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

WILLIAM WHITFORD, et al.,

Plaintiffs,

v. Case No. 15CV0421

BEVERLY GILL, et al.,

Defendants.

DEFENDANTS' BRIEF ON REMEDY

When federal court declares a legislative districting plan to be unconstitutional, the law is clear that the court must allow the Legislature an opportunity to draw a revised plan meeting constitutional requirements. While the defendants disagree with the Court's ruling that the Assembly districts are unconstitutional, the proper remedy is for the Court to issue an injunction that directs the Legislature to revise the Assembly districts to comply with its decision. The Court should therefore enter an injunction directs the Legislature to devise a new plan.

The real issue with respect to remedy is the timing of when a legislative alternative should be presented. Given the uncertain nature of the law on partisan gerrymandering, the Court should not require a revised plan until after the Supreme Court has ruled on the case. Such an approach would allow

the defendants' appeal to the Supreme Court to proceed immediately, while avoiding a waste of resources devising a plan that is a temporary placeholder until the Supreme Court's ruling in this case. Only after a Supreme Court ruling will it be known if a replacement map is needed and, if so, what form it should take.

This is not an equal apportionment or racial gerrymandering case where numerous Supreme Court decisions can guide district courts, legislatures, and the parties on how to revise a map to make it constitutional. Given the complete lack of Supreme Court precedent governing partisan gerrymandering claims, it would be a waste of resources for the Legislature to draft and pass a replacement plan, and for the parties and the Court to consider that plan, when any plan devised at most would be a placeholder pending a decision from the Supreme Court, and perhaps completely unnecessary should the Supreme Court reverse. Even if the Supreme Court adopts a standard for partisan gerrymandering, a revised map drawn to meet this Court's standard would likely have to change—either because Act 43 is constitutional under that standard or because the new standard is different from the one adopted by this Court.

Lastly, the defendants do not think that additional evidence is warranted. The defendants will address any new evidence suggested by the plaintiffs in their initial brief, if any, in the defendants' response brief.

BACKGROUND

I. Trial record on the passage of Act 43

The Legislature took approximately four months to enact Act 43, from the receipt of the census data necessary to begin drafting in early April 2011 (Day 2 Tr. 55–56), to enactment on August 9, 2011, and publication on August 23, 2011. (Dkt. 125 ¶ 86.) The drafting process began in April and lasted until late June when regional alternatives were presented to legislative leadership. (Dkt. 148:55–92.) As the Court noted in its decision, in Wisconsin "the caucus system plays a significant role in the legislative process." (Dkt 166:5.) Therefore, the legislative leadership had to build support for the plan within the caucus before the bill would be introduced to the full Legislature.

The bill which became Act 43 was introduced by the Committee on Organization in the State Senate on July 11, 2011. (Dkt. 125 ¶ 86.) Following the introduction of the bill, it had a public hearing, amendments offered, and then debates and votes in both houses of the Legislature. (Dkt. 125 ¶ 86; Dkt. 148:112–17.) The bill was signed by the Governor on August 9, 2011, and became law upon publication on August 23, 2011. (*See* Dkt. 147:152–53.)

II. The Court's decision

The Court issued its decision on November 21, 2016, holding that the Assembly districts in Act 43 were unconstitutional. The Court employed a legal standard requiring a showing of (1) "an intent to entrench a political party in

power," (Dkt. 166:59); (2) a discriminatory effect that "impede[s]" a party's ability to translate their votes into legislative seats," (Dkt. 166:90); and (3) an inquiry into "whether a plan's partisan effect is justifiable, *i.e.*, whether it can be explained by the legitimate state prerogatives and neutral factors that are implicated in the districting process." (Dkt. 166:91.)

This was an unusual case in which the parties submitted evidence without knowing the legal standard under which the Court would rule. The Court did not establish a legal standard under which the case would be tried until the decision was issued months after trial. Further, the Court split 2–1 on what the legal standard should be, with a dissent that would have upheld Act 43 and dismissed the plaintiffs' claims. (Dkt. 166:119–59.)

The Court ordered further briefing on "the nature and timing of all appropriate remedial measures" and requested that the parties "inform the court of the nature and extent of the testimony they believe is required" in order for the Court to rule on the remedy. (Dkt. 166:116.)

III. Statutes relevant to the next general elections for Assembly

The next general election will occur in November of 2018, with partisan primaries in August of 2018. Wis. Stat. § 5.02(5) (defining "General election" as "the election held in even-numbered years on the Tuesday after the first Monday in November to elect United States senators, representatives in congress, presidential electors, state senators, representatives to the

assembly"); Wis. Stat. § 5.02(12s) (defining "Partisan primary" as "the primary held the 2nd Tuesday in August to nominate candidates to be voted for at the general election."). Candidates for the Assembly cannot begin to circulate nomination papers until April 15, 2018, with the requisite paperwork due on June 1, 2018. Wis. Stat. § 8.15(1); Wis. Stat. § 8.21(1).

ARGUMENT

The proper remedy is for the Court to enter an injunction directing the Legislature to draft a new map consistent with its opinion. The Court's order, however, should not require the Legislature to pass a replacement plan until the Supreme Court rules on appeal, the result of which may obviate the need for a remedial map. Even if the Supreme Court establishes a legal standard for partisan gerrymandering, that new standard may well change the form a remedial map would take.

I. The Court should allow the Legislature the opportunity to adopt a districting plan that meets constitutional requirements.

While the defendants disagree with the Court's ruling that the Act 43 Assembly districts are unconstitutional, the proper remedy is to enter an injunction directing the Legislature to devise a new plan that complies with the Court's decision. The Supreme Court "has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978) (plurality opinion). As a result,

> [w]hen a federal court declares an existing apportionment scheme unconstitutional, it is therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan.

Id. at 540. Numerous Supreme Court decisions establish that a court that has invalidated a State's existing plan should "give the legislature an opportunity to devise an acceptable replacement before itself undertaking the task of reapportionment." *McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981) (collecting cases). This is consistent with Wisconsin law, which provides "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.

In this case, it is "practicable" for the Legislature to devise a districting plan because there are no elections on the horizon that would justify departing from the normal procedure. It is also consistent with the purpose behind the Supreme Court's practice. Federal courts are to limit their intervention in districting because "a state's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause." *Wise*, 437 U.S. at 540 (quoting *Burns v. Richardson*, 384 U.S. 73, 85 (1966) (alteration omitted)). The Supreme Court prefers that legislatures implement districting plans because "'the federal courts are often going to be faced with hard remedial problems' in minimizing friction between their remedies and

legitimate state policies." *Connor v. Finch*, 431 U.S. 407, 414 (1977) (quoting *Taylor v. McKeithen*, 407 U.S. 191, 194 (1972)). The Legislature "is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality." *Id.* at 414–15. "The federal courts by contrast possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name." *Id.* at 415.

The Wisconsin Legislature is in the best position to draw a revised plan that addresses the Court's ruling, while also addressing traditional districting principles and Wisconsin's constitutional commands that

> [t]he members of the assembly shall be chosen biennially, by single districts, on the Tuesday succeeding the first Monday of November in even-numbered years, by the qualified electors of the several districts, such districts to be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable.

Wis. Const. art. IV, § 4. Further, the Senate plan has not been ruled unconstitutional. Thus, the Legislature must consider how to implement the ruling alongside the state constitutional requirement that "no assembly district shall be divided in the formation of a senate district." Wis. Const. art. IV, § 5.

The Court should therefore enter an injunction that grants the Wisconsin Legislature the opportunity to redistrict the Assembly in accordance

with the Court's opinion. The entry of an injunction will allow the defendants to appeal the case to the Supreme Court. 28 U.S.C. § 1253.

II. The Court's injunction should not require the Legislature to present a replacement plan until there has been a ruling by the Supreme Court on appeal.

The law is clear that the Legislature should have an opportunity to draw a replacement plan. Because the substantive law regarding partisan gerrymandering is not clear, the Court's injunction should not require the Legislature to formally redraw the districts until the Supreme Court has clarified the law. Federal courts are commanded not to restrict "a state's freedom of choice to devise substitutes for an apportionment plan found unconstitutional . . . beyond the clear commands of the Equal Protection Clause." *Wise*, 437 U.S. at 540 (quoting *Burns v. Richardson*, 384 U.S. 73, 85 (1966) (alteration omitted)). In partisan gerrymandering claims, the "commands of the Equal Protection Clause" are far from clear. As this Court explained, there is no "well-trodden path," (Dkt. 166:31) and the Supreme Court's "navigational signs are not yet well-placed." (Dkt. 166:31.) In ruling on the intent element, the Court even relied on the fact that this case is one that "arises in periods before the Supreme Court has illuminated the full meaning of a constitutional right." (Dkt. 166:63.)

The unique nature of this case is illustrated by the fact that the parties tried the case without knowing the legal standard under which the case was to

be decided. The Court did not determine that standard until its decision was issued months after trial. The parties submitted evidence on the plaintiffs' proposed standard that focused on the efficiency gap, but as the dissent pointed out, "[d]espite the central role the efficiency gap has played in the case from the beginning . . . the majority has declined the Plaintiffs' invitation to adopt their standard." (Dkt. 166:120.)

Further, the dissent pointed out the many ways in which the Court's standard differs from the standards offered by the Justices who would entertain partisan gerrymandering claims in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), and *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006) (*LULAC*). Among other issues, the standard uses a different definition of "entrench" than "Justices who have used that language in previous cases intended," (Dkt. 166:120), and the "the Plaintiffs do not even attempt to argue that Act 43 violates traditional redistricting principles" even though Justices who would entertain partisan gerrymandering claims would require this as an element of the claim. (Dkt. 166:120.)

Given the uncertainty in the governing legal standard, it would waste judicial and legislative resources to proceed with replacement plans before the Supreme Court has ruled. This is not an equal population or racial gerrymandering case, where there is ample Supreme Court authority to guide the Legislature, the Court, and the parties in determining a remedy while a

case is on appeal. No legal standard governing these claims has emerged, and the Supreme Court rejected partisan gerrymandering claims in *Vieth* and *LULAC*. The chances of a reversal, remand, or other ruling inconsistent with this Court's decision are high because the standard employed in the decision is not based on a standard that commanded close to plurality support in either *Vieth* or *LULAC*.

Even if the Supreme Court establishes a standard for partisan gerrymandering, such a ruling would likely require changes to any remedial map. Act 43 could be constitutional under a newly-announced standard, as happened in *Davis v. Bandemer*, 478 U.S. 109, 143 (1986), such that no changes to the Assembly map would be necessary. Alternatively, the Supreme Court could remand to apply the newly announced standard. Even a Supreme Court ruling that holds Act 43 was unconstitutional may do so under a different legal standard than this Court articulated, which would likely require different revisions to Act 43 than what would be contemplated under this Court's standard. The Legislature, the Court, and the parties should not expend resources drawing and debating a plan that is merely a placeholder until the Supreme Court rules on the issue.

A ruling to this effect is supported by the reasoning employed by Justice Brennan in granting a stay of an injunction ordering New Jersey to draw new congressional districts. *Karcher v. Daggett*, 455 U.S. 1303, 1304 (1982)

(Brennan, J., in chambers). In that case, the district court split 2-1 on how *Kilpatrick v. Preisler*, 394 U.S. 536 (1969) should be applied to achieve equally populated congressional districts. *Id.* at 1304. Justice Brennan noted that "[t]he importance of a definitive answer from this Court as to the proper interpretation of the *Kirkpatrick* standard is self-evident." *Id.* at 1306. Justice Brennan balanced the equities in favor of a stay because the Supreme Court "has repeatedly emphasized that legislative apportionment plans created by the legislature are to be preferred to judicially constructed plans." *Id.* at 1307. Justice Brennan's reasoning supports not requiring the Legislature to pass a plan before the Supreme Court rules, due to the lack of a legal standard governing partisan gerrymandering claims.

III. The defendants do not believe new testimony is needed for the Court to issue a ruling on remedy.

The defendants do not think new testimony is needed or warranted at this time. The defendants will consider any proposed new evidence suggested by the plaintiffs in their brief and address whether such evidence is needed in the response brief. Should the Court decide new evidence is warranted, the defendants reserve the right to produce additional evidence and contest evidence presented by the plaintiffs.

CONCLUSION

The Court should enter an injunction directing the Legislature to revise the Assembly districts to conform to the Court's decision, but not require a replacement plan be enacted until a decision by the Supreme Court.

Dated this 21st day of December, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

/s/Brian P. Keenan
BRIAN P. KEENAN
Assistant Attorney General
State Bar #1056525

Attorneys for Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0020
(608) 267-2223 (Fax)
keenanbp@doj.state.wi.us