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,

Civil Action
File No. 11-CV-562

Three-judge panel
28 U.S.C. § 2284

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JOINT RESPONSE OF BALDUS AND VOCES DE LA FRONTERA PLAINTIFFS IN SUPPORT OF PROPOSED REMEDY FOR VOTING RIGHTS ACT VIOLATION

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.

Dated: April 5, 2012.

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The remedies presented to the Court earlier this week, one by the joint plaintiffs and two by the Department of Justice, present a stark choice. Yet only at the most superficial level is the choice about lines on a City of Milwaukee map. The differences that divide the plaintiffs and the Department of Justice are geographic, statistical and analytical, to be sure, but they go more importantly to the very heart of the Voting Rights Act and the role of this Court. The differences extend as well to process, and the challenges that have plagued this litigation, for the Department of Justice has not disclosed the provenance of its proposals or the real parties in interest.[1]

The Department of Justice would have this Court, in effect, adopt its proposed boundaries primarily because they are most like the boundaries in the legislation found in violation of federal law. The Department's proposals might well carry the title "Motion for Reconsideration" because they acknowledge only nominally this Court's decision. The Department has continued to resist the Court's holding that, in this case, the relevant measure of an "effective voting majority" is citizenship. The Court should not accept its proposals. They do not have analytical or statistical support. They do not have community support. And, far from offering a valid remedy, they themselves would probably violate the Voting Rights Act.

I. THE MAPS PROPOSED BY THE DEPARTMENT OF JUSTICE DO NOT MEET THE COMMAND OF SECTION 2 OF THE VOTING RIGHTS ACT.

The Department of Justice's two proposals for Assembly Districts 8 and 9 provide no remedy at all. Instead, the proposals carry the same constitutional, statutory, procedural and analytical infirmities found by the Court in Act 43. *See* Defendants' Brief Regarding Map Alternatives ("Defs.' Br.") (Dkt. 221). The Department provides no support—legal or

[1] Given the Department of Justice's position that "redistricting is the province of the Legislature" (Trans. Tr. vol. III at 96:16-19), rather than that of the Government Accountability Board, it has an obligation to disclose to the Court on whose behalf it is submitting the proposed maps.

otherwise—to establish their maps' compliance with section 2 of the Voting Rights Act.[2] A review of the Department's maps demonstrates that they fail to meet the Court's directive: first, they do not present a Hispanic-American citizen voting age population ("HCVAP") in Assembly District 8 that creates an effective Latino citizen voting majority; second, they continue to use the incorrect non-citizenship rate to calculate HCVAP (and provide no support for the methodology used); and, finally, they continue to incorporate areas containing high non-Latino voter turnout and low Latino voting age populations.

It is the Department's unsupported assertion that their proposed Map 1 most closely adheres to the legislature's "intent" and Map 2 is a "variation on a theme." Defs.' Br. at 4, 7. Without an explanation for how the Department divined the legislature's policy judgment, proposed Maps 1 and 2—like Act 43—fail to satisfy the requirement of section 2 that Latino voters be able to participate in the political process and elect representatives of their choice. Instead of creating an effective majority-minority Latino assembly district, both maps create (again) two influence districts. This Court has already found such a configuration in violation of section 2. *See* Mem. Op. at 27-28.

Using the correct Latino citizen voting age data, the HCVAP for the Department's proposed Assembly District 8 in Map 1 does not contain even a simple majority of Latino voting age citizens. *See* Supplemental Declaration of Dr. Kenneth R. Mayer ("Mayer Decl. II"), ¶¶ 6-9 (April 5, 2012) (calculating AD 8's HCVAP for Map 1 to be 49.17 percent); *see* Joint Brief of Plaintiffs In Support of Proposed Remedy for Voting Rights Act Violation (Pls.' Br.) (Dkt. 224) at 4-5. Even using the Department's *incorrect* method of calculating the HCVAP (necessarily

[2] The Department of Justice's comparisons, whether or not statistically accurate, to the Court's 2002 plan are unavailing. The state has changed. The City of Milwaukee populations have changed dramatically. The Voting Rights Act jurisprudence has evolved. No matter, the Department of Justice's arguments in this regard only emphasize the need to improve the citizen voting age population concentrations through the plan promulgated by this Court.

resulting in an inflated citizenship rate), the 51.4 percent bare majority HCVAP proposed by the Department for Map 1 does not create an effective Latino voting majority.[3] *See* Pls.' Br. at 4-5.

Map 2 suffers from the same fatal flaws as Map 1. Using the correct non-citizenship rate of 42 percent, the actual HCVAP of proposed Assembly District 8 is 52.81 percent, significantly lower than the Department's purported and inflated 55 percent HCVAP. Mayer Decl. II, ¶¶ 6-9; *see* Defs.' Br. at 7. While 52.81 percent HCVAP constitutes a bare majority of Latino citizen voters, it is not enough for an effective Latino voting majority given lower voter turnout among Latinos. *See* Pls.' Br. at 4-5. By attempting to disingenuously maximize HCVAP, the Department takes too lightly the "fundamental right" of Latinos to exercise their vote found by this Court. Mem. Op. at 19.

Compounding the probability that the Latino community will be unable to elect a candidate of their choice is the Department's inclusion of geographical areas that contain high non-Latino voter turnout, but low Latino voting age populations—again, reminiscent of failed Act 43. *See* Mayer Decl. II, ¶¶ 11-14. Thus, the Department of Justice attempts to include geographic areas that are racially polarized and "neighborhoods where the effects of past discrimination are less burdensome than those experienced by the Latinos from the predecessor Assembly District 8." *See id.*; *see* Mem. Op. at 28.

The proposed Assembly Districts 8 submitted by the Department fail to achieve an effective voting majority of Latinos, and the presumption should be in favor of the only proposed district with a sufficiently high HCVAP—the plaintiffs' joint proposal. As the Court held, the right to vote is a "fundamental right" (Mem. Op. at 19), and the rights of Latinos in Assembly

[3] Similarly, the total Latino voting age (not citizen vote age) population presented by Map 1 is only 62.16 percent. Defs.' Br. at 4. Again, this is not sufficient for the Latino population in Assembly District 8 to be confident of electing a candidate of their choice. *See* Pls.' Br. at 3-4.

District 8 to elect a candidate of their choosing is "too valuable to be evaluated on an expert's unsubstantiated prediction" (*id.* at 30).

II. THE DEPARTMENT OF JUSTICE OFFERS NO EVIDENCE THAT ITS' PROPOSED MAPS REFLECT THE LEGISLATURE'S INTENT OR COMMUNITY CONSENSUS.

There is no evidence that the Department's proposed maps either "adhere to [] legislative intent" or display community consensus or even involvement in the Department's proposals. The Department of Justice states, without citation, that the legislature "intended [Act 43] to create one majority-minority Latino Assembly District and one district the Latino community would have a chance of winning in the next decade." Defs.' Br. at 3. There is nothing in the record (other than statistical inference) to suggest that was the legislature's intention.[4] Even if it were the legislature's intention, moreover, the boundaries violated the Voting Rights Act and, not incidentally, would not have achieved the twin goals articulated by the Department of Justice. Mayer Decl. II, ¶ 5. Indeed, as the plaintiffs' expert has indicated, the articulated goals provided little or no analytical support for reaching them. *See* Mayer Decl. II, ¶¶ 5-14.

The Department does not say whether these proposals have Latino community support. Nor could they. Plaintiffs' counsel does not have knowledge even suggesting that the Latino community leaders they consulted were contacted about the Department of Justice's maps by anyone from the Department, the Attorney General's office, the Government Accountability Board, or counsel representing these entities. *See* Declaration of Jacqueline Boynton, ¶¶ 4-12. By contrast, the plaintiffs' proposal has the approval of a wide cross-section of the Latino community, and it was formulated with input from them. *See* Pls.' Br. at 6-8.

[4] It is not even possible to assert, for there is no evidence, that the legislature specifically "used its judgment," Defs.' Br. at 3, in any way at all with respect to the two assembly districts in the City of Milwaukee. Nor is it possible to state credibly that the legislature made a policy judgment "to increase the majority Hispanic voting age percentage...," *id.* at 4, over the 2002 boundaries.

The Department of Justice suggests that the Legislative Technology Services Bureau ("LTSB") "be allowed to take the selected map and 're-draw' it to insure that the final product meets the legal requirements for implementation as a statute and complies with other state laws (including 2011 Wisconsin Act 39)." Defs.' Br. at 9. The plaintiffs have no objection to the LTSB's involvement, noting that one of its representatives, Tony Van Der Wielen, already has been deposed in this litigation and, as noted by the Department, served as the Court-appointed expert for GIS issues in 2002. *See* Deposition of Tony Van Der Wielen (Dkt. 173) (Feb. 7, 2012). However, there should be no ambiguity in this regard: the boundaries being adopted for the state by this Court are not a "statute" and will not be implemented "as a statute."

Act 43 is not a valid statute, and no court can make it so—in whole or in part. The Court can and will promulgate district boundaries for the state just as its predecessors did. In that regard, it is more than a historical note that the Wisconsin Statutes Annotated published in the wake of the 2002 Court decision carry this notation where the redistricting statutes traditionally have appeared: "Districts as created by the Federal Court Redistricting Decision dated May 22, 2002." Wis. Stats. 4.00 (2009-2010).

CONCLUSION

The plaintiffs stipulate that the Department of Justice has preserved its right to appeal this Court's decision, order and judgment to the United States Supreme Court. The Department's counsel have so stated repeatedly. However, the remedial issues here are fundamental and, at least in the first instance, they are this Court's to decide.

For these and the reasons stated in their previous briefs, the plaintiffs respectfully request that the Court adopt their proposed configurations for Assembly Districts 8 and 9 as part of its redistricting plan for the Wisconsin state legislature.

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