Supreme Court of Wisconsin

NO. 2021AP001450 - OA

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

Petitioners,

vs.

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.

AMICUS BRIEF OF LISA HUNTER, JACOB ZABEL, JENNIFER OH, JOHN PERSA, GERALDINE SCHERTZ, AND KATHLEEN QUALHEIM IN OPPOSITION TO PETITION FOR ORIGINAL ACTION

Marc Erik Elias*
Aria C. Branch*
Daniel C. Osher*
Jacob D. Shelly*
Christina A. Ford*
William K. Hancock*
ELIAS LAW GROUP LLP
10 G St., NE, Suite 600
Washington, D.C. 20002
MElias@elias.law
ABranch@elias.law
DOsher@elias.law
JShelly@elias.law
CFord@elias.law
WHancock@elias.law
*Motion for *Pro Hac Vice* Admission Forthcoming

Charles G. Curtis, Jr.
Bar No. 1013075
PERKINS COIE LLP
33 E Main St, Ste 201
Madison, Wisconsin 53703-3095
608.663.7460
CCurtis@perkinscoie.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Other Authorities

INTRODUCTION

This Court has been clear: ordinary redistricting disputes do not warrant the exercise of this Court's original jurisdiction. This is especially true where the Petition—as here—anticipates that the judiciary will be tasked with drawing new district maps in the first instance. Instead, this hyper-political, intensely fact-bound process is more appropriately resolved by the three-judge federal district court where amici Lisa Hunter, Jacob Zabel, Jennifer Oh, John Persa, Geraldine Schertz, and Kathleen Qualheim have already filed an action that is well underway.[1]

Since the United States Supreme Court interpreted the federal constitution in the 1960s to require decennial redistricting, the state judiciary has *never* drawn Wisconsin's political boundaries. But federal courts have done so regularly, including in three of the previous four cycles. Where the elected branches fail

---

[1] There is another federal redistricting action pending before the same three-judge federal court, and the plaintiffs in both cases have consented to consolidation. *See Black Leaders Organizing for Communities v. Spindell*, 3:21-cv-00534-jdp-ajs-eec (W.D. Wis.).

to redistrict on their own, this is as it should be for a variety of reasons. First, as several members of this Court have explained, the institutional credibility of life-tenured federal judges is more likely to survive the partisan blood sport of assigning voters to politicians through redistricting. Second, trial courts are experienced factfinders, and they have developed the comprehensive procedures necessary to ensure all relevant evidence is gathered fairly and efficiently. And third, proposed actions like this one do not raise any issues unique to state law—Petitioners seek relief under the one-person, one-vote principle imported from federal law, and this Court has no special advantage in applying that rule. In fact, with regard to congressional redistricting, Petitioners have not identified *any state law claim at all.*

Because there is no reason to depart from this Court's consistent position that it should not exercise original jurisdiction in redistricting litigation, the Petition should be denied.

ARGUMENT

Amici and Petitioners agree: Wisconsin's congressional and legislative districts are unconstitutionally malapportioned and may not be used for future elections; the Legislature and governor are not reasonably likely to enact new districting plans in time for next year's candidate filing deadlines; and therefore, the judiciary must prepare to adopt the necessary maps. Amici filed precisely this claim in the United States District Court for the Western District of Wisconsin nearly a month ago, and that litigation is proceeding swiftly. *See Hunter v. Bostelmann*, No. 3:21-cv-00512 (W.D. Wis. Aug. 13, 2021). A three-judge panel has been appointed; related actions have been noted for consolidation; the Legislature has been granted intervention; the parties must file a proposed litigation schedule with the three-judge panel next Monday, September 13, and are in the process of meeting and conferring on plaintiffs' proposed schedule circulated last week; and Petitioners in this very case have filed an unopposed motion to intervene as plaintiffs in the federal litigation to make the same claims they are

raising in their Petition. This Court's discretionary exercise of its original jurisdiction to hear a parallel and duplicative case would provide no additional benefit, while introducing considerable disadvantages. Because the federal court supplies the forum most conducive to resolving this dispute, the Petition should be denied.

I. Federal courts are better insulated from the partisan forces that seek to dominate the redistricting process.

As the U.S. Supreme Court has noted, "[p]olitics and political considerations are inseparable from districting and apportionment." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). This Court knows that truth well, which is why several Justices have previously emphasized that the Wisconsin Supreme Court is not the appropriate forum for district map-drawing.

In 2003, this Court appointed a committee of experts "to review Wisconsin state legislative redistricting history, redistricting rules and procedures in other jurisdictions, and to propose procedural rules in the event that due to a legislative impasse, an original action challenging existing districts would be filed and accepted." *In the Matter of the Adoption of Procedure for*

Original Action Cases Involving State Legislative Redistricting (Wis. S. Ct. Jan. 30, 2009).[2] Consideration of these issues by the committee and the Court continued for many years thereafter, culminating in an open administrative conference in January 2009 and a decision that same month declining to adopt any rules for redistricting litigation. *Id.* A central theme of these proceedings was the well-founded fear that redistricting litigation would ensnare the Court in partisan quarrels and undermine public perceptions of the Court's neutrality.

It was not only members of the public and assorted experts who voiced these concerns—several Justices themselves clearly recognized the political morass for exactly what it is. Explaining why she believed it would be "institutionally unwise" to adopt a redistricting rule, then-Justice Roggensack noted that redistricting litigation "has the probability to increase the political

---

[2] Available at https://www.wicourts.gov/sc/scord/DisplayDocument.html?content=html&seqNo=35414.

pressures on this Court in a partisan way that is totally inconsistent with our jobs as a nonpartisan judiciary. . . . Redistricting is a huge danger to put on the Court's plate and a danger we do not need to accept." *See* Supreme Court Administrative Conference, Wisc. Eye (Jan. 22, 2009), https://wiseye.org/2009/01/22/supreme-court-open-administrative-conference-3/ at 33:16, 36:10, 38:07. She added, "if we . . . insert ourselves into the actual lawmaking function which is what redistricting is, I think the public cannot help but perceive us as less impartial and perhaps question our impartiality on other matters." *Id.* at 35:10. Now-Chief Justice Ziegler expressed similar concerns about placing the Court "squarely within the sights of the partisan political framework." *Id.* at 1:05:25. Then-Justice Gableman agreed that the state judiciary's involvement in map-drawing would "be dangerous to the institution of this Court" and unnecessarily place it "in the center stage of partisan politics." *Id.* at 1:09:40. And then-Justice Prosser, a longtime legislative leader who was intimately familiar with the redistricting process, warned

that accepting redistricting litigation would "turn this Court into a much more political operation." *Id.* at 57:14.

These Justices emphasized that redistricting litigation should be resolved in a federal forum, where life-tenured federal judges are better insulated from political pressures. Then-Justice Roggensack observed that Wisconsin federal courts "had proven their competence in the past," "have done a very good job," and "are not elected officials that are apt to be seen as partisans when they do the job of redistricting." *Id.* at 34:40. She continued, "There is under no set of circumstances that the federal courts could not take this. . . . It takes four votes to start an original jurisdiction, and I say 'No.'" *Id.* at 1:14:13.

Now-Chief Justice Ziegler agreed. She explained, "We have a federal court who has lifetime appointments and they have done this three times and apparently have done it successfully. It's a minority of states that have attempted to tackle this issue, and . . . the majority of the minority [have] justices who are appointed [rather than elected]." *Id.* at 1:05:34.

Justice Prosser repeated the same sentiment: "I just think it is the wrong assignment for this Court, at almost any time, because I'm not sure people fully understand what redistricting is." *Id.* at 18:02. He further warned, "It is almost a conflict [of interest] for us to make these decisions, either extremely carefully or blindfolded, and then go back to those folks and ask for support of the Court. I think it's an inherent conflict of interests." *Id.* at 20:42. The solution, Justice Prosser explained, was simple: "Let them go to the federal court."[3]

All of these considerations remain true today. This Court is under no obligation to hear this original action, and prudence counsels against it. This is doubly so where the prospect of parallel federal litigation is no mere abstract hypothetical, but rather an active reality where Petitioners have already sought intervention

---

[3] *See* Ruth Conniff, *Why the Wisconsin Supreme Court Doesn't Want to Take on Redistricting*, Wis. Examiner (Sept. 2, 2021), https://wisconsinexaminer.com/2021/09/02/conservatives-on-the-wisconsin-supreme-court-have-explained-repeatedly-why-they-should-not-take-up-redistricting; Comments from Election Law Scholars, *In Re: Petition for Proposed Rule to Amend Wis. Stat. § 809.70* at 9 (Nov. 30, 2020), available at https://www.wicourts.gov/supreme/docs/2003commentslevitt.pdf.

unopposed. In 2002 this Court declined to accept an original redistricting action much like this one, recognizing that "[s]imultaneous, separate efforts by the state and federal courts addressing the subject of legislative redistricting would engender conflict and uncertainty" and "undermine principles of cooperative federalism." *Jensen v. Wis. Elections Bd.*, 2002 WI 13, 249 Wis. 2d 706, 639 N.W.2d 537, ¶¶ 18-19 (2002). By similarly declining to grant this Petition, the Court can reduce partisan politicization of the state judiciary, preserve the Court's reputation for impartiality, confirm that judicial considerations do not change with the political winds, and avoid federal-state duplication—all without denying Petitioners the opportunity to pursue the entirety of their requested relief in the parallel federal action.

II. Trial courts are better prepared for the intensive factfinding that this dispute is likely to require.

The *Jensen* Court denied the petition for original action for a second reason that remains just as persuasive today: the Wisconsin Supreme Court "obviously [is] not a trial court [and so its] current original jurisdiction procedures would have to be

substantially modified in order to accommodate the requirements of this case." 249 Wis.2d 706, ¶ 20. No different than in 2002, the current Court has not established any "protocol for the adjudication of redistricting litigation in accordance with contemporary legal standards. A procedure would have to be devised and implemented, encompassing, at a minimum, deadlines for the development and submission of proposed plans, some form of factfinding (if not a full-scale trial), legal briefing, public hearing, and decision." *Id.* This is no small task, and now is not the time for it.

This Court needs no reminding that over *six years* (from 2002-2009) were devoted to developing rule proposals crafted by neutral experts, and that the Court failed to find any of the recommendations to be sufficient. Just this year it again considered and denied a proposal—from Petitioners' own counsel, no less—that was offered specifically to prepare for this cycle's redistricting litigation. *In re Petition for Proposed Rule to Amend*

Wis. Stat. § 809.70 (May 14, 2021).[4] There is no reason, time, or need for this Court to *now* develop and adopt the robust body of procedural rules that would be necessary to manage this kind of demanding, resource-intensive case.

The 2002-2009 process—which convened impartial experts to propose a formal report after years of study, and included public comment, a supplemental memorandum from the committee, and two open administrative conferences—supplies the model for how decisions of this political magnitude should be made. As the Court recognized in *Jensen*, there would be much to decide before entertaining redistricting litigation, including how to pursue factfinding; what opportunities would be provided for public hearing and comment on proposed redistricting plans; what timetables would apply for the factfinder, the public, and the Court

---

[4] Available at https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=368630.

to act; and what measures, if any, could mitigate forum shopping between federal and state courts. 249 Wis.2d 706, ¶ 24.

This Court need not and should not scramble to arrange all of these rules and procedures in order for Petitioners to pursue the claims they allege because—again—these Petitioners have already filed an unopposed motion to intervene as parties to an identical action in federal district court. Resolving intricate factual disputes is the daily business of federal trial courts, and they have more experience drawing Wisconsin's legislative maps than any other body in the modern era. *See, e.g.*, *Baumgart v. Wendelberger*, No. 01-C-0121, 02-C-0366, 2002 WL 34127471 (E.D. Wis. May 30, 2002); *Prosser v. Elections Bd.*, 793 F. Supp. 859 (W.D. Wis. 1992); *Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630 (Wis. E.D. 1982). In contrast to the six years this Court devoted in the 2000s to attempting to develop redistricting procedures for impasse cases, the 2002 *Baumgart* litigation saw new maps drawn and judgment entered a mere six weeks after related complaints were consolidated. *See Baumgart*, 2002 WL 34127471, at *2. This

efficiency reflects the Wisconsin federal courts' familiarity and facility with redistricting issues and tasks, and further confirms that a federal forum is most appropriate for this matter.

III. Petitioners do not raise any claims that will be unfamiliar to the federal court.

Petitioners' sole hook for bringing their Petition in state court is that Wisconsin's congressional and legislative districts "violate the one person one vote principle, contained in art. IV of the Wisconsin Constitution." Pet. at 1. This is insufficient to maintain this action.

Article IV of the Wisconsin Constitution establishes the State's legislative branch. It provides for the Legislature's powers, composition, and basic organizing rules. Notably, it does not contain a single word pertaining to Wisconsin's federal representation in the U.S. House of Representatives or otherwise confer a right to vote for federal representatives from equally populated districts. That right is derived from Article I, Section 2 of the U.S. Constitution, which provides that members of the U.S. House "shall be apportioned among the several States . . .

according to their respective Numbers," and which "intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote." *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964). Conspicuously, Petitioners cite only two state court cases in their entire Petition—*Jensen* and *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 564, 126 N.W.2d 551 (1964)—and neither case concerned congressional redistricting. If Petitioners wished to challenge the malapportionment of Wisconsin's districts for federal representation, then they could have done what Amici did and filed a federal claim in federal court. Alternatively, they could have filed a federal claim in circuit court under Wis. Stat. §§ 751.035 and 801.50(4m), subject to removal under 28 U.S.C. § 1446. But no matter what they could have done, Petitioners clearly have not cited *any* authority, under state or federal law, for their claim pertaining to Wisconsin's congressional districts.

As for state legislative districts, this Court has recognized that a state law claim is available under Article IV, Section 3 of

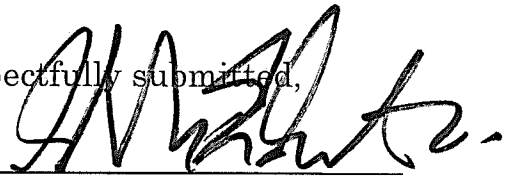
the Wisconsin Constitution. *See Reynolds*, 22 Wis. 2d 544, 564. That Section simply provides that, "At its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants." Wis. Const. art. IV, § 3. Redistricting litigation is difficult and fact-intensive, but this ordinary rule of equal apportionment does not pose any interpretive puzzles that require the state judiciary's analysis. Indeed, Petitioners acknowledge that the same claim they bring under the Wisconsin Constitution can be found under the federal Constitution's Fourteenth Amendment. Pet. at 2. There is no disputing that Wisconsin's federal courts have extensive experience applying one person, one vote principles, and so nothing will be lost by continuing this litigation in that forum.

CONCLUSION

For the reasons stated above, this Court should deny the Petition.

Dated: September 7, 2021

Respectfully submitted,

/s/ 

Charles G. Curtis, Jr.
Bar No. 1013075
PERKINS COIE LLP
33 East Main Street, Suite 201
Madison, WI 53703-3095
Telephone: (608) 663-5411
Facsimile: (608) 283-4462
CCurtis@perkinscoie.com

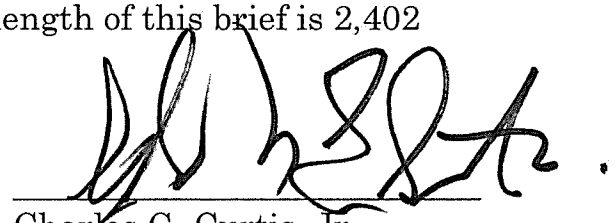
Marc E. Elias*
Aria C. Branch*
Daniel C. Osher*
Jacob D. Shelly*
Christina A. Ford*
William K. Hancock*
ELIAS LAW GROUP LLP
10 G St., NE, Suite 600
Washington, D.C. 2002
MElias@elias.law
ABranch@elias.law
DOsher@elias.law
JShelly@elias.law
CFord@elias.law
WHancock@elias.law

*Motion for *Pro Hac Vice* Admission Forthcoming

FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a non-party brief produced with a proportional serif font. The length of this brief is 2,402 words.

Dated: September 7, 2021

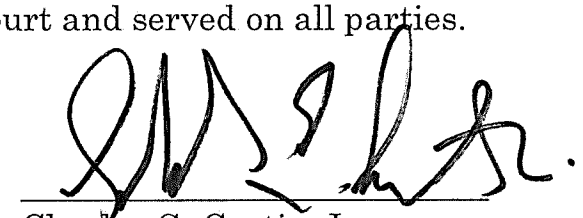


Charles G. Curtis, Jr.

CERTIFICATION REGARDING ELECTRONIC BRIEF

I certify that I have submitted an electronic copy of this brief in compliance with the requirements of Wis. Stat. § 809.19(12). I further certify that the electronic copy of this brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all parties.

Dated: September 7, 2021

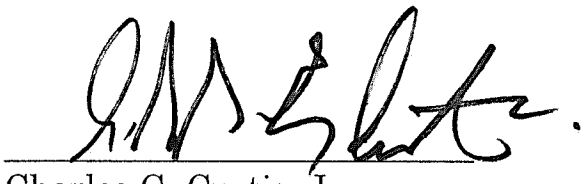


Charles G. Curtis, Jr.

CERTIFICATE OF SERVICE

I certify that on this 7th day of September, 2021, I caused a copy of this brief to be served upon counsel for each of the parties via e-mail and U.S. Mail.

Dated: September 7, 2021



Charles G. Curtis, Jr.