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

WILLIAM WHITFORD, ROGER ANCLAM, EMILY BUNTING, MARY LYNNE DONOHUE, HELEN HARRIS, WAYNE JENSEN, WENDY SUE JOHNSON, JANET MITCHELL, ALLISON SEATON, JAMES SEATON, JEROME WALLACE, and DONALD WINTER, Plaintiffs, v. BEVERLY R. GILL, JULIE M. GLANCEY, ANN S. JACOBS, STEVE KING, DON MILLIS, and MARK L. THOMSEN. Defendants.	)	No. 15-cv-421-bbc

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PLAINTIFFS' BRIEF ON REMEDIES

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Dated: December 21, 2016

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INTRODUCTION

In its November 21, 2016 opinion, this Court held that Wisconsin's Act 43 (the "Current Plan") is an unconstitutional partisan gerrymander. The Court concluded that the Current Plan "was intended to burden the representational rights of Democratic voters throughout the decennial period," that the Plan "has had its intended effect," and that this "discriminatory effect is not explained by the political geography of Wisconsin nor is it justified by a legitimate state interest." Trial Op. (Dkt. 166) at 2-3. The Court also instructed the parties to file briefs regarding "the nature and timing of all appropriate remedial measures," including "all evidentiary and legal support they believe is required for the court to make its ruling." *Id*. at 116. This submission responds to the Court's order.

In plaintiffs' view, a set of overarching principles should guide the remedy phase of this litigation. With respect to *timing*, any appeal by defendants of this Court's ruling on liability should be decided by the Supreme Court during its 2017 term, and the Current Plan should be replaced by a proper remedial map in the 2018 and 2020 elections. With respect to *substance*, a proper remedial map is one that treats the major parties reasonably symmetrically over a range of plausible electoral conditions (and that also complies with all other federal and state legal requirements). And with respect to *process*, this Court has a great deal of discretion, which it should exercise so as to ensure that the timing and substance goals are met.

Plaintiffs develop these themes below while addressing a series of more specific issues. *First*, the Court should immediately enjoin any further use of the Current Plan so that defendants may appeal if they wish; at the same time, the Court should begin the remedy phase of this litigation, which should proceed simultaneously with any appeal. *Second*, the Court may, but need not, give Wisconsin's elected branches the chance to enact a proper remedial map. The

elected branches' illegal conduct in passing and defending the Current Plan, as well as their own position that they are barred by the Wisconsin Constitution from redistricting again until the 2020 cycle, are compelling reasons for the Court not to extend them this opportunity. *Third*, if the Court nevertheless permits the elected branches to design a remedy, it should provide them with a firm timetable, clear line-drawing criteria, and concrete disclosure instructions. *Fourth*, if the Court becomes responsible for crafting a remedial map—either in the first instance or because the elected branches are unable or unwilling to act—it would be bound by even stricter line-drawing constraints, but would be free to select from an array of procedural options. And *fifth*, to assist the Court with scheduling, plaintiffs include a calendar with suggested deadlines for all relevant actors and actions.

ARGUMENT

A. The Court Should Immediately Enter an Injunction and Start the Remedial Process.

To begin with, as soon as possible, the Court should enter an injunction barring any further use of the Current Plan. Such an injunction is the usual first step in the remedial process whenever a district map has been found to violate a federal or state legal requirement. *See, e.g.*, *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 861 (E.D. Wis. 2012) (*Baldus II*) ("enjoining [defendants] from implementing Act 43 in its current form" after finding a Voting Rights Act violation); *Baumgart v. Wendelberger*, 2002 WL 34127471, at *1 (E.D. Wis. May 30, 2002) (entering "an order enjoining the eight members of the Wisconsin Elections Board from taking any actions related to elections under the existing [and unconstitutional] apportionment plan"); *Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 632 (E.D. Wis. 1982) ("enter[ing] an order . . . enjoining the defendant state Elections Board from preparing for

or administering any elections using the current [and unconstitutional] Senate and Assembly districts").

Beyond its consistency with judicial practice, an immediate injunction will allow defendants (if they wish) to appeal this Court's liability ruling to the Supreme Court on a timetable enabling the Supreme Court to reach a decision during its 2017 term (and so before the 2018 election). At present, defendants cannot appeal because this Court has not yet entered "an order granting or denying . . . an interlocutory or permanent injunction." 28 U.S.C. § 1253. As soon as the Court enjoins any further use of the Current Plan, defendants *will* be able to appeal, with a deadline of "thirty days from the judgment, order or decree, appealed from, if interlocutory." *Id*. § 2101(b); *see also id*. (specifying a sixty-day deadline for appeal from a *final* judgment). As described further below, an appeal on this timetable will likely result in a Supreme Court decision by June 2018 at the latest. However, if this Court were to delay significantly the entry of an injunction—for example, until the remedial process has concluded—then it is likely that any Supreme Court appeal would not be resolved until the 2018 term or even later (and so after the 2018 election).

In addition to enabling defendants to appeal this Court's liability ruling, an immediate injunction will begin the remedy phase of this litigation. This phase can and should unfold simultaneously with any appeal. Under Federal Rule of Civil Procedure 62(c), "While an appeal is pending from an interlocutory order . . . that grants, dissolves, or denies an injunction, *the court may suspend, modify, restore, or grant an injunction on terms . . . that secure the opposing party's rights.*" Fed. R. Civ. P. 62(c) (emphasis added). This Court thus plainly has jurisdiction to impose further remedies after entering its initial injunction, even if that injunction is appealed. *See, e.g., Robbins v. Pepsi-Cola Metro. Bottling Co.*, 800 F. 2d 641, 643 (7th Cir. 1986)

(discussing the district courts' "'long-recognized power to grant injunctions pending appeal'"); *United States v. Articles of Food and Drug*, 441 F. Supp. 772, 774 (E.D. Wis. 1977) ("[W]hen an appeal is taken from an interlocutory injunction, the Court in its discretion may suspend or modify the operation of the injunction during the pendency of the appeal.").

Indeed, in redistricting cases, courts typically deny attempts by defendants to stay remedial proceedings until their merits appeals have been decided. *See Larios v. Cox*, 305 F. Supp. 2d 1335, 1336 (N.D. Ga. 2004) (*Larios I*) ("[D]istrict courts evaluating redistricting challenges have generally denied motions for a stay pending appeal."). The reason why these efforts are rebuffed is simple: Staying the remedial process until the merits appeal is over may significantly delay the imposition of a new district plan—and thus result in another election conducted under the unlawful old map. *See id*. at 1344 ("[T]he practical effect of a stay would be that the State of Georgia would conduct the 2004 elections again using unconstitutional apportionment plans."); *see also, e.g. Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("[I]t would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan."); *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 560 (E.D. Va. 2016) ("To force the Plaintiffs to vote again under the Enacted Plan even if the Supreme Court affirms our finding that the Plan is unconstitutional . . . constitutes irreparable harm to them . . . ."); *Johnson v. Mortham*, 926 F. Supp. 1540, 1543 (N.D. Fla. 1996) ("Plaintiffs will suffer significant and irreparable injury if the stay is granted.").

This logic is squarely applicable here. If this Court were to postpone this case's remedy phase until after the Supreme Court disposed of any merits appeal by defendants, then it would be very difficult to put in place a new plan in time for the 2018 election, and plaintiffs would likely be forced to suffer another election held using state assembly districts this Court has held

to be unconstitutional. As noted above (and further explained below), the Supreme Court will probably decide any merits appeal by defendants by June 2018. The remedial process could also take as much as a year to play out, especially if Wisconsin's elected branches are unable or unwilling to act and this Court must design a remedial plan. Clearly, if this process unfolds *after* a Supreme Court decision, rather than *during* any appeal to that Court, then plaintiffs may well have to wait until 2020—the last election of the decade—before finally enjoying their constitutional right to vote under a lawful map.

Accordingly, this Court should enjoin at once any further use of the Current Plan. As soon as this injunction is entered, the Court should also commence the remedy phase of this litigation. Furthermore, the Court should reject any motion by defendants to stay the remedial process. In this way, the Court can ensure *both* that any merits appeal by defendants is resolved during the Supreme Court's 2017 term *and* that a proper remedial map is enacted in time for the 2018 election.

B. The Court Should Not Permit Wisconsin's Elected Branches to Try to Enact a Proper Remedial Plan.

After the Current Plan is enjoined, what then? The next step in redistricting cases is usually (but not necessarily) for the court to give the elected branches a reasonable opportunity to enact a map that complies with all applicable legal requirements. As the Supreme Court has stated, "When a federal court declares an existing apportionment scheme unconstitutional, it is . . . appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978); *see also, e.g.*, *Reynolds*, 377 U.S. at 586 (noting that "judicial relief becomes appropriate only when a legislature fails to reapportion in a timely fashion after having had an adequate opportunity to do so").

This policy is rooted in the political nature of redistricting, a feature that is thought (in most cases) to render the elected branches preferable to the judiciary for mapmaking purposes. *See, e.g.*, *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973) ("[T]he apportionment task, dealing as it must with fundamental 'choices about the nature of representation' . . . is primarily a political and legislative process."). However, as the above citations indicate, judicial deference to the elected branches is *not* absolute. Rather, the elected branches get the first shot at passing a remedial map only when this approach is "practicable," and their opportunity to act lasts only so long as is "reasonable" and "timely." "[W]hen those with legislative responsibilities do not respond, or . . . it [is] impractical for them to do so," courts must "devise and impose a reapportionment plan." *Wise*, 437 U.S. at 540.

Courts therefore incur responsibility for redistricting under one of two scenarios. The first is when they have invalidated a plan and the elected branches fail to enact a proper remedial map within a specified timeframe. Such failure can result from legislative gridlock, from disagreement between the legislature and the governor, or from other factors. *See Who Draws the Lines?*, All About Redistricting, http://redistricting.lls.edu/who-courtstate10.php (showing that, in the current cycle, courts designed full state legislative plans in Kansas, Minnesota, Nevada, and New Mexico, and partial plans in Texas and Wisconsin[1]). The second scenario arises when, based on past experience, courts do not believe that the elected branches are likely to produce a valid remedial map. In this circumstance, courts do not provide the elected branches with an opportunity that will probably be squandered, but rather impose a suitable remedy themselves.

[1] The *Baldus* court redrew certain state assembly districts in Milwaukee after it struck down the original districts on Voting Rights Act grounds and Wisconsin's elected branches failed to enact a remedial plan (or, indeed, to submit any remedial proposal to the court). *See Baldus v. Members of Wis. Gov't Accountability Bd.*, 862 F. Supp. 2d 860, 862 (E.D. Wis. 2012) (*Baldus III*).

The *Hays* litigation that defendants have extensively cited in their earlier briefing provides a good example of a court declining to permit a legislature with a poor record to try to craft a remedial plan. Louisiana's elected branches had "persist[ed] in defending the indefensible," "doggedly clinging to an obviously unconstitutional plan." *Hays v. Louisiana*, 936 F. Supp. 360, 372 (W.D. La. 1996). The court found that "the Legislature has left [it] no basis for believing that, given yet another chance, it would produce a constitutional plan," and ordered into effect its own map. *Id*. Similarly, in *Terrazas v. Slagle*, 789 F. Supp. 828 (W.D. Tex. 1991), *aff'd sub nom. Richards v. Terrazas*, 505 U.S. 1214 (1992), the court faced Texas officials preoccupied with "partisan concerns and preservation of incumbents" rather than "minimal protection to the electoral interests of racial and ethnic minorities." *Id*. at 838. Seeing "no real hope that further deference to the legislature . . . would yield any result other than continued protection of some members' self-interests to the exclusion of minorities' rights," the court put into place its own plan. *Id*. at 839; *see also, e.g.*, *LULAC v. Perry*, 457 F. Supp. 2d 716, 721 (E.D. Tex. 2006) (court immediately imposing its own remedy in Voting Rights Act case); *Johnson v. Miller*, 929 F. Supp. 1529, 1567 (S.D. Ga. 1996) (same in racial gerrymandering case).

These cases are directly on point here, where Wisconsin's elected branches have compiled a record every bit as objectionable as Louisiana's in *Hays*, Texas's in *Terrazas* and *LULAC*, and Georgia's in *Johnson*. In its liability ruling, the Court held that the pursuit of raw partisan advantage suffused most of the line-drawing choices that the Current Plan's drafters made. *See* Trial Op. (Dkt. 166) at 63-74. Wisconsin's elected branches also violated the Voting Rights Act when they enacted the Plan, denying Latino voters in Milwaukee the opportunity to elect their candidates of choice. *See Baldus II*, 849 F. Supp. 2d at 854-58. And as discussed

below, both the Plan's drafters and Wisconsin's elected branches were extraordinarily deceptive and secretive about their mapmaking activities. They repeatedly lied about the criteria they employed and asserted a fraudulent legislative privilege in an effort to prevent their behavior from becoming public. *See Baldus v. Members of Wis. Gov't Accountability Bd.*, 843 F. Supp. 2d 955, 958-60 (E.D. Wis. 2012) (*Baldus I*). This shameful performance should give the Court no confidence that Wisconsin's elected branches have suddenly become capable of enacting a proper remedial plan.

That is all bad enough. But there is another reason why the Court should not allow Wisconsin's elected branches to try to produce a valid remedy. During the *Baldus* litigation, defendants argued emphatically that, under the Wisconsin Constitution, the elected branches may enact only one state legislative plan per decade. Defendants based this position on a provision stating that, "At its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants." Wis. Const. art. IV, § 3. According to defendants, this provision, as construed by the Wisconsin Supreme Court, "means the Legislature may enact only one redistricting statute every ten years." Defs' Br. Regarding Art. 4, Section 3 of the Wis. Const. Relating to Redist. at 3, *Baldus v. Members of Wis. Gov't Accountability Bd.*, No. 11-CV-562-JPS-DPW-RMD (E.D. Wis. Feb. 22, 2012) (attached as Ex. A). There is "a longstanding and unbroken prohibition against a second redistricting," *id.* at 10, so "[o]nce the Legislature has enacted a redistricting plan . . . the Legislature's power to pass any other redistricting plan is 'exhausted,'" *id.* at 4 (quoting *State ex rel. Att'y Gen. v. Cunningham*, 51 N.W. 724, 740 (Wis. 1892)).

Due to this construction of the Wisconsin Constitution, defendants warned at the *Baldus* trial that they could not settle with plaintiffs. Settlement would have required the passage of a new state legislative map, but "there is, unfortunately, this impediment to proceeding in that fashion." Tr. of Court Trial (II) at 27, *Baldus v. Members of Wis. Gov't Accountability Bd.*, No. 11-CV-562-JPS-DPW-RMD (E.D. Wis. Feb. 21, 2012). Sure enough, defendants did not settle. Nor, after losing the case and having the court invalidate two districts under Section 2 of the Voting Rights Act, did defendants submit (or the elected branches enact) a remedial plan. *See Baldus III* 862 F. Supp. 2d at 862 ("We thus have nothing at this stage from the Legislature to guide us in resolving this final problem."). Again, according to defendants, for the elected branches to have passed a new map in response to a court order would have violated the Wisconsin Constitution.

Assuming defendants' arguments in *Baldus* were made in good faith, there is a clear implication for this Court: It must impose a remedy itself because Wisconsin's elected branches are constitutionally barred from engaging again with redistricting until the 2020 cycle. If defendants now maintain that the elected branches *are* empowered to enact a remedial plan, they should explain to the Court what has changed between 2012 and today. Notably, Article 4, Section 3 of the Wisconsin Constitution has *not* been amended in this period, nor has the provision been construed by any Wisconsin court.[2]

[2] Nor can defendants rely on Judge Wood's ruling at the *Baldus* trial. She explained that, under the provision's text, the Legislature is free to tackle redistricting more than once *during its first session after the decennial census*. *See* Tr. of Court Trial (III) at 65, *Baldus v. Members of Wis. Gov't Accountability Bd.*, No. 11-CV-562-JPS-DPW-RMD (E.D. Wis. Feb. 22, 2012) (attached as Ex. B) ("We see nothing in Article IV, Section 3 that forecloses the General Assembly from revisiting its plans of redistricting and reapportionment *during its current session*." (emphasis added)); *id*. at 66 (noting "the Legislature's authority to amend the redistricting plan *before the end of the current session*" (emphasis added)); *id*. at 68-69 (observing that "the state Legislature might correct any possible flaws in the legislation *while it is still in its first session after the census*" (emphasis added)); *id*. at 70-71 ("Our conclusion, therefore, is that the Wisconsin Constitution requires only that the Legislature discharge its redistricting and reapportionment duties *during its first session after the 2010 decennial census* . . . ." (emphasis

C. If the Court Does Allow Wisconsin's Elected Branches to Try to Design a Valid Remedy, It Should Give Them a Strict Deadline and Detailed Instructions.

If the Court nevertheless grants Wisconsin's elected branches the opportunity to try to design a valid remedy, what directions should it give to them? *First*, the Court should require the Wisconsin Legislature to pass, and the Governor to sign into law, new state legislative maps by April 1, 2017.[3] As described below, this deadline is necessary in order to allow sufficient time for a court-supervised remedial process to unfold if the elected branches are unable or unwilling to act. This deadline would also give the elected branches *100 days* from the filing of this brief—and *130 days* from the Court's ruling on liability on November 21, 2016—to enact new maps. By comparison, the drafting and passage of Act 43 took about three months (April to July 2011), and only *nine days* (July 11-20, 2011) elapsed between the bill's introduction and the Assembly's and Senate's votes in favor of it. *See* Trial Op. (Dkt. 166) at 7-15. There can thus be no doubt that this deadline is reasonable, especially since the elected branches would already have at their disposal all the data they previously assembled.

Indeed, the deadline is quite generous compared to courts' scheduling orders in other redistricting cases. In *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016), for instance, after finding North Carolina's congressional plan unconstitutional due to racial gerrymandering,

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added)). Judge Wood never suggested (nor could have given the provision's plain text) that the Legislature has the power to enact a new state legislative plan in its *fourth* session after the decennial census.

And nor can defendants argue that the Wisconsin Constitution is preempted by the Federal Constitution. State law is preempted when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of" federal law. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also, e.g., Perkins v. City of Chicago Heights*, 47 F.3d 212, 216 (7th Cir. 1995) ("Once a court has found a federal constitutional or statutory violation . . . a state law cannot prevent a necessary remedy."). Here, though, the Wisconsin Constitution does *not* "stand[] as an obstacle to," or "prevent a necessary remedy." If *this Court* imposes a proper remedial map, then Wisconsin's elected branches will not have to breach their constitutional duty not to redraw district lines more than once per decade. In other words, it is perfectly possible here to satisfy *both* the Wisconsin Constitution *and* the federal constitutional prohibition on partisan gerrymandering.

[3] Only Wisconsin's state assembly plan has been challenged in this litigation. However, because state assembly districts are nested within state senate districts, *see* Wis. Const. art. IV, § 5, any new state assembly map will also necessarily result in a new state senate map.

the court "require[d] that new districts be drawn within *two weeks* of the entry of this opinion." *Id*. at 627 (emphasis added). Likewise, in *Larios I*, after determining that Georgia's state legislative plans were malapportioned, the court gave Georgia's elected branches *nineteen days* to enact new maps. *See* 305 F. Supp. 2d at 1336; *see also, e.g*., *Vieth v*. *Pennsylvania*, 195 F. Supp. 2d 672, 679 (M.D. Pa. 2002) (ordering a new congressional plan to be enacted within three weeks); *Johnson*, 926 F. Supp. at 1494 (ordering a new congressional plan to be enacted within thirty-five days).

Second, this Court should make clear to Wisconsin's elected branches that a proper remedial state assembly plan, in addition to complying with all other federal and state legal requirements, must treat the major parties reasonably symmetrically over a range of plausible electoral conditions. *See, e.g*., *Gorin v*. *Karpan*, 775 F. Supp. 1430, 1446 (D. Wyo. 1991) (deeming it an "appropriate function of this court . . . to provide the legislature with guidelines for legislative action"). This requirement for the elected branches stems from their obligation to remedy fully—and the Court's duty to *ensure* they have remedied fully—their constitutional violation. *See, e.g*., *White v*. *Weiser*, 412 U.S. 783, 797 (1973) ("The District Court should not . . . refrain from providing remedies fully adequate to redress constitutional violations which have been adjudicated and must be rectified."); *LULAC v*. *Clements*, 986 F.2d 728, 814 (5th Cir. 1993) (the elected branches must "develop a plan that fully remedies the current vote dilution"). Here, an essential component of the constitutional offense is a large and durable partisan asymmetry. *See* Trial Op. (Dkt. 166) at 90. It cannot be allowed to persist in any remedial map.

The asymmetry of any plan enacted by the elected branches can be assessed using either statewide seat and vote shares, *see id*. at 74-80, or a measure of symmetry such as the efficiency gap, *see id*. at 80-90. In both cases, because the map will not yet have been used in an election,

its performance will have to be analyzed through some version of the methods employed by Professor Mayer, *see id*. at 24-25, and Professor Gaddie, *see id*. at 12-13. *See also id*. at 75-78 (discussing both experts' techniques). Under these methods, the following steps are advisable:

1. Construct ward-level models in which state assembly votes in a prior election are a function of presidential votes in that same election, demographic variables, and incumbency status. *See* Mayer Rpt. (Dkt. 54, Tr. Ex. 2) at 5-28 (describing this process and noting that it is standard in the literature).

2. Use these models to produce estimates of the numbers of Democratic and Republican votes if each ward is placed in an open-seat district, a district with a Democratic incumbent, or a district with a Republican incumbent. *See id*. at 31-34 (summarizing this stage of the analysis).

3. Aggregate these ward-level estimates to the district level, taking into account the presence or absence of incumbents, and thus predict each party's votes in each new district. *See* Mayer Rebuttal Rpt. (Dkt. 95, Tr. Ex. 114) at 22-25.

4. Use these district-level vote predictions to calculate each party's statewide seat and vote shares as well as the efficiency gap. *See* Mayer Rpt. (Dkt. 54, Tr. Ex. 2) at 38-47.

5. Conduct a swing analysis, shifting each party's statewide vote share up and down by several percentage points in each direction, and recalculate each party's statewide seat share and the efficiency gap for each shift. *See* Trial Op. (Dkt. 166) at 75-80, 83-84, 88 (discussing and relying on sensitivity testing); Mayer Rebuttal Rpt. (Dkt. 95, Tr. Ex. 114) at 26-29; Jackman Decl. Ex. D (Dkt. 58-4, Tr. Ex. 93) at 1-6.

To be clear, these steps are not a homework assignment for the elected branches, which should be free to conduct as little (or as much) analysis as they see fit. Rather, the steps represent plaintiffs' view—based on the academic literature, the expert opinions in this case, and the Court's own liability ruling—as to how the size and the durability of a plan's partisan asymmetry should be evaluated when that plan has not yet been used in an election. *See* Trial Op. (Dkt. 166) at 89-90 n.314 (noting that "even absent an actual electoral outcome," the resilience of a plan's asymmetry can be ascertained "by employing a swing analysis"). The Court should rely on the steps' conclusions (which would be supplied by experts) to determine whether any remedial plan

enacted by the elected branches does, in fact, fully remedy the constitutional violation by treating the major parties reasonably symmetrically over a range of plausible electoral conditions.

This approach, it is worth noting, is methodologically but *not* conceptually novel. To the contrary, it is exactly how remedial plans are assessed in contexts such as one-person, one-vote and Section 2 of the Voting Rights Act. In these areas, the elected branches also have the discretion to craft new maps without employing any particular technique. But with the aid of litigants and experts, courts then *scrutinize* the elected branches' outputs using well-accepted methods to ensure that the plans are consistent with the Constitution's equal population requirement and the Act's promise of representation for minority voters. The *tools* here are different: precinct-level models and swing analyses rather than population deviations and racial polarization estimates. But the *idea* is the same: harnessing social science to make certain the law is followed. *Cf*. Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. Rev. 1517, 1518 (2002) ("Law and social science are perhaps nowhere more mutually dependent than in the voting-rights field.").[4]

Lastly, the Court should require defendants to disclose all information that may be relevant to assessing the validity of any remedial plan that Wisconsin's elected branches enact. These materials include: (1) shape files that can be inputted into, and analyzed using, standard redistricting software; (2) all legislative history for the plan, such as transcripts of committee hearings and floor debates; (3) a description of the process that was followed in designing the

[4] How symmetric (and how durably so) a remedial plan must be is not a question that must be answered at this early juncture. In its prior decisions, this Court has held that how *asymmetric* a map must be to satisfy the discriminatory effect prong of the test for partisan gerrymandering is an issue that can be resolved in due time, as courts gain more experience with these kinds of cases. *See* Trial Op. (Dkt. 166) at 89 n.311 ("we need not reach the propriety" of any particular asymmetry threshold); Summ. Jdgmt. Op. (Dkt. 94) at 26 ("determining a threshold may be something that can wait for another day"). The same logic applies here. If Wisconsin's elected branches manage to enact a remedial plan, the map may be obviously defective because it is severely and persistently asymmetric. Conversely, the map may be self-evidently valid because it is highly symmetric across all plausible electoral conditions. The Court need not attempt ex ante to draw a line whose location may not have to be set at all.

plan, including the identity and role of all participants involved in the process; (4) a statement of the criteria that were applied in designing the plan; (5) all correspondence among legislators, staffers, attorneys, political scientists, and anyone else involved in designing the plan; (6) all documents shown to legislators about their new districts; (7) all analyses of the plan's electoral performance; (8) all analyses of the plan's performance in terms of other redistricting criteria; (9) all earlier drafts of the enacted plan; and (10) all analyses of these earlier drafts.

The Court should further order (1) all parties involved in the redistricting process to preserve all materials related to the process, including electronically stored information and hard copies; (2) all parties involved in the redistricting process to conduct their activities using computers that can be made available and accessible should any question arise regarding the completeness of the production; and (3) the heads of Wisconsin's elected branches (State Assembly Speaker Robin Vos, State Senate Majority Leader Scott Fitzgerald, and Governor Scott Walker) to swear under oath that all relevant materials have been produced.

Plainly, all of this information could shed light on the propriety of any remedial plan enacted by Wisconsin's elected branches. Indeed, the Court relied heavily on exactly this kind of evidence in ruling that discriminatory intent underlay the Current Plan, *see id*. at 63-74, and that the Plan's discriminatory effect was unjustified, *see id*. at 103-07. Moreover, it is best practice in remedial redistricting proceedings for courts to insist on the disclosure of such materials. Last month, the court in *Covington v*. *North Carolina*, No. 1:15-CV-399 (M.D.N.C. Nov. 29, 2016), did so, ordering that "defendants provide the Court and the plaintiffs with the information needed to evaluate the constitutionality of the new districts" after striking down the old districts on racial gerrymandering grounds. Slip Op. at 5. So too did the court in *League of Women Voters in Fla*. *v*. *Detzner*, 179 So. 3d 258 (Fla. 2015), "requir[ing] that each party submitting an alternative plan

'identify every person involved in drawing, reviewing, directing or approving the proposed remedial plan'" after finding Florida's congressional plan to be a partisan gerrymander in violation of the Florida Constitution. *Id*. at 261-62.

The release of these materials is particularly important here, where the Current Plan's authors were exceptionally deceptive and secretive about their redistricting activities. The authors lied outright in their testimony in *Baldus*, claiming they "did not know if partisan makeup was considered, that [they] had no access to voting data from past elections, and that only 'population equality, municipal splits, compactness, contiguity, [and] communities of interest' were considered." *Baldus II*, 849 F. Supp 2d at 845. The Legislature also repeatedly asserted privilege over documents and correspondence pertaining to the Plan's design, prompting a series of stunning rebukes from the *Baldus* court. *See Baldus I*, 843 F. Supp. 2d at 958 ("the Legislature . . . now attempts to cloak the record of that action behind a charade masking as privilege"); *id*. at 959 ("the Legislature and the actions of its counsel give every appearance of flailing wildly in a desperate attempt to hide from both the Court and the public the true nature of exactly what transpired in the redistricting process"); *id*. at 960 (sanctioning defendants because the court "will not suffer the sort of disinformation, foot-dragging, and obfuscation now being engaged in by Wisconsin's elected officials and/or their attorneys"); *id*. at 960 (condemning "a poorly disguised attempt to cover up a process that should have been public from the outset"). Plaintiffs fear that history will repeat itself unless this Court makes it unmistakably clear from the start that all relevant information must be preserved and disclosed.

To recap, then, if the Court gives Wisconsin's elected branches the opportunity to enact a remedial plan, it should specify three conditions for them. Any such plan must be passed and signed into law by April 1, 2017. Any such plan must treat the major parties reasonably

symmetrically over a range of plausible electoral conditions. And all materials relevant to assessing the validity of any such plan must be turned over to plaintiffs.

D. If the Court Imposes a Remedy Itself, It Would Be Bound by Stricter Substantive Constraints but Free to Choose Among Several Procedural Options.

If the Court ends up with responsibility for crafting a remedy—either in the first instance or because the elected branches fail to pass a proper remedial map by April 1, 2017—how should it proceed? Substantively, there are four ways in which a court-ordered plan would differ from one produced by the elected branches. *First*, while the elected branches are free to use multimember districts (if they are permitted by state law), a court-ordered plan must use only single-member districts. *See*, *e.g.*, *Wise*, 437 U.S. at 540; *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975). *Second*, while a plan enacted by the elected branches may have a total population deviation as high as 10% without becoming presumptively unconstitutional—unless "it is more probable than not that illegitimate considerations were the predominant motivation behind the plan's deviations," *Harris v. Ariz. Indep. Redist. Comm'n*, 136 S. Ct. 1301, 1309 (2016)—a court-ordered plan should strive for "little more than *de minimis* variation." *Abrams v. Johnson*, 521 U.S. 74, 98 (1997); *see also*, *e.g.*, *Connor v. Finch*, 431 U.S. 407, 414 (1977) (same); *Seastrunk v. Burns*, 772 F.2d 143, 151 (5th Cir. 1985) (requiring "the [judicial] fashioning of a near-optimal apportionment plan").

Third, the same logic that impels almost perfect population equality in a court-ordered plan also demands almost perfect partisan symmetry.[5] Near-absolute population equality is required because, having found that a plan is malapportioned, a court has no good reason not to cure the violation fully. The *elected branches* may implement policies that are better achieved

[5] Since a plan must be *durably* asymmetric in order to be unlawful, the same logic demands a court-ordered remedial map that is *persistently* symmetric over a range of plausible electoral conditions.

through some level of malapportionment, but a *court* has no license to do so. *See, e.g.*, *Upham v. Seamon*, 456 U.S. 37, 42 (1982) ("This stricter standard applies . . . to remedies required by the nature and scope of the violation."); *Larios v. Cox*, 314 F. Supp. 2d 1357, 1360 (N.D. Ga. 2004) (*Larios II*) ("Because the core constitutional wrong to be remedied in this case was a violation of the Fourteenth Amendment's one person, one vote principle, equality of population was a paramount concern in redrawing the maps."). Here, by the same token, the elected branches may pursue goals that are consistent with a modest degree of partisan asymmetry. But a court has no equivalent prerogative; its aim must be to remedy as scrupulously as possible the partisan gerrymandering violation it has identified.

Another reason why a court-ordered plan must strive for almost perfect partisan symmetry is the Supreme Court's admonition that such a plan must be "'free from any taint of arbitrariness or discrimination.'" *Connor*, 431 U.S. at 414 (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964)); *see also, e.g.*, *White*, 412 U.S. at 799 (Marshall, J., concurring in part) ("[T]he judicial remedial process in the reapportionment area . . . should be a fastidiously neutral and objective one, free of all political considerations . . . ."). To avoid partisan unfairness, many courts in *malapportionment* cases have taken into account election results when designing district plans, and tried to ensure that both major parties are treated equitably. *See, e.g.*, *Avalos v. Davidson*, 2002 WL 1895406, at *8 (D. Colo. Jan. 25, 2002); *Balderas v. Texas*, 2001 WL 36403750, at *3 (E.D. Tex. Nov. 14, 2001); *Diaz v. Silver*, 978 F. Supp. 96, 102-04 (E.D.N.Y. 1997); *Good v. Austin*, 800 F. Supp. 557, 566 (E.D & W.D. Mich. 1992); *Prosser v. Elections Bd.*, 793 F. Supp. 859, 871 (W.D. Wis. 1992); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 659 (N.D. Ill. 1991). It would be very odd, to say the least, if courts in *partisan*

gerrymandering cases did not have to exhibit the same sensitivity to their maps' electoral consequences.

And *fourth*, a court-ordered map must respect, not flout, the elected branches' legitimate redistricting objectives. These objectives are typically "expressed in statutory and constitutional provisions." *White*, 412 U.S. at 795; *see also, e.g.*, *Upham*, 456 U.S. at 42 (discussing the "substantive constitutional and statutory standards to which such state plans are subject"). Partisan advantage is *not* a valid redistricting goal. *See, e.g.*, *Personhuballah*, 155 F. Supp. 3d at 564 ("[W]e have found no case holding that we must maintain a specific political advantage in drawing a new plan . . . ."); *Colleton Cty. Council v. McConnell*, 201 F. Supp. 2d 618, 629 (D.S.C. 2002) ("[I]t is inappropriate for the court to engage in political gerrymandering."). Nor is the protection of incumbents when this aim is a pretext for partisan gain. *See, e.g.*, *Cox v. Larios*, 542 U.S. 947, 949 (2004) (Stevens, J., concurring) (criticizing "drafters' efforts at selective incumbent protection"). And even the *evenhanded* shielding of incumbents ranks low in importance because it is "'inherently more political.'" *Abrams*, 521 U.S. at 84; *see also, e.g.*, *Essex v. Kobach*, 874 F. Supp. 2d 1069, 1091 (D. Kan. 2012) ("subordinating the protection of incumbents to the other legislative goals").[6]

Here, Wisconsin's criteria for state assembly districts are specified by Article 4, Sections 4-5 of the Wisconsin Constitution. The districts must "consist of contiguous territory," "be bounded by county, precinct, town or ward lines," "be in as compact form as practicable," and nest within state senate districts. Wis. Const. art. IV, §§ 4-5. These, then, are the legitimate

[6] Incumbency protection would be an especially problematic goal here, where the current incumbents won their seats under a plan that the Court held is an unlawful partisan gerrymander. To shield these incumbents from competition would mean preserving the fruit of the gerrymander and preventing the constitutional violation from being fully remedied.

redistricting objectives to which the Court must defer in designing a plan—in addition to using single-member districts and pursuing almost perfect population equality and partisan symmetry.

This leaves the question of process: If the Court has to craft a remedy, how should it go about doing so? There is no single answer; rather, over the years, courts have employed a range of procedures when called upon to draw districts. "The modal arrangement involves the appointment of a special master who then submits a plan to the court for its approval or modification." Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 Geo. Wash. L. Rev. 1131, 1148 (2005). Under this approach, the court provides explicit criteria to the special master, and then verifies (with the parties' assistance) that the criteria have, in fact, been followed. *See, e.g.*, *Favors v. Cuomo*, 2012 WL 928223, at *2 n.5 (E.D.N.Y. Mar. 19, 2012) (noting the changes made by the court to the special master's plan in response to the parties' submissions); *Larios II*, 314 F. Supp. 2d at 1359 (describing "a series of guidelines to inform the Special Master in the process of preparing reapportionment maps").

A second option "involves more active participation by the court, which hires its own expert to help the judges draw the plan themselves." Persily, *supra*, at 1148. This method entails less separation between the court and the plan; the court itself, not a court-appointed special master, is the plan's author. *See, e.g.*, *Essex*, 874 F. Supp. 3d at 1079 ("[F]aced with the daunting prospect of redrawing four new plans on essentially ten days' notice, the Court secured [a redistricting expert] to serve as a technical advisor . . . ."); *Prosser*, 793 F. Supp. at 865 ("We have decided to formulate our own plan, which combines the best features of the two best [proposed] plans.").

A final possibility is for the court to "place the burden of proposing a remedy on the parties to the litigation or, for that matter, any interested party willing to suggest a redistricting

plan." Persily, *supra*, at 1149. "Under this procedure, the court sits back and evaluates alternatives, and selects from a buffet of options presented to it." *Id*. Of course, this approach is only feasible if the court specifies criteria for the submissions; otherwise the court risks being inundated by legally or practically flawed proposals. *See, e.g.*, *Perez v. Texas*, 891 F. Supp. 2d 808, 825 (W.D. Tex. 2012) (analyzing and adopting a "compromise map" that "Plaintiffs and Intervenors conferred and developed"); *Baldus II*, 849 F. Supp. 2d at 864 (ordering that "the parties (and any non-parties who may wish to do so) submit suggested maps that they believe will comply with the applicable provisions found in the VRA, the United States Constitution, and the Wisconsin Constitution").

All three of these options have worked well in the past, and can do so again. But however the Court proceeds (if it becomes responsible for imposing its own remedy), plaintiffs make two recommendations. *First*, the Court should identify, as clearly as possible, its line-drawing criteria. These criteria should be conveyed to any special master the Court appoints, any expert the Court hires, and any parties wishing to submit plans. *Second*, the Court should permit interested parties to make submissions, preferably accompanied by analyses of the plans' electoral consequences and compliance with other legal requirements. These submissions should be made to any special master or expert before she begins her work, or to the Court itself if the Court decides to design a map on its own.[7]

Plaintiffs note, in this regard, that if and when the Court begins to accept submissions, they intend to tender a plan that will unquestionably be a proper remedial map. This plan will treat the major parties *highly* symmetrically over a range of plausible electoral conditions. The plan will also meet all other federal and state legal requirements. The plan will be a "viable . . .

[7] Even if they were not allowed to try to *enact* a remedial plan, Wisconsin's elected branches could certainly *submit* a proposal to the Court. They would not be excluded from the remedial process, then, even if the Court chose to impose its own remedy.

alternative" to the Current Plan as well—one that takes into account practical considerations, commands the support of plaintiffs and a bipartisan coalition of other stakeholders, and could realistically be imposed in its submitted form. Trial Op. (Dkt. 166) at 111. Plaintiffs believe this plan will help the Court to evaluate any map that Wisconsin's elected branches enact (if they are given a chance to do so) and/or to craft its own remedy (if it incurs this duty).

E. The Court Should Set a Schedule for All Relevant Actors and Actions.

Finally, the Court should set a schedule so that any appeal of its liability ruling can be decided during the Supreme Court's 2017 term and the Current Plan can be replaced by a proper remedial map in the 2018 and 2020 elections. For the reasons outlined earlier, the Court should also proceed with the remedy phase while any appeal of its liability ruling is pending.

Starting with the timing of any appeal, the thirty-day clock for filing a notice to appeal will begin ticking as soon as the Court enters an injunction barring any further use of the Current Plan. *See* 28 U.S.C. §§ 1253, 2101(b). After filing a notice of appeal, defendants would then have sixty days, renewable for good cause for up to another sixty days, to file a jurisdictional statement with the Supreme Court. *See* U.S. Sup. Ct. R. 18(3). Next, plaintiffs would have thirty days to file a motion to affirm. *See id*. 18(6). At this point, defendants would have fourteen days to file an opposition to the motion to affirm before the briefs were distributed to the Justices. *See id*. 18(7). Given this schedule, the Court would be able to decide whether to note probable jurisdiction at the beginning of its 2017 term. If the Court expeditiously noted probable jurisdiction, the appeal would be briefed and argued during this term, and the Court would issue a decision by the term's end in June 2018.

To illustrate: If this Court were to enjoin any further use of the Current Plan on February 1, 2017—within a month of the close of the briefing ordered by the Court, *see* Trial Op. (Dkt. 166) at 116—approximately the following timetable would result for any appeal:

- February 1, 2017: Entry of this Court's injunction.
- March 1, 2017: Deadline for defendants' notice of appeal to the Supreme Court.
- July 1, 2017: Deadline for defendants' jurisdictional statement (given a sixty-day extension).
- August 15, 2017: Clerk's distribution of materials to the Justices.
- September 25, 2017: Supreme Court's first conference of the 2017 term.
- October 1, 2017: Probable jurisdiction noted.
- Nov. 15, 2017 – Jan. 15, 2018: Merits briefing.
- Feb. 1, 2018: Oral argument.

Under this timetable (which assumes rapid action by the Justices), any appeal could not be argued before the Supreme Court until the winter of 2018, or more than a year from now. If the Supreme Court took until the end of its term to decide the case—a distinct possibility—roughly nineteen months would have elapsed between this Court's liability ruling and the Supreme Court's judgment. To prevent any more delay, and to ensure that the Supreme Court is able to rule on any appeal during its 2017 term, this Court should therefore enjoin any further use of the Current Plan as soon as possible, and no later than February 1, 2017.

Turning from any appeal to the case's remedy phase, the best way to come up with a reasonable schedule is to work backward. While the Wisconsin Elections Commission has not yet set deadlines for the 2018 election, candidates are likely to be able to begin compiling signatures to place their names on the primary ballot in the early spring of 2018. *See GABIS-009 Ballot Access Checklist – Legislative Candidates*, Wis. Elections Comm'n,

http://elections.wi.gov/forms/gabis-9. A rule of thumb is that a proper remedial plan should be in place "no later than one month before candidates may begin qualifying for the primary ballot." Persily, *supra*, at 1147. Erring on the side of caution, this means that January 1, 2018 should be the deadline for a final remedy to be imposed. This deadline would give candidates enough time to familiarize themselves with the new districts, and to decide whether and where to run.

Next, it would be prudent for the Court to set aside six months for the judicial design of a remedy (if one is required). In the first three months of this period, the Court-appointed special master, the Court-hired expert, or the Court on its own, would receive party submissions, hold hearings, assemble data, and produce a draft plan. In the latter three months, parties would comment on the draft map, more hearings would likely be necessary, and the Court would finalize the map. Redistricting by the elected branches often takes six months or longer, and that is without the greater transparency and fairness that are appropriate for a judicial process. *Cf*. California Redistricting Commission, Final Report on 2011 Redistricting (Aug. 15, 2011) (showing that California's independent redistricting commission needed seven months, from January to August 2011, to draft and finalize its maps).

Similarly, the Court should allocate three months for the parties to analyze and comment on any remedial plan enacted by Wisconsin's elected branches (if they are given the opportunity to pass one) and for the Court to assess the plan's validity. This stage is likely to require further discovery, new expert opinions, briefing by the parties, and possibly another hearing or oral argument. It would be best for all concerned for the stage not to be rushed so the Court would have enough time to consider fully the plan's propriety. *See, e.g.*, *Covington*, Slip Op. at 4 (criticizing "the State's proposed schedule" for failing to "build in any time for the Court to

make changes should the State's new districts be inadequate to remedy the constitutional violation").

Putting these pieces together, plaintiffs recommend the following schedules for the case's remedial phase. (The first schedule assumes Wisconsin's elected branches are given a chance to pass a remedial map. The second assumes they are not, and thus lengthens the periods for judicial action; it could easily be abbreviated in order to conclude this phase sooner.)

Schedule 1:

- April 1, 2017: Deadline for the Wisconsin Legislature to pass, and the Governor to sign into law, a new state legislative plan. All materials required to be disclosed to plaintiffs should also be produced on this date.
- July 1, 2017: Deadline for the Court to determine the elected branches' plan's validity.
- October 1, 2017: Deadline for the Court to produce a draft plan of its own (if the elected branches' plan is found invalid).
- January 1, 2018: Deadline for the Court to finalize its plan (if the elected branches' plan is found invalid).
- Early Spring, 2018: State legislative candidates begin compiling signatures to place their names on the primary ballot.

Schedule 2:

- July 1, 2017: Deadline for the Court to produce a draft plan of its own.
- January 1, 2018: Deadline for the Court to finalize its plan.
- Early Spring, 2018: State legislative candidates begin compiling signatures to place their names on the primary ballot.

As explained earlier, the first schedule leaves ample time for Wisconsin's elected branches to enact a remedial plan: 130 days from the Court's liability ruling, or nearly 50 percent longer than it took for the Current Plan to be designed and passed in 2011. The second schedule also allows more than enough time for the Court to draft and then finalize a remedial map of its

own: roughly six months each for drafting and then finalizing the map. Plaintiffs therefore believe that both of these schedules are eminently reasonable—and indeed, much more deliberately paced than many remedy phases in previous redistricting cases.

CONCLUSION

For the foregoing reasons, the Court should enter an injunction barring any further use of the Current Plan as soon as possible. The Court should then conduct the case's remedial phase as detailed above, with the goal of putting into place a proper remedial map in time for the 2018 and 2020 elections.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CARLENE BECHEN, ELVIRA BUMPUS, RONALD BIENDSEI, LESLIE W. DAVIS, III, BRETT ECKSTEIN, GEORGIA ROGERS, RICHARD KRESBACH, ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON, JEANNE SANCHEZ-BELL, CECELIA SCHLIEPP, TRAVIS THYSSEN and CINDY BARBERA,

Plaintiffs,

TAMMY BALDWIN, GWENDOLYNNE MOORE, and RONALD KIND,

Intervenor-Plaintiffs,

v.

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants,

F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI, PAUL D. RYAN, JR., REID J. RIBBLE, and SEAN P. DUFFY,

Intervenor-Defendants

Case No. 11-C-562
JPS-DPW-RMD

VOCES DE LA FRONTERA, INC., RAMIRO VARA, OLGA VARA, JOSE PEREZ, and ERICA RAMIREZ,

Plaintiffs,

Case No. 11-CV-1011
JPS-DPW-RMD

v.

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants.

Defendants' Brief in Regarding Article 4, Section 3 of the Wisconsin Constitution relating to Redistricting

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The Wisconsin Constitution, Article 4, Section 3, provides:

> At its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants.

Wisconsin Const., Art. IV, § 3.[1]

[1] The defendants, the members of the Wisconsin Government Accountability Board, and its Director and General Counsel, by their attorneys, file this brief. At hearing on the evening of February 21, plaintiffs' counsel suggested that there are documents suggesting that "they" (presumably, members of the Wisconsin Legislature) have previously stated that they intend to enact additional redistricting legislation. The GAB is not the Legislature and has no such intent or power.

The Wisconsin Supreme Court has uniformly, and without exception, said this means the Legislature may enact only one redistricting statute every ten years. Even if this Court should choose to give an advisory opinion on the meaning of this provision, it would not prevent anyone from suing the Legislature in State court for violating the Wisconsin Constitution.

I. The Wisconsin Constitution allows "no more than one" apportionment during the interval between federal population enumerations.

Dating to at least 1892, the Wisconsin Supreme Court has interpreted this constitutional provision to mean that there may be "no more than one" apportionment during the interval between federal population enumerations. *See State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 740 (1892) ("The duty to pass such an act is a continuing one from the time it is constitutionally devolved upon the legislature until performed, though when thus performed the power to pass any other such act is exhausted, and will not again arise until after another enumeration."); *State ex rel. Smith v. Zimmerman*, 266 Wis. 307, 63 N.W.2d 52, 56 (1954) ("*Zimmerman II*") ("It is now settled that without a constitutional change permitting it no more than one legislative apportionment may be made in the interval between two federal enumerations."); *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 662, 60 N.W. 2d 416, 424 (1953) ("*Zimmerman I*")("[N]o

more than one valid apportionment may be made in the period between the federal enumerations.")[2]

In *Cunningham*, the Wisconsin Supreme Court discussed the intent behind the requirement that the Legislature enact a redistricting plan "at its first session," and explained that this requirement focuses on the urgency of the need to redistrict, rather than on the "session" at which the redistricting plan is passed. Once the Legislature has enacted a redistricting plan—in whatever "session" that occurs—the court explained that the Legislature's power to pass any other redistricting plan is "exhausted":

> [N]otwithstanding the requirement of the constitution that it be passed at the session next after the last enumeration, [t]he plain intent of this provision is to enable a new apportionment to be made at the earliest practicable period after the enumeration, to the end that the change in the representation thereby required shall readily become effective, and not be unreasonably delayed. The duty to pass such an act is a continuing one from the time it is constitutionally devolved upon the legislature until performed, though *when thus performed the power to pass any other such act is exhausted*, and will not again arise until after another enumeration.

Cunningham, 51 N.W. at 740 (emphases supplied). The court explained that under a similar provision of the New York Constitution, the fact that a redistricting plan was

[2] *See also State ex rel. Hicks v. Stevens*, 112 Wis. 170, 88 N.W. 48, 49 (1901): "In Michigan [County], an apportionment having been duly made, the division into representative districts must remain unaltered until the return of another enumeration .... Under the construction we feel compelled to adopt, the legislature may meet the growing demands of the increase of population,--may create new counties and endow them with life and vitality as to matters of local administration,--provided the original legislative districts are not disturbed." *Id*. (emphasis added).

finally enacted at a later "session" was not determinative. *Id.* (citing *Rumsey v. People*, 19 N.Y. 41). The determinative fact is that the *passage of the act* exhausts the legislative power, not the session at which it occurs. [3]

Some sixty years after *Cunningham*, the Wisconsin Supreme Court addressed this issue again in the *Zimmerman* cases, considering the matter to be "settled" law, again referring to the power of the Legislature as "exhausted" once a redistricting plan has been enacted. In *Zimmerman II*, the court said:

> It is now settled that without a constitutional change permitting it *no more than one legislative apportionment may be made in the interval between two federal enumerations* .... In discussing the legislature's attempt to change senate districts by ch. 242, Laws of 1953, we stated expressly that under the present state constitution the passage of the Rosenberry act *exercised and exhausted* the power of the legislature to redistrict during the present interval between censuses except in the cases of districts whose boundaries did not observe the constitutional mandate ...
>
> **** **** ****
>
> Both houses of the legislature passed the bill, the governor signed it, the secretary of state published it, the legislature adjourned *sine die*, and the citizens of the state by their action in the referendum brought to pass the condition upon which the finality of the Rosenberry apportionment depended. Nothing in the facts now called

[3] Although portions of the relevant Wisconsin constitutional provision have been amended since, the operative language remains: "At its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants." WIS. CONST. art. IV, § 3. Amendments were made in 1910, 1962 and 1982 as to unrelated provisions. *See* Wisconsin Statutes Annotated, Const. Art. IV, § 3.

> to our attention disposes us to reverse our statement in the *Thomson* case, *supra*, and to hold that the Rosenberry act was *not* completed legislation. In the absence of a successful attack upon its constitutionality (not attempted here), it was a reapportionment, directed by the constitution to be done *once and only once* following each federal census, which passed beyond the legislature's power of revision at the date of the referendum at the very latest. It is not necessary to decide now whether it so passed at an earlier date. The defendant's contention that the 1953 legislature retained and still possessed any power to redistrict areas already districted in conformity to the constitution by ch. 728, Laws of 1951 cannot be sustained.
>
> *Zimmerman II*, 266 Wis. 307, 312-314, 63 N.W.2d 52, 56 (emphasis supplied).[4]

This case reiterates what the court held in *Cunningham*: the Legislature may redistrict "once and only once," and having done so, its powers are "exhausted." While the court referred to the "date of the referendum" (identified earlier in the decision as November 1952) as "the very latest" date of possible relevance, the court nevertheless indicated that it was "not necessary to decide" whether the date was any earlier. The fact that the court found that unnecessary to decide supports the conclusion that it was the very act of *passing* the law (in 1951) that exhausted the Legislature's power to "once and only once" reapportion.

Similarly, in *Zimmerman I*, the court already held that "the power to redistrict" was "exercised and exhausted by the *passage* of the Rosenberry act for the period after the 1950

[4] The Wisconsin Supreme Court most recently cited *Zimmerman II* in 2010 in *McConkey v. Van Hollen*, 326 Wis. 2d 1, ¶¶ 33-34, 783 N.W.2d 855 (Wis. 2010), though for a different aspect of state constitutional law.

United States census and until the next federal enumeration." *Zimmerman I*, 264 Wis. 644, 662, 60 N.W. 2d 416, 424 (1953) (emphasis supplied). The Legislature could reapportion again, the court said, only if: (a) Article IV of the Wisconsin Constitution was amended, or (b) a new enumeration was set forth by the United States. *Id.*

II. Wisconsin's constitutional allowance of "no more than one" apportionment per decade is not unusual.

In 1983, the California Supreme Court relied in part upon *Zimmerman II* in interpreting its own state constitution, which dated back to 1879, and affirmed what it called the "once-a-decade" rule. *See Legislature v. Deukmejian*, 669 P.2d 17, 21 (Cal. 1983). That rule, the court said, helps "to avoid subjecting the body politic unnecessarily to a repetition of the turmoil and disruption which inevitably surround reapportionment and redistricting." *Id.*; *Kennedy Wholesale, Inc. v. State Bd. of Equalization*, 806 P.2d 1360, 1364 (Cal. 1991) (citing *Deukmejian* and referring to the constitutional provision as the "once-a-decade" limit on reapportionment).

The California Supreme Court explained that the California Constitution, as adopted in 1879, provided for reapportionment by the Legislature "at its *first session* after each census" and concluded that the drafters of the state constitution intended that the state be "redistricted immediately after each decennial census *and not again* thereafter until the next census." *Id.* at 22 (emphasis supplied). That court, dating back to 1907, had "held so repeatedly." *Id.* While the California Constitution subsequently was

amended to provide for redistricting "[in] the year following the year in which the national census is taken," without regard to how many times or in which session, the court held that the "once-a-decade" rule remained in place. *Id.* at 24-27. Once the state legislature enacted a plan, "the lawmaking power of the state may not make a second revision, whether by means of a legislative enactment or an initiative statute." *Id.* at 27, citing 18 Ops. Cal. Atty. Gen. (1951).

The California Supreme Court relied upon *Zimmerman II, see id.* at 28-29, as well as to cases interpreting similar state constitutional provisions in New York, Massachusetts, Michigan, Ohio, Virginia, and North Carolina. The "once-in-a-decade rule is by no means peculiar to California … As the Supreme Court of Kansas has observed: 'It is the general rule that once a valid apportionment law is enacted no future act may be passed by the legislature until after the next regular apportionment period prescribed by the Constitution.'" *Id.* at 24, n. 12.[5]

Deukmejian rejected two arguments raised here—it rejected the argument that a legislature may act a second time if no elections have been held under the first redistricting plan, and rejected an argument that it mattered that the legislation had not been implemented given separate constitutional challenges to it (there, in other litigation). *Id.* at 28-29.

[5] In comparison, the Colorado Constitution (adopted in 1876) permitted state legislative districts to be redrawn "from time to time." *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1239 (Colo. 2003). Even under that rule, the "from time to time" rule is limited and does not apply to Congressional redistricting because the Colorado Constitution does not expressly state that it does: "Had they [the framers of the Colorado Constitution] wished to have more frequent redistricting, the framers would have said so. They did not." *Id.*

Commentators have considered the underlying policy behind the "once-a-decade" rule to be sound. *See* Justin Levitt and Michael P. McDonald, "Taking The 'Re' Out Of Redistricting: State Constitutional Provisions On Redistricting Timing," 95 GEORGETOWN LAW J. 1247 (April 2007). "Overly frequent redistricting allows insiders to thwart specific challengers more reliably by drawing lines to punish or exclude with increased precision, as was done to a 2006 candidate for the Georgia state senate; it may also thwart challengers in general by limiting the challengers' ability to plan an effective bid far in advance .... Overly frequent alteration of districts also disrupts the critical link between a representative and his or her constituency: constituents shuffled into and out of districts become unconnected to particular representatives and unable to hold them accountable in elections." *Id.* at 1276-77.

Regardless of whether Wisconsin's "no more than one" apportionment per decade is good or bad policy, the Wisconsin Supreme Court is "the final arbiter of what is state law." *Montana v. Wyoming*, 131 S. Ct. 1765, 1773 n.5 (U.S. 2011) (citations omitted). Federal courts are "bound by authoritative state court rulings on matters of state law whether or not [the courts] consider those rulings well reasoned." *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 272 (7th Cir. 1983).

III. An Advisory Opinion To The Legislature Is Unlikely To Encourage Another Redistricting Bill.

Although the parties apparently have differing views about what the Wisconsin Supreme Court means when it says "once and only once," resolving that difference will have no effect on any issue

in this case. Thus, any opinion this Court gives will be advisory only.

And an advisory opinion will be unlikely to encourage the Legislature to enact another redistricting statute. This Court's opinion would not insulate the Legislature from a lawsuit in State court charging a violation of the Wisconsin Constitution.

CONCLUSION

Under the Wisconsin Constitution, it is "settled" that "no more than one legislative apportionment may be made in the interval between two federal enumerations." *Zimmerman II*, 266 Wis. 307, 312-13, 63 N.W.2d 52, 56. *Zimmerman*, and the cases going back to the late 1800s, establishes a longstanding and unbroken prohibition against a second redistricting, regardless of the "session" in which it may occur. None of these cases suggests the Wisconsin Supreme Court would hesitate to re-affirm, again, that Article IV, Section 3 does not permit "more than one legislative apportionment" per decade. Passing another apportionment statute, having already "exhausted" its ability to do so in this decade, would simply invite a (successful) state-court lawsuit for violating Article IV, Section 3 of the Wisconsin Constitution.

Dated this 22nd day of February, 2012.

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CARLENE BECHEN, ELVIRA BUMPUS, RONALD BIENDSEIL, LESLIE W. DAVIS, III, BRETT ECKSTEIN, GLORIA ROGERS, RICHARD KRESBACH, ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON, JEANNE SANCHEZ-BELL, CECELIA SCHLIEPP, TRAVIS THYSSEN, CINDY BARBERA, RON BOONE, VERA BOONE, EVANJELINA CLEERMAN, SHEILA COCHRAN, MAXINE HOUGH, CLARENCE JOHNSON, RICHARD LANGE, and GLADYS MANZANET,	Case No. 11-CV-562 JPS-DPW-RMD
Plaintiffs,	Milwaukee, Wisconsin
TAMMY BALDWIN, GWENDOLYNNE MOORE and RONALD KIND,	February 22, 2012 8:30 a.m.
Intervenor-Plaintiffs,	**VOLUME** III **A.M. SESSION**
v.	
Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, and TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,	
Defendants,	
(caption continued on next page)	

TRANSCRIPT OF COURT TRIAL

BEFORE DIANE WOOD, CIRCUIT JUDGE, ROBERT DOW, JR., DISTRICT JUDGE, and J. P. STADTMUELLER, DISTRICT JUDGE

Contract Reporters: Halma-Jilek Reporting 414-271-4466

Proceedings recorded by computerized stenography, transcript produced by computer aided transcription.

F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI, PAUL D. RYAN, JR., REID J. RIBBLE, and SEAN P. DUFFY,

Intervenor-Defendants.

VOCES DE LA FRONTERA, INC., RAMIRO VARA, OLGA VARA, JOSE PEREZ, and ERICA RAMIREZ,

Plaintiffs,

v.

Case No. 11-CV-1011 JPS-DPW-RMD

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, and TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

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P R O C E E D I N G S

THE BAILIFF: Hear Ye, Hear Ye, Hear Ye, the United States District Court for the Eastern District of Wisconsin is now open, the Honorable Judges J. P. Stadtmueller, District Judge, Eastern District of Wisconsin, Diane P. Wood, Circuit Court Judge, United States Court of Appeals for the Seventh Circuit, and Robert M. Dow, Jr., District Judge, Northern District of Illinois, presiding.

All persons having business before this Honorable Court are admonished to draw near and give their attention for this special three-judge court convened pursuant to Title 28, United States Code, Section 2284 is now in session.

God save the United States and this Honorable Court. Please be seated and come to order.

THE BAILIFF: The court calls Alvin Baldus, et al, versus Michael Brennan, et al, Case No. 11-CV-526, for the continuation of a court trial. May I please have the appearances, beginning with the plaintiffs.

MR. POLAND: Good morning, Your Honor. Doug Poland Dustin Brown and Wendy Arends appearing on behalf of the Baldus Plaintiffs.

MR. EARLE: Good morning, Your Honors. Peter Earle and Jackie Boynton appearing on behalf of Voces de la Frontera, Plaintiffs.

MR. HASSETT: Good morning. Scott Hassett and Jim

Olson of Lawton & Cates on behalf of the Intervenor Plaintiffs.

MS. LAZAR: Good morning, Your Honors. Assistant Attorney General Maria Lazar appearing on behalf of the Defendants, the Members of the Wisconsin Government Accountability Board, and their director and general counsel. Also appearing with me are attorneys Dan Kelly, Patrick Hodan, Colleen Fielkow and Jack Curtis.

In addition, Your Honor, we just wanted to point out one minor point. The defendants in this case are the Government Accountability Board. The Department of Justice, through the Attorney General's Office with its special counsel, represents the Government Accountability Board, not the Legislature, as is noted one more time on the Plaintiffs' pleadings. We just wanted to make sure that everyone knows who the players are and just bring that to the court's attention again. Thank you.

MR. SHRINER: Good morning, Your Honor. Thomas Shriner and Kellen Kasper for the Intervenor Defendants.

JUDGE STADTMUELLER: Thank you. Good morning, Counsel. As we left yesterday afternoon, the court had asked for further briefing on the matter of the attorney-client privilege issue with respect to any testimony to be taken from Attorney James Troupis, as well as some further briefing on the subject that we spent a bit of time on last evening with respect to whether or not the Legislature, indeed, has the

authority, if they chose to do so, to revisit the subject of the redistricting legislation, in particular Act 43. At the outset I want to again extend on behalf of myself and my colleagues and our staff our sincere appreciation for the parties and their counsel having taken the time, on relatively short notice, to make further written submissions in response to the concerns expressed by the court.

We have had an opportunity both last evening and again this morning to consider these subjects, and I'm going to defer to my colleague, Judge Dow, who will deliver the opinion of the court with respect to the matter of the attorney-client privilege issue and the clarification that Mr. Troupis and his counsel sought. Judge Dow?

JUDGE DOW: Thank you, Judge Stadtmueller. On the motion for clarification concerning the scope of inquiry for Mr. Troupis' testimony and deposition that will precede that testimony, we have considered the parties' briefs and provide the follows guidance in the interests of efficiency for the parties and the court, and to address the ethical dilemma that arises when an attorney is subpoenaed to testimony regarding communications with his client.

The court already has ruled that certain documents are not within the scope of the attorney-client privilege and has indicated a preliminary view that Mr. Troupis will be required to testify and should sit for a deposition prior to

giving that testimony so that his examination at trial can be as focused as possible on issues that require resolution by this court.

We agree with Plaintiffs that Mr. Troupis' testimony may be relevant -- indeed, likely will be relevant -- to issues of intent and the totality of circumstances that are germane to the Voting Rights Act claims as to Districts 8 and 9 as they have been drawn in Act 43.

We also agree with Plaintiffs that Mr. Troupis' participation in the political, strategic and policy aspects of the redistricting process was not limited to his dealings with MALDEF, and that there may be additional areas of legitimate inquiry, though we stress that the inquiry should be focused. Indeed, given the time constraints under which all of us are operating, Plaintiffs would be well advised to pare their questioning, both at deposition and trial, to what is essential to their case.

In sum, as to political, strategic or policy matters and as to communications and documents shared with third parties, such as MALDEF, the court has been clear and consistent, any attorney-client privilege either did not exist or was waived.

However, we do conclude that further exploration with Mr. Troupis of certain documents that have been released pursuant to the court's prior orders would impermissibly tread

on the attorney-client privilege and/or Attorney Work Product Doctrine. Although we found the documents themselves were not subject to the privilege, largely because of the almost complete melding of the political and legal processes undertaken by the Legislature in this instance, we are mindful that Mr. Troupis is a lawyer -- indeed, a very experienced lawyer in this area -- and that the further exploration of his legal advice to his client and his mental impressions is not warranted, notwithstanding the denial of the privilege as to the documents themselves. The documents as to which further inquiry at deposition or at trial is not permitted are Nos. 31 through 32, 39 through 40, 70 through 73 and 76 through 82. When I use those numbers, I'm referring to the numbers as we were given the documents. We were given 1 through 84 prior to our ruling last week. Rather than switching conventions on you, I'm going to use those documents to describe the documents that were subject to the prior order.

In regard to the documents that were produced last week and were not the subject of the court's February 16th order, the court concludes that the following are off limits for further inquiry for the same reasons, and here I'm going to use the Bates numbers, JRT81, 86, 113, 126 and 127.

The final thing that I would say, and I'm sure I speak for all of us not only in regard to everything I have previously said, but especially in regard to what I'm going to

repeat here, and that is that the Plaintiffs would be well advised to focus on what is essential to their case given the time constraints we're operating under. Okay. That's all I have on this issue.

JUDGE STADTMUELLER: Thank you, Judge Dow.

MR. DAUGHERTY: Your Honor, if I can be heard just briefly. Don Daughtery on behalf of Attorney Troupis. So the court is directing Mr. Troupis to testify pursuant to the Supreme Court rule exception under 21.6 I think it's 5 pursuant to a court order, correct?

JUDGE DOW: Yes, that is correct, and I should have included that. The ethical dilemma comes right out of that provision of your rules, so that is the basis for our ruling.

MR. DAUGHERTY: Thank you.

JUDGE DOW: Thank you, sir.

MR. EARLE: May I address the court?

JUDGE STADTMUELLER: You may, Mr. Earle.

MR. EARLE: A further point of clarification. We had anticipated, in connection with the deposition of Attorney Troupis, a duces tecum requiring him to produce any correspondence or email that fall within the scope of the prior orders of the court, but which may not yet have been produced. The question of whether we have achieved final certification remains ambiguous, and in the view of the Plaintiffs was placed in more question by one of the paragraphs in the motion for

clarification, which seemed to indicate that Attorney Troupis had been relying on third parties and others to comply with the court's orders. The question is not clear whether Attorney Troupis has conducted an adequate search and identified documents responsive to the court's prior orders.

JUDGE STADTMUELLER: Well, in that regard I think, first of all, as officers of the court and we as judges have endeavored to work our way through this with a limited set of documents. Obviously, one of you held up a large sheath of documents yesterday that were never provided to the court, and I'm not suggesting for a minute that they should have been, but Judge Dow I think has a reasonably good approach in identifying for you those documents that clearly are beyond the attorney-client privilege question. There are others that remain within the scope of the attorney-client privilege, and to the extent that documents that the court has not had the benefit of reviewing fall within either category, I think you now have sufficient guidance from which to approach questioning the witness. It is for that reason and that very reason that we did not want to take counsels' time or our collective time engaging in what would be best described as pretrial discovery in the context of the trial proceeding, which I will address following Judge Wood's order with regard to the issue that we addressed yesterday, and that is whether there is, indeed, a roadblock or an insurmountable Supreme Court opinion that would

preclude the Legislature revisiting the subject of Act 43. In that regard I will now defer to Judge Wood.

JUDGE WOOD: Thank you, Judge Stadtmueller. On behalf of the court we have all prepared a brief order to this effect which I will read addressing this subject. As we know, this case presents the latest chapter in the redistricting of Wisconsin's legislative and congressional districts after a decennial census. As required by 28 U.S.C. Section 2284, this three-judge court has been convened to address the consistency of those statutes with federal law. Before proceeding with trial, however, the court concluded that one last serious effort to resolve these issues in the proper forum, that is to say the State Legislature, was advisable. This was in keeping with the consistent guidance from the Supreme Court of the United States stressing the fact that redistricting is primarily the duty and responsibility of the state. The court reminded us of that as recently as Perry versus Perez this year, quoting many other cases.

At the time this court made that suggestion, all parties agreed to explore this question seriously. But when we reconvened yesterday afternoon, however, counsel for the Defendant Government Accountability Board presented what he described as a "good-news bad news" scenario. He stated that the Legislature was willing to consider making changes to the maps that are before the court, but that it believed itself to

be under a binding legal prohibition against doing so based on the Constitution of Wisconsin and the Wisconsin Supreme Court's decision in State ex rel. Smith versus Zimmerman, a 1954 decision.

The preliminary question that this court must resolve is whether it has the authority to express an opinion on the ability of the Legislature to act. We conclude that we do possess that authority. Settlement is a firmly established part of the pretrial process in Federal courts, as you know from Federal Rule of Civil Procedure 16(a). Courts are entitled to issue orders compelling litigants to meet and confer and to conduct discussions with parties empowered to make decisions. If one party takes the position that it is under a legal disability to proceed with the settlement process, the court has the authority to resolve that question before moving ahead with the case. If it agrees that settlement is legally precluded, then it must, of course, move ahead to the formal trial. If it concludes that settlement is permissible, then it is entitled, as a part of its general authority over case management, to order the parties to engage in these discussions. In the present case, we conclude that this court both can and must decide whether the Wisconsin Constitution, as interpreted by the Supreme Court of Wisconsin in Smith versus Zimmerman and related cases, imposes such a legal blockade against the Legislature that would preclude it

from acting.

The fact that this requires us to engage in an interpretation of state law is of no moment. Federal courts routinely decide questions of state law that arise in conjunction with proceedings both under the federal question jurisdiction, which is what supports the present case, or under the diversity jurisdiction. Although it would have been this court's preference to refer this question of state law to the Supreme Court of Wisconsin for an authoritative interpretation, it appears that this option is not available to us. The governing statutes and rules that Wisconsin has adopted limit the certification procedure to questions referred by the Supreme Court of the United States, a Federal Court of Appeals or a fellow state Supreme Court. I'm referring to Article 8, Section 3, Subsection 3 of the Wisconsin Constitution which states that the Supreme Court, among other things, may accept cases on certification by the Court of Appeals, and to Wisconsin Statute 821.01, which provides that, quote, "The Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States or the highest appellate court of any other state" in certain circumstances. Perhaps the Legislature overlooked the now rare phenomenon of the three-judge district court, which is comparable to a Court of Appeals insofar as its decisions are appealable directly to the U. S. Supreme Court,

or perhaps this omission was intentional. No matter. The plain language of the State Constitution and the statute precludes us from taking this preferable avenue, and so of necessity we must decide.

The natural starting point for our analysis is the language of the Wisconsin Constitution. Article IV, Section 3 provides, and here we emphasize the same words as we did yesterday, "At its first session after each enumeration made by the authority of the United States, the Legislature shall apportion and district anew the members of the Senate and Assembly, according to the number of inhabitants." The most natural reading of that language is as a reference to one of the normal biennial sessions of the Wisconsin Legislature. In response to a question from the court yesterday, counsel for the Defendant Intervenors, the members of the Republican delegation to the United States House of Representatives, opined that for at least 100 years the Wisconsin legislative sessions after been two years in duration. That view was confirmed by the Legislature's own web page, which states that, quote, "Wisconsin legislative sessions are referred to by the odd-numbered year in which the session starts," close quote.

We see nothing in Article IV, Section 3 that forecloses the General Assembly from revisiting its plans of redistricting and reapportionment during its current session. Indeed, the Smith decision itself states that the

constitutional prohibition is directed at the phenomenon of, quote, "frequent redistricting," close quote. Later in the opinion, the court reiterated that it was rejecting the relator's argument because, quote, "for all practical purposes, under the relator's view, the Legislature may redistrict the state as often as it chooses, the constitutional prohibition to the contrary notwithstanding," close quote. Action within the first session after the decennial census, if it is completed before the first election that occurs under the new boundaries, poses no risk at all of "frequent redistricting." Instead, it is compatible with a reading of the State Constitution to the effect that the Legislature is authorized to undertake and must conclude its reapportionment and redistricting duties during the first session after each national census.

Indeed, Defendant Government Accountability Board itself has previously acknowledged the Legislature's authority to amend the redistricting plan before the end of the current session. In an internal memorandum issued November 10, 2011, the GAB stated that its plan of action included, quote, "working with the Legislature to develop legislation that will make necessary technical corrections to Acts 39, 43 and 44 to correct districts," close quote. The GAB continued, quote, "The simplest way to accomplish this is to make technical corrections to the Acts," close quote. The GAB does not suggest anywhere in the memorandum that its plan of action

might conflict with state law. Similarly, the record reflects no objection from the Legislature to the GAB's assumption that the Acts could be corrected for this purpose.

We agree with the GAB's earlier position. Nothing in Zimmerman stands in the way of further revision by the General Assembly at this time. In the first place, the facts of Zimmerman are both highly unusual and distinguishable from our situation. In Zimmerman, the Legislature enacted the apportionment at issue in 1951, but the Act was not to become operative until January 1, 1954, and then only if in a referendum held at the time of the 1952 general election the people should reject a proposal to establish Senate or Assembly districts on an area as well as a population basis. The proposal was rejected. Then, in the session beginning in 1953, I reiterate, a new session, the Legislature enacted a new law to correct the old one. Consistent with the established duration of Wisconsin legislative sessions, it is self-evident that the 1953 law was not enacted during the first session of the Legislature following the 1950 decennial census.

In rejecting the contention that the 1953 Legislature retained and still possessed the power to redistrict areas already districted in the 1951 law, the Wisconsin Supreme Court ruled that the subject of reapportionment, quote, "passed beyond the Legislature's power of revision at the date of the referendum at the very latest," that would have been 1954,

adding that "it is not necessary to decide now whether it so passed at an earlier date." So the court just didn't hold that the passage of the 1951 law alone was enough to exhaust the Legislature's power.

Additional limitations in Zimmerman also support this understanding. Among other things, the court noted these things. Both Houses of the Legislature passed the bill, number one. Number two, the governor signed it. Number three, the Secretary of State published it. Number four, the Legislature adjourned sine die. And number five, the citizens of the state, by their action in the referendum, brought to pass the condition on which the finality of the Rosenberry reapportionment of 1951 depended. Here, the first, second and third steps have been accomplished. Step 5 is not in play, because it was unique to the 1951 Act, but Step 4 has not yet occurred.

Having concluded that neither the Constitution of Wisconsin nor any ruling by the State Supreme Court stands in the way of further legislative consideration of the issues raised in this litigation, we note also from a broader perspective that the ground has shifted considerably since the mid 1950's. More recent decisions of the Wisconsin Supreme Court and the Supreme Court of the United States are fully consistent with an effort to see if the state Legislature might correct any possible flaws in the legislation while it is still

in its first session after the census. Indeed, these more recent materials indicate this is not only a proper course, but a preferred one.

Zimmerman, of course, was decided well before Baker versus Carr, a 1962 decision of the Supreme Court, and the enactment of the Voting Rights Act prior to which redistricting and reapportionment were thought to be non-justiciable political questions. After those measures, judicial review of redistricting statutes became not only permissible, but routine. These developments raised new questions about the way in which federal and state institutions were to interact. As I've already said, the Supreme Court of the United States has emphasized the primacy of the state's role, even while it has steadfastly upheld a role for the federal courts in this area when all else fails.

The Wisconsin Supreme Court has sent a similar message. In Jensen versus Wisconsin Elections Board, decided in 2002 during the last round of Wisconsin's redistricting, that court emphasized that, quote, "congressional reapportionment and state legislative redistricting are primarily state, not federal, prerogatives, and they remain inherently political and legislative, not judicial," close quote, tasks. They also commented the framers in their wisdom entrusted this decennial exercise to the legislative branch because the give and take of the legislative process involving,

as it does, representatives elected by the people to make precisely these sorts of political and policy decisions, is preferable to any other. By contrast, adjudicating these issues is not a comfortable place for any court, state or federal.

Having made those comments, though, the State Supreme Court declined to accept an original action on the issue of redistricting given the fact that there was ongoing federal litigation on exactly the same issue. In essence, the state court recognized that comity is a two-way street, and it refused the invitation to intervene at a late stage of the case because, as it explicitly said, of principals of cooperative federalism and federal-state comity, and also a desire to avoid unjustifiable duplication of effort and expense. At the same time, it urged the Legislature to, quote, "now undertake to give the people of this state their due, and timely deliver a plan of legislative redistricting."

The Supreme Court of the United States made similar comments in the LULAC against Perry case, which recognized the primacy of state law in legislatures, and also mentioned the proposition that, when possible, courts should avoid passing unconstitutional questions, the familiar Ashwander principle.

Our conclusion, therefore, is that the Wisconsin Constitution requires only that the Legislature discharge its redistricting and reapportionment duties during its first

session after the 2010 decennial census -- a session that remains ongoing. Nothing in Zimmerman is inconsistent with that reading of the Wisconsin Constitution, nor with post-Baker, post-Voting Rights Act jurisprudence of both the Wisconsin Supreme Court and the Supreme Court of the United States. In fact, our position the fully consistent with a number of related doctrines, including federalism, comity, judicial economy, separation of powers and constitutional avoidance. We do not doubt whether there is authority to revisit it the current plan; the question is whether there is a will to do so.

We, therefore, hold that there's no legal impediment to the parties' compliance with our order to confer in good faith to see if a settlement might by reached in this case. Since preliminary discussions have already taken place, the parties are hereby ordered to take that step, and Judge Stadtmueller can correct me if I'm wrong on time, but I believe to report back to this court by 2:00 p.m. today to see whether any such settlement is possible, or if they have reached an impasse. Depending on that outcome, we will proceed accordingly.

THE COURT: Thank you, Judge Wood. Consistent with Judge Wood's opinion this morning, the way the court is going to leave the matter as of 10:30 is we will expect that counsel report back to the court. We will not reconvene, but you must

report back to the court not later than 2:00 p.m. this afternoon as to what the final decision may be with respect to the Legislature revisiting the subjects that we have been discussing over the last day and one-half. The reason for the 2:00 p.m. cutoff is that lawyers who are going to be trying this case need to be prepared. We will start the trial tomorrow morning at 8:30. We expect to complete all of the testimony at some point Friday, whether it's late afternoon or into the evening. We have no intention, at least on the basis of the record as it now stands, to carry this trial forward into next week. So I again will implore counsel to redouble their efforts to narrow the issues, narrow the number of actual live witnesses who will have to give testimony or who may be expected to give testimony, including the matter of Mr. Troupis' testimony. If counsel are agreeable, you may simply file a deposition transcript in lieu of a trial transcript, or you can redact the transcript with only certain questions and answers as need be appropriate. We're not interested in elongating this process anymore than is absolutely required.

With respect to tomorrow's schedule in the event we do go forward, we will convene at 8:30 with opening statements and begin with the testimony of the plaintiffs' witnesses. As I indicated at the final pretrial conference, I will leave it to counsel to work out among yourselves the order in which

individual witnesses will be cross-examined, whether they be by the Intervenor Defendants or the principal Defendants or Intervenor Plaintiffs to the extent that they may have some follow-up questions. But all of these matters can be effectively addressed in good, open communications with counsel, and to the extent that any of the proffered live witnesses testimony can be avoided, either by stipulation or submitting a proffer to which opposing counsel have no objection, what we are endeavoring to accomplish is to complete the trial record Friday evening. If that's not possible, we will address returning on Monday, but we're not looking to take that step, quite candidly. Are there any other matters that we need to address this morning?

MR. POLAND: Your Honor, if I may. How would the court prefer the parties report back by 2:00 p.m.? Would you prefer in writing? Phone call?

JUDGE STADTMUELLER: You can contact Mr. Willenbrink and he will advise the court.

MR. POLAND: Thank you, Judge.

MR. KELLY: Your Honor, we would like to clarify how you conceive of the meet and confer proceeding this afternoon. As Ms. Lazar mentioned this morning, we represent an independent executive branch of the Wisconsin government. We don't represent the Legislature. We will certainly take the court's decisions and rationale to the Legislature for their

consideration and place that before them and report back to the court what their decision is, but I don't know if you envision any other role than that for us, because we don't represent them.

JUDGE STADTMUELLER: And I understand, and I leave it to you and Mr. Poland and Mr. Earle, if all three of you want to meet and confer with their lawyers, if they have counsel that they are working with, we don't need to know who they are, it's just to ensure that they have an opportunity to reflect upon the opinion of the court, namely, that there is no impediment in the view of this court to their revisiting the subject, since time with each passing hour is becoming more critically important in terms of whatever steps are taken, both with regard to the trial and the court having an opportunity to digest all of the evidence, much of which is already before us in written form, and depending on the court's ruling whether there need be any further action taken by the Legislature.

MR. KELLY: Your Honor, would it be the court's anticipation that if we were to reach some form of settlement, that the court would make a declaration that that settlement results in a constitutionally sound map? And the reason I ask, Your Honor, is because of the need for a preclusive effect so that someone else doesn't tomorrow start another piece of litigation against whatever map results from any settlement that happens to be reached.

JUDGE STADTMUELLER: Well, in anticipation of that unintended consequence, if you will, I think it in large measure is going to be dependent upon how open the legislative process becomes. If it is simply shake and bake with no legislative committee hearings and no opportunities for third parties to present their views, which has been consistently the biggest problem in this case, is that the process is not in keeping with traditional notions of open, transparent government. To the extent that these issues can be set aside and the process be made open, as generally is the case with legislation, they ought not be concerned, but they do need to be concerned about the views of those who have a stake in all of this and, obviously, a reasoned approach can be had.

JUDGE WOOD: I might add a word about that, as well, which is simply to say, which I'm sure you well know, any hypothetical future litigation would be governed by Wisconsin's rules of claim and issue preclusion, if it happened to be in state court, or there might be some issue of federal law, and courts can't fully anticipate that, but on the other hand, stare decisis is a very strong principle in our system. We normally don't have a rule that we preclude people who have never had a day in court, but on the other hand, a good, solid opinion is normally the end of things. There's not a long history of repeated litigation that exists in these kinds of cases, so I think it's the soundness of the ultimate plan and

the strength of the opinion are what are your primary protections.

MR. KELLY: One moment, Your Honor. I just want to make sure I understand then that the court understands that if we were to reach -- if the Legislature were to revisit Act 43 or Act 44 and make any changes, that we would then come back to this court and there would be a dismissal with prejudice of this litigation. Would it be the court's opinion that that dismissal with prejudice would be a sufficient ruling on the merits, that no further complaint based on those causes of action would be justiciable?

JUDGE WOOD: Again, I would say that, subject to the review of the revised plan, I mean, it's impossible for us to sit here right now and rule on a plan we have never seen. Assuming the revised acts pass muster, of course this case would be dismissed with prejudice, but it's not possible for us to say to somebody who's a stranger to this litigation what that person's rights are, hypothetically speaking. The present plaintiffs would not be able to come back, of course.

MR. KELLY: So the result of the legislative action would be that this case would be automatically dismissed, is that right? There would be no further review of that plan in this case?

JUDGE WOOD: Assuming that -- I mean, we would have to look at the plan, but, yes, assuming that the plan is

acceptable, that's my understanding.

JUDGE STADTMUELLER: Absolutely.

MR. KELLY: So we would still have a trial on the acts, but it would be a trial on the acts as amended as opposed to the acts as they exist today?

JUDGE WOOD: Only if we thought that there was a disputed issue that required a trial, I would think.

JUDGE STADTMUELLER: I guess I would liken it to the settlement, for example, in a class action litigation in which the settlement requires approval by the court before whom the underlying action was pending, and if all of the issues are appropriately addressed, and assuming that the concerns that the plaintiffs have raised in this case are adequately addressed and that we don't create other issues by revisiting the plan, for example, denying other constituents in these districts their one-man, one-vote right. So I guess at the end of the day there is a focus point of the shortcomings, that be an appropriate descriptor of the current legislation, and if amending it or revisiting it is done in a manner that creates other issues for the court, forgetting if there are no other parties that object, but the court is obliged to make an independent determination based upon the principles that are before us in this very case, and assuming those principles are appropriately addressed and there are no lingering issues, I have no hesitancy in speaking for my colleagues in telling you

that the plan would certainly receive the approval of the court.

MR. KELLY: But, Your Honor, with respect, to provide the court with that kind of information necessary to make a determination of whether that amended plan would meet constitutional muster, that is to say that it addressed the concerns of the plaintiffs, it would require exactly what we are prepared to do, were prepared to do yesterday, which is put on a three- to four-day trial with all of our experts to explain to the court all of the factors that go into building a constitutional map. It does not seem like what we are proposing here is going to advance the ball very far if we are going to be presenting the same trial, perhaps with some modifications around the edges to address whatever the Legislature chooses or not chooses to do, but we're still going to have all of our experts here, we're still going to have days of testimony, we're still going to have all of the legal arguments about whether the issues have been, in the court's eyes, adequately addressed.

JUDGE DOW: Why would that be so if there's agreement? I mean, essentially you have got plaintiff parties coming in here to complain about the current map, for lack of a better word. I know that there is a whole process they are complaining about, as well, but if those current concerns are addressed and there aren't any disputes, I don't know why we

need have to a trial. We have enough paper here -- I mean, I think there are some parties out here that think that we have enough paper here to decide this case on summary judgment or on a motion for judgment on the pleadings. If you take away the disputed issues, I don't know why we'd need to have a trial. We certainly have enough here to make a lot of findings.

JUDGE WOOD: And I don't know why, if there's agreement, I mean, I guess that the whole concept of this was everybody getting together. I think you are jumping ahead to really a worst-case scenario in which agreement would fall apart, the Legislature would do something that they still didn't like, but these Plaintiffs are part of the process. I think the analogy to a class action settlement is an excellent one.

MR. KELLY: Thank you, Judge Wood, and I may have missed the import of what you said earlier today. There was a suggestion that the process would be the thing, that this would be -- that there would be public hearings, there would be committee hearings, there would be amendments and this would travel through the normal legislative process. But I think I'm hearing you say now that we would have an agreement about what the amendment would be, which means there would be no committee hearings necessary, no public hearings necessary. So it's one or the other. We can either address the Plaintiffs' concerns on an agreed basis, or we open the process up and essentially

start over with the redistricting process. But if we reopen it to do a new redistricting process, there's not even a suggestion that the Plaintiffs would be satisfied with that. The Legislature decided, in its good judgment, that it passed a solid constitutional plan. It embodies their judgment of what's best for the people of the State of Wisconsin. There is no reason to believe that going back they are going to adopt whatever the Plaintiffs happen to want in this case, because there's always going to be some other group of people who want something different.

The nature of redistricting is it's not going to please everyone. There will be another group that wants something completely different, they will complain, they will come to court, we will go back to the Legislature, we will start the process over again, we will get another political map, and then we will present it to the court, and we're going to keep going through this iterative process without a natural resolution. So we can either do this potentially on a settled basis, which would require confidential communications with the parties in such a way that the members of the Legislature would be able to agree amongst themselves about what parts of the Plaintiffs' concerns would be addressed, and then they could pass that without committee hearings, without public hearings and without that political process. Or we can do the political process with no guarantee that the Plaintiffs' concerns are

going to be adopted, because in the Legislature's mind their concerns are baseless.

JUDGE STADTMUELLER: Well, all of that in be true, but unfortunately, Mr. Kelly, from the record that is before the court, we don't know what the Legislature did other than pass an act. For example, you mentioned experts. We have no idea what they really relied upon. It may have been totally a political decision, and that's fine, they are entitled to make a political decision, but the political decision still has to pass constitutional muster, and that's what this litigation is all about, at least in the view of these three judges.

MR. KELLY: I completely agree, Your Honor.

JUDGE WOOD: Could I just get some clarification from you about one point, because I guess what I had understood this to be about is whether it's possible to settle the claims that are actually before this court from the various Plaintiffs that are here in a way that would be acceptable to all sides so that we could have an agreed conclusion. Now I would imagine that part of that conclusion would have to be not just a promise from the Legislature to pass corrective legislation, but actual passage of it, but I also start from the premise, which I take, among other things, from the Perez litigation that there's a great deal of this that is let's say less contested than other parts of it. There might be some focus in any particular settlement, I'm not going to prejudge what happens in

settlement, but it seems to me we are not talking about throwing out the entire map and starting over again, we're talking about can this case be settled.

MR. KELLY: Judge, I think that puts a nice bow around the question. If this is going to be a settlement, then I don't think there's going to be a need for any post-settlement trial on whether that map is constitutional. But we do need the court's imprimatur that it's constitutional for the settlement to have any significance whatsoever, because otherwise we will have another group of plaintiffs.

JUDGE WOOD: So essentially you want a consent decree. You want more than just a private settlement, you want a consent decree, it sounds to me like.

MR. KELLY: That's essentially what we would need. If the court believes it has the authority to issue a consent decree that would be binding on everyone else in the State of Wisconsin so that we don't go through this again in a couple of weeks, then I think the Legislature might be able to move ahead with a potential settlement.

JUDGE STADTMUELLER: I see no problem with that, if you want to cast it as a consent decree as opposed to private settlement or whatever.

MR. KELLY: That's fine. I want to make sure we're not doing this again in a few weeks.

JUDGE WOOD: I don't think any of us really wants to.

JUDGE DOW: And the issue, just from a trial perspective, we wouldn't be sitting here if we didn't think there was some issue for trial, but you guys control the ability to take those things off the table by ceasing to have a dispute about them. I mean, that's kind of -- I understand your point is so even if all of us sitting in this room cease to have a dispute about them, what about the rest of the world that may have a dispute. I understand that point. But in terms of simplifying this for trial, if you guys cease to have a dispute, there isn't anything to try here. We have a lot of paper here that we could make findings on, if there's nothing in dispute.

MR. KELLY: As a factual matter, yes. But even if we were to cease to have a dispute, just so the court is clear, I can't make the Legislature do anything. I mean, they have their own authority, they have their own priorities and issues, and they will do what they are going to do, and we will convey what the court has said to them.

JUDGE DOW: And they may well have their own incentives, as well. I mean, as the case now stands, there's a triable fact on constitutional claims, and our dictates are to avoid those, if possible, that's all part of what Judge Wood was reading a half-an-hour ago, but they also may have incentives that they might like to take those issues off the table to avoid the possibility that they might lose the

litigation. That's the issue.

MR. KELLY: Thank you, Your Honor.

JUDGE STADTMUELLER: Very well. There being nothing further, the court will stand adjourned and we will await further word. Before we do that, Mr. Shriner, in keeping with the court's comments earlier, you don't have to say anything now, but you may recall the Court suggesting last evening that you and Mr. Earle explore, perhaps, a stipulation.

MR. SHRINER: Mr. Olson and Mr. Hassett and I have had conversations. I think we are very close to being agreed on what the testimony of our witnesses would be and being able to submit it.

JUDGE STADTMUELLER: Very well. Thank you. The court stands in recess.

THE BAILIFF: All rise.

UNITED STATES DISTRICT COURT)
)SS
EASTERN DISTRICT OF WISCONSIN)

I, KATHY A. HALMA, Official Court Reporter for the United States District Court, Eastern District of Wisconsin, do hereby certify that I reported the foregoing proceedings and that the same is true and correct in accordance with my original shorthand notes taken at said time and place.

_____

KATHY A. HALMA
Official Court Reporter
United States District Court