UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, et al.,

Plaintiffs,

TAMMY BALDWIN, et al.,

Intervenor-Plaintiffs,

vs.

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

MICHAEL BRENNAN, et al.,

Defendants,

F. JAMES SENSENBRENNER, JR., et al.,

Intervenor-Defendants.

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

Plaintiffs,

vs.

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

MICHAEL BRENNAN, et al.,

Defendants.

REPLY BRIEF IN SUPPORT OF MOTION BY INTERVENOR-DEFENDANTS TO DISMISS INTERVENOR-PLAINTIFFS' COMPLAINT
(No. 11-CV-562)

INTRODUCTION

As noted in the movants' opening brief, the intervenor-plaintiffs' complaint is in all material respects a copy of the Act 44 portions of plaintiffs' first amended complaint. It makes no different or additional claims with respect to the Congressional redistricting statute. The intervenor-plaintiffs chose to stand on that original complaint when the plaintiffs filed a second amended complaint (unless otherwise noted, hereinafter, the "Complaint"). Because the two pleadings are essentially the same, the movants filed a single brief in support of their combined motions for judgment on the pleadings as to the Act 44 portions of the plaintiffs' Complaint and as to the intervenor-plaintiffs' Act 44-only complaint.

The plaintiffs and the intervenor-plaintiffs chose to file separate responses to the combined motions and single brief, submitting 46 pages of coordinated briefing.[1] To respond to all these arguments, the movants find it necessary, therefore, to file separate replies, but they do not repeat in this short brief the arguments made in their reply to the plaintiffs' responsive brief.

ARGUMENT

I. The Intervenor-Plaintiffs' "Democratic Process" Claim Has No Support in the Law. It Attempts to Sidestep the Supreme Court's Holdings on Claims of Political Gerrymandering.

The plaintiffs concede that the fourth, fifth, and eighth claims of the Complaint, taken together, attempt to state no claim other than for partisan gerrymandering. (Pls.' Br. 5–6.) Surely, this seems obvious enough, given that the Complaint's fifth claim (explicitly a

[1] The two groups of plaintiffs simply divided up portions of the movants' argument as to their "similar" complaints (Int.-Pls.' Br., Dkt. #98, at 1) and addressed them separately. The intervenor-plaintiffs "adopt[ed] the Plaintiffs' brief" (filed three hours later) as to the fifth claim (*id.* at 3) and left to the plaintiffs the "political" challenge to Act 44 in which their own complaint shares. (*Id.* at 6.) Similarly, the plaintiffs relied on the intervenor-plaintiffs' filings earlier in the afternoon (Pls.' Br., Dkt. #105, at 8–11 & n.3, 18 n.7, 21). Their common effort exceeds the length of briefing that the rule would allow either of them by roughly 50%. *See* Civ. L.R. 7(f).

gerrymandering claim) cites essentially the same purported principles (¶ 60(b)) discussed in the fourth claim (¶¶ 50–55) and mentioned in the eighth claim (¶ 89). So-called "traditional redistricting principles," like compactness, retention of core constituencies, and maintaining communities of interest, cannot be stripped by the intervenor-plaintiffs from the political gerrymandering claim itself.[2] They have no separate constitutional life. Yet, the intervenor-plaintiffs confusedly seem to believe otherwise, declining to "challenge the new map on political grounds" and instead focusing their brief on these purported principles and claiming that "the new [Congressional district] boundaries will damage representative democracy," which they treat as if that were a distinct cause of action. (Int.-Pls.' Br. 6.) This is a blatant attempt to frame their claims under an unsupported theory, in order to avoid the herculean task laid out by the political gerrymandering case law. The effort should be ignored. Skinny political gerrymandering claims called something else do not thereby gain constitutional heft. *See Radogno v. Ill. State Bd. of Elections*, No. 1:11-cv-4884, 2011 U.S. Dist. LEXIS 134520, *16–17 (N.D. Ill. Nov. 22, 2011) (finding no distinction between a political gerrymandering claim and other claims purporting to arise under different headings where "the action being challenged—redrawing legislative districts to favor one political party over another—is the same in all three counts," and dismissing all three claims with prejudice).

[2] The intervenor-plaintiffs state that "[t]he redrawing of congressional boundaries for the Third, Seventh, and Eighth should have been a no-brainer," in part because "[n]othing needed to be done in the Eighth as a disparity of 4,000 from ideal population is not considered significant." (Int.-Pls.' Br. 5.) The one redistricting principle that the Supreme Court has held *does* apply in Congressional redistricting is that of minimum population deviation from the ideal size, in accordance with the most recent census data available at the time the maps were adopted. *See, e.g.*, *Karcher v. Daggett*, 462 U.S. 725 (1983). The intervenor-plaintiffs' "plan" (moving "about 20,000 in population from the Third to the Seventh" and doing nothing else) would unquestionably fail to satisfy constitutional requirements on this score alone. *See id.* Act 44 satisfies this requirement, which, as will be shown, is the only one based in the Constitution of the United States.

As the source of their "damage to representative democracy claim," the intervenor-plaintiffs cite a single case, *Prosser v. Elections Board*, 793 F. Supp. 859 (W.D. Wis. 1992), a pre-*Vieth* redistricting case[3] in which a court had to draw legislative district lines because Wisconsin's political branches had failed to agree on a plan. The *Prosser* court discussed political gerrymandering, but it did not anywhere recognize the possibility of a "representative democracy" claim based on the principles discussed by the intervenor-plaintiffs. *See id.* at 863–64. Moreover, that court made clear that its own process of weighing different proposed plans would not apply in cases such as this one:

> What is true is that if we were reviewing an enacted plan we would pay little heed to cries of gerrymandering, because every reapportionment plan has some political effect, and so could be denounced as "gerrymandering" committed by the party that had pressed for its enactment. But we are not reviewing an enacted plan. An enacted plan would have the virtue of political legitimacy. We are comparing submitted plans with a view to picking the one (or devising our own) most consistent with judicial neutrality. Judges should not select a plan that seeks partisan advantage—that seeks to change the ground rules so that one party can do better than it would do under a plan drawn up by persons having no political agenda—even if they would not be entitled to invalidate an enacted plan that did so.

Id. at 867.

Here, of course, a plan has been enacted that has "the virtue of political legitimacy." The *Prosser* decision correctly recognized that, while judges cannot consider political ends when it falls to them to do the redistricting, legislators and governors can. Since *Prosser*, the Supreme Court has reframed the debate over the viability of political

[3] Though they rely on this 20-year-old, pre-*Vieth* case, the intervenor-plaintiffs conveniently ignore the month-old decision in *Committee for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 1:11-cv-5065, 2011 U.S. Dist. LEXIS 144302 (N.D. Ill. Dec. 15, 2011), which defeats their "representative democracy" claim, just as it does the "political" claim left to the plaintiffs to defend.

gerrymandering claims in *Vieth*, 541 U.S. 267 (2004), and *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006). Nothing in those cases or in *Prosser* supports the intervenor-plaintiffs' quixotic suggestion that this Court interpret the fourth and eighth claims of the Complaint as something other than garden-variety political gerrymandering claims.

Moreover, because of the plaintiffs and intervenor-plaintiffs' decision to present their responses in this disjointed manner, they not attempted to show why Act 44's district lines are so egregious as to make the Wisconsin legislature's alleged disregard for some subset of purportedly relevant principles worse than maps at issue in political gerrymandering claims that have failed elsewhere. Discussions of and maps from such other plans, along with previous maps, are available for contrast. *See, e.g.*, *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 2011 U.S. Dist. LEXIS 144302, *12 nn.3–4 & app'x A–D (N.D. Ill. Dec. 15, 2011) (citing to and including Illinois' previous and newly enacted Congressional districting maps).

Besides ignoring the relevant case law on political gerrymandering, the intervenor-defendants also now change course from the allegations found in the complaints on which both sets of plaintiffs' claims are founded. The intervenor-plaintiffs complained about the 3rd and 7th Congressional Districts drawn by Act 44 only on the issue of compactness (Compl.-in-Intervention, Dkt. #67, at ¶ 48), while raising issues about purported communities of interest only in discussing the Fox River Valley region and the Milwaukee area. (*Id.* at ¶ 51.)[4] They made no allegations that the newly redrawn 3rd and 7th Districts broke up any communities of interest. Now they do, apparently having decided that the originally identified regions did not actually contain communities of interest "unconstitutionally" fractured by Act 44.

[4] The corresponding paragraphs of the plaintiffs' Complaint likewise were limited to these examples in paragraphs 52 and 55 of that pleading. (Compl., Dkt. # 58, at ¶¶ 52, 55.)

II. The Intervenor-Plaintiffs' Invocation of "Traditional Redistricting Principles" Improperly Attempts to Have this Federal Court Strike Down a Valid State Law on Bases Not Founded in the United States Constitution.

The intervenor-plaintiffs citation to *Prosser* highlights a fundamental flaw in their thinking about their "representative democracy" claim. As noted, the legislature's failure to enact a legislative redistricting law after the 1990 census made it necessary for a federal court to draw up a plan creating equally sized Assembly districts. In such a setting, as *Prosser* pointed out, judges properly go out of their way to find neutral principles to apply to their unwanted, because constitutionally disfavored, task. However squishy the so-called "traditional redistricting criteria" may be,[5] they at least wear the patina of nonpartisanship. Of course, they will inevitably have substantial political effects, even if operated by members of the judiciary.

But the case that the intervenor-plaintiffs bring to this Court is quite different. This Court can invalidate a state law like Act 44 only if the statute violates the United States Constitution. The one-person, one-vote principle, founded in the Equal Protection Clause, is not in play here, and the intervenor-plaintiffs assert no other constitutionally based challenge. The intervenor-plaintiffs' redistricting "principles" cannot be applied to strike down a state law because they are not themselves federal constitutional law,[6] just remedial principles intended to preserve judicial neutrality when judges have to draw their own maps.

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[5] The intervenor-plaintiffs spend long, single-spaced pages (*see* Int.-Pls.' Br. 16–24), for example, trying to demonstrate that Act 44 destroys "communities of interest." (They also claim, falsely, that it "break[s] up the communities of Stevens Point, Wausau, and Wisconsin Rapids," *id.* 6, each of which remains intact.) But keeping Congressional districts homogeneous is plainly a two-edged sword. A rational legislature might well decide that it is better to have Members of the House represent a wide variety of interests than to risk making them unifocal—or, even, captives of an industry—by promoting too much homogeneity in a district. That is not to say that this legislature had such thoughts in its collective mind, only that a consideration that is useful to map-drawing judges because it appears neutral might be rejected by legislators on rational, principled grounds. The right to make such judgments is an important difference between judicial and political actors.

[6] Whatever the status of compactness and contiguity as *state* constitutional principles, *see* Wis. Const. art. IV, § 4, they apply by that provision's terms only to legislative, not Congressional, districts. In any event, the

Further, the intervenor-plaintiffs claim that the Complaint has identified those "redistricting principles" that are "universally recognized." (*Id.* at 3.) Their list is not definitive, even if any list could be, for they fail to mention, for example, the frequently mentioned goal of incumbent protection. The *Vieth* plurality, though finding political gerrymandering claims nonjusticiable, cited "the traditional criterion of incumbency protection" and noted even Justice Souter's previous recognition of it as an acceptable districting principle. *Vieth*, 541 U.S. at 298 (Scalia, J., plurality opinion) (citing *Bush v. Vera*, 517 U.S. 952, 1047–48 (1996) (Souter, J., dissenting)). Incumbency protection stands alongside compactness, contiguity, preservation of core districts, and the like in contexts where such principles are applicable. *Bush v. Vera*, 517 U.S. at 967 (O'Connor, J.) ("In some circumstances, incumbency protection might explain as well as, or better than, race a State's decision to depart from other traditional districting principles, such as compactness . . . ."); *Gaffney v. Cummings*, 412 U.S. 735, 751–54 & n.18 (1973) (upholding a legislatively-adopted plan benefitting incumbents of both parties). If the plaintiffs and the intervenor-plaintiffs seek to raise traditional redistricting principles to a new constitutional status in political gerrymandering claims (whether so-termed or not), it would be inappropriate to pick and choose among them without explanation. The intervenor-plaintiffs' disregard of incumbency protection as a redistricting criterion is especially surprising given their purported reliance on continuity-based representation considerations. (Int.-Pls.' Br. 8–9.) Moreover, the Wisconsin legislature's tradition of deferring to incumbent Members of the House to draw Congressional maps in Wisconsin, so (rightly) valued by the intervenor-plaintiffs (*id.* at 5–6), inherently embodies such a principle.

Eleventh Amendment prevents this federal Court from enforcing state law against the state. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984).

The intervenor-plaintiffs tell the Court that, because the 2002 Congressional districting law had been passed with bipartisan support, "[t]here would be no need to change those districts" (Int.-Pls.' Br. 10), that compactness of districts "is considered desirable to reduce the travel time in campaigning" (*id.* at 13), and that "[n]o one in Wisconsin knows the problems in general associated with a non-compact district" more than ex-Congressman Obey. (*Id.* at 15.) Yet, the lines *did* need to be drawn based on the new census data, and Mr. Obey's views did not prevail with the legislature. Far more importantly, his preferred method of redistricting is not enshrined in the federal Constitution. *Shaw v. Reno*, 509 U.S. 630, 647 (1993) ("We emphasize that these criteria are important not because they are constitutionally required—they are not—but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines."); *Gaffney*, 412 U.S. at 752 n.18 ("But compactness or attractivenss has never been held to constitute an independent federal constitutional requirement for state legislative districts."). After all, "it is a constitution that we are expounding," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819), and that Constitution vests authority over the redistricting process in the duly-elected representatives of the people of the states, and not in courts guided by "experts," as the intervenor-plaintiffs would prefer. The decisions of legislatures, including redistricting decisions, are of the essence of our representative democracy.

CONCLUSION

The Court should dismiss all claims in the intervenor-plaintiffs' complaint. They do not state a claim upon which relief can be granted. The intervenor-plaintiff invitation to this Court to upset validly enacted state law on grounds with no foundation in the United States Constitution should be firmly rejected.

Respectfully submitted,

FOLEY & LARDNER LLP

Dated this 17th day of January, 2012.

s/ Thomas L. Shriner, Jr.

Thomas L. Shriner, Jr. (WBN 1015208)
Kellen C. Kasper (WBN 1081365)
FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202-5306
414.297.5601 (TLS)
414.297.5783 (KCK)
414.297.4900 (facsimile)

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