UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WILLIAM WHITFORD, ROGER ANCLAIM, EMILY BUNTING, MARY LUNNE DONOHUE, HELEN HARRIS, WAYNE JENSEN, WENDY SUE JOHNSON, JANET MITCHELL, ALLISON SEATON, JAMES SEATON, JEROME WALLACE and DONALD WINTER,

Plaintiffs,

v. Case No.: 15-CV-421-BBC

BEVERLY R. GILL, JULIE M. GLANCEY, ANN S. JACOBS, STEVE KING, DON MILLIS, and MARK L. THOMSEN,

Defendants.

BRIEF OF AMICUS CURIAE, THE LEAGUE OF WOMEN VOTERS OF WISCONSIN, IN SUPPORT OF NEITHER PARTY

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**Application for admission pro hac vice pending*

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January 5, 2017

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STATEMENT OF IDENTITY AND INTERESTS OF AMICUS CURIAE

The League of Women Voters of Wisconsin ("the League") was founded in 1920 by the suffragists who fought to win the right to vote for women. Since then it has actively engaged in advocacy asserting that voting and fair elections are fundamental rights for all citizens. The League has advocated for fair voting districts since 1952 and has advocated for reforms to ensure that Wisconsin voting districts are drawn on a nonpartisan basis since 1981. The League has extensive experience evaluating redistricting systems and procedures to determine their validity in creating districts that are politically accountable without resulting in extreme partisan gerrymandering.

The League has participated as a party and as amicus curiae in numerous other court cases affecting voting rights for Wisconsin residents. For example, in recent years the League was the lead plaintiff in a declaratory judgment action in Wisconsin state court challenging the Wisconsin voter photo ID law under the state constitution (*League of Women Voters of Wisconsin v. Walker*, 2014 WI 97). The League participated as an amicus curiae in 2016 in two cases before the Seventh Circuit Court of Appeals challenging the voter ID law and other recently enacted voting restrictions (*Frank v. Walker,* Case Nos. 16-3003 & 16-3052, and *One Wisconsin Institute v. Thomsen,* Case Nos. 16-3083 & 16-3091). In 1982, the League participated as amicus curiae in a redistricting case in Wisconsin and jointly submitted a plan to the court with Common Cause in Wisconsin. The League also opposed a redistricting plan introduced and approved in the 1983 legislative session as part of the 1983-85 Biennial Budget bill and participated in litigation challenging the plan.

In the late 1980s, the League actively pursued the passage of a constitutional amendment to establish a redistricting commission in Wisconsin. Since 2011, the League has participated in collaborative efforts to educate the public on the need for a nonpartisan approach to drawing district maps.

SUMMARY OF ARGUMENT

Having determined that Wisconsin's current legislative map is the result of intentional partisan discrimination with acute discriminatory effects, this Court has broad discretion to craft an adequate remedy. An adequate remedy must be prompt and must eliminate the extreme partisan discrimination under the current map. The remedy should also seek to preserve political accountability and minimize judicial intrusion into the legitimate political process. The League urges this Court to take the following steps in order to best serve those objectives:

1. As supported by both parties, the Court should immediately enjoin further use of the existing map, in order to trigger defendants' right to appeal the Court's judgment on the merits.

2. Without waiting for the Supreme Court to resolve that appeal, this Court should immediately establish a framework for producing a new map in time for use in the 2018 election cycle. Defendants' objections to this Court's doing so are without merit.

   a. Crafting a remedy now has both costs and benefits. But the damage to democratic values and to the voters of Wisconsin of leaving in place an unconstitutional map, with impermissibly skewed representation for yet another two-year Assembly session (if the Supreme Court affirms), far outweighs the mere inconvenience and expense of drafting a new map that might prove unnecessary (if the Court reverses).

b. Contrary to defendants' claim, it is not foreseeable that the Supreme Court, in affirming, would mandate remedial criteria incompatible with the flexible parameters that this Court can and should establish.

c. Finally, in their appeal on the merits, defendants may claim that the alleged difficulty of crafting a remedy argues against recognizing partisan gerrymandering as a constitutional violation on the merits. See Def. Remedy Br. 9-10.[1] The failure to craft a remedy now would invite abstract speculation on this important issue. If this Court establishes a remedial process now, the Supreme Court will be provided with a complete record on which it may fully assess the justiciability of partisan gerrymandering claims.

3. While disagreeing with defendants' objections to an immediate remedial process, the League also disagrees with plaintiffs' position (Pl. Remedy Br. 5) that this Court should not permit Wisconsin's elected branches to try to enact a remedial plan. Redistricting is primarily a political responsibility, and courts must seek to minimize their intrusion into that process. At the same time, the League shares plaintiffs' concern that this Court's findings of fact undermine confidence in the ability of Wisconsin's one-party-dominated government to enact a remedial plan purged of discriminatory partisan motivation and effect.

Accordingly, the League urges this Court to invite the legislature to prepare a new map using procedures that protect against unlawfully discriminatory partisan

[1] Def. Remedy Br. 9-10 ("This is not an equal protection or racial gerrymandering case, where there is ample Supreme Court authority to guide the Legislature, the Court and the parties in determining a remedy. . . . No legal standard governing these claims has emerged . . . .").

gerrymandering. If the legislature chooses to craft a new map in such a manner, the legislature could preserve political accountability, while also minimizing undue partisanship and avoiding the prospect that the state's political branches would in effect force this Court to draft or select a new map itself.

4. The Wisconsin legislature has several lawful options that would safeguard the new maps from unlawfully discriminatory partisan gerrymandering. Many states employ a bipartisan or nonpartisan agency to draft maps advisory to the legislature, which retains final responsibility for enacting (or rejecting) the proposed map. The Wisconsin legislature could readily do likewise, through vehicles that we detail below. Extensive experience in other states demonstrates that options of this kind work efficiently and effectively to retain democratic accountability while preventing undue partisanship and inspiring public confidence that the redistricting process is fair and non-discriminatory.

5. If the legislature chooses not to draft a new map or, exercising its prerogative to employ a different process, fails to produce a map that fully remedies the constitutional violations within a reasonable time, as determined by the Court, this Court would then be compelled to establish a process for a court-ordered map to be developed and approved in time for the 2018 election.

ARGUMENT

I. This Court Should Immediately Enjoin Further Use of the Existing Map.

The League agrees with both parties that an immediate injunction is in order.

II. This Court Should Establish a Framework For Producing a New Map Now.

Defendants' objections to this Court's acting now to cure the constitutional defect are without merit. To be sure, if the Supreme Court reverses this Court's judgment on the merits, that remedial effort would have been unnecessary. But if the Supreme Court affirms, the failure to craft a remedial plan now would leave insufficient time to prepare a constitutionally permissible map in time for the 2018 election. See Pl. Remedy Br. 3; Def. Remedy Br. 4-5. In that event, this Court would have no choice but to leave the current map in effect, with the impermissibly skewed legislative representation it entails. Under those circumstances, the irreparable injury to Wisconsin voters facing another two years of lawmaking by an unconstitutionally apportioned Assembly would far outweigh the cost and inconvenience of drafting a new map that would have been unnecessary if the Supreme Court reverses.

Contrary to defendant's claim (Def. Remedy Br. 10), it is not foreseeable that the Supreme Court, in affirming, would mandate remedial criteria incompatible with the flexible parameters that this Court can and should establish. The core of the constitutional violation identified by this Court, and one of its three necessary preconditions, is adoption of a redistricting scheme "intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of political affiliation." Slip Op. 56. Any Supreme Court decision affirming the judgment of this Court will surely acknowledge the centrality of this criterion, which the Wisconsin legislature must scrupulously satisfy in any effort to prepare a lawful new

map. Moreover, if it proceeds in one of the specific ways we detail below, the legislature can readily provide itself additional assurance that its approach and the resultant map will satisfy all plausible remedial parameters. Because the specific approaches we suggest afford structural insulation against single-party discriminatory intent, they preclude serious voting impediments based on political affiliation and not justified by legitimate legislative concerns. Cf. Slip. Op. 56 (identifying these as additional factors relevant to the analysis of unconstitutionality). Thus the specific approaches we describe below would eliminate all plausible signals of unconstitutional partisan gerrymandering, while leaving ample room for legitimate political considerations, as assessed in a nonpartisan manner by politically engaged, politically accountable actors.

Finally, ordering such a remedy now would provide a more complete record for the inevitable review by the Supreme Court, allowing that Court to assess fully the justiciability of partisan gerrymandering claims on their merits.

III. This Court Should Permit Wisconsin's Elected Branches to Try to Enact a Lawful Map.

Supreme Court precedent makes clear that redistricting is primarily a political responsibility and that district courts ordinarily should seek to minimize their intrusion into that process, even when violations of the constitution or the Voting Rights Act make such an intrusion unavoidable. *McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981) (collecting cases). Nonetheless, the League shares plaintiffs' concern that in the unique context of this case, this Court's findings of fact raise doubt about the ability of

Wisconsin's one-party-dominated government to adopt a new map free from excessive partisan motivation and impact.

Accordingly, the League urges this Court, at the first stage of the remedial process, to invite the Wisconsin legislature to submit a new map. As discussed below, if the legislature proceeds with preparing new map in accordance with one of the methods outlined below, it can avoid the twin pitfalls of excessive, unconstitutional legislative partisanship on the one hand and unjustified judicial intrusion into the political process on the other. All of these methods are *political* but not *partisan*; they are democratic, politically accountable, and at the same time, insulate the resulting districts from excessive, unjustified partisan discriminatory intent. Of course, if the legislature chooses not to draft a new map or, exercising its prerogative to employ a different process, produces a new map that this Court subsequently determines not to fully remedy the constitutional violation, this Court would then be compelled to establish an appropriate new map itself, in accordance with one of the permissible remedial procedures already well established by precedent. See Pl. Br. 19-21.

IV. The Wisconsin Legislature Has Several Options for Preparing a New Map in a Manner That is Politically Accountable but Insulated from Undue Partisanship.

Although several states confer redistricting responsibility entirely on a bipartisan or nonpartisan commission independent of the legislature,[2] the Wisconsin constitution

[2] Alaska, Arizona, California, Montana and Washington currently use this approach. In another seven states (Arkansas, Colorado, Hawaii, Missouri, New Jersey, Ohio and Pennsylvania), political appointees serve on commissions but membership is usually balanced between the parties. See Brennan Center for Justice, "Who Draws the Lines" (Nov. 2010), available at http://www.brennancenter.org/analysis/redistricting-advocates.

precludes this option (unless imposed by a supervening federal decree). See Wis. Const. art. IV §3 (specifying that redistricting is a legislative responsibility). Other states, however, employ a bipartisan or nonpartisan agency to *advise* the legislature, which retains final responsibility for enacting (or rejecting) the map that such an agency produces.[3]

In the Wisconsin context, several options are available for drafting a new map in such a way. First, the legislature could delegate the responsibility for drafting a new map to defendants themselves, the six bipartisan members of Wisconsin's bipartisan Elections Commission. Second, if there is concern that an even-numbered membership might reduce the chances of producing a mutually acceptable map, the legislature could follow the model successfully employed in several states by instructing the Commissioners, for this purpose only, to jointly designate a nonpartisan seventh member to serve as chair.[4] Third, the legislature could direct Wisconsin's Legislative Reference Bureau, an existing nonpartisan legislative service agency that drafts all legislation, to develop a new map. Finally, the legislature, following another model

[3] Five states (Iowa, Maine, New York, Rhode Island and Vermont) currently use this approach. Id. For comprehensive survey of redistricting methods currently employed in all 50 states, see National Conference of State Legislatures, Redistricting Commissions: State Legislative Plans, available at http://www.ncsl.org/research/redistricting/2009-redistricting-commissions-table.aspx; Ballotpedia, State-by-state redistricting procedures, available at https://ballotpedia.org/State-by-state_redistricting_procedures; Justin Levitt, All About Redistricting, available at http://redistricting.lls.edu/.

[4] In Iowa, which uses an advisory commission constituted in a similar way, the neutral chairperson of the commission must be "an eligible voter of this state but shall not hold a partisan political office or political party office or be related to or employed by a member of the United States Congress or the Iowa General Assembly or be employed by the Congress or Iowa General Assembly itself." See Iowa Legislative Services Agency, Legislative Guide to Redistricting in Iowa 13-15 (n.d.), available at https://www.legis.iowa.gov/docs/Central/Guides/redist.pdf; Iowa Code § 42.5(2).

successfully employed in many states, could create a new five-member ad hoc committee consisting of an equal number of members designated by the minority and minority leaders of the Senate and Assembly, with those members jointly designating a nonpartisan additional community member to serve as chair.

In proceeding in any of these ways, the legislature would of course instruct the entity charged with drafting the map to follow all the usual districting criteria mandated by state and federal law, such as compactness, contiguity, respect for existing municipal boundaries, and non-dilution of minority voting power.

The legislature would also have the option to provide a variety of avenues for public and political input. For example, Iowa's Legislative Services Agency, advised by a nonpartisan advisory commission, is afforded approximately 45 days (from the time when census data becomes available) to craft a map and present it to the legislature.[5] The advisory commission is then required to hold at least three public hearings about the plan in different geographic regions of the state and submit a report concerning the hearings to the legislature no later than 14 days after the plan is submitted to the legislature. The legislature then must bring the redistricting bill to a vote within three days after the commission report is received. Only corrective amendments to the plan are allowed. If the initial plan is rejected, the Legislative Services Agency must submit a second plan within 35 days after the initial plan is rejected, but it need not hold public hearings on the second plan, and the legislature must vote on the second plan "no

[5] Iowa Code §42.3. See Iowa Legislative Services Agency, supra.

sooner than seven days after the second plan is submitted"[6]; again only corrective amendments are allowed.

In the context of the present case, a timetable like Iowa's, with ample opportunity for political and public input, would appear feasible without jeopardizing prospects for having an approved plan in place in time for the 2018 election cycle.[7] Since its creation in 1980, the Iowa process has operated smoothly; in 1991 the legislature enacted the first proposed plan without amendment, and in 2001 it enacted the second proposed plan without amendment.[8] Since 1980 no Iowa redistricting plan has been challenged in court,[9] and observers consistently report that the process has been regarded as fair to all sides.[10]

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[6] Id., p. 15.

[7] If the Iowa legislature rejects the second plan, the advisory commission has a further 35 days to draft a third plan, and in this instance the Iowa scheme permits the legislature to amend the plan in the same manner as any ordinary bill. As applied to the present case, a third round of this kind would appear to jeopardize timely implementation of a proper map, and in the context of Wisconsin's one-party government, a provision for unrestricted legislative amendment at the third stage would undercut the commission's value as a protection against excessive partisan influence. In any event, the Iowa legislature has never seen a need to exercise its option to make unrestricted amendments at the third stage. See note 8, infra.

[8] In 1981, the Iowa legislature rejected both of the first two plans but enacted the third plan without amendment. Id., p. 3.

[9] Id.

[10] E.g., Tracy Jan, "Iowa Keeping Partisanship Off the Map," *Boston Globe*, Dec. 8, 2013, available at https://www.bostonglobe.com/news/politics/2013/12/08/iowa-redistricting-takes-partisanship-out-mapmaking/efehCnJvNtLMIAFSQ8gp7I/story.html (noting that "[i]nstead of drawing lines that favor a single political party, the Iowa mapmakers abide by nonpartisan metrics that all sides agree are fair."); Edith Munro, "Gerrymandering? Not in Iowa," *Albany [Iowa] Times Union*, April 14, 2011, available at http://www.timesunion.com/opinion/article/Gerrymandering-Not-in-Iowa-1336319.php, (noting "[n]ot only is our redistricting process essentially nonpartisan, but it produces cohesive, manageable districts and meaningful electoral contests -- and has been doing so since 1981."); Craig Robinson, "The Politics of Iowa's Redistricting Process," *Iowa Republican*, March 17, 2011, available at http://theiowarepublican.com/2011/the-politics-of-iowa%E2%80%99s-redistricting-process/ (newsletter "for Republicans, by Republicans," noting that "Iowa's redistricting process is deemed to be one of the fairest and most nonpartisan processes in the country since a non-partisan state agency, the Legislative Services Agency (LSA), is responsible for drafting the three possible redistricting plans. …Even though the maps will be drawn by the non-partisan LSA, that doesn't mean that politics will not

It is pertinent to stress that a plan of this sort is by any measure *more* democratic, with *greater* political accountability, than redistricting controlled entirely by a single party, as is currently the case in Wisconsin. In the 2012 election approximately 51% of Wisconsin voters cast their ballots for Democratic Party Assembly candidates; in the 2014 election the figure was approximately 48%. Slip Op. 75. Yet whether these voters represent a slight majority of the electorate (as in 2012) or a minority just short of 50% (as in 2014), these voters currently have *no voice at all* in the redistricting system. A process guided by a nonpartisan or bipartisan commission provides a vehicle for *appropriate* politics, with input and influence across the entire electorate, rather than single-party domination that is the antithesis of democracy.

As the experience of Iowa and other states demonstrates,[11] options of this kind retain democratic accountability but at the same time prevent *undue* partisanship and inspire public confidence that the redistricting process is fair and non-discriminatory. As the Supreme Court has noted:

> Independent redistricting commissions, it is true, "have not eliminated the inevitable partisan suspicions associated with political line-drawing." But "they have succeeded to a great degree [in limiting the conflict of interest implicit in legislative control over redistricting]." They thus impede legislators from choosing their voters instead of facilitating the voters' choice of their representatives.

Arizona State Legislature v. Arizona Independent Redistricting Commission, 576 U.S. ___, ___, 135 S. Ct. 2652, 2676 (2015) (citation omitted).

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play a role in the redistricting process. The first thing that each member of the legislature will do is look to see how each proposal will affect his or her district. …").

[11] Altogether 17 states use independent or advisory commissions constituted on a nonpartisan or bipartisan basis. See notes 2 & 3, supra. Most have done so for many years, without significant difficulty. See generally Ballotpedia, supra note 3; Levitt, supra note 3.

V. If the Legislature Chooses Not to Prepare a Map or Produces an Unacceptable New Map, This Court Should Establish a Process For Drawing an Appropriate New Map in Time for the 2018 Election.

If the legislature produces a new map, whether by one of the suggested neutral procedures or in another way, this Court should afford plaintiffs and other interested parties an opportunity to raise objections and, if warranted, to present alternative maps. Thereafter, the Court would rule on whether the legislature's proposed map suffices to cure the constitutional defects and if not, would establish a process for drawing an appropriate new map in time for the 2018 election.

CONCLUSION

For the foregoing reasons, the League respectfully urges this Court to immediately enjoin further use of the current map and to invite the Wisconsin legislature to promptly submit a new map free from unlawfully discriminatory partisan gerrymandering; the Court should then entertain objections to the proposed new map. If no new map is submitted within a reasonable time, as determined by the Court, or if the map submitted fails to fully remedy the constitutional violations, the Court should establish a procedure for preparing a new map, and in any case should proceed to approve a lawful map in time for the 2018 general election.

Respectfully submitted this 5th day of January, 2017.

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