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IN THE SUPREME COURT OF WISCONSIN
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.

Petition for Original Action in the Wisconsin Supreme Court

BRIEF OF *AMICI CURIAE* BLACK LEADERS ORGANIZING FOR COMMUNITIES, VOCES DE LA FRONTERA, THE LEAGUE OF WOMEN VOTERS OF WISCONSIN, CINDY FALLONA, LAUREN STEPHENSON, REBECCA ALWIN, HELEN HARRIS, WOODROW WILSON CAIN, II, NINA CAIN, TRACIE Y. HORTON, PASTOR SEAN TATUM, MELODY MCCURTIS, BARBARA TOLES, and EDWARD WADE, JR.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

INTERESTS OF *AMICI*

As detailed in the Motion for Leave, *amici* are current and proposed plaintiffs in *Black Leaders Organizing for Communities, et al. v. Spindell, et al.*, No. 21-cv-00534 (W.D. Wis.) ("*BLOC*"), a federal lawsuit challenging Wisconsin's legislative districts. The Petition here directly implicates that case. *Amici* also have significant interests in ensuring equally apportioned legislative districts, compliant with the federal Voting Rights Act and adopted through proper processes.

INTRODUCTION

The decennial redistricting process through which Wisconsin adopts new legislative maps that accord with Census data, as well as federal and state legal requirements, is an inherently partisan process with extensive and long-lasting ramifications. Indeed, redistricting is a political thicket that also requires navigating a complex legal landscape. When the Legislature and Governor disagree on the design of new

districts, as they have in three of the past four decades, complex and fact-intensive impasse litigation follows. Technological advances allow parties to draw myriad variations on maps that meet state constitutional requirements and incorporate traditional redistricting criteria. Parties advocate for their favored maps, and attack those of their opponents, supported by expert and lay witness testimony. Further complicating matters, redistricting raises unique federal issues, including compliance with Section 2 of the Voting Rights Act (52 U.S.C. §10301). In sum, redistricting litigation uniquely combines pitched political battles among multiple parties with fact-intensive proceedings and complicated, specialized issues of federal law.

Petitioners ask this Court to take on a Herculean task: jump into the political morass of redistricting, without any rules or procedures for adjudicating the sprawling, fact-intensive litigation, for the purpose of deciding complex legal

issues familiar to federal courts but not adjudicated here, when there are already extant federal-court proceedings addressing this same task. Exacerbating the difficulty, the Census data were late, compressing the redistricting timeline.

The Court should decline Petitioners' request. Given the timeline, this Court's lack of precedent or rules to guide its process, and the fact that federal redistricting lawsuits are well under way, exercising original jurisdiction here would be inappropriate. This Court has declined similar invitations in each previous decade when faced with such circumstances. The Court should defer in this instance, as in the past, to the federal courts to address redistricting.

ARGUMENT

I. Federal Cases Are Well Under Way.

Federal redistricting lawsuits have commenced and are well under way. One such suit, *Hunter, et al. v. Bostelmann, et al.*, No. 21-cv-00512 (W.D. Wis.), has been pending for four

weeks. Seventh Circuit Court of Appeals Chief Judge Diane Sykes designated a three-judge panel to hear *Hunter* and *BLOC*, and the cases are poised to be consolidated. The Legislature has intervened as a party in *Hunter*, and others – including Congressmen and Petitioners here—have sought to intervene. Substantive motions have been filed and briefing is underway. As ordered by the federal court, the parties have discussed scheduling to advance the cases, with a proposed joint schedule due next week. In sum, the federal cases have already set sail.

The Court has faced this situation before. In *Jensen v. Wisconsin Elections Board*, this Court denied original jurisdiction, concluding that an original action

> would necessarily put [the] case and any redistricting map it would produce on a collision course with the case now pending before the federal three-judge panel. At the very least, the outcome here would be subject to later review in federal court. At best, such a scenario would delay and disrupt the 2002 election season, which is now almost upon us. At worst, it would throw the whole process into considerable doubt.

2002 WI 13, ¶16, 249 Wis.2d 706, 639 N.W.2d 537 (per curiam). Here, the late Census data have delayed the redistricting process. (Pet. ¶41) And, as in *Jensen*, the next statewide legislative election cycle is imminent, with nomination papers set to circulate on April 15, 2022. Wis. Stat. §§8.15(1), 8.20(8)(a).[1] Thus, all parties are already behind schedule, and this Court's rationale in *Jensen* applies with full force.

With federal lawsuits pending and the next election cycle "now almost upon us," this Court entering the fray would aggravate timing challenges. *Jensen*, 2002 WI 13, ¶16. Any maps drawn in this action would be subject to federal-court review (since Petitioners expressly address only state-law

[1] Ideally, redistricting would be complete in time for nomination papers to be circulated for the spring election, beginning on December 1, 2021, Wis. Stat. §8.10(2)(a), although it is most critical that it be completed in time for the next statewide legislative election in the fall of 2022.

claims). Accordingly, accepting original jurisdiction would "throw the whole process into considerable doubt." *Id.*

II. This Court Avoids Inserting Itself In The Partisan Redistricting Process.

To declare the law and to mete out impartial justice with public confidence, the judicial branch safeguards its nonpartisan status. For that reason, this Court has been loath to embroil itself in inherently political disputes, like redistricting.

In 2008 and 2009, this Court rejected rules for original-action redistricting cases, and justices warned against taking such cases. Justice Prosser noted that adopting rules for redistricting litigation "quite honestly [would] turn this Court into a much more political operation."[2] Justice Roggensack doubted that it was "really best for [the] court to get involved in redistricting," which "is inherently political," because the

[2] *See* https://wiseye.org/2009/01/22/supreme-court-open-administrative-conference-3/ (last visited November 19, 2020) at 57:14.

Court "is pushed on enough politically."[3] She later reiterated those concerns, noting redistricting litigation "has the probability to increase the political pressures on this court in a partisan way that is totally inconsistent with our jobs as a nonpartisan judiciary."[4] Chief Justice Ziegler concurred:

> Our Court is truly nonpartisan and should be. We call the balls and the strikes. We don't decide which team we're rooting for. And I think [redistricting litigation] puts us out of the field of being the umpire and into the range of being one of the players. And I don't think that's good for this Court in any way.[5]

Justice Gableman agreed that the Court should not engage in cases that "would actually have us take a part in creating the lines."[6] Justice Prosser said he would vote against exercising

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[3] https://wiseye.org/2008/04/08/supreme-court-rules-hearing-and-open-administrative-conference-part-3-of-4/ at 1:30:15.

[4] *See* https://wiseye.org/2009/01/22/supreme-court-open-administrative-conference-3/ at 33:16 (last visited November 19, 2020).

[5] *Id.* at 1:07:06.

[6] *Id.* at 1:11:59.

original jurisdiction in a redistricting case "every time."[7] Those concerns ring equally true today.

Adjudicating this matter would necessarily mire the Court in partisan politics. If the Court approves a map proposed by partisan actors, it would likely be perceived as partisan. If instead it draws its own map, it might be accused of making a political decision beyond its purview. The Petition puts the Court in a no-win position of being fully engaged in a partisan political process. To preserve public faith in the judiciary's nonpartisan and independent decision-making, this Court should again abstain from entering the political thicket of redistricting.

[7] https://wiseye.org/2008/04/08/supreme-court-rules-hearing-and-open-administrative-conference-part-3-of-4/ at 1:58:10.

III. This Court Is Not Structured To Handle This Dispute.

Redistricting litigation is fact-intensive, requiring presentation and assessment of technical demographic and statistical analyses and the evaluation of countless data points to compare proposed maps. Technological advances have made drawing, and manipulating, legislative maps easier than ever. Every map proposed must undergo scrutiny by litigants and experts to determine whether it complies with legal requirements and to evaluate its merits. Only adversarial litigation, expert testimony, and cross-examination can ensure a fair process.

The centrality of fact-finding in redistricting disputes cannot be overstated. The parties and *amici* could propose hundreds, if not thousands, of distinct maps that comply with equal-population requirements but differ in their treatment of Wisconsin constitutional criteria, including contiguity and

compactness, and traditional criteria including preservation of communities of interest (as well as federal statutory and constitutional interests). Robust fact-finding is crucial to assessing the legal merits of each proposed map. Development of a factual record through discovery is necessary, and those facts, as well as data underlying any proposed districts, must be carefully scrutinized and evaluated by experts. That is precisely what has occurred in previous federal redistricting litigation. *See, e.g.*, *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *vacated and remanded on other grounds*, 138 S. Ct. 1916 (U.S. 2018); *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840 (E.D. Wis. 2012).

This Court was neither intended nor structured to be a trial court, but instead a court of review. It lacks both procedures for handling such fact-intensive litigation and the

resources necessary for robust fact-finding.[8] As this Court has previously held, a trial court "is much better equipped for the trial and disposition of questions of fact than is this court and such cases should be first presented to that court." *In re Exercise of Original Jurisdiction of Supreme Court*, 201 Wis. 123, 128, 229 N.W. 643 (1930) (per curiam); *see also* Wisconsin Internal Operating Procedures III.B.4. ("The Supreme Court is not a fact-finding tribunal, and although it may refer issues of fact to a circuit court or referee for determination, it generally will not exercise its original jurisdiction in matters involving contested issues of fact."). As in the past, this Court should reject the Petition on that basis. *Jensen*, 2002 WI 13, ¶20.

[8] Justice Roggensack raised the resources issue in 2008: "There's nothing that's been put out that I've seen about (a) how are we going to staff this, and (b) where are we going to get the money for it." https://wiseye.org/2008/04/08/supreme-court-rules-hearing-and-open-administrative-conference-part-3-of-4/ at 1:37:18 (last visited Nov. 19, 2020).

If the Court accepts jurisdiction and impasse occurs, the Court will have to develop rules and procedures on an expedited basis to resolve a type of dispute it has eschewed for decades. This Court's fact-finding would face increased time pressure due to delayed Census data. The development of such rules and procedures is no small feat and this Court has twice demurred. Following *Jensen*, the Court spent seven years attempting to craft procedural rules, ultimately abandoning that effort. It similarly rejected new rules earlier this year. This Petition would give the Court mere months to craft and then apply procedural rules governing high-stakes, high-profile litigation.

Federal courts, by contrast, are uniquely prepared. They have a special expedited process for a three-judge trial-court to adjudicate restricting litigation. 28 U.S.C. §2284(a). And our federal courts in Wisconsin are well-versed in resolving these cases. *See Baldus*, 849 F. Supp. 2d at 840; *Prosser v. Elections*

Bd., 793 F. Supp. 859 (W.D. Wis. 1992); *Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630 (E.D. Wis. 1982); *State of Wis. v. Zimmerman*, 205 F. Supp. 673, 673 (W.D. Wis. 1962); *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471 (E.D. Wis. May 30, 2002), *amended*, No. 01-C-0121, 2002 WL 34127473 (E.D. Wis. July 11, 2002). It follows that federal courts are currently better suited to handle redistricting disputes.

Justices from this Court have endorsed federal-court jurisdiction over redistricting disputes for precisely that reason. Justice Prosser asserted that redistricting "is the wrong assignment for this Court, at almost any time."[9] He recognized the "inherent conflict of interests" created when this Court makes redistricting decisions.[10] Chief Justice Ziegler pointed

[9] *See* https://wiseye.org/2009/01/22/supreme-court-open-administrative-conference-3/ at 18:04 (last visited September 2, 2021).

[10] *Id*. at 20:45.

out that federal judges have "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."[11] Justice Roggensack agreed: "[T]he federal courts have done a very good job, and the federal courts are not elected officials that are apt to be seen as partisans when they do the job of redistricting."[12] She reached a stark conclusion: "There is under no set of circumstances that the federal courts could not take [a redistricting case]. They've taken it twice before and could take it easily again. ... I would vote not to take it. It takes four votes to start an original jurisdiction, and I say 'No.'"[13]

[11] *Id.* at 1:05:02.

[12] *Id.* at 34:25.

[13] *Id.* at 1:14:13.

And, of course, were this Court to adjudicate a redistricting dispute, it would do so over a period of many months while at the same time attending to its usual appellate docket. Without the tools necessary to manage redistricting litigation, and at the risk of being unable to address its usual docket, this Court should deny Petitioners' request and defer to the federal court.

IV. This Court Should Not Accept Jurisdiction In Light Of The Voting Rights Act Claim Raised In The Federal-Court Proceeding.

The *BLOC* federal-court action includes a proposed claim not raised by the original action Petition—a challenge under Section 2 of the Voting Rights Act ("VRA") to the quantity and configuration of Milwaukee-area Assembly districts, which currently dilute Black voters' ability to elect their preferred candidates. (A. App.001-036.) The proposed VRA claim in the federal-court action warrants this Court's denial of the original action Petition for several reasons.

First, the VRA claim should be resolved before any districts are redrawn to correct for malapportionment. The district lines drawn to remedy the VRA violation in the Milwaukee-area Assembly districts will not only dictate precisely how those districts must have their populations reapportioned, but will necessarily have a cascading effect on how the remaining districts throughout the state are drawn. It is illogical for this Court to accept original jurisdiction to decide a state-law malapportionment claim when a VRA claim is before the federal court. Action by this Court could result in conflicting orders between this Court and the federal court, leading to confusion, doubt, and further federal law preemption proceedings in federal court. *See Jensen*, 2002 WI 13, ¶16 (noting that plan imposed by state court "would be subject to collateral review for compliance with federal law"—a "collision course" to be avoided). Were this Court to adopt districts after a trial, those districts might then be subject to

scrutiny in a federal-court proceeding, potentially invalidating this Court's work.

Second, the federal court should decide both the VRA and the federal-law malapportionment claims presented to it because the delayed release of Census data has compressed the time for judicial resolution of redistricting claims. There is no time for staggered state- and federal-court actions to resolve the state-law malapportionment claim in this Court followed by resolution of the VRA claim in federal court. *See id.*, ¶18 (concluding that accepting original jurisdiction over redistricting was inadvisable when there was insufficient time for "an orderly and efficient resolution of the case" to avoid parallel state- and federal-court proceedings). Indeed, Petitioners ask this Court to permit them to bypass the statutory procedure for bringing redistricting claims precisely because they contend that it would be "extremely difficult" to complete "both a circuit court action and Supreme Court review" before

candidates begin circulating nomination papers on April 15, 2022. If there is no time for orderly circuit court and appellate resolution in state courts, then there is likewise no time for this Court to decide an original action and permit orderly resolution of the VRA claim in federal court—with the potential for subsequent direct review by the U.S. Supreme Court. *See* 28 U.S.C. §§1253, 2284.

The compressed schedule requires the federal court to address the VRA claim without delay. Because the federal court also has malapportionment claims before it, and given that it must also fashion a remedy for VRA violations, the only efficient course is for the federal court to resolve all claims and impose remedial plans. *See Jensen*, 2002 WI 13, ¶19 ("Simultaneous, separate efforts by the state and federal courts...would engender conflict and uncertainty.... The risk that this would leave the state with no clear, authoritative map...is significant."); *id.*, ¶21 (noting there was insufficient

time for "back-to-back state- and federal-plenary proceedings on a matter as complex and consequential as" redistricting). A contrary approach would "result in an unjustifiable duplication of effort and expense, all incurred by the taxpayers of this state." *Id.*, ¶18. Deferring would accord with this Court's action in 2011 of deferring and then ultimately dismissing a redistricting-related original action petition in the face of the pending *Baldus* case. *See Clinard v. Brennan*, No. 2011AP2677-OA.

Third, while this Court could theoretically impose a plan that remedies both the pending malapportionment and proposed VRA claims, it is particularly ill-equipped to adjudicate whether the remedial plans it considers comply with the VRA. Litigation under Section 2 of the VRA is among the most complex adjudicated in federal courts. These claims are "peculiarly dependent upon the facts in each case" and "require[] an intensely local appraisal of the design and impact

of the contested electoral mechanisms." *Thornburg v. Gingles*, 478 US. 30, 79 (1986). "The [U.S.] Supreme Court has made clear that resolution of the question of vote dilution is a fact intensive enterprise to be undertaken by the district court." *Goosby v. Town Bd. of Town of Hempstead*, 180 F.3d 476, 492 (2d Cir. 1999); *accord Ga. State Conf. of NAACP v. Fayette Cty. Bd. of Comm'rs*, 775 F.3d 1336, 1349 (11th Cir. 2015) (remanding Section 2 case given "the intensely local appraisal of the facts warranted, and the complex questions of fact and law that must be settled by the court below").

In determining when a map complies with Section 2, courts must first consider expert evidence on whether: (1) the racial group is "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) members of the racial group are "politically cohesive," and (3) the white bloc voting usually defeats the minority preferred candidates in the challenged districts. *LULAC v. Perry*, 548

U.S. 399, 425 (2006). The second and third preconditions involve analysis of demographic and electoral data indicating racially polarized voting, shown by expert analysis of voting patterns in racially homogenous precincts, bivariate ecological regression analysis of voting patterns, or ecological inference modeling of racially polarized voting trends. *See, e.g.*, *Gingles*, 478 U.S. at 52-53. If the preponderance of evidence shows that the *Gingles* preconditions are satisfied, courts must then engage in fact-intensive totality of the circumstances analysis, including multiple factors set forth in the Senate Report accompanying the enactment of the VRA. Such factors include the history of voting discrimination in the jurisdiction, the extent of racially polarized voting, the extent to which the affected racial group bears the effect of past discrimination in areas like education, employment, and health, the use of overt or subtle racial appeals in campaigns, the lack of responsiveness of elected officials to the particularized needs

of the minority group, and more. *LULAC*, 399 U.S. at 426; *see also* U.S. Department of Justice, *Guidance under Section 2 of the Voting Rights Act, 52 U.S.C. 1301, for redistricting and methods of electing government bodies* (Sept. 1, 2021), at 7 (A. App. 037-050).

This Court is not well-equipped to adjudicate in the first instance whether a redistricting plan complies with the VRA. As discussed above, this is not a fact-finding tribunal. Petitioners contend that "this litigation *may* require some fact finding," which they say could be handled by a "referee," such as the referees this Court appoints to decide facts "in attorney discipline matters." (Pet. at 17-18 (emphasis added)) Not so. This case *will* necessarily entail complex and fact-intensive analysis if the Court is to draw a plan compliant with the VRA. This will be all the more difficult if the VRA claim in *BLOC* is contested by another party—as Petitioners' "least changes" position suggests it may be—and referral of Section 2 factual

determinations to a "referee" would be highly inappropriate. Second, this Court has never before adjudicated a VRA claim, which is one of the most complex areas of federal law. The federal court has done so, including last decade.

Amici's proposed VRA claim in federal court, combined with the unusual time constraints because of the Census delay, compel the denial the Petition here.

CONCLUSION

Since the onset of the one-person, one-vote paradigm, this Court never has adjudicated the merits of a redistricting action. It consistently has refused to do so, instead deferring to the federal courts. And for good reason. Federal courts have the procedural tools, experience, and body of jurisprudence to quickly and effectively adjudicate redistricting cases, a task that is more fact-intensive, time-consuming, and specialized than ever. Petitioners seek to lead this Court down a primrose path, pretending that the burden on this Court of presiding over

this litigation would be light. Even a cursory review of federal-court opinions in redistricting cases gives the lie to such arguments. The Court should deny the Petition for Original Action.

Dated: September 7, 2021.

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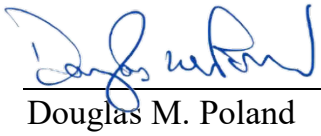
FORM AND LENGTH CERTIFICATION

I certify that the foregoing brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the foregoing brief, exclusive of the caption, Table of Contents, and Table of Authorities, is 3,275 words.

Dated: September 7, 2021.



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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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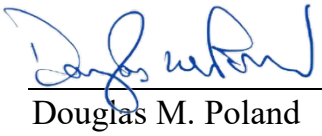

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CERTIFICATION OF MAILING AND SERVICE

I certify that 10 paper copies of the foregoing Brief of Amici Curiae of Black Leaders Organizing For Communities, Voces De La Frontera, The League of Women Voters of Wisconsin, Cindy Fallona, Lauren Stephenson, Rebecca Alwin, Helen Harris, Woodrow Wilson Cain, II, Nina Cain, Tracie Y. Horton, Pastor Sean Tatum, Melody Mccurtis, Barbara Toles, and Edward Wade, Jr., and Appendix were hand-delivered to the Clerk of the Supreme Court on September 7, 2021.

I further certify that on September 7, 2021, I sent true and correct email copies as well as three paper copies, by first-class mail, postage prepaid, of the foregoing Brief of Amici Curiae of Black Leaders Organizing For Communities, Voces De La Frontera, The League of Women Voters of Wisconsin, Cindy Fallona, Lauren Stephenson, Rebecca Alwin, Helen Harris, Woodrow Wilson Cain, II,

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CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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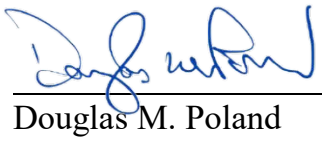

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