IN THE SUPREME COURT OF WISCONSIN

No. 2021AP001450 - OA

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.

NON-PARTY BRIEF OF DANIEL R. SUHR IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

Daniel R. Suhr is a public-minded attorney who comes as a true friend-of-the-court with no agenda besides his personal view on the correct outcome. *See Neonatology Assocs., P.A. v. CIR*, 293 F.3d 128, 131 (3d Cir. 2002) ("[A]n amicus who makes a strong but responsible presentation in support of a party can truly serve as the court's friend."). *See generally* Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy,* 72 Yale L.J. 694 (1963).

STATEMENT OF THE ISSUE

Should the Wisconsin Supreme Court exercise original jurisdiction over this redistricting case and issue its own reapportionment plan using a special master or other redistricting expert if the Legislature and Governor fail to agree through the normal legislative process?

ARGUMENT

Introduction

This petition is filed in anticipation of the possibility that the Governor and Legislature may not agree on a redistricting plan. *See State ex rel. Reynolds v. Zimmerman*, 126 N.W.2d 551 (Wis. 1964) (though Wis. Const. Art. IV, Sec. 3, empowers "the Legislature" to redistrict, it must act through a law subject to gubernatorial veto). Multiple parties have filed suit in various courts, including this one, seeking judicial reapportionment in the likely event that an impasse persists.

Given the importance of properly apportioned electoral maps to the representative nature of Wisconsin's government, this Court has on multiple past occasions exercised original jurisdiction over redistricting cases. *See infra.* Drawing on that ample precedent, this brief explains why it is proper for the Court to do so once again. It then addresses a concern with taking up a redistricting case—the factually complex and intensive nature of reapportioning electoral maps—suggesting that the Court could enlist the assistance of a special master ("referee") or other expert in the matter. The brief demonstrates that courts frequently use special masters for redistricting and shows that Wisconsin courts have used special masters in a variety of factually complex situations, and could do so here as well.

I. The Wisconsin Supreme Court has taken redistricting cases as original actions in the past.

The Wisconsin Supreme Court has taken redistricting cases as original actions on multiple past occasions, including in suits brought by private plaintiffs. *See, e.g.*, *State ex rel. Att'y Gen. v. Cunningham*, 51 N.W. 724, 725 (Wis. 1892), *State ex rel. Bowman v. Dammann*, 243 N.W. 481 (Wis. 1932), *Zimmerman*, 126 N.W.2d at 561.

The Court's decision to accept those petitions makes good sense because "reapportionment or redistricting case[s] [are], by definition, publici juris, implicating the sovereign rights of the people of this state." *Jensen v. Wisconsin*

Elections Bd., 639 N.W.2d 537, 542 (Wis. 2002). The Court observed in *State ex rel. Lamb v. Cunningham*[1] that section 3, article 7 of the Wisconsin Constitution "was designed to give this court original jurisdiction of 'all judicial questions affecting the sovereignty of the state, its franchises and prerogatives, or the liberties of its people.'" 53 N.W. 35, 48 (Wis. 1892) (quoting *Att'y Gen. v. Chicago & N.W. Ry. Co.*, 35 Wis. 425, 518 (Wis. 1874)). The Court further stated in *Attorney General v. City of Eau Claire*, that for it to exercise original jurisdiction, the State's interest must be:

> primary and proximate, not indirect or remote . . . affecting the state at large, in some of its prerogatives; raising a contingency requiring the interposition of this court to preserve the prerogatives and franchises of the state, in its sovereign character . . . .

37 Wis. 400, 444 (1875). The Court has also counted exigent circumstances and inadequacy of lower court remedies in favor of exercising original jurisdiction. *Petition of Heil*, 284 N.W. 42, 48 (Wis. 1938).

As the Court made clear in *Jensen*, the process of drawing up legislative districts is certainly a matter of importance for the state as a whole because it directly implicates the representative nature of Wisconsin's government and

[1] A follow-up case to *Cunningham I*, 51 N.W. 724.

the liberties of its people. To use the language of the older cases, it goes to the core of the prerogatives and franchises of the state in its sovereign character.

The case also calls for the attention of this Court in particular. No individual county-based circuit court judge can adequately represent and reflect the interests of the people of the State as a whole like this court can. Just as three federal judges drawn from across the Seventh Circuit are not representative of Wisconsin, neither can three circuit judges represent the whole state. *See* Wis. Stat. 751.035. Only this Court, with seven justices all elected by the people of the entire state, has the judicial authority to reflect and safeguard the interests of the state as a whole. Certainly this Court represents a better expression of the people's preferences and sovereignty than a federal court with two of its three judges drawn from Illinois.

It is true that the Court has on several such occasions declined to draw legislative maps itself, instead referring the task back to the legislature or upholding the presented apportionment map. *See* the *Cunningham* cases (51 N.W. 724 and 53 N.W. 35); *Dammann*, 243 N.W. 481. But the Court has made clear that it has the power to conduct apportionment itself and has in fact exercised that power. In *Zimmerman*, 126 N.W.2d at 569, the Court ruled that the legislature's districting maps violated the Wisconsin Constitution. The Court found that the most appropriate form of relief would be for the

legislature to pass and the governor to sign into law a valid redistricting plan. *Id*. at 570. That remains the optimal outcome here as well.

Given the other branches' prior inability to agree on a plan and the quickly approaching elections, however, the *Zimmerman* Court imposed a deadline of two months for them to come up with a valid plan. *Id*. It stated that: "We do not abdicate our power to draft and execute a final plan of apportionment which conforms to the requirements of art. IV, Wis. Const., should the other arms of our state government be unable to resolve their differences and adopt a valid plan." *Id*. at 571. The legislature and governor failed to enact any legislative apportionment within the Court's two-month deadline, so the Court enacted one itself, to "be effective for the 1964 legislative elections, and thereafter until such time as the legislature and governor have enacted a valid legislative apportionment plan." *State ex rel. Reynolds v. Zimmerman*, 128 N.W.2d 16, 17 (Wis. 1964).

II. The Wisconsin Supreme Court may appoint a special master to assist it in the fact-intensive matter of reapportionment.

That the Court has issued a reapportionment plan in the past is precedent for doing so again here. Yet that which is permissible or proper may not be easy or convenient. Let's be honest: redistricting under the best of circumstances is a technically detailed exercise that has become heavily technology dependent.

Further, the Court has expressed reluctance to exercise original jurisdiction over otherwise eligible cases in which the parties disagree about issues of fact. *Green for Wisconsin v. State Elections Bd.*, 723 N.W.2d 418, 419 (Wis. 2006). The Court, however, has solutions to the problem of messy facts in original actions: it has used "mechanisms . . . such as appointment of a special master . . . to conduct fact-finding under the continued jurisdiction/supervision of this court." *State ex rel. Ozanne v. Fitzgerald*, 798 N.W.2d 436, 465 (Wis. 2011) (Abrahamson, C.J., concurring/dissenting) (citing *Wis. Prof'l Police Ass'n, Inc. v. Lightbourn*, 627 N.W.2d 807, 817 (Wis. 2001)). This Court has held that "[t]he Wisconsin statutes authorize a court to appoint a referee to determine 'matters of account' and other complicated issues. 'The role of a referee is to help the court in cases where the expertise of the referee is needed' to assist the court in obtaining facts and arriving at a correct result in complicated litigation." *Ehlinger v. Hauser*, 785 N.W.2d 328, 342–43 (Wis. 2010) (quoting Patricia Graczyk, *The New Wisconsin Rules of Civil Procedure Chapters 805–807,* 59 MARQ. L. REV. 671, 683–84 (1976)). In fact, this Court uses referees in original actions all the time, likely without even realizing it: attorney discipline cases. *In re Sedor*, 245 N.W.2d 895, 899 (Wis. 1976) (quoting *State v. Preston*, 159 N.W.2d 684 (Wis. 1968)).

Were this Court to appoint a special master to assist it in the complex task of drawing new legislative districts, it would tread a path well established

by both state and federal courts. Federal courts considering redistricting cases frequently use special masters. *See, e.g.*, *Butterworth v. Dempsey*, 237 F. Supp. 302, 304 (D. Conn. 1964); *Puerto Rican Legal Def. & Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 681, 684 (E.D.N.Y. 1992); *North Carolina v. Covington*, 138 S. Ct. 2548, 2550 (2018) (discussing the use of a special master below). The same is true in state courts. *See, e.g.*, *Guy v. Miller*, No. 11 OC 00042 1B (Nev. Dist. Ct., Carson City Oct. 27, 2011) (adopting with slight modifications the redistricting map devised by special masters appointed "to resolve the impasse created by the continuing failure of the Legislature to pass legislation acceptable to the Governor"); *In re Reapportionment Comm'n*, 36 A.3d 661 (Conn. 2012) (adopting the congressional districting plan devised by a special master appointed after the legislative reapportionment committee missed its deadline).

Federal courts appoint special masters pursuant to Federal Rule of Civil Procedure 53, which "allows courts to appoint a special master to perform or manage certain aspects of a case, if consented to by the parties," typically "because the court cannot efficiently address the matter," the "matter requires protracted fact finding," or the "matter involves a highly technical dispute." Lynn Jokela & David F. Herr, *Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool*, 31 WM. MITCHELL L. REV. 1299, 1301, 314 (2005). Special masters provide courts with

"expertise in . . . areas [such as] accounting, finance, science, and technology, which in certain cases, can help ensure a fair result." *Id*. at 1324.

The Federal Judicial Center, a branch of the federal judiciary which "conducts policy research and provides continuing education resources for the judicial branch,"[2] conducted a survey in 2000 of federal courts' use of special masters.[3] This "empirical survey of the effectiveness of special masters" which "include[d] commentary from judges regarding their experience after appointing special masters," "concluded that special masters were 'extremely or very effective.'" Jokela et al. at 1300. Among the benefits reported were "better, faster, and fairer resolution of litigation in the cases in which masters are used, as well as an easing of the burdens these cases place on the judiciary." *Id*.

Almost all state courts, including Wisconsin, have a procedural rule analogous to F.R.C.P. Rule 53 providing for the use of special masters. Wisconsin's statute provides that a "referee" [special master] may be appointed in cases not involving a jury when the "matters [are] of account and of difficult computation of damages" and there is "a showing that some exceptional condition requires it." Wis. Stat. § 805.06(2). The statute goes on to say that

[2] Federal Judicial Center website, https://www.fjc.gov.

[3] Thomas E. Willging et al., *Special Masters' Incidence and Activity*, Fed. Jud. Center 1 (2000), http:// https://www.uscourts.gov/sites/default/files/specmast.pdf.

the referee "shall prepare a report upon the matters submitted by the order of reference and, if required to make findings of fact and conclusions of law . . . shall set them forth in the report." § 805.06(5)(a).

Wisconsin state courts have frequently turned to special masters to handle complex factual matters. *See, e.g.*, *Associated Bank, N.A. v. Brogli*, 917 N.W.2d 37 (Wis. Ct. App. 2018) (special master appointed to determine parties' respective ownership stake in property being sold to pay off debt); *Hauser*, 785 N.W.2d at 334 (certified public accountant appointed as special magistrate to determine corporation's book value for shareholder suit); *Harold Sampson Children's Tr. v. The Linda Gale Sampson 1979 Tr.*, 679 N.W.2d 794, 796 (Wis. 2004) (special master appointed to determine whether documents produced to opposed counsel had been protected by attorney-client privilege); *Hannan v. Godfrey*, 617 N.W.2d 906 (Wis. Ct. App. 2000) (special master appointed to determine valuation of partnership); *Willenson v. Est. of Bailey*, 543 N.W.2d 867 (Wis. Ct. App. 1995) (special master appointed to resolve a dispute over funds missing from an estate). In other words, special masters are well-known as neutral experts for redistricting in courts nationally and as familiar tools on complex topics in Wisconsin cases.

III. The Court may choose among a range of approaches to judicial redistricting.

Though special masters are one tool for addressing the technically complex work of redistricting, they are hardly the Court's only option. Reviewing a large sample of redistricting cases, Professor Nathaniel Persily of Stanford Law School has seen courts take other routes as well, such as choosing from plans submitted by the parties, or drawing district maps themselves, perhaps with the help of an outside expert who assists the court but with less authority than a special master. *See generally* Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 GEO. WASH. L. REV. 1131 (2005). These approaches can also be combined, for instance by starting from a current map and relying on an expert or special master to make the fewest modifications necessary to bring the map into compliance (because the prior map has the democratic legitimacy of having been enacted through the normal legislative process).

CONCLUSION

This Court has held that "[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." *Jensen,* 639 N.W.2d at 542. The anticipated impasse on reapportionment between the Legislature and Governor means that the political branches will mostly fail to timely enact a

new redistricting map. In that event, it is the responsibility of this Court to do so itself—thereby protecting the state constitutional rights of Wisconsin's citizens, upholding state sovereignty, and bestowing democratic legitimacy on the reapportionment process. While the factually complex nature of redistricting cases may be a deterrent to the Court exercising original jurisdiction over this matter, this brief has shown that courts commonly and satisfactorily rely on the assistance of special masters and other experts in redistricting cases. It has also noted that Wisconsin courts make frequent use of special masters to resolve factually complex questions. Accordingly, the Court should consider enlisting a special master or other expert to assist it in exercising its responsibility to create a new redistricting map for the State.

Respectfully submitted,

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SEPTEMBER 7, 2021

CERTICATE AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,427 words in the body, as counted by Microsoft Word.

CERTIFICATE AS TO ELECTRONIC FILING

Pursuant to R. App. Pro. 809.19(12)(F), I hereby certify that I have submitted an electronic copy of this non-party brief in compliance with the requirements of Rule 809.19(12). I also certify that this electronic brief is identical in content and format to the printed form of the brief filed today. A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all parties.

CERTIFICATE OF SERVICE

I certify that on September 7, 2021, I caused three copies of the foregoing non-party brief to be served upon counsel of record by placing the same in the U.S. Mail, first class postage.

CERTIFICATES SIGNED:

Daniel R. Suhr