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.

INTERVENOR-DEFENDANTS' BRIEF IN RESPONSE TO INTERVENOR-PLAINTIFFS' TRIAL BRIEF

The trial scheduling order of December 15 called for parties to file trial briefs last week on issues as to which the filing party bears the burden of proof. Of the four groups of parties to *Baldus*, only the intervenor-plaintiffs (the Democratic Members) filed a trial brief on Act 44, the congressional redistricting statute. The GAB defendants and the intervenor-defendants (the Republican Members) filed nothing because they do not have the burden of proof on any issue. By limiting their brief to Act 43, the plaintiffs appear effectively to have abandoned their attack on Act 44.[1] So this brief responds only to that of the Democratic Members.

Discovery has permitted the parties to stipulate that bipartisan considerations played a part in the drafting of the Act 44 map. (Stip. Facts, ¶¶ 211–13, 216, 219–21.) As has been the case for the last 40 years, the Legislature allowed the Members of both parties to negotiate the congressional map. (*Id.* ¶ 209.)[2] All parties likewise agree that Erik Olson, the chief of staff to Congressman Ronald Kind, who headed up the decennial redistricting process on behalf of the Democratic Members, stated that a draft redistricting map that he had received from Congressman Paul Ryan's chief of staff "isn't too unreasonable." (*Id.* ¶ 223.) This concession came after the inclusion of various features requested by the Democratic Members, and before

[1] After receiving the Republican Members' reply briefs rebutting the various claims against Act 44, the plaintiffs and the Democratic Members moved to "defer" decision on the Republican Members' dispositive motions. (Motions to Defer, Dkt. #117, 119.) The first professed reason for deferral, their desire to analyze the then-recent deposition of Andrew Speth, has resulted in little more than stipulated facts indicating that he took into consideration the preferences of both Republican and Democratic Members in drafting the map embodied in Act 44. The second reason for deferral, the purported "anomalies" in the implementation of Act 44, led to extended discovery and ultimately a decision not to amend the complaint, so that there is no such issue before the Court. So, the plaintiffs' trial brief has *nothing* new to say about Act 44, just (page 5) that they have said all that they have to say in opposing the Republican Members' motion for judgment on the pleadings.

[2] In *White v. Weiser*, 412 U.S. 783 (1973), the Supreme Court had this to say about a congressional redistricting plan justified as advancing "a policy frankly aimed at maintaining existing relationships between incumbent congressmen and their constituents and preserving the seniority the members of the State's delegation have achieved in the United States House of Representatives":

> We do not disparage this interest. We have, in the context of state reapportionment, said that the fact that "district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness." *Burns v. Richardson*, 384 U.S. 73, 89 n. 16 (1966). *Cf. Gaffney v. Cummings*, 412 U.S. 735, 752 (1973).

412 U.S. at 791.

Congressman Kind received from the Republican Members a further change to the map that he had requested. Thus, aside from the lack of workability of the plaintiffs' and the Democratic Members' proposed standard for measuring any alleged partisan gerrymander claim, discovery has shown that Act 44 was neither truly partisan nor unreasonable nor excessive in its incorporation of political considerations.

Despite this, in their trial brief the Democratic Members—rather than voluntarily dismissing their Act 44 claims—continue to press a claim for relief (one that is, they say, distinct from one for political gerrymandering) that has no legal or factual basis.

I. The Democratic Members' "Representative Democracy" Claim Has No Basis in the Law, Seeks Merely to Evade the Requirements of Political Gerrymandering Case Law, and, Accordingly, States No Viable Claim.

Presumably, the Democratic Members are by now well aware of the Supreme Court's teaching on claims of political gerrymandering. *E.g.*, *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 299 (2006). Previous briefs have explained the treacherous course that any plaintiff must traverse in asserting such a claim and why all plaintiffs here have failed to successfully get around the obstacles on the course (Int.-Defs.' Br. in Supp. of Motions on the Pld'gs. and to Dismiss, Dkt. #76; Int.-Defs.' Reply Br. in Supp. of Mot. for J. on the Pld'gs., Dkt. #115), as well as why the Democratic Members' transparent attempt to avoid this case law is unsupportable. (Int.-Defs.' Reply Br. in Supp. of Mot. to Dismiss, Dkt. #116.) The Democratic Members ignore all of this, instead continuing inappropriately to seek a shortcut, in an attempt to cut Act 44 off at the pass. However, no such alternative path is open to these or any other plaintiffs.

The Democratic Members claim to have discovered an alternative theory that allows an end run around political gerrymandering case law in, of all places, a 20-year-old district court case. In *Prosser v. Elections Board*, 793 F. Supp. 859 (W.D. Wis. 1992), the Western District

redrew the state legislative map after the Legislature and the Governor had failed to reach an accord. (Int-Pls.' Trial Br. 6.) As an initial matter, the Democratic Members make a questionable choice in placing their hopes for relief on a decision that has no precedential value. *See, e.g.*, *Wirtz v. City of South Bend*, No. 11-3811 (7th Cir. Feb. 7, 2012) ("A district court decision does not have precedential effect, *Midlock v. Apple Vacations West, Inc.*, 406 F.3d 453, 457–58 (7th Cir. 2005); *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1124 (7th Cir. 1987)—that is, it is not an authority, having force independent of its reasoning, and to which therefore a court with a similar case must defer even if it disagrees, unless the circumstances that justify overruling a precedent are present.") Beyond this, *Prosser* is not even a "similar case" to this one. There the court—compelled to draw a map by legislative inaction in the face of new census figures—discussed certain apolitical considerations that a *court* could properly take into account *in that circumstance*. It explicitly distinguished what it was doing from cases reviewing legislatively-adopted maps challenged on political gerrymandering grounds:

> 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 has 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 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) (emphasis added) (internal citations omitted).

Whatever the Democratic Members see in *Prosser* that they think supports their position (notably, they nowhere quote directly from the decision), such aspects of the case are at best

dicta and, in light of *Vieth* and *LULAC* and other cases since decided, poorly aged dicta to boot. In arguing from *Prosser*, the Democratic Members assert that in that case, "[t]he principal considerations discussed were community of interest and compactness with the ultimate goal being a plan that is best for representative democracy." (Int.-Pls.' Trial Br. 6.) This gets the Democratic Members nowhere, for at least two related reasons that they ignore.

First, invocation of cases like *Prosser* is inefficacious, since alleged violations of such redistricting "principles" cannot form an independent basis for relief, for they do not come from the United States Constitution.[3] "[C]ompactness, contiguity, and respect for political subdivisions . . . are important not because they are constitutionally required—they are not—but because they are objective factors that may serve to defeat a claim [of otherwise unconstitutional gerrymandering]." *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (internal citation to *Gaffney*, 412 U.S. at 752, n.18). The Supreme Court has held that, in the context of an explicit political-gerrymandering claim (which the Democratic Members purport to disavow), "even those criteria that might seem promising at the outset (*e.g.*, contiguity and compactness) are not altogether sound as independent judicial standards for measuring a burden on representational rights." *Vieth*, 541 U.S. at 308. Merely listing "principles" and placing them under a "Representative Democracy" heading cannot create a federal constitutional claim where, as here, there is none.

Second, the Democratic Members' tactics fail because Act 44 is a duly enacted statute. As noted, in *Prosser* the court had to step in and select or fashion a plan "most consistent with judicial neutrality." 793 F. Supp. at 862. Other cases relied upon by the Democratic Members

[3] As is conspicuous from the Democratic Members' trial brief, which cites the state constitutions of four other states (Int.-Pls.' Trial Br. 4), no Wisconsin constitutional or statutory provision even arguably requires consideration of "communities of interest," or any other redistricting principle, in drawing congressional district lines. (Joint Proposed Conclusions of Law, ¶ 239.) There is no federal statutory challenge to Act 44, so nothing less than the Constitution itself can supplant the line-drawing choices made by the Legislature.

arose similarly and are, thus, likewise inapplicable to the Court's task here—to determine whether a duly enacted state law violates the Constitution.[4] These same cases uniformly regard the courts' role as an unnatural but necessary one, occasioned by the absence of a legislative plan. In those circumstances, courts look at both constitutional requirements and *non-constitutional* considerations, and they do so *because* they are not political bodies. *E.g.*, *Carstens*, 543 F. Supp. at 82 (noting "two constitutional criteria, population equality and absence of racial discrimination, have formed the foundation of judicial analysis . . . ," but "lower courts have frequently been forced to resort to additional non-constitutional criteria in their comparisons of proposed congressional plans"). Here, where legislators passed and the Governor approved Act 44, this Court is not redrawing a map or selecting from a palette of proposals. It must determine whether Act 44 is constitutional. Period. This is not a step that the Court can skip, despite the Democratic Members' implicit invitation to do so.

II. The Democratic Members Themselves Participated in Determining What Would Be in Act 44 and Proposed a Map Containing Many Features They Now Decry.

The Democratic Members now complain that Act 44 ignores or violates the "principles" of core retention,[5] compactness, and communities of interest. (Int.-Pls.' Trial Br. 7–14.) As

[4] The *only* district court case that the Democratic Members cite that involved an enacted plan, *Bandemer v. Davis*, 603 F. Supp. 1479 (S.D. Ind. 1984), was *reversed by the Supreme Court* for having applied an insufficiently demanding standard. 478 U.S. 109, 113 (1986). The other cases cited did not involve enacted plans. *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 687 (D. Ariz. 1992) (determining that after state House and Senate disagreement led to "legislative impasse, the court must adopt or draw a plan"); *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 632 (E.D. Wis. 1982) ("To date, a new legislative reapportionment plan has not been enacted. We have been advised that a plan was passed by the legislature in May but that it was vetoed by Governor Lee Dreyfus."); *Carstens v. Lamm*, 543 F. Supp. 68, 71–72 (D. Colo. 1982) (finding plan from previous decade unconstitutional and, in light of repeated gubernatorial vetoes of new plans, drawing a court-fashioned plan); *Mellow v. Mitchell*, 607 A.2d 204, 205 (Pa. 1992) (intervening after legislature failed to enact new plan); *Legislature of the State of California v. Reinecke*, 516 P.2d 6, 8 (Cal. 1973) ("In these mandate proceedings we are called upon to resolve the impasse created by the continuing failure of the Legislature to pass legislative and congressional reapportionment bills acceptable to the Governor.").

[5] The reader of the Democratic Members' assertion that Act 44 "shifted a population of 799,841 in Districts Three, Seven, and Eight" (Int.-Pls.' Trial Br. 4) will discover by referring to Table 29 included in their brief (*id.* at 8)

discussed, these are not constitutional requirements. Yet, the Democratic Members essentially ask this Court to find that the only redistricting plan that can pass constitutional muster is one that they now champion: an imagined "plan" that would re-establish the congressional district lines that the 2002 Legislature drew, with the only specifically mentioned change being to place all of Clark County in the 7th District (where Act 44 put it) instead of splitting it between the 3rd and 7th Districts (as it had been under the 2002 statute).

Likewise, the Democratic Members would have this Court re-adopt the lines of the 8th District drawn by the 2002 Legislature, with no changes.[6] However, the former 8th District, which needed to gain population after the 2010 Census, was not contiguous to any district from the 2002 statute that had to lose population after 2010. (*See* Joint Pretrial Report, Ex. 1, Table 29; Trial Ex. 179). The only "overpopulated" districts were the 1st, the 2nd, and the 3rd, and the 8th touched none of them. *Id.* To achieve population equality, the 8th District obviously could not be quarantined from the rest of the state, as the Democratic Members now suggest that it should have been. (*See* Int.-Pls.' Trial Br. 9-10.)[7] Their vehement preference for this specific "map," as an alternative to Act 44, has its origins in the views of David Obey, a former congressman, expressed at the public hearing on Acts 43 and 44 held in July. (*See* Affidavit of

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that this "statistic" is derived from clear double-counting. The Democratic Members count people on the way both "into" and "out of" a given district, thereby double-counting anyone moving from one district to another.

[6] The Democratic Members erroneously assert that, under Act 44, "District Eight is expanded in the northwest to include Vilas County." (Int.-Pls.' Trial Br. 10.) Under Act 44, Vilas County and all counties contiguous to it are located in the 7th Congressional District. 2011-12 Wis. Stat. § 3.17(1).

[7] The Democratic Members improperly cite ¶ 200 of the stipulated facts on this point. The parties have not agreed that "a disparity of 4,000 from ideal population is not considered significant" (Int.-Pls.' Trial Br. 4), an assertion that the Democratic Members claim would allow the 8th District to remain entirely unchanged from its 2002 boundaries. Indeed, the plaintiffs' motion to defer consideration of the Republican Member's dispositive motions, which the Democratic Members joined in all respects (Dkt. #119), contends that "only a congressional redistricting plan with virtually no population deviation can withstand the 'one person, one vote' demands of Article I." (Dkt. #117, ¶ 4.) Thus, the Democratic Members' current position seems to be that substantial deviations from ideal population equality are not permitted where the Legislature makes a good-faith effort to achieve perfect population equality (an effort successfully achieved here), but that substantial deviations are permissible as long as the Legislature makes no attempt to address a given population disparity. This is an absurd proposition.

David R. Obey, Dkt. #100, ¶ 19; *id.*, Ex. A, at 4–5.)[8] The Democratic Members now seem to argue that, instead of using a computer, the members of Wisconsin's current delegation to the House (or the state Legislature) should have employed Mr. Obey to draw the map, stating that "a computer is far inferior to a [former] congressman." (Int.-Pls.' Trial Br. 5.) Yet, Act 44 was not drawn *by* a computer, it was drawn with the help of a computer, using the input of many people, including the Democratic Members themselves, as well as their respective staff members.

Before Mr. Obey's testimony in July, the Democratic Members themselves had taken a very different view of congressional redistricting. At least as early as April 2011, the Democratic Members retained a Democratic firm in Washington (NCEC), to consult on the redistricting process and to draft a set of possible redistricting scenarios. (Stip. Facts, ¶ 225; Int.-Pl. Tammy Baldwin's Responses to Defs.' Interrogatories, Requests for Production and Requests for Admission (Trial Ex. 1067), Ex. 2v.) By April 20, they had "pushed again" for NCEC to get them a set of about a dozen redistricting scenarios. (*Id.*) The Democratic Members' productions include a set of such scenarios and analyses (*id.* at Ex. 2f), along with various other political analyses from NCEC and elsewhere (*id.*, Exs. 2b, 2c, 2d, 2e, 2g, 2t). These include a map, dated February 14, analyzing past "Democratic Performance" in 37 counties—apparently those "border" counties that the Democratic Members anticipated might be candidates for a move to a new congressional district, including Marathon, Wood, and Portage Counties. (*See id.*, Ex. 2t.)[9]

[8] It is worth noting that Mr. Obey justified his suggestion by stressing that Clark County has "bounced back and forth for years between those two districts [the 3rd and 7th Congressional Districts]." *Id.*, Ex. A, at 5. Apparently, voters who have been bounced around before are fair game for another bounce. At the very least, it seems incongruous to posit a constitutional claim, based on the Equal Protection Clause and representational rights, by suggesting that the rights of the voters in one county are of less importance than the rights of those in others.

[9] Congresswoman Baldwin's discovery responses further state that NCEC provided her office with three large wall maps entitled, "Wisconsin 2010 Gubernatorial Election Two-Party Vote by Ward," "Wisconsin CD2 2010 Congressional Election Two-Party Vote by Ward," and "Wisconsin 2008 Presidential Election Two-Party Vote by Ward." (Trial Ex. 1067, at 9.)

Also early in the process, each of the Democratic Members consulted with Congressman Ryan to express specific preferences for changes to their respective districts' lines. (Stip. Facts, ¶ 211.) Congresswoman Baldwin wanted to reduce or eliminate her district's footprint in Jefferson County. (*Id.*) Congresswoman Gwendolynne Moore expressed a desire that her district expand north from the City of Milwaukee to include certain North Shore suburban communities. (*Id.*) Likewise, a change made after the first draft of the map incorporated Congressman Kind's desire to preserve the Mississippi River corridor of his district, as well as Congresswoman Baldwin's desire to reduce driving times from Madison to areas within her district. (Stip. Facts, ¶ 216.) Each of the Democratic Members later met with Congressman Ryan and Mr. Speth, the primary drafter of Act 44's map, to discuss Mr. Speth's draft map. (Stip. Facts, ¶ 219.) At that time, Congressman Kind asked that Fort McCoy be placed in the 3rd District, rather than in the 7th, a change that was made by Mr. Speth in response to that request. (Stip. Facts, ¶¶ 220, 229.) After viewing Mr. Speth's draft, Congresswoman Moore's deputy chief of staff, Andrew Stevens reported, "Basically, Ryan would give us everything in northern Milwaukee County except River Hills. GSM [Congresswoman Gwendolynne S. Moore] was happy with that. Our counter does not change Ryan's proposal regarding Milwaukee." (Int.-Pl. Gwendolynne Moore's Responses to Defs.' Interrogatories, Requests for Production of Documents and Requests for Admissions (Trial Ex. 1065), Ex. 2a.; Stip. Facts, ¶ 224.) Likewise, at this time Congressman Kind's chief of staff, Erik Olson, stated that Mr. Speth's map "isn't too unreasonable." (Int.-Pl. Ronald Kind's Responses to Defs.' Interrogatories, Requests for Production of Documents and Requests for Admissions (Trial Ex. 1066), Ex. 2a.) All members of Wisconsin's House delegation, Republicans and Democrats, later had a joint meeting to discuss the proposed map. (Stip. Facts, ¶ 219.)

These same Democratic Members on June 3 also proposed a plan that would have placed all of Wood County in a different congressional district (the 3rd) from Portage and Marathon Counties (the 7th), and that would have placed St. Croix County in the 7th, just as Act 44 does. (Trial Ex. 43B.) This map had been drawn in with help from the Democratic Congressional Campaign Committee (DCCC) and was sent as an email attachment from Mr. Olson to Mr. Speth. (Stip. Facts, ¶ 226; Trial Ex. 1066, Ex. 2b.) Upon receiving this proposal from the Democratic Members, and after inquiring of Mr. Olson, Mr. Speth determined that the it did not reflect minimal deviation from ideal population. (Stip. Facts, ¶ 227.) This can be seen from the deviation statistics at the bottom of the proposed map itself. (Trial Ex. 43B.)

As noted, the June 3 plan included many changes from the map enacted in 2002 that were ultimately embodied in Act 44. Moreover, the Democratic Members' June 3 proposal belies their present professed concerns about population movements between districts. Their own plan would have moved Wood County (2010 population: 74,749), Adams County (20,875), and the city of Chippewa Falls (13,661) into the 3rd District, these three changes alone accounting for a proposed population movement of 109,285 into the district. (Trial Ex. 43B; 2010 U.S. Census, "State & County QuickFacts," *available at* http://quickfacts.census.gov/qfd/states/55000.html (last visited Feb. 19, 2012).) Additionally, the proposal would have moved into the 3rd District the towns of Wheaton and Hallie in Chippewa County, along with those substantial portions of Clark County and the city of Eau Claire not previously in the 3rd, among other changes. (*Id.*)

Likewise, the Democratic Members' proposal would have moved into the 7th (from the 3rd and 8th) populations totaling well over 115,000, specifically those of St. Croix County (84,345), Vilas County (21,430), Forest County (9,304), and the remaining portions of Langlade and Oneida Counties. (*Id.*) The Democratic Members' plan also would have, like Act 44, placed

two counties (Iowa and Lafayette) and the balance of a third county (Sauk), previously in the 3rd, into the 2nd instead. (Trial Ex. 43B.) It also would have made substantial changes to districts in the southeastern portion of the state, beyond those made by Act 44. (*Id.*) Notably, the changes made in their June 3 proposal include all of those preferences and requests made by the Democratic Members to Mr. Speth, and which Mr. Speth incorporated into Act 44, as acknowledged in the stipulated facts. (*See* Trial Ex. 43B; Stip. Facts, ¶¶ 211, 216, 220, 229.)

Overall, these proposals belie the Democratic Members' current insistence that a "least-change" map is constitutionally required, as well as their various specific complaints about Act 44. The quibbles they now express as to Act 44 are not only not derived from the Constitution, but are entirely at odds with what they themselves sought to have embodied in the Act.

CONCLUSION

The Democratic Members, like the plaintiffs, have failed to state any claim upon which relief can be granted as to Act 44. One previously urged theory, a political gerrymandering claim, exists, but continues to lack standard or substance, and has been all but abandoned. A second, an amorphous "representative democracy" theory pressed by the Democratic Members, is not a valid constitutional claim and improperly seeks to borrow sentiments from inapplicable cases, so as to impose the rule of absolute judicial neutrality on the elected representatives of the people of Wisconsin. These efforts to challenge the constitutionality of Act 44 fail utterly and should be dismissed.

Respectfully submitted,

FOLEY & LARDNER LLP

Dated this 20th day of February, 2012.

s/ Thomas L. Shriner, Jr.

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