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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP1450-OA

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

Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN in her official capacity as a member of the Wisconsin Elections Commission, JULIE GLANCEY in her official capacity as a member of the Wisconsin Elections Commission, ANN JACOBS in her official capacity as a member of the Wisconsin Elections Commission, DEAN KNUDSON in his official capacity as a member of the Wisconsin Elections Commission, ROBERT SPINDELL, JR. in his official capacity as a member of the Wisconsin Elections Commission and MARK THOMSEN in his official capacity as a member of the Wisconsin Elections Commission,

Respondents.

RESPONDENTS' RESPONSE TO PETITION FOR LEAVE TO COMMENCE AN ORIGINAL ACTION

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INTRODUCTION

Petitioners ask this Court to take jurisdiction of an action involving one of the most fact-finding intensive and complex areas of trial court litigation—redistricting. Such a lawsuit directly conflicts with the principles that guide this Court's exercise of its original jurisdiction. This Court has long held that original actions are appropriate for legal questions, not complex fact-finding. Yet that is exactly what this case would require. Overseeing this original action would involve intensive discovery and discovery disputes, frequent and rapid motion practice, voluminous disputed factual submissions, pretrial maneuvering, and a multi-day trial. The decision itself would also be factually and legally complicated. Evaluating, selecting, and drawing a reconfigured map would require detailed facts, specialized software, and expert analysis. This Court is not designed to take-on these complicated fact-finding and logistical issues. Therefore, this Court should deny the petition for original action.

STATEMENT OF THE CASE

Petitioners are four Wisconsin voters who claim that the 2020 census results show that Wisconsin's congressional and state legislative districts—including Petitioners' districts—are malapportioned and no longer meet the constitutional requirement of one-person, one-vote. (Pet. ¶¶ 1, 13–17.) They correctly conclude that this "situation requires that a new apportionment plan with new maps be adopted to replace the election districts currently set forth in [the Wisconsin statutes]." (Pet. ¶ 4.)

Petitioners ask this Court to take jurisdiction of this lawsuit and award multi-step relief. They first ask the Court to "declare that a new constitutional apportionment plan is necessary under the Wisconsin Constitution" and "enjoin the Respondents from administering any election [for state assembly, state senate, and congressional districts] under the

existing maps." (Pet. ¶¶ 36, 4, 8.) They then ask the Court to "stay this matter until the Legislature has adopted a new apportionment plan" and rule on any challenges to the new maps. (Pet. ¶ 36.) If the Legislature and the Governor cannot agree on new maps that meet all the traditional redistricting criteria including equity of population, Petitioners ask this Court to draw the maps. (Pet. ¶ 36.)

They do not say how long this Court should give the Legislature and Governor to try to agree before embarking on that task itself. But they say that this Court must have conducted this litigation and created final maps by April 15, 2022, when candidates can begin circulating nomination papers for the Fall 2022 election. (Pet. ¶¶ 36, 45.)

As daunting as Petitioners' proposed deadline would be to accomplish what they seek—waiting to see whether the Legislature and Governor can enact a law and then, if they fail to do so, at some point conducting fact-intensive litigation—the April 15 date is not workable. It would allow no time for the Elections Commission and local clerks to take the necessary steps for candidates to begin circulating papers by the statutorily-set date.

This is not the only action filed in recent days asking a court to draw new maps. A group of Wisconsin voters and several interest groups have filed cases in federal district court seeking relief similar to that which Petitioners seek here. *See Hunter v. Bostelmann*, No. 21-CV-512 (W.D. Wis. Aug. 13, 2021); *Black Leaders Organization for Communities v. Spindell*, No. 21-CV-534 (W.D. Wis. Aug. 23, 2021). Petitioners have moved to intervene in *Hunter*, and the two federal cases are likely to be consolidated.

REASONS THE PETITION FOR AN ORIGINAL ACTION SHOULD BE DENIED

This Court's longstanding principles governing its exercise of original jurisdiction, as well as its original action

procedures, do not contemplate this Court becoming a trial court. But that is exactly what the redistricting original action contemplated by Petitioners would require—a factually and logistically complex proceeding, ending in an equally complex decision. This Court should decline to undertake such a task.

I. Original actions are appropriate for legal questions, not complex fact-finding, as would be required here.

For over a century, this Court has maintained that original jurisdiction is appropriate for legal questions amenable to a "speedy and authoritative determination." *Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 50 (1938); *see also State ex rel. Hartung v. City of Milwaukee*, 102 Wis. 509, 78 N.W. 756, 757 (1899). Thus, the Court has repeatedly expressed "great[ ] reluctance" to "grant leave for the exercise of its original jurisdiction . . . where questions of fact are involved." *In re Exercise of Original Jurisdiction*, 201 Wis. 123, 229 N.W. 643, 645 (1930); *see also* Sup. Ct. Internal Operating Procedures (IOP) § III(B)(3). Rather, trial courts are "much better equipped for the . . . disposition of questions of fact than is this court," and so cases involving factual questions "should be first presented to" trial courts. *In re Exercise of Original Jurisdiction*, 224 N.W at 645 (citing *State ex rel. Hartung*).

That is still the rule: original actions are appropriate if, among other things, there are "no issues of material fact that prevent the court from addressing the legal issues presented." *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶ 19, 334 Wis. 2d 70, 798 N.W.2d 436 (Prosser, J., concurring) (rejecting, as a matter of law, a challenge to the process used to pass a legislative act). This Court thus considers granting a petition for an original action where it may be disposed of "as a matter of law" and "no fact-finding procedure is necessary." *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 683, 264 N.W.2d 539

(1978) (addressing a legal question regarding partial veto authority).

This Court is "obviously not a trial court" and its original jurisdiction procedures cannot accommodate the fact-finding-intensive requirements of this case. *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 20, 249 Wis. 2d 706, 639 N.W.2d 537. This Court has never taken on a fact-finding or map-making redistricting trial, as would be required here. While *Jensen* identified several cases where the Court exercised jurisdiction over a redistricting-related matter, none required this Court to craft its own map or choose between maps submitted by the parties. Such a case would involve intensive vetting of disputed facts, including competing expert testimony, a map-drawing process that "require[s] an enormous effort." *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 638 (E.D. Wis. 1982); *see Jensen*, 249 Wis. 2d 706, ¶¶ 18, 20.

For example, in *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 647, 60 N.W.2d 416, (1953), the Court highlighted that the case involved "no disputed questions of fact." Rather, the Court addressed legal questions like whether a constitutional amendment related to districting was properly presented to the people. *Id.* at 651–55; *see also State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 26, 730 (1892) (the facts were "admitt[ed]" and the Court addressed discrete legal questions). Similarly, in *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 558–59, 126 N.W.2d 551 (1964), the Court had no fact-finding hearings but rather invalidated an attempted redistricting based on the failure to present the bill to the Governor for his approval, as required. The Court then provided time for the Legislature and Governor to produce a map, recognizing the difficulties that would arise if the Court had to do so in the first instance: "the problem of drafting a plan convinces us that there is no single plan which the constitution, as a matter of law, requires to be adopted to the exclusion of all others."

Id. at 569; *see also State ex rel. Bowman v. Dammann*, 209 Wis. 21, 243 N.W. 481 (1932) (evaluating an existing map based on the particular legal arguments made); *Jensen*, 249 Wis. 2d 706, ¶ 9 (noting that in *State ex rel. Dreyfus v. Election Board*, No. 82–480–OA (Wis. 1982), the Court granted a redistricting-related petition "but its jurisdiction was brief and inconsequential").

This Court has never taken on a redistricting lawsuit of this magnitude with good reason. Such a lawsuit directly conflicts with the principles that guide this Court's exercise of its original jurisdiction. This Court should not change course now.

II. This redistricting lawsuit would require complex fact-finding and logistical issues, ill-suited for an original action.

Redistricting disputes spur a host of legal claims, each with its own fact- and expert-intensive inquiry. Overseeing and then deciding the matters requires the full arsenal of the trial courts that hear them. First, overseeing the litigation is no small task: there is intensive discovery and discovery disputes, frequent and fast-moving motion practice, voluminous factual submissions, pretrial maneuvering, and multi-day trials. The cases thus require ongoing decision-making on the way to the merits. Second, the final merits decision is itself a factually and legally complex undertaking. Evaluating, selecting, and drawing maps involve complex factual review and factfinding, specialized software, and experts to navigate it.

A. Redistricting lawsuits are complex.

Redistricting proceedings are extensive and factually complex because the claims demand it. As the federal court that drew Wisconsin's districts following the 2000 census observed, reapportionment "requires the balancing of several

disparate goals." *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at *2 (E.D. Wis. May 30, 2002). Considerations that drafters and courts must grapple with include, for example:

- Population equality and "one-person-one-vote" requirements.
- Drawing districts that are as contiguous and compact as possible.
- The requirements of the federal Voting Rights Act.
- "Core retention."
- Avoiding split municipalities and ward boundaries.
- Maintaining traditional communities of interest.
- For court-drawn maps, avoiding partisan advantage.
- Avoiding unnecessary pairing of incumbents.
- Addressing senate elections in Wisconsin where, if voters are shifted from odd to even senate districts, they will face a two-year delay in voting for state senators, referred to as "disenfranchisement."

These requirements are products of federal law and Wisconsin's Constitution. *Baumgart*, 2002 WL 34127471, at *3 (summarizing the sources of these requirements); *Whitford v. Gill*, 218 F. Supp. 3d 837, 844–45 (W.D. Wis. 2016), *vacated and remanded on other grounds*, 138 S. Ct. 1916 (2018) (providing a similar summary). And each comes with its own complexities.

For instance, Wisconsin's constitutional compactness requirement "is not absolute," but rather turns on what is "practicable," which will involve consideration of natural and political-subdivision boundaries. *Wisconsin State AFL-CIO*, 543 F. Supp. at 634 (citation omitted). And a senate "disenfranchisement" claim—where voters lose their constitutional right to vote for a state senator for two years—involves particularized inquiries into the degree of voter disenfranchisement, overall population shifts, impacts on particular demographic groups, and a comparison

of possible districting maps. *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 852–53 (E.D. Wis. 2012). The inquiry turns on a particular case's "own record"; there is no "hard-and-fast standard." *Id.* at 852.

The potential federal claims also are fact intensive. One example stems from the "one-person, one-vote" principle.[1] This type of population equity claim turns on detailed factual inquires. *Baldus*, 849 F. Supp. 2d at 849–50. The plaintiffs have the initial burden to show "(1) the existence of a population disparity that (2) could have been reduced or eliminated by (3) a good-faith effort to draw districts of equal proportion." *Id.* at 850. If that is shown, defendants must show that the variance "was necessary to achieve some legitimate goal," which involves inquiries into "core retention; avoidance of split municipalities; contiguity; compactness; and maintenance of communities of interest." *Id.* (citation omitted).

Key facts and expert opinions inevitably are disputed. In *Baldus*, for instance, while the trial itself "took only about two days," as Petitioners note (Pet. ¶ 46), pre-trial proceedings spanned over nine months and included amendments to the complaint, written discovery, depositions, and expert discovery schedules, motions to compel discovery, to quash subpoenas, and for protective orders, motions for emergency hearings, summary judgment filings, pre-trial filings of proposed facts, pre-trial briefs, and motions in limine, among many other filings on the 319-item docket. *See Baldus*, No. 11-CV-562 (E.D. Wis.).

[1] The "one-person, one-vote" principle is also contained in the Wisconsin Constitution and is central to Petitioners' claim here. (Pet. ¶ 20.) As Petitioners note, this claim "comports generally with the federal standard for population equality." (Pet. ¶ 22.)

Another relevant federal claim comes from the Voting Rights Act, a claim that often arises in Wisconsin redistricting cases. Those claims turn on whether "(1) the minority groups are sufficiently large and geographically compact to create a majority-minority district; (2) the minority groups are politically cohesive in terms of voting patterns; and (3) voting is racially polarized, such that the majority group can block a minority's candidate from winning." *Baldus*, 849 F. Supp. 2d at 854. If that showing is made, courts then evaluate "the totality of the circumstances to determine whether the minority groups have been denied an equal opportunity to participate in the political process and elect candidates of their choice." *Id.*; *see also Prosser v. Elections Bd.*, 793 F. Supp. 859, 868–71 (W.D. Wis. 1992) (addressing Voting Rights Act claim).

The three-factor test will turn on both on-the-ground facts and expert opinions providing, for example, a "racial polarization analysis." *Baldus*, 849 F. Supp. 2d at 855. And the totality of circumstances inquiry "requires [the court] to get into the weeds and decide, based on all of the facts in the record, whether [the populations at issue] have been denied an equal opportunity to participate in the political process and elect candidates of their choice." *Id.*; *see also id.* at 856 (summarizing testimony from two experts related to demography and voting opportunity).

The claims that would be addressed in Petitioners' proposed lawsuit would go far beyond discrete issues of fact. They would not involve a few easily discerned facts that may be outsourced in a targeted way to a referee. Rather, the claims are factual from top to bottom, and the ultimate decision turns on them. That requires hearings before, and findings by, the ultimate decisionmaker.

B. Redistricting decisions are also complex.

Unsurprisingly, a court's ultimate decision on what maps to implement is similarly complex. Recognizing this, some federal trial panels have sought to avoid the complex task of drawing maps by selecting from several proposed maps. But courts have often concluded that that solution was not tenable.

In deciding these cases at the merits stage, the court must make detailed findings of fact. For example, in *Whitford*, the merits decision by the majority spanned over 110 pages on the docket. *Whitford*, 218 F. Supp. 3d at 843–930 (reproducing Dkt. 166 of No. 15-CV-421 (W.D. Wis.)). And that decision did not even reach implementing a new map.

Selecting or drawing a map "is a daunting task, especially for judges." *Prosser*, 793 F. Supp. at 864. When taken on by a court, it "require[s] an enormous effort." *Wisconsin State AFL-CIO*, 543 F. Supp. at 638. In theory, selecting a map might be less daunting than drawing one, but that is often not possible. For example, in *Baumgart*, "sixteen plans were submitted to the court." *Baumgart*, 2002 WL 34127471, at *4. All had "various unredeemable flaws," meaning "the court was forced to draft one of its own." *Id.* at *6. Similarly, in *Prosser*, ten plans were submitted. *Prosser*, 793 F. Supp. at 862. The court intended to select a plan, as opposed to drawing one itself, but that proved unrealistic: "we have decided to retract our threat to choose the 'best' no matter how bad it was" because even the "best plans" proposed were flawed. *Id.* at 865.

Either when selecting or drawing a map, the court must sift through the plans and related evidence, which requires voluminous written submissions and a multi-day trial. Most recently, in *Whitford*, the federal court held a four-day trial with testimony from eight witnesses, including five experts. *Whitford*, 218 F. Supp. 3d at 857. In *Prosser*, the court held a

two-day trial, but not necessarily because there were fewer facts to discern. Rather, "evidence in support of the various plans was introduced in written form, so that the hearing could be devoted to cross-examination of the experts and to opening and closing arguments of counsel." *Prosser*, 793 F. Supp. at 862.

The standards for a constitutionally permissible map are exacting. Under U.S. Supreme Court precedent, "court-ordered districts are held to higher standards of population equality than legislative ones." *Baumgart*, 2002 WL 34127471, at *3 (quoting *Abrams v. Johnson*, 521 U.S. 74, 98 (1997)). Further, "[j]udges should not select a plan that seeks partisan advantage . . . even if they would not be entitled to invalidate an enacted plan that did so." *Prosser*, 793 F. Supp. at 867.[2] That is on top of the list of "disparate goals" in federal and state law: promoting core retention, contiguity, and compactness; avoiding municipal and other splits; maintaining communities of interest; avoiding pairing of incumbents; and satisfying limits on senate-based "disenfranchisement" and also federal requirements, including the Voting Rights Act. *Baumgart*, 2002 WL 34127471, at *2–3.

That task requires detailed line-drawing across Wisconsin that sorts population while conforming to these state and federal requirements. That map-drawing virtually rewrites

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[2] As a matter of federal law, the U.S. Supreme Court held that a partisan gerrymandering claim is non-justiciable. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019). But, as *Prosser* recognized, that does not mean a court-drawn map may contain partisan advantage. *Rucho* also does not eliminate the various other claims that may arise. For example, only one of the nine claims in *Baldus* (claim 5) was about partisan gerrymandering. *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 854 (E.D. Wis. 2012).

entire chapters of the Wisconsin statutes. *See* Wis. Stat. chs. 3 & 4. That can be seen in the decisions where a federal court has needed to write a plan. For example, the technical redistricting portion of the order in *Baumgart* spans 50 pages on the docket, setting out which assembly districts are to be combined into which senate districts, and what particular territory in counties, towns, cities, wards, and so on will be combined into each assembly district. *See Baumgart*, 2002 WL 34127471, at *8–31 (reproducing Dkt. 444 of No. 01-CV-121 (E.D. Wis.)); *see also Prosser*, 793 F. Supp. at 871–94.

In *Baumgart*, for example, the court had to navigate the southeastern corner of Wisconsin and the Voting Rights Act, while maintaining municipal boundaries and uniting communities of interest, avoiding population deviation, and creating physically compact districts, among other considerations. *Baumgart*, 2002 WL 34127471, at *7 (summarizing the process). That necessarily required "subjective choices," like deciding "which communities to exclude from overpopulated districts and to include in underpopulated districts." *Id* (emphasis omitted).

In contemporary times, the process involves "highly sophisticated mapping software" using layers and overlays for various boundaries and districting criteria. *Whitford*, 218 F. Supp. 3d at 847–48, 889 (describing testimony about map-drawing). For the 2010 maps, the Legislature used three map-drawers and, in addition, a professor consultant. *Id.* at 847. The process of drafting and evaluating the maps "spanned several months." *Id.* at 850.

Petitioners provide no explanation of how this Court would handle this redistricting lawsuit. They suggest that this Court could appoint a referee, (Pet. ¶ 46), without explaining how that process would work, let alone how it would be sufficient to handle a fact-intensive redistricting case. A redistricting case is not litigation with discrete factual issues amenable to outsourced fact-finding. From beginning to end,

these cases turn on presenting, finding, and then evaluating the facts. These core tasks cannot be outsourced in the way Petitioners suggest—the judges themselves must carry out this work.[3]

CONCLUSION

This Court should deny the petition for an original action.

Dated this 3rd day of September 2021.

Respectfully submitted,

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[3] Both state and federal law designate trial courts as the appropriate place for the intensive fact-finding necessary in redistricting lawsuits. *See, e.g.*, Wis. Stat. §§ 751.035(1), 801.50(4m) (providing for appointment of panel of three circuit court judges to hear action challenging apportionment of any congressional or state legislative district); 28 U.S.C. § 2284(a) (requiring appointment of three-judge panel to hear action challenging constitutionality of apportionment of congressional districts).

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