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,

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,

Civil Action
File No. 11-CV-562

Three-judge panel
28 U.S.C. § 2284

(caption continued on next page)

PLAINTIFFS' TRIAL BRIEF

VOCES DE LA FRONTERA, INC., RAMIRO VARA, OLGA WARA, 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, and TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants.

Dated: February 15, 2012.

GODFREY & KAHN, S.C.

By: */s/ Douglas M. Poland*

Douglas M. Poland
State Bar No. 1055189
Dustin B. Brown
State Bar No. 1086277
One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53701-2719
608-257-3911
dpoland@gklaw.com
dbrown@gklaw.com

Attorneys for Plaintiffs

This trial brief for the plaintiffs begins, unconventionally perhaps, with the defendants' strongest argument. The statutes at issue, Acts 43 and 44, which redistricted the state for the prospective legislative and Congressional elections on August 14 and November 6 and beyond, are presumptively constitutional. Their very enactment gives them the benefit of the doubt. Inescapably, however, they also warrant the appropriate skepticism and close inquiry that would not attend a tax or regulatory statute because they involve the democratic process and representative government.

The Court will not hear, at the trial next week, any comprehensive explanation from the defendants for the redistricted configuration of the state. No member of the legislative majority, from the leadership or back bench, will proudly describe the transparent process or unifying themes that led to the creation of boundaries for the 33 state senate and 99 assembly districts or the eight Congressional districts. The defendants, instead, will defend the presumption almost exclusively with expert witnesses. In the end, however, they will rely primarily on the presumption given statutes. It is not enough.

Nor is it enough to rely on compliance with the one person, one vote principle that brought redistricting litigation from the "political thicket" of *Colegrove v. Green*, 328 U.S. 549 (1946), to *Baker v. Carr*, 369 U.S. 186 (1962), to the nuanced and difficult redistricting decisions following the 2000 and 2010 censuses. With today's sophisticated software, achieving virtually literal population equality among districts is the beginning, not the end, of the process.

What are the principal constitutional and statutory flaws in Act 43, the legislative districting statute?

- It violates the Voting Rights Act because it dilutes the Latino population in Milwaukee when it should have concentrated it;

- It violates the Equal Protection Clause, ignoring the state constitution, by gratuitously moving citizens from district to district, dissipating core district populations and disenfranchising in the process almost 300,000 people who are denied the right to vote in the 2012 state senate elections; and

- It divides, without justification, community boundaries and communities of interest, sacrificing traditional districting principles to what can only be (though denied to be) political ends in a 12-day, largely secretive process.

Notwithstanding the fact that redistricting is decennial, there is no shortage of precedent—two U.S. Supreme Court mandates in the last several weeks alone.[1] Yet the plaintiffs rely in part on the four published decisions by the successive three-federal judge panels convened here since 1982. The plaintiffs do so for two primary reasons: those panels involved six federal judges who lived most of their lives in this state and who, with their colleagues from the circuit, drew the boundaries that have governed the state senate and assembly districts for the last 30 years.[2] And one of the issues here involves the applicability of this Court's 2002 order to four pending recall elections.

Some of the challenges that confronted those judges have been surmounted with technology that permits redistricting with virtually perfect population equality, though in virtually infinite different ways. It might well be possible, for example, to configure the state's 33 senate districts into vertical stripes, north to south, with virtually no population deviation, but

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[1] *Perry v. Perez*, 565 U.S. ___, 132 S. Ct. 934 (2012) ("*Perry*"); *Tennant v. Jefferson County Comm'n*, No. 11A674, 2012 WL 164090 (U.S. Jan. 20, 2012) (order granting stay).

[2] *Baumgart v. Wendelberger*, Nos. 01-121 and 02-366, 2002 WL 34127471 (E.D. Wis. May 30, 2002) (*per curiam*), *amended by* 2002 WL 34127473 (E.D. Wis. July 11, 2002); *Prosser v. Elections Bd.*, 793 F. Supp. 859 (W.D. Wis. 1992) (*per curiam*); *Republican Party of Wisconsin v. Elections Bd.*, 585 F. Supp. 603 (E.D. Wis. 1984), *vacated and remanded for dismissal of complaint*, *Wisconsin Elections Bd. v. Republican Party of Wisconsin*, 469 U.S. 1081 (1984); *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630 (E.D. Wis. 1982).

it would not be constitutional for a host of reasons. *See Prosser v. Elections Bd.*, 793 F. Supp. 859, 863 (W.D. Wis. 1992) (*per curiam*). While the legislature did not do that, it no less ignored federal law and basic districting principles, and that should lead this Court to find the statutes invalid.

An irony, with procedural and substantive dimensions, pervades the parties' dispute over Act 43. The three individuals who drew the legislative boundaries are consistent in their sworn testimony: politics played absolutely no role in the process. *See*, *e.g.*, Handrick Depo. (Dkt. 136) at 217:3-18; Foltz Depo. (Dkt. 138) at 194:17-195:6; Ottman Depo. (Dkt. 140) at 200:5-201:5; *see also* Defs.' Amended Answer and Affirmative Defenses to the Second Amended Complaint for Declaratory and Injunctive Relief ("Amended Answer") (Dkt. 66) ¶ 62. The architect of Act 44 made no such claim, *see* Stipulated Findings of Fact ("Stip. FOF") (Dkt. 158) ¶¶ 209, 221-222, and the flaws in that statute are detailed in the materials submitted by the Intervenor-Plaintiffs.

What then explains the choices made? Wherever the initial burden lies here, the answer to that question can only come from the defendants.

STATEMENT OF FACTS[3]

Wisconsin's bicameral legislature has 99 assembly districts and 33 senate districts, each senate district embracing three assembly districts. Historically, both major political parties have been successful in state and federal elections. A relatively rare exception occurred in 2010 when Republican candidates won majorities in each legislative chamber and the Governor's office.

[3] The parties have filed a Joint Pretrial Report that contains statements of both stipulated and contested facts and law. *See* Dkt. 158. Only the briefest summary is necessary here.

The Governor signed Act 43 (legislative districting) and Act 44 (congressional) into law on August 9, 2011. That enactment followed a public legislative process that took only 12 days: circulated to the public in draft form on July 8, a single public hearing on July 13, and final legislative approval on majority votes divided by party on July 19 and 20. (There was a much longer, secretive and politically unilateral process that preceded it. *See* Pls.' Findings of Fact ("Pls.' FOF") (Dkt. 158) ¶¶ 243-257.) This litigation began contemporaneously, and it has proceeded through a Second Amended Complaint with nine claims; a series of discovery disputes and orders; a motion to dismiss (legislative districts) denied on October 21; and a motion for judgment on the pleadings on December 8 (congressional) that remains pending. The Court consolidated this case with a subsequently filed Voting Rights Act complaint from Voces de la Frontera, Inc. ("Voces"), and it also permitted intervention by the state's five Republican members of Congress and its three Democratic members. No Act 43 party filed additional motions for relief until the defendants' summary judgment motion late last Friday.[4]

At the outset, this Court noted the then-pending litigation in Illinois, and the cases there that have provided a point of reference for the serial discovery orders here. *See Committee for a Fair and Balanced Map v. Illinois State Bd. of Elections*, No. 11-CV-5065, 2011 WL 6318960 (N.D. Ill. Dec. 15, 2011) ("*Fair Map*"); *Radogno v. Illinois State Bd. of Elections*, No. 11-CV-04884, 2011 WL 6153160 (N.D. Ill. Dec. 7, 2011) ("*Radogno*"). While the Illinois and Wisconsin litigation share some issues, their political and factual foundations are stark

[4] Defendants' summary judgment motion is untimely and procedurally unsound. *See* Plaintiffs' Letter to the Court, February 13, 2012 (Dkt. 133). Their assertion that this Court does not have the authority to hear plaintiffs' claims seeking prospective injunctive and declaratory relief against officers of an independent state agency lacks merit as well. *See Ex parte Young*, 209 U.S. 123 (1908). Defendants have filed answers to each of plaintiffs' complaints, admitting that this Court has jurisdiction to hear all of the claims, filed a motion to dismiss, and vigorously participated in the discovery process – all while remaining silent on any immunity issue. Their conduct begs the question as to why they assert their purported right to Eleventh Amendment immunity on the eve of trial. *See Hill v. Blind Indus. & Servs.*, 179 F. 3d 754, 756, 759 (9th Cir. 1999), *amended by*, 201 F. 3d 1186 (9th Cir. 2000) (finding the defendant waived Eleventh Amendment immunity because it did not assert it in a timely manner by appearing and actively litigating the case on the merits).

contrasts. The majority parties in each legislative chamber and the Governor's office are reversed—with the Democratic Party's officeholders controlling the legislative process in Illinois—and the factual distinctions between the cases are equally stark.

The legislation itself in Illinois provided a narrative explanation for the boundary choices made. The defendants there also offered a detailed rationale for those choices, including the explicit political considerations that significantly influenced some of them. Here, the testimony of the individuals who literally drew the boundaries enacted into law stated unequivocally that political considerations played no role. *See supra* p. 4. The defendants' answer is equally adamant. *See* Defs.' Amended Answer ¶ 62. While that leaves little direct basis for the plaintiffs' Act 43 political gerrymandering claims, it also leaves no explanation for the extreme racial, geographical, and population decisions the statute does reflect.

ARGUMENT

I. ACT 43 VIOLATES THE VOTING RIGHTS ACT.

The ecumenical ability to prepare "zero deviation" redistricting plans has led inevitably to a focus on racial and apolitical factors in redistricting. (The political gerrymandering question need not be revisited here because it has been fully briefed, in the context of Act 44 alone, in the pending Rule 12(c) motion by Intervenor-Defendants.) The complaints here allege violations of the Voting Rights Act in the composition of two assembly districts in the City of Milwaukee. Act 43 impermissibly dilutes the political strength of Latino voters by dividing them into two assembly districts. It impermissibly dilutes the political strength of African-American voters by packing them into six districts.

Latino Community

The heart of the issue is Act 43's geographical division of the Latino community in Milwaukee and its dilution politically. While the testimony elicited by Voces will address this

issue more expansively, the parties' disagreement is easily stated. The defendants contend that the Latino community should be split into two districts. The plaintiffs and Voces maintain that the Voting Rights Act compels a single assembly district and prohibits the dilution of political influence that characterizes two.

While the geographical division of the Latino community in Milwaukee is readily apparent, more subtle is Act 43's dilution of the community's ability to elect a representative by reconfiguring Assembly District 8 to include high-turnout white neighborhoods. The political division and dilution will be the primary focus of expert testimony. In brief, the defendants contend that Act 43 creates "two majority Hispanic Assembly districts (measured by Hispanic voting age population), one of which is 60.5% Hispanic VAP, and the other is 54.0% Hispanic VAP." Defs.' Findings of Fact ("Defs.' FOF") (Dkt. 158) ¶ 426. However, a 54 percent voting age population is insufficient, as a matter of law, for Voting Rights Act compliance. *See Ketchum v. Byrne*, 740 F.2d 1398, 1415 (7th Cir. 1984). Indeed, it is *prima facie* evidence of minority voting dilution. Even if it were sufficient on its face, moreover, voting age population is the wrong metric.

The relevant metric is *citizen* voting age population. The defendants overstate the effective Latino voting age population in Assembly Districts 8 and 9 because they do not consider the consequences of noncitizenship or the historically low registration rates. Nor do they consider the impact of Wisconsin's newly enacted voter identification law on electoral participation. *See* 2011 Wis. Act 23 (requiring photo identification). With noncitizenship rates taken into account, as they must be here, the percentage of *eligible* Latinos constituting the voting age population in Assembly Districts 8 and 9 drops dramatically – below 50 percent – to between 47.07 percent and 49.62 percent in Assembly District 8 and between 40.53 percent and

43.02 percent in Assembly District 9. Pls.' FOF ¶¶ 317, 318. Indeed, the defendants' own expert essentially concedes that Act 43 fails to create a Latino majority district with an effective voting age population. *See* Tr. Ex. 32 (Morrison Report) at 9.

Regardless of the measurement (voting age population or citizen voting age population), moreover, Act 43 impermissibly dilutes the political strength of Latino voters by dividing them into Assembly Districts 8 and 9. In the absence of a neutral non-racial explanation, the choice appears deliberate – even more so considering the secrecy with which the legislature has enshrouded communications involving those who created Assembly Districts 8 and 9. And there is no explanation because the defendants provide none.

There was—and remains—a feasible alternative configuration that does not dilute the voting strength of Latinos in violation of section 2 of the Voting Rights Act. Assembly District 8 can be configured so that it has a Latino voting age population of 70.07 percent and, accordingly, a Latino citizen voting age population of 60.06 percent. *See* Pls.' FOF ¶ 320. It *is* possible to construct a compact Assembly District 8 with a sufficiently large and effective eligible Latino voting population to permit them to elect a representative of their choice. That is a goal of the Voting Right Acts. Given that, and the absence of a race-neutral explanation for the division of the Latino neighborhoods, Act 43 violates section 2 of the Act. It impermissibly dilutes the political strength of Latino voters.

African-American Community

Act 43 created six majority African-American assembly districts with voting age populations between 51.48 and 61.94 percent. Stip. FOF ¶ 128. However, the defendants' expert has conceded that African-Americans are unnecessarily concentrated in the six districts. *See* Pls.' FOF ¶ 337.

Under Act 43, there are five assembly districts (10, 11, 16, 17, and 18) where the concentration of African-American voters is excessive, far above the threshold (typically, 55 percent of the voting age population) commonly accepted as necessary to achieve effective majority status for African-American voters. *See* Pls.' FOF ¶ 337. When the percentage of African-American voting age population is reduced to 55 percent in each of these districts, at least 12,900 African-American voters and the influence they bring could be in adjacent districts. *See* Pls.' FOF ¶ 338. A new configuration would maintain African-American influence while still retaining effective majorities in the existing majority-minority districts and enhancing the influence of African-Americans city, county and statewide.

The excessive concentration of African-Americans packed in the five districts must be considered in conjunction with evidence of the discriminatory intent and effect of Act 43—evident from the totality of the circumstances. *See Fair Map*, 2011 WL 6318960, at *16. In addition to racial packing, these include the high rates of racially polarized voting, the manner in which Act 43 was enacted, and the disregard for traditional redistricting principles. *See* Pls.' FOF ¶¶ 335, 339, 243-259. Moreover, like many other dimensions of Act 43, there remains no persuasive explanation for the excessive and impermissible concentration of African-Americans in Assembly Districts 10, 11, 16, 17, and 18.

II. ACT 43 UNCONSTITUTIONALLY DISENFRANCHISES VOTERS AND DESTROYS DISTRICT INTEGRITY.

In each decade since 1983, the federal courts in this state have confronted the inevitable consequences in redistricting of the state's staggered four-year terms for state senate. Every citizen moved by Act 43 from an even- to an odd-numbered district loses an opportunity to vote in a regular election for state senator. It is undisputed that Act 43 displaces almost 300,000

individuals in this manner, imposing for them a six-year gap—from 2008 to 2014—between regular senate elections.

That any redistricting plan will disenfranchise *some* voters cannot justify disenfranchising more voters than necessary under the Equal Protection Clause. In 1983, the state enacted a redistricting statute that unnecessarily disenfranchised almost 174,000 people because malapportionment had already been cured in a 1982 court-drawn map. Based on this single fact, a three-judge panel here found that the statute suffered from a "fatal flaw." *Republican Party*, 585 F. Supp. at 605, *vacated*, 469 U.S. 1081 (1984). This Court already has noted the significance of this separate claim by the plaintiffs, denying the defendants' substantive motion to dismiss it and specifically citing the 1984 decision. *See* Order Denying Defs.' Motion to Dismiss (Dkt. 25) at 7-8. On the Rule 12 assumption that the facts alleged were true, this Court held the disenfranchisement claim "more than speculative." *Id.* The disenfranchisement facts alleged in the complaint have not changed, nor have the defendants provided any explanation in discovery for wholesale disenfranchisement.

Some disenfranchisement is, indeed, unavoidable. However, whether or not the right to vote is a "fundamental" right, it remains guaranteed in state senate elections by the state constitution and, in effect, by this Court's 2002 decision. Whatever the legal standard, moreover, whether strict scrutiny or something less, the defendants cannot persuasively defend the choices that have led to the displacement of 300,000 people and the denial of a right to vote.

The defendants attempt to find refuge in a safe harbor of their own creation. The court-drawn map in 1992 displaced 5.25 percent of the state, they contend, and Act 43 displaces 5.26 percent. Those who drew the Act 43 maps treated a 5.25 percent disenfranchisement rate as "a benchmark" to emulate because, in their view, that was an "acceptable level of delay in

voting." Foltz Depo. (Dkt. 138) at 185:4-186:1, 187:20-188:1. That the 2002 map disenfranchised only 3.14 percent of the state's population is ignored, just like the facts that technological advances have made an even lower disenfranchisement rate far more attainable and that, in the 1992 case, it was not a dispositive issue argued by the parties.

There are no safe harbors. A "temporary loss of voting rights" is tolerated only when "it is an 'absolute necessity' or when it is 'unavoidable.'" *Republican Party*, 585 F. Supp. at 606. The legal standard is not "acceptable" disenfranchisement. A 5.25 percent disenfranchisement rate was not unavoidable. It was, to the contrary, a predetermined and arbitrary target. As but one example, Act 43 transfers nearly 140,000 people between Senate Districts 21 and 22: 72,431 voters are shifted into SD 21 from SD 22, and 66,837 people are shifted from SD 21 to SD 22. Pls.' FOF ¶¶ 287, 288. These shifts achieve a net population increase in SD 21 of 5,589 but at a steep price: they disenfranchise nearly thirteen times that number, 72,431. *Id.*

Characterizing the deprivation of the right to vote in state senate elections as "delayed voting," the defendants contend that while Act 43 does, indeed, deprive almost 300,000 people of the right to vote, the "net" effect is just under 135,000 people because of the extraordinary recall elections last summer. *See* Defs.' FOF ¶ 396. The exercise of one constitutional right—to vote in a recall election—cannot compensate for the deprivation of another. The defendants still do not confront, just as they refused to confront in their briefs supporting their failed motion to dismiss, the Court's 1984 decision. Nor are they willing to confront the parallel impact of this Court's 2002 boundaries, which remain in effect. *See infra* pp. 13-14.

The massive movement of people that results in a deprivation of a constitutional right to vote for a state senator is a flaw that infects the statute's treatment of other redistricting requirements in the state constitution. Paralleling the gratuitous population transfers between

senate districts, Act 43 rearranges district populations and eviscerates core populations without apparent cause, let alone good cause. The legislature cannot "be indifferent among all" of the "nearly infinite set of district configurations that would generate population equality across districts." *Prosser*, 793 F. Supp. at 863.

The Supreme Court in *Perry v. Perez*, less than a month ago, noted – in the context of a judicially-drawn plan – the need to avoid massive and gratuitous change: "Where shifts in a State's population have been relatively small, a court may need to make only minor or obvious adjustments to the State's existing districts...." 565 U.S. ___, 132 S. Ct. at 940-41. The population shifts in Texas were large. Not so, here. While that case involves judicially-drawn districts and legislatures do have more flexibility in redistricting, they do not have a license.

III. ACT 43 IGNORES OTHER STATE CONSTITUTIONAL REQUIREMENTS FOR DISTRICTING, VIOLATING THE EQUAL PROTECTION CLAUSE.

The constitutional mandate to district anew following every census is not an invitation to reconstruct wholesale the state's political boundaries and deconstruct the core composition of legislative districts.[5] Nor is it an invitation to ignore state constitutional requirements. The haste, secrecy and unexplained decision-making used to adopt Act 43 may not, by themselves, constitute grounds for declaring it invalid. They are unavoidable in the Court's analysis, however, because the defendants have provided no explanation—rational or compelling—for so many of the decisions reflected in the statute. *See* Pls.' FOF ¶¶ 243-259. Moreover, at least since *Gaffney v. Cummings*, 412 U.S. 735 (1973), traditional districting principles have been a necessary part of the balance in the one person, one vote analysis.

These unexplained decisions include, for example, unnecessarily splitting municipalities between legislative districts. Act 43 divides the City of Racine into three different assembly

[5] The defendants themselves acknowledge the precision of the serial decisions by the federal courts here. *See* Stip. FOF ¶¶ 153, 165-166, 168-169; Defs.' FOF ¶¶ 397-399.

districts; it combines parts of the cities of Racine and Kenosha into a single assembly and senate district and cuts them off from the rural parts of Racine County and Kenosha County, which are in a separate senate district. *See* Pls.' FOF ¶¶ 273-75. Act 43 splits the City of Beloit, traditionally within one assembly district, into two. *See id.* ¶¶ 277-78. Moreover, Act 43 divides the 19,118 residents of the City of Marshfield, part of Senate District 24 for a century, between two senate and assembly districts. *See id.* ¶¶ 279-80.

Although "municipal splits should be used sparingly," *Wisconsin State AFL CIO v. Elections Bd.*, 543 F. Supp. 630, 636 (E.D. Wis. 1982), Act 43 does so repeatedly and unnecessarily, imposing significant burdens in cost and administration. *See* Pls.' FOF ¶¶ 283. Defendants' perfunctory explanations for these divisions do not account for traditional redistricting criteria. There is no rational basis under the Equal Protection Clause for Act 43's failure to honor them.

IV. ACT 43, IN THE FIRST INSTANCE, REQUIRES A DECLARATION FROM THIS COURT ON RECALL ELECTION BOUNDARIES AND, THEN, LEGISLATIVE AMENDMENT.

With the state's partisan primary on August 14, 2012, the first tentatively-scheduled day that candidates may circulate petitions for nomination is April 15, almost two months away, although the trial testimony will disclose some flexibility in that date. This Court's determination that Act 43 is fatally flawed, on one or more grounds, need not lead at least initially to judicially imposed boundaries. The legislature has time to exercise its constitutional responsibility, openly and responsibly, on the basis of traditional districting principles (including compliance with the Voting Rights Act). Only if the legislature fails to act, or fails to act constitutionally, need this Court do what has had to be done judicially every decade since 1980.

The remedy here does not substitute this Court's judgment for the legislature's, but the legislature requires this Court's judgment before it can, again, try to exercise its own. In this

regard, the self-described "anomalies," leading the defendants to work with municipal and county clerks to resolve discrepancies between district and municipal boundaries, a process that is ongoing, are not inconsequential. Whether or not the legislature was aware of them last summer, it is now. Whether or not the legislature erred in using census blocks, instead of wards adopted by municipalities, it can use the reconciled boundaries now.

The fact remains, notwithstanding Act 39 (companion legislation to Act 43) that the state constitution requires that legislative districts "be bounded by county, precinct, town or ward lines … and be in as compact form as practicable." Wis. Const. art. IV, § 4. Whether or not the legislature abused the public trust in its procedures or violated the state constitution, it can honor that trust and traditional redistricting principles now. The plaintiffs have no quarrel with the census itself. Its accuracy is not at issue. The defendants' legislatively and improvidently mandated use of census blocks rather than wards will be at issue, however, if the Court invalidates Act 43.

One claim here cannot abide a deferred remedy. The defendants today are reviewing recall petitions, signed by tens of thousands of people (including several plaintiffs), for four state senators (Senate Districts: 13, 21, 23, and 29). Unavoidably, the defendants necessarily will decide whether any recall elections will take place under the boundaries established by this Court in 2002 or, alternatively, by Act 43. Those 2002 boundaries, of course, embody this Court's mandate. They are the boundaries within which the recall petitions circulated, and the Court has continuing jurisdiction over the application of the very boundaries it created.

The recall elections last summer and at least one special election have been conducted under the 2002 boundaries, and on October 19, 2011 defendants issued a memorandum stating

that any recall elections, consistent with the plain language of Act 43, will take place under the 2002 boundaries. *See* Tr. Ex. 186. Yet uncertainty and justiciable controversy remain.

All four state senators in their February 9, 2012 written challenges to the recall petitions argue that the 2012 boundaries should govern any recall elections. Notwithstanding GAB's adoption of the petition recommended in the October 19th memorandum, the defendants in their pleadings deny plaintiffs' assertions that the "2002 districts . . . are the only legal, valid and proper districts for any election prior to the disposition in this case," and that the "challenged 2011 districts cannot serve as districts for any . . . recall elections." Defs.' Amended Answer (Dkt. 66) ¶¶ 100, 101. Going even farther, the defendants join the plaintiffs in asking the Court to "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." *Id.* ¶ 4 (defendants' request for relief). The defendants even admit, in a Waukesha County lawsuit concerning the recall election boundaries, that the 2002 districts are "unconstitutionally malapportioned," (Pls.' FOF ¶ 294) – this despite the "legal fiction" that plans remain constitutionally apportioned throughout a decade. *Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003).

It has been the defendants' grail, since the outset of this case, to avoid federal jurisdiction and authority. It was a focus of their unsuccessful motion to dismiss. It is a focus of their late-filed summary judgment motion. Yet it overlooks two central facts. Traditional redistricting principles, whether or not enshrined in state law, have always been an indispensable part of the federal courts' redistricting jurisprudence. The questions of core population retention and the deprivation of the right to vote are intertwined with the one person, one vote analysis.

Any deviation from population equality has to be justified. No safe harbor permits even minimal deviation without a justification grounded in those redistricting principles. Moreover, as loathe as the defendants' counsel may be to have this Court address the impending recall elections, the issue is precisely which borders will obtain: those established by this Court in 2002 or, notwithstanding that judgment and the plain language of Act 43, those the statute established. This Court has jurisdiction to apply its own decisions.

CONCLUSION

For the reasons stated above, the Court should declare Act 43 unconstitutional and enjoin its application in any election—recall, special or regularly scheduled—pending either the enactment of a valid redistricting statute or, in the absence of that, a plan adopted by this Court.

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