties must provide "the name, and if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the *disclosing* party may use to support its claims or defenses, unless the use would be solely for impeachment." (Emphasis supplied.)

Courts agree that the test is whether the *disclosing* party intends to call the individual at trial: "Plaintiff's allegations that defendant has not produced information regarding some [individuals] is . . . irrelevant because the essential inquiry is whether the disclosing party intends to use the witness." *Gluck v. Ansett Australia Ltd.*, 204 F.R.D. 217, 222 (D.D.C. 2001) (citation

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[2]Aside from the legal irrelevance of the legislators' intent, as a practical matter it is next to impossible to actually find it: "[D]iscerning the subjective motivation of those enacting statutes is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed finite . . . To look for the sole purpose of even a single legislator is probably to look for something that does not exist." *Edwards v. Aguillard*, 482 U.S. 578, 636-37 (1987) (J. Scalia, dissenting).

omitted); *A Traveler v. CSX Transp., Inc.*, No. 1:06-cv-56, 2006 WL 2051732 (July 20, 2006, N.D. Ind.) (same).

Further, because initial disclosures are not witness lists, disclosing parties may regularly amend them as case preparation proceeds and they determine they will need the testimony of previously undisclosed individuals. "A party is no longer obligated to disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use. . . . As case preparation continues, a party must supplement its disclosures when it determines that it may use a witness or document that it did not previously intend to use." Federal Rule of Civil Procedure 26, 2000 Notes of Advisory Committee, ¶9 *Crouse Cartage Co. v. Nat'l Warehouse Inv. Co.*, No IP02-0071-c-T/K, 2003 WL 21254617 (S.D. Ind. April 10, 2003) (challenge to 26(a) disclosures failed to clear "high hurdle" of demonstrating intent to use undisclosed witness).'

The defendants have acted in good faith and with full candor—promising even to assist informally in learning names and other information to make depositions unnecessary. Despite that, the plaintiffs insist that the defendants must disclose individuals with information the *plaintiffs* may use in this case. That is simply not what the rule requires, or even contemplates. This Motion to Compel Disclosure should be dismissed without the necessity of a hearing.

Conclusion

The defendants' Initial Disclosures were within the parameters of the Federal Rules of Civil Procedure. The Amended Initial Disclosures name Professor Gaddie (who was retained after the Initial Disclosures were submitted). They also add names to some of the general categories listed in an attempt to assuage the plaintiffs' concerns (even though the defendants have no present intention to use their information in this case). So not only have the defendants provided the required information, they have disclosed more than necessary.

Defendants respectfully ask this Court to deny the Motion in its entirety.

Dated this 28th day of November, 2011.

J.B. VAN HOLLEN
Attorney General

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

Attorneys for Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-3519
(608) 267-2223 (fax)
lazarms@doj.state.wi.us

Reinhart Boerner Van Deuren s.c.

s/Patrick J. Hodan
Patrick J. Hodan
WI State Bar ID No. 1001233
phodan@reinhartlaw.com
Daniel Kelly
WI State Bar ID No. 1001941
dkelly@reinhartlaw.com
Colleen E. Fielkow
WI State Bar ID No. 1038437
cfielkow@reinhartlaw.com
Attorneys for Defendants

Reinhart Boerner Van Deuren s.c.
1000 North Water Street, Suite 1700
Milwaukee, WI 53202
Telephone: 414-298-1000
Facsimile: 414-298-8097

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

ALVIN BALDUS, 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, CINDY BARBERA, RON BOONE, VERA BOONE, EVANJELINA CLEERMAN, SHEILA COCHRAN, MAXINE HOUGH, CLARENCE JOHNSON, RICHARD LANGE, and GLADYS MANZANET,

Plaintiffs,

Case No. 11-CV-00562
JPS-DPW-RMD

TAMMY BALDWIN, GWENDOLYNNE MOORE and RONALD KIND,

Intevenor-Plaintiffs,

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,

F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI, PAUL D. RYAN, JR., REID J. RIBBLE, and SEAN P. DUFFY.

Intevenor-Defendants.

VOCES DE LA FRONTERA, INC., RAMIRO VARA, OLGA VARA,

JOSE PEREZ, and ERICA RAMIREZ,

Plaintiffs,

v. Case No. 11-CV-1011
JPS-DPW-RMD

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.

AFFIDAVIT OF MARIA S. LAZAR
IN SUPPORT OF RESPONSE TO PLAINTIFFS' MOTION TO COMPEL DISCLOSURES

STATE OF WISCONSIN)
) ss.
DANE COUNTY)

MARIA S. LAZAR, being first duly sworn under oath, states as follows:

1. I am an Assistant Attorney General for the State of Wisconsin and am one of the counsel of record for the defendants in this above-captioned matter.

2. Pursuant to the Court's Scheduling and Discovery Order, dated November 14, 2011, at approximately 4:00 p.m. on November 16, 2011, plaintiffs and defendants simultaneously exchanged Initial Disclosures pursuant to Fed. R. Civ. P. 26(a)(1). (Copies of both plaintiffs and defendants' Initial Disclosures are attached as Exhibits A and B, respectively,

to the Declaration of Rebecca Kathryn Mason in Support of Plaintiffs' Motion to Compel Disclosure, dated November 21, 2011 (Docket Entry 53) ["Mason Declaration"]).

3. On November 17, 2011, plaintiffs' counsel wrote and emailed to me to complain that the defendants' Initial Disclosures were not sufficient. (A copy of that letter from Attorney Mason is attached as Exhibit C to the Mason Declaration).

4. I was presenting all day at the State Bar of Wisconsin's 2011 Annual Bankruptcy Update Seminar in Milwaukee, Wisconsin on November 17, 2011 and did not check my emails that date.

5. Counsel for plaintiffs was advised that I was out of the office all day on November 17, 2011. (See email from Attorney Mason; Exhibit C to the Mason Declaration).

6. On the morning of November 18, 2011, I found the letter on my chair. I immediately emailed Attorney Mason to set up a time to discuss her letter regarding the Initial Disclosures. Later that day, we spoke twice on the telephone. I asserted that the defendants were in compliance and pointed out several misstatements in Attorney Mason's November 17, 2011 letter, to wit:

a. The letter asserts that the defendants did not list *any* names. However, in our first paragraph, the names of seven GAB individuals and staff are listed. Attorney Mason admitted she had neglected to note that inclusion.

b. The letter asserts that the defendants are the state of Wisconsin. However, the defendants are not the State of Wisconsin, they are members of and the executive director of the Government Accountability Board.

c. The letter imputes knowledge of the State to the defendants. Again, they are not the State.

7. In addition, in the final conversation on November 18, 2011 at approximately 12:15 p.m., I offered to attempt to provide the plaintiffs with informal discovery. I also offered to provide the names of the defendants' experts once they were retained—as of that date no experts had yet been retained. I advised Attorney Mason of that fact. I further offered to amend the Initial Disclosures to include the names listed on the plaintiffs' Initial Disclosures. We concluded the telephone call with Attorney Mason promising not to file a Motion to Compel until we spoke again.

8. I have attached, as Exhibit A, a copy of the email I sent to Attorney Mason on November 18, 2011 at approximately 1:50 p.m.; some of its statements are referred to in the plaintiffs' Motion to Compel Disclosure, but it is not attached as an Exhibit.

9. On Monday November 21, 2011, at approximately 4:00 p.m. or so, Attorney Mason called me to advise me that "unless I amended the Initial Disclosures immediately," the plaintiffs would file a Motion to Compel. I returned her call a few minutes later and stated that I could not immediately file amended Initial Disclosures, but added that there were no names which I could add which were not already listed on the plaintiffs' Initial Disclosures. I asked for additional time, but—due to the dates set forth in the Court's Scheduling and Discovery Order, that was the last date that the plaintiffs could file their Motion.

10. In the second telephone call on November 21, 2011, Attorney Mason assured me that if I amended the Initial Disclosures to include those names, she would promptly withdraw the Motion to Compel.

11. On November 21, 2011 at approximately 5:00 p.m., the plaintiffs filed their Motion to Compel Disclosure.

12. On November 23, 2011, the defendants retained expert Professor Keith Gaddie.

13. On November 25, 2011, at noon, the defendants emailed Amended Initial Disclosures to all parties of record and asked Attorney Mason to withdraw the plaintiffs Motion to Compel. (True and correct copies of the email to Attorney Mason and Defendants' Amended Initial Disclosures, both dated November 25, 2011, are attached hereto as Exhibits B and C, respectively). Per the Court's Scheduling and Discovery Order, on Monday November 28, 2011 at 9:30 a.m., I personally hand-delivered a hard-copy of the Amended Initial Disclosures to Attorney Mason's office and advised the receptionist that the materials were time sensitive.

14. On November 28, 2011, at approximately 2:15 p.m., Attorney Mason emailed me a copy of a letter (a hard copy of which was also delivered to my office shortly thereafter), in which she offered to withdraw, without prejudice, the plaintiffs' Motion to Compel Disclosures and to extend the deadline by which the defendants are to respond to the plaintiffs' Motion to Compel Disclosures provided we meet certain conditions. To wit, Attorney Mason insisted we confirm "that [we] do not intend to use these anonymous individuals as witnesses or refer to their work, including reports and analysis." However, the plaintiffs further note that "they and their work will remain subject to [the plaintiffs'] discovery, of course, but through [the defendants'] Rule 26 supplemented disclosures, [we] in effect have removed them from [our] list of potential witnesses and exhibits." (A true and correct copy of Attorney Mason's November 28, 2011 letter is attached hereto as Exhibit D).

15. At approximately 7:00 p.m., I respectfully declined Attorney Mason's offer. (A true and correct copy of my letter to Attorney Mason, dated November 28, 2011, is attached hereto as Exhibit E). That letter was sent to all counsel of record by email and will be mailed and hand-delivered to Attorney Mason on November 29, 2011.

16. I am making this Affidavit in support of the Defendants' Response to Plaintiffs' Motion to Compel Disclosure.

Dated this 28th day of November, 2011.

MARIA S. LAZAR

Subscribed and sworn to before me
this 28th day of November, 2011.

F. Thomas III
Notary Public, State of Wisconsin
My commission is permanent

EXHIBIT 29

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, 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, CINDY BARBERA, RON BOONE, VERA BOONE, EVANJELINA CLEERMAN, SHEILA COCHRAN, MAXINE HOUGH, CLARENCE JOHNSON, RICHARD LANGE, and GLADYS MANZANET

Plaintiffs,

TAMMY BALDWIN, GWENDOLYNNE MOORE and RONALD KIND,

Intervenor-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,

F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI, PAUL D. RYAN, JR., REID J. RIBBLE, and SEAN P. DUFFY,

Intervenor-Defendants.

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

VOCES DE LA FRONTERA, INC., RAMIRO VARA, OLGA VARA, JOSE PEREZ, and ERICA RAMIREZ,

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-1011
JPS-DPW-RMD

ORDER

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

On November 21, 2011, the plaintiffs filed a motion to compel the defendants to disclose the identities of and appropriate contact information for individuals involved in creating and adopting Wisconsin's legislative districts, which are being challenged in this litigation. (Docket #50; Pl.'s Br. Supp. Mot. Comp., ¶ 5).

On a plain reading of the discovery rules, though, the plaintiffs' motion to compel must be denied. In fact, the plaintiffs, themselves, point out that Rule 26(a)(1)(A)(I) requires disclosure of individuals only when "the *disclosing party* may use [those individuals] to support its claims or defenses." (Pl.'s Br. Supp. Mot. Comp., ¶ 2 (citing Fed. R. Civ. P. 26(a)(1)(A)(I) (emphasis supplied by the Court))).

Thus, in the end, despite the fact that the complexities associated with the parties fulfillment of their mutual disclosure obligations portend a bit of a sticky wicket, the current motion is straightforward and readily dispatched. In accordance with Rule 26, at this initial disclosures phase of discovery, the plaintiffs are not entitled to receive information about individuals that the defendants (the "disclosing parties") do not intend to use in supporting their defenses. Fed. R. Civ. P. 26(a)(1)(A)(I); 6 *Moore's Federal Practice* § 26.22(4)(a)(ii) ("The focus is on persons who have information that the disclosing party may use"). Therefore, so long as the defendants do not intend to use undisclosed individuals with knowledge of the creation and passing of the challenged districts, then the plaintiffs are not entitled to that information. Fed. R. Civ. P. 26(a)(1)(A)(I).

The Court takes the defendants at their word that they do not intend to call any individuals sought by the plaintiffs and, therefore, will deny the plaintiffs' motion to compel.

That said, the Court notes that it may find itself later obliged to preclude and/or strike the testimony of any later-named individuals or otherwise sanction the defendants, if the defendants eventually attempt to rely upon individuals who otherwise fall within the category of individuals about whom the plaintiffs now seek disclosure. *See Frazier v. Layne Christensen Co.*, 370 F. Supp. 2d 823, 828 (W.D. Wis. 2005), *vacated in part on other grounds*, 380 F. Supp. 2d 989 (W.D. Wis. 2005); Fed. R. Civ. P. 37(c)(1) (providing the Court the ability to strike or order monetary payments as a result of inappropriate non-disclosure). In *Frazier v. Layne Christensen Co.*, the court struck the testimony of an initially-undisclosed witness that the defendant eventually attempted to use. 370 F. Supp. 2d at 828 (W.D. Wis. 2005). There, the court clarified that, even if a party is not "one-hundred percent sure" that it will use an individual's testimony, it still must disclose the individual if it *may* use that individual's testimony. *Id.* And so, in *Frazier*, because the challenged testimony came from an individual with substantial knowledge of the subject matter of the dispute, the court found it "difficult to comprehend how the defendant could not realize…that [such individuals] might have discoverable information." *Id.* Accordingly, the *Frazier* court struck the later-submitted testimony. *Id.*

Similarly, this Court will not suffer "sandbagging" by either party. If the defendants truly do not believe that they will use individuals in the category the plaintiffs now seek, then Rule 26(a) does not require that they disclose that information. But, should the defendants later supply a laundry-

list of amendments to initial disclosures as the case proceeds, the Court will closely examine the timeliness of any such disclosures to determine whether they should have been made earlier in the pretrial process. The defendants appear to hint that they may make later disclosures of witnesses at will. (Def.'s Resp. Mot. Comp. 7). The Court will not tolerate a party "hiding the ball" until a later stage in the litigation. To be sure, at the request of both parties, this litigation is on an expedited time-table. Therefore, at the risk of stating that which is obvious, delays in the discovery process will create significant logistical issues for everyone associated with the case, including the Court.

Simply put, to best manage this case, the Court will not hesitate to exercise its discretion under Rule 37 to strike future disclosures or award appropriate monetary sanctions should a party's discovery responses be deemed non-compliant or otherwise withheld in bad faith.

Accordingly,

IT IS ORDERED that the plaintiffs' motion to compel disclosure (Docket #50) be and the same is hereby **DENIED**.

Dated at Milwaukee, Wisconsin, this 30th day of November, 2011.

BY THE COURT:

J.P. Stadtmueller
U.S. District Judge

EXHIBIT 30

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, et al.,

Plaintiffs,

v. Civil Action No. 11-CV-562

MEMBERS OF THE WISCONSIN GOVERNMENT ACCOUNTABILITY BOARD, et al.,

Defendants.

CIVIL L.R. 7(h) EXPEDITED NON-DISPOSITIVE MOTION OF NON-PARTIES WISCONSIN STATE SENATE AND WISCONSIN STATE ASSEMBLY TO QUASH THE SUBPOENA ISSUED TO JOSEPH HANDRICK

Non-parties, the Wisconsin State Senate, by its Majority Leader Scott L. Fitzgerald and the Wisconsin State Assembly, by its Speaker Jeff Fitzgerald, submit this Civil L.R. 7(h) Non-Dispositive Motion to Quash the Subpoena issued to Joe Handrick (McLeod Dec., Ex. 1). In the subpoena, Plaintiffs demanded that Mr. Handrick produce for inspection "any and all documents used by you or members of the Legislature to draw the 2011 redistricting maps enacted as Act 43 and Act 44," as well as appear for a deposition on December 1, 2011. Fed. R. Civ. P. 45 requires a court to quash a subpoena that "fails to allow a reasonable time to comply," "requires disclosure of privileged or other protected matter," or "subjects a person to undue burden." Fed. R. Civ. P. 45(c)(3)(A). Plaintiffs' subpoena does all three and must be quashed.

A. Discovery is Prohibitied Because Mr. Handrick is a Non-Testifying Expert.

The State Senate and State Assembly retained Mr. Handrick in February 2011 as a consulting expert in the redistricting process in anticipation of litigation. In this capacity, Mr.

Handrick provided consulting services in connection with the undersigned firm's representation of the State Senate and State Assembly. As a retained, non-testifying expert, Mr. Handrick is not subject to discovery of any kind, whether by subpoena or otherwise. Fed. R. Civ. P. 26(b)(4)(D); *Ager v. Jane C. Stormont Hosp. & Training Ctr. for Nurses*, 622 F.2d 496, 501 (10th Cir. 1980).

B. The Subpoena Seeks Information that is Privileged.

Because Mr. Handrick was a non-testifying consultant, the subpoena seeks information that is privileged and thus not subject to discovery. Mr. Handrick assisted counsel for the Senate and Assembly in the provision of legal advice during the redistricting process. All communications between Mr. Handrick and/or the Senate and Assembly leadership on the one hand and legal counsel on the other are privileged and not subject to production. **Rule 45(c)(3)(A)(iii)** requires this Court to quash the subpoena on this ground.

C. The Subpoena was Served Three Days Before the Date for Compliance.

Even if the blanket protections of Rule 26(b)(4) did not completely shield Mr. Handrick from discovery, the subpoena still is improper for several additional, independent reasons.

First, the subpoena violates **Rule 45(c)(3)(A)(i)** and thus must be quashed because it allowed only three days to comply – a wholly unreasonable time. The subpoena was served on November 28, 2011, and demanded compliance by December 1, 2011. (McLeod Dec. Ex. 1).

D. The Subpoena Does not Specify the Method of Recording Testimony.

Rule 45(a)(1)(B) provides that "[a] subpoena commanding attendance at a deposition must state the method for recording the testimony." The subpoena does not do so. As such, the subpoena is invalid on its face.

E. The Subpoena is Overbroad and Does not Specify the Documents Sought.

The subpoena is vastly overbroad on its face in that it demands, without limitation, all

documents "used by you or members of the Legislature to draw the 2011 redistricting maps enacted as Act 43 and Act 44." The subpoena makes no attempt to specifically identify particular documents; it merely demands the entire files of every member of the Legislature. A blanket, all-encompassing subpoena such as this one is improper. *See Linder v. Calero-Portcarrero*, 180 F.R.D. 168, 174-75 (D.D.C. 1998). The subpoena also clearly seeks information that is outside of Mr. Handrick's possession or control. As an unelected, outside consultant, Mr. Handrick does not have control or custody over "documents used by . . . members of the Legislature." *See Outside the Box Innovations, LLC v. Travel Caddy, Inc.*, 455 F. Supp. 2d 1374, 378 (N.D. Ga. 2006). As such, Mr. Handrick cannot be compelled to produce them. **Rule 45(c)(3)(A)(iv)** requires that this Court quash the subpoena on this ground.

E. The Discovery Sought from Mr. Handrick is not Relevant to the Dispute.

Finally, the discovery sought from Mr. Handrick simply is not relevant to any of the claims or issues in this matter. At issue in the litigation is whether the resulting redistricting maps are constitutional. How the Legislature arrived at the final product is legally immaterial. The intent of any given participant in the process is immaterial. *See South Carolina Educ. Assn v. Campbell*, 883 F.2d 1251, 1257-58 (4th Cir. 1989) ("The Supreme Court has long recognized that judicial inquiries into legislative motivation are to be avoided.") Mr. Handrick is even further removed: he is an outside consultant who assisted counsel for the Senate and Assembly in connection with providing legal advice on matters relating to the reapportionment of the Wisconsin Senate, Assembly, and Congressional districts arising out of the 2010 census. Since the actions or intent of individual legislators are irrelevant to the constitutional validity of Acts 43 and 44, those of an outside consultant are all the more immaterial. To the extent the

legislative process has any relevance, the legislative file and record, including committee testimony, are matters of public record and obtainable without a subpoena.

Plaintiffs have violated their duty to "take reasonable steps to avoid imposing undue burden or expense" on a responding party. Consequently, the Court "must . . . impose an appropriate sanction" on Plaintiffs or their counsel. Rule 45(c)(1). Non-party respondents respectfully request an award of attorneys' fees incurred in preparing this motion.

Dated this 30th day of November, 2011.

MICHAEL BEST & FRIEDRICH LLP

By: s/ Aaron H. Kastens
Eric M. McLeod, SBN 1021730
emmcleod@michaelbest.com
Aaron H. Kastens, SBN 1045209
ahkastens@michaelbest.com
100 East Wisconsin Avenue, Suite 3300
Milwaukee, Wisconsin 53202-4108
Telephone: (414) 271-6560
Facsimile: (414) 277-0656

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, et al.,

Plaintiffs,

v. Civil Action No. 11-CV-562

MEMBERS OF THE WISCONSIN GOVERNMENT ACCOUNTABILITY BOARD, et al.,

Defendants.

DECLARATION OF ERIC M. McLEOD

I, Eric M. McLeod, hereby state and declare as follows, under penalty of perjury pursuant to 28 U.S.C. §1746.

1. I am an attorney and a partner with the Law Firm of Michael Best & Friedrich, the attorneys for the Wisconsin State Senate, by its Majority Leader Scott L. Fitzgerald and the Wisconsin State Assembly by its Speaker Jeff Fitzgerald. I make this affidavit based on my personal knowledge and in support of non-parties Wisconsin State Senate and Wisconsin State Assembly's Motion to Quash the Subpoena Issued to Joe Handrick.

2. Attached hereto as Exhibit 1 is a true and correct copy of the subpoena issued by plaintiffs to Joe Handrick.

3. The Wisconsin State Senate, by its Majority Leader Scott Fitzgerald and the Wisconsin State Assembly, by its Speaker Jeff Fitzgerald, through this law firm retained Mr. Handrick as a consulting expert in the Wisconsin redistricting process in anticipation of litigation. In this capacity, Mr. Handrick provided consulting services in connection with

Michael Best & Friedrich's representation of and provision of legal advice to the State Senate and State Assembly.

4. I declare under penalty of perjury that the foregoing is true and correct.

Dated this 30th day of November, 2011.

/s/ Eric M. McLeod
Eric M. McLeod

029472-0001\10548556.1

EXHIBIT 31

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

ALVIN BALDUS, 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, CINDY BARBERA, RON BOONE, VERA BOONE, EVANJELINA CLEERMAN, SHEILA COCHRAN, MAXINE HOUGH, CLARENCE JOHNSON, RICHARD LANGE, and GLADYS MANZANET,

Plaintiffs,

Case No. 11-CV-00562
JPS-DPW-RMD

TAMMY BALDWIN, GWENDOLYNNE MOORE and RONALD KIND,

Intevenor-Plaintiffs,

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,

F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI, PAUL D. RYAN, JR., REID J. RIBBLE, and SEAN P. DUFFY.

Intevenor-Defendants.

VOCES DE LA FRONTERA, INC., RAMIRO VARA, OLGA VARA,

JOSE PEREZ, and ERICA RAMIREZ,

Plaintiffs,

v.

Case No. 11-CV-1011
JPS-DPW-RMD

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.

DEFENDANTS' AMENDED ANSWER AND AFFIRMATIVE DEFENSES TO SECOND 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 Reinhart Boerner Van Deuren, s.c., by Patrick J. Hodan, Daniel Kelly, and Colleen E. Fielkow, for their Amended Answer and Affirmative Defenses to the plaintiffs' Second Amended Complaint for Declaratory and Injunctive Relief, dated November 18, 2011 and filed November 22, 2011, hereby state as follows:

ANSWER

The un-numbered summary paragraphs set forth at the beginning of the Second 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 Second Amended Complaint. Nonetheless, defendants respond to those summary paragraphs here.

SUMMARY

> This is an action for a declaratory judgment and for injunctive relief, involving the rights of plaintiffs under the U.S. Constitution and the Wisconsin Constitution and the statutorily-mandated configuration of the eight congressional districts, 33 senate districts and 99 assembly districts in the State of Wisconsin for 2012 and beyond. These districts—reflected in legislation adopted on July 19 and 20, 2011, Wisconsin Acts 43 and 44, and signed by the Governor on August 9, 2011—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 Second Amended Complaint and that the Second Amended Complaint speaks for itself and DENY any characterization of the Second 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 second amended complaint supersedes the complaint filed on June 10, 2011, and the amended complaint filed on July 21, 2011.

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 sentence of the second paragraph.

The plaintiffs seek a declaratory judgment that:

> ☐☐The redistricting law in Act 43 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;
>
> ☐☐Act 43 violates the Equal Protection Clause and the Wisconsin 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 statute in Act 44 violates the constitutional requirement that districts be compact and preserve communities of interest;
>
> ☐☐Both the congressional and legislative redistricting laws violate the First and Fourteenth Amendments in that the districts reflect deliberate, systematic and impermissible partisan gerrymandering and impinge upon freedom of association and expression by penalizing voters and elected representatives solely because of their political affiliation and beliefs;
>
> ☐☐The law in Act 43 violates the statutory and constitutional prohibitions against using race as a predominant factor in creating district boundaries;
>
> ☐☐The congressional and legislative redistricting laws violate the Equal Protection Clause because they cannot be justified as furthering any legitimate state interest and are, therefore, unconstitutional; and
>
> ☐☐Any special or recall elections cannot be conducted under Act 43 because plaintiffs would be deprived of equal protection and their right to mandate legislative elections and participate in them pursuant to the state constitution.

Answer to Third Summary Paragraph: Defendants STATE that the allegations of the third summary paragraph refer to the allegations set forth in the Second Amended Complaint and that the Second Amended Complaint speaks for itself. Defendants further DENY any characterization of the Second Amended Complaint contrary to its express terms. Defendants further DENY all allegations that the redistricting law 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, plaintiffs request injunctive relief prohibiting any elections, including recall or special elections, from being conducted under the boundaries created by the new statutes. 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]

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 U.S. Constitution and federal law and supplemental jurisdiction under 28 U.S.C. § 1367 to hear claims under the Wisconsin 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 21, 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 statutorily-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 ADMIT plaintiffs are challenging the constitutionality of Acts 43 and 44. 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.

---

[1]On October 21, 2011, this Court denied the defendants' motion to dismiss the amended complaint on procedural and substantive grounds. *See* Dkt. #25.

3. Accordingly, under 28 U.S.C. § 2284(a), a district court of three judges has been convened to hear the case. In 1982, 1992 and 2002, three-judge panels convened pursuant to 28 U.S.C. § 2284 and 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 ADMIT that a district court of three judges has 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 plans in the absence of any such legislatively created and enacted plans. Finally, defendants ASSERT that there are valid, constitutional redistricting plans based upon the 2010 decennial census 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 14 of the individual plaintiffs reside and vote in this judicial district.

Answer to ¶ 4: To the extent that this Court may properly take jurisdiction of this action, venue is properly in the Eastern District of Wisconsin. Defendants lack information or knowledge sufficient to form a belief as to the truth of the allegations regarding the residences of the individual plaintiffs and put plaintiffs to their proof thereon.

PARTIES

Plaintiffs

5. 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 Acts 43 and 44). 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 law.

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 law.

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 law.

d. 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 law.

e. Ross Boone, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the Village of Twin Lakes, Kenosha County, Wisconsin, with his residence in the 1st Congressional District, 61st Assembly District and the 21st Senate District as those districts have been established by law.

f. Vera Boone, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the Village of Twin Lakes, Kenosha County, Wisconsin, with her residence in the 1st Congressional District, 61st Assembly District and the 21st Senate District as those districts have been established by law.

g. 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 law.

h. Evanjelina Cleereman, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the City of Milwaukee, Milwaukee County, Wisconsin, with her residence in the 4th Congressional District, 8th Assembly District and 3rd Senate District as those districts have been established by law.

i. Sheila Cochran, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the City of Milwaukee, Milwaukee County, Wisconsin, with her residence in the 4th Congressional District, 17th Assembly District and the 4th Senate District as those districts have been established by law.

j. 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 law.

k. 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 8th Senate District as those districts have been established by law.

l. Maxine Hough, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the Town of East Troy, Walworth County, Wisconsin, with her residence in the 1st Congressional District, 32nd Assembly District and the 11th Senate District as those districts have been established by law.

m. Clarence Johnson, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the City of Milwaukee, Milwaukee County, Wisconsin, with his residence in the 4th Congressional District, 22nd Assembly District and the 8th Senate District as those districts have been established by law.

n. 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 law.

o. Richard Lange, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of South Range, Douglas County, Wisconsin, with his residence in the 7th Congressional District, 73rd Assembly District and 25th Senate District as those districts have been established by law.

p. Gladys Manzanet, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter of the City of Milwaukee, Milwaukee County, Wisconsin, with her residence in the 4th Congressional District, 9th Assembly District and 3rd Senate District as those districts have been established by law.

q. 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 law.

r. 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 law.

s. 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 law.

t. 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 law.

u. 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 law.

v. 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 law.

w. 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 law.

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 (w), 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, under Wis. Stat. §§ 10.01(2)(a), 10.06(1)(f), 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 Second 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.

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 U.S. constitution requires that the members of Congress be elected from districts with equal populations. The Wisconsin 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 Wisconsin 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. It further requires that state senators "shall be chosen" by the voters every four years. It also gives citizens, in article XIII, section 12, the right to "petition for the recall of any incumbent elective officer...." and upon a recall election, the person receiving the "highest number of votes in the recall election shall be elected for the remainder of the term."

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 lack information sufficient to form a belief as to the truth of whether Exhibit A is a copy of the Census Bureau's Apportionment Population and Number of Representatives, by state, and so deny. 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. Act 43 specifically and explicitly provides that it shall first apply "…. with respect to regular elections, to offices filled at the 2012 general election," and "…. with respect to special or recall elections, to offices filled or contested concurrently with the 2012 general election."

Answer to ¶ 18: Defendants ASSERT that Act 43 speaks for itself and is effective according to its terms and DENY any characterization of such document contrary to its express terms.

19. 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 ¶ 19: 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 ¶ 19.

20. 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 ¶ 20: 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.

Answer to ¶ 20(a): Defendants ADMIT ¶ 20(a).

Answer to ¶ 20(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 ¶ 20(b).

Answer to ¶ 20(c): Defendants ADMIT ¶ 20(c).

21. 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(l)(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 ¶ 21: Defendants ASSERT that the statutes referenced in the first sentence of ¶ 21 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."

Congressional Districts

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

Answer to ¶ 22: 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 ¶ 22.

23. 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 ¶ 23: 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.

24. 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 ¶ 24: Defendants ADMIT the first sentence of ¶ 24 and restate their answers to ¶¶ 19 and 20, above. Defendants DENY any and all remaining allegations contained in ¶ 24.

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

Answer to ¶ 25: 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 ¶ 25.

CLAIMS FOR RELIEF

26. 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 ¶ 26: Defendants DENY ¶ 26.

27. 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 ¶ 27: Defendants DENY ¶ 27.

FIRST CLAIM

Legislative Boundaries Unconstitutionally Sacrifice Redistricting Principles

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

Answer to ¶ 28: Defendants incorporate their responses to ¶¶ 1 through 27 of the Second Amended Complaint, above, as though fully set forth herein.

29. The federal and state constitutions require that legislative districts be apportioned with equal populations.

Answer to ¶ 29: Defendants ASSERT that ¶ 29 contains purported statements of law in response to which no answer is required.

30. Any deviation from exact population equality must be justified by the applicable state interest and policy.

Answer to ¶ 30: Defendants ASSERT that ¶ 30 contains purported statements of law and/or legal conclusions in response to which no answer is required.

31. Wisconsin's traditional redistricting principles, set forth in the state's constitution, statutes and federal case law, require legislative districts to be compact, preserve core populations from prior districts, and preserve county and other political subdivision boundaries and communities of interest. The state constitution also requires that legislative districts be based on districts first drawn by local units of government.

Answer to ¶ 31: Defendants ASSERT that the federal and Wisconsin Constitutions speak for themselves and DENY any characterization of such constitutions contrary to their express terms.

32. The new legislative districts wholly and impermissibly ignore Wisconsin's traditional and mandatory redistricting principles.

a. They are not geographically compact—in fact, significantly less so than the 2002 boundaries established by this Court. 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*, *e.g.,* Exhibit D, comparing the Racine/Kenosha districts to their 2002 counterparts.

b. The 2011 assembly districts do not preserve core populations from prior districts. Based on the 2010 census, 323,026 individuals needed to move assembly districts; the new statute moves 2,357,592 individuals—two million more than necessary—into new assembly districts. As a result, the 2011 districts retain only 59 percent of the core population from the 2002 districts—in fact, in districts currently held by Democrats, only 49 percent of the core population is retained. (In contrast, the 2002 boundaries retained 76.7 percent of the core populations from the prior districts.) 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 statute removes 57,932 individuals from the district and adds 53,984 individuals.

ii. The 2010 census disclosed that AD 33 should have been reduced by 2,016 individuals; the new statute 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 reach the ideal population; the new statute 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 statute removes 52,142 individuals from the district and adds 50,684 individuals.

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

c. Many of the 2011 state senate districts also do not preserve core populations from prior districts. The 2010 census disclosed that 231,341 individuals needed to shift senate districts; the new statute, 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 statute adds 66,837 individuals from a different district and removes 74,586 individuals from the existing district.

ii. The 2010 census revealed that SD 21, which used to border SD 22 to the north, needed to increase by 5,598 individuals; the new statute 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 and legally insignificant. The new statute 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 statute, 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 individuals greater than the ideal population, according to the 2010 census. The new statute 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 statute adds 13,741 individuals to the district and removes 13,321 from the 2002 district population.

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

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

ii. 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 statute 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 some communities of interest are fractured, other communities that have little in common are combined.

iii. In the Fox Valley, the City of Appleton, a majority of which has traditionally been contained within one assembly district (AD 57), is 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.

iv. The City of Beloit has been contained traditionally and historically within one assembly district (AD 45). Act 43 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 11 on the east). The residents of the City of Beloit, which often has the highest unemployment rate in the state, have very little in common with residents of, for example, Lake Geneva. v. In Milwaukee, three assembly districts that had historically been contained within Milwaukee County are now stretched from the edge of the city well into Waukesha County.

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

i. 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 statute, 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, and otherwise fracturing communities of interest.

ii. 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 statute 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, and otherwise fracturing communities of interest.

Answer to ¶ 32: Defendants DENY ¶ 32.

Answer to ¶ 32(a-e): Defendants DENY all sub-parts of ¶ 32 in their entirety.

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

Answer to ¶ 33: Defendants ADMIT that, pursuant to Act 43, Section 10(2) and Act 44, Section 4(2), and absent a court order to the contrary, GAB intends to conduct all special or recall elections scheduled before the fall 2012 general elections under the boundaries established by this Court in *Baumgart v. Wendelberger*, 2002 WL 34127471 (E.D. Wis. May 30, 2002) (per curiam), amended by 2002 WL 34127473 (E.D. Wis. July 11, 2002). Defendants DENY all other allegations in ¶ 33.

34. In the absence of the statutorily- 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 ¶ 34: Paragraph 34 sets forth allegations of law which require no response. Subject to the foregoing, defendants lack knowledge and information sufficient to form a belief as to whether any elections conducted under the boundaries established by this Court in *Baumgart v. Wendelberger*, 2002 WL 34127471 (E.D. Wis. May 30, 2002) (per curiam), amended by 2002 WL 34127473 (E.D. Wis. July 11, 2002) will deprive any of the individual plaintiffs of their civil rights and, therefore, DENY the same. Defendants further ADMIT that conducting elections under 2011 Wisconsin Acts 43 & 44 will not deprive anyone of their civil rights. Defendants DENY all remaining allegations in ¶ 34.

SECOND CLAIM

The Legislation Does Not Recognize Local Government Boundaries

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

Answer to ¶ 35: Defendants incorporate their responses to ¶¶ 1 through 34 of the Second Amended Complaint, above, as though fully set forth herein.

36. The Wisconsin constitution requires that, to the extent possible, counties, municipalities and wards be kept whole within legislative district boundaries. It mandates that they be "bounded" by lines drawn for and by local political units.

Answer to ¶ 36: Defendants ASSERT that the Wisconsin Constitution speaks for itself and defendants DENY any characterization of the constitution contrary to its express terms.

37. Although population equality is the primary goal of redistricting, Wisconsin's constitutional requirement of respecting political subdivisions—especially in light of the state's historically broad application of this requirement—remains a significant consideration and cannot be unnecessarily ignored; county and political subdivision divisions should be minimal.

Answer to ¶ 37: Defendants ASSERT that the Wisconsin Constitution speaks for itself and defendants DENY any characterization of the constitution contrary to its express terms.

38. The 2011 legislative districts unconstitutionally fail to minimize the splitting of counties and political subdivisions, ignoring Wisconsin's long-established policy to maintain their integrity.

Answer to ¶ 38: Defendants DENY ¶ 38.

39. The new districts are not bound by county, precinct, town or ward lines already established by local governments. In addition, the statute splits significantly more counties, municipalities and wards than the 2002 boundaries. The districts in Racine, Kenosha, Appleton, Beloit and Milwaukee, discussed above in paragraphs 32a through e, are examples of these impermissible divisions.

Answer to ¶ 39: Defendants DENY ¶ 39.

40. In creating district boundaries, the statute ignores local boundaries already established by local government boundaries and in the process of being established. Instead, the new law forces local municipalities to make their districts conform to the state's plan, violating the Wisconsin constitution. *See* Exhibit C; *supra,* ¶ 21.

Answer to ¶ 40: Defendants DENY ¶ 40.

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

Answer to ¶ 41: Defendants DENY ¶ 41.

42. In the absence of the statutorily- 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 ¶ 42: Defendants DENY ¶ 42.

THIRD CLAIM

Legislative Districts Unnecessarily Disenfranchise 300,000 Wisconsin Citizens[2]

43. Plaintiffs incorporate by reference the allegations to paragraphs 1 through 42 above.

Answer to ¶ 43: Defendants incorporate their responses to ¶¶ 1 through 42 of the Second Amended Complaint, above, as though fully set forth herein.

44. 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 presidential mid-term elections.

Answer to ¶ 44: Defendants ADMIT ¶ 44.

45. 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 Wisconsin constitution requires, every four years for a senator to represent them.

Answer to ¶ 45: Defendants DENY ¶ 45.

46. 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 1 (which needed to *lose* 8,656 individuals).

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[2]This Court already has determined that these allegations state a claim for relief. *See supra* p. 3 n.1.

Answer to n.2: Defendants ASSERT that n.2 contains purported statements of law and/or legal conclusions to which no answer is required.

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 moved out of the district were moved into Senate District 31, which needed to *lose* 1,034 individuals.

Answer to ¶ 46: Defendants DENY ¶ 46. 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 ¶¶ 46(a-d): Defendants DENY all sub-parts of ¶ 46 in their entirety.

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

Answer to ¶ 47: Defendants ADMIT that, pursuant to Act 43, Section 10(2) and Act 44, Section 4(2), and absent a court order to the contrary, GAB intends to conduct all special or recall elections scheduled before the fall 2012 general elections under the boundaries established by this Court in *Baumgart v. Wendelberger*, 2002 WL 34127471 (E.D. Wis. May 30, 2002) (per curiam), amended by 2002 WL 34127473 (E.D. Wis. July 11, 2002). Defendants DENY all other allegations in ¶ 47.

48. In the absence of the statutorily- 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 ¶ 48: Paragraph 48 sets forth allegations of law which require no response. Subject to the foregoing, Defendants lack knowledge and information sufficient to form a belief as to whether any elections conducted under the boundaries established by this Court in *Baumgart v. Wendelberger*, 2002 WL 34127471 (E.D. Wis. May 30, 2002) (per curiam), amended by 2002 WL 34127473 (E.D. Wis. July 11, 2002) will deprive any of the individual plaintiffs of their civil rights and, therefore, DENY the same. Defendants further ADMIT that conducting elections under 2011 Wisconsin Acts 43 & 44 will not deprive anyone of their civil rights. Defendants DENY all remaining allegations in ¶ 48.

FOURTH CLAIM

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

49. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 48 above.

Answer ¶ 49: Defendants incorporate their responses to ¶¶ 1 through 48 of the Second Amended Complaint, above, as though fully set forth herein.

50. The federal and state constitutions require that political districts be compact and preserve communities of interest, including core populations that historically have been in the same district.

Answer to ¶ 50: Defendants ASSERT that the federal and Wisconsin Constitutions speak for themselves and further DENY any characterization of such constitutions contrary to their express terms.

51. 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 ¶ 51: Defendants ASSERT that ¶ 51 contains purported statements of law in response to which no answer is required. Further answering defendants DENY any and all allegations contained therein.

52. 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 from the Minnesota boarder in the west to Florence County in the east.

b. The 3rd Congressional District similarly and unnecessarily spans 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 new 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.

d. Act 44 unnecessarily shifts congressional district populations to satisfy partisan political goals.

Answer to ¶ 52: Defendants DENY ¶ 52.

Answer to ¶¶ 52(a-d): Defendants DENY all sub-parts of ¶ 52 in their entirety.

53. 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, but is not limited to, 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 ¶ 53: Defendants ASSERT that ¶ 53 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.

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

Answer to ¶ 54: Defendants ASSERT that ¶ 54 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.

55. The congressional districts created by Act 44 impermissibly divide communities of interest:

a. Fox Valley Area: The new statute 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 established by this Court where the county was represented by only three members of Congress.

Answer to ¶ 55: Defendants DENY ¶ 55.

Answer to ¶ 55(a-b): Defendants DENY all sub-parts of ¶ 55 in their entirety. Further, defendants put plaintiffs to their proof regarding the allegations made in the sub-parts of ¶ 55.

56. 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 plaintiffs by violating their constitutional rights.

Answer to ¶ 56: Defendants ADMIT that, pursuant to Act 43, Section 10(2) and Act 44, Section 4(2), and absent a court order to the contrary, GAB intends to conduct all special or recall elections scheduled before the fall 2012 general elections under the boundaries established by this Court in *Baumgart v. Wendelberger*, 2002 WL 34127471 (E.D. Wis. May 30, 2002) (per curiam), amended by 2002 WL 34127473 (E.D. Wis. July 11, 2002). Defendants DENY all other allegations in ¶ 56.

57. In the absence of the statutorily- 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 ¶ 57: Paragraph 57 sets forth allegations of law which require no response. Subject to the foregoing, Defendants lack knowledge and information sufficient to form a belief

as to whether any elections conducted under the boundaries established by this Court in *Baumgart v. Wendelberger*, 2002 WL 34127471 (E.D. Wis. May 30, 2002) (per curiam), amended by 2002 WL 34127473 (E.D. Wis. July 11, 2002) will deprive any of the individual plaintiffs of their civil rights and, therefore, DENY the same. Defendants further ADMIT that conducting elections under 2011 Wisconsin Acts 43 & 44 will not deprive anyone of their civil rights. Defendants DENY all remaining allegations in ¶ 57.

FIFTH CLAIM

Congressional and Legislative Districts Constitute Unconstitutional Gerrymandering

58. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 57 above.

Answer to ¶ 58: Defendants incorporate their responses to ¶¶ 1 through 57 of the Second Amended Complaint, above, as though fully set forth herein.

59. 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 ¶ 59: 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.

60. The new districts violate the requirements of the Equal Protection Clause and First Amendment because the districts are not justified by neutral or applicable state interests, and constitute an impermissible partisan gerrymander.

a. Act 43 explicitly eliminates the statutory provision that sets forth the legislature's justification for failing to attain precise population equality through the legislature's "good faith effort to apportion the legislature giving due consideration to the need for contiguity and compactness of area, the maintenance of the integrity of political subdivisions and of communities of interest, and competitive legislative districts."

b. The partisan effects of Acts 43 and 44 evince a systematic and deliberate effort by the Republican legislative leadership to draw districts with a distinct partisan advantage for Republican officials and candidates to the exclusion of Wisconsin's redistricting principles—including compactness, and preservation of local boundaries, communities of interest and core populations of prior districts. For example, although on average the assembly districts retain approximately 59 percent of the core populations of prior districts, the average core population retention for districts held by Republican officials is actually 64 percent, while the average core population retention for districts held by Democratic officials is just 49 percent.

Answer to ¶ 60: Defendants DENY ¶ 60.

Answer to ¶ 60(a-b): Defendants DENY all sub-parts of ¶ 60 in their entirety.

61. The intent of the majority in enacting Acts 43 and 44 is to deny plaintiffs and other citizens inclined to vote for Democratic candidates fair representation in the state legislature and congress in 2012 and beyond, including any special or recall elections.

a. The minority party in the state legislature was denied a fair chance to participate in the hurried and largely secret redistricting process described in paragraphs 19 and 20.

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

c. 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 ¶ 61: Defendants DENY ¶ 61.

Answer to ¶ 61(a-c): Defendants DENY all sub-parts of ¶ 61 in their entirety.

62. The effect of Acts 43 and 44 is to give the Republican majority an unfair electoral advantage, disproportionate to its historical success, in an attempt to preserve their political majorities and minimize the prospects for the minority party. For example:

a. For the last decade and more, Wisconsin's 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 nevertheless would win 58 assembly seats.

Answer to ¶ 62: Defendants DENY ¶ 62.

Answer to ¶ 62(a-b): Defendants DENY all sub-parts of ¶ 62 in their entirety.

63. The statute 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.

Answer to ¶ 63: Defendants lack information sufficient to form a belief as to the truth of the matters asserted and so DENY ¶ 63.

64. Under these boundaries, and as a direct result of partisan gerrymandering, the assembly may go from a 59-39 Republican majority to a 64-34 Republican majority in 2012.

Answer to ¶ 64: Defendants lack information sufficient to form a belief as to the truth of the matters asserted and so DENY ¶ 64.

65. 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 Acts 43 and 44, 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. This infringes upon plaintiffs' freedoms of association and expression, including campaigning and voting.

Answer to ¶ 65: Defendants DENY ¶ 65.

66. The new districts will impair the minority party's association and expression rights as well by limiting the ability to recruit candidates, and it will deter potential candidates from exercising their right to run for office by making a Democratic candidacy futile. The new districts also will deter potential Democratic voters from casting ballots that, by definition, are likely to be meaningless.

Answer to ¶ 66: Defendants DENY ¶ 66.

67. A political candidate with less chance of winning an election will usually receive less in campaign contributions, a form of political speech, than a candidate with a greater chance of winning. Accordingly, the new districts impair the ability of Democratic candidates or donors to raise campaign contributions and thereby engage in political speech.

Answer to ¶ 67: Defendants DENY ¶ 67.

68. The legislature's districting is arbitrary and discriminatory.

Answer to ¶ 68: Defendants DENY ¶ 68.

69. The legislature's districting implicates First Amendment rights and is not narrowly tailored to achieve a compelling state interest.

Answer to ¶ 69: Defendants DENY ¶ 69.

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

Answer to ¶ 70: Defendants ADMIT that, pursuant to Act 43, Section 10(2) and Act 44, Section 4(2), and absent a court order to the contrary, GAB intends to conduct all special or recall elections scheduled before the fall 2012 general elections under the boundaries established by this Court in *Baumgart v. Wendelberger*, 2002 WL 34127471 (E.D. Wis. May 30, 2002) (per curiam), amended by 2002 WL 34127473 (E.D. Wis. July 11, 2002). Defendants DENY all other allegations in ¶ 70.

71. In the absence of the statutorily- 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: Paragraph 71 sets forth allegations of law which require no response. Subject to the foregoing, Defendants lack knowledge and information sufficient to form a belief as to whether any elections conducted under the boundaries established by this Court in *Baumgart v. Wendelberger*, 2002 WL 34127471 (E.D. Wis. May 30, 2002) (per curiam),

amended by 2002 WL 34127473 (E.D. Wis. July 11, 2002) will deprive any of the individual plaintiffs of their civil rights and, therefore, DENY the same. Defendants further ADMIT that conducting elections under 2011 Wisconsin Acts 43 & 44 will not deprive anyone of their civil rights. Defendants DENY all remaining allegations in ¶ 71.

SIXTH CLAIM

Legislative Districts Violate the Federal Voting Rights Act

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

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

73. 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 fracturing minorities into several districts to dilute their influence.

Answer to ¶ 73: Defendants ASSERT that the Voting Rights Act speaks for itself and DENY any characterization of such document contrary to its express terms.

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

Answer to ¶ 74: The allegations in ¶ 74 constitute legal conclusions to which a responsive pleading is not required.

75. 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 communities without regard for any factors other than, on their face, race.

Answer to ¶ 75: Defendants DENY ¶ 75.

76. Under the new statute, African Americans, including but not limited to Sheila Cochran and Clarence Johnson, have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

a. Racial bloc voting is pervasive in the City of Milwaukee among both majority and African American groups. Majority bloc voting is almost invariably sufficient to defeat the minority's preferred candidate.

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 statute, however, creates only six assembly districts where a majority of the voting age population is African American.

d. It is possible to create a redistricting plan that will provide more African Americans a more equal opportunity to elect candidates of their choice.

e. 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 and statutory requirements.

f. The statute's 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 ¶ 76: Defendants DENY ¶ 76.

Answer to ¶ 76(a): Defendants lack knowledge or information sufficient to form a belief as to the truth of the matters asserted in ¶ 76(a) and, therefore, DENY the same.

Answer to ¶ 76(b): Defendants DENY ¶ 76(b).

Answer to ¶ 76(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 ¶ 76(c).

Answer to ¶ 76(d): Defendants DENY ¶ 76(d).

Answer to ¶ 76(e): Defendants DENY ¶ 76(e).

Answer to ¶ 76(f): Defendants DENY ¶ 76(f).

77. Under the new statute, Latinos, including but not limited to Evanjelina Cleereman and Gladys Manzanet, have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice:

a. Racial bloc voting is pervasive in the City of Milwaukee among both majority and Latino groups. Majority bloc voting is almost invariably sufficient to defeat the minority's preferred candidate.

b. Latino populations comprise a sufficiently large and geographically compact group to elect at least one legislator of their choice, yet the statute fails to create any district with sufficient Latino voting age citizen population.

c. It is possible to create a redistricting plan that will provide Latinos a more equal opportunity to elect at least one legislator of their choice.

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

Answer to ¶ 77: Defendants DENY ¶ 77.

Answer to ¶ 77(a): Defendants lack knowledge or information sufficient to form a belief as to the truth of the matters asserted in ¶ 77(a) and, therefore, DENY the same.

Answer to ¶ 77(b): Defendants DENY ¶ 77(b).

Answer to ¶ 77(c): Defendants DENY ¶ 77(c).

Answer to ¶ 77(d): Defendants DENY ¶ 77(d).

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

Answer to ¶ 78: Defendants ADMIT that, pursuant to Act 43, Section 10(2) and Act 44, Section 4(2), and absent a court order to the contrary, GAB intends to conduct all special or recall elections scheduled before the fall 2012 general elections under the boundaries established by this Court in *Baumgart v. Wendelberger*, 2002 WL 34127471 (E.D. Wis. May 30, 2002) (per

curiam), amended by 2002 WL 34127473 (E.D. Wis. July 11, 2002). Defendants DENY all other allegations in ¶ 78.

> 79. In the absence of the statutorily- 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. §§ 1973, 1983 and 1988.

Answer to ¶ 79: Paragraph 79 sets forth allegations of law which require no response. Subject to the foregoing, Defendants lack knowledge and information sufficient to form a belief as to whether any elections conducted under the boundaries established by this Court in *Baumgart v. Wendelberger*, 2002 WL 34127471 (E.D. Wis. May 30, 2002) (per curiam), amended by 2002 WL 34127473 (E.D. Wis. July 11, 2002) will deprive any of the individual plaintiffs of their civil rights and, therefore, DENY the same. Defendants further ADMIT that conducting elections under 2011 Wisconsin Acts 43 & 44 will not deprive anyone of their civil rights. Defendants DENY all remaining allegations in ¶ 79.

SEVENTH CLAIM

Legislative Districts Unconstitutionally Use Race As A Predominant Factor

80. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 79 above.

Answer to ¶ 80: Defendants incorporate their responses to ¶¶ 1 through 79 of the Second Amended Complaint, above, as though fully set forth herein.

> 81. The Equal Protection Clause prohibits a state from using race as the predominant basis for splitting voters into districts to the exclusion of other redistricting criteria.

Answer to ¶ 81: The allegations in ¶ 81 constitute legal conclusions to which a responsive pleading is not required.

82. The legislative process and information available to the legislature at the time Act 43 was passed, and the demographics of the 2011 legislative districts, demonstrate that race was the predominant factor in the drawing of certain legislative districts.

a. The new Racine-Kenosha senate district includes populations that belong to the same race, but otherwise does not take into consideration communities of interest.

b. In Milwaukee, by shifting existing districts based predominantly 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 and do not take into consideration communities of interest.

Answer to ¶ 82: Defendants DENY ¶ 82.

Answer to ¶ 82(a-b): Defendants DENY all sub-parts of ¶ 82 in their entirety.

83. The statute unconstitutionally considered race as the predominant factor to the exclusion of Wisconsin's traditional redistricting principles.

Answer to ¶ 83: Defendants DENY ¶ 83.

84. The legislature's race-based districting is not narrowly tailored to achieve a compelling state interest.

Answer to ¶ 84: Defendants DENY ¶ 84.

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

Answer to ¶ 85: Defendants ADMIT that, pursuant to Act 43, Section 10(2) and Act 44, Section 4(2), and absent a court order to the contrary, GAB intends to conduct all special or recall elections scheduled before the fall 2012 general elections under the boundaries established by this Court in *Baumgart v. Wendelberger*, 2002 WL 34127471 (E.D. Wis. May 30, 2002) (per curiam), amended by 2002 WL 34127473 (E.D. Wis. July 11, 2002). Defendants DENY all other allegations in ¶ 85.

86. In the absence of the statutorily- 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 ¶ 86: Paragraph 86 sets forth allegations of law which require no response. Subject to the foregoing, Defendants lack knowledge and information sufficient to form a belief as to whether any elections conducted under the boundaries established by this Court in *Baumgart v. Wendelberger*, 2002 WL 34127471 (E.D. Wis. May 30, 2002) (per curiam), amended by 2002 WL 34127473 (E.D. Wis. July 11, 2002) will deprive any of the individual plaintiffs of their civil rights and, therefore, DENY the same. Defendants further ADMIT that conducting elections under 2011 Wisconsin Acts 43 & 44 will not deprive anyone of their civil rights. Defendants DENY all remaining allegations in ¶ 86.

EIGHTH CLAIM

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

87. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 86 above.

Answer to ¶ 87: Defendants incorporate their responses to ¶¶ 1 through 86 of the Second Amended Complaint, above, as though fully set forth herein.

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

Answer to ¶ 88: 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.

89. The state 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 ¶ 89: Defendants DENY ¶ 89.

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

Answer to ¶ 90: Defendants DENY ¶ 90.

91. Because the new law 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 retain compactness, preserve communities of interest, preserve core populations, and are not based on local boundaries.

Answer to ¶ 91: Defendants DENY ¶ 91.

92. There is no apolitical state interest that justifies the new Congressional and legislative districts.

Answer to ¶ 92: Defendants DENY ¶ 92.

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

Answer to ¶ 93: Defendants ADMIT that, pursuant to Act 43, Section 10(2) and Act 44, Section 4(2), and absent a court order to the contrary, GAB intends to conduct all special or recall elections scheduled before the fall 2012 general elections under the boundaries established by this Court in *Baumgart v. Wendelberger*, 2002 WL 34127471 (E.D. Wis. May 30, 2002) (per curiam), amended by 2002 WL 34127473 (E.D. Wis. July 11, 2002). Defendants DENY all other allegations in ¶ 93.

94. In the absence of the statutorily- 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 ¶ 94: Paragraph 94 sets forth allegations of law which require no response. Subject to the foregoing, Defendants lack knowledge and information sufficient to form a belief as to whether any elections conducted under the boundaries established by this Court in *Baumgart v. Wendelberger*, 2002 WL 34127471 (E.D. Wis. May 30, 2002) (per curiam), amended by 2002 WL 34127473 (E.D. Wis. July 11, 2002) will deprive any of the individual plaintiffs of their civil rights and, therefore, DENY the same. Defendants further ADMIT that conducting elections under 2011 Wisconsin Acts 43 & 44 will not deprive anyone of their civil rights. Defendants DENY all remaining allegations in ¶ 94.

NINTH CLAIM

Any Special or Recall Elections Cannot Be Conducted Under Act 43

95. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 94 above.

Answer to ¶ 95: Defendants incorporate their responses to ¶¶ 1 through 94 of the Second Amended Complaint, above, as though fully set forth herein.

96. Defendants have approved a guideline (attached as Exhibit E) that, consistent with the mandate of Act 43, any special or recall elections scheduled before the fall 2012 general elections shall be conducted under the boundaries established by this Court in 2002 and in effect since then.

Answer to ¶ 96: The guideline attached as Exhibit E to the Second Amended Complaint is an information resource only, and does not constitute a regulation or mandate of the Government Accountability Board. However, defendants ADMIT that, pursuant to Act 43, Section 10(2) and Act 44, Section 4(2), and absent a court order to the contrary, GAB intends

to conduct all special or recall elections scheduled before the Fall 2012 general elections under the boundaries established by this Court in *Baumgart v. Wendelberger*, 2002 WL 34127471 (E.D. Wis. May 30, 2002) (per curiam), amended by 2002 WL 34127473 (E.D. Wis. July 11, 2002). The defendants DENY all other allegations in ¶ 96.

> 97. Any effort to conduct special or recall elections under the boundaries established by Act 43 would violate that policy, and pending the resolution of this litigation, disrupt the status quo and the electoral boundaries of a decade established by this Court. It will deprive plaintiffs of equal protection and their constitutional right to participate in legislative elections pursuant to recall.

Answer to ¶ 97: To the extent the reference to "that policy" means Exhibit E, the defendants DENY that Exhibit E is a policy. The defendants ADMIT that conducting special or recall elections under the boundaries established by Act 43 would be inconsistent with the information contained in Exhibit E. The defendants DENY all other allegations in ¶ 97.

> 98. The constitutionality of the 2011 legislative districts is at issue in this lawsuit. Defendants challenged only one substantive claim in their motion to dismiss plaintiffs' first amended complaint, thereby (at least tacitly) recognizing that the other allegations state a claim upon which relief may be granted.

Answer to ¶ 98: The defendants ADMIT that the Second Amended Complaint challenges the constitutionality of 2011 Wisconsin Acts 43 & 44. The defendants DENY all other allegations of this paragraph.

> 99. In rejecting defendants' motion to dismiss, this Court recognized the unconstitutionality of potentially disenfranchising, unnecessarily, nearly 300,000 Wisconsin citizens.

Answer to ¶ 99: The defendants ASSERT that the Court's October 21, 2011, Order is effective according to its terms and deny all allegations inconsistent with the terms and of that Order. The defendants DENY all other allegations contained in this paragraph.

> 100. The challenged 2011 districts cannot serve as districts for any future elections, whether regular, special or recall elections, unless and until this Court rules on the constitutionality of the districts.

Answer to ¶ 100: Defendants DENY ¶ 100.

101. The 2002 districts, therefore, are the only legal, valid and proper districts for any election prior to final disposition in this case.

Answer to ¶ 101: Defendants DENY ¶ 101.

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; *Growe 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." *Growe*, 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).

16. Defendants hereby incorporate by reference, and reserve the right to assert, any and all of the Affirmative Defenses set forth by any other defendants or intervenor-defendants.

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 Second Amended Complaint on its merits and with prejudice.

4. If the Court determines that the Government Accountability Board's compliance with Act 43, Section 10(2) and Act 44, Section 4(2) will violate any law with regard to the allegations herein, declare and establish the election district boundaries under which the defendants should conduct the recall and special elections prior to the regular primary and general 2012 elections.

5. Awarding defendants their costs and reasonable attorneys' fees.

6. Such other and further relief as the Court may deem appropriate.

Dated this 30th day of November, 2011.

J.B. VAN HOLLEN
Attorney General

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

Attorneys for Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-3519
(608) 267-2223 (fax)
lazarms@doj.state.wi.us

and

Reinhart Boerner Van Deuren s.c.

s/Patrick J. Hodan
Patrick J. Hodan
WI State Bar ID No. 1001233
phodan@reinhartlaw.com
Daniel Kelly
WI State Bar ID No. 1001941
dkelly@reinhartlaw.com
Colleen E. Fielkow
WI State Bar ID No. 1038437
cfielkow@reinhartlaw.com

Attorneys for Defendants

Reinhart Boerner Van Deuren s.c.
1000 North Water Street, Suite 1700
Milwaukee, WI 53202
Telephone: 414-298-1000
Facsimile: 414-298-8097

EXHIBIT 32

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EXHIBIT 33

LexisNexis®

BARRICADE FLASHER SERVICE, INC., PLAINTIFF-APPELLANT, v. WIND LAKE AUTO PARTS, INC. AND STEVEN J. HEINZE, DEFENDANTS-RESPONDENTS.

Appeal No. 2011AP64

COURT OF APPEALS OF WISCONSIN, DISTRICT TWO

2011 Wisc. App. LEXIS 863

November 16, 2011, Decided
November 16, 2011, Filed

NOTICE:

THIS OPINION IS SUBJECT TO FURTHER EDITING. IF PUBLISHED, THE OFFICIAL VERSION WILL APPEAR IN THE BOUND VOLUME OF THE OFFICIAL REPORTS.

PRIOR HISTORY: [*1]
APPEAL from an order of the circuit court for Racine County: CHARLES H. CONSTANTINE, Judge. Cir. Ct. No. 2010CV1954.

DISPOSITION: Affirmed.

JUDGES: Before Brown, C.J., Neubauer, P.J., and Reilly, J.

OPINION BY: REILLY

OPINION

P1 REILLY, J. Barricade Flasher Service, Inc. appeals from an order dismissing its lawsuit against Wind Lake Auto Parts, Inc. and Steven J. Heinze (collectively "Wind Lake"). Barricade brought the suit against Wind Lake in Racine County after it failed to name them as defendants in a separate lawsuit that Barricade had initiated in Milwaukee County. The Racine County circuit court dismissed Barricade's lawsuit pursuant to *WIS. STAT. § 802.06(2)(a)10.* (2009-10)[1] after it found that the "underlying theory of recovery" in the two lawsuits was the same and that both lawsuits dealt with the same factual circumstances. Barricade argues that as Wind Lake was never named in the Milwaukee County lawsuit, the Racine County lawsuit is not the same action. We disagree and affirm the circuit court.

1 All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

BACKGROUND

P2 On February 12, 2008, Barricade filed suit in Milwaukee County against Jeffrey E. Bodendorfer Jr. and Sr., alleging theft, [*2] fraud, conversion, conspiracy, and breach of fiduciary duty. The Bodendorfers subsequently sought contribution and indemnification from Wind Lake, and thus added them as third party defendants on November 2, 2009. On February 15, 2010, the circuit court set a March 15, 2010 deadline for the parties to amend their pleadings. Two weeks after the deadline, Barricade amended its summons and complaint to add Wind Lake as a defendant. Barricade then filed a motion to extend the deadline to allow it to add Wind Lake. The circuit court denied the motion.

P3 Barricade then filed suit against Wind Lake in Racine County for fraud. Wind Lake filed a motion to

dismiss pursuant to *WIS. STAT. § 802.06(2)(a)10.*, which provides that a court may dismiss a lawsuit when there is "[a]nother action pending between the same parties for the same cause."[2] Barricade argued that as it did not sue Wind Lake in Milwaukee County, its lawsuit in Racine County was not the same action. The circuit court rejected this argument, stating that "both the Milwaukee County and the Racine County cases are going to deal with the same factual circumstances and the same parties (whether named or not)." [*3] The court also noted that

> Barricade had every opportunity to commence an action against Wind Lake in Milwaukee County and was unable to do so in a timely manner. The Racine County action would cause the parties to essentially litigate the same case in two separate counties. While the relief sought is different, the underlying theory of recovery is not.

2 *WIS. STAT. § 802.06(2)(a)10.* provides:

> (2) HOW PRESENTED. (a) Every defense, in law or fact, except the defense of improper venue, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or 3rd-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> . . ..
>
> 10. Another action pending between the same parties for the same cause.

P4 Barricade now appeals the dismissal of its complaint against Wind Lake in the Racine County lawsuit.

STANDARD OF REVIEW

P5 Whether dismissal is warranted under *WIS. STAT. § 802.06(2)(a)10.* is left to the discretion of the circuit court. *See* ***Caulfield v. Caulfield****, 183 Wis. 2d 83, 89, 515 N.W.2d 278 (Ct. App. 1994).* A circuit court's discretionary decision will not be reversed [*4] unless the court erroneously exercised its discretion. ***Sukala v. Heritage Mut. Ins. Co.****, 2005 WI 83, ¶8, 282 Wis. 2d 46, 698 N.W.2d 610.* A circuit court erroneously exercises its discretion if it makes an error of law or if it fails to base its decision upon the facts in the record. ***Steinmann v. Steinmann****, 2008 WI 43, ¶20, 309 Wis. 2d 29, 749 N.W.2d 145.*

DISCUSSION

P6 In ***Aon Risk Services, Inc. v. Liebenstein****, 2006 WI App 4, ¶1, 289 Wis. 2d 127, 710 N.W.2d 175 (Ct. App. 2005)*, Aon Risk Services sued Palmer & Cay of Wisconsin, LLC, and Palmer & Cay Holdings, Inc. The circuit court granted summary judgment and dismissed Aon's claims. ***Id.*** The court also denied Aon's motion for leave to amend its complaint. ***Id.****, ¶¶1, 41.* Aon then filed a new lawsuit against the parent company of the Palmer & Cay entities it already sued. ***Id.****, ¶41.* The allegations raised in this second lawsuit, however, mirrored the allegations in the first lawsuit. ***Id.*** The circuit court granted summary judgment to the Palmer & Cay parent company and we affirmed. ***Id.****, ¶2.*

P7 We noted that a new lawsuit "is not an alternate way to amend a complaint . . .. A party may not circumvent a ruling it does not like in one case . . [*5] . by filing a new action, *unless the second action is based on claims that could not have been brought in the first action . . .*." ***Id.****, ¶¶41-42* (emphasis original). As Aon did not explain why the Palmer & Cay parent company could not have been joined in the first lawsuit or why the claims Aon raised in the second lawsuit could not have been asserted in the first lawsuit, the circuit court recognized the second lawsuit as an attempt to makc an "cnd-run" around the court's decision to deny Aon's motion for leave to amend its complaint. ***Id.****, ¶44.* Aon's remedy was to appeal the denial of its motion for leave to amend the complaint, not to file a new lawsuit. ***Id.***

P8 Barricade argues that its Racine County lawsuit should not have been dismissed because the parties differ from those involved in the Milwaukee County lawsuit. The defendants in the two ***Aon*** lawsuits, however, differed as well, yet we held that the circuit court properly dismissed the second lawsuit because Aon did

not demonstrate how the claims it raised in the second lawsuit could not have been brought in the first lawsuit, or why the defendant in the second lawsuit could not have been named in the first lawsuit. ***Id.*** Bringing [*6] a new action against a different party is not enough to get around *WIS. STAT. § 802.06(2)(a)10.* As the circuit court noted, the Racine County lawsuit against Wind Lake is based on facts and circumstances that would be brought out in the Milwaukee County lawsuit. There is no basis for Wind Lake to defend itself against two lawsuits stemming from the same claim. Barricade had its chance to add Wind Lake as a party and did not do so. Barricade's only remedy is to appeal the Milwaukee County circuit court's decision to deny Barricade's motion to extend the deadline to amend its complaint. *See* ***Aon****, 289 Wis. 2d 127, ¶44.*

P9 We recognize that ***Aon*** was partially overruled in ***Burbank Grease Services, LLC v. Sokolowski****, 2006 WI 103, ¶33, 294 Wis. 2d 274, 717 N.W.2d 781.* We are also aware "that a court of appeals decision expressly overruled by [the supreme court] no longer retains any precedential value, unless [the supreme court] expressly states that it is leaving portions of the court of appeals decision intact." ***Blum v. 1st Auto & Cas. Ins. Co.****, 2010 WI 78, ¶56, 326 Wis. 2d 729, 786 N.W.2d 78.* While the ***Burbank*** decision did not abrogate the portion of Aon that discussed *WIS. STAT. § 802.06(2)(a)10.*, [*7] it also did not state that it was leaving those portions intact. Therefore, while ***Aon*** is no longer controlling precedent, it remains persuasive precedent. We find ***Aon*** persuasive and thus adopt the reasoning of the portions of ***Aon*** discussed above. *See* ***Aon****, 289 Wis. 2d 127, ¶¶41-44.*

CONCLUSION

P10 We affirm the circuit court's order dismissing Barricade's lawsuit against Wind Lake in Racine County.

By the Court.--Order affirmed.

Recommended for publication in the official reports.

EXHIBIT 34

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EXHIBIT 35

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2296/1dn
PJH:cjs:md

July 1, 2011

Senator Fitzgerald,

Please be aware that this draft requires the supreme court to take certain actions. This may be in violation of the separation of powers doctrine, and may be rejected by the supreme court on those grounds. Please let me know if you would like to discuss this point further.

If you have any changes or would like to discuss this draft, please contact me.

Peggy Hurley
Legislative Attorney
Phone: (608) 266-8906
E-mail: peggy.hurley@legis.wisconsin.gov

2011 DRAFTING REQUEST

Senate Amendment (SA-SB150)

Received: **07/15/2011**

Received By: **phurley**

Wanted: **As time permits**

Companion to LRB:

For: **Scott Fitzgerald (608) 266-5660**

By/Representing: **Tad**

May Contact:

Drafter: **phurley**

Subject: **Courts - miscellaneous**

Addl. Drafters:

Extra Copies:

Submit via email: **YES**

Requester's email: **Sen.Fitzgerald@legis.wisconsin.gov**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Supreme court may take up appeals

Instructions:

page 20, line 4: delete "shall" and sub "may"

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/1	phurley 07/15/2011	nnatzke 07/15/2011	jfrantze 07/15/2011	_____ _____	ggodwin 07/15/2011	ggodwin 07/15/2011	

FE Sent For:

<END>

LRBa1410
07/15/2011 02:20:26 PM
Page 1

2011 DRAFTING REQUEST

Senate Amendment (SA-SB150)

Received: **07/15/2011**

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Subject: **Courts - miscellaneous**

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Extra Copies:

Submit via email: **YES**

Requester's email: **Sen.Fitzgerald@legis.wisconsin.gov**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Supreme court may take up appeals

Instructions:

page 20, line 4: delete "shall" and sub "may"

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/1	phurley	/1 nwn 7/15	7/15				

FE Sent For:

<END>

State of Wisconsin
2011 – 2012 LEGISLATURE

LRBa1410/1
PJH:
NWN

SENATE AMENDMENT ,

TO 2011 SENATE BILL 150

today 7-13-11

At the locations indicated, amend the bill as follows:

1. Page 20, line 4: delete "shall" and substitute "may".

(END)

EXHIBIT 36

MICHAEL BEST
& FRIEDRICH LLP

Michael Best & Friedrich LLP
Attorneys at Law
100 East Wisconsin Avenue
Suite 3300
Milwaukee, WI 53202-4108
Phone 414.271.6560
Fax 414.277.0656

Joseph Louis Olson
Direct 414.277.3465
Email jlolson@michaelbest.com

December 2, 2011

FILED
IN CIRCUIT COURT
DEC 02 2011
WAUKESHA CO. WI
CIVIL DIVISION

11 DEC -2 PM 4:01
CLERK OF CIRCUIT COURT
CIVIL DIVISION

VIA MESSENGER

Ms. Kathleen Madden
Clerk of Circuit Court
Waukesha County Courthouse
515 W. Moreland Boulevard
Waukesha, WI 53188-2428

Re: Dennis Clinard, et al. v. Michael Brennan, et al.
Case No. 11CV03995

Dear Ms. Madden:

Enclosed for filing please find the original and eight copies of an Amended Summons and Complaint for Declaratory and Other Relief in the above-entitled matter. Please file the original and return file-stamped copies with the messenger completing this delivery.

The Amended Complaint is limited to a challenge to a determination of the Government Accountability Board concerning the conduct of special or recall elections in legislative districts established by a 2002 court redistricting plan. This issue alone does not implicate a challenge to the apportionment of a state legislative district and, thus, does not trigger the procedures in Wis. Stat. §§ 751.035(1) and 801.50(4m) concerning notice to the Wisconsin Supreme Court and appointment of a three-judge panel.

Sincerely,

MICHAEL BEST & FRIEDRICH LLP

Joseph Louis Olson

JLO:skt

Enclosures

029472-0001\10560993.1

11 DEC -2 PM 4:01
CLERK OF CIRCUIT COURT
CIVIL DIVISION