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.

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.

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

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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