

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

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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,

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**PLAINTIFFS' RESPONSE TO THE  
LEGISLATURE'S ASSERTION IT IS UNABLE TO AMEND ACT 43**

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Civil Action  
File No. 11-CV-562

Three-judge panel  
28 U.S.C. § 2284

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VOCES DE LA FRONTERA, INC., RAMIRO VARA,  
OLGA VARA, 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.

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Yesterday morning, the Court asked counsel for the plaintiffs and defendants to “engage in meaningful dialogue” regarding “how best to proceed with regard to achieving that which every citizen, without regard to party affiliation, without regard to politics, ought to achieve, and that is a fair, just and meaningful redistricting plan.” Feb. 21, 2012 Transcript Volume I (“Trans. Vol. I”) at 12. Yesterday evening, the Court heard counsel for both parties express a willingness, on behalf of the legislative leadership from each side of the political aisle, to try to resolve the historic issues raised in this case without the need for a full trial on the merits of Acts 43 and 44. As the Court noted, there is a strong preference to work out these issues, in the legislature, not the courts, if possible.

There is no reason for the Court not to accept the representations of the legislature. In the interests of justice and fairness, the Court should stay the trial until March 2012 to permit the legislature to try to accomplish now what it could not last summer. The Government Accountability Board, above all parties, should want that result, but its counsel has expressed a

different perspective, reaching back more than 50 years to find an “impediment” in a distinguishable case.

**I. THERE IS NO LEGAL IMPEDIMENT BARRING THE LEGISLATURE FROM TAKING ACTION WITH REGARD TO ACT 43.**

Based on the representations of GAB’s counsel, the only obstacle to the legislature moving forward with a meaningful dialogue regarding Act 43 is a lawyer’s interpretation of one case. Feb. 21, 2012 Transcript Volume II (“Trans. Vol. II”) at 30-31. GAB’s counsel raised this issue late yesterday afternoon, stating that Article IV, section 3 of the Wisconsin Constitution and case law bar the legislature from considering or implementing corrective legislation for Act 43, relying solely on *State ex. rel. Smith v. Zimmerman*, 266 Wis. 307, 63 N.W.2d 52 (1954). *See* Trans. Vol. II at 26-27. According to defendants’ counsel, this Gordian knot cannot be cut. A closer reading of the case law and its context demonstrates otherwise. *Zimmerman* is not a reason to refuse negotiation, it is an excuse.

It may be easiest to begin with a negative: *State ex rel. Smith v. Zimmerman* is not about the legislature’s ability to revisit a redistricting bill to settle significant claims as to its validity.<sup>1</sup> *Smith* does not preclude the legislature from amending Act 43 to ensure that its alleged infirmities are cured—as they should be—by the legislature.

The Wisconsin Constitution does not explicitly bar the legislature from revisiting a redistricting bill. Article IV, section 3, is an affirmative mandate that the legislature reapportion

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<sup>1</sup> The backdrop of *Zimmerman* is distinguishable as well. In July 1950, the Wisconsin Legislative Council created a reapportionment committee consisting of 2 senators, 3 representatives, and 3 public members. *See* Ex. 1 (Wis. Leg. Ref. Bureau, Wisconsin Redistricting Criteria (Informational Memorandum 10-4 July 2010)). The committee became known as the “Rosenberry Committee” after its chairperson, Marvin B. Rosenberry, a former chief justice of the Wisconsin Supreme Court. The committee’s recommendations were submitted to the 1951 legislature (holding biennial sessions beginning in odd-numbered year since 1881) and formed the basis of the legislative redistricting plan adopted by the 1951 legislature. Chapter 728, Laws of 1951, the “Rosenberry Act,” represented the first full statewide reapportionment since 1921. Long before *Baker v. Carr*, it was based solely on the premise of making legislative districts as equal in population as possible. *Id.*

its districts “[a]t their first session after each” census. The Wisconsin Supreme Court has construed this provision to mean that “no more than one valid apportionment may be made in the period between the federal enumerations.” *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953).

That holding is limited to *valid* apportionments and to the “first session” post-census. In *Smith*, there was “no claim . . . that the . . . apportionment in 1951 did not comply with all constitutional demands.” 266 Wis. at 313. Here, there is. Defendants contend that the claim is not enough—they hypothesize that a frivolous claim could be collusively filed to allow evasion of the constitutional limitation. Clearly, collusive filing is not a concern here, and, in any event, the *Smith* Court disagrees with the defendants’ hypothesis: it was only “[i]n the absence of a successful attack upon its constitutionality (not attempted here)” that the reapportionment had “passed beyond the legislature’s power of revision” 266 Wis. at 314. Moreover, this Court has left no doubt about the seriousness of the plaintiffs’ claims, although, as the Court has endeavored to remind the parties, they remain only claims at this point.

The constitutional mandate is to reapportion the legislature “the first session” after each census. That session remains open until “12 noon on January 7, 2013,” and no elections have been held in the Act 43 districts. To the contrary, all special and recall elections have been held under the boundaries established by this Court in 2002. In *Smith*, by contrast, the legislature had “adjourned” and “the citizens of the state by their action in the referendum brought to pass the condition upon which the finality of the Rosenberry apportionment depended”—*i.e.*, they elected new legislators to represent them in the new districts. *Smith*, 266 Wis. at 313.

If the finality of Act 43 depends, as *Smith* suggests, on an election under its mandate, there is no bar to revisiting it until November 2012. Indeed, *Smith* explicitly characterized “the

date of the referendum” as the “very latest” date beyond which the reapportionment had “passed beyond the legislature’s power of revision”—and the Court declined to rule “whether it so passed at an earlier date.” *Id.* at 314. Far from barring the legislature from acting, this case permits it.

The *Smith* Court, quoting *State ex rel. Hicks v. Stevens*, 112 Wis. 170 (1901), characterized the once-per-census limitation as a means of curbing reapportionment abuse: “If new counties may be created and the apportionment rearranged and readjusted to suit legislative whims, the power might be subject to abuse, and the real purpose of the restrictions defeated.” *Smith*, 266 Wis. at 318. Revisiting Act 43 at the urging of a three-judge federal court hardly suits “legislative whims” and will not open the door to abuse.

## **II. THE LEGISLATURE HAS THE CAPABILITY TO AMEND ACT 43.**

The legislature has expressed a willingness to amend Act 43, and all of the interested parties have indicated that this is a readily achievable course of action. Until yesterday, there had been no suggestion that the legislature does not possess the ability to do so. Indeed, even before the enactment of Act 43, legislative staffers responsible for drafting the plan envisioned the possibility of amendment, stating “[t]his is a placeholder map. If the Senate comes back in the majority, we may come back and adjust.” *See* Ex. 2 (Pls.’ Tr. Ex. 113 (Talking points memorandum prepared by legislative staffers Adam Foltz and Tad Ottman )) (emphasis in original). As early as July 25, 2011 (five days after Act 43’s legislative approval), one of the legislature’s counsel, Jim Troupis, suggested to legislative staffers Adam Foltz and Tad Ottman (along with Joseph Handrick, Eric McLeod, and Raymond Taffora) that “the alternative of simply redrawing within the area remains a real possibility,” with regard to the newly created Latino districts. *See* Ex. 3 (Pls.’ Tr. Ex. 210 (MBF 000259, 7/25/12 email from Jim Troupis)).

Three months after the enactment of Act 43, Senator Mary Lazich floated the idea of amending Act 43 to make it effective immediately (trying to ensure that any recall elections

would be conducted under the Act 43 boundaries) rather than adhering to the plain-language November 2012 statutory effective date of the boundaries. When asked if such a bill could be enacted, Lazich said: “The Legislature can move mountains when they need to or they can move like molasses in January.” *See* Ex. 4 (*Wisconsin Republicans Eye Change to Recall Law*, Talking Points Memo (Oct. 27, 2011)).

Four months after the enactment of Act 43, GAB itself stated that corrective legislation can (and should) be enacted in response to the “anomalies” issue. *See* Ex. 5 (Dkt. 113) (Internal Government Accountability Board Memorandum from Sarah Whitt, SVRS Functional Lead, and Shane Falk, Staff Counsel to Nathaniel E. Robinson, Elections Division Administration, and Ross Hein, Elections Supervisor, regarding Census Blocks Conflicting with Municipal Boundaries (Nov. 10, 2011)). GAB stated that it would “[w]ork with the Legislature to develop legislation that will make necessary technical corrections to Acts 39, 43, and 44 to correct districts to properly reflect actual municipal boundaries rather than being strictly based on census blocks. The simplest way to accomplish this is to make technical corrections to the Acts to refer to the actual wards that comprise the districts, rather than referring to the census blocks.” *Id.*

Six months after the enactment of Act 43, Kevin J. Kennedy, General Counsel for GAB and a defendant in this case, similarly stated in his deposition that because of the need to address the errors arising from Act 43’s use of census blocks rather than wards in the redistricting process, the legislature (or a court) can change the dates, currently June 1, for candidates to file nomination papers with the agency. Deposition of Kevin J. Kennedy (Dkt. 144) at 96:20-97:1, 97:21-24. Doing so would alleviate any issues related to timing of elections that defendants may contend impedes the legislature from reaching a resolution. If the majority leadership of the

legislature truly is interested in negotiating a resolution to address the concerns identified by this Court, it has the power to change the timing of the nomination process to achieve that end.

It is noteworthy that never, until yesterday, had GAB's counsel pointed out the impediment it has now discovered. Moreover, the constitutional context of redistricting has changed dramatically since 1954. The law is now one person, one vote. Federal courts review redistricting laws for statutory and constitutional violations. Where necessary, they remand statutorily-enabled boundaries for judicial or legislative corrections. Indeed, this Court's own 2002 judgment, still valid, gives it the authority to compel what GAB's counsel wants to avoid: giving the legislative process a second chance, this time properly open to public input and scrutiny.

### **CONCLUSION**

The legislature should endeavor to move mountains on behalf of the Wisconsin citizens they represent. Plaintiffs have raised serious questions about Act 43, not only as to its content but also as to the process by which it was adopted. The Court, recognizing the legal significance of those challenges, has invited the legislature to revisit the statute. The irony is that defendant GAB, after spending months emphasizing that redistricting is a function of the legislature, is now arguing against a legislative correction.

Perhaps the defendants want an assurance that it will never again face a redistricting challenge this decade. Such a guarantee is impossible no matter how this litigation concludes. Even if this Court holds Act 43 unconstitutional and sends the legislature back to the drawing board, it cannot guarantee that another plaintiff will not file suit challenging the legislature's own remedy. No court can.

However, this Court will retain continuing jurisdiction over any settlement—either to affirm its legality or to adjudicate any doubts—and can, plaintiffs assume, put a speedy end to

any further challenges once its validity is confirmed. Such assurance should be enough, plaintiffs would hope, to put most doubts to rest and allow a legislative solution to proceed apace. Redistricting *is* primarily a legislative function – as long as it is done openly and constitutionally. Not everyone gets a second chance. The legislature has one, and it needs one.

Dated: February 22, 2012.

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