IN THE SUPREME COURT OF WISCONSIN

No. 2023AP1399

REBECCA CLARKE, RUBEN ANTHONY, TERRY DAWSON, DANA GLASSTEIN, ANN GROVES-LLOYD, CARL HUJET, JERRY IVERSON, TIA JOHNSON, ANGIE KIRST, SELIKA LAWTON, FABIAN MALDONADO, ANNEMARIE MCCLELLAN, JAMES MCNETT, BRITTANY MURIELLO, ELA JOOSTEN (PARI) SCHILS, NATHANIEL SLACK, MARY SMITH-JOHNSON, DENISE (DEE) SWEET, AND GABRIELLE YOUNG,

Petitioners,

GOVERNOR TONY EVERS, IN HIS OFFICIAL CAPACITY; NATHAN ATKINSON, STEPHEN JOSEPH WRIGHT, GARY KRENZ, SARAH J. HAMILTON, JEAN-LUC THIFFEAULT, SOMESH JHA, JOANNE KANE, AND LEAH DUDLEY,

Intervenors-Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION; DON MILLIS, ROBERT F. SPINDELL, JR., MARK L. THOMSEN, ANN S. JACOBS, MARGE BOSTELMANN, AND JOSEPH J. CZARNEZKI, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN ELECTIONS COMMISSION; MEAGAN WOLFE, IN HER OFFICIAL CAPACITY AS THE ADMINISTRATOR OF THE WISCONSIN ELECTIONS COMMISSION; SENATOR ANDRÉ JACQUE, SENATOR TIM CARPENTER, SENATOR ROB HUTTON, SENATOR CHRIS LARSON, SENATOR DEVIN LEMAHIEU, SENATOR STEPHEN L. NASS, SENATOR JOHN JAGLER, SENATOR MARK SPREITZER, SENATOR HOWARD L. MARKLEIN, SENATOR RACHAEL CABRAL-GUEVARA, SENATOR VAN H. WANGGAARD, SENATOR JESSE L. JAMES, SENATOR ROMAINE ROBERT QUINN, SENATOR DIANNE H. HESSELBEIN, SENATOR CORY TOMCZYK, SENATOR JEFF SMITH, AND SENATOR CHRIS KAPENGA, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN SENATE,

Respondents,

WISCONSIN LEGISLATURE; BILLIE JOHNSON, CHRIS GOEBEL, ED PERKINS, ERIC O'KEEFE, JOE SANFELLIPO, TERRY MOULTON, ROBERT JENSEN, RON ZAHN, RUTH ELMER, AND RUTH STRECK,

Intervenors-Respondents.

PETITIONERS' SUPPLEMENTAL APPENDIX

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CERTIFICATION BY ATTORNEY

I hereby certify that filed with this brief is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Electronically signed by Daniel S. Lenz
Daniel S. Lenz

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

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

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

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

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PLAINTIFF JUDY ROBSON'S MOTION FOR RELIEF FROM JUDGMENT
Rule 60(b)(5) and (6), Fed. R. Civ. P.

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. SCHOBER, 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.[1]

Plaintiff Judy Robson ("Robson"), by her counsel, Godfrey & Kahn, S.C., moves the Court for the entry of an order pursuant to Rule 60(b)(5) or (6) of the Federal Rules of Civil

[1] 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.

Procedure providing relief from this Court's May 30, 2002 judgment (as amended) and entering a succeeding judgment that ensures that the vote of every citizen of the state is equally weighted—consistent with the Fifth and Fourteenth Amendments, the state constitution, and the constitutional mandate of "one person, one vote."

The grounds for this motion are more fully set forth in plaintiff Robson's supporting brief filed along with this motion. Robson also states:

GROUNDS

1. On May 30, 2002, in the absence of a valid state statutory enactment, this Court entered an order and judgment establishing the legislative district boundaries in Wisconsin. *Baumgart v. Wendelberger*, 2002 WL 34127471 (E.D. Wis. 2002) (*per curiam*) (three-judge panel), *amended by* 2002 WL 34127473 (E.D. Wis. July 11, 2002).

2. The 2002 legislative general elections, every subsequent biennial legislative election, and other legislative elections—including the November 2, 2010 election—have been conducted under the district boundaries established by this Court in 2002. At no time since then has the legislature considered or enacted a legislative districting plan to replace those boundaries.

3. The next regular state legislative general election will take place on November 6, 2012, and the complementary partisan primary is scheduled for September 11, 2012.[2] Based on this primary date, candidates for state legislative office can begin circulating nomination papers on June 1, 2012 and must submit them by July 10, 2012.

4. The Government Accountability Board (the agency responsible for administering elections in Wisconsin and the institutional successor to the Elections Board) must notify the

[2] To comply with the Military and Overseas Election Act, the September 11, 2012 primary may be moved to an earlier date. *See* 42 U.S.C. § 1973ff. Senate Bill 116 and Assembly Bill 161, currently pending before the Wisconsin legislature, would move the partisan primary from the second Tuesday in September to the second Tuesday in August.

county clerks by May 8, 2012 of the offices that electors of each county will fill in the 2012 primary and general elections.[3]

5. A plaintiff in the 2002 litigation, Judy Robson, seeks relief in the form of an order setting aside the 2002 order and judgment pursuant to Rule 60(b)(5) or (6), Fed. R. Civ. P., and entering a succeeding judgment that ensures that the vote of every citizen in the state is equally weighted consistent with the federal and state constitutions and the constitutional mandate of "one person, one vote."

6. Rule 60(b)(5) states that "the court may relieve a party ... from [an] order" if "applying [the judgment] prospectively is no longer equitable." Rule 60(b)(6) states that the court also may grant relief from an order for "any other reason that justifies relief" from the operation of the judgment. The remedy is unusual, but the passage of time itself does not preclude the motion. *See* Rule 60(c)(1).

7. The legislative boundaries established by this Court in its May 2002 order and judgment were based upon the 2000 census. Since then, the federal government has conducted a 2010 census that reflects the state's 2010 population by ward, city, and county and state legislative districts.

8. Based on the population data from the Bureau of the Census, U.S. Department of Commerce ("Census Bureau"), released on March 9, 2011, population growth and population shifts during the last decade have resulted in substantial population inequality among Wisconsin's 33 existing state Senate districts, and 99 existing state Assembly districts.

[3] If the partisan primary is moved to August (or before), all other dates, including nomination paper circulation and filing, and the G.A.B.'s deadline to notify clerks, will also be moved to earlier dates.

9. The legislative districts established by the Court almost 10 years ago, based on the 2000 census, are by definition, malapportioned. They are unconstitutional because their use to elect state legislators will violate the constitutional rights of state citizens.

10. The malapportionment of legislative districts dilutes the voting rights of Wisconsin's voters who reside in relatively over-populated districts: the weight or value of each voter in relatively over-populated district is, by definition, less than that of any voter residing in a relatively under-populated district.

11. No legislation has been introduced—let alone debated, adopted and signed into law—to establish constitutionally-apportioned legislative districts.

12. Using the 2002 state legislative districts prospectively for the 2012 legislative elections, premised upon now dated census information and a set of circumstances no longer valid, will lead to inequitable results for Wisconsin voters, depriving them of their constitutional rights.

RELIEF REQUESTED

WHEREFORE, plaintiff Judy Robson respectfully requests that the Court enter an Order setting aside the May 30, 2002, order and judgment and providing such other and further relief as is just and equitable to ensure that the 2012 state legislative elections take place in districts that meet the requirement of "one person, one vote."

Dated: June 9, 2011.

GODFREY & KAHN, S.C.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

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

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

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

(caption continued on next page)

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

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. SCHOBER, 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.[1]

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

[1] 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.

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*").[2] One of the original plaintiffs, Judy Robson, now asks 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."

ARGUMENT

Under Rule 60(b)(5) or (6), this Court should set aside its prior judgment and, in the absence of a valid statutory enactment, establish new legislative districts for the 2012 elections. In May 2002, this Court concluded that the then-existing state legislative districts were unconstitutional and established new legislative districts. Its order divided the state into districts based on the 2000 Census data with each state senate district containing a population of approximately 162,536 residents and each assembly district containing a population of approximately 54,179 residents. *See Baumgart*, 2002 WL 34127471. The state legislature has never altered, supplemented or supplanted that order.

Given the population growth and population shifts enumerated in the 2010 Census, that May 2002 judgment, as amended, is no longer valid. The 2010 census reflects significant population growth and population shifts during the last decade among Wisconsin's 33 Senate districts and 99 Assembly districts. The result: an unconstitutional malapportionment of legislative districts. The voting strength of Wisconsin residents who reside in relatively

[2] This Court amended the order in July 2002 for technical reasons.

over-populated districts is diluted. The weight or value of any and every voter in relatively overpopulated district is, by definition, less than that of any and every voter in a relatively under-populated district.

Whether legislative district boundaries are court-ordered or legislatively-enacted, changed circumstances—notably, population growth and population shifts measured in the census—create new conditions that render the decade-old legislative districts no longer constitutional. The district boundaries must be redrawn. In *Jackson v. De Soto Parish Sch. Bd.*, 585 F.2d 726, 728-29 (5th Cir. 1978), the U.S. Court of Appeals explicitly acknowledged that "reapportionment plans … are not immutable" and that "[t]he judicial process must be flexible enough to allow challenges to schemes that have, because of changing population patterns …[,] become unconstitutional in their operation." *Id.* at 728. The Sixth Circuit has similarly reasoned that federal courts have great latitude in fashioning remedies for constitutional violations in reapportionment cases. *See Rader v. Cliburn*, 476 F.2d 182, 184 (6th Cir. 1973).

When a court issues a judgment, that court can maintain or reassert jurisdiction for the same issues and same parties in subsequent stages of litigation. *See King v. State Bd. of Elections*, 979 F. Supp. 582, 588-89 (N.D. Ill.) (*citing Johnson v. Burken*, 930 F.2d 1202, 1207 (7th Cir. 1991) (other citations omitted)), *vacated*, 519 U.S. 978 (1996). Where the prior judgment is no longer equitable based on changed circumstances, the court has the authority to set aside its earlier judgment and to issue a subsequent, equitable judgment based upon the new circumstances. *See* Fed. R. Civ. P. 60(b); *King v. State Bd. of Elections*, 979 F. Supp. at 589. Of course, setting aside a judgment is extraordinary, and any party seeking such a remedy must provide clear and convincing reasons. *Id.*; *see Williams v. Hatcher*, 890 F.2d 993, 995 (7th Cir. 1989) (rule requires "exceptional circumstances").

Extraordinary relief is warranted here. The Wisconsin state legislature—to date—has failed to even introduce legislation to redraw the legislative district boundaries. Indeed, there has not been a legislatively-enacted districting plan for the legislature in this state for at least 30 years.[3] All of the district boundaries have been judicially-mandated.

An order setting aside this Court's May 2002 judgment would promote judicial economy and continuity. Should this Court conclude it should or must draw the new boundaries, it will need to do what it has done before: take evidence, evaluate competing proposals, and establish the new legislative boundaries—all with enough time to allow the Government Accountability Board, as well as potential candidates, to comply with statutory deadlines leading up to the regularly scheduled September 11, 2012 primary and November 6, 2012 general elections.

To be sure, redistricting litigation is complex. This Court spent a significant amount of time digesting evidence and theories to develop constitutionally-permissible and fair legislative districts ten years ago. This Court's familiarity with the redistricting process will result in judicial economy. In addition, this Court's approach to the 2002 redistricting litigation was methodical and reasoned. (The state legislature never questioned it by adopting or even trying to adopt a legislative districting plan.) Another court may or may not choose to follow the same approach.

Moreover, this is not an attempt to re-litigate issues decided ten years ago. The Court's decision then was not appealed. The voters, elected officials and candidates of this state have, by silence if nothing else, not expressed dissatisfaction with it. But the constitutional facts have changed. The 2010 census changed them, rendering unconstitutional what was in 2002 demonstrably constitutional, and it is this "change in the conditions that makes continued

[3] *Prosser v. Elections Board*, 793 F. Supp. 859 (W.D. Wis. 1992); *Wisconsin State AFL-CIO v. Elections Board*, 543 F. Supp. 630 (E.D. Wis. 1982); and *Republican Party of Wisconsin v. Elections Board*, 585 F. Supp. 603 (E.D. Wis. 1984).

enforcement [of the prior order and judgment] inequitable," requiring the grant of the motion. *De Filippis v. United States*, 567 F.2d 341, 344 (7th Cir. 1977).

The plaintiff's Rule 60(b) motion has been filed neither too late nor too soon. The rule itself notes that the motion must be filed within a "reasonable time." Only motions under the first three subsections of the rule, none applicable here, have a time limit of one year after the entry of the judgment or order at issue. Here, the motion could not have been brought at all before the release of the 2010 census data, which occurred on March 9, 2011. Nor is the motion premature.

More than ten years ago, on February 1, 2001, voters filed suit in this Court seeking a declaratory judgment that the apportionment plan for Congressional districts (legislatively enacted in 1992) was unconstitutional. They asked for an injunction barring elections under that plan "and, in the absence of subsequent action by state legislators, the institution of a judicially-crafted redistricting plan." *Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 858 (E.D. Wis. 2001) (three-judge panel). Even though the state legislature then "had not yet attempted to create a constitutional apportionment plan," the Court found that the "complaint as filed does present a justiciable case or controversy." *Id*. at 859. "[C]hallenges to districting laws may be brought immediately upon release of official data showing district imbalance...," *id*. at 860, because existing legislative boundaries become "'instantly unconstitutional.'" *Id*. (citation omitted).

This Court, with Judge Easterbrook dissenting, fully discussed the concepts of standing, ripeness and jurisdiction. It noted the partisan political division in the state legislature, a division that does not exist today, and concluded that it was "irrelevant for standing purposes that the harm may not develop and that the plaintiff may not [ultimately] be entitled to relief." *Id*. at 862.

Accordingly, the Court declined to dismiss the case—filed, notably, more than four months *before* this motion in the analogous time period—or apply any abstention doctrine.

> Boiled down to the bare essentials, there is a case or controversy in this case because Wisconsin's current apportionment law is unconstitutional.... The alleged harm is not hypothetical. While injury is by no means certain, the plaintiffs' fear of injury is realistic.

Id. at 866.

This Court nonetheless, as a matter of comity, stayed the proceedings for several months "until the appropriate state bodies have attempted—and failed—to do so on their own." *Id*. at 867. They did attempt, and they did fail. *See generally*, *Baumgart*. This motion is in the same procedural posture as the 2001 complaint, and the plaintiff seeks the same relief. Following the precedent in *Baumgart*, the Court should reassert jurisdiction and, if it deems necessary, stay the matter until a date certain, allowing the state legislature the opportunity to exercise its responsibility. However, as this Court did 10 years ago, it should retain jurisdiction because the state may fail to meet its obligation to draw constitutionally-apportioned legislative districts within a time period that allows the Government Accountability Board, potential candidates and Wisconsin citizens sufficient time to prepare for the regularly scheduled 2012 fall elections.

It is also noteworthy that Rule 60(d) does not "limit" in any way the Court's authority to adjudicate an "independent action" to relieve a party from a "judgment, order or proceeding." In the interests of jurisdictional caution, the plaintiff—joined by others—intends to do that, filing in this Court an independent action under 42 U.S.C. § 1983 embodying the essential allegations of this motion. The Court can choose to proceed on either (though not both) or neither (though the decision in *Baumgart* establishes that it has jurisdiction to proceed).

The only way to ensure continuity in Wisconsin's redistricting litigation is for this Court to reassert jurisdiction, even provisionally, over the redistricting process. Due to the inherently political nature of drawing district maps, redistricting litigation is susceptible to forum shopping. This Court's decision to set aside its May 2002 judgment—and preside over subsequent redistricting litigation made necessary by changed circumstances—will prevent it.

CONCLUSION

Following the 2010 Census, there can be no question that Wisconsin's legislative district boundaries must be redrawn to comply with well-established constitutional standards. This Court should set aside its May 2002 order and judgment and preside over the redistricting process to protect constitutional rights and to promote judicial economy and continuity.

Dated: June 9, 2011.

GODFREY & KAHN, S.C.

By: *s/ Rebecca Kathryn Mason*

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

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,

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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,

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and,

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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.

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

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
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s/Maria S. Lazar
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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

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, JUDY ROBSON,
KEVIN W. SHIBILSKI, ROBERT D. WIRCH,
SPENCER BLACK, JAMES E. KREUSER,
GREGORY B. HUBER, each individually
and as members of the Wisconsin State Senate,

Intervenor-Plaintiffs,

v. Case No. 01-C-0121

JERALYN WENDELBERGER, chairperson
of the Wisconsin Elections Board,
and each of its 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 J. KENNEDY,
its executive director,

Defendants,
and

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

Intervenor-Defendants.

JULY 27, 2011

Before EASTERBROOK, *Chief Circuit Judge*, CLEVERT, *Chief District Judge,* and STADTMUELLER, *District Judge*

DECISION AND ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT AND MOTION FOR SUBSTITUTION

PER CURIAM. Judy Robson, one of the Intervenor-Plaintiffs has filed a motion (Docket # 453) pursuant to Fed. R. Civ. P. 60(b)(5) and (6) seeking relief from an earlier order and judgment entered by this court more than nine years ago. The underlying order, issued on May 30, 2002, (Docket # 444) declared the Wisconsin law outlining the state's legislative districts to be unconstitutional and reorganized Wisconsin's assembly and senate districts. The plaintiff's motion argues that the recent 2010 census has resulted in malapportionment of Wisconsin's legislative districts. Putting to the side the issue of whether the plaintiff's motion has any substantive validity, relief under Fed. R. Civ. P. 60(b) is an "extraordinary remedy available only in exceptional circumstances." *Smith v. Widman Trucking & Excavating*, 627 F.2d 792, 796 (7th Cir. 1980). The occurrence of a constitutionally mandated, decennial event is hardly a "special circumstance" warranting reopening the court's earlier judgment. An opposite ruling would only serve to eviscerate the principle of the need for finality with regard to judgments of this, or any court. *Spika v. Lombard*, 763 F.2d 282 (7th Cir. 1985).

Accordingly,

IT IS ORDERED that the plaintiff's motion for relief from judgment, filed pursuant to Fed. R. Civ. P. 60(b)(5) and (6) be and the same is herewith DENIED.

OFFICE OF THE CLERK

Supreme Court of Wisconsin

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November 13, 2018

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You are hereby notified that the Court has entered the following order:

No. 2017AP2278-OA Koschkee v. Evers

Pending before this court are: (1) the motion of proposed intervenors, Peggy Coyne, Mary Bell, Mark W. Taylor, Corey Otis, Marie Stangel, Jane Weidner, and Kristin Voss, to intervene and participate as intervening respondents in this original action, to file a brief in response to the brief filed by the petitioners, and to fully participate in oral argument, or in the alternative, motion for leave to file a non-party brief amicus curiae and to participate in oral argument; and (2) the motions of the Wisconsin Association of School Boards, Inc. and the Wisconsin School Administrators' Alliance, Inc., and the Attorney General and the Wisconsin Department of Justice for leave to file non-party briefs amicus curiae;

The court having considered the motions and responses;

IT IS ORDERED that the motion for intervention is denied;

IT IS FURTHER ORDERED that the motions for leave to file non-party briefs amicus curiae of the Wisconsin Association of School Boards, Inc. and the Wisconsin School Administrators' Alliance, Inc., the Attorney General and the Wisconsin Department of Justice, and Peggy Coyne, Mary Bell, Mark W. Taylor, Corey Otis, Marie Stangel, Jane Weidner, and Kristin Voss are granted. Twenty-two copies of the briefs shall be filed on or before December 3, 2018;

IT IS FURTHER ORDERED that the motion of Peggy Coyne, Mary Bell, Mark W. Taylor, Corey Otis, Marie Stangel, Jane Weidner, and Kristin Voss ("Coyne amici") for leave to participate in oral argument is held in abeyance pending further order of the court. Amici are generally not granted oral argument time in addition to the argument time allotted to the parties. The Coyne amici are directed to ask the parties if they would be willing to cede any oral argument time to the Coyne amici. In the event the parties are unwilling to cede any argument time, the Coyne amici are directed to so inform the court by December 3, 2018.

Sheila T. Reiff
Clerk of Supreme Court

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No. 2021AP1450-OA

IN THE SUPREME COURT OF WISCONSIN

BILLIE JOHNSON, ERIC O'KEEFE, ED PERKINS, AND RONALD ZAHN,

Petitioners,

BLACK LEADERS ORGANIZING FOR COMMUNITIES, VOCES DE LA FRONTERA, LEAGUE OF WOMEN VOTERS OF WISCONSIN, CINDY FALLONA, LAUREN STEPHENSON, REBECCA ALWIN, CONGRESSMAN GLENN GROTHMAN, CONGRESSMAN MIKE GALLAGHER, CONGRESSMAN BRYAN STEIL, CONGRESSMAN TOM TIFFANY, CONGRESSMAN SCOTT FITZGERALD, LISA HUNTER, JACOB ZABEL, JENNIFER OH, JOHN PERSA, GERALDINE SCHERTZ, KATHLEEN QUALHEIM, GARY KRENZ, SARAH J. HAMILTON, STEPHEN JOSEPH WRIGHT, JEAN-LUC THIFFEAULT, AND SOMESH JHA,

Intervenors-Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN, in her official capacity as a member of the Wisconsin Elections Commission, JULIE GLANCEY, in her official capacity as a member of the Wisconsin Elections Commission, ANN JACOBS, in her official capacity as a member of the Wisconsin Elections Commission, DEAN KNUDSON, in his official capacity as a member of the Wisconsin Elections Commission, ROBERT SPINDELL, JR., in his official capacity as a member of the Wisconsin Elections Commission, AND MARK THOMSEN, in his official capacity as a member of the Wisconsin Elections Commission,

Respondents,

THE WISCONSIN LEGISLATURE, GOVERNOR TONY EVERS, in his official capacity, AND JANET BEWLEY SENATE DEMOCRATIC MINORITY LEADER, on behalf of the Senate Democratic Caucus,

Intervenors-Respondents.

PROPOSED JOINT DISCOVERY PLAN

Pursuant to the Court's Order of November 17, 2021, the Parties submit the following Joint Discovery Plan:

1. **Scope and Subjects of Discovery; Completion**.
    a. **Scope.**
        i. Discovery shall be limited to material that is relevant to whether (and to what degree) the Parties' proposed state legislative and congressional apportionment remedial plans comply with the requirements of state and federal law and other parameters set forth in the Court's decision of November 30, 2021.
    b. **Fact Discovery**.
        i. The parties agree that in light of stipulations and the Court's November 30 Order, at this time they do not anticipate that fact discovery is needed beyond the exchange of maps, expert disclosures, and any documents or data that a party intends to rely upon or an expert has relied upon. Noted below, government GIS and Census redistricting data are publicly available on websites maintained by the United States Census Bureau and the Wisconsin Legislative Technology Services Bureau. As indicated below, the Parties stipulate to the authenticity and admissibility of such records.

ii. If any party seeks to take discovery, it shall do so between December 15 and 23, or otherwise by agreement of the parties or leave of court.[1]

c. **Expert Discovery**. The Parties agree that, to the extent the federal and Wisconsin rules are different, expert disclosures, reports, and discovery of communications shall be consistent with Federal Rules of Civil Procedure 26(a)(2)(B), (a)(2)(E), (b)(4), (e), as opposed to the Wisconsin rules which would otherwise be applicable.

d. **Time to Complete Discovery.** Except as stipulated herein and as may be otherwise stipulated, discovery shall be completed by December 23, 2021.

2. **Initial Disclosures.**

a. The Parties agree that by December 8, the Parties shall disclose all individuals other than experts whose testimony the party intends to use at any possible evidentiary hearing contemplated in the Court's November 17, 2021 Order. This disclosure obligation is ongoing.

3. **Expert Disclosures**

a. Timing.

i. Initial expert disclosures shall be made on December 15, 2021.

ii. All Parties agree that any Party may submit an expert report as an attachment to the Responsive

[1] The Parties do not waive their rights to object to any discovery sought by any other party.

Briefs due December 30. The scope of any expert report or affidavit submitted with the Responsive Brief must be limited to rebutting initial briefs, maps, and reports.

iii. All Parties agree that any Party may submit an expert report as an attachment to the Reply Briefs due January 4. The scope of any expert report or affidavit submitted with the Reply Brief must be limited to rebutting responsive briefs and reports.

iv. The Parties may disclose additional experts in connection with the Parties' Responsive and Reply briefs.

b. Reports.

i. Expert reports or affidavits shall contain all components specified in Fed. R. Civ. P. 26(a)(2)(B), including compensation and work history, as well as identification of facts, data, and assumptions relied upon, and a list of materials relied upon.

ii. The Parties recognize that the Court previously ordered that expert reports or affidavits shall "strive for brevity and shall contain an executive summary not to exceed 1,100 words."

iii. Parties and experts have a duty to supplement per Fed. R. Civ. P. 26(a)(2)(E) and (e).

c. Documents and Supporting Materials.

i. No later than the day following the disclosure of any expert report or affidavit, sponsoring Parties

must make available facts or data considered by the expert witness in forming his or her opinion otherwise not disclosed and available in the expert reports. Without limitation, this disclosure shall include any raw data (that is not otherwise clearly identified and publicly available), any modified data, r-files, statistical analysis, formulas, other backup sufficient to replicate analysis, inaccessible articles or books, and similar materials relied upon. The Parties agree to make good faith efforts to make such information available the same day as the disclosure of the expert report or affidavit.

d. Depositions.
    i. The parties agree there will be no expert depositions.

4. **Production of Maps.**
    a. Proposed maps shall be disclosed in the following formats: CSV, Shapefile, and PDF.
    b. Each CSV file must contain two fields: one that identifies all census blocks in the state, and another that identifies the district to which each census block has been assigned. File compression software shall not be used.
    c. Parties shall exchange proposed maps with the expert disclosures on December 15, 2021.

5. **Production of Other Documents; Stipulations.**

a. Petitioners, the Legislature, the BLOC and Hunter Intervenor-Petitioners, the Congressmen, the Governor, the Citizen Mathematicians and Scientists, the Wisconsin Elections Commission Respondents, and Senator Bewley stipulate to the authenticity and admissibility of the 2020 Census Redistricting Data available at https://legis.wisconsin.gov/ltsb/gis/data/ and listed under the subheadings "U.S. DOJ Summarized Fields" and "2020 TIGER Geography & P.L. 94-171 Redistricting Data as U.S. DOJ Summarized Fields."

b. Petitioners, the Legislature, the BLOC and Hunter Intervenor-Petitioners, the Congressmen, the Governor, the Citizen Mathematicians and Scientists, the Wisconsin Elections Commission Respondents, and Senator Bewley stipulate to the authenticity and admissibility of the relevant portions of the legislative record (including Legislative Reference Bureau and Legislative Council materials) contained on the Legislature's website for the following bills and resolutions:

i. 2021 Wisconsin Senate Bill 621 (available at https://docs.legis.wisconsin.gov/2021/proposals/reg/sen/bill/sb621 and referenced legislative journal entries).

ii. 2021 Wisconsin Senate Bill 622 (available at https://docs.legis.wisconsin.gov/2021/proposals/reg/

sen/bill/sb622 and referenced legislative journal entries).

iii. 2021 Wisconsin Assembly Bill 624 (available at https://docs.legis.wisconsin.gov/2021/proposals/ab624 and referenced legislative journal entries).

iv. 2021 Wisconsin Assembly Bill 625 (available at https://docs.legis.wisconsin.gov/2021/proposals/reg/asm/bill/ab625 and referenced legislative journal entries).

v. 2021 Senate Joint Resolution 65 (available at https://docs.legis.wisconsin.gov/2021/proposals/reg/sen/joint_resolution/sjr65 and reference legislative journal entries).

c. The Legislature created a website relating to redistricting that, among other things, allowed the public to submit proposed maps between September 1, 2021 through October 15, 2021. This website used the domains https://drawyourdistrict.legis.wisconsin.gov and https://redistricting.legis.wisconsin.gov. Petitioners, the Legislature, the Congressmen, the Citizen Mathematicians and Scientists stipulate to the authenticity and admissibility of all materials contained at the domains https://drawyourdistrict.legis.wisconsin.gov and https://redistricting.legis.wisconsin.gov as of the date of this submission.

d. Petitioners, the Legislature, the BLOC and Hunter Intervenor-Petitioners, the Governor, the Congressmen, the Citizen Mathematicians and Scientists, the Wisconsin Elections Commission Respondents, and Senator Bewley stipulate to the authenticity and admissibility of Executive Order #66, which can be accessed through the Legislature's website at https://docs.legis.wisconsin.gov/code/executive_orders/2019_tony_evers/2020-66.pdf.

e. The Citizen Mathematicians and Scientists stipulate to the authenticity and admissibility of the General Election Returns from the Election Data section of the above website (https://legis.wisconsin.gov/ltsb/gis/data/).

f. The Citizen Mathematicians and Scientists stipulate to the authenticity and admissibility of the CVAP (Special Tabulation by Race and Ethnicity) data for the five-year period ending in 2019, available at https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/cvap.2019.html.

g. The Citizen Mathematicians and Scientists stipulate to the authenticity and admissibility of the Shapefiles of American Indian Lands from the Census PL Data, titled AMIN shapefile: tl_2020_55_aiannh20.zip", which is available at https://www2.census.gov/geo/tiger/TIGER2020PL/STATE/55_WISCONSIN/55/, as well as the blockfiles of the same information, which is titled

"BlockAssign_ST55_WI_AIANNH.txt," available at https://www.census.gov/geographies/reference-files/time-series/geo/block-assignment-files.html

h. The Governor, the Wisconsin Elections Commission Respondents, and the Citizen Mathematicians and Scientists stipulate to the authenticity and admissibility of the Primary Election Returns from the Wisconsin Elections Commission, available at https://elections.wi.gov/elections-voting/results-all.

i. The Parties agree to work cooperatively to join all parties where possible to the above-stipulations and to enter additional stipulations. Parties agree to enter such stipulations by January 11, 2022, and shall file those completed and additional stipulations with the Court by January 12, 2022.

j. If the Parties contemplate substantial production of documents, other than those stipulated to above, then all production shall be in a format mutually agreed upon in a separate Electronically Stored Information (ESI) discovery protocol.

6. **Service of Documents**

a. The Parties stipulate service and production of discovery by electronic mail.

b. The Parties stipulate that publicly available government records, including for example the legislative record, need not be re-produced during the discovery phase.

7. **Claims of Privilege and Work Product.**
    a. The Parties agree that any documents in any format that contain privileged information or legal work product (and all copies) shall be immediately returned to the producing party if the documents appear on their face to have been inadvertently produced or if there is notice of the inadvertent production within 10 days after the producing party discovers that the inadvertent production occurred. The Parties agree that the recipient of such inadvertently produced information will not use the information, in any way, in the prosecution of the recipient's case. Further, the Parties agree that the recipient may not assert that the producing Party waived privilege or work product protection based upon the inadvertent production; however, the recipient may challenge the assertion of the privilege and seek a Court order denying such privilege.
8. **Post-Briefing Procedures**. Should the Court decide an evidentiary hearing "on one or more of four consecutive days beginning January 18, 2022" is necessary, the Parties may negotiate additional pretrial disclosure deadlines (*e.g.*, exhibit lists, witness lists, and the like) at a later date. The Parties offer the following comments on potential proceedings:
    a. Should the Court decide an evidentiary hearing "on one or more of four consecutive days beginning January 18, 2022" is necessary, The Legislature proposes that

Parties shall exchange written direct testimony of all fact and expert witnesses no later than January 11, 2022. The expert written direct testimony may be the experts' report(s), but is not required to be the experts' reports given the potential for written direct testimony to streamline the issues. Direct testimony would be filed with the Court no later than January 12, 2022. Absent stipulation by all Parties, witnesses for whom a sponsoring party has submitted direct testimony shall be made available for live cross-examination and re-direct.

b. Should the Court decide an evidentiary hearing "on one or more of four consecutive days beginning January 18, 2022" is necessary, the Citizen Mathematicians and Scientists take no position on whether expert direct testimony should occur live at the hearing or be in the form of written direct testimony. If the Court prefers written direct testimony, however, the Citizen Mathematicians and Scientists submit that, for the sake of judicial economy, each Party's expert reports or affidavits serve as its written expert direct testimony and no additional written direct testimony be permitted. Absent stipulation by all Parties, witnesses for whom a sponsoring party has submitted direct testimony shall be made available for live cross-examination, re-direct, and re-cross.

c. The Petitioners and the Congressmen state that any evidentiary hearing appears to be unnecessary, since the parties have agreed that no fact discovery is needed beyond exchange of maps, expert disclosures, and disclosure of data relied upon by experts.

d. The BLOC and Hunter Intervenor-Petitioners, the Governor, and Senator Bewley agree with the Petitioners and the Congressmen that any evidentiary hearing appears to be unnecessary, since the parties have agreed that no fact discovery is needed beyond exchange of maps, expert disclosures, and disclosure of data relied upon by experts. Should the Court decide an evidentiary hearing "on one or more of four consecutive days beginning January 18, 2022" is necessary," the BLOC and Hunter Intervenor-Petitioners, the Governor, and Senator Bewley propose the expert reports and affidavits submitted to the Court shall serve as the direct testimony for all witnesses, whether expert or otherwise, in this proceeding. Cross-examination of expert witnesses may be unnecessary, but the parties can make expert witnesses available if the court would like oral expert testimony.

e. The Wisconsin Elections Commission Respondents take no position on post-briefing procedures.

Dated December 3, 2021.

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You are hereby notified that the Court has entered the following order:

No. 2021AP1450-OA Johnson v. Wisconsin Elections Commission

Pending before the court is an original action filed by petitioners, Billie Johnson, et al. Briefing is underway and proposed remedial maps were filed on December 15, 2021, in accordance with the terms of this court's November 17, 2021 order and its opinion filed November 30, 2021, Johnson v. Wisconsin Elections Commission, 2021 WI 87. Responses were filed on December 30, 2021.

Together with their response, intervenor-petitioners Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald ("the Congressmen"), filed a motion seeking leave to "submit a modified version of their Proposed Remedial Map for this Court's consideration." The Congressmen's motion states that the Johnson petitioners do not oppose their motion but intervenors-petitioners Governor Tony Evers in his official capacity; Senator Janet Bewley, State Democratic Minority Leader; Citizen Mathematicians and Scientists; Lisa Hunter, et al., and Black Leaders Organizing for Communities, et al., all oppose the motion.

Our order issued November 17, 2021 stated, inter alia that "any party that filed a proposed map and subsequently determines that it merits a correction or modification, may file a motion seeking the court's leave to amend the proposed map. Such motion shall include a description of the amendments, the reasons for them, a proposed amended map, and shall state whether the motion is unopposed by other the parties." Our November 17, 2021 order further advised the parties that the court retained the option of requesting responses from the other parties to such a motion. Accordingly,

IT IS ORDERED that the motion of the intervenor-petitioners Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald seeking leave to "submit a modified version of their Proposed Remedial Map for this Court's consideration" is held in abeyance until further order of the court;

IT IS FURTHER ORDERED that on or before 4:00 p.m. on January 5, 2022, the other parties may file a response to the intervenor-petitioners Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald's motion seeking leave to "submit a modified version of their Proposed Remedial Map for this Court's consideration." The response shall not exceed 10 pages if a monospaced font is used or 2,200 words if a proportional serif font is used, but the parties are encouraged to strive for brevity. The court does not anticipate permitting a reply from the Congressmen and this order does not alter the existing briefing schedule;

IT IS FURTHER ORDERED that all filings in this matter shall be filed as an attachment in pdf format to an email addressed to clerk@wicourts.gov. See Wis. Stat. §§ 809.70, 809.80 and 809.81. A paper original and 10 copies of each filed document must be received by the clerk of this court by 12:00 noon of the business day following submission by email, with the document bearing the following notation on the top of the first page: "This document was previously filed via email."

Sheila T. Reiff
Clerk of Supreme Court

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You are hereby notified that the Court has entered the following order:

No. 2021AP1450-OA Johnson v. Wisconsin Elections Commission

On January 25, 2022, Lisa Hunter, et al. (the "Hunter Intervenors") filed a motion asking the court for leave to provide certain information set forth in the motion in response to questions and statements that arose during argument, and further requesting that "[s]hould this Court require a one-person population range, the Hunter Intervenors respectfully reiterate their request to submit a technical, non-substantive modification to their proposed congressional map." A response to the motion was filed on January 26, 2022, by Congressmen Glenn Grothman, Mike Gallager, Bryan Steil, Tom Tiffany and Scott Fitzgerald (the "Congressmen Intervenors") asking, inter alia, the court to deny the Hunter Intervenors' request for permission to provide information and responses to questions raised at oral argument. The Congressmen Intervenors further request that if the court grants permission to the Hunter Intervenors to submit a modified version of their proposed congressional map, all parties must be granted an opportunity to file modified maps in response to questions raised at oral argument. Therefore,

IT IS ORDERED that the Hunter Intervenors' motion seeking leave to provide the information contained in the filing dated January 25, 2022 is granted and the document is accepted for filing;

IT IS FURTHER ORDERED that the Congressmen Intervenors' response to the motion is accepted for filing;

IT IS FURTHER ORDERED that the other parties may file a letter response to the Hunter Intervenors' motion, not to exceed five pages in length if a monospaced font is used or 1,100 words if a proportional serif font is used, no later than 12:00 p.m. on February 2, 2022;

IT IS FURTHER ORDERED that the Hunter Intervenors' request for leave to provide a modified proposed congressional map is held in abeyance until further order of the court; and

IT IS FURTHER ORDERED that the filings in this matter shall be filed as an attachment in .pdf format to an email addressed to clerk@wicourts.gov. See Wis. Stat. §§ 809.70, 809.80 and 809.81. Seventeen paper copies of each submission must be received by the clerk of this court by 9:00 a.m. of the business day following submission by email, with the paper document bearing the following notation on the top of the first page: "This document was previously filed via email."

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March 7, 2022

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You are hereby notified that the Court has entered the following order:

No. 2021AP1450-OA Johnson v. Wisconsin Elections Commission

On March 3, 2022, this court issued a decision enjoining Wisconsin's existing congressional and legislative districts and ordering new district plans proposed by Wisconsin Governor Tony Evers. Johnson v. Wisconsin Elections Comm'n, 2022 WI 14. On March 4, 2022, the Wisconsin Legislature filed an expedited motion asking this court to stay the court's injunction as it applies to Wisconsin's senate and assembly districts, pending the Wisconsin Legislature's intended appeal to the United States Supreme Court.

IT IS ORDERED that any party that wishes to file a response to the Wisconsin Legislature's expedited motion for a stay pending appeal may submit a letter brief no later than 11:00 a.m. on March 9, 2022;

IT IS FURTHER ORDERED that all filings in this matter shall be filed as an attachment in .pdf format to an email addressed to clerk@wicourts.gov. See Wis. Stat. §§ 809.70, 809.80 and

809.81. A paper original and 10 copies of each filed document must be received by the clerk of this court by 12:00 noon of the business day following submission by email, with the document bearing the following notation on the top of the first page: "This document was previously filed via email"; and

IT IS FURTHER ORDERED that requests for additional briefing or extensions will be viewed with disfavor.

Sheila T. Reiff
Clerk of Supreme Court

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IN THE SUPREME COURT OF WISCONSIN

No. _____

BILLIE JOHNSON, ERIC O'KEEFE, ED PERKINS, AND RONALD ZAHN,

Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN, JULIE GLANCEY, ANN JACOBS, DEAN KNUDSON, ROBERT SPINDELL, AND MARK THOMSEN, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN ELECTIONS COMMISSION,

Respondents.

PETITION TO THE SUPREME COURT OF WISCONSIN TO TAKE JURISDICTION OF AN ORIGINAL ACTION

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ISSUE PRESENTED

1. Whether the Petitioners, who, based on the 2020 Census results, live in malapportioned districts, are entitled to:

(a) a declaration that the existing apportionment maps as set forth in Wis. Stat. §§ 3.11-3.18 (for congressional districts) and §§ 4.01-4.99 (for state assembly districts) and § 4.009 (for state senate districts) violate the one person one vote principle, contained in art. IV of the Wisconsin Constitution;

(b) an injunction prohibiting the Respondents from administering any election for Congressional, State Senate, or State Assembly seats until a new apportionment plan is adopted and in place that satisfies the requirements of art. IV of the Wisconsin Constitution; and

(c) in the absence of an amended state law with a lawful apportionment plan, establishment of a judicial plan of apportionment to meet the requirements of art. IV of the Wisconsin Constitution.

INTRODUCTION

1. The results of the 2020 census make clear what everyone knew would occur. Based on population increases and decreases in different geographic areas, the existing apportionment plans for Wisconsin's Congressional, State Senate and State Assembly seats no longer meet the Wisconsin constitutional requirements summarized in the principle of one person, one vote.

2. In *State ex rel. Reynolds v. Zimmerman,* 22 Wis. 2d 544, 564, 126 N.W.2d 551 (1964), this Court said, with respect to redistricting cases, that such cases involve a denial of voting rights under art. IV of the Wisconsin Constitution (as well as the equal protection clause of the U.S. Constitution).[1]

3. The Petitioners, among many others, now live in state and/or congressional voting districts that have many more people than live in other districts and, as a result, have a diluted vote relative to the votes of others who live in less populated districts.

[1] The Petitioners do not raise a claim under the federal constitution in this proceeding.

4. That situation requires that a new apportionment plan with new maps be adopted to replace the election districts currently set forth in Wis. Stat. §§ 3.11-3.18 (for the congressional districts) and §§ 4.01-4.99 (for the state assembly districts) and § 4.009 (for the state senate districts).

5. A group of Wisconsin voters have already filed an action in federal court, *see Hunter v. Bostelmann*, No. 21-cv-512 (W.D. Wis. Aug. 13, 2021), seeking similar relief to the relief being sought herein.

6. But the U.S. Constitution directly endows the States with the primary duty to redraw their congressional districts. U.S. Const. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof[.]")

7. And, although the federal and state courts have concurrent jurisdiction to decide redistricting matters, the U.S. Supreme Court has made it clear that the states' role is primary. *Growe v. Emison,* 507 U.S. 25, 34 (1993).

8. This Court said the same in *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶5, 249 Wis. 2d 706, 639 N.W.2d 537: "It is an established constitutional principle in our federal system that congressional reapportionment and state legislative redistricting are primarily state, not federal, prerogatives."

9. Given that the state's role is primary, this Court previously noted that if the Legislature is unable to timely enact a new redistricting map, this Court's "participation in the resolution of these issues would ordinarily be highly appropriate." *Jensen*, 249 Wis. 2d 706, ¶4.

10. Further, this Court said that in our State, "[t]he people . . . have a strong interest in a redistricting map drawn by an institution of state government—ideally and most properly, the legislature, secondarily, this court." *Id.* at ¶17.

11. Thus, redistricting is a state matter both with respect to the legislative function and the judicial function.

12. The Petitioners should not be required to resort to a federal court, and only a federal court, to protect their state constitutional rights. In *Reynolds*, this Court said that

"***there is no reason for Wisconsin citizens to have to rely upon the federal courts for the indirect protection of their state constitutional rights.***" 22 Wis. 2d at 564 (emphasis added).

PARTIES

13. Petitioners are Wisconsin voters who live in malapportioned districts. Each of the districts the parties live in fail the one person, one vote constitutional standard, under which population equality across districts ensures that each Wisconsinite's vote counts equally.

14. Petitioner Billie Johnson resides at 2313 Ravenswood Road, Madison, Wisconsin 53711, in the Second Congressional District, State Assembly District 78, and State Senate District 26. Because of the latest reapportionment count, Petitioner Johnson's vote is unconstitutionally diluted, counting less than if he lived in a different district.

15. Petitioner Eric O'Keefe resides at 5367 County Road C, Spring Green, Wisconsin 53588, in the Second Congressional District, State Assembly District 51, and State Senate District 17.

Because of the latest reapportionment count, Petitioner O'Keefe's vote is unconstitutionally diluted, counting less than if he lived in a different district.

16. Petitioner Ed Perkins resides at 4486 N. Whitehawk Drive, Grand Chute, Wisconsin 54913, in the Eighth Congressional District, State Assembly District 56, and State Senate District 19. Because of the latest reapportionment count, Petitioner Perkins' vote is unconstitutionally diluted, counting less than if he lived in a different district.

17. Petitioner Ronald Zahn resides at 287 Royal Saint Pats Drive, Wrightstown, Wisconsin 54180, in the Eighth Congressional District, State Assembly District 2, and State Senate District 1. Because of the latest reapportionment count, Petitioner Zahn's vote is unconstitutionally diluted, counting less than if he lived in a different district.

18. Respondent Wisconsin Elections Commission ("WEC") is a governmental agency created under Wis. Stat. § 5.05 and charged with the responsibility for the administration of Chapters 5 and 6 of the Wisconsin Statutes and other laws relating to

elections and election campaigns, other than laws relating to campaign financing. WEC has its offices and principal place of business at 212 E. Washington Avenue, 3rd Floor, Madison, Wisconsin 53703.

19. Respondents Marge Bostelmann, Julie Glancey, Ann Jacobs, Dean Knudson, Robert Spindell, and Mark Thomsen are commissioners of WEC. The WEC Commissioners are sued solely in their official capacities.

STATEMENT OF FACTS

20. There must be population equality across districts under the command of the "one person, one vote" principle. As this Court said in *Reynolds*, "sec. 3, art. IV, Wis. Const., contains a precise standard of apportionment-the legislature shall apportion districts according to the number of inhabitants." 22 Wis. 2d at 564.

21. This Court further acknowledged, however, that "a mathematical equality of population in each senate and assembly district is impossible to achieve, given the requirement that the boundaries of local political units must be considered in the

execution of the standard of per capita equality of representation." *Id.* at 564.

22. This comports generally with the federal standard for population equality in that states must draw congressional districts with populations as close to perfect equality as possible, *Evenwel v. Abbott*, ___ U.S. ___, 136 S. Ct. 1120, 1124 (2016), while the federal standard for state legislative districts is more lenient.

23. For example, in 2011, when the Legislature drew the existing maps for congressional districts it "apportion[ed] the 2010 census population of the state of Wisconsin perfectly." *Baldus v. Members of Wisconsin Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 853 (E.D. Wis. 2012).

24. The report from the Legislative Reference Bureau on the proposed bill adopting the existing 2011 congressional maps stated that the population in Congressional Districts 3, 4, 5, 6, 7, and 8 was 710,873 and in Congressional Districts 1 and 2 was 710,874—a difference of one voter.

25. Indeed, except for a dispute regarding whether Hispanics in the Milwaukee area were entitled to one majority

Hispanic assembly district or two minority influenced assembly districts (which dispute was ultimately resolved), the existing congressional, state senate and state assembly maps now contained in Wis. Stat. §§ 3.11-3.18 (for the congressional districts) and §§ 4.01-4.99 (for the state assembly districts) and § 4.009 (for the state senate districts), were held to meet all of the traditional redistricting criteria including equality of population. *Baldus*, 849 F. Supp. 2d 840.

26. On August 12, 2021 the United States Census Bureau delivered apportionment counts to the President based upon the 2020 census.

27. From 2010 to 2020, the population of Wisconsin increased from 5,686,986 to 5,893,718.

28. Because there are eight Wisconsin congressional districts, the ideal population of each district is 736,715.

29. However, the apportionment counts establish the following with respect to the populations now contained in each of the eight Wisconsin congressional districts:

1st Congressional District – 727,452

2nd Congressional District – 789,393

3rd Congressional District – 733,584

4th Congressional District – 695,395

5th Congressional District – 735,571

6th Congressional District – 727,774

7th Congressional District – 732,582

8th Congressional District – 751,967

30. As a result, there is no longer the required level of equality between the populations in the eight Wisconsin congressional districts needed to meet the constitutional requirement of one person, one vote. The 2nd and 8th Congressional Districts, where the Petitioners reside, are overpopulated.

31. The data for state legislative redistricting similarly shows that new maps for the state legislative seats are necessary. Given the total population of Wisconsin, the ideal population for

each of Wisconsin's 99 assembly districts is 59,533, and the ideal population for each of Wisconsin's 33 senate districts is 178,598.

32. Yet the assembly and senate districts in which the Petitioners reside are now malapportioned: Assembly District 78 (Johnson – 67,142); Assembly District 51 (O'Keefe – 56,878); Assembly District 56 (Perkins – 64,544); Assembly District 2 (Zahn – 62,564); Senate District 26 (Johnson – 201,819); Senate District 17 (O'Keefe – 173,532); Senate District 19 (Perkins – 184,473); Senate District 1 (Zahn – 184,304).

33. The Petitioners are entitled to new apportionment maps that continue to meet all of the traditional redistricting criteria including equality of population.

34. This lawsuit is already ripe although the Legislature may yet draw, and the Governor may yet approve, maps that redress the Petitioners' injury. *Cf. generally Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 860 (E.D. Wis. 2001) ("Since it is impossible for legislative districts to remain equipopulous from decade to decade, challenges to districting laws may be brought immediately upon release of official data showing district

imbalance—that is to say, "*before* reapportionment occurs." (quoting Pamela S. Karlan, *The Right to Vote: Some Pessimism about Formalism,* 71 Tex. L.Rev. 1705, 1726 (1993))). Consequently, this Court should accept jurisdiction of this case and stay it until the Legislature adopts a constitutionally adequate apportionment plan.

35. If the State Legislature does not, while this litigation is pending, adopt new maps that are approved by the Governor and which meet all of the traditional redistricting criteria including equality of population, then the Petitioners request that this Court do so, applying the principle of making the least number of changes to the existing maps as are necessary to meet the requirement of equal population and the remaining traditional redistricting criteria. This "least changes" approach is consistent with past practice, *Baumgart v. Wendelberger*, No. 01-C-0121, 02-C-0366, 2002 WL 34127471, *7 (E.D. Wis. May 30, 2002) (unpublished) (court begins with last-enacted maps), *amended*, No. 01-C-0121, 02-C-0366, 2002 WL 34127473 (E.D. Wis. July 11, 2002) (unpublished), and "creates the least perturbation in the political

balance of the state." *Prosser v. Elections Bd.,* 793 F. Supp. 859, 871 (W.D. Wis. 1992).

STATEMENT OF RELIEF SOUGHT

36. This Court should grant this petition, declare that a new constitutional apportionment plan is necessary under the Wisconsin Constitution, enjoin the Respondents from administering any election under the existing maps and then stay this matter until the Legislature has adopted a new apportionment plan and then, if any challenge is made to the new maps, rule on the constitutionality of such plan. Further, if the Legislature does not approve new maps that are approved by the Governor and which meet all of the traditional redistricting criteria including equality of population, then the Petitioners request that this Court do so. In so doing, the Petitioners intend to urge the Court to create districts that are equal in population, contiguous, compact, and that maximize "continuity," moving the fewest number of voters to a district currently represented by someone other than that voter's current representative. The Petitioners intend to

argue that the Court need not and should not take into account projections of the likely political impact of the maps. Such considerations are not required under the United States Constitution, *see Rucho v. Common Cause*, 588 U.S. ___, 139 S. Ct. 2484 (2018). The Petitioners intend to ask that this Court approve maps in time for candidates to timely circulate nomination papers for the Fall 2022 elections.

REASONS WHY THIS COURT SHOULD TAKE JURISDICTION

37. It is an established constitutional principle, recognized by both the U.S. Supreme Court and this Court, that congressional and state legislative redistricting is primarily a state and not a federal prerogative. This Court has a duty under both to exercise its jurisdiction.

38. A violation of the one person, one vote principle is a violation of art. IV of the Wisconsin Constitution.

39. Given that the Petitioners assert rights under the Wisconsin Constitution and that the U.S. Supreme Court and this Court have recognized that reapportionment, including

reapportionment undertaken by courts when the political branches cannot agree, is primarily a state responsibility, there is no reason that the Petitioners should have to rely upon the federal court rather than this Court to protect those rights. To the contrary, they ought to be able to appeal to the courts of the state of Wisconsin.

40. In *Jensen* this Court said that "there is no question" that redistricting actions warrant "this court's original jurisdiction; any reapportionment or redistricting case is, by definition, *publici juris*, implicating the sovereign rights of the people of this state." *Jensen*, 249 Wis.2d 706, ¶17.

41. Further, the time for the resolution of redistricting litigation is so short (especially given the delay in the completion of the 2020 census) that completing both a circuit court action and appellate review within the available period of time would be extremely difficult.

42. It is not yet known precisely when the Legislature will adopt new redistricting maps.

43. The redistricting map after the 1990 census was not completed by the Legislature until April 14, 1992.[2] After the 2000 census, each house approved its own map on March 7, 2002 but neither house acted on the other's proposed map.[3] The redistricting map after the 2010 census was approved by the Legislature on July 19, 2011 (but that date was based on receiving the state level redistricting counts from the Census Bureau on March 10, 2011).[4] The 2011 maps were the quickest done by the Legislature in the last three decades of redistricting and were done in a situation where the state actually received the state level data 21 days before the March 31st deadline and where the Legislature and the Governorship were in the hands of the same party.

44. Here, given the delay in census results and the fact that Wisconsin currently has divided government, it is likely that

[2] Michael Keane, *Redistricting in Wisconsin* 14, Wisconsin Legislative Reference Bureau (Apr. 1, 2016), *available at* https://www.wisdc.org/images/files/pdf_imported/redistricting/redistricting_april2016_leg_ref_bureau.pdf.
[3] *Id.*
[4] *Id.* at 15.

new maps, if they are approved, would not be approved until the end of the year.

45. Under current law, candidates may begin circulating nomination papers for the 2022 fall elections on April 15, 2022, which papers must be filed no later than June 1.[5] Given the probable timeline discussed in the previous paragraphs, litigation regarding the Legislature's proposed maps cannot proceed on the merits until approximately the end of the year when the Legislature has completed proposed maps, but the case must be completed in time for candidates to begin circulating nomination papers by April 15, 2022. That would be an extremely difficult time frame for both a circuit court action and Supreme Court review.

46. While this litigation may require some fact finding, the requirements of hearing and resolving those questions are not beyond the capacities of a referee. In 2012, the trial before a three-judge panel of a challenge to the enacted maps took only about two

[5] *See* Wis. Stat. § 8.15.

days. *Baldus*, 849 F. Supp. 2d at 847. This Court routinely refers matters of comparable length to a referee in attorney discipline matters and can do so here.

CONCLUSION

47. For the foregoing reasons, the Petitioners respectfully request that this Court declare that a new constitutional apportionment plan is necessary under the Wisconsin Constitution, enjoin the Respondents from administering any election under the existing maps, stay this matter until the Legislature has adopted a new apportionment plan, and then rule on the constitutionality of such plan (if there is any challenge thereto). Further, if the Legislature does not approve new maps that are approved by the Governor and which meet all of the traditional redistricting criteria including equality of population, then the Petitioners request that this Court do so, applying the principle of making the least number of changes to the existing maps as are necessary to meet the requirement of equal population and the remaining traditional redistricting criteria and that this

Court do so in time for candidates to timely circulate nomination papers for the Fall 2022 elections.

Dated this 23rd day of August, 2021.

Respectfully Submitted,

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FILED
2021 Nov-23 PM 06:25
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BOBBY SINGLETON, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No.: 2:21-cv-1291-AMM**
	)	
JOHN H. MERRILL, *in his official capacity as Alabama Secretary of State, et al.*,	)	**THREE-JUDGE COURT**
	)	
Defendants.	)	

EVAN MILLIGAN, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No.: 2:21-cv-01530-AMM**
	)	
JOHN H. MERRILL, *in his official capacity as Secretary of State of Alabama, et al.*,	)	**THREE-JUDGE COURT**
	)	
Defendants.	)	

Before MARCUS, Circuit Judge, MANASCO and MOORER, District Judges.

BY THE COURT:

ORDER ON MOTIONS FOR CONSOLIDATION AND JOINDER, AND SCHEDULING ORDER

These cases are two of four recently filed cases currently pending in the Northern District of Alabama that allege that Alabama's electoral maps are racially

gerrymandered in violation of the United States Constitution and/or the Voting Rights Act of 1965: *Singleton v. Merrill*, Case No. 2:21-cv-1291-AMM (challenges the congressional map on constitutional grounds only); *Milligan v. Merrill*, Case No. 2:21-cv-1530-AMM (challenges the congressional map on constitutional and statutory grounds); *Thomas v. Merrill*, Case No. 2:21-cv-1531-AMM (challenges the state legislative map on constitutional grounds only); and *Caster v. Merrill*, Case No. 2:21-cv-1536-AMM (challenges the congressional map on statutory grounds only).

Singleton and *Milligan* are before three-judge panels, 28 U.S.C. § 2284, that include the same three judges; *Thomas* is before a different three-judge panel, 28 U.S.C. § 2284, that includes one judge who also sits on the *Singleton* and *Milligan* panels, and two other judges; and *Caster* is before a single district judge, who also sits on all three panels.

Singleton and *Milligan* are before the court on two motions by the Alabama Secretary of State ("the Secretary") – a motion made in both cases to join or dismiss the *Caster* plaintiffs under Federal Rules of Civil Procedure 12(b)(7) and 19 (*Singleton* Doc. 33, *Milligan* Doc. 21); and a motion made in *Singleton* to consolidate *Singleton*, *Milligan*, and *Caster* under Rule 42 (*Singleton* Doc. 36) – and following a Rule 16 conference held on November 23, 2021 that included all parties in all three cases challenging the congressional map.

For the following reasons, the motion to consolidate is **GRANTED** insofar as *Singleton* and *Milligan* are consolidated for the limited purposes of preliminary injunction discovery and a preliminary injunction hearing; the court **RESERVES RULING** on the motion for further consolidation of *Singleton* and *Milligan*; the motion for consolidation to include *Caster* is **DENIED** at this time; the motion to join or dismiss is **DENIED** at this time; and a scheduling order is **SET**.

I. BACKGROUND

Singleton presents a constitutional challenge to Alabama's 2021 Congressional redistricting plan for its seven seats in the United States House of Representatives ("the Plan"). The *Singleton* plaintiffs allege that the Plan "is racially gerrymandered, in violation of the Equal Protection Clause of the Fourteenth Amendment and Article I, § 2 of the Constitution of the United States." Doc. 15 ¶ 56. The *Singleton* plaintiffs further assert that the drafters of the Plan violated the Fourteenth and Fifteenth Amendments because they allegedly intentionally discriminated against Black voters in Alabama when they drew the Plan's Congressional districts. *Id*. ¶¶ 75-79. The *Singleton* plaintiffs request relief including "a Court-ordered redistricting plan" that "give[s] no deference to the racially gerrymandered [d]istricts." *Id*. at 47. The *Singleton* plaintiffs propose that the court remedy the racial gerrymander by ordering the State to adopt their "Whole County Plan," which does not split any of Alabama's 67 counties into multiple districts and

"increase[s] the number of Districts in which black voters would have an equal opportunity to elect candidates of their choice." *Id*. at 29-30, 46. According to the Secretary, the relief that the *Singleton* plaintiffs request would require Alabama to have no majority-Black Congressional district. Doc. 33 at 6.

On the same day that the *Singleton* plaintiffs filed their amended complaint (November 4, 2021), different plaintiffs ("the *Caster* plaintiffs") filed a lawsuit in the Middle District of Alabama that challenges the Plan under Section Two of the Voting Rights Act of 1965, 52 U.S.C. § 10301 ("Section Two"). The *Caster* plaintiffs allege that the Plan "dilutes the Black vote" in Alabama because the Plan "fail[s] to create two majority-Black [Congressional] districts." *Caster* Doc. 3 ¶¶ 1, 4. The *Caster* plaintiffs request relief including "ordering a congressional redistricting plan that includes two majority-Black congressional districts." *Id*. ¶ 5. The *Caster* action was transferred to the Northern District of Alabama on November 16, 2021. Notably, the *Caster* plaintiffs did not challenge the Plan on constitutional grounds.

Also on November 16, 2021, the *Milligan* plaintiffs filed their lawsuit, challenging the Plan under Section Two and the Fourteenth Amendment. *Milligan* Doc. 1. Like the *Caster* plaintiffs, the *Milligan* plaintiffs request that the court order Alabama to adopt a congressional redistricting plan that includes two majority-minority districts. *Id*. at 53.

On November 18, 2021, the Secretary filed in *Singleton* and *Milligan* motions for joinder of the *Caster* plaintiffs. *Singleton* Doc. 33; *Milligan* Doc. 21. In those motions, the Secretary asserts *inter alia*, that "[t]he relief that the *Singleton* Plaintiffs seek . . . is incompatible with the relief sought by the *Caster* Plaintiffs"; that the failure to join the parties would "creat[e] a substantial risk of subjecting Secretary Merrill to 'inconsistent obligations'"; and that "under Rule 19(a) . . . [the *Caster* plaintiffs] must be joined as parties to this action." *Singleton* Doc. 33 at 5, 16 (quoting Fed. R. Civ. P. 19(a)(1)(B)(ii)); *accord Milligan* Doc. 21. The Secretary filed a separate motion in *Singleton* for consolidation of *Singleton*, *Milligan*, and *Caster*. *Singleton* Doc. 36. In that motion, the Secretary asserts that *Caster* and *Milligan* should be consolidated with this action because they "involve a common question of law or fact." *Id*. at 4.

The *Caster* plaintiffs opposed the motion to consolidate primarily on the ground that the three-judge court convened to hear and decide *Singleton* lacks jurisdiction to hear their action, which does not assert a constitutional attack and therefore does not trigger the provisions for a three-judge court found in 28 U.S.C. § 2284 ("Section 2284"). *Caster* Doc. 38. As to the obvious issue of potentially duplicative discovery efforts in connection with three motions for preliminary injunctive relief, all of which the parties request be heard within the next 60 days,

the Caster plaintiffs stated that they are "willing to coordinate related discovery with the *Singleton* parties." *Id*. at 14 n.4.

The *Milligan* plaintiffs, in turn, assert that this court should consolidate "discovery and, as appropriate, hearings on the preliminary injunction motions" in *Caster*, *Milligan*, and *Singleton*, but that consolidation for other purposes is unwarranted at this time. *Milligan* Doc. 39.

II. CONSOLIDATION

Federal courts "enjoy substantial discretion in deciding whether and to what extent to consolidate cases" under Federal Rule of Civil Procedure 42(a). *Hall v. Hall*, 138 S. Ct. 1118, 1131 (2018). Because the *Milligan* plaintiffs do not object to the consolidation of their case with *Singleton* for the limited purposes of discovery and a hearing relevant to the applications for preliminary injunctive relief in both cases, *Milligan* Docs. 18, 39; because *Singleton* and *Milligan* "involve a common question of law or fact," Fed. R. Civ. P. 42(a); and because consolidating *Singleton* and *Milligan* for the limited purposes of discovery and a hearing in connection with the requests in those cases for preliminary injunctive relief will materially assist the parties and the court in proceeding on the expedited schedule that the parties have proposed, *Singleton* and *Milligan* are hereby **CONSOLIDATED** for the limited purposes of discovery and a hearing relevant to the applications for preliminary injunctive relief in those cases. Because this consolidation is for a limited purpose,

the parties in those cases should file in both cases any pleadings or other papers that are relevant to consolidated proceedings. The court **RESERVES RULING** on the Secretary's request for further consolidation of *Singleton* and *Milligan* for a later time. The Secretary's request for consolidation to include *Caster* is **DENIED** at this time.

III. JOINDER

Federal Rule of Civil Procedure 19(a)(1) provides: "A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a).

The court has reservations about the jurisdictional implications of joinder: the *Caster* plaintiffs intentionally have not asserted a claim that independently supports the jurisdiction of a three-judge panel under Section 2284, so there is a risk that using joinder (or consolidation) to include those plaintiffs in this consolidated action could exceed the limited jurisdiction of this court under that statute. In any event, assuming

arguendo that joinder would be proper, the Secretary has not established that it is required. The Secretary expresses concern about the potential for "complete relief" if the *Caster* plaintiffs are not joined, but the Secretary does not assert that without the *Caster* plaintiffs, the *Singleton* plaintiffs could not obtain the relief they seek. *Singleton* Doc. 33 at 8. The Secretary also does not assert that disposing of the *Singleton* action in the *Caster* plaintiffs' absence would impede the *Caster* plaintiffs' ability to protect their interests. *See id*.

The Secretary's principal argument is that if the *Caster* plaintiffs are not joined in these actions, their absence could subject the Secretary "to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the [*Caster* plaintiffs'] interest" in the subject matter of the litigation (*i.e.*, the Plan). *Id*. at 4-6. According to the Secretary, there is a "substantial risk" that "federal courts [will] order[] him to do incompatible things at the same time: . . . [adopt] a congressional map drawn with two majority-African-American districts" and a "map . . . [with] zero such districts." *Id*. at 6.

But the Secretary has failed to establish that the risk he identified is "substantial." Fed. R. Civ. P. 19(a). Several practical realities mitigate any such risk. *First*, the same three judges are hearing *Singleton* and *Milligan*, and one of those judges is hearing *Caster*. *Second*, as the *Caster* plaintiffs recognize, it is highly unlikely that the court in *Caster* "would issue a substantive ruling [on their

application for preliminary injunctive relief] before the *Singleton* Court [and the *Milligan* court]" issues a ruling on the *Singleton* plaintiffs' application for preliminary injunctive relief. *Caster* Doc. 38 at 12 n.3. *Third*, the highly coordinated schedules on which the applications for preliminary injunctive relief in all three cases (set forth below and in an order contemporaneously entered in *Caster*) will be heard address the Secretary's concern that multiple separate proceedings could result in inconsistent findings of fact or legal rulings. Accordingly, the court finds that the risk of inconsistent judgments is insufficiently substantial to support joinder of the *Caster* plaintiffs, and the Secretary's motion for joinder is **DENIED** at this time.

IV. SCHEDULE FOR PRELIMINARY INJUNCTION PROCEEDINGS

The court has considered the parties' positions with respect to the appropriate schedule of preliminary injunction proceedings, the serious time exigencies surrounding the fair and timely resolution of this litigation, including the provisions of Alabama's election law that set deadlines applicable to the next Congressional election to be conducted using the electoral map that is the subject of this action (Alabama Code Section 17-13-5(a), which effectively establishes a deadline of January 28, 2022 for candidates to qualify with major political parties to participate in the 2022 primary election for the United States House of Representatives and Senate, and Alabama Code Section 17-13-3(a), which establishes the date of that primary election as May 24, 2022), and the extraordinary and urgent time demands

placed on all parties and the court in connection with these proceedings. Accordingly, the following schedule is **ORDERED**:

On or before **DECEMBER 7, 2021**, the parties in *Singleton* and *Milligan* shall file a joint statement of facts that are stipulated for purposes of preliminary injunction proceedings.

The *Milligan* plaintiffs shall file their motion for preliminary injunctive relief on or before **DECEMBER 15, 2021**.

The *Singleton* plaintiffs may (but are not required to) amend, supplement, replace, or otherwise restate their application for preliminary injunctive relief on or before **DECEMBER 15, 2021**.

The Secretary shall file any objections to both the *Singleton* plaintiffs' motion (regardless whether the *Singleton* plaintiffs rest on the application they have already filed, or amend, supplement, replace, or otherwise restate it) and the *Milligan* plaintiffs' motion on or before **DECEMBER 22, 2021**. The previous order of the court that the Secretary shall file any objection to the *Singleton* plaintiffs' motion by November 26, 2021 is **VACATED** solely as to the deadline for that response.

The respective plaintiffs shall file any reply in support of their motions for preliminary injunctive relief within five days of the filing of any objection.

The preliminary injunction discovery process will go forward so that the panel may have at its disposal any competent and probative evidence that the parties can develop before the hearing. To that end:

On or before **DECEMBER 10, 2021**, the parties in *Singleton* and *Milligan* shall exchange any expert reports related to the motion for preliminary injunction.

On or before **DECEMBER 20, 2021**, the parties in *Singleton* and *Milligan* shall exchange any expert rebuttal reports related to the motion for preliminary injunction.

During the Rule 16 conference held on November 23, 2021, all parties agreed not to depose expert witnesses in advance of the preliminary injunction hearing because of the serious time exigencies described above. In the light of that agreement, it is the court's expectation that the parties' expert reports and rebuttal reports will be sufficiently detailed to afford the parties and the court an adequate opportunity to understand the expert's expected testimony in advance of the preliminary injunction hearing.

On or before **DECEMBER 17, 2021**, the parties in *Singleton* and *Milligan* shall complete all discovery related to the motion for preliminary injunction, other than the filing of the expert rebuttal reports.

Any other motions related to the application for preliminary injunctive relief or hearing thereof shall be filed on or before close of business on **DECEMBER 17,**

2021. Any objection to such motions shall be filed within seven days of the filing of such motions, and any reply in support of such motions shall be filed within four days of the filing of such objection.

At or before 4:00 pm Central Standard Time on DECEMBER 23, 2021, the parties in *Singleton* and *Milligan* shall file a joint pretrial report that includes the following:

- A list of witnesses who have been deposed.
- A list of witnesses who will testify live at the preliminary injunction hearing.
- A list of witnesses whose deposition testimony will be presented at the preliminary injunction hearing, with deposition transcripts attached.
- A list of stipulated exhibits, numbered and with the exhibits attached.
- A list of exhibits to which a party has raised an objection, with the grounds for the objection set forth and the exhibit attached.
- Any other stipulations that the parties believe will expedite the preliminary injunction proceedings.

The court **SETS** a hearing on both applications for preliminary injunctive relief on **JANUARY 4, 2022, at 9:00 a.m. Central Standard Time** in Courtroom 8 in the Hugo L. Black United States Courthouse, 1729 5th Avenue North, Birmingham, Alabama. At that hearing, each set of plaintiffs will be afforded the opportunity to make its own oral argument, offer its own proof to support its motion

for a preliminary injunction, examine its own witnesses, and examine (and cross-examine, as appropriate) other witnesses. The *Singleton* plaintiffs shall proceed first and then the *Milligan* plaintiffs, before Judge Manasco hears the plaintiffs' case in *Caster*, following which presentations the Defendants shall present their defense in *Singleton* and *Milligan* before the panel, and then their defense in *Caster* before Judge Manasco. The plaintiffs shall be permitted to present any rebuttal evidence.

Within five days of the completion of the preliminary injunction hearing, the parties in *Singleton* and *Milligan* shall file proposed findings of fact and conclusions of law for the panel's consideration.

DONE and **ORDERED** this 23rd day of November, 2021.

ANNA M. MANASCO
UNITED STATES DISTRICT JUDGE

OFFICE OF THE CLERK

Supreme Court of Wisconsin

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December 11, 2020

To:

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Reserve Judge

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*Address list continued on page 3.

You are hereby notified that the Court has entered the following order:

No. 2020AP2038 Trump v. Biden L.C. #2020CV7092

A notice of appeal and a petition for bypass having been filed by plaintiffs-appellants, Donald J. Trump, et al., and counsel for the plaintiffs-appellants having represented that the defendants-respondents have authorized him to state that they do not object to granting the petition for bypass in this matter;

IT IS ORDERED that the petition for bypass is granted and this court assumes jurisdiction over this action; and

IT IS FURTHER ORDERED that, given the time constraints in this matter, the court will also rely on the parties' filings that have already been made in the circuit court. The parties shall file electronic copies of those filings with the clerk of this court by 4:30 p.m. on Friday, December 11, 2020. Copies of all such filings shall be filed in this court as attachments in pdf format to one or more emails addressed to clerk@wicourts.gov. See Wis. Stat. §§ 809.14, 809.80, and 809.81; and

IT IS FURTHER ORDERED that, on or before 10:00 p.m. on Friday, December 11, 2020, each party may file a supplemental brief in this court, which shall be no longer than 25 pages in length. These supplemental briefs shall be filed by all parties at the same time, and no response briefs shall be permitted. Each supplemental brief shall be filed as an attachment in pdf format to an email addressed to clerk@wicourts.gov. See Wis. Stat. §§ 809.14, 809.80, and 809.81. The parties shall file a paper original and two paper copies of each supplemental brief with the clerk of this court by 10:00 a.m. on Monday, December 14, 2020, with the following notation on the top of the first page: "This document was previously filed via email;" and

IT IS FURTHER ORDERED that the court will not accept any non-party briefs in this matter; and

IT IS FURTHER ORDERED that the clerk of the Milwaukee County Circuit Court shall immediately transmit to the clerk of this court via electronic means the notice of appeal and docketing statement filed by plaintiffs-appellants in Milwaukee County Case No. 2020CV7092; and

IT IS FURTHER ORDERED that the clerk of the Milwaukee County Circuit Court shall electronically transmit the record in Milwaukee County Case No. 2020CV7092 to the clerk of this court by 4:30 p.m. on Friday, December 11, 2020; and

IT IS FURTHER ORDERED that the statement on transcript in this matter is waived; and

IT IS FURTHER ORDERED that, as soon as possible and no later than 5:00 p.m. on December 11, 2020, Court Reporter Kristin Menzia, who recorded the proceedings before the circuit court on December 11, 2020, shall initially file an electronic copy of the transcript of those proceedings, including the oral decision issued by the circuit court, with this court by attaching the transcript as a pdf file attached to an email addressed to clerk@wicourts.gov. The court reporter shall subsequently file the original certified hard copy of the transcript of the December 11, 2020 proceedings with the clerk of this court, who shall ensure that the transcript is added to the circuit court record in this matter. The plaintiffs-appellants-petitioners shall make arrangements for the payment of the transcript; and

IT IS FURTHER ORDERED that the court will hear oral argument in this matter at 12:00 p.m. on Saturday, December 12, 2020. The plaintiffs-appellants-petitioners shall have 45 minutes of oral argument time, of which counsel may reserve no more than 10 minutes for rebuttal. The

defendants-respondents shall also have 45 minutes of oral argument time, which they shall allocate among themselves. By no later than 10:00 p.m. on December 11, 2020, counsel for defendants-respondents shall advise the clerk of this court via an email to clerk@wicourts.gov as to the allocation on which they have agreed. Due to the COVID-19 pandemic, oral arguments before the court will be conducted via videoconferencing. The hearing room will not be open to the public. The court will endeavor to make the proceedings available for viewing on the Wisconsin Eye website. Counsel in this case will receive instructions from the Marshal of this court regarding the procedures for appearing remotely.

Sheila T. Reiff
Clerk of Supreme Court

Address list continued:

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May 5, 2020

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You are hereby notified that the Court has entered the following order:

No. 2020AP828-OA Fabick v. Palm

A petition for leave to commence an original action under Wis. Stat. § (Rule) 809.70, a motion for injunctive relief, and a combined legal memorandum in support of both the petition and the motion having been filed on behalf of petitioners, Jeré Fabick, et al.;

IT IS ORDERED that respondents, Andrea Palm, Julie Willems Van Dijk, and Nicole Safar, in their official capacities as executives of the Wisconsin Department of Health Services; Josh Kaul, in his official capacity as Attorney General of Wisconsin; David Erwin, in his official capacity as Chief of the Wisconsin State Capitol Police; David Mahoney, in his official capacity as Sheriff of Dane County, Wisconsin; Ismael Ozanne, in his official capacity as District Attorney of Dane County, Wisconsin; Eric Severson, in his official capacity as Sheriff of Waukesha County, Wisconsin; Susan Opper, in her official capacity as the District Attorney of Waukesha County, Wisconsin; Kurt Picknell, in his official capacity as Sheriff of Walworth County, Wisconsin; and Zeke Wiedenfeld, in his official capacity as District Attorney of Walworth County, Wisconsin, shall respond to the petition and the motion by 4:00 p.m. on May 8, 2020. Any response shall be

filed as an attachment in pdf format to an email addressed to clerk@wicourts.gov. See Wis. Stat. §§ 809.14, 809.80, and 809.81. The respondents shall also mail or deliver a paper original and one copy of any response to the clerk of this court with the following notation on the top of the first page: "This document was previously filed via email."; and

IT IS FURTHER ORDERED that the petitioners may file a reply in support of the petition and the motion by 4:00 p.m. on May 11, 2020. The filing shall be accomplished in the manner set forth in the preceding paragraph; and

IT IS FURTHER ORDERED that any non-party that wishes to file a brief in support of or in opposition to the petition for leave to commence an original action and the motion for injunction must file a motion for leave of the court to file a non-party brief pursuant to the requirements of Wis. Stat. § (Rule) 809.19(7). Non-parties should also consult this court's Internal Operating Procedure III.B.6.c. concerning the nature of non-parties who may be granted leave to file a non-party brief. A proposed non-party brief must accompany the motion for leave to file it. Any proposed non-party brief shall be limited to the issues of whether this court should grant or deny the petition and the accompanying motion for injunctive relief, and it shall not exceed 20 pages if a monospaced font is used or 4,400 words if a proportional serif font is used. Any motion for leave with the proposed non-party brief attached shall be filed no later than 4:00 p.m. on May 8, 2020. Any submission by a non-party that does not comply with Wis. Stat. § (Rule) 809.19(7) and any proposed non-party brief for which this court does not grant leave will not be considered by the court.

Sheila T. Reiff
Clerk of Supreme Court

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Supreme Court of Wisconsin

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April 21, 2020

To:

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Eric M. McLeod
Lane E. B. Ruhland
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You are hereby notified that the Court has entered the following order:

No. 2020AP765-OA Wisconsin Legislature v. Palm

A petition for leave to commence an original action under Wis. Stat. § (Rule) 809.70, a motion for temporary injunctive relief, and a combined legal memorandum in support of both the petition and the motion having been filed on behalf of petitioner, the Wisconsin Legislature;

IT IS ORDERED that respondents, Andrea Palm, Julie Willems Van Dijk, and Nicole Safar, in their official capacities as executives of the Wisconsin Department of Health Services, shall file a response to the petition and the motion by 4:00 p.m. on April 28, 2020. The response shall be filed as an attachment in pdf format to an email addressed to clerk@wicourts.gov. See Wis. Stat. §§ 809.14, 809.80, and 809.81. The respondents shall also mail or deliver a paper original and one copy of the response to the clerk of this court with the following notation on the top of the first page: "This document was previously filed via email."; and

IT IS FURTHER ORDERED that the petitioner may file a reply in support of the petition and the motion by 4:00 p.m. on April 30, 2020. The filing shall be accomplished in the manner set forth in the preceding paragraph; and

IT IS FURTHER ORDERED that any non-party that wishes to file a brief in support of or in opposition to the petition for leave to commence an original action and the motion for temporary injunction must file a motion for leave of the court to file a non-party brief pursuant to the

requirements of Wis. Stat. § (Rule) 809.19(7). Non-parties should also consult this court's Internal Operating Procedure III.B.6.c. concerning the nature of non-parties who may be granted leave to file a non-party brief. A proposed non-party brief must accompany the motion for leave to file it. Any proposed non-party brief shall be limited to the issues of whether this court should grant or deny the petition and the accompanying motion for temporary injunctive relief, and it shall not exceed 20 pages if a monospaced font is used or 4,400 words if a proportional serif font is used. Any motion for leave with the proposed non-party brief attached shall be filed no later than 4:00 p.m. on Wednesday, April 29, 2020. Any submission by a non-party that does not comply with Wis. Stat. § (Rule) 809.19(7) and any proposed non-party brief for which this court does not grant leave will not be considered by the court.

Sheila T. Reiff
Clerk of Supreme Court

OFFICE OF THE CLERK

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April 6, 2020

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You are hereby notified that the Court has entered the following order:

No. 2020AP608-OA Wisconsin Legislature v. Evers

A petition for leave to commence an original action under Wis. Stat. § (Rule) 809.70, a supporting legal memorandum, and a motion for temporary injunctive relief having been filed on behalf of petitioner, the Wisconsin Legislature;

IT IS ORDERED that respondent, Tony Evers, in his official capacity as Governor of the State of Wisconsin, shall electronically file a response to the petition by 3:30 p.m. on April 6, 2020, via email addressed to clerk@wicourts.gov.

DANIEL KELLY, J., did not participate.

Sheila T. Reiff
Clerk of Supreme Court