

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

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

Plaintiffs,

v.

Case No. 3:21-cv-00512

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.

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**MOTION TO INTERVENE AS PLAINTIFFS**

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PLEASE TAKE NOTICE that Proposed Intervenor-Plaintiffs, Billie Johnson, Eric O'Keefe, Ed Perkins, and Ronald Zahn timely move this Court pursuant to Rule 24 of the Federal Rules of Civil Procedure for leave to intervene as Plaintiffs in the above-captioned case.

Proposed Intervenor-Plaintiffs are Wisconsin voters whose constitutional rights are jeopardized by this lawsuit, and existing parties do not adequately represent their interests in the case. *See* Fed. R. Civ. P. 24(a)(2). Further, their claims share with the main action a common question of law and their intervention will not unduly delay or prejudice the adjudication of the original parties' rights. *See* Fed. R. Civ. P. 24(b)(1), (3).

This Court should therefore authorize Proposed Intervenor-Plaintiffs to intervene as of right pursuant to Fed. R. Civ. P. 24(a), or, alternately, should authorize permissive intervention pursuant to Fed. R. Civ. P. 24(b).

The basis for this Motion to Intervene as Plaintiff is set forth in the accompanying Memorandum of Law in Support of Motion to Intervene as Plaintiffs. Also accompanying the motion is a Proposed Complaint (Exhibit A), a Motion to Stay Proceedings (Exhibit B), a Memorandum of Law in Support of Motion to Stay Proceedings (Exhibit C), and an Original Action Petition (Exhibit D).

Dated this 26th day of August, 2021.

Respectfully submitted,

WISCONSIN INSTITUTE FOR LAW & LIBERTY  
Attorneys for Proposed Intervenor-Plaintiffs

/s/ Richard M. Esenberg

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

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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-PLAINTIFFS**

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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.



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, 3<sup>rd</sup> 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:

1<sup>st</sup> Congressional District – 727,452

2<sup>nd</sup> Congressional District – 789,393

3<sup>rd</sup> Congressional District – 733,584

4<sup>th</sup> Congressional District – 695,395

5<sup>th</sup> Congressional District – 735,571

6<sup>th</sup> Congressional District – 727,774

7<sup>th</sup> Congressional District – 732,582

8<sup>th</sup> 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 2<sup>nd</sup> and 8<sup>th</sup> 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*

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

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LISA HUNTER, JACOB ZABEL, JENNIFER  
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their official capacities as members of the Wisconsin  
Elections Commission,

Defendants.

---

**MOTION TO STAY PROCEEDINGS**

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PLEASE TAKE NOTICE that Intervenor-Plaintiffs, Billie Johnson, Eric O'Keefe, Ed Perkins, and Ronald Zahn timely move this Court to stay these proceedings under *Grove v. Emison*, 507 U.S. 25, 34 (1993), and its inherent authority until such time as the Wisconsin Legislature and the Wisconsin courts have completed their work relating to the redistricting process.

The basis for this Motion to Stay Proceedings is set forth in the accompanying Memorandum of Law in Support of Motion to Stay.

Dated this 26th day of August, 2021.



Respectfully submitted,

WISCONSIN INSTITUTE FOR LAW & LIBERTY  
Attorneys for Proposed Intervenor-Plaintiffs

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WISCONSIN

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LISA HUNTER, JACOB ZABEL, JENNIFER  
OH, JOHN PERSA, GERALDINE SCHERTZ,  
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Plaintiffs,

Case No. 3:21-cv-00512

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.

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**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STAY PROCEEDINGS**

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The Intervenor-Plaintiffs, Billie Johnson, Eric O'Keefe, Ed Perkins and Ronald Zahn, are Wisconsin citizens who, based upon the most recent census results, reside in state and congressional voting districts that are over-populated and, as a result, have a diluted vote relative to the votes of others who live in less populated districts. They have filed a Petition for an Original Action in the Wisconsin Supreme Court to seek relief based upon the legal principle of "one person, one vote" under the Wisconsin Constitution. *See* Ex. D to Motion to Intervene.



They have intervened in this action: (1) to request that this Court stay the action under *Grove v. Emison*, 507 U.S. 25, 34 (1993), because neither the Wisconsin Legislature nor the Wisconsin courts have yet made decisions regarding new voting maps for Wisconsin, and (2) to be heard on the merits, if this Court should ever be in a position to rule on the merits, of their one person, one vote claim. This memorandum is submitted in support of their motion to stay.

### ARGUMENT

Although the federal and state courts have concurrent jurisdiction to decide redistricting matters, the law is clear that under principles of federalism and comity the states' role is primary. *Grove v. Emison*, 507 U.S. 25, 34 (1993); *Chapman v. Meier*, 420 U.S. 1, 27 (1975); *Scott v. Germano*, 381 U.S. 407, 409 (1965).

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, 95 S.Ct. 751, 42 L.Ed.2d 766 (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).

Here the census results needed for redistricting have only been available for about two weeks and the Wisconsin Legislature has begun the task of addressing the “highly political task” of redistricting. In addition, the Intervenor-Plaintiffs have

asked the Wisconsin Supreme Court to take their one person, one vote claim if the Legislature does not complete the task.

Thus, if it should come to pass that the Wisconsin Legislature does not approve new maps which are agreed to by the Governor (as the Plaintiffs predict) then the task can still be handled by a state (as opposed to a federal) institution, namely the state courts and *Grove* specifies that any redistricting plan judicially “enacted” by a state court would be entitled to presumptive full-faith-and-credit legal effect in federal court. *Id.* at 35–36.

And while someone might argue that the Wisconsin Supreme Court need not accept the Petition before it, that Court, itself, has previously said 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 v. Wisconsin Elections Bd.*, 2002 WI 13, ¶17, 249 Wis.2d 706, 639 N.W.2d 537. That Court has further 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.

In *Grove*, the Supreme Court explained that federal courts are *required* to stay their hand while either the state legislature or a state court is addressing the task of redistricting. *Id.* at 34. Here, the census results are only two weeks old and both are involved. Under *Grove*, this Court has no option except to defer and stay its hand.

In their complaint, the Plaintiffs apparently seek to get around *Grove* by arguing that the Legislature will not be able to adopt maps which will be approved by the Governor and, as a result, this Court must intervene. But even if the Plaintiffs are correct about that and it comes to pass that the Governor vetoes the maps approved by the Legislature, then the primary place for resolution of that dispute is the state courts and the Intervenor-Plaintiffs have sought such relief in the state courts.

The U.S. Census Bureau did not release the census information to the states which is necessary for the Legislature to commence the redistricting process until August 12, 2021. It is not the proper role of a federal court to intercede mere weeks after the release of that data when neither the state legislature nor the state courts have had a chance to act.

### CONCLUSION

The Intervenor-Plaintiffs respectfully request that this Court stay proceedings in this matter until such time as the Wisconsin Legislature and the Wisconsin courts have completed their work relating to the redistricting process.

Dated this 26th day of August, 2021.

Respectfully submitted,

WISCONSIN INSTITUTE FOR LAW & LIBERTY  
Attorneys for Proposed Intervenor-Plaintiffs

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**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.*

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

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## ISSUE PRESENTED

1. Whether the Petitioners, who, based on the 2020 Census results, live in malapportioned districts, are entitled to:

(a) a declaration that the existing apportionment maps as set forth in Wis. Stat. §§ 3.11-3.18 (for congressional districts) and §§ 4.01-4.99 (for state assembly districts) and § 4.009 (for state senate districts) violate the one person one vote principle, contained in art. IV of the Wisconsin Constitution;

(b) an injunction prohibiting the Respondents from administering any election for Congressional, State Senate, or State Assembly seats until a new apportionment plan is adopted and in place that satisfies the requirements of art. IV of the Wisconsin Constitution; and

(c) in the absence of an amended state law with a lawful apportionment plan, establishment of a judicial plan of apportionment to meet the requirements of art. IV of the Wisconsin Constitution.

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

2. In *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 564, 126 N.W.2d 551 (1964), this Court said, with respect to redistricting cases, that such cases involve a denial of voting rights under art. IV of the Wisconsin Constitution (as well as the equal protection clause of the U.S. Constitution).<sup>1</sup>

3. The Petitioners, among many others, now live in state and/or 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.

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<sup>1</sup> The Petitioners do not raise a claim under the federal constitution in this proceeding.

4. 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).

5. 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.

6. 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[.]”)

7. 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).

8. 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.”

9. Given that the state’s role is primary, this Court previously noted that if the Legislature is unable to timely enact a new redistricting map, this Court’s “participation in the resolution of these issues would ordinarily be highly appropriate.” *Jensen*, 249 Wis. 2d 706, ¶4.

10. Further, this Court said 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.

11. Thus, redistricting is a state matter both with respect to the legislative function and the judicial function.

12. The Petitioners should not be required to resort to a federal court, and only a federal court, to protect their state constitutional rights. In *Reynolds*, 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.”* 22 Wis. 2d at 564 (emphasis added).

### **PARTIES**

13. Petitioners are Wisconsin voters who live in malapportioned districts. Each of the districts the parties live in fail the one person, one vote constitutional standard, under which population equality across districts ensures that each Wisconsinite’s vote counts equally.

14. Petitioner 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, Petitioner Johnson’s vote is unconstitutionally diluted, counting less than if he lived in a different district.

15. Petitioner 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, Petitioner O’Keefe’s vote is unconstitutionally diluted, counting less than if he lived in a different district.

16. Petitioner 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, Petitioner Perkins’ vote is unconstitutionally diluted, counting less than if he lived in a different district.

17. Petitioner 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, Petitioner Zahn’s vote is unconstitutionally diluted, counting less than if he lived in a different district.

18. 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, 3<sup>rd</sup> Floor, Madison, Wisconsin 53703.

19. 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

20. 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.

21. 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.

22. 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.

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 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:

1<sup>st</sup> Congressional District – 727,452

2<sup>nd</sup> Congressional District – 789,393

3<sup>rd</sup> Congressional District – 733,584

4<sup>th</sup> Congressional District – 695,395

5<sup>th</sup> Congressional District – 735,571

6<sup>th</sup> Congressional District – 727,774

7<sup>th</sup> Congressional District – 732,582

8<sup>th</sup> 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 Petitioners 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 Petitioners 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); 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).

33. The Petitioners are entitled to new apportionment maps that continue to meet all of the traditional redistricting criteria including equality of population.

34. This lawsuit is already ripe although the Legislature may yet draw, and the Governor may yet approve, maps that redress the Petitioners' injury. *Cf. generally Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 860 (E.D. Wis. 2001) ("Since it is impossible for legislative districts to remain equipopulous from decade to decade, challenges to districting laws may be brought immediately upon release of official data showing district

imbalance—that is to say, “before reapportionment occurs.” (quoting Pamela S. Karlan, *The Right to Vote: Some Pessimism about Formalism*, 71 Tex. L.Rev. 1705, 1726 (1993))). Consequently, this Court should accept jurisdiction of this case and stay it until the Legislature adopts a constitutionally adequate apportionment plan.

35. If the State Legislature does not, while this litigation is pending, 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 number of changes to the existing maps as are necessary to meet the requirement of equal population and the remaining traditional redistricting criteria. This “least changes” approach is consistent with past practice, *Baumgart v. Wendelberger*, No. 01-C-0121, 02-C-0366, 2002 WL 34127471, \*7 (E.D. Wis. May 30, 2002) (unpublished) (court begins with last-enacted maps), *amended*, No. 01-C-0121, 02-C-0366, 2002 WL 34127473 (E.D. Wis. July 11, 2002) (unpublished), and “creates the least perturbation in the political

balance of the state.” *Prosser v. Elections Bd.*, 793 F. Supp. 859, 871 (W.D. Wis. 1992).

### STATEMENT OF RELIEF SOUGHT

36. This Court should grant this petition, declare that a new constitutional apportionment plan is necessary under the Wisconsin Constitution, enjoin the Respondents from administering any election under the existing maps and then stay this matter until the Legislature has adopted a new apportionment plan and then, if any challenge is made to the new maps, rule on the constitutionality of such plan. 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. In so doing, the Petitioners intend to urge the Court to create districts that are equal in population, contiguous, compact, and that 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). The Petitioners intend to ask that this Court approve maps in time for candidates to timely circulate nomination papers for the Fall 2022 elections.

#### **REASONS WHY THIS COURT SHOULD TAKE JURISDICTION**

37. It is an established constitutional principle, recognized by both the U.S. Supreme Court and this Court, that congressional and state legislative redistricting is primarily a state and not a federal prerogative. This Court has a duty under both to exercise its jurisdiction.

38. A violation of the one person, one vote principle is a violation of art. IV of the Wisconsin Constitution.

39. Given that the Petitioners assert rights under the Wisconsin Constitution and that the U.S. Supreme Court and this Court have recognized that reapportionment, including

reapportionment undertaken by courts when the political branches cannot agree, is primarily a state responsibility, there is no reason that the Petitioners should have to rely upon the federal court rather than this Court to protect those rights. To the contrary, they ought to be able to appeal to the courts of the state of Wisconsin.

40. 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.

41. Further, the time for the resolution of redistricting litigation is so short (especially given the delay in the completion of the 2020 census) that completing both a circuit court action and appellate review within the available period of time would be extremely difficult.

42. It is not yet known precisely when the Legislature will adopt new redistricting maps.

43. The redistricting map after the 1990 census was not completed by the Legislature until April 14, 1992.<sup>2</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>3</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>4</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 and the Governorship were in the hands of the same party.

44. Here, given the delay in census results and the fact that Wisconsin currently has divided government, it is likely that

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<sup>2</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>3</sup> *Id.*

<sup>4</sup> *Id.* at 15.

new maps, if they are approved, would not be approved until the end of the year.

45. 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>5</sup> Given the probable timeline discussed in the previous paragraphs, litigation regarding the Legislature's proposed maps cannot proceed on the merits 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.

46. While this litigation may require some fact finding, the requirements of hearing and resolving those questions are not beyond the capacities of a referee. In 2012, the trial before a three-judge panel of a challenge to the enacted maps took only about two

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<sup>5</sup> See Wis. Stat. § 8.15.

days. *Baldus*, 849 F. Supp. 2d at 847. This Court routinely refers matters of comparable length to a referee in attorney discipline matters and can do so here.

### CONCLUSION

47. 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 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,



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