

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,

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

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

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**

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*,² 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 ...

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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.

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