In the Supreme Court of Wisconsin

No. 2021-AP-1450-OA

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

Petitioners,

v.

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

Respondents.

NON-PARTY BRIEF OF WISCONSIN LEGISLATURE IN SUPPORT OF PETITION TO SUPREME COURT TO TAKE JURISDICTION OF ORIGINAL ACTION

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INTRODUCTION

Wisconsin voters ask this Court to take original jurisdiction over an action challenging the constitutionality of existing district boundaries. Pet. ¶¶1, 13-17, 36. They ask that the boundaries be adjusted, should the Legislature be unable to timely produce new district maps based on new census data. *Id.* ¶36.

The obligation to revise Wisconsin's district boundaries after each census rests with the Legislature. U.S. Const. art. I, §2, cl. 3, §4, cl. 1; Wis. Const. art. IV, §3. Nearly sixty years ago, this Court recognized that the legislative process must have an opportunity to precede judicial action on apportionment, but should judicial relief be necessary, "there is no reason for Wisconsin citizens to have to rely upon the federal courts[.]" *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 564, 571, 126 N.W.2d 551 (1964). And for far longer, this Court has exercised original jurisdiction over disputes involving redistricting. *See, e.g., State ex rel. Thomson v. Zimmerman,* 264 Wis. 644, 60 N.W.2d 416 (1953); *State ex rel. Bowman v. Dammann,* 209 Wis. 21, 243 N.W. 481 (1932); *State ex rel. Att'y Gen. v. Cunningham,* 81 Wis. 440, 51 N.W. 724 (1892). There can be "no question" that actions involving redistricting "warrant[]

this court's original jurisdiction; any reapportionment or redistricting case is, by definition, publici juris, implicating the sovereign interests of the people of this state." *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶17, 249 Wis. 2d 706, 639 N.W.2d 537.

The U.S. Supreme Court, too, recognizes that States, through their legislatures or other bodies, have the "primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe v. Emison*, 507 U.S. 25, 34 (1993). Accordingly, "[a]bsent evidence" that the State—including its judiciary—"will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Id.* at 34; *see also Jensen*, 2002 WI 13, ¶11 ("We read *Growe* as the United States Supreme Court's effort to put the state supreme courts back into the equation.").

Despite *Growe*'s command, plaintiffs have raced to the federal courthouse. They have challenged Wisconsin's existing legislative districts and demanded that the federal court (with only one federal judge from Wisconsin) re-draw Wisconsin's district lines if the Legislature does not abide by a schedule to be set by the federal court. *Hunter v. Bostelmann*, No. 3:21-cv-00512 (W.D. Wis.) (filed August 13,

2021) ("*Hunter*"); *Black Leaders Organizing for Communities v. Spindell*, No. 3:21-cv—534 (W.D. Wis.) (filed August 23, 2021) ("*BLOC*").[1] These cases threaten to usurp the State's primacy in redistricting.

To protect the State's constitutional prerogative in redistricting and to prevent federal interference, the Court should exercise original jurisdiction over this action.

ARGUMENT

Taking jurisdiction in this case protects the State's and its citizens' constitutional interest in having Wisconsin control Wisconsin's redistricting process. It will shield Wisconsin from unwarranted federal supervision over ongoing redistricting efforts. And because redistricting, by definition, implicates the sovereign interests of the citizens of Wisconsin, this matter can and should be addressed by this Court through an original action.

Finally, protecting that sovereign interest well outweighs any possible concerns about exercising original jurisdiction, including Respondents' unfounded assertions. Federal litigation is in its infancy,

[1] The *Hunter* and *BLOC* complaints are included in the Legislature's concurrently filed Appendix. Leg. App. 3, 24.

and the Legislature has asked that it be dismissed given the forum available in this Court if an impasse were to arise. Federal courts have no business drawing Wisconsin's legislative districts. The current circumstances are "favorable to an orderly and efficient resolution of the case," and this Court may "readily accept original jurisdiction[.]" *Jensen*, 2002 WI 13, ¶18.

I. Wisconsin, not a federal court, is responsible for redistricting.

By accepting original jurisdiction, this Court protects Wisconsin from unwarranted federal supervision. It does so by sending a clear message to federal courts that there is no evidence that the branches of the Wisconsin state government will fail to timely redistrict.

Redistricting is primarily the responsibility of States, not the federal government. *See Growe*, 507 U.S. at 33-34, 36. Accordingly, federal courts may not obstruct or impede redistricting absent "evidence" making it "apparent" that the state's legislative *and judicial* process will fail to "develop a redistricting plan in time for the primaries." *Id.* at 34, 36.

There is a present threat that a federal court will interfere with the State's ongoing redistricting process. The *Hunter* and *BLOC* plaintiffs have requested that the federal court place Wisconsin's legislative redistricting process on a timeline. (Leg. App. 18, 40). The district court has ordered the parties to submit a joint scheduling plan by September 13, 2021, suggesting the federal court may do just that.

To be sure, it would be inappropriate for the federal court to exercise jurisdiction at this time. The *Hunter* plaintiffs filed their federal lawsuit only one day after census data was delivered. Pet. ¶26; Leg. App. 3. The redistricting process has only just begun, let alone made its way to Wisconsin's judiciary to resolve any impasse.[2] Similarly, the *BLOC* plaintiffs filed a federal complaint 10 days into redistricting, the same day this petition was filed. Leg. App. 24.

The United States Supreme Court has discouraged this sort of race to the federal courthouse. It has directed federal courts to stay out of way while the State, including its judiciary, addresses redistricting. *See, e.g.*, *Growe*, 507 U.S. at 33-36; *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)

[2] The legislative redistricting process is underway. For example, the Legislature is soliciting public input on new legislative plans. Wisconsin Legislature, "Draw Your District Wisconsin," https://drawyourdistrict.legis.wisconsin.gov/.

("[R]eapportionment is primarily a matter for legislative consideration and determination," and "judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so."). Where, as here, federal claims are filed at the onset of redistricting with a state forum available to resolve any future impasse, such claims should be dismissed for lack of subject matter jurisdiction and ripeness. *See, e.g.*, *Mayfield v. Texas,* 206 F.Supp.2d 820, 824-26 (E.D. Tex. 2001); *Arrington v. Elections Bd.*, 173 F.Supp.2d 856, 868-70 (E.D. Wis. 2001) (Easterbrook, J., dissenting).

While federal courts *could* and *should* stay out of redistricting disputes, some federal courts have imposed a timeline on legislative action during the early stages of redistricting and then stayed proceedings. *See, e.g., Arrington,* 173 F.Supp.2d at 867. It is thus all the more important that this Court take jurisdiction given the prospect that the federal court may attempt to follow this path, which amounts to federal supervision of the legislative districting process.

If this Court takes jurisdiction, there will be no basis for the federal court to hold onto the federally filed lawsuits. It sends a clear message that Wisconsin is fully capable of addressing redistricting on its own—

as *Growe* anticipates and expects. There will be no reason to assume, let alone "evidence," that Wisconsin will not timely perform its redistricting duties. *Growe*, 507 U.S. at 34.

The Legislature fully expects to enact new district maps based on new census data. If that process fails, however, the next step is this Court, not a federal court. As stated in *Jensen*, "The people of this state have a strong interest in a redistricting map drawn by an institution of state government—ideally and most properly, the legislature, secondarily, this court." 2002 WI 13, ¶17. When a federal court intercedes in that process to impose a redistricting deadline, it not only interferes with the State's legislative process, it interferes with the State's judicial branch. The federal court is the *wrong* sovereign to impose such deadlines. This Court, on the other hand, could establish a schedule for judicial action, with due regard for the Legislature's primary redistricting role. Because redistricting is fundamentally a *state* concern, such action by this Court does not implicate the obvious and acute federalism concerns if a federal court were to do the same. Indeed, this Court has done so in the past. *Zimmerman*, 22 Wis. 2d at 571-72 (postponing remedial action in malapportionment case until "it becomes absolutely necessary to do so" "should the other arms of our state

government be unable to … adopt a valid plan"). The Court should do the same here by taking original jurisdiction to ensure that redistricting is timely.[3]

II. An original action in this Court is appropriate.

For the reasons above, Wisconsin's judicial branch (not the federal courts) is the appropriate forum to remedy malapportionment if the legislative process fails to produce new districts. For the reasons below, an original action in this Court is the most appropriate vehicle to entertain Petitioners' claim.

1. This Court may exercise original jurisdiction over any matter that "trigger[s] the institutional responsibilities of the Supreme Court." *Wis. Legislature v. Palm*, 2020 WI 42, ¶10, 391 Wis. 2d 497, 942 N.W.2d 900 (citation omitted). Among the categories of cases that this Court regularly exercises its original jurisdiction are those involving matters *publici juris,* i.e., those affecting the sovereign rights of the people. *See, e.g.*, *Labor and Farm Party v. Elections Bd.*, 117 Wis. 2d 351, 352, 344

[3] Should the Court take jurisdiction, the Legislature would intervene if and when necessary to protect its institutional interest in redistricting (for example, if an impasse were to arise).

N.W.2d 177 (1984) (taking original action in matter regarding Presidential candidate's ballot access, recognizing action as a matter *publici juris*).

Exercising original jurisdiction over matters involving sovereign rights is the principal reason the Constitution grants this Court original jurisdiction. *Att'y General v. Blossom*, 1 Wis. 317, 330 (1853). As this Court observed in *Petition of Heil,* the Constitution makes this Court both a "court of last resort on all judicial questions under the constitution and laws of the state" and "a court of *first* resort on all judicial questions affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people." 230 Wis. 428, 436, 284 N.W.2d 42 (1939) (emphasis added) (internal citations omitted).

Redistricting and reapportionment are matters that directly affect sovereign interests. Redistricting determines the geographic boundaries by which the State's citizens elect their members of Congress and state legislators. Accordingly, "any reapportionment or redistricting case is, by definition, publici juris, implicating the sovereign rights of the people of this state," and thus warrants original jurisdiction. *Jensen*, 2002 WI 13, ¶17. Thus, this Court has accepted original jurisdiction in actions involving redistricting on numerous occasions. *See, e.g.*, *Zimmerman*, 22

Wis. 2d 544; *Dammann*, 209 Wis. 21; *Cunningham*, 81 Wis. 440. It should do so again here.

Further, the benefits of granting original jurisdiction are numerous. First, doing so eliminates the prospect of dueling and potentially tardy circuit courts—a benefit first observed by this Court five years after Wisconsin was granted statehood. *Blossom*, 1 Wis. at 330. Second, and relatedly, exercising original jurisdiction diminishes the possibility of unnecessary delay. It avoids the possibility that Wisconsin's districts will be redrawn multiple times by multiple state courts, only to wind up in this Court on appeal. Third, any judicial remedy would be adopted by the State's supreme tribunal comprising Justices representing the entire State, not a few judges elected by a smaller geographic factions. Fourth, federal courts would be required to defer to this Court's proceedings, consistent with our constitutional structure. *See, e.g.*, *Growe*, 507 U.S. at 33-36.

2. There is no question that this Court has the capability to ably adjudicate Petitioners' malapportionment claim and provide a judicial remedy should that be necessary. Respondents are flat wrong that "[t]his Court has never taken on a fact-finding or map-making redistricting trial." Resp. Br. 7. This Court ordered remedial maps in an original

action nearly sixty years ago (notably, without the conveniences of today's technology). *See State ex rel. Thompson v. Zimmerman*, 23 Wis. 2d 606, 128 N.W.2d 16 (1964).[4]

Claims that this Court is incapable of addressing redistricting matters because they involve complicated factual development are based more on obfuscation of the Court's role than reality.[5] The malapportionment claim itself should not involve contested facts. How to determine where people live and whether there are inequitable population distributions within legislative districts is not an open factual question; the Constitution directs the Legislature to use data from the recent U.S. Census. Wis. Const. art. IV, §3. That census data is equally

[4] Respondents are also wrong to suggest that the Court would be starting from scratch. *See Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at *7 (E.D. Wis. May 30, 2002) (describing process as "taking the 1992 reapportionment plan as a template and adjusting it for population deviations").

[5] For example, Respondents invoke the 110-page district court decision in *Whitford v. Gill*, 218 F.Supp.3d 837 (W.D. Wis. 2016), *vac'd* 138 S. Ct. 1916 (2018)—since vacated by the U.S. Supreme Court—as an example of "detailed findings of fact" required in redistricting cases. Resp. Br. 12. *Whitford*'s partisan gerrymandering claims look nothing like the malapportionment claims here. If anything, *Whitford* stands as an example of what *not* to do. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019) ("[T]he one-person, one-vote rule is relatively easy to administer as a matter of math. The same cannot be said of partisan gerrymandering claims, because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly.").

available to all potential parties and the Court, as illustrated by the complaints that have already been filed here and in federal court.

If and only if an impasse were to arise, this Court would have to remedy any alleged malapportionment. But that is not a freewheeling and open-ended policymaking exercise, as Respondents wrongly suggest it would be. *See* Resp. Br. 12-14. Parties will submit proposed maps to the Court for its consideration. In this original action, this Court may refer those proposals and any attendant factual questions to the circuit court or a referee for determination. Wis. Stat. §751.09. The Court would be free, for example, to appoint a special master for any fact-finding with respect to proposed maps. Equipped with recommendations from a special master and further briefing and argument from the parties, the Court will have all the tools to evaluate proposed remedies under the appropriate legal standards, starting with the existing maps and giving due regard to the Legislature's primary role in districting policy.

Respondents disagree, and most telling is the implication of their arguments: remedying a malapportionment claim is too complicated for this Court (it would not be), so it should simply outsource the drawing of Wisconsin's district boundaries to three federal judges (two of whom are

from Illinois). There is absolutely no basis under Wisconsin's Constitution or the federal Constitution for doing so.

III. Circumstances are favorable for an orderly and efficient resolution of this case in this Court.

Nearly twenty years ago, this Court declined to take original jurisdiction over a malapportionment action in *Jensen*. 2002 WI 13, ¶4. The Court's decision was largely motivated by the fact that Wisconsin citizens commenced a federal reapportionment lawsuit more than a year before its decision and that the federal court had already scheduled a trial. *Id.* at ¶¶13, 14.

Importantly, the *Jensen* Court observed that "[u]nder circumstances more favorable to an orderly and efficient resolution of the case, we would readily accept original jurisdiction [of a redistricting case] and decide the important issues [such a case] raises." *Id.* at ¶18. This is that case. For the following reasons, this action comes to the Court with the greatest opportunity for an orderly and efficient resolution.

First, federal litigation has just begun, and it is premature given this Court's capability of resolving any impasse. There is no scheduling order, let alone a trial scheduled as in *Jensen*. The federal court has not

even determined whether it has jurisdiction.[6] No court is (or even could be) more "advanced" on a litigation timeline than this Court. For all of the reasons discussed above, Petitioner's original action is on *better* footing than the recently filed federal complaints, which are at war with the State's primacy in redistricting.

Second, the redistricting process has just begun. Census data has only recently been delivered, and the next elections are many months away. The Petition here is filed well before *Jensen* (in relation to next fall's elections). *Compare id*., ¶1 (noting original action filed on January 7, 2002), *with* Petition (filed August 23, 2021). There was no delay in seeking this Court's jurisdiction, and the Court has maximum time to remedy an impasse should one arise.

Third, Jensen expressed concern that exercising jurisdiction would put this Court on a "collision course" with the then-pending federal case, risking "uncertainty regarding the validity of respective plans parallel litigation would produce." *Jensen*, 2002 WI 13, ¶¶16, 18, 19. But there is no risk here that taking an original action would place this Court's activity on a collision course with federal proceedings, absent the sort of

[6] The Legislature's motion to dismiss for lack of federal jurisdiction is pending.

federal interference of the state redistricting process that *Growe* deemed impermissible.[7] Nor would there be any doubt about whether a plan adopted by this Court would be valid. When a State adopts a plan through judicial action, "the elementary principles of federalism and comity embodied in the full faith and credit statute, 28 U.S.C. §1738, obligate[s] the federal court[s] to give that judgment *legal effect*[.]" *Growe*, 507 U.S. at 35-36 (emphasis in *Growe*; alterations added).

Fourth, and related, the *Jensen* Court was concerned that "a redistricting plan adopted by this Court—like the one adopted by the Legislature—would be subject to collateral federal court for compliance with state law," and declined jurisdiction in the spirit of "cooperative federalism." *Jensen*, 2002 WI 13, ¶16 (citing cases). But this Court does not answer to a federal district court, as *Growe* itself illustrated. 507 U.S. at 35-36. Further, none of the appellate decisions cited in *Jensen* for this proposition involved a collateral attack on a judicially crafted state court

[7] *Jensen* also observed that during the 1980 redistricting cycle, a redistricting claim was removed to federal court. *Jensen*, 2002 WI 13, ¶¶9, 18 & n.7. Removal should not be a concern here. First, the cited removal occurred a decade prior to *Growe*'s instruction to federal courts to not interfere or impede with the State's redistricting process. Second, even if a party were to improperly attempt removal, there is plenty of time for the matter to be remanded to this Court before any possible legislative impasse.

remedy redrawing district boundaries; all involved federal-court challenges to plans crafted by state policymakers.[8] By contrast here, if it became necessary for this Court to implement district maps, any such order should be appealable only to the U.S. Supreme Court, and only if there were a justiciable federal question. 28 U.S.C. §§1257, 1738; *see Growe*, 507 U.S. at 35-36.

CONCLUSION

This Court should exercise its original jurisdiction over this Petition. Redistricting is a state prerogative, first belonging to the legislature, and second to this Court. This Court, not a federal court, is the appropriate forum to address any unconstitutional aspects of current law should the legislative process fail to produce new districts.

[8] *See, e.g.*, *Johnson v. De Grandy*, 512 U.S. 997, 1004-06 (1994) (reviewing legislature's districting plan); *Holder v. Hall*, 512 U.S. 874, 876-77 (1994) (reviewing plan adopted by Georgia county); *Voinovich v. Quilter*, 507 U.S. 146, 149-50 (1993) (reviewing state apportionment board promulgated plan); *Sexson v. Servaas*, 33 F.3d 799, 800-03 (7th Cir. 1994) (reviewing plan promulgated by city council); *see also Thompson v. Smith*, 52 F.Supp.2d 1364, 1367-1372 (M.D. Ala. 1999) (finding all causes of action addressed in state litigation to be precluded).

Dated this 7th day of September, 2021.

Respectfully submitted,

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CERTIFICATIONS

Certifications as Required By Wis. Stat. § 809.19(8g)

1. I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm) relating to the form of briefs. This brief uses a proportionally spaced serif font, is produced with margins equal to or greater than those specified by rule, and includes page numbers as specified by rule.

2. I further certify that this brief conforms with the Court's Order of August 26, 2021, relating to word count for non-party briefs. Excluding the Caption, Table of Contents, Table of Authorities, the signature block, and these Certifications, the length of this brief, is 3289 words as calculated by Microsoft Word.

3. I further certify that the contemporaneously submitted Appendix of the Wisconsin Legislature complies with the applicable form requirements of Wis. Stat § 809.19 (b), (bg). The Appendix contains a table of contents and public records that are relevant to the Court's consideration of the Petition. This brief does not include citations to unpublished Wisconsin court decisions and this case is not an appeal from a final or non-final Order.

Certificate of Filing Pursuant to Court's August 26, 2021 Order and Service

I certify that I caused the: (1) Motion Of Wisconsin Legislature For Leave To File Non-Party Brief In Support of Petition To Supreme Court To Take Jurisdiction of Original Action; and the attached (2) Non-Party Brief of Wisconsin Legislature In Support Of Petition To Supreme Court To Take Jurisdiction of Original Action; and (3) Appendix of the Wisconsin Legislature, to be filed with the Court as an attachment to an email dated this day and directed to clerk@wicourts.gov. I further certify that I will cause 10 copies of these materials with a notation that "This document was previously filed by email" to be filed with the clerk no later than 4 p.m. on Wednesday, September 8, 2021.

I further certify that on September 7, 2021, I caused a copy of what was emailed to the Clerk to be sent by to counsel of record for Petitioners and Respondents by email. I mailed additional service copies to counsel for Petitioners and Respondents on this same day.

Respectfully submitted,

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