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

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JUDY ROBSON, individually,

Plaintiff and Moving Party,

and,

REV. OLEN ARRINGTON, JR., ALVIN BALDUS, STEPHEN H. BRAUNGINN, JOHN D. BUENKER, ROBERT J. CORNELL, V. JANET CZUPER, LEVENS DE BACK, STEVEN P. DOYLE, ANTHONY S. EARL, JAMES A. EVANS, DAGOBERTO IBARRA, JOHN H. KRAUSE, SR., JOSEPH J. KREUSER, FRANK L. NIKOLAY, MELANIE R. SCHALLER, ANGELA W. SUTKIEWICZ, and OLLIE THOMPSON,

Original Plaintiffs,

and,

Case No. 01-C-121/02-C-0366
Three-Judge Panel
(Clevert, J. Presiding)

JAMES R. BAUMGART, ROGER M. BRESKE, BRIAN T. BURKE, CHARLES J. CHVALA, RUSSELL S. DECKER, JON ERPENBACH, GARY R. GEORGE, RICHARD GROBSCHMIDT, DAVE HANSEN, ROBERT JAUCH, MARK MEYER, RODNEY MOEN, GWENDOLYNNE S. MOORE, KIMBERLY PLACHE, FRED A. RISSER, KEVIN W. SHIBILSKI, ROBERT D. WIRCH, SPENCER BLACK, JAMES E. KREUSER, SPENCER G. COGGS, and GREGORY B. HUBER, each individually and as members [or, now, former members] of the Wisconsin State Legislature,

and,

JAMES SENSENBRENNER, JR., THOMAS E. PETRI, MARK A. GREEN, and PAUL RYAN, each individually and as members [or, now, former members] of the United States Congress,

Original Intervenor-Plaintiffs,

and,

G. SPENCER COGGS, LEON YOUNG, ANNETTE POLLY WILLIAMS, JOHNNIE MORRIS-TATUM,

Additional Original Intervenor-Plaintiffs,

v.

JERALYN WENDELBERGER, chairperson of the State of Wisconsin Elections Board, and each of its members [or former members] in his or her official capacity, JOHN P. SAVAGE, DAVID HALBROOKS, R.J. JOHNSON, BRENDA LEWISON, STEVEN V. PONTO, JOHN C. SCHOBER, CHRISTINE WISEMAN, and KEVIN KENNEDY, its executive director;

Original Defendants,

and,

SCOTT R. JENSEN, in his capacity as the [former] Speaker of the Wisconsin Assembly, and MARY E. PANZER, in her capacity as the [former] Minority Leader of the Wisconsin Senate,

Intervenor-Defendants.

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RESPONSE OF WISCONSIN GOVERNMENT ACCOUNTABILITY BOARD TO MOTION FOR RELIEF FROM JUDGMENT

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The Members of the Wisconsin Government Accountability Board ("GAB"), Michael Brennan, David Deinninger, Gerald Nichol, Thomas Cane, Thomas

Barland, and Timothy Vocke, each in his official capacity only, and Kevin Kennedy, in his official capacity as Director and General Counsel for the GAB only (collectively "proposed substitute defendants"), by their attorneys, J.B. Van Hollen, Attorney General, and Maria S. Lazar, Assistant Attorney General, hereby respond in opposition to plaintiff-movant Judy Robson's Motion for Relief from Judgment dated June 9, 2011 ("Motion").

## INTRODUCTION

Plaintiff-movant Judy Robson's motion is based upon the same faulty premise[1] as that upon which a related federal lawsuit[2] just filed by the same counsel in the Eastern District of Wisconsin[3] is based: no action will be taken by the State Legislature to redistrict. There is no basis for hypothesizing that the current State Legislature will not act on its own and adopt and enact legislative boundaries which reflect the population shifts as noted in the 2010 decennial census,[4] or that the Wisconsin State Supreme Court, in the absence of such action, will not take this matter as an original action. Should either event occur—and there is significant time in which they could occur (up to and including February 2012), the federal

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[1]*See* Ground No. 11 of the Motion for Relief from Judgment at 5.

[2]*Baldus, et al. v. Brennan, et al.*, Eastern District of Wisconsin Case No. 11-C-00562.

[3]Counsel for plaintiff-movant in this action as well as for the new plaintiffs in the related action, *Baldus, et al. v. Brennan, et al.*) are the same.

[4]In fact, such legislation has already been introduced.

courts do not have subject matter jurisdiction because there is no case or controversy and the matter is clearly not ripe for deliberation. *Deida v. City of Milwaukee*, 192 F. Supp. 2d 899, 904 (E.D. Wis. 2002) ("To show an actual case or controversy, plaintiff must show *both* that she has standing to assert her particular claims and that it is an appropriate time for judicial intervention.") (quoting *Renne v. Geary*, 501 U.S. 312, 320 (1991)) (emphasis added).

In *Baldus v. Brennan*, the plaintiffs there (one of whom—Alvin Baldus—is also an original plaintiff in this action) are seeking the same relief as in this motion. It just comes in a different form.[5] In the instant motion, the plaintiff-movant seeks to have the Order establishing legislative boundaries (pursuant to the 2000 decennial census) set aside and to have the former three-judge panel set new legislative boundaries (pursuant to the new 2010 decennial census). In the new action, *Baldus*, the plaintiffs seek that same relief, and in addition, seek to restrain and enjoin the GAB from acting upon the old legislative boundaries. As the instant action also seeks "such other and further relief as is just and equitable to ensure that the 2012 state legislative elections take place in districts," (Pl's motion at 5), it is highly likely that, if the Motion is granted, the plaintiff-movant will then seek to restrain GAB from using the old legislative boundaries.

Moreover—and quite significantly—since the date the Motion was filed (as well as the complaint in the new action), the State Legislature has introduced

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[5]Plaintiff-movant admits that the Motion and the *Baldus* action are part of a joint strategy and that either or neither may be taken up by the Court. (Pl's brief at 7).

legislation[6] which establishes congressional and state legislative districts and hearings on such legislation will commence starting July 13, 2011 (*see* the first two pages of Senate Bill 148, Senate Bill 149, and the State of Wisconsin Senate Journal dated July 11, 2011, copies of which are attached hereto as Exhibits A-C). Thus, the sole basis for this Motion has been rendered moot. Accordingly, the GAB requests that the Court deny this Motion on that basis alone.

However, should the Court consider the underlying merits of the Motion, the GAB respectfully suggests that there is no basis under any Federal Rule of Civil Procedure upon which these two closed cases should be reopened and relief from the 2002 judgment granted. Therefore, this Motion should be denied.

## ARGUMENT

There is a long-standing tradition that judgments, once rendered, are to be treated as final. *McGeshick v. A.K. Choucair*, 72 F.3d 62, 63 (7th Cir. 1995). To allow otherwise would be to keep litigants and the courts in a perpetual state of confusion, disarray, and uncertainty. It is only under extraordinary or inequitable circumstances that courts will even consider whether to re-examine judgments, much less to modify or vacate such judgments. The initial judgments in the two closed cases were arrived at following the 2000 decennial census—a single,

[6]The Court may take judicial notice, pursuant to Fed. R. Evid. 201, of these matters of public record contained in Assembly and Senate Bills and the Legislative Journals.

historical event. They were not prospective and did not anticipate that they would be the proper avenues to forever address future census results—which are separate and distinct, historical events. Indeed, it has been the practice in years past that *new* redistricting or reapportionment litigation is commenced every decade. There is no basis upon which relief from the judgment should be granted in this closed case.

## I. THERE ARE NO EXTRAORDINARY CIRCUMSTANCES OR UNDUE HARDSHIP WHICH WARRANT RELIEF FROM JUDGMENT UNDER FED. R. CIV. P. 60(b)(6).

Under Fed. R. Civ. P. 60(b), there are certain circumstances upon which a district court may grant a party relief from a judgment. While the plaintiff-movant does not clearly specify under which subpart of this rule that her Motion has been brought she does mention "extraordinary circumstances," and, thus, the most relevant provision is for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). The courts have held that relief under Fed. R. Civ. P. 60(b), in general, is "'an extraordinary remedy and is granted only in extraordinary circumstances.'" *McCormick v. City of Chicago*, 230 F.3d 319, 327 (7th Cir. 2000) (quoting *Dickerson v. Board of Educ. of Ford Heights, Ill.*, 32 F.3d 1114, 1116 (7th Cir. 1994)).

Indeed, it is even a step more in that direction for relief to be granted under Fed. R. Civ. P. 60(b)(6), often called the "catch-all" provision. *Bakery Machinery & Fabrication, Inc. v. Traditional Baking, Inc.*, 570 F.3d 845, 848 (7th Cir. 2009). "In a rule already limited in application to extraordinary circumstances, proper resort

to this 'catch all' provision is even more highly circumscribed." *Provident Savings Bank v. Popovich*, 71 F.3d 696, 700 (7th Cir. 1995). This provision is only to be applied in "the most extraordinary of circumstances." *Pantoja v. Texas Gas & Transmission Corp.*, 890 F.2d 955, 960 (7th Cir. 1989), *cert. denied*, 497 U.S. 1024 (1990). There are no extraordinary or "most" extraordinary circumstances present here.

"Extraordinary circumstances" is not defined in the federal rules, but a review of cases indicates what has been considered extraordinary—as well as what has not. For instance, a change in decisional state law after the judgment which clearly changes how that judgment would have been rendered has *not* been held to be extraordinary. *Cincinnati Ins. Co. v. Flanders Electric Motor Service, Inc.*, 131 F.3d 625, 630 (7th Cir. 1997). Likewise, negligence of counsel has also been held not to be an "extraordinary circumstance." *Tobel v. City of Hammond*, 94 F.3d 360, 363 (7th Cir. 1996). "Absent extraordinary circumstances creating a substantial danger that the underlying judgment was unjust, it is certainly a proper use of a district court's discretion to invoke the strong policy favoring the finality of judgments." *Cincinnati Ins. Co.*, 131 F.3d at 630. Here, the underlying judgment was just—it was based upon the facts at the time as determined by the 2000 decennial census. The issuance of a 2010 census is not extraordinary. In fact, it is the exact opposite—it is in the ordinary course that a new decennial census is conducted every decade. And, as plaintiff-movant admits (Pl's brief at 5, n.3), in each decade for at least the last thirty years, a new action has been initiated to

address redistricting in Wisconsin. That evidences the proper channel by which to proceed, if a lawsuit is even made necessary.

The plaintiff-movant contends that there are "changed circumstances" which warrant the relief being sought (Pl's brief at 4), but that is disingenuous. The circumstances have not changed: the data produced in the 2000 decennial census is still valid as of that date. The judgment in the underlying cases is still fair and equitable as it relates to that census. The new 2010 decennial census is not an "extraordinary" change upon which a Motion for Relief should be granted. Rather it is a future, cyclical event which requires new litigation, if any is so required, only upon the inaction of the State Legislature and State Courts.

Put rather simply, the State Constitution vests the primary responsibility to redistrict legislative boundaries every ten years upon the State Legislature. Wis. Const. art. IV, § 3; U.S. Const. art. I, § 2; *Growe v. Emison*, 507 U.S. 25, 34 (1993) ("'We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.'") (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)). And, as noted above, the State Legislature has already introduced legislation with new congressional and legislative boundaries and has begun the process of enacting the same (*see* exhibits attached hereto). Thus, to *grant* this Motion would be extraordinary.

Here, the judgment has been in place since 2002—and the time for appeal or other review has long since run. Thus, the judgment is final and there is an

overarching policy consideration which rests upon recognizing and respecting the finality of judgments. *Cf. Schmitt v. American Family Mut. Ins. Co.*, 187 F.R.D. 568, 573 (S.D. Ind. 1999) (in this case, a non-final judgment warranted relief under the Federal Rules). "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties." *Baldwin v. Iowa State Traveling Men's Assoc.*, 283 U.S. 522, 525 (1931). Redistricting as to the 2000 census has been conducted and finalized. It is settled.

The plaintiff-movant incorrectly contends that the Court in 2000-2002 maintained jurisdiction over the two closed cases. (Pl's brief at 7). That is not the case at all, as the final judgment in 2002 concludes with an order closing the case. *Baumgart v. Wendelberger*, 2002 WL 34127472, *24 (E.D. Wis. May 30, 2002) ("It is further ordered and adjudged that this case is closed"). The plaintiff-movant further asks this Court to reassert jurisdiction over redistricting because the Court is "familiar[ ]with the redistricting process" and another Court may not choose to follow the prior Court's "methodical and reasoned" approach. (Pl's brief at 5). Both of these requests are based upon a misapplication of the cases cited by plaintiff-movant. In *King v. State Board of Elections*, 979 F. Supp. 582, 588-89 (N.D. Ill. 1996), *vacated and remanded*, 519 U.S. 978 (1996), contrary to plaintiff-movant's assertions, the court cited *Johnson v. Burken*, 930 F.2d 1202 (7th Cir. 1991), for the proposition that courts will not "ordinarily reconsider" their

own decisions and that courts will "avoid reexamining the prior decision 'unless powerful reasons are given for doing so.'" *King*, 979 F. Supp. at 589 (quoting *Burken*, 930 F.2d at 1207). That is precisely the situation here.

Even the principle stated by plaintiff-movant is inapplicable to the given circumstances: she contends that a "court can maintain or reassert jurisdiction for the same issues and same parties in subsequent stages of litigation." (Pl's brief at 4). Here, the issues are *not* the same (there is an entirely new census) and the litigation is already concluded—and has been final for over nine years. There are no further stages of litigation.

The *King* case involved somewhat similar facts, yet is still distinguishable. There, a previous court had—through the use of a three-judge panel set legislative boundaries (but only upon the failure of the Illinois State Legislature to do so) following the 1990 decennial census. *King*, 979 F. Supp. at 586. Four years later, King challenged the constitutionality of the boundaries based upon population concerns but not with respect to a new census. *Id.* Some defendants argued the new lawsuit was an attempt to modify or vacate the earlier decision and, thus, should have been brought in the old lawsuit under Fed. R. Civ. P. 60(b). *King*, 979 F. Supp. at 587. The court rejected that argument on the basis that King was not a party to the previous action and that the previous court had not retained jurisdiction to hear future constitutional challenges to its order. *Id.* at 589-90.

In the instant case, the plaintiff-movant was a party in the underlying case, but that Court did not retain jurisdiction to hear future constitutional challenges.

Moreover, the plaintiff-movant's challenge is not to the prior judgment's constitutionality at the time it was entered, but is rather a challenge based upon entirely *new* facts and circumstances. The prior judgment was constitutional based upon the 2000 decennial census. The 2010 decennial census raises *new* issues which must be addressed in a *new* action. Merely because a plaintiff from the 2001/2002 case raises a *new* issue does not convert it into a continuation of the 2000 census case. Had King been challenging the legislative districts based upon a *new* census, the defendants would not have argued that it was an attempt to modify or vacate the prior judgment, and there would not have been any challenges to the separate and independent lawsuit as the proper means by which to assert his claim.

Just as it is here, that new census would be an entirely new and discrete event which necessitates the filing an entirely new lawsuit (and—coincidentally, plaintiff-movant's counsel have done just that in the *Baldus* action, albeit with different plaintiffs). Accordingly, relief should not be granted under Fed. R. Civ. P. 60(b)(6).

## II. THE JUDGMENTS IN THESE CASES WERE NOT PROSPECTIVE AND THERE IS NO EQUITABLE BASIS UPON WHICH THEY SHOULD BE REVISITED UNDER FED. R. CIV. P. 60(b)(5).

The plaintiff-movant also mentions Fed. R. Civ. P. 60(b)(5) as a basis upon which her Motion should be granted, but does not provide any explanation or argument as to why this case falls within that section's purview. Regardless, the circumstances in which this rule is applicable are not present in the instant matter.

This section requires that the judgment in question must be "no longer equitable" and "prospective in application." Fed. R. Civ. P. 60(b)(5); *Cincinnati Ins. Co.*, 131 F.3d at 630. The question of "prospective application" is the easier of the two requirements to address. "Judgments are prospective when they are 'executory' or 'involve the supervision of changing conduct or conditions.'" *Id.* "Many judgment have continuing consequences in the future but that does not mean that they have 'prospective application' for the purposes of Rule 60(b)(5)." *Id.* at 631.

In *DeWeerth v. Baldinger*, 38 F.3d 1266, 1275 (2d Cir. 1994), a case cited favorably by *Cincinnati Ins. Co.* (at 631), the court discussed and denied a Fed. R. Civ. P. 60(b)(5) motion on the basis that a declaratory judgment regarding the ownership of a Monet painting stolen during World War II was not "prospective" in nature, such that reversal was not warranted when the state laws regarding discovery changed. That court held:

> [The] argument that declaratory judgments may have prospective application is also unpersuasive. The types of declaratory judgments referred to by [plaintiff], orders of disbarment and judgments which form a lien on property, affect events that happen in the future, and thus are distinguishable from the final judgment in this case, which simply resolved the parties' rights based on a past dispute.

*DeWeerth*, 38 F.3d at 1276.

Here, there can be no valid argument that a decision in 2002 regarding redistricting based upon the 2000 decennial census was "prospective" in application. Everyone—including the Court—knew in 2002 that a new decennial census would be conducted in 2010, and in 2020 and so forth. The 2002 judgment

was a final judgment based upon the facts as they existed at that time. The Court could have retained jurisdiction over the mapping, but such a retention of jurisdiction would have required that the 2001/2002 case *never* be final and that it stay with this Court in perpetuity. It—wisely—did not do so. Thus, there is no prospective application to that judgment and that requirement of Fed. R. Civ. P. 60(b)(5) is not met.

Additionally, plaintiff-movant cannot establish that the judgment in *Baumgart* is no longer equitable solely based upon entirely new facts. That judgment was equitable at the time and a mere claim of "changed circumstances" does not warrant a finding to the contrary.

Plaintiff-movant relies upon two cases[7] for the proposition that reapportionment plans are not immutable and that there is great latitude in fashioning new plans or remedies. (Pl's brief at 4). While this fundamental premise

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[7]In addition, the plaintiff-movant cites to *De Fillipis v. United States*, 567 F. 2d 341, 344 (7th Cir. 1977), for the proposition that a "change in conditions" makes the enforcement of a judgment inequitable. Robson's reliance on that case is misplaced. The *De Fillipis* case (which has been overruled in part by *United States v. City of Chicago*, 663 F.2d 1354, 1359 (7th Cir. 1981)), was based upon the decision in *United States v. Swift & Co.*, 286 U.S. 106 (1932), and concerned "consent decrees." In *De Fillipis*, the moving party contended that a change in decisional law was a change in circumstances which made continued enforcement of the judgment inequitable. *De Fillipis*, 567 F.2d at 343-44. However, the *De Fillipis* court never discussed whether continued enforcement was inequitable, as it found the movant had not met its burden of proof and had not shown a "grievous wrong." *Id.* at 344. Plaintiff-movant in the instant case cannot show a grievous wrong that mandates relief from the judgment when the only change in circumstances is a decennial census that everyone knew was to be conducted.

is correct, it does not support the theory that final judgments in redistricting and reapportionment cases should be reopened each and every time a new census is received. In fact, the cited cases themselves indicate that new litigation is the proper remedy. In *Jackson v. DeSoto Parish School Board*, 585 F.2d 726, 728 (5th Cir. 1978), the plaintiffs brought a new action challenging the constitutionality of a previously-ordered reapportionment plan. The issue was not whether relief should be granted from the prior judgment at all; the case concerned whether the challenge to the plan was precluded by res judicata or collateral estoppel. *Id.* at 729. In fact, when discussing whether a Fed. R. Civ. P. 60(b)(5) motion would have been a more proper vehicle, the *Jackson* case expressly held that the prior court had not retained jurisdiction: "We note, however, that in reapportionment, unlike school desegregation and institutional reform cases, the court's jurisdiction is not continuing, and the plan, once adopted and acted upon, does not require further judicial supervision." *Jackson,* 585 F.2d at 30, n.1. Thus, the previous judgments in both *Jackson* and this case are not prospective.

Likewise, the *Rader v. Cliburn*, 476 F.2d 182, 183 (6th Cir. 1973), case concerned, not a motion for relief from judgment, but rather an entirely new action filed to challenge the constitutionality of a court-ordered reapportionment plan. While that court did hold that federal district courts have "great latitude in the fashioning of remedies for constitutional violations in reapportionment cases," it did so in the context of an entirely new action. *Id.* at 184. In fact, the court went further and held that there would have been no basis for a Fed. R. Civ. P. 60(b)(6)

motion as that case was "assuredly [] not a case of unusual and exceptional circumstances for which such relief may be granted." *Rader*, 476 F.2d at 184. (citation omitted).

Accordingly, neither case cited by the plaintiff-movant provides support for her Motion. In sum, the plaintiff-movant cannot meet either requirement under Fed. R. Civ. P. 60(b)(5), and her Motion must be denied.

## III. FINALLY, THE COURT SHOULD DENY THIS MOTION AND PROCEED WITH THE NEWLY FILED ACTION.

The plaintiff-movant concludes her brief with a statement that Fed. R. Civ. P. 60(b) does not limit a party's ability to start a separate and independent action; that is precisely what has been done here with the contemporaneous filing of the *Baldus* lawsuit. The plaintiff-movant concludes by asserting that this Court could "choose to proceed on either (though not both) or neither." (Pl's brief at 7). That is correct.

In this case, however, the plaintiff-movant has failed to establish the basis upon which this Motion can be granted, so the Court should deny this Motion. Any determination as to the validity of the *Baldus* action should be resolved in that case, notwithstanding the plaintiff-movant's supporting arguments made in the brief in this case.

In her conclusion, the plaintiff-movant asserts that, by filing this Motion and the *Baldus* action, she is avoiding forum shopping. To the contrary, that is precisely what this Motion (and the *Baldus* action) are doing: they have shopped

for a federal forum even though established United Supreme Court law provides that state courts are the preferred venue for redistricting cases. Federal courts have been advised to respect the state's rights to establish its own legislative boundaries—by the Legislature and then the state judiciary. "In the reapportionment context, the [United States Supreme] Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself." *Growe*, 507 U.S. at 33 (emphasis in original).

All parties agree that this Court is the final arbiter as to whether and in what action this Court may choose to proceed. Respectfully, the substitute defendants urge this Court to deny this Motion and to consider whether to assert jurisdiction in the new action.

## CONCLUSION

Quite simply, the entire Motion for Relief from Judgment is based upon the hypothetical assertion that the State Legislature (and then the State Courts) will not act prior to February 2012 to set new legislative boundaries and districts. This very premise has been belied by the recent introduction of just such legislation. Thus, the Motion for Relief from Judgment is moot and should be dismissed.

In the alternative, based upon the foregoing, there is no basis under either Fed. R. Civ. P. 60(b)(5) or (6) upon which relief from the Judgment in this closed case should be granted. Therefore, the GAB respectfully requests that the Court deny the Motion for Relief from Judgment in its entirety.

Dated this 13th day of July, 2011.

J.B. VAN HOLLEN
Attorney General

s/Maria S. Lazar
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