

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

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

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

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,  
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

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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, TIMOTHY  
VOCKE, and KEVIN KENNEDY, Director and  
General Counsel for the Wisconsin Government  
Accountability Board,

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

Defendants.

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**Defendants' Brief in Response to the *Voces* Plaintiffs' Trial Brief**

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Plaintiffs Voces de la Frontera, Inc., et al., cannot maintain a claim under Section 2 of the Voting Rights Act for a number of reasons. First, Act 43 builds on and improves the two Assembly Districts in Latino areas created under the 2002 court-plan. In 2002, the court-plan created only one majority-minority voting age population Latino Assembly District. Act 43 creates two such districts—Assembly District 8 and Assembly District 9. Second, Plaintiffs will not establish that Act 43 splits the Latino population into two districts in a way that creates ineffective minorities of voters as required by *Thornburg v. Gingles*, 478 U.S. 30 (1986). At trial, there will not be persuasive evidence that the Latino vote is not sufficiently strong to elect candidates of choice of the Latino community. The Plaintiffs cannot prove that Act 43 will impair or prevent them from electing their chosen representatives, and Act 43 therefore cannot violate § 2 of the Voting Rights Act.

**I. ACT 43 DOES NOT VIOLATE THE VOTING RIGHTS ACT.**

In *Thornburg v. Gingles*, the Supreme Court set out three threshold requirements that a plaintiff must satisfy under Section 2 of the Voting Rights Act, *before* a court may consider the “totality of the circumstances”: 1) “the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district”; 2) “the minority group must be able to show that it is politically cohesive,” i.e., that it votes as a racial bloc; and 3) “the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate.” *Gingles*, 478 U.S. 30, 50-51 (1986)(internal citations omitted).

Only if the three "necessary preconditions" of *Gingles* are established may a court move on to the second part of the test for evaluating Section 2 claims—a "totality-of-the-circumstances" analysis to determine whether the plan impairs the ability of the minority voters to participate equally in the political process. *See Johnson v. De Grandy*, 512 U.S. 997, 1013 (1994).

**A. Act 43 Improves upon the 2002 Court Plan.**

Act 43 creates one additional majority Latino voting age district than created by the 2002 court plan. It improves upon the 2002 Court Plan relating to Wisconsin's Latino population. Under Act 43, nearly a quarter of the entire Wisconsin Latino population is located within one heavily Latino Senate district, S3, with the majority of the Latino population in Assembly District 8 and Assembly District 9. *See* Tr. Ex. 140, Grofman Report, ¶ 16. The 2002 court plan created only one majority Latino population Assembly District (Assembly District 8), with a 62.14% Latino population. *Id.*, ¶ 17(a). The second largest Latino population district (Assembly District 9) in the 2002 court plan had a Latino population of only 28.42%. *Id.*

Under Act 43, the Latino voting age population increased from 58.34% to 60.52% in Assembly District 8. *Id.* at ¶ 17(c). In Assembly District 9, the Latino voting age population increased from 22.94% to 54.03%. *Id.* at ¶ 17(d). The following table illustrates the continued Latino voting strength in Assembly District 8 and the improved strength in Assembly District 9 as a result of Act 43:

<b><u>Latino Assembly District Voting Age Populations</u></b>			
<b><u>Assembly Districts</u></b>	<b><u>2002 Under Court-Drawn Map</u></b>	<b><u>2010 At Time of Census</u></b>	<b><u>Under Act 43</u></b>
AD8	58.34%	65.50%	60.52%
<b><i>AD9</i></b>	<b><i>22.94%</i></b>	<b><i>46.18%</i></b>	<b><i>54.03%</i></b>

*See* Tr. Ex. 140, Grofman Report, Exs. B-D.

**B. The Voting Rights Act does not require super "majority-minority" districts.**

Voces alleges "unlawful dilution of voting strength of Latino residents of the 8th Assembly District." Voces Compl., ¶¶ 1, 27-33. Voces generally claims that Act 43 violates the Voting Rights Act by splitting the Latino population into two districts. *See generally id.* Likewise, the Baldus Plaintiffs allege that "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." *Baldus Compl.*, ¶ 77(b).

The Voces Trial Brief further "alleges" a violation of the Voting Rights Act based on the argument that Assembly District 8 includes "a significant portion of a different community area known as Wilson Park" and that Wilson Park is "an entirely different and distinct community of interest." Dkt. No. 164, Voces Trial Brief. The Voces Complaint, however, does not contain allegations about the inclusion of Wilson Park, and does not mention "communities of interest." *See* Tr. Ex. 143, Voces Complaint. The

Voces discovery responses do not include information relating to these allegations, either. *See* Tr. Ex. 1061.

While both groups of Plaintiffs argue that Act 43 should have created one single super-majority Latino Assembly District, the Voting Rights Act does not require this. If it did, the court in 2002 would have violated the Voting Rights Act when it created a Latino district less Latino than Assembly District 8 in Act 43. The Supreme Court has made clear that dispersion of minority populations into more than one district—even if none of the districts contain a majority-minority population—is not a *per se* violation of § 2: “Section 2 contains no *per se* prohibitions against particular types of districts ... Only if the apportionment scheme has the effect of denying a protected class the equal opportunity to elect its candidate of choice does it violate § 2.” *Voinovich v. Quilter*, 507 U.S. 146, 155 (1993) (emphases added).

In *Johnson v. De Grandy*, the Court emphasized that majority-minority districts are not always necessary to ensure that minority groups be able to elect the candidates of their choice:

If the lesson of *Gingles* is that society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity, that should not obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice.

*De Grandy*, 512 U.S. 997, 1020 (1994) (emphasis added).

This is because *Gingles* does not require majority-minority districts, and hinges instead on the effective voting power of a minority group when combined with "crossover" voters: under the third prong of *Gingles*, "a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." *Gingles*, 478 U.S. at 56. Under *Gingles*, *Voinovich* and *De Grandy*, even the absence of a majority-minority district is not a *per se*

violation of § 2, but rather requires an examination of the effect of the plan on minority representation. By way of background, in *Gingles* the evidence indicated that in North Carolina in the 1980s “a substantial majority of white voters would rarely, if ever, vote for a black candidate.” 478 U.S. at 59.<sup>1</sup>

**C. Plaintiffs cannot show that they have been, or will be, unable to elect candidates of their choice.**

Plaintiffs essentially claim, in the classic *Gingles* manner, that Act 43 violates the Voting Rights Act because it disperses Latinos “‘into [two] districts in which they constitute an ineffective minority of voters.’” *Voinovich*, 507 U.S. at 154 (quoting *Gingles*, 478 U.S. at 46 n. 11). To succeed, Plaintiffs must show that “a white bloc vote normally will defeat the combined strength of minority support plus white ‘crossover’ votes.” *Gingles*, 478 U.S. at 54.

But Plaintiffs cannot show that Act 43 will impair their ability to elect their preferred candidate. At trial, there will not be persuasive evidence that the Latino population in Assembly District 8 is insufficient under the Voting Rights Act. *See Gingles*, 478 U.S. at 54; *see also Page v. Bartels*, 144 F. Supp. 2d 346, 353 (D.N.J. 2001) (applying *Gingles* and holding that the reduction of the African-American voting age population in a district from 53% to 27% would not impair or prevent minorities from electing their preferred candidates).<sup>2</sup>

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<sup>1</sup> This factual underpinning of *Gingles* may no longer be true in the state in which it originated. In North Carolina in 2008, candidate Barack Obama won the state by aggregating white and black votes. His overall vote total was “about one-third black and two-thirds white.” *See New York Times*, November 6, 2008, available at <http://thecaucus.blogs.nytimes.com/2008/11/06/obama-wins-north-carolina/> He received support from more white evangelicals than did Senator John Kerry four years earlier. *See* The Pew Forum, “Much Hope, Modest Change for Democrats,” August 11, 2010, available at <http://www.pewforum.org/Politics-and-Elections/Much-Hope-Modest-Change-for-Democrats-Religion-in-the-2008-Presidential-Election.aspx>.

<sup>2</sup> Subsequent evidence post-*Bartels* indicates that in the elections which followed in 2002, minorities won in districts where they were less than a majority, as the minorities constituted a majority in the Democratic primaries and won the general elections with crossover support. *See* E. Jaynie Leung, *Page v. Bartels: A “Total Effects” Approach to Evaluating Racial Vote Dilution Claims*, 21 L. & Ineq. 192 (2003).

Plaintiffs' argument that they will be unable to elect candidates of choice in District 8 is not based on any analysis of past Assembly races in District 8. That is understandable, since a Latino candidate has won every election in Assembly District 8 since 1998. Rather, it is based largely on two "racially polarized voting" studies by their expert, Dr. Mayer.<sup>3</sup> Through Dr. Meyer, they argue that voters in and near Assembly District 8 and Assembly District 9 vote in a "racially polarized" way. But "polarized" voting, Plaintiffs concede, does not mean that the minority candidate of choice does not win. Relying on the first "polarized voting" study, they argue:

For example in the 2011 primary for Milwaukee County Circuit Court Judge, the former elected representative of the 8th Assembly District, Pedro Colon, ran against multiple White candidates. Dr. Mayer found that 58.2% of Latinos voted for Judge Colon while only 32% of the White voters voted for him. In the general election that followed similar levels of racially polarized bloc voting were found.

Dkt. No. 164, Voces Trial Brief, at 4-5. This proves too much: Judge Colon, the Latino candidate, *won*—as he did each time he ran for Assembly District 8. *Id.*

Plaintiffs nevertheless continue to cite to those non-Assembly races, claiming that Defendants' expert, Dr. Grofman, "believes that the 'best evidence' of racially polarized bloc voting is electoral data from the electoral districts in question." *Id.* at 5 (citing Grofman Dep. at 69:1 to 69:11). This is not true. Dr. Grofman testified, to the contrary, that the "best evidence" is that "taken from *elections* of the type under challenge ... partisan contests for the assembly and senate and party primaries therein." Grofman Dep., Dkt. No. 150, at 68:19-69:11. Dr. Grofman specified that non-assembly races are

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<sup>3</sup> Plaintiffs boast that their expert is "the only" expert who did this analysis. In his second study, the Plaintiffs' expert produced an "ecological inference run" after expert deadlines passed, in order to attempt to cure the Plaintiffs' failure to show that their candidate of choice is unable to win elections under prong 3 of *Gingles*. See generally Mayer Deposition, 210:9-13 and Exhibit 1025. In any event, that type of exogenous data should only be used if there is not sufficient data available from the races at issue. Grofman Deposition, 71:9:18. Looking to wards, or portions of wards, or aldermanic districts would only be necessary to the extent that there were no adequate information from the Assembly races. *Id.* at 73:1-12. Furthermore, those aldermanic elections are non-partisan and pose particular problems for the election of minority candidates. *Id.* at 74:10-18.

"exogenous contests" that are used when there is no actual data for the particular *type of elections* that are at issue (here, state assembly races). *Id.*, 71:11-21.<sup>4</sup>

Here, there is data regarding Assembly District 8 races. Assembly District 8 has been continuously represented by a Latino member under the 2002 court plan, and in fact has had a Latino representative since 1998. *See* Tr. Ex. 140, Grofman Report, ¶ 18. Under the 2002 court plan, Assembly District 9 has been represented by the same non-Latino Assembly member since the plan was put in place. *Id.* Under Act 43, Assembly District 9 provides an increased opportunity for the success of a candidate of choice of the Latino community, given the increase in Latino population within new Assembly District 9. *Id.*, ¶ 19(b).<sup>5</sup>

In sum, Plaintiffs cannot show that Act 43 will impair or prevent minorities from electing their chosen representatives, and Act 43 therefore cannot violate § 2 of the Voting Rights Act.

### CONCLUSION

Plaintiffs cannot show, as a necessary precondition to their Voting Rights Act claim, that non-minority voters are voting as a bloc to thwart the election of Latino candidates in Assembly District 8, as required by the Supreme Court's decision in *Gingles*. Accordingly, Plaintiffs' claims under the Voting Rights Act should be appropriately dismissed.

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<sup>4</sup> *Voces* quickly proceeds past *Gingles* into a "totality of the circumstances" analysis, and therein cites to "anticipated testimony" regarding subjects that *Voces* did not include in their Complaint or their discovery responses, and which appear only as proposed statements of contested facts in the pre-trial report. *See supra*, at pg. 4, citing Tr. Ex. 143, *Voces* Complaint and Tr. Ex. 1061, *Voces* Discovery Responses.

<sup>5</sup> A chart summarizing complete election results from Assembly District 8, for both the primary and general elections, is attached as Exhibit A to this brief.

Dated this 20th day of February, 2012.

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