

UNITED STATES DISTRICT COURT  
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-CV-121 / 02-CV-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

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**REPLY BRIEF IN SUPPORT OF PLAINTIFF'S RULE 60(b) MOTION  
FOR RELIEF FROM JUDGMENT**

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F. 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. SCHOBBER,  
CHRISTINE WISEMAN and KEVIN J. KENNEDY,  
its executive director;

Original Defendants,

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.<sup>1</sup>

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On June 9, 2011, one of the plaintiffs in this 2002 redistricting case filed this Rule 60(b)  
motion to reopen the judgment for one reason: this Court, in the face of state government's

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<sup>1</sup> This is the original caption with bracketed material that reflects the change in status for some of the parties. The Elections Board itself became the Government Accountability Board in 2008, by statute, and none of the original member-defendants remains. Kevin Kennedy, the board's executive director, retains that position in the reconstituted state agency.

failure to do so, established the legislative districts that have provided the electoral structure for the state for the last ten years. There have been two significant developments since the motion's filing:

- The state has opposed the motion and moved to dismiss a separate case (Case No. 11-cv-562), now assigned to Judge Stadtmueller, raising the same constitutional and statutory issues; and,
- The legislature on July 19 and 20, 2011, adopted redistricting legislation, which the plaintiffs in the separate case now have challenged on its merits with their amended complaint, raising federal and state claims—constitutional as well as statutory. *See* Case No. 11-cv-562, Docket No. 12.

The moving party here, a former state senator, Judy Robson, reiterates a principal point of her motion and the brief supporting it. Rule 60(b) explicitly permits the maintenance of a separate action, and she is a plaintiff in that separate action. While there is no need for two cases, however, there surely is a need for one—because the legislation adopted by the legislature and sent to the governor is unconstitutional. Notwithstanding the state's endorsement of a “new” action to address “new” issues raised by the “new” census, it has moved to dismiss that new case. *See* Response of Wisconsin Government Accountability Board to Motion for Relief from Judgment at 11 (“Defendants’ Brief”); Motion to Dismiss by All Defendants, Case No. 11-cv-562, Docket No. 6.

By opposing the Rule 60(b) motion and moving to dismiss the new and free standing litigation, the state leaves no doubt of its goal and motive. It wants to deny the plaintiffs *any* federal forum. The state repeatedly requests that the federal courts defer to the state judicial system. *E.g.*, Defendants’ Brief at 16, 17. Yet there is no litigation pending in the state judicial system. Even were there, moreover, the state’s argument ignores both the quintessentially federal rights at issue in redistricting and the 30-year history of federal court involvement in redistricting in this state.

“Indeed,” the state itself notes, “it has been the practice in years past that *new* redistricting or reapportionment litigation is commenced every decade.” Defendants’ Brief at 6; *accord id.* at 7 (emphasis in original). Precisely. And it has been commenced in federal, not state, court.

## ARGUMENT

On May 30, 2002, this Court entered an order and judgment that: (1) declared the then-existing state legislative districts unconstitutional; (2) enjoined all elections under the unconstitutional districts; and, (3) established new legislative districts. *Baumgart v. Wendelberger*, 2002 WL 34127471 (E.D. Wis. May 30, 2002) (*per curiam*) (three-judge panel), *amended by* 2002 WL 34127473 (E.D. Wis. July 11, 2002) (“*Baumgart*”).<sup>2</sup> One of the original plaintiffs, Ms. Robson, has asked this Court to provide relief from that order and judgment because the population growth and population shifts disclosed in the 2010 census data invalidate, in effect, the Court’s 2002 order. The districts’ populations are no longer equal, no longer constitutional, rendering this Court’s order and judgment—through the passage of time and changes in population—inequitable. No longer is there a guarantee of “one person, one vote.”

When Judy Robson filed this motion on June 9, 2011, the motion was not based on a hypothetical: it was based on reality. That is, despite the 2010 census disclosing that Wisconsin’s population had shifted in significant ways that made the 2002 legislative district boundaries drawn by this Court unconstitutional, the legislature at that point had introduced no legislation, held no hearings, and adopted no new Congressional or legislative district boundaries.

The defendants’ response was that circumstances had not changed, eliminating the basis for the Rule 60(b) motion, because the 2000 census was valid as of the 2002 date of the Court’s

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<sup>2</sup> This Court amended the order in July 2002 for technical reasons.

order establishing the new legislative districts. *See* Defendants’ Brief at 8.<sup>3</sup> While that is self-evident—the 2000 census was the only operative census in 2002—the statement reflects a lack of understanding of the “one-person, one-vote” principle that is the fundamental building block of redistricting jurisprudence. This Court’s 2002 legislative map has controlled—and will continue to control—Wisconsin’s elections until and unless there are new, constitutionally-valid boundaries. *See Baker v. Carr*, 369 U.S. 186, 191 (1962).

Moreover, the issues raised by this motion and the issues addressed by this Court in 2001-02 are entirely the same: whether legislative district boundaries are constitutional and statutorily valid. *Compare* Brief in Support of Plaintiff’s Rule 60(b) Motion for Relief From Judgment *with* Defendants’ Brief at 10. That there are new facts—i.e., that Wisconsin’s population grew at an uneven rate across the state—is precisely the reason for this motion. Legislative districts once constitutional, even ones drawn by a Court, become unconstitutional when shifts in and growth of the state’s population render the districts malapportioned. Accordingly, the enforcement of this Court’s 2002 judgment is inequitable because its application would dilute the vote for hundreds of thousands of Wisconsin citizens.

To be sure, the legislature introduced new Congressional and legislative district boundaries (July 11), held a truncated public hearing (July 13), and adopted new redistricting legislation (July 19 and 20), completing Wisconsin’s legislative redistricting process in just nine days. Although the legislature has now adopted redistricting legislation—not yet signed into law—the constitutionality of the boundaries in effect today are not moot.

The new redistricting legislation may adequately address population equality concerns by establishing districts with small population deviations, but it does so at the expense of nearly all

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<sup>3</sup> The state’s argument contradicts itself. “The circumstances have not changed,” it maintains, because the 2000 census was valid in 2002. Defendants’ Brief at 8. A few paragraphs later, it takes the opposite position: “Here, the issues are *not* the same [because] (there is an entirely new census)....” *Id.* at 10 (emphasis in the original).

of the other redistricting principles established by the U.S. and Wisconsin constitutions and law. The legislation further impermissibly discriminates against the plaintiffs in the flawed and gerrymandering process used to adopt the plan, and the resulting districts unconstitutionally discriminate against the plaintiffs' opportunity to influence the political process for at least the next decade. *See* Plaintiff's First Amended Complaint ¶¶ 30, 31, 36, 42, 48, 51, 56, 57, 65 and 75, Case No. 11-CV-562, Docket No. 12.

Federal courts have no more important duty than to prevent the denial of constitutionally-protected rights of voters. In the interest of judicial economy, Ms. Robson asks this Court to set aside its judgment and, absent constitutional and statutorily-valid redistricting legislation, preside over the redistricting process to protect constitutional rights.

Dated: June 27, 2011.

GODFREY & KAHN, S.C.

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