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,

(caption continued on next page)

Civil Action
File No. 11-CV-562

Three-judge panel
28 U.S.C. § 2284

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY TO DEFENDANTS' TRIAL BRIEF

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.

From the first moments of this litigation, the defendants' counsel have sought to avoid the historic reach and constitutional role of the federal courts in the redistricting process. It began with the failed motion to dismiss that argued the state legislature had mandated that redistricting litigation be venued in the state court system under a new state statute. It continued with the filing, though not by the defendants, of serial pleadings in the Wisconsin Supreme Court and a state trial court to pre-empt these cases. And it continues with the belated attempt—a Friday night summary judgment filing five business days before trial—to narrow this panel's consideration of the issues placed before it and never contested jurisdictionally, until now, by the defendants' counsel.

The Court should not limit its jurisdiction. Nor should it ignore, as the defendants' counsel suggested in an opening statement, the remarkable process that led to the enactment of Acts 43 and 44. A presumption of statutory validity assumes, in no small part, a presumption of transparency in the legislative process. The process here was anything but. In the same vein, the

defendants have waived any appropriate questions under the Eleventh Amendment or basic principles of federalism. Even had they not, moreover, redistricting litigation unavoidably involves intertwined issues under the Equal Protection Clause, the Voting Rights Act, and state statutory and constitutional dictates.

This Court, in declining to recognize a 1954 state supreme court decision as an "impediment" to a consensual resolution here, noted how dramatically the constitutional context for redistricting had changed since then, and in the last decade, adding a historical note: "the state court recognized that comity is a two-way street, and it refused the invitation to intervene at a late stage of the case … [due to] principles of cooperative federalism and federal-state comity, and also a desire to avoid unjustifiable duplication of effort and expense." Tr. Vol. I (Dkt. 191) at 21 (Feb. 22, 2012); *see also Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, 249 Wis. 2d 706, 639 N.W.2d 537. In this regard, the effectiveness and applicability of the Court's own 2002 judgment are also at issue and, surely, this Court has jurisdiction over that.

I. SOVEREIGN IMMUNITY DOES NOT PRECLUDE THIS COURT FROM ADJUDICATING PLAINTIFFS' CLAIMS.

A. Plaintiffs Seek Prospective Injunctive Relief Under Federal Law.

For all of the decisions the U.S. Supreme Court has rendered on legislative redistricting since *Reynolds v. Sims*, only once has it had any occasion to discuss the application of *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984), and it did so dismissively fewer than ten years ago. *See Branch v. Smith*, 538 U.S. 254, 277-79 (2003). Under *Pennhurst*, a federal court cannot require a state, absent its consent (express or implied), to conform its conduct to state law. *See Komyatti v. Bayh*, 96 F.3d 955, 960 (7th Cir. 1996). For all of the *Pennhurst*-derived cases the defendants cite, *see*, *e.g.*, Defs.' Br. (Dkt. 129) at 4-5, none involved redistricting. The explanation is not complicated: redistricting involves the intersection of state

and federal law. States conduct elections, including elections for federal office, but state election law always remains subject to Fourteenth Amendment principles.

Sovereign immunity does not bar any suit that prospectively seeks to prevent state officials from conduct that violates federal law. *See Ex parte Young*, 209 U.S. 123 (1908); *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 337 (7th Cir. 2000). "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md. Inc. v. Public Service Comm'n of Md.*, 535 U.S. 635, 645 (2002).

Not only does *Ex parte Young* provide an exception to any Eleventh Amendment bar, the prospective relief sought here seeks to enjoin a continuing violation of the Equal Protection Clause and the Voting Rights Act, through Act 43's treatment of the Latino community, the disenfranchisement of almost 300,000 people, and the massive movement of people that, without justification, divides communities. The defendants themselves note: "[t]he Eleventh Amendment does not bar suits against a state official when the suit seeks prospective injunctive relief to 'end a continuing violation of federal law,….'" Defs.' Br. at 4 n.1, citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73 (1996) (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)). The plaintiffs allege that the defendants, in the implementation of Act 43, will violate the Voting Rights Act and the Equal Protection Clause. They can be—and should be—enjoined from doing that.

B. Defendants Waived Any Right To Assert Sovereign Immunity.

Defendants simultaneously argue that they raised sovereign immunity "multiple" times prior to their February 10 summary judgment motion (Defs.' Br. at 6) and that they had unstated "strategic" reasons for not raising it earlier. Defs.' Resp. to Pls.' Tr. Br. (Dkt. 174) at 7 n.4.

Defendants cannot have it both ways. The defendants first raised sovereign immunity in their February 10, 2012 summary judgment motion and brief. Dkt. 129. The Court will not find any reference to it in the defendants' serial answers (Dkt. 29, 57, 66), in their August 4, 2011 motion to dismiss (Dkt. 18), or in any other pleading in the eight months of this litigation. Whether or not that is unusual and whatever the rationale, in the context of an unusual and fast-tracked case, it is too late. Defendants' belated assertion of sovereign immunity—and, not incidentally, the legislature's conduct throughout this litigation—waived any right they might have had to assert immunity.

The Supreme Court has long recognized that a state may waive its sovereign immunity, stating "[g]enerally, we will find a waiver either if the State voluntarily invokes our jurisdiction, or else if the State makes a clear declaration that it intends to submit itself to our jurisdiction." *See College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, at 675–76, 681 (1999) (internal quotation marks and citations omitted); *Lapides v. Bd. of Regents of the Univ. Sys. of Georgia*, 535 U.S. 613, 619 (2002). Waiver has been found when the state's conduct during the litigation "clearly manifests acceptance of the federal court's jurisdiction or is otherwise incompatible with an assertion of Eleventh Amendment immunity." *Hill v. Blind Indus. & Servs.*, 179 F.3d 754, 758-59 (9th Cir. 1999) (finding waiver by litigation conduct).[1] The U.S. Court of Appeals for the Seventh Circuit further explained the waiver principle:

> Waivers by litigation conduct depend on whether the state has made a voluntary change in behavior that demonstrates it is no longer defending the lawsuit and is instead taking advantage of the federal forum. This is not a question of what label the state assumes in litigation: …. Instead, the crucial considerations are the voluntariness of the state's choice of forum and the functional consequences of that choice.

[1] The defendant in *Hill* chose to defend on the merits, waiting until the first day of trial to assert sovereign immunity.

Bd. of Regents of the Univ. of Wis. Sys. v. Phoenix Int'l Software, Inc., 653 F.3d 448, 462 (7th Cir. 2011) (Wood, J.).[2] To permit a defendant to litigate the case on the merits, and then belatedly claim Eleventh Amendment immunity to avoid an adverse result, would "work a virtual fraud on the federal court and opposing litigants." *Hill*, 179 F.3d at 758-59 (citing *Newfield House, Inc. v. Mass. Dep't of Pub. Welfare*, 651 F.2d 32, 36 n.3 (1st Cir. 1981)).

Defendants concede that their failure to raise sovereign immunity (until February 10) was motivated by "strategic reasons." Defs.' Resp. to Pls.' Tr. Br. at 7 n.4. Precisely. Examined more closely, the totality of defendants' conduct in this case casts doubt on the sincerity of its waiver assertion at the eleventh hour. Defendants (in their amended answer) merely reserved the right to assert any defenses raised by Intervenor-Defendants. Dkt. 60, 66 at ¶ 12 (affirmative defenses).[3] This hardly constitutes an affirmative assertion of waiver.

Defendants' strategic maneuvers, viewed from a broader perspective, also trigger the waiver doctrine. Plaintiffs added their ninth claim—regarding the districts to be applied for recall elections—in a second amended complaint filed on November 18, 2011. Tr. Ex. 11.

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[2] The Ninth Circuit in *Hill* earlier had explained the rationale behind construing the belated assertion of sovereign immunity as waiver:

> A party knows whether it purports to be an "arm of the state," and is capable of disclosing early in the proceedings whether it objects to having the matter heard in federal court. Timely disclosure provides fair warning to the plaintiff, who can amend the complaint, dismiss the action and refile it in state court, or request a prompt ruling on the Eleventh Amendment defense before the parties and the court have invested substantial resources in the case. Timely disclosure also facilitates discovery, when appropriate, and allows the parties to establish a full record for appellate review. Requiring the prompt assertion of an Eleventh Amendment defense also minimizes the opportunity for improper manipulation of the judicial process.
>
> If a state or state agency elects to defend on the merits in federal court, it should be held to that choice the same as any other litigant.

179 F.3d at 758.

[3] In addition, defendants' answers expressly request affirmative relief from the Court to "declare and establish the election district boundaries" under which any special or recall elections are to be held prior to the 2012 general elections. Dkt. 57 (at 45), 66 (at 46). Defendants, in fact, seek to avail themselves of this Court's jurisdiction.

Answering the complaint on November 25, defendants admitted their intention, "absent a court order to the contrary," to "conduct all special or recall elections scheduled before the fall 2012 general elections under the *now-unconstitutional* boundaries established by this Court in" 2002. Tr. Ex. 12, ¶ 94 (emphasis added). They also admitted that doing so would "deprive the individual plaintiffs of their civil rights," *id.*, ¶ 95, and they affirmatively asked for a declaration of the district boundaries for the impending recall elections. *Id.*, at 45, ¶ 4. Defendants were at the time, as they continue to be, represented by the Department of Justice and a private law firm.

On November 28, a group of citizens represented by Michael, Best & Friedrich (the same law firm—and same attorney, in fact—hired by the legislature to draw Act 43) filed a state court action in Waukesha County seeking a declaration that recall elections "not be conducted in unconstitutionally malapportioned districts" and that such elections only be conducted under the Act 43 boundaries. Tr. Ex. 167, ¶ 3. Each member of the GAB was named as a defendant in that action. Two days later, on November 30, defendants amended their answer in this action, removing the express allegation that conducting the state senate recalls under the 2002 district boundaries would be unconstitutional, among other changes. Tr. Ex. 12A, ¶ 94.

Throughout this tortured and tortuous process, the defendants' counsel never raised sovereign immunity as a defense here—though at least others sought to achieve it through litigation elsewhere. For the defendants, it was a known defense knowingly waived.

II. STATE DISTRICTING MANDATES AND PRINCIPLES ARE INSEPARABLE FROM ANY EQUAL PROTECTION ANALYSIS IN REDISTRICTING.

A. There Is No Safe Harbor With Respect To Population Deviations.

The defendants contend that "this Court lacks jurisdiction," Defs.' Br. at 2, over state statutory and constitutional mandates. Even if they have not waived this argument, it misses the point. Since the very first generation of federal redistricting jurisprudence, the U.S. Supreme

Court has addressed state legislative district population deviation, minimal or substantial, under the Equal Protection Clause (not Article I, section 2) in the context of state redistricting principles and practices.

From its very first decision on legislative districting, *Reynolds v. Sims*, 377 U.S. 533 (1964), the Supreme Court recognized the correlation between population equality and other districting principles. With those principles in mind, it required districts "as nearly of equal population as practicable." *Id.* at 577. "Population is, of necessity, the starting point ...." *Id.* at 567. But even then, long before technology made zero population deviation achievable—in an infinite variety of configurations—population was never the only point. Had it been, the Court never would have used the phrase "as practicable" or discussed the myriad districting principles that would permit population variation. Later, in *Mahan v. Howell*, 410 U.S. 315 (1973), the Court characterized the maintenance of subdivision lines and population equality as a "dual goal" that the Virginia plan satisfied. *Id.* at 328 n.9. Finally, in *Gaffney v. Cummings*, 412 U.S. 735 (1973), the Court criticized an "unrealistic overemphasis on raw population figures" that ignores legitimate factors and state interests in redistricting. *Id.* at 749.

"These objective principles," contend the defendants, "are simply legitimate goals that *can* be used to justify variances from perfect population equality." Defs.' Br. at 3 (emphasis added). To the contrary, they must be used, and that is where the legislature has failed. Whether or not the plaintiffs' claims that involve state law are "free-standing," *id.*, they are indispensable—particularly here where the defendants have offered so little explanation for the radical choices made in Act 43. In 1983, the Supreme Court in *Karcher v. Daggett*, 462 U.S. 725, focused on the state's burden to justify population deviations as necessary to meet the "legitimate goal[s]" of traditional districting principles, including "making districts compact,

respecting municipal boundaries, [and] preserving the cores of prior districts...." *Id.* at 731, 740, quoted, Defs.' Br. at 2. As population deviations diminish or evaporate, the legitimate goals remain, and they are part of the Equal Protection analysis. Indeed, the defendants' cross-examination of Dr. Mayer made that very point yesterday. *See* Trans. Vol. III (Dkt. 196) at p. 385 (Feb. 23, 2012).

The defendants seek nothing less than an exemption from the Equal Protection Clause. Population variations less than 10 percent, they contend, "require no justification." Dkt. 177 at ¶ 519. Today, defendants' own expert testified to the contrary: no safe harbor exists. Moreover, below a single digit threshold, the defendants' contend, the legislature can do what it wants "with or without a rational basis." *Id.* at ¶ 526. It long has been black letter constitutional law, however, that every legislative enactment must have, at the least, a rational basis to prevent arbitrary and capricious choices in legislation, state or federal. *See Romer v. Evans,* 509 U.S. 620, 631 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.").

The rational basis test may be readily passed, especially for garden variety commercial legislation, but it is a test that must be taken once a party has brought credible evidence to bear that there is no rational basis. And that bar has surely been passed here—indeed, this Court recognized just that in its denial of the defendants' motion to dismiss.

The defendants contend that compliance with population variation standards of 30 years ago—9.9 percent, for example—insulate them from *any* Equal Protection analysis. Dkt. 174 at 4, *citing White v. Regester*, 412 U.S. 755, 764 (1973) (finding minor mathematical inequality insufficient for a *prima facie* case of invidious discrimination). Yet the focus of redistricting

jurisprudence at least through the 1990s has been primarily on population deviations and not on the corollary principles, whether enshrined in state or federal law. The defendants argument for a "safe harbor"—simply because they have a computer program that will permit legislative districts with virtually equal populations—would eliminate any judicial review and any application of the Equal Protection Clause.

Population deviation is no longer *the* issue; it now is rarely even *an* issue. Technology has changed the process and the constitutional and statutory focus. The court in *Session v. Perry* stated "[t]his extraordinary change in the ability to slice thin the lines brings welcome assistance, but comes with a high cost of creating much greater potential for abuse." 298 F. Supp. 2d 451, 457 (E.D. Tex.), *vacated on other grounds*, 543 U.S. 941 (2004). States are not free, with impunity, to ignore equal protection (in any sense of the phrase) or traditional districting principles as long as they meet a real or perceived threshold for population equality, district by district.

The Pennsylvania Supreme Court, just a month ago, took pains to reaffirm state law requirements in light of the technology that has "allayed the initial extraordinary difficulties in achieving acceptable levels of population deviation." It relied on *Gaffney*: "Fair and effective representation ... does not depend solely on mathematical equality...[t]here are other relevant factors to be taken into account and other important interests...." to preserve. *Holt v. 2011 Legislative Reapportionment Comm'n,* No. 7 MM 2012, __ A.3d __, 2012 WL 375298 (Pa. Feb. 3, 2012).

Having foresworn political factors, the defendants must explain the legislative choices made in terms of other legitimate state interests in districting. And they have not done so.

The population deviations in the state legislative districts are unconstitutional under the Equal Protection Clause because the defendants have provided no explanation for the massive shifts and divisions of recognized interests to reach those modest deviations. The terminology and matrices of the cases from the 1960's to the 1990's are still valid, of course, but they necessarily must be refined for what technology now permits in districting. To reiterate Mr. Morrison's testimony: there is no safe harbor for Fourteenth Amendment violations.

Population is the beginning, not the end, of the analysis—even more so today than ever before. Indeed, it is precisely because the census is an estimate, sophisticated to be sure, that other factors do matter in any legal analysis. The constitutional goal is "fair and effective representation in [the] state legislature," *Gaffney*, 412 U.S. at 749, and maintaining core populations, avoiding inexplicable divisions of communities of interest and massive disenfranchisement of voters are all part of that analysis.

B. Still No Explanation Has Been Proffered For The Massive Disenfranchisement Of Almost 300,000 People.

This Court has expressed its concern, more than once, about the disenfranchisement of citizens, moved inexplicably from district to district in a fashion that deprives them of the right to vote for state senator in the next election. *See* Dkt. 25. It is another "state constitutional right" that the defendants' counsel would have the Court ignore.

The facts are not in dispute on the plaintiffs' third claim. Almost 300,000 people will not be able to vote in the quadrennial election for state senate. It is not, to use the defendants' euphemism, "delayed voting." Defs.' Br. at 26. It is a denial of the right to vote. The fact that it is a right guaranteed by the state constitution—like every right to vote for a state office—does not suspend the Equal Protection Clause any more than the violation of the one person, one vote doctrine for state legislative districting does. The defendants have conceded precisely that. *See*

Defs.' Br. at 30 n.26 (quoting *Donatelli v. Mitchell*, 2 F.3d 508, 515 (3rd Cir. 1993) (applying rational basis standard to disenfranchisement)). Again, the defendants have ignored the dramatic changes in technology and jurisprudence since the Supreme Court decided the "political thicket" was not so dense that it eliminated federal constitutional analysis.

The literal numbering of senate districts is not at issue. *See* Defs.' Br. at 27 (*citing State ex rel. Attorney Gen. v. Cunningham*, 81 Wis. 440, 468, 51 N.W. 724 (1892)). Nor is the disenfranchisement under the "court plans" of the last three decades even relevant, drawn as they were without today's technology and with a principal focus then on population deviation. (Notably, the defendants concede that the 2002 Court plan disenfranchised about 171,000 people. Defs.' Br. at 29.) A 110-year old state supreme court decision does not dictate the outcome—just as a 1954 decision did not prohibit the legislature from voluntarily (or not) revisiting legislative district boundaries.

The standard set by this Court, adopted by other courts cited by the defendants in their previous briefs, is whether the disenfranchisement is "unavoidable." The testimony has left no doubt that the massive disenfranchisement, like the movement of people in and out of districts that destroyed core populations, was avoidable. The Court's 1984 decision was vacated by the Supreme Court not because of the disenfranchisement holding but because the state had enacted a constitutional statute, replacing—appropriately—the boundaries established by the federal judiciary. This Court, of course, cited *Republican Party of Wisconsin v. Elections Bd.,* 585 F. Supp. 603 (E.D. Wis., 1984), with approval in denying the defendants' motion to dismiss (Dkt. 25), which was aimed squarely at the plaintiffs' third claim, a decision on which the defendants' summary judgment brief is silent.

The defendants are not silent, however, with respect to the fact that some voters in some of the affected districts had the opportunity to vote in a recall election for state senate last summer. Yet, as the plaintiffs' expert testified, recall elections and regularly-scheduled elections are very different. One is not a substitute for another. Nor should the exercise of one right be the price for forfeiting another.

C. No Rational Basis Exists For The Failure To Follow Traditional Redistricting Criteria.

While there is no need here to revisit the elusive concepts surrounding "political gerrymandering," Justices Souter and Ginsberg emphasized the importance of traditional districting principles in that context. *Veith v. Jubelirer*, 541 U.S. 267, 295-96 (2004); *see* Defs.' Br. at 12 n.12. They cannot be ignored. Here, the disadvantaged group is not "political" but, rather, entire communities and communities of interest moved without explanation and contrary to state districting principles and provisions, including the explicit mandate that legislative districts be based on municipal and ward boundaries.

The legislative staff members who drew the district boundaries have disavowed, under oath, *any* political motivation for the choices inherent in Act 43. *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 (Dkt. 66) ¶ 62. The question here is not whether there is a political motivation. Yet there must be some explanation for massive population shifts that degrade the core of districts, split communities of interest, exacerbate disenfranchisement, and the dilute the influence of Latino neighborhoods. Equal protection, if nothing else, requires a rational explanation—if not offered by the legislature, then offered even in hindsight by the defendants' witnesses, who had little explanation to give regarding the

imposition of unnecessary disenfranchisement and the dilution of the electoral influence of Latinos.

The defendants contend that "the discretion of state legislatures to define where and why legislative districts are drawn is bounded only by the limitation that it not be used in a manner that violates individual constitutional or statutory rights." Defs.' Br. at 20. Precisely. And those rights are both federal and state, both constitutional and statutory, and they include the Equal Protection Clause.

III. ACT 43 VIOLATES THE VOTING RIGHTS ACT.[4]

The failure of Act 43 to meet the demands of the Voting Rights Act has been amply discussed in previous briefs. *See* Dkt. 158, 164, 165, 180. The plaintiffs have met the three-part test of *Gingles. See Thornburg v. Gingles*, 478 U.S. 30 (1986); *see* Dkt. 158, 164, 165, 180. It is worth noting, however, that just as redistricting analysis has necessarily become more sophisticated and nuanced with technology, so too must the Voting Rights Act's application. The landmark federal legislation does not focus on population *per se* but on "voting rights." The analysis of political opportunity, especially in Latino communities, does not depend solely on population or even voting age population but citizen voting age population. Any other metric is a fiction that, deliberately or not, ignores the ability to vote—determined not merely by age or residence but by citizenship.

The political cohesiveness of the Latino community is not in doubt, and neither is the evidence that non-Latinos vote as a bloc. The testimony of Judge Pedro Colón, former state representative for the old Assembly District 8, highlights Act 43's effect on Assembly District 8. In his 2008 race against Grant Langley (non-Latino) for Milwaukee City Attorney, he received a

[4] Plaintiff Voces de la Frontera joins and adopts these arguments as well.

total of 31, 332 votes to Mr. Langley's total of 45,627. *See* Tr. Ex. 201. In the area of old Assembly District 8 retained by Act, Judge Colón received 828 votes to Mr. Langley's 585. In contrast, Judge Colón only received 652 votes to Mr. Langley's 1,250 in the wards that were imported into the Assembly District 8 as created by Act 43. The new areas of Assembly District 8 that have been annexed are areas where non-Latinos quite clearly vote as a bloc.

Defendants continue to be dismissive of the process by which Act 43 was created. They do not address the mounting evidence that a few members of the Latino community were used to provide the plan with a patina of approval of the larger community. After touting the fact that one public hearing on Act 43 was held (six days before legislative approval), defendants and other parties have difficulty explaining emails that show only a few members of the Latino community were consulted regarding the creation of Assembly Districts 8 and 9. *See, e.g.,* Tr. Ex. 210 (MBF 000259). The comments by this Court over the last three months need not be recounted, but the impact of a secretive process had particular impact on the division of the Latino community in Milwaukee.

IV. THE PLAINTIFFS AND THE DEFENDANTS' COUNSEL HAVE A REAL AND TANGIBLE DISAGREEMENT OVER THE DISTRICT BOUNDARIES FOR RECALL ELECTIONS THAT THIS COURT CAN AND SHOULD DECIDE.

Much like their "strategic" assertion of sovereign immunity, defendants' belated declaration that no case or controversy exists is not supported by the facts. Indeed, this real and tangible disagreement was on display in open court today when plaintiffs asked defendants to enter into a stipulation regarding plaintiffs' ninth claim:

> 1. GAB has stated and continues to maintain that any recall or special elections conducted between now and the effective date of Act 43 for elections—that is, November 6, 2012, the date of the 2012 general election—shall be conducted under the 2002 boundaries established by this Court.

> 2. It is constitutional to conduct the elections under the 2002 boundaries and, in fact, recall and special elections conducted in 2011 were validly conducted under those boundaries.

Inexplicably, the defendants' counsel respectfully declined plaintiffs' proposal.

It is incongruous, then, for defendants to continue with their abrupt about-face, claiming there is no case or controversy over the plaintiffs' ninth claim because purportedly they and plaintiffs want the same thing: the impending recall elections will be conducted using the 2002 boundaries. Indeed, GAB has declared its intention to do just that, *see* Tr. Ex. 166, and plaintiffs have no reason to doubt its sincerity. There is no dispute as to what Act 43 says (that it "first applies ... to offices filled or contested concurrently with the 2012 general election") or how the GAB interprets it. But what the defendants' counsel will not say is that maintaining the 2002 boundaries for the pending recalls is constitutional. Therein lies the controversy.

Defendants' answer to plaintiffs' second amended complaint had, until amended, stated this controversy in plain terms: the 2002 boundaries that GAB intended to use for the recall elections are "now unconstitutional" and conducting any elections using them would violate plaintiffs' civil rights. Tr. Ex. 12, ¶¶ 94, 95. Those precise statements no longer appear in the answer as later amended, but eliminating some of the language does not eliminate the controversy.

Defendants insist that their representation to the Court that the parties agree on the recall election boundaries is enough to put the issue to rest. Perhaps it would if the GAB would also stipulate to the 2002 boundaries' constitutionality for that purpose. That is all plaintiffs need to withdraw their ninth claim, but GAB has not yet done so.

It is not as if the GAB—and the attorneys from the Department of Justice who represent it on recall issues—are not in a position to defend the 2002 boundaries' continued constitutionality through the recall elections. Nor should the GAB, an independent agency

comprised of former judges, face any institutional hurdles to making that assessment. Indeed, it is difficult to imagine why the GAB would *not* do so, given that it plans to use those boundaries for the recall elections. The GAB does not implement the legislature's statutory mandates without regard to their constitutionality.

There can be no doubt as to the constitutionality of establishing the first general election following the decennial census as the effective date of a redistricting plan. *See Georgia v. Ashcroft*, 539 U.S. 461, 489 n.2 (2003). As the "anomaly" questions and this very litigation reflect, uncertainties surrounding new redistricting statutes counsel in favor of allowing sufficient time to resolve any questions before its effective date. The continued application of existing districts until the redistricting plan can be put in place following the census is entirely consistent with constitutional principles.

That GAB still does not appear to agree creates a case or controversy between parties of adverse interests. The question is one of federal constitutional law and this Court's jurisdiction over its own orders: does the effective date of Act 43, which necessitates that the 2002 district boundaries remain in place until the 2012 general election, comply with the constitutional mandate of one person, one vote? The GAB intends to use the 2002 boundaries for the recalls but, by refusing to stipulate to their constitutionality, necessarily puts this at issue.

This litigation was set on an expedited timetable to resolve uncertainty as to district boundaries before campaigns begin. That mandate necessarily includes the resolution of this question. This Court need not enter an injunction to make GAB comply with Act 43, which could—in the absence of waiver—implicate *Pennhurst*. Instead, plaintiffs request only declaratory relief that compliance with the statutory effective date of Act 43 is constitutional.

CONCLUSION

For the reasons stated above, the plaintiffs ask the Court to deny the defendants' summary judgment motion and any related effort to limit or deny the scope of federal jurisdiction. Based on the testimony at trial and all of the materials of record, the Court should declare Act 43 unconstitutional under the Voting Rights Act and the Equal Protection Clause. It should permit the legislature, for a period not to exceed two weeks, to submit to the Court a legislative redistricting statute that meets the requirements of federal statute and the Fourteenth Amendment, and it should declare constitutional the use of the Court's own 2002 boundaries for any special or recall elections until the effective date of a valid statutory replacement.

Dated: February 24, 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

7534832_1