

**FILED****AUG 23 2021****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.*

---

**MEMORANDUM IN SUPPORT OF PETITION TO THE  
SUPREME COURT OF WISCONSIN TO TAKE  
JURISDICTION OF AN ORIGINAL ACTION**

---

RICHARD M. ESENBERG (WI Bar No. 1005622)  
ANTHONY LoCOCO (WI Bar No. 1101773)  
LUCAS VEBBER (WI Bar No. 1067543)  
Wisconsin Institute for Law & Liberty, Inc.  
330 East Kilbourn Avenue, Suite 725  
Milwaukee, Wisconsin 53202-3141  
Phone: (414) 727-9455  
Facsimile: (414) 727-6385  
Rick@will-law.org  
ALoCoco@will-law.org  
Lucas@will-law.org  
*Attorneys for Petitioners*

## Table of Contents

INTRODUCTION .....	1
FACTUAL BACKGROUND .....	5
I. Redistricting Litigation should be handled in an Original Action. ....	8
A. Redistricting cases are of state-wide importance and affect the sovereign rights of the people. ....	8
B. The timing of redistricting litigation is exceedingly tight. ....	10
CONCLUSION.....	13

## INTRODUCTION

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.

The Petitioners, among many others, live in 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. They seek redress from this Court due to the violations of the Wisconsin Constitution stemming from that vote dilution.

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. But the U.S. Constitution directly endows the States with the primary duty to redraw their congressional districts. *See* 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[.]”)

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. *Grove v. Emison*, 507 U.S. 25, 34 (1993). 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.”

Further, the time for redistricting litigation is so short (especially this cycle with the delay in the completion of the census) that completing both a circuit court action and a Supreme Court review within the available period of time would be extremely difficult.

Given that redistricting is primarily a state matter, and that the time for completing redistricting litigation is short, this Court should accept this case as an original action. Once it does so, the

federal court will have to stay the case pending before it, in deference to allowing this Court to proceed. As noted in *Grove*, 507 U.S. at 34:

“[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.” *Chapman v. Meier*, 420 U.S. 1, 27 (1975). Absent evidence that these state branches 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.

*Grove* specifically requires federal courts “to defer consideration of disputes involving redistricting where the State, through its legislative *or judicial branch*, has begun to address that highly political task itself.” *Grove*, 507 U.S. at 33 (emphasis added). *Grove* also specifies that any redistricting plan judicially “enacted” by a state court (just like one enacted by a state legislature) would be entitled to presumptive full-faith-and-credit legal effect in federal court. *Id.* at 35–36.

Given that federal courts are to defer to state courts in redistricting cases, and not vice versa, the Petitioners should not be required to resort to a federal court. Reapportionment is, as

both the United States Supreme Court and this Court have recognized, primarily a state responsibility, including when undertaken by the judiciary. Nor should the Petitioners be forced into a federal court to protect their state constitutional rights. In *State ex rel. Reynolds v. Zimmerman*, 22 Wis.2d 544, 564 126 N.W.2d 551 (1964), 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.*” (Emphasis added.)

The Petitioners appreciate that redistricting arouses political passions. Differing groups of political partisans may favor a state or federal forum. But both the United States Supreme Court and this Court have recognized that the highest court of a state is not only a competent tribunal for such questions, *but the preferred forum*. The people of the State of Wisconsin are entitled to have what is primarily a state responsibility adjudicated in state courts.

And, as we shall see, the circumstances warrant that the matter proceeds as an original action.

## FACTUAL BACKGROUND

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.

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.

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.

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). The report from the Legislative Reference Bureau on the proposed bill adopting the existing 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.

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.

However, on August 12, 2021 the United States Census Bureau delivered apportionment counts to the President based



upon the 2020 census. The census results showed that 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 no longer exists. The least populated district is the 4th Congressional District with a population of 695,395. The most populated district is the 2nd Congressional District with a population of 789,393. This difference does not satisfy the standards of one person, one vote.

The state legislative districts tell a similar story, with assembly district populations ranging from 52,628 (Assembly District 10) to 69,732 (Assembly District 79) and senate district populations ranging from 162,069 (Senate District 6) to 201,819 (Senate District 26). The districts are malapportioned.

As a result, the Petitioners are entitled to new apportionment maps that continue to meet all of the traditional redistricting criteria including equality of population.

If the State Legislature does not 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 amount of changes necessary to the existing maps as are necessary to meet the requirement of equal population and the remaining traditional redistricting criteria.

**I. Redistricting Litigation should be handled in an Original Action.**

This Court should accept this case under its original jurisdiction for two primary reasons: (a) it is a case of state-wide importance that affects the sovereign rights of the people of this state, and (b) time is of the essence.

*A. Redistricting cases are of state-wide importance and affect the sovereign rights of the people.*

The standard for when this Court will accept cases under its original action jurisdiction is best summarized in *Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 50 (1938) in which this Court said that it will accept a case under its original jurisdiction when “the questions presented are of such importance” as to call for a “speedy and authoritative determination by this court in the first instance.” This Court has further emphasized that cases of statewide importance to Wisconsin citizens call for it to exercise its

original action jurisdiction. *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶11, 391 Wis. 2d 497, 942 N.W.2d 900.

This case meets that standard. It affects the rights of *all* Wisconsinites under art. IV of the Wisconsin Constitution. In *State ex rel. Reynolds v. Zimmerman*, 22 Wis.2d 544, 564, 126 N.W.2d 551 (1964), this Court specifically pointed out that redistricting cases involve a denial of voting rights under art. IV of the Wisconsin Constitution. And it accepted the *Reynolds* case as an original action.

Moreover, 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.

Further, this Court previously noted that if, for political reasons, the Legislature cannot enact a new redistricting map, *this Court’s* “participation in the resolution of these issues would ordinarily be highly appropriate,” *id.* at ¶4, and 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.

*B. The timing of redistricting litigation is exceedingly tight.*

It is not yet known precisely when the Legislature will adopt new redistricting maps. The redistricting map after the 1990 census was not completed by the Legislature until April 14, 1992.<sup>1</sup> After the 2000 census, each house approved its own map on March 7, 2002 but neither house acted on the other’s proposed map.<sup>2</sup> 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).<sup>3</sup> 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 31<sup>st</sup> deadline and where the Legislature

---

<sup>1</sup> 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](https://www.wisdc.org/images/files/pdf_imported/redistricting/redistricting_april2016_leg_ref_bureau.pdf).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 15.

and the Governorship were in the hands of the same party. Here, given the delay in census results and the fact that Wisconsin currently has divided government, it is more likely that new maps would be approved (if at all) at the end of the year.

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<sup>st</sup>.<sup>4</sup> Given the probable timeline for maps discussed in the previous paragraphs, litigation regarding the Legislature's proposed maps cannot proceed very far 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.

While some fact-finding will be required—the various parties will present maps and make arguments for their

---

<sup>4</sup> See Wis. Stat. § 8.15.

adoption—the process is not as cumbersome or lengthy as is commonly supposed. In 2012, the trial of a challenge to the enacted maps—which involved the same type of critique and comparison—took only about two days. *Baldus*, 849 F. Supp. 2d at 847. Hearings of that length are routinely conducted by referees in attorney discipline cases.

The Petitioners believe that this Court can—and should—tune out much of the noise that surrounds redistricting. In so doing, they intend to urge the Court to create districts that are 1) equal in population, 2) contiguous, 3) compact, and that 4) 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), and ought not to be part of any judicial review of proposed maps.<sup>5</sup>

### CONCLUSION

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

---

<sup>5</sup> While some consideration of electoral projections may be relevant in determining whether maps comport with the Voting Rights Act, the Petitioners believe that their use was substantially curtailed in *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2012).

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,



RICHARD M. ESENBERG (WI Bar No. 1005622)

ANTHONY LOCOCO (WI Bar No. 1101773)

LUCAS VEBBER (WI Bar No. 1067543)

Wisconsin Institute for Law & Liberty, Inc.

330 East Kilbourn Avenue, Suite 725

Milwaukee, Wisconsin 53202-3141

Phone: (414) 727-9455

Facsimile: (414) 727-6385

Rick@will-law.org

ALoCoco@will-law.org

Lucas@will-law.org

*Attorneys for Petitioners*