

No. 2021AP1450

In the Supreme Court of Wisconsin

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.

**MOTION OF CONGRESSMEN GLENN GROTHMAN, MIKE
GALLAGHER, BRYAN STEIL, TOM TIFFANY, AND SCOTT
FITZGERALD FOR PERMISSION TO FILE NONPARTY BRIEF
SUPPORTING PETITIONERS**

Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald (hereinafter “the Congressmen”), who also intend to be candidates for re-election in 2022, move for permission to file a nonparty brief in this case under Wis. Stat. § (Rule) 809.19(7) and this Court’s August 26,

2021 Order in this case. The Congressmen have submitted a copy of the proposed nonparty brief with this Motion.

The grounds for this Motion are as follows:

1. The Petition raises three redistricting or reapportionment claims relating to the unequal population of Wisconsin's congressional districts (as well as the State's Assembly and Senate districts) that will result in the event of a political deadlock between the Legislature and the Governor. Pet.1.

2. The Congressmen have “special knowledge [and] experience” in the redistricting issues raised by the Petition, thus “render[ing] a brief from [them] of significant value to the court.” Wis. Sup. Ct. IOP III.B.6.c; *see* Order at 1, *Johnson v. Wis. Elections Comm’n*, No.2021AP1450-OA (Wis. Aug. 26, 2021) (hereinafter “August 26, 2021 Order”); Congressmen Nonparty Br.2–3. The Congressmen are all duly elected Representatives to the U.S. House of Representatives from five of Wisconsin's eight congressional districts, and they all intend to be candidates for reelection in 2022. Congressmen Nonparty Br.2. Given this status

as elected members of Congress, each Congressman has the solemn duty to “promote and protect their [constituents] interests,” requiring them to develop “close[] relations” and “common feeling[s] and interests” with the citizens of the districts from which they were elected. *State ex rel. Att’y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 730 (1892); *accord McCormick v. United States*, 500 U.S. 257, 272 (1991); Congressmen Nonparty Br.2–3. This is why federal courts have regularly permitted members of Congress to intervene to defend these interests in redistricting actions related to their maps. *See, e.g., Baldus v. Members of Wis. Gov’t Accountability Bd.*, No. 11-CV-562 JPS-DPW-RMD, 2011 WL 5834275 (E.D. Wis. Nov. 21, 2011); *League of Women Voters of Mich. v. Johnson*, 902 F.3d 572 (6th Cir. 2018); Congressmen Nonparty Br.3.

4. Analogously, in *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 1, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam), this Court permitted leaders of the minority party in the Assembly and Senate to intervene to defend the interests of “Senate and

Assembly Democrats,” in a case involving “state legislative redistricting.” *Id.* ¶ 1. In this case, the entirety of the delegation of Republican Congressmen moves to file this nonparty brief, in a case implicating congressional redistricting.

5. The Congressmen’s proposed nonparty brief raises arguments that are important developments of, or distinct from, the arguments raised by Petitioners—all of which arguments would be “of significant value to the court.” Wis. Sup. Ct. IOP III.B.6.c; *see* August 26, 2021 Order at 1.

6. As an initial matter, and in an important elaboration on Petitioners’ arguments, the Congressmen’s proposed nonparty brief argues that this Court should act quickly and unequivocally to make clear that the Wisconsin courts will carry out their constitutional redistricting responsibility, should a political deadlock occur. Congressmen Nonparty Br.3–6; *accord* Pet. Mem. 2–4. This is because, as the U.S. Supreme Court explained in *Grove v. Emison*, 507 U.S. 25 (1993), “state government—legislative *and* judicial—[i]s primary in matters of

reapportionment and redistricting,” because “[t]he people of this state have a strong interest in a redistricting map drawn by an institution of *state* government—ideally and most properly, the legislature, secondarily, *this court*.” *Jensen*, 2002 WI 13, ¶¶ 17–18 (emphases added); Congressmen Nonparty Br.3–5. This Court must act expeditiously to make clear that the Wisconsin courts will *not* “fail timely to perform th[eir] duty” in the event of a political deadlock, however, since a federal court is currently considering a redistricting challenge raising the same equal-population-based objections as the Petition here. *Growe*, 507 U.S. at 34; Congressmen Nonparty Br.5. This Court’s action is also needed to discourage the inappropriate “federal-state court ‘forum shopping’” that the plaintiffs in the federal court action have engaged in. *Jensen*, 2002 WI 13, ¶ 24; Congressmen Nonparty Br.6.

7. The Congressmen’s proposed nonparty brief also argues that this Court could take one of three paths to make clear that the Wisconsin courts will carry out their redistricting function if a political deadlock between the Legislature and Governor occurs.

8. First, the Congressmen’s proposed nonparty brief argues that this Court should grant the Petition, as it clearly satisfies this Court’s original-jurisdiction criteria. Congressmen Nonparty Br.7–11. The Petition presents issues of *publici juris*, since a “reapportionment or redistricting case,” “by definition,” implicates “the sovereign rights of the people of this state.” *Jensen*, 2002 WI 13, ¶ 17; Congressmen Nonparty Br.9. Further, the Petition also satisfies the “exigency” consideration, because the people of Wisconsin are entitled to “clear, authoritative map[s] of [] districts going into the upcoming election season.” *Jensen*, 2002 WI 13, ¶ 19; Congressmen Nonparty Br.9–10.

9. Second, if this Court were inclined to deny the Petition, the Congressmen’s proposed nonparty brief argues that this Court should then exercise its broad supervising authority and construe the Petition as the filing of an action under 2011 Act 39, appointing a three-judge panel under that Act to adjudicate this dispute. Congressmen Nonparty Br.11–13. This avenue would have many of the benefits of granting the Petition, including by making clear

that Wisconsin courts *will* “timely [] perform th[eir] duty” to adjudicate the equal-population-based problems with the current congressional maps, should a political deadlock arise. *Grove*, 507 U.S. at 34; Congressmen Nonparty Br.11–13.

10. Finally, the proposed nonparty brief argues that, if this Court does not wish to take either of these two paths, it should, at a minimum, make clear that it will grant a petition for original action and/or appoint promptly a three-judge panel under Act 39 if a political deadlock occurs. Congressmen Nonparty Br.12–13. That unambiguous clarity is *absolutely essential* given the speed needed to adjudicate this redistricting dispute, and the fact that a federal court is already considering whether to stay its hand under *Grove*. Congressmen Nonparty Br.13.

For the foregoing reasons, the Congressmen respectfully request that this Court grant their motion for permission to file their simultaneously submitted proposed nonparty brief.

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