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December 9, 2011

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Wisconsin Court of Appeals/Supreme Court
110 East Main Street - Suite 215
P. O. Box 1688
Madison, WI 53701-1688

Re: *Dennis Clinard et al. v. Michael Brennan et al.*, Appeal Number 2011AP002677 – OA

Dear Clerk:

Enclosed please find the Intervenors' Memorandum.

By copy of this letter, all counsel of record is being provided with copies of the same.

Thank you for your attention to this matter.

Very truly yours,

FRIEBERT, FINERTY & ST. JOHN, S.C.

Jeremy P. Levinson
jpl@ffsj.com

JPL/ier
Attachment

cc: Eric M. McCleod, Esq. (w/encl.) – Via E-mail & U.S. Mail
Joseph Louis Olson, Esq. (w/encl.) – Via E-mail & U.S. Mail
Kevin J. Kennedy, Esq. (w/encl.) – Via E-mail & U.S. Mail
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STATE OF WISCONSIN
SUPREME COURT

FILED
DEC 09 2011
CLERK OF SUPREME COURT
OF WISCONSIN

DENNIS CLINARD, ERIN M. DECKER, LUONNE A. DUMAK, DAVID A. FOSS, LaVONNE J. DERKSEN, PAMELA S. TRAVIS, JAMES L. WEINER, JEFF L. WAKSMAN, and KEVIN CRONIN,

Petitioners,

and

Case No. 2011AP00267 - OA

ALVIN BALDUS; CINDY BARBERA; 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;

Involuntary Petitioners,

v.

MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND and TIMOTHY VOCKE each in his official capacity as a member of the WISCONSIN GOVERNMENT ACCOUNTABILITY BOARD; and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board;

Respondents.

INTERVENORS' MEMORANDUM

The Committee to Recall Wanggaard, Randolph Brandt, The Committee to Recall Moulton, John Kidd, The Committee to Recall Senator Pam Galloway, Nancy Stencil, and Rita Pachal ("Intervenors"), by their Attorney Jeremy P. Levinson, hereby respond to Petitioners' and Respondents' December 6, 2011 submissions.

Both Petitioners' and Respondents' submissions presume that Petitioners' "Voluntary Withdrawal of Petition" extinguished the Petition as a matter before this Court. Petitioners' and Respondents' positions misapprehend the relevant statutes. Because Intervenors had previously filed a motion to dismiss, § 805.04(1), Wis. Stats., (made applicable to this proceeding by § 809.84, Wis. Stats.), relieved Petitioners of any unilateral authority to withdraw that they might have had had Intervenors not filed their motion. Absent a stipulation among the parties, the "Voluntary Withdrawal" is without any effect. The statute serves to prevent exactly the cynical and inappropriate manipulation of the courts and their procedures that have dominated this proceeding and its twin proceeding first filed in Waukesha County Circuit Court, *Clinard v. Brennan*, Waukesha County Case No. 2011CV3995, now pending in this Court, No. 2011XX1409.

More generally, as a matter of jurisdiction and the need and authority to control its docket, it is for the Court to determine what matters pend before it. The Court is not at the mercy of the whim or strategic machinations of a party. Once put before the Court, a matter is to proceed and be disposed of according to rules, precedent, and the Court's discretion.

While the Petitioners' December 6, 2011 submission offered little more to which a response might be made, the Respondents' submission offers additional arguments. The Respondents begin with the unremarkable proposition that state courts have the ability to hear redistricting challenges and that there exists a general preference that redistricting matters be resolved by state rather than federal institutions.

Respondents' submission ignores the two key issues: First, the assertion that the 2002 legislative districts have become "unconstitutionally malapportioned" states no legal claim whatsoever. It is well settled that a valid Redistricting Plan is deemed valid for ten years until

the next redistricting process following the next decennial census. *See, e.g, League of United Latin American Citizens v. Perry*, 548 U.S. 399, 421, 126 S. Ct. 2594, 2611 (2006); *see also Mississippi State Conference of N.A.A.C.P. v. Barbour*, 2011 WL 1870222 (S.D. Miss., May 16, 2011) (collecting and discussing cases), *summarily aff'd, Mississippi State Conf. of the NAACP v. Barbour*, No. 11-82 (U.S. Oct. 31, 2011).

Applying §§ 801.50(4m) and 751.035, Wis. Stats., to require the Court to appoint a panel in a wholly ministerial and robotic fashion anytime a panel is demanded, regardless of whether a legally meaningful challenge to apportionment serves as a basis for such a request, would lead to absurd and likely unconstitutional results. Such an interpretation of these statues would strip the Court of its traditional role and authority and invite waste and manipulation that the Court would be largely powerless to control. Intervenors suggest that, minimally, the Court may and should ascertain whether any request for appointment of a three judge panel rests on a cognizable claim and otherwise meets the foregoing statutes' predicates.

Second, while the Respondents offer a bare reference to *Growe v. Emison*, 507 U.S. 25 (1993), they ignore the issue raised by that case and, more specifically, by *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, 249 Wis. 2d 706, 639 N.W.2d 537. *Growe* involved a situation in which a federal action was filed *after* a state action. *Jensen* involved what the case at bar presents, a state action followed after a federal action had begun and progressed substantially. In *Jensen*, this Court deferred to a previously filed federal action, correctly recognizing that doing otherwise would disserve the public, the judicial system, and the relationship between the state and federal courts. Usurpation of the federal action would also sow uncertainty and invite manipulation. Under present circumstances, the Petition's request would likely entangle the Court in partisan electoral politics that would harm the institution and the public interest.

The Respondents' discussion of the impact of the filing in Waukesha County Circuit Court, *Clinard v. Brennan*, Waukesha County Case No. 2011CV3995, on the Petition filed one week earlier in this Court, *Clinnard v. Brennan*, Case No. 2011AP2677-OA, does not appear to take a specific position. Respondents' discussion would appear, however, to support Intervenors' request that the two matters, now both before the Court, be treated as one. For all practical purposes, the two cases are wholly duplicative and their treatment as separate proceedings would serve only to create waste and confusion.

Finally, Petitioners refuse to respond to Intervenors' motion to dismiss, instead instructing the Court that it may not reach the merits of the motion. Intervenors suggest that this position underappreciates the authority and duty of the Court. For their part, Respondents "do not opine as to the merits of or relief sought in the motion to dismiss." *Respondents' December 6, 2011 Memo.* at 7. Intervenors' motion to dismiss stands unopposed in substance.

CONCLUSION

Based on the foregoing and the record in this matter, and in *Clinard v. Brennan*, Waukesha County Case No. 2011CV3995, now pending in this Court, No. 2011XX1409, Intervenors respectfully request that the matters be consolidated or otherwise treated as unified and dismissed on the merits. Minimally, the above-captioned proceeding should be so dismissed.

Dated this 9th day of December, 2011.

FRIEBERT, FINERTY & ST. JOHN, S.C.

By:

Jeremy P. Levinson
State Bar No. 1026359
Joseph M. Peltz
State Bar No. 1061442

Attorneys for The Committee to Recall Wanggaard, Randolph Brandt, The Committee to Recall Moulton, John Kidd, The Committee to Recall Senator Pam Galloway, Nancy Stencil, and Rita Pachal

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