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December 2, 2011

VIA MESSENGER

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

FILED  
IN CIRCUIT COURT

DEC 02 2011

WAUKESHA CO. WI  
CIVIL DIVISION

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

Re: Dennis Clinard, et al. v. Michael Brennan, et al.  
Case No. 11CV33995

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

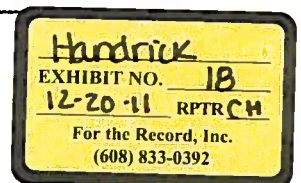
Joseph Louis Olson

JLO:skt

Enclosures

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CLERK OF CIRCUIT COURT  
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STATE OF WISCONSIN : CIRCUIT COURT : WAUKESHA COUNTY  
BRANCH 9

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

Plaintiffs,

v.

Case No. 11-CV-03995  
Case Code: 30701

MICHAEL BRENNAN, DAVID DEININGER,  
GERALD NICHOL, THOMAS CANE,  
THOMAS BARLAND, 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,

Defendants.

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**AMENDED SUMMONS**

THE STATE OF WISCONSIN

To each person named above as an Involuntary Plaintiff or Defendant:

You are hereby notified that the above-named Plaintiffs have filed a lawsuit or other legal  
action against you. The complaint, which is attached, states the nature and basis of the legal  
action.

Within 45 days of receiving this summons, you must respond with a written answer, as  
that term is used in chapter 802 of the Wisconsin Statutes, to the complaint. The court may

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CLERK OF CIRCUIT COURT  
CIVIL DIVISION

reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the Court, whose address is Waukesha County Clerk of Court, Waukesha County Courthouse, 515 West Moreland Boulevard, Waukesha, WI 53188, and to Eric M. McLeod of Michael Best & Friedrich LLP, plaintiffs' attorneys, whose address is One South Pinckney Street, Suite 700, Post Office Box 1806, Madison, Wisconsin 53701-1806. You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the court may grant judgment against you for the award of money or other legal action requested in the complaint, and you may lose your right to object to anything that is or may be incorrect in the complaint. A judgment may be enforced as provided by law.

Dated this 2<sup>nd</sup> day of December, 2011.

**MICHAEL BEST & FRIEDRICH LLP**  
Attorneys for Plaintiffs

By: 

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STATE OF WISCONSIN : CIRCUIT COURT : WAUKESHA COUNTY  
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**AMENDED COMPLAINT FOR DECLARATORY AND OTHER RELIEF**

**INTRODUCTION**

Following the enactment of 2011 Wisconsin Acts 43 and 44 by the State Legislature ("2011 Redistricting Plan"), the Government Accountability Board ("GAB"), which is the state agency responsible for administering the laws concerning the conduct of elections in the State of Wisconsin, issued formal guidance that any recall elections which may be initiated and held prior to the general election in November of 2012, are to be conducted in the old legislative districts

established by the 2002 court-adopted redistricting plan (the "2002 Court Plan"). GAB issued this formal guidance despite the fact there is no dispute that the prior legislative districts are unconstitutionally malapportioned.

GAB issued this formal guidance despite also concluding that the legislative districts established by the 2011 Redistricting Plan are effective for purposes of constituent representation. Thus, in the event that any recall elections are conducted between now and November of 2012, many electors who are now represented by a particular State Senator in a new district established by the 2011 Redistricting Plan *will not* be able to vote in a recall election concerning that Senator. Conversely, many electors who are no longer represented by that Senator, because they reside in the Senator's old district but not within the new district, *will* be entitled to vote in a recall election concerning that Senator.

This amounts to a clear violation of the constitutional provision concerning the recall of elective officers set forth in Article XIII, Section 12 of the Wisconsin Constitution. Thus, Plaintiffs seek a declaration from this Court that recall elections may not be conducted in unconstitutionally malapportioned districts and that such elections may only be conducted in the districts established by the 2011 Redistricting Plan, which incumbent legislators now represent.

#### PARTIES

##### **Plaintiffs**

1. Plaintiff Dennis Clinard is a resident of the State of Wisconsin residing at 5852 Cedar Road in the Town of Sparta, County of Monroe, 54656. Clinard is a qualified elector who resides in the 70<sup>th</sup> Assembly District pursuant to the 2011 Redistricting Plan. Clinard's residence was previously within the 92<sup>nd</sup> Assembly District pursuant to the 2002 Court Plan. In 2010,

Clinard ran for the office of State Assembly in the old 92<sup>nd</sup> Assembly District and may again run for the legislature.

2. Plaintiff Erin M. Decker is a resident of the State of Wisconsin residing at 706 N. School Street in the Village of Silver Lake, County of Kenosha, 53170. Decker is a qualified elector whose residence was formerly in the 66<sup>th</sup> Assembly district, represented by Representative Kerkman, and the 22<sup>nd</sup> Senate district, represented by Senator Wirch. Pursuant to the 2011 Redistricting Plan, Decker's residence is now in the 61<sup>st</sup> Assembly district, represented by Representative Kerkman, and the 21<sup>st</sup> Senate district, represented by Senator Wanggaard.

3. Plaintiff Luonne A. Dumak is a resident of the State of Wisconsin residing at 3601 South 147<sup>th</sup> Street, Apt. 134 in the City of New Berlin, County of Waukesha, 53151. Dumak is a qualified elector whose residence was formerly in the 84<sup>th</sup> Assembly district, represented by Representative Kuglitsch, and the 28<sup>th</sup> Senate district, represented by Senator Lazich. Pursuant to the 2011 Redistricting Plan, Dumak's residence is now in the 15<sup>th</sup> Assembly district, represented by Representative Staskunas, and the 5<sup>th</sup> Senate district, represented by Senator Vukmir.

4. Plaintiff David A. Foss is a resident and qualified elector of the State of Wisconsin residing at 1804 22<sup>5/8</sup> Street in the Town of Rice Lake, County of Barron, 54868.

5. Plaintiff LaVonne J. Derksen is a resident of the State of Wisconsin residing at 2338 Talc Trail, Apt. 209 in the City of Madison, County of Dane, 53719. Derksen is a qualified elector whose residence was formerly located in the 79<sup>th</sup> Assembly district represented by Representative Pope-Roberts. Pursuant to the 2011 Redistricting Plan, Derksen's residence is now in the 78<sup>th</sup> Assembly district, represented by Representative Pocan.

6. Plaintiff Pamela S. Travis is a resident and qualified elector of the State of Wisconsin residing at N2607 Cardinal Avenue in the Town of Grant, County of Clark, 54456.

7. Plaintiff John E. Hager is a resident of the State of Wisconsin residing at 127 West Hidden Trail, Unit 101 in the City of Elkhorn, County of Walworth, 53121. Hager is a qualified elector who resides in the 31<sup>st</sup> Assembly District, which was formerly represented by Representative Nass but is currently represented by Representative Loudenbeck pursuant to the 2011 Redistricting Plan.

8. Plaintiff James L. Weiner is a resident of the State of Wisconsin residing at W5665 Young Road in the Town of LaGrange, County of Walworth, 53156. Weiner is a qualified elector whose residence was formerly in the 31<sup>st</sup> Assembly district, represented by Representative Nass. Pursuant to the 2011 Redistricting Plan, Weiner's residence is now in the 33<sup>rd</sup> Assembly district, which is still represented by Representative Nass.

9. Plaintiff Jeff L. Waksman is a resident of the State of Wisconsin residing at 334 North Allen Street, Unit 5 in the City of Madison, County of Dane, 53726.

10. Plaintiff Kevin Cronin is a resident of the State of Wisconsin residing at 1832 Grange Avenue in the City of Racine, County of Racine, 54301. Cronin is a qualified elector whose residence was formerly in the 62<sup>nd</sup> Assembly district, represented by Representative Mason, and the 21<sup>st</sup> Senate district, represented by Senator Wanggaard. Pursuant to the 2011 Redistricting Plan, Cronin currently resides in the 66<sup>th</sup> Assembly district, represented by Representative Turner, and the 22<sup>nd</sup> Senate district, represented by Senator Wirch.

**Defendants**

11. Defendant Michael Brennan, resident of the City of Marshfield, Wisconsin; David Deininger, resident of the Town of Monroe, Wisconsin; Gerald Nichol, resident of the City of

Madison, Wisconsin; Thomas Cane, resident of the City of Wausau, Wisconsin; Thomas Barland, resident of the City of Eau Claire, Wisconsin; and Timothy Vocke, resident of the Town of Rhinelander, Wisconsin are all members of the Wisconsin Government Accountability Board and are named in such official capacity. The Wisconsin Government Accountability Board is an independent agency of the State of Wisconsin with authority for the administration of laws concerning the conduct of elections.

12. Defendant Kevin Kennedy is a Wisconsin resident residing in Dane County, Wisconsin and is the Director and General Counsel for the Wisconsin Government Accountability Board.

#### **JURISDICTION AND VENUE**

13. Venue in this Court is proper pursuant to Wis. Stat. § 801.50(3)(a), which provides that “all actions in which the sole defendant is the state, any state board or commission, or any state officer, employee, or agency in an official capacity shall be venued in the county designated by the plaintiff unless another venue is specifically authorized by law.”

14. Wisconsin’s Uniform Declaratory Judgments Act, Wis. Stat. § 806.04, states that “[c]ourts of record within their respective jurisdictions shall have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” Wis. Stat. § 806.04(1). The Act further allows a party “whose rights, status or other legal relations are affected by a statute” to petition a court and “have determined any question of construction or validity arising under” the statute. Wis. Stat. § 806.04(2).

#### **FACTUAL BACKGROUND**

15. Pursuant to Article IV, Section 3 of the Wisconsin Constitution, the Wisconsin State Legislature is responsible for enacting a constitutionally-valid plan for legislative districts.



16. Article IV, Section 3 of the Wisconsin Constitution requires that the legislature “apportion and district anew” the state assembly and senate districts following each federal census.

17. The Bureau of Census, U.S. Department of Commerce, conducted a decennial census in 2010 pursuant to Article 1, Section 2 of the United States Constitution. Census data from the 2010 Census was released to the State of Wisconsin in March of 2011.

18. Pursuant to Article IV, Section 3 of the Wisconsin Constitution and Article 1, Section 2 of the United States Constitution, the Wisconsin State Legislature drafted and adopted legislation, 2011 Wisconsin Acts 43 and 44, referred to herein as the 2011 Redistricting Plan, establishing new legislative and congressional districts based upon population data gathered through the 2010 Census.

19. The Wisconsin State Senate adopted the 2011 Redistricting Plan on July 19, 2011. The Wisconsin State Assembly adopted the 2011 Redistricting Plan on July 20, 2011.

20. Governor Walker signed the 2011 Redistricting Plan into law on August 9, 2011.

21. The GAB has issued formal guidance regarding the initial applicability of the legislative districts created by Act 43. A copy of the GAB’s formal guidance memorandum is attached to this Complaint as Exhibit A.

22. According to the GAB’s formal guidance memorandum, “[t]he effective date of 2011 Wisconsin Act 43 with respect to representation differs from its effective date for election purposes.” (Exhibit A at 3)

23. GAB has concluded in its formal guidance memorandum that the legislative districts established by the 2011 Redistricting Plan are “effective as of August 24, 2011 for representation purposes.” (*Id.*)

24. However, GAB has also concluded that “the legislative districts created by 2011 Wisconsin Act 43 are not in effect for the purpose of ‘special or recall elections to offices filled or contested’ prior to the General Election on November 6, 2012.” (*Id.* at 2) GAB’s conclusion in this regard is purportedly based on provisions of Act 43 which state that the Act “first applies, with respect to regular elections, to offices filled at the 2012 general elections,” 2011 Wis. Act 43 § 10(1), and that the Act “first applies, with respect to special or recall elections, to offices filled or contested concurrently with the 2012 general election.” 2011 Wis. Act. 43 § 10(2).

25. Thus, GAB has concluded that any special or recall elections to offices filled or contested prior to the November 2012 General Election are to be conducted in the legislative districts established by the 2002 Court Plan. GAB’s conclusion is erroneous because the legislative districts established by the 2002 Court Plan are unconstitutionally malapportioned and, thus, cannot be used to conduct elections consistent with the central constitutional principle of one-person, one-vote

26. As outlined above, the new legislative districts established by the 2011 Redistricting Plan were established pursuant to Article IV, Section 3 of the Wisconsin Constitution using population data compiled by the federal government in the 2010 Federal Census and disseminated to the State of Wisconsin. The 2010 Federal Census data demonstrate that the populations within the legislative districts established by the 2002 Court Plan deviated substantially from equal population and were therefore unconstitutionally malapportioned.

27. As shown by the 2010 Federal Census data, the population deviation among Senate districts under the 2002 Court Plan ranged from a high of 25,535 (14.82%) above zero deviation or an ideal population of 172,332 and a low of 19,574 (11.36%) below zero deviation. The population deviation among Assembly districts under the 2002 Court Plan ranged from a

high of 18,720 (32.59%) above zero deviation or an ideal population of 57,444, and a low of 9,057 (15.77%) below zero deviation.

28. According to GAB's guidance memorandum, current legislators now represent constituents who reside in the new legislative districts established by the 2011 Redistricting Plan. Yet, despite the fact that current legislators represent persons who reside in the new legislative districts, GAB's guidance concludes that legislators may be recalled by a different set of constituents, namely those residing within the old districts established by the 2002 Court Plan.

29. GAB's guidance, which provides that any special or recall elections must be conducted in the old districts, while the new districts are effective for purposes of constituent representation, results in the potential disenfranchisement of nearly one million Wisconsin citizens for purpose of recall elections. Among the 24 Senate districts in which recall elections could be held in 2012, there are 923,362 citizens, including Plaintiff Decker, who, according to GAB's guidance, could not vote in a recall election concerning the Senator who now represents them.

30. On November 15, 2011, the Committee to Recall Wanggaard filed a registration statement with GAB and appended to it a statement of intent to circulate a petition to recall Senator Wanggaard executed by the Committee's treasurer, Randolph Brandt. If the Committee to Recall Wanggaard is successful in forcing a recall election in the 21<sup>st</sup> Senate District, Plaintiff Decker could not vote in the election, despite the fact that Senator Wanggaard currently represents her.

31. Article XIII, Section 12(7) of the Wisconsin Constitution specifically provides that "no law shall be enacted to hamper, restrict, or impair the right of recall." Article XIII, Section 12(1) provides that a "recall petition shall be signed by electors ... in the ... district

which the incumbent represents.” GAB’s guidance providing that old legislative districts apply to recall elections is in direct conflict with this constitutional mandate and serves to impair the right of recall of more than 900,000 citizens, including Decker.

**CLAIM FOR RELIEF**

(Declaratory Relief Pursuant To Wis. Stat. § 806.04 That Special Or Recall Elections May Not Be Conducted In Districts Established By The 2002 Court Plan)

32. There is no dispute that based on the 2010 Census data the legislative districts established under the 2002 Court Plan are unconstitutionally malapportioned and violate the central principle of one-person, one-vote.

33. GAB has nevertheless concluded that any special or recall elections held prior to November of 2012 will be conducted in the old legislative districts.

34. GAB has recently received statements of intent to circulate recall petitions in Senate Districts 13, 21, 23 and 29. Upon information and belief, petition circulators are circulating or intend to circulate recall petitions within the old Senate Districts under the 2002 Court Plan, pursuant to the GAB guidance.

35. GAB has legal authority to evaluate and determine the sufficiency of recall petition and, where such petitions are deemed sufficient, to direct that recall elections be held in a given legislative district. If not enjoined, GAB will unlawfully direct that recall elections be conducted in the Senate Districts under the 2002 Court Plan in the event the petitions in those districts are deemed sufficient.

36. Plaintiffs’ interests will be impacted if recall elections are conducted in unconstitutional districts and are entitled to a declaration that recall elections may not be conducted in such districts.

**CONCLUSION**

37. Plaintiffs respectfully request that an order be issued declaring that the legislative districts established by the 2002 Court Plan may not be used to conduct any special or recall elections.

38. Plaintiffs respectfully request that an order be issued enjoining the Government Accountability Board from taking any action related to the conduct of any recall election in the unconstitutionally malapportioned legislative districts established by the 2002 Court Plan.

Dated this 2<sup>nd</sup> day of December, 2011.

**MICHAEL BEST & FRIEDRICH LLP**  
Attorneys for Plaintiffs

By: 

Eric M. McLeod, SBN 1021730

Joseph Louis Olson, SBN 1046162

Michael P. Srenock, SBN 1055271

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## State of Wisconsin\Government Accountability Board

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JUDGE THOMAS H. BARLAND  
Chair

KEVIN J. KENNEDY  
Director and General Counsel

**DATE:** October 19, 2011

**TO:** Robert Marchant, Senate Chief Clerk  
Patrick Fuller, Assembly Chief Clerk

**FROM:** Kevin J. Kennedy, Director and General Counsel  
Government Accountability Board

**SUBJECT:** Legislative Redistricting: Effective Date and Use of State Funds

On September 6, 2011, Jonathan Becker, Nathaniel Robinson and I from the Government Accountability Board ("G.A.B.") met with you and staff of the Legislative Council to discuss the impact of redistricting on incumbent legislators. Prior to this meeting, you and Legislative Council staff received a number of inquiries about the impact of 2011 Wisconsin Act 43 with respect to the ability of incumbent legislators to communicate with constituents and to run for and hold legislative office. Because these were not new issues, we agreed to review past decisions of the former Elections and Ethics Boards and guidance from the Department of Justice.

On October 10, 2011, I received copies of past guidance from the Department of Justice. G.A.B. staff forwarded this information to Legislative Council staff and you. We had a brief meeting on October 12, 2011, in which you asked whether a 1982 Attorney General Opinion, OAG 48-82, 71 Wis. Op. Atty. Gen. 157 (Wis. A.G. 1982), resolved the issues on the use of state funds by incumbent legislators to communicate with constituents and travel in legislative districts created by 2011 Wisconsin Act 43, as well as the conduct of special or recall elections. At the time of that meeting, I believed it did, but I noted that the G.A.B. staff had not fully analyzed the material.

After reviewing all of the material, the G.A.B. staff believes that the 1982 Attorney General Opinion to Senator Risser (71 Wis. Op. Atty. Gen. 157 (Wis. A.G. 1982)) is not directly on point with the current issue. That opinion was based on a federal court finding that existing legislative districts were unconstitutional. As a consequence of that finding, the federal district court specifically ordered that the then-existing legislative districts could not be used for purposes of nomination and election after June 17, 1982, at which time and by the same court order new legislative district lines became effective. In the present situation, unlike 1982, there has been no judicial determination that the existing legislative districts are unconstitutional, and the Legislature has specifically addressed the initial applicability of 2011 Wisconsin Act 43 for various purposes.

Although the 1982 Attorney General Opinion is not directly on point, some of its language, as well as subsequent opinions including a 1983 Attorney General Opinion (OAG 47-83, 72 Wis. Op. Atty. Gen. 172 (Wis. A.G. 1983)), and the language of 2011 Wisconsin Act 43 itself all provide helpful analysis and application to the current situation, as affected by 2011 Wisconsin Act 43.

At the October 12, 2011 meeting, I promised to provide the G.A.B. staff position as quickly as possible. Below are the G.A.B. staff opinions and analyses regarding the initial applicability of

EXHIBIT  
A

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2011 Wisconsin Act 43 with respect to 1) elections, and 2) communication and representation of constituents.

1. **Initial Applicability Date with Respect to Elections: November 6, 2012**

a. **Opinion**

It is the G.A.B. staff's position that the legislative districts created by 2011 Wisconsin Act 43 are not in effect for the purpose of "special or recall elections to offices filled or contested" prior to the General Election on November 6, 2012.

b. **Analysis**

The Legislature enacted legislation reapportioning the legislative districts and members, 2011 Wisconsin Act 43, as required by the state constitution. Wis. Const. art. IV, § 3. The legislation was signed by the Governor and published on August 23, 2011. Unless specified in the legislation, every act is effective on the day following publication. WIS. STAT. § 991.11. However, 2011 Wisconsin Act 43 specifically provided for the initial applicability of the act for certain purposes. The Act "first applies, with respect to regular elections, to offices filled at the 2012 general election." 2011 Wis. Act 43, § 10 (1). In addition, the Act "first applies, with respect to special or recall elections, to offices filled or contested concurrently with the 2012 general election." 2011 Wis. Act § 10 (2).

"First applies" historically means that an act is in effect for the first time on a certain date or occurrence and remains in effect after that date or occurrence. *Detwiler v. Wisconsin Dept. of Revenue*, 2007 WI App 125, ¶6 n.3, 301 Wis. 2d 512, 517, 731 N.W.2d 663, 666 (Wis. Ct. App. 2007).

Wisconsin Stats. s. 5.02 (5) defines "general election" as the election held in even-numbered years on the Tuesday after the first Monday in November conducted to elect, among other offices, state senators and representatives to the assembly. WIS. STAT. §5.02 (2011). The next general election will occur on November 6, 2012.

By the specific terms of 2011 Wisconsin Act 43, any recall election or special election to fill a vacancy conducted before November 6, 2012 shall be conducted in the legislative districts in effect prior to the enactment of 2011 Wisconsin Act 43. For example, the special election to fill the vacancy in the 95<sup>th</sup> Assembly District was ordered by the Governor on September 2, 2011 to be conducted under the district lines in effect before the passage of 2011 Wisconsin Act 43. 2011 Executive Order 41.

This differs significantly from the situation presented in 1982 when the Attorney General Opinion (71 Wis. Op. Att. Gen. 157) was issued. As noted above, in 1982, a federal court had found that existing legislative districts were unconstitutional and ordered all subsequent elections to be conducted under a reapportionment plan set out in the court order and beginning on the specific date of June 17, 1982. *The Wisconsin State AFL-CIO et al. v. Elections Board et al.*, No. 82-C-0112 (E.D. Wis. 1982). In the 1982 Attorney General Opinion to Senator Risser (71 Wis. Op. Att. Gen. 157), the Attorney General interpreted and applied this specific court order and opined that the former districts were not in effect for the conduct of elections or the use of public funds by incumbent legislators after June 17, 1982. The Attorney General's opinion was released on August 19, 1982,



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and therefore the language in the opinion assumes that the new court-ordered legislative districts were already in place and effective.

The meaning and effect of the initial applicability provisions of 2011 Wisconsin Act 43 are better understood in the context of the October 4, 1983 Attorney General Opinion to Representative Lofhus (72 Wis. Op. Atty. Gen. 172). Here, the Attorney General offered an opinion on the effective dates of the redistricting described in 1983 Wisconsin Act 29, the Act adopted to replace the federal district court's redistricting plan that had been effective since June 17, 1982.<sup>1</sup> This Attorney General's opinion concluded that the effective date of the Act is also the effective date for new legislative districts unless the legislature specifically provided other exceptions to the initial applicability of the Act for certain purposes. The Attorney General opinion concluded that, by reason of Wisconsin Stats. s. 991.11, the publication date of the Act, July 20, 1983, was also the effective date of the Act except for specific statutory exceptions. The only exception in the Act was related to specific language setting the initial applicability of sections 8.15(9) and 8.20(10) of the statutes, which related to the Election Board's duty to provide new district maps to candidates.

The language of 2011 Wisconsin Act 43 is very clear as to the initial applicability exceptions from the Wisconsin Stats. s. 991.11 effective date of the Act (August 24, 2011). The Act initially applies for the purposes of regular elections to offices filled at the 2012 general election and to special or recall elections to offices filed or contested concurrently with the 2012 general election. Therefore, for purposes of any elections in 2012, the new legislative districts found in Act 43 do not apply to special or recall elections to offices filled or contested prior to the November 6, 2012 general election.

**2. Initial Applicability Date with Respect to Communication and Representation of Constituents: August 24, 2011**

**a. Opinion**

It is the G.A.B. staff's position that beginning on August 24, 2011, neither this legislation nor any provisions of the Code of Ethics for Public Officials and Employees, Wisconsin Stats. Ch 19, Subchapter III, restricts the use of public funds by incumbent legislators to send mail or travel within the boundaries set forth in 2011 Wisconsin Act 43 for the purpose of conducting legislative business.

**b. Analysis**

- i. 2011 Wisconsin Act 43 is effective as of August 24, 2011 for representation purposes.

The effective date of 2011 Wisconsin Act 43 with respect to representation differs from its effective date for election purposes. The 1982 Attorney General Opinion to Senator Risser (71 Wis. Op. Atty. Gen. 157) specifically provides that with respect to the former legislative districts, the "vitality

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<sup>1</sup> The 1982 redistricting plan was found unconstitutional in 1992, following the 1990 census. See *Prosser et al. v. Elections Board, et al.*, 793 F. Supp. 859, 865 (W.D. Wis. 1992). In 1992, a three-judge panel created a redistricting plan that was effective for all elections held after June 2, 1992. *Prosser v. Elections Board*, 793 F. Supp. at 871. The 1992 redistricting plan was held unconstitutional in 2002, following the 2000 census. See *Baumgart et al. v. Wendelberger*, Case No. 01-C-0121; see *Jenson et al. v. Wendelberger*, Case No. 02-C-0366. The federal district court created a redistricting plan that was effective for all elections held after May 30, 2002. *Id.* However, 1983 Wisconsin Act 22, first held unconstitutional in the context of the 1990 census, was not challenged as unconstitutional between its effective date of July 29, 1983 and the 1990 census. *Prosser v. Elections Board*, 793 F. Supp. at 871



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depends upon the purpose being inquired into." OAG 48-82, 71 Wis. Op. Att. Gen. 157 (Wis. A.G. 1982). The 1983 Attorney General Opinion to Representative Loftus (72 Wis. Op. Atty. Gen. 172) emphasized that even though the Elections Board did not need to provide new district maps to candidates until the 1984 primary and general elections, this did not mean that the "the new districts [we]re not effective before 1984." 72 Wis. Op. Atty. Gen. 172. Thus, even though the new districts do not take effect for election purposes until November 6, 2012, this does not mean that 2011 Wisconsin Act 43 is not effective for other purposes before that date.

It appears that it is constitutionally permissible, per the 1983 Attorney General Opinion, for the Legislature to enact redistricting legislation that will "apportion and district anew the members of the senate and assembly," Wis. Const. art IV, Section 3, upon publication of an act, while at the same time the act provides exceptions for initial applicability of the act for specific purposes. In 2011 Wisconsin Act 43, it seems the Legislature intended to effectuate the Act on the Wis. Stats. s. 991.11 date (August 24, 2011) for purposes of representation.

ii. 2011 Wisconsin Act 43 does not affect the current status of elected officials.

Even though the new districts took effect on August 24, 2011, this does not affect the current status of elected senators and representatives. The 1982 Attorney General Opinion to Senator Risser (71 Wis. Op. Att. Gen. 157) and the 1983 Attorney General Opinion to Representative Loftus (72 Wis. Op. Atty. Gen. 172) also provide applicable guidance on the treatment of the residence of incumbent legislators with respect to retaining their current office and running for election under the new district plan. The former Elections Board applied these opinions in response to inquiries with respect to the 2002 redistricting. Correspondence to Representative David Travis, April 25, 2002. In the response to Representative Travis, the Elections Board noted that for purposes of representation (and absent contrary language in the act or statute), redistricting takes effect with the adoption of the new plan. Representation is based on a previous election and holding office, not on a future reelection. Seeking reelection is not relevant to representation and is only relevant to campaigning for the office to which a candidate seeks election.

iii. 2011 Wisconsin Act 43 does not change how current elected officials may use state funds.

The new legislation does not affect the laws governing how currently sitting elected officials who seek reelection or election to another office may use state funds. The guidance from the Attorney General in 1983 discussed the use of state funds by incumbent legislators with respect to the former and new districts under the judicial and legislative plans. 72 Wis. Op. Atty. Gen. 172. The opinion noted that the restrictions of Wis. Stats. s. 11.33, limiting the use of public funds after the first day for circulating nomination papers, are still applicable. It also provided that a legislator may not use funds for a purely private, non-public, purpose. However, a legislator may expend funds which have been appropriated for the legislator's use for mailings and travel within or outside the legislator's district if connected with the legislator's representation of his or her constituents subject to legislative rules and applicable statutes. 72 Wis. Op. Atty. Gen. 172.

The G.A.B. and the former Ethics Board have consistently found that great deference should be given to the Legislature's determination of public purpose consistent with other statutes such as the restriction on the distribution of 50 or more substantially similar items or communications after the first date for circulating nomination papers, see Wis. Stats. s. 11.33, the use of public office to obtain a private benefit, see Wis. Stats. s. 19.45 (2), or the use of public office to obtain an unlawful benefit

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or advantage, see Wis. Stats. s. 19.45 (5). In light of the discussion in the 1983 Attorney General opinion, the use of public funds to communicate or travel in districts related to the legislator's initial election or subsequent re-assignment by 2011 Wisconsin Act 43 does not appear to be actively designed to obtain a private benefit or unlawful benefit or advantage as restricted under the Code of Ethics for Public Officials.

The Legislature appears to have developed fiscal and policy restraints on the use of public funds by legislators with respect to constituent communication and travel. The proposed policy that permits the use of public funds within those constraints to communicate and travel within the district from which a legislator was elected and the related district under 2011 Wisconsin Act 43 does not contravene provisions in Wis. Stats. s. 19.45. Such communications are, however, also subject to the limitation in Wis. Stats. s. 11.33.


This does not mean that a legislator may use public funds for communications or travel to obtain a private benefit or unlawful benefit or advantage, including for campaign purposes. The G.A.B. would investigate a complainant that set forth facts alleging such activity.

### 3. Conclusion

This is an opinion of the G.A.B. staff. It is not an opinion issued pursuant to Wis. Stats. s. 5.05 (6a). As we discussed in our initial meeting, the staff plans to present its conclusions to the Board in the form of recommended guidance to share with legislators and the public.

Sincerely,

GOVERNMENT ACCOUNTABILITY BOARD



Kevin J. Kennedy  
Director and General Counsel