

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CARLENE BECHEN, ELVIRA
BUMPUS, RONALD BIENDSEIL, LESLIE W.
DAVIS, III, BRETT ECKSTEIN, GLORIA
ROGERS, RICHARD KRESBACH, ROCHELLE
MOORE, AMY RISSEEUW, JUDY ROBSON,
JEANNE SANCHEZ-BELL, CECELIA
SCHLIEPP, TRAVIS THYSSEN, CINDY
BARBERA, RON BOONE, VERA BOONE,
EVANJELINA CLEERMAN, SHEILA COCHRAN,
MAXINE HOUGH, CLARENCE JOHNSON,
RICHARD LANGE, and GLADYS MANZANET,

Plaintiffs,

Case No. 11-C-00562
JPS-DPW-RMD

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.

VOCES DE LA FRONTERA, INC.,
RAMIRO VARA, OLGA VARA,
JOSE PEREZ, and ERICA RAMIREZ,

Plaintiffs,

v.

Case No. 11-C-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, TIMOTHY
VOCKE, and KEVIN KENNEDY, Director and
General Counsel for the Wisconsin Government
Accountability Board,

Defendants.

DEFENDANTS' BRIEF IN RESPONSE TO PLAINTIFFS' BRIEF
AND TO MOTION OF CITY OF MILWAUKEE

I. Plaintiffs' Proposed Map Pursues Impermissible Ends.

The plaintiffs admit their goal is not ensuring the Latino community has an “equal opportunity” to elect a candidate of their choice, as required by the Voting Rights Act. 42 U.S.C. §1973(b) (minority community should not have “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”) Instead, they want to move as many Latinos into District 8 as possible. Thirteen of the plaintiffs’ 14 affiants said they prefer the plaintiffs’ map because their goal was “achieving the highest possible percentage of Hispanic citizens of voting age” in District 8. But packing members of a minority community into a district can itself violate the Voting Rights Act. *Shaw v. Hunt*, 517 U.S. 899, 914 (section 2 violated “if the manipulation of districting lines . . . packs [minorities]

into one district or a small number of districts, and thereby dilutes the voting strength of members of the minority population”).

Unnecessarily maximizing District 8’s Hispanic population transforms an “equal opportunity” into an impermissible guarantee and needlessly dilutes Hispanic influence in District 9. In fact, one of the plaintiffs’ affiants (Christine Neumann-Ortiz) testified that her goal was just that - a guarantee that District 8 would elect a Hispanic candidate.¹ But the VRA itself says this is an illegitimate goal: “[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.” 42 U.S.C. §1973(b).

Further, unnecessarily maximizing Hispanic population in one district, while diluting Hispanic influence in another, can result in racial gerrymandering. Because race appears to have been the plaintiffs’ primary consideration in drawing District 8, their map may be constitutionally infirm: “The constitutional wrong [violation of the Equal Protection Clause] occurs when race becomes the ‘dominant and controlling’ consideration [in drawing a map].” *Shaw*, 517 U.S. at 905. The constitutional standard is no less applicable simply because the map purports to be remedial: “This [the race-neutrality requirement] is true whether or not the reason for the racial classification is benign or the purpose remedial.” *Id.* 904-05.

Plaintiffs request a 67.68% HVAP district (yielding between 54.8% and 57.4% CVAP, depending on the estimated non-citizenship rate).² This is more than is necessary to achieve an “equal opportunity” in light of District 8’s unbroken history of electing a Latino candidate since 2002 (when the HVAP was only 58.34%). Defendants’ Map 1, on the other hand, which

¹ “[T]his was a recognition of Latino Redistricting Committee, you know, we would like to see a map that can guarantee -- can ensure that we can continue to elect a candidate of our choice” Trial Tr. Vol IV (Dkt. 195) at 162: 20-23.

² Declaration of Peter Morrison at ¶2, Ex. 1 (April 5, 2012).

increases the HVAP from 2002 to 62.16% (yielding a CVAP of between 48.8% and 51.4%), ensures the Latino community has an “equal opportunity” to elect a candidate of its choice. (*Id.* at ¶3, Ex. 2.) Even defendants’ Map 2 is preferable to plaintiffs’ map because it raises the CVAP range to between 51.8% and 54.3% without sacrificing quite as much Hispanic strength in Assembly District 9. (*Id.* at ¶4, Ex. 3.)

And there is no evidence that plaintiffs’ “guarantee” map has the broad support they claim. The plaintiffs hand-picked 14 individuals and had them sign cookie-cutter affidavits. If support by fourteen individuals represents broad community support, then there was also broad community support for the district as configured by Act 43, as evidenced by the 24 individuals who lent their names to the Hispanics For Leadership testimony submitted to the Legislature. (*See* Trial Ex. 1002.)

II. This Court Is Not Redrawing All Districts In The State.

This Court has already limited this case’s remedial phase to adjusting the boundary between Assembly Districts 8 and 9. The plaintiffs, however, claim the Court struck down the entirety of Act 43, and that the Court now must draw new districts for the entire state. And in the process they want modifications to districts the Court has already found are constitutionally sound. This is contrary to black-letter Wisconsin law.

Wisconsin’s legislative acts are severable. Thus, unless the Legislature manifestly expresses a contrary intent, a court may only strike that part of a legislative act that offends a controlling provision of law. The rest of the statute stands:

In construing Wisconsin laws the following rules shall be observed unless construction in accordance with a rule would produce a result inconsistent with the manifest intent of the legislature:

* * *

(11) Severability. The provisions of the statutes are severable. The provisions of any session law are severable. If any provision of the statutes or of a session law is

invalid, or if the application of either to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.

Wis. Stat. § 990.001(11).

Both the Wisconsin and United States Supreme Courts say reviewing courts examine statutes to determine whether the legislature intended the entire statute to fall should any part be found unconstitutional: “Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability.” *State v. Janssen*, 219 Wis.2d 362 ¶37 (1998) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984)). That is to say, “[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.” *Id.* at ¶37 (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976)).

There is nothing about Act 43 to suggest the Legislature intended to override the presumption of severability. There is no language rejecting the application of Wis. Stat. § 990.001(11), and nothing stating that the statute would be effective only if all subsections were preserved.

Act 43’s subject demonstrates that its provisions are severable. The Act, of course, creates 99 discrete Assembly Districts and 33 dependent Senate Districts. Depending on the nature of a district’s infirmity, adopting a remedy will have a ripple effect on at least one adjacent district. But it will not affect *all* districts, so any district unaffected by the remedy will be left standing. In this case, the ripple phenomenon will affect only one other district. Thus, because the remedy will take place entirely within the outer boundaries of Assembly Districts 8

and 9, it will affect none of the 33 Senate Districts or any of the other 97 Assembly Districts, which should be left in effect.

Finally, the structure of Act 43 makes severance a natural and logical method of implementing a remedy. Each Assembly and Senate District is separately defined by a single subsection of Act 43. So the Court can strike subsections 4.08 (District 8) and 4.09 (District 9) without affecting the validity or enforceability of so much as a comma in the remainder of the Act. The Court could then adopt a map for just Districts 8 and 9. This approach honors both *Perry* and Wisconsin's statutory preference for severing unenforceable statutory provisions while leaving the rest in effect.³

III. City Of Milwaukee Request

It is axiomatic that remedies come only *after* finding a violation of some right. Yet the City asks the Court to disregard parts of Act 43 without identifying a violation of any controlling law. Instead, its unsworn letter simply says Act 43 creates administrative inconveniences. That, of course, is not a basis for invalidating part of a statute.

The plaintiffs highlight why it would be improper to grant the City's request. They say the Court should feel free to adjust other district boundaries because they brought up the so-called "anomalies" issue in this case. But they also dropped that claim, so there has been no ruling. Further, Kevin Kennedy testified that the Government Accountability Board can faithfully apply Act 43. (Trial Tr. Vol. V at 276:2-9.) And no one contradicted him. So to the extent the City's request suggests Act 43 cannot be properly implemented, it would be inappropriate to privilege its unsworn post trial letter over sworn trial testimony.

³ The practical result would be the same if the Court struck the entire Act while, pursuant to *Perry*, adopting all of its provisions but for subsections 4.08 and 4.09.

The plaintiffs' failure to account for Wisconsin's severability statute also infects their support for the City's request. They argue that, because the Court will be redrawing the map for the entire state, it can adopt any adjustments to the districts it wishes. But the Court's ruling makes redrawing all districts neither necessary nor proper.

Conclusion

Consistent with Wis. Stat. § 990.001(11) and *Perry*, the remedy in this case must be limited to striking subsections 4.08 and 4.09 of Act 43 and adopting a replacement map for those two districts (defendants' Map 1 or, *in extremis*, Map 2 being preferable to plaintiffs' map).

Dated this 5th day of April, 2012.

Respectfully submitted,

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