FILED
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CLERK OF SUPREME COURT
OF WISCONSIN

IN THE SUPREME COURT OF WISCONSIN

No. _____

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 ELECTIONS COMMISSION,

Respondents.

PETITION TO THE SUPREME COURT OF WISCONSIN TO TAKE JURISDICTION OF AN ORIGINAL ACTION

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EXHIBIT
D

ISSUE PRESENTED

1. Whether the Petitioners, who, based on the 2020 Census results, live in malapportioned districts, are entitled to:

(a) a declaration that the existing apportionment maps as set forth in Wis. Stat. §§ 3.11-3.18 (for congressional districts) and §§ 4.01-4.99 (for state assembly districts) and § 4.009 (for state senate districts) violate the one person one vote principle, contained in art. IV of the Wisconsin Constitution;

(b) an injunction prohibiting the Respondents from administering any election for Congressional, State Senate, or State Assembly seats until a new apportionment plan is adopted and in place that satisfies the requirements of art. IV of the Wisconsin Constitution; and

(c) in the absence of an amended state law with a lawful apportionment plan, establishment of a judicial plan of apportionment to meet the requirements of art. IV of the Wisconsin Constitution.

INTRODUCTION

1. The results of the 2020 census make clear what everyone knew would occur. Based on population increases and decreases in different geographic areas, the existing apportionment plans for Wisconsin's Congressional, State Senate and State Assembly seats no longer meet the Wisconsin constitutional requirements summarized in the principle of one person, one vote.

2. In *State ex rel. Reynolds v. Zimmerman,* 22 Wis. 2d 544, 564, 126 N.W.2d 551 (1964), this Court said, with respect to redistricting cases, that such cases involve a denial of voting rights under art. IV of the Wisconsin Constitution (as well as the equal protection clause of the U.S. Constitution).[1]

3. The Petitioners, among many others, now live in state and/or congressional voting districts that have many more people than live in other districts and, as a result, have a diluted vote relative to the votes of others who live in less populated districts.

[1] The Petitioners do not raise a claim under the federal constitution in this proceeding.

4. That situation requires that a new apportionment plan with new maps be adopted to replace the election districts currently set forth in Wis. Stat. §§ 3.11-3.18 (for the congressional districts) and §§ 4.01-4.99 (for the state assembly districts) and § 4.009 (for the state senate districts).

5. A group of Wisconsin voters have already filed an action in federal court, *see Hunter v. Bostelmann*, No. 21-cv-512 (W.D. Wis. Aug. 13, 2021), seeking similar relief to the relief being sought herein.

6. But the U.S. Constitution directly endows the States with the primary duty to redraw their congressional districts. U.S. Const. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof[.]")

7. And, although the federal and state courts have concurrent jurisdiction to decide redistricting matters, the U.S. Supreme Court has made it clear that the states' role is primary. *Growe v. Emison,* 507 U.S. 25, 34 (1993).

8. This Court said the same in *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶5, 249 Wis. 2d 706, 639 N.W.2d 537: "It is an established constitutional principle in our federal system that congressional reapportionment and state legislative redistricting are primarily state, not federal, prerogatives."

9. Given that the state's role is primary, this Court previously noted that if the Legislature is unable to timely enact a new redistricting map, this Court's "participation in the resolution of these issues would ordinarily be highly appropriate." *Jensen*, 249 Wis. 2d 706, ¶4.

10. Further, this Court said that in our State, "[t]he people . . . have a strong interest in a redistricting map drawn by an institution of state government—ideally and most properly, the legislature, secondarily, this court." *Id.* at ¶17.

11. Thus, redistricting is a state matter both with respect to the legislative function and the judicial function.

12. The Petitioners should not be required to resort to a federal court, and only a federal court, to protect their state constitutional rights. In *Reynolds*, this Court said that

"***there is no reason for Wisconsin citizens to have to rely upon the federal courts for the indirect protection of their state constitutional rights.***" 22 Wis. 2d at 564 (emphasis added).

PARTIES

13. Petitioners are Wisconsin voters who live in malapportioned districts. Each of the districts the parties live in fail the one person, one vote constitutional standard, under which population equality across districts ensures that each Wisconsinite's vote counts equally.

14. Petitioner Billie Johnson resides at 2313 Ravenswood Road, Madison, Wisconsin 53711, in the Second Congressional District, State Assembly District 78, and State Senate District 26. Because of the latest reapportionment count, Petitioner Johnson's vote is unconstitutionally diluted, counting less than if he lived in a different district.

15. Petitioner Eric O'Keefe resides at 5367 County Road C, Spring Green, Wisconsin 53588, in the Second Congressional District, State Assembly District 51, and State Senate District 17.

Because of the latest reapportionment count, Petitioner O'Keefe's vote is unconstitutionally diluted, counting less than if he lived in a different district.

16. Petitioner Ed Perkins resides at 4486 N. Whitehawk Drive, Grand Chute, Wisconsin 54913, in the Eighth Congressional District, State Assembly District 56, and State Senate District 19. Because of the latest reapportionment count, Petitioner Perkins' vote is unconstitutionally diluted, counting less than if he lived in a different district.

17. Petitioner Ronald Zahn resides at 287 Royal Saint Pats Drive, Wrightstown, Wisconsin 54180, in the Eighth Congressional District, State Assembly District 2, and State Senate District 1. Because of the latest reapportionment count, Petitioner Zahn's vote is unconstitutionally diluted, counting less than if he lived in a different district.

18. Respondent Wisconsin Elections Commission ("WEC") is a governmental agency created under Wis. Stat. § 5.05 and charged with the responsibility for the administration of Chapters 5 and 6 of the Wisconsin Statutes and other laws relating to

elections and election campaigns, other than laws relating to campaign financing. WEC has its offices and principal place of business at 212 E. Washington Avenue, 3rd Floor, Madison, Wisconsin 53703.

19. Respondents Marge Bostelmann, Julie Glancey, Ann Jacobs, Dean Knudson, Robert Spindell, and Mark Thomsen are commissioners of WEC. The WEC Commissioners are sued solely in their official capacities.

STATEMENT OF FACTS

20. There must be population equality across districts under the command of the "one person, one vote" principle. As this Court said in *Reynolds*, "sec. 3, art. IV, Wis. Const., contains a precise standard of apportionment-the legislature shall apportion districts according to the number of inhabitants." 22 Wis. 2d at 564.

21. This Court further acknowledged, however, that "a mathematical equality of population in each senate and assembly district is impossible to achieve, given the requirement that the boundaries of local political units must be considered in the

execution of the standard of per capita equality of representation." *Id.* at 564.

22. This comports generally with the federal standard for population equality in that states must draw congressional districts with populations as close to perfect equality as possible, *Evenwel v. Abbott*, ___ U.S. ___, 136 S. Ct. 1120, 1124 (2016), while the federal standard for state legislative districts is more lenient.

23. For example, in 2011, when the Legislature drew the existing maps for congressional districts it "apportion[ed] the 2010 census population of the state of Wisconsin perfectly." *Baldus v. Members of Wisconsin Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 853 (E.D. Wis. 2012).

24. The report from the Legislative Reference Bureau on the proposed bill adopting the existing 2011 congressional maps stated that the population in Congressional Districts 3, 4, 5, 6, 7, and 8 was 710,873 and in Congressional Districts 1 and 2 was 710,874—a difference of one voter.

25. Indeed, except for a dispute regarding whether Hispanics in the Milwaukee area were entitled to one majority

Hispanic assembly district or two minority influenced assembly districts (which dispute was ultimately resolved), the existing congressional, state senate and state assembly maps now contained in Wis. Stat. §§ 3.11-3.18 (for the congressional districts) and §§ 4.01-4.99 (for the state assembly districts) and § 4.009 (for the state senate districts), were held to meet all of the traditional redistricting criteria including equality of population. *Baldus*, 849 F. Supp. 2d 840.

26. On August 12, 2021 the United States Census Bureau delivered apportionment counts to the President based upon the 2020 census.

27. From 2010 to 2020, the population of Wisconsin increased from 5,686,986 to 5,893,718.

28. Because there are eight Wisconsin congressional districts, the ideal population of each district is 736,715.

29. However, the apportionment counts establish the following with respect to the populations now contained in each of the eight Wisconsin congressional districts:

1st Congressional District – 727,452

2nd Congressional District – 789,393

3rd Congressional District – 733,584

4th Congressional District – 695,395

5th Congressional District – 735,571

6th Congressional District – 727,774

7th Congressional District – 732,582

8th Congressional District – 751,967

30. As a result, there is no longer the required level of equality between the populations in the eight Wisconsin congressional districts needed to meet the constitutional requirement of one person, one vote. The 2nd and 8th Congressional Districts, where the Petitioners reside, are overpopulated.

31. The data for state legislative redistricting similarly shows that new maps for the state legislative seats are necessary. Given the total population of Wisconsin, the ideal population for

each of Wisconsin's 99 assembly districts is 59,533, and the ideal population for each of Wisconsin's 33 senate districts is 178,598.

32. Yet the assembly and senate districts in which the Petitioners reside are now malapportioned: Assembly District 78 (Johnson – 67,142); Assembly District 51 (O'Keefe – 56,878); Assembly District 56 (Perkins – 64,544); Assembly District 2 (Zahn – 62,564); Senate District 26 (Johnson – 201,819); Senate District 17 (O'Keefe – 173,532); Senate District 19 (Perkins – 184,473); Senate District 1 (Zahn – 184,304).

33. The Petitioners are entitled to new apportionment maps that continue to meet all of the traditional redistricting criteria including equality of population.

34. This lawsuit is already ripe although the Legislature may yet draw, and the Governor may yet approve, maps that redress the Petitioners' injury. *Cf. generally Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 860 (E.D. Wis. 2001) ("Since it is impossible for legislative districts to remain equipopulous from decade to decade, challenges to districting laws may be brought immediately upon release of official data showing district

imbalance—that is to say, "*before* reapportionment occurs." (quoting Pamela S. Karlan, *The Right to Vote: Some Pessimism about Formalism,* 71 Tex. L.Rev. 1705, 1726 (1993))). Consequently, this Court should accept jurisdiction of this case and stay it until the Legislature adopts a constitutionally adequate apportionment plan.

35. If the State Legislature does not, while this litigation is pending, adopt new maps that are approved by the Governor and which meet all of the traditional redistricting criteria including equality of population, then the Petitioners request that this Court do so, applying the principle of making the least number of changes to the existing maps as are necessary to meet the requirement of equal population and the remaining traditional redistricting criteria. This "least changes" approach is consistent with past practice, *Baumgart v. Wendelberger*, No. 01-C-0121, 02-C-0366, 2002 WL 34127471, *7 (E.D. Wis. May 30, 2002) (unpublished) (court begins with last-enacted maps), *amended*, No. 01-C-0121, 02-C-0366, 2002 WL 34127473 (E.D. Wis. July 11, 2002) (unpublished), and "creates the least perturbation in the political

balance of the state." *Prosser v. Elections Bd.*, 793 F. Supp. 859, 871 (W.D. Wis. 1992).

STATEMENT OF RELIEF SOUGHT

36. This Court should grant this petition, declare that a new constitutional apportionment plan is necessary under the Wisconsin Constitution, enjoin the Respondents from administering any election under the existing maps and then stay this matter until the Legislature has adopted a new apportionment plan and then, if any challenge is made to the new maps, rule on the constitutionality of such plan. Further, if the Legislature does not approve new maps that are approved by the Governor and which meet all of the traditional redistricting criteria including equality of population, then the Petitioners request that this Court do so. In so doing, the Petitioners intend to urge the Court to create districts that are equal in population, contiguous, compact, and that maximize "continuity," moving the fewest number of voters to a district currently represented by someone other than that voter's current representative. The Petitioners intend to

argue that the Court need not and should not take into account projections of the likely political impact of the maps. Such considerations are not required under the United States Constitution, *see Rucho v. Common Cause*, 588 U.S. ___, 139 S. Ct. 2484 (2018). The Petitioners intend to ask that this Court approve maps in time for candidates to timely circulate nomination papers for the Fall 2022 elections.

REASONS WHY THIS COURT SHOULD TAKE JURISDICTION

37. It is an established constitutional principle, recognized by both the U.S. Supreme Court and this Court, that congressional and state legislative redistricting is primarily a state and not a federal prerogative. This Court has a duty under both to exercise its jurisdiction.

38. A violation of the one person, one vote principle is a violation of art. IV of the Wisconsin Constitution.

39. Given that the Petitioners assert rights under the Wisconsin Constitution and that the U.S. Supreme Court and this Court have recognized that reapportionment, including

reapportionment undertaken by courts when the political branches cannot agree, is primarily a state responsibility, there is no reason that the Petitioners should have to rely upon the federal court rather than this Court to protect those rights. To the contrary, they ought to be able to appeal to the courts of the state of Wisconsin.

40. In *Jensen* this Court said that "there is no question" that redistricting actions warrant "this court's original jurisdiction; any reapportionment or redistricting case is, by definition, *publici juris*, implicating the sovereign rights of the people of this state." *Jensen*, 249 Wis.2d 706, ¶17.

41. Further, the time for the resolution of redistricting litigation is so short (especially given the delay in the completion of the 2020 census) that completing both a circuit court action and appellate review within the available period of time would be extremely difficult.

42. It is not yet known precisely when the Legislature will adopt new redistricting maps.

43. The redistricting map after the 1990 census was not completed by the Legislature until April 14, 1992.[2] After the 2000 census, each house approved its own map on March 7, 2002 but neither house acted on the other's proposed map.[3] The redistricting map after the 2010 census was approved by the Legislature on July 19, 2011 (but that date was based on receiving the state level redistricting counts from the Census Bureau on March 10, 2011).[4] The 2011 maps were the quickest done by the Legislature in the last three decades of redistricting and were done in a situation where the state actually received the state level data 21 days before the March 31st deadline and where the Legislature and the Governorship were in the hands of the same party.

44. Here, given the delay in census results and the fact that Wisconsin currently has divided government, it is likely that

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[2] Michael Keane, *Redistricting in Wisconsin* 14, Wisconsin Legislative Reference Bureau (Apr. 1, 2016), *available at* https://www.wisdc.org/images/files/pdf_imported/redistricting/redistricting_april2016_leg_ref_bureau.pdf.
[3] *Id.*
[4] *Id.* at 15.

new maps, if they are approved, would not be approved until the end of the year.

45. Under current law, candidates may begin circulating nomination papers for the 2022 fall elections on April 15, 2022, which papers must be filed no later than June 1.[5] Given the probable timeline discussed in the previous paragraphs, litigation regarding the Legislature's proposed maps cannot proceed on the merits until approximately the end of the year when the Legislature has completed proposed maps, but the case must be completed in time for candidates to begin circulating nomination papers by April 15, 2022. That would be an extremely difficult time frame for both a circuit court action and Supreme Court review.

46. While this litigation may require some fact finding, the requirements of hearing and resolving those questions are not beyond the capacities of a referee. In 2012, the trial before a three-judge panel of a challenge to the enacted maps took only about two

[5] *See* Wis. Stat. § 8.15.

days. *Baldus*, 849 F. Supp. 2d at 847. This Court routinely refers matters of comparable length to a referee in attorney discipline matters and can do so here.

CONCLUSION

47. For the foregoing reasons, the Petitioners respectfully request that this Court declare that a new constitutional apportionment plan is necessary under the Wisconsin Constitution, enjoin the Respondents from administering any election under the existing maps, stay this matter until the Legislature has adopted a new apportionment plan, and then rule on the constitutionality of such plan (if there is any challenge thereto). Further, if the Legislature does not approve new maps that are approved by the Governor and which meet all of the traditional redistricting criteria including equality of population, then the Petitioners request that this Court do so, applying the principle of making the least number of changes to the existing maps as are necessary to meet the requirement of equal population and the remaining traditional redistricting criteria and that this

Court do so in time for candidates to timely circulate nomination papers for the Fall 2022 elections.

Dated this 23rd day of August, 2021.

Respectfully Submitted,

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