IN THE SUPREME COURT OF WISCONSIN

No. _____

STEPHEN JOSEPH WRIGHT, GARY KRENZ, SARAH J. HAMILTON, JEAN-LUC THIFFEAULT, SOMESH JHA, JOANNE KANE, AND LEAH DUDLEY,
Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION; DON MILLIS, ROBERT F. SPINDELL, JR., MARK L. THOMSEN, ANN S. JACOBS, MARGE BOSTELMANN, AND JOSEPH J. CZARNEZKI, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN ELECTIONS COMMISSION; AND MEAGAN WOLFE, IN HER OFFICIAL CAPACITY AS THE ADMINISTRATOR OF THE WISCONSIN ELECTIONS COMMISSION,
Respondents.

MEMORANDUM IN SUPPORT OF PETITION TO COMMENCE ORIGINAL ACTION

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INTRODUCTION

Enshrined in the Wisconsin Constitution is the basic principle that governments "deriv[e] their just powers from the consent of the governed." Wis. Const. art. I, § 1. Extreme partisan gerrymandering turns this principle on its head. When lawmakers draw legislative maps to achieve counter-majoritarian results and entrench themselves in power, they dilute and devalue citizens' right to vote.

That is the current state of affairs in Wisconsin. Wisconsin's senate and assembly districting plans—drawn by the Republican-controlled Legislature in 2021 and adopted by this Court in 2022—are some of the most extreme partisan gerrymanders in modern American history.

Article VII, Section 3(2) of the Wisconsin Constitution and Section 809.70 of the Wisconsin Statutes provide this Court with original jurisdiction in this case. *See* Wis. Const. art. VII, § 3(2) ("The supreme court … may hear original actions and proceedings."); Wis. Stat. § 809.70 (outlining procedural requirements for original actions). This Court is empowered to exercise its original jurisdiction whenever "the case concerns 'the sovereignty of the state, its franchises or prerogatives, or the liberties of its people.'" *Johnson v. Wis. Elections Comm'n* (*Johnson I*), 2021 WI 87,

¶ 20, 399 Wis. 2d 623, 967 N.W.2d 469 (quoting *Petition of Heil*, 230 Wis. 428, 436, 284 N.W. 42, 45 (1938)).

"There is no question" that a statewide partisan-gerrymandering case like this one "warrants this court's original jurisdiction" because, as this Court has held, "***any*** reapportionment or redistricting case is, by definition publici juris, implicating the sovereign rights of the people of this state." *Id.* (quoting *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 17, 249 Wis. 2d 706, 639 N.W.2d 537 (emphasis added)). Because this case implicates the sovereign rights of all Wisconsin voters, presents issues that only this Court can resolve, and must be addressed on an expedited timeframe, this case should proceed as an original action in this Court.

FACTUAL BACKGROUND

In 2010, Wisconsin voters elected a Republican Governor and Republican majorities in the Senate and Assembly—the State's first Republican "trifecta" since the 1990s. Shortly after the 2010 election, Republican majorities in the Senate and Assembly radically reshaped Wisconsin's legislative maps. The resulting plans (the "2011 Plans") shifted 2.3 million Wisconsin residents—more than 40% of the State's population—into new assembly districts, to entrench a Republican majority in the Legislature for at least the next decade.

In 2021, shortly after the United States Census Bureau delivered updated redistricting data to the State, the Republican leaders of the Senate and Assembly introduced redistricting plans. Republican majorities in the Legislature soon passed these proposals on party-line votes, but Governor Evers vetoed the legislation. The Legislature failed to override his veto. *See Johnson I*, 2021 WI 87, ¶ 17.

With the executive and legislative branches deadlocked, a group of voters petitioned this Court to establish redistricting plans that complied with the "one person, one vote" principle in advance of the 2022 elections. This Court decided that it would prioritize a "'least-change' approach," stating that it would select a map from the parties that made the minimum changes necessary to remedy the malapportionment in the then-existing redistricting plans. *Id.* ¶ 81; *but see id.* ¶¶ 82–84 & n.4 (Hagedorn, J., concurring) (stating, in contrast to the lead opinion, that equitable considerations could inform the judicial remedy imposed). This Court ultimately adopted the senate and assembly maps crafted and passed by the Wisconsin Legislature. *Johnson v. Wis. Elections Comm'n*, 2022 WI 19, ¶ 22, 401 Wis. 2d 198, 972 N.W.2d 559. By accepting the Legislature's plans, this Court overrode Governor Evers's veto of those maps, and thereby put into place what one commentator labeled "by far the most politically skewed

state legislative maps adopted by a court anywhere in the country over at least the past three decennial redistricting cycles." Robert Yablon, *Gerrylaundering*, 97 N.Y.U. L. REV. 985, 998, 1052–53 & n.317 (2022).

REASONS WHY THE COURT SHOULD COMMENCE AN ORIGINAL ACTION

The Wisconsin Constitution authorizes this Court to "hear original actions and proceedings." Wis. Const. art. VII, § 3(2); *see also* Wis. Stat. § 809.70 (outlining procedural requirements for original actions). This Court has long held that it may commence an original action when "the questions presented are of such importance" to the State as to require a "speedy and authoritative determination by this court in the first instance." *Petition of Heil*, 230 Wis. 428, 446, 284 N.W. 42, 50 (1938) (per curiam). This Court is therefore "a court of last resort on all judicial questions under the constitution and laws of the state" but "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." *Att'y Gen. v. Chicago & N.W. Ry. Co.*, 35 Wis. 425, 518 (1874).

This case meets that standard for the Court's original jurisdiction for at least three reasons: First, it involves a matter of statewide importance that affects the sovereign rights of the people of Wisconsin, namely, the distribution of voting power through redistricting. Second, it involves a

question of justiciability that only this Court can resolve. And third, timing is of the essence, as a remedy is required in advance of the 2024 elections. Accordingly, the case should proceed as an original action.

First, it is well-established that state-legislative redistricting is a state prerogative constrained by the state constitution. This Court has recognized the "established constitutional principle in our federal system that congressional reapportionment and state legislative redistricting are primarily state, not federal prerogatives." *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 5, 249 Wis. 2d 706, 639 N.W.2d 537. The United States Supreme Court has similarly noted that "the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe v. Emison*, 507 U.S. 25, 34 (1993); *see also Moore v. Harper*, 143 S. Ct. 2065, 2083 (2023) (recognizing that the state entity "responsible for redistricting … remain[s] subject to constraints set forth in the State Constitution").

Dating back to the 19th century, this Court has repeatedly exercised original jurisdiction over cases concerning statewide districting plans to assess their compliance with fundamental principles of fairness under the Wisconsin Constitution. In 1892, for example, the Court held that it could exercise its original jurisdiction "to secure and protect … political rights and

the liberties of the people" in the wake of an unconstitutional gerrymander. *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 449, 51 N.W. 724, 735 (1892). Indeed, 70 years before the U.S. Supreme Court held that federal courts could adjudicate the constitutionality of redistricting plans in *Baker v. Carr*, 369 U.S. 186 (1962), this Court held that it had "the judicial power to declare [an] apportionment act unconstitutional, and to set it aside as absolutely void." *Cunningham*, 81 Wis. at 486 (noting that redistricting impacts "no one particular class of people or locality, but all the people of the state, in their collective and individual rights and interests"). Several months later, the Court struck down another Democratic gerrymander, noting that "[a]mong the propositions so firmly established as to require no further exposition from this court" was the Court's exercise of original jurisdiction in cases affecting the liberties of Wisconsinites. *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 121, 53 N.W. 35, 48 (1892) (citing *Cunningham*, 81 Wis. at 497).

Through most of the 20th century, redistricting disputes in Wisconsin were largely heard through original actions. *See, e.g.*, *State ex rel. Bowman v. Dammann*, 209 Wis. 21, 243 N.W. 481 (1932) (exercising original jurisdiction in a challenge concerning districting); *State ex rel. Broughton v. Zimmerman*, 261 Wis. 398, 52 N.W.2d 903 (1952) (same), *overruled on other*

grounds by State ex rel. Reynolds v. Zimmerman, 22 Wis. 2d 544, 126 N.W.2d 551 (1964); *Reynolds*, 22 Wis. 2d 544 (same); *State ex rel. Sonneborn v. Sylvester*, 26 Wis. 2d 43, 132 N.W.2d 249 (1965) (same).

To be sure, in more recent times, the federal courts have played a larger role in redistricting disputes, leading this Court to defer to them on occasion. For example, in declining to exercise jurisdiction over the redistricting disputes following the 2000 Census, this Court explained that there was an already-ongoing challenge before a federal three-judge panel over the same claims, which would put the two courts "on a collision course." *Jensen*, 2002 WI 13, ¶¶ 16, 19. The federal panel had already taken jurisdiction and scheduled a trial. *Id.* ¶ 14. As this Court therefore recognized, "[s]imultaneous, separate efforts by the state and federal courts addressing the subject of legislative redistricting would engender conflict and uncertainty." *Id.* ¶ 19.

The procedural quirk driving this Court's decision in *Jensen* has no bearing in this case, as subsequent decisions from this Court have confirmed. In *Johnson v. Wisconsin Elections Commission*, this Court exercised original jurisdiction over a challenge to statewide districting plans. In so doing, the Court reiterated many of the basic principles discussed in *Jensen*: "There is no question" that legislative apportionment

cases "warrant[] this court's original jurisdiction" because "***any*** reapportionment or redistricting case is, by definition publici juris, implicating the sovereign rights of the people of this state." *Johnson I*, 2021 WI 87, ¶ 20 (quoting *Jensen*, 2002 WI 13, ¶ 17) (emphasis added).

Applying this Court's clear directive here, there can be no doubt that original jurisdiction is warranted. The sovereign rights of the people of Wisconsin hang in the balance. Petitioners allege that the senate and assembly districting plans violate the Wisconsin Constitution on several grounds, including that they flout the basic principle that governments must "deriv[e] their just powers from the consent of the governed," Wis. Const. art. I, § 1, and violate the constitutional guarantees to free speech, the right to assemble and petition, and to free government, Wis. Const. art. I, §§ 3, 4, 22.

Second, exercising original jurisdiction in this case is also appropriate because this case involves a threshold question of first impression that only this Court can resolve. In *Johnson I*, a majority of this Court stated that partisan gerrymanders present political questions under the Wisconsin Constitution because "(1) there are no 'judicially discoverable and manageable standards' by which to judge partisan fairness; and (2) the Wisconsin Constitution explicitly assigns the task of redistricting to the

legislature." *Johnson I*, 2021 WI 87, ¶ 40 (citation omitted). But the dissenting Justices argued, correctly, that the majority's justiciability discussion was "an unnecessary and sweeping overreach" that "answer[ed] a constitutional question that [the Court] never asked, that the parties did not brief, and that [was] immaterial to [the] case." *Id.* ¶ 102 (Dallet, J., dissenting). Indeed, no party in *Johnson I* challenged an existing map on extreme partisan gerrymandering grounds. As a result, the *Johnson I* dissent concluded that "[t]he majority's gratuitous discussion of whether claims of extreme partisan gerrymandering are cognizable" was an "advisory opinion" that does not bind this Court. *Id.* ¶ 103 (Dallet, J., dissenting). Rather than allowing this litigation to play out among lower state courts without clear guidance about the justiciability of Petitioners' constitutional claims, this Court should grant the case as an original action to provide definitive resolution of that question.

That some factfinding may be required to decide Petitioners' partisan-gerrymandering claims should not preclude this Court from exercising original jurisdiction. As an initial matter, many of the facts with respect to the Legislative Plans are already well established. As this Court is well aware, the plans that were drawn by the Legislature in 2021 and ordered into effect by this Court in 2022 were required to effect the "least

change" possible from the Legislature's 2011 maps. Thus, the Legislature has repeatedly stated that the Legislative Plans were designed to be as similar as possible to the 2011 Plans. And as to the 2011 Plans, a three-judge federal district court has already concluded after a full trial that the 2011 Plans were designed "to secure the Republican Party's control of the state legislature for the decennial period." *Whitford v. Gill*, 218 F. Supp. 3d 837, 890 (W.D. Wis. 2016), *vacated and remanded*, 138 S. Ct. 1916 (2018). Indeed, "the evidence establishe[d] that one of the purposes of [the 2011 Plans] was to secure Republican control of the Assembly under ***any*** likely future electoral scenario" and thus "entrench the Republican Party in power." *Id.* at 896 (emphasis added). Further, the federal court found that the 2011 Plans' partisan skew could not be explained away by "Wisconsin's natural political geography." *Id.* at 926.

These facts about the extreme partisan skew in the 2011 Plans are already established, and because the current Legislative Plans are—by design, according to the Legislature—meant to be as similar as possible to the 2011 Plans, the further facts to be developed are limited in scope. To the extent further factfinding may be necessary, there are multiple viable options, including referring factual issues to a referee for determination. *See* Wis. Stat. § 751.09. Indeed, the Wisconsin Constitution expressly reserves

the power to make "factual determinations" to "trial courts or to the supreme court under appropriate procedures in the exercise of its constitutional grant of original jurisdiction." *Wurtz v. Fleischman*, 97 Wis. 2d 100, 107 & n.3, 293 N.W.2d 155, 159 & n.3 (1980). This Court has previously employed these procedures, such as the appointment of a special master, to conduct factfinding under the Court's supervision in original actions. *See, e.g.*, *Wis. Pro. Police Ass'n v. Lightbourn*, 2001 WI 59, ¶ 6, 243 Wis.2d 512, 627 N.W.2d 807 (describing the role of the reserve judge appointed to supervise the stipulation of facts agreed to by parties in the original action). To the extent the Court finds it necessary to do so, it should employ similar procedures here.

Finally, the tight timing of this redistricting litigation necessitates this Court's original jurisdiction. Affording Plaintiffs proper relief requires that new legislative maps be put in place well before the 2024 primary elections, which are scheduled for August 13, 2024. *See* Wis. Stat. § 5.02(12s). And important primary deadlines are closer yet. Pursuing both a circuit court action and an appeal to this Court in advance of those deadlines would be impracticable. To promote certainty for parties, candidates, and voters alike, the Court should hear this case as an original action.

In short, because this case implicates the sovereign rights of the people of Wisconsin, the Court has previously resolved similar disputes as original actions and is well equipped to do so again, and time is of the essence, the Court should take jurisdiction and proceed with this case as an original action.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court commence an original action and grant the relief requested in the Petition.

Dated: August 4, 2023

Respectfully submitted,

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