

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN**

LISA HUNTER, JACOB ZABEL, JENNIFER
OH, JOHN PERSA, GERALDINE SCHERTZ,
and KATHLEEN QUALHEIM,

Case No. 3:21-cv-00512

Plaintiffs,

BILLIE JOHNSON, ERIC O'KEEFE, ED
PERKINS, and RONALD ZAHN,

Intervenor-Plaintiffs,

v.

MARGE BOSTELMANN, JULIE M. GLANCEY,
ANN S. JACOBS, DEAN KNUDSON, ROBERT F.
SPINDELL, JR., and MARK L. THOMSEN, in
their official capacities as members of the Wisconsin
Elections Commission,

Defendants.

COMPLAINT OF INTERVENOR-PLAINTIFFS¹

The Intervenor-Plaintiffs Billie Johnson, Eric O'Keefe, Ed Perkins, and Ronald Zahn, by their undersigned counsel, allege as follows:

INTRODUCTION

1. 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 constitutional requirements summarized in the principle of one person, one vote.

¹This complaint is identical to Intervenor-Plaintiffs' complaint filed August 26, 2021 as ECF No. 21-1, but with the exhibit sticker removed.

2. Such cases involve a denial of voting rights under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution as well as Article I, Section 2 of the U.S. Constitution.

3. The Intervenor-Plaintiffs have already asserted a claim under the Wisconsin Constitution in a Petition for an Original Action filed with the Wisconsin Supreme Court on August 23, 2021. As set forth below and in an accompanying Motion to Stay Proceedings, the Intervenor-Plaintiffs request that this Court stay this action under *Grove v. Emison*, 507 U.S. 25, 34 (1993). For purposes of this case, the Intervenor-Plaintiffs assert claims under the Fourteenth Amendment and Article I, Section 2 of the U.S. Constitution.

4. The Intervenor-Plaintiffs, among many others, now live in certain state and congressional voting 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.

5. That situation requires that a new apportionment plan with new maps be adopted to replace the election districts currently set forth 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).

6. The Wisconsin Legislature first received the information from the U.S. Census Bureau necessary to draw new maps only two weeks ago.

7. Under *Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 860 (E.D. Wis. 2001), this lawsuit is already ripe, although the Legislature may yet draw, and the Governor may yet approve, maps that redress the Intervenor-Plaintiffs' injury.

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

9. 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).

10. Moreover, redistricting is a state matter both with respect to the legislative function and the judicial function and here the Wisconsin Legislature has not yet had a chance to act and the Intervenor-Plaintiffs have already asked the Wisconsin Supreme Court to handle the judicial function, if such a function becomes necessary. Thus, while this action is ripe in this Court, this Court should stay any action herein until the Legislature has the opportunity to adopt a constitutionally adequate apportionment plan and the Wisconsin courts have ruled on any remaining dispute.

JURISDICTION AND VENUE

11. This is an action under 42 U.S.C. § 1983 asserting violations of the Fourteenth Amendment to the U.S. Constitution and Article I, Section 2 of the U.S. Constitution.

12. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

13. Venue is proper under 28 U.S.C. § 1391(b)(1)-(2).

PARTIES

14. The Plaintiffs, Lisa Hunter, Jacob Zabel, Jennifer Oh, John Persa, Geraldine Schertz, and Kathleen Qualheim, are all Wisconsin voters.

15. The Intervenor-Plaintiffs are likewise Wisconsin voters who live in malapportioned districts. Each of the districts the Intervenor-Plaintiffs live in fail the one person, one vote constitutional standard, under which population equality across districts ensures that each Wisconsinite's vote counts equally.

16. Intervenor-Plaintiff Billie Johnson resides at 2313 Ravenswood Road, Madison, Wisconsin 53711, in the Second Congressional District, State Assembly District 78, and State Senate District 26. Because of the latest reapportionment count, Intervenor-Plaintiff Johnson's vote is unconstitutionally diluted, counting less than if he lived in a different district.

17. Intervenor-Plaintiff Eric O'Keefe resides at 5367 County Road C, Spring Green, Wisconsin 53588, in the Second Congressional District, State Assembly District 51, and State Senate District 17. Because of the latest reapportionment count, Intervenor-Plaintiff O'Keefe's vote is unconstitutionally diluted, counting less than if he lived in a different district.

18. Intervenor-Plaintiff Ed Perkins resides at 4486 N. Whitehawk Drive, Grand Chute, Wisconsin 54913, in the Eighth Congressional District, State Assembly District 56, and State Senate District 19. Because of the latest reapportionment

count, Intervenor-Plaintiff Perkins' vote is unconstitutionally diluted, counting less than if he lived in a different district.

19. Intervenor-Plaintiff Ronald Zahn resides at 287 Royal Saint Pats Drive, Wrightstown, Wisconsin 54180, in the Eighth Congressional District, State Assembly District 2, and State Senate District 1. Because of the latest reapportionment count, Intervenor-Plaintiff Zahn's vote is unconstitutionally diluted, counting less than if he lived in a different district.

20. Respondent Wisconsin Elections Commission ("WEC") is a governmental agency created under Wis. Stat. § 5.05 and charged with the responsibility for the administration of Chapters 5 and 6 of the Wisconsin Statutes and other laws relating to elections and election campaigns, other than laws relating to campaign financing. WEC has its offices and principal place of business at 212 E. Washington Avenue, 3rd Floor, Madison, Wisconsin 53703.

21. Respondents Marge Bostelmann, Julie Glancey, Ann Jacobs, Dean Knudson, Robert Spindell, and Mark Thomsen are commissioners of WEC. The WEC Commissioners are sued solely in their official capacities.

STATEMENT OF FACTS

22. There must be population equality across districts under the command of the "one person, one vote" principle. The standard for population equality for congressional districts is quite strict. 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). Any deviation from complete equality must be minor and must be justified by some consistent state policy. *See id.*

23. 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).

24. The report from the Legislative Reference Bureau on the proposed bill adopting the existing 2011 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.

25. 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.

26. On August 12, 2021, the United States Census Bureau delivered apportionment counts to the President and to the states based upon the 2020 census.

27. From 2010 to 2020, the population of Wisconsin increased from 5,686,986 to 5,893,718.

28. Because there are eight Wisconsin congressional districts, the ideal population of each district is 736,715.

29. However, the apportionment counts establish the following with respect to the populations now contained in each of the eight Wisconsin congressional districts:

1st Congressional District – 727,452

2nd Congressional District – 789,393

3rd Congressional District – 733,584

4th Congressional District – 695,395

5th Congressional District – 735,571

6th Congressional District – 727,774

7th Congressional District – 732,582

8th Congressional District – 751,967

30. As a result, there is no longer 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. The 2nd and 8th Congressional Districts, where the Intervenor-Plaintiffs reside, are overpopulated.

31. The data for state legislative redistricting similarly shows that new maps for the state legislative seats are necessary. Given the total population of Wisconsin, the ideal population for each of Wisconsin's 99 assembly districts is 59,533, and the ideal population for each of Wisconsin's 33 senate districts is 178,598.

32. Yet the assembly and senate districts in which the Intervenor-Plaintiffs reside are now malapportioned. Assembly District 78 (Johnson – 67,142); Assembly District 51 (O’Keefe – 56,878); Assembly District 56 (Perkins – 64,544); Assembly District 2 (Zahn – 62,564).

33. Likewise, the senate districts in which each of the four Intervenor-Plaintiffs reside are now malapportioned: Senate District 26 (Johnson – 201,819); Senate District 17 (O’Keefe – 173,532); Senate District 19 (Perkins – 184,473); Senate District 1 (Zahn – 184,304).

34. The Intervenor-Plaintiffs are entitled to new apportionment maps that continue to meet all of the traditional redistricting criteria including equality of population. But the responsibility for achieving this result rests first with the Wisconsin Legislature and then the Wisconsin courts.

35. Moreover, in the absence of new constitutional maps approved by the Legislature and the Governor, the Intervenor-Plaintiffs request that any court (whether state or federal) that handles any dispute regarding the new maps apply the principle of making the least number of changes to the existing maps as are necessary to meet the requirement of equal population and the remaining traditional redistricting criteria.

CLAIMS FOR RELIEF

COUNT I – 42 U.S.C. § 1983 – Violation of the Fourteenth Amendment to the U.S. Constitution – Legislative Malapportionment

36. The Intervenor-Plaintiffs reallege and incorporate the preceding allegations of the complaint.

37. The Equal Protection Clause of the Fourteenth Amendment provides in part that a state shall not “deny to any person within its jurisdiction the equal protection of the laws.”

38. “[A]s a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis,” and “an individual’s right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.” *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

39. Due to population shifts, Wisconsin’s legislative districts are no longer constitutionally apportioned, injuring one or more of the Intervenor-Plaintiffs, and new maps must be drawn before elections may be held.

COUNT II – 42 U.S.C. § 1983 – Violation of Article I, Section 2 of the U.S. Constitution – Congressional Malapportionment

40. The Intervenor-Plaintiffs reallege and incorporate the preceding allegations of the complaint.

41. Under Article I, Section 2 of the United States Constitution, congressional districts must “be apportioned to achieve population equality ‘as nearly as is practicable.’” *Karcher v. Daggett*, 462 U.S. 725 (1983) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964)).

42. Due to population shifts, Wisconsin’s congressional districts are no longer constitutionally apportioned, injuring one or more of the Intervenor-Plaintiffs, and new maps must be drawn before elections may be held.

PRAYER FOR RELIEF

Wherefore, the Intervenor-Plaintiffs respectfully request that this Court:

A. Stay this matter until the Wisconsin Legislature has adopted a new apportionment plan, and the Wisconsin courts have finally ruled on any and all issues related to the matters asserted herein;

B. If this matter is not fully resolved by either the Wisconsin Legislature or the Wisconsin courts and this Court takes this matter on the merits:

1. Declare that the current apportionment plan for Wisconsin's State Assembly and Senate districts, Wis. Stat. §§ 4.01-4.99, 4.009, violate the Fourteenth Amendment to the United States Constitution;

2. Declare that the current apportionment plan for Wisconsin's congressional districts, Wis. Stat. §§ 3.11-3.18, violates Article I, Section 2 of the United States Constitution;

3. Permanently enjoin the Defendants from administering any elections under the existing apportionment maps;

4. Implement a new legislative and congressional district map that complies with the Fourteenth Amendment to the United States Constitution and Article I, § 2 of the United States Constitution, applying the principle of making the least amount of changes to the existing maps as are necessary to meet the requirement of equal population and the remaining traditional redistricting criteria;

5. Award the Intervenor-Plaintiffs costs and attorneys' fees as allowed by law, *see* 42 U.S.C. § 1988; and

6. Grant the Intervenor-Plaintiffs such other and further relief as the Court deems appropriate.

Dated this 26th day of August, 2021.

Respectfully Submitted,

WISCONSIN INSTITUTE FOR LAW & LIBERTY

s/ Richard M. Esenberg

Richard M. Esenberg (WI Bar No. 1005622)

Anthony F. LoCoco (WI Bar No. 1101773)

Lucas T. Vebber (WI Bar No. 1067543)

330 East Kilbourn Avenue, Suite 725

Milwaukee, WI 53202

Telephone: (414) 727-9455

Facsimile: (414) 727-6385

Rick@will-law.org

ALoCoco@will-law.org

Lucas@will-law.org

Attorneys for Intervenor-Plaintiffs