No. 2021AP1450

In the Supreme Court of Wisconsin

BILLIE JOHNSON, ERIC O'KEEFE, ED PERKINS, *and* RONALD ZAHN,
PETITIONERS,
v.
WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN *in her official capacity as a member of the Wisconsin Elections Commission*, JULIE GLANCEY *in her official capacity as a member of the Wisconsin Elections Commission*, ANN JACOBS *in her official capacity as a member of the Wisconsin Elections Commission*, DEAN KNUDSON *in his official capacity as a member of the Wisconsin Elections Commission*, ROBERT SPINDELL, JR. *in his official capacity as a member of the Wisconsin Elections Commission and* MARK THOMSEN *in his official capacity as a member of the Wisconsin Elections Commission*,
RESPONDENTS.

On Petition To The Supreme Court To
Take Jurisdiction Of An Original Action

NONPARTY BRIEF OF CONGRESSMEN GLENN GROTHMAN, MIKE GALLAGHER, BRYAN STEIL, TOM TIFFANY, AND SCOTT FITZGERALD SUPPORTING PETITIONERS

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INTRODUCTION

This Court's disposition of this Petition may well determine whether Wisconsin will cede a core aspect of its sovereignty to the federal courts. Less than three weeks ago, a group of voters filed a lawsuit in the U.S. District Court for the Western District of Wisconsin, raising population-equality objections to Wisconsin's congressional districts,[1] and asking the federal court to redraw these districts in the event of a deadlock between the Legislature and the Governor. The federal court—while still considering a motion to dismiss—has now required the parties to "confer on full case schedule and to submit a joint proposal," explaining that, "given the delay in the release of the 2020 census results with the 2022 mid-terms approaching, time is particularly short." *Hunter v. Bostelmann*, No.21-cv-512-jdp-ajs-eec, Dkt.24 at 1, 3 (W.D. Wis. Aug. 27, 2021). The upshot is that, absent a clear indication from this Court that the Wisconsin courts *will* resolve the population-based concerns with Wisconsin's congressional districts if a deadlock occurs, federal courts may well complete this task in the next few months, undermining our State's sovereignty.

This Court should make clear that Wisconsin does not need federal courts to draw our congressional districts in the

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[1] While this Brief refers throughout to Wisconsin's congressional districts, all of the considerations discussed herein also apply to the Assembly and Senate districts.

event of a political deadlock, as it is this Court's unquestioned prerogative under *Growe v. Emison*, 507 U.S. 25 (1993), following one of three available paths. First, and most preferably, this Court should grant the Petition and then stay the case until it is clear whether the Legislature and Governor will be able to come together on a congressional map. Second, and alternatively, this Court should use its superintending authority to convert the Petition into one asking for the appointment of a three-judge panel under 2011 Act 39, and then appoint such a panel immediately. Finally, and at minimum, if this Court is inclined to deny the Petition entirely, it should make clear in that denial order that it *will* grant a petition for original action or make an Act 39 panel appointment if a political deadlock occurs.

STATEMENT OF INTEREST

Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald (hereinafter "the Congressmen"), who also intend to be candidates for re-election in 2022, are duly elected Representatives to the U.S. House of Representatives from five of Wisconsin's eight congressional districts. The Congressmen have "special knowledge [and] experience" in the redistricting issues raised by the Petition, which will "render a brief from [them] of significant value to the court." Wis. Sup. Ct. IOP III.B.6.c. By virtue of their status as elected members of Congress, the Congressmen each have the solemn duty to "promote and

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

ARGUMENT

I. This Court Should Act Quickly And Unequivocally To Make Clear That Wisconsin Courts *Will* Carry Out Their Constitutional Redistricting Responsibility In The Event Of A Political Deadlock

A. As this Court explained in *Jensen v. Wisconsin Elections Board*, 2002 WI 13, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam), under the principles that the U.S. Supreme Court explicated in *Growe*, "state government—legislative *and judicial*—[i]s primary in matters of reapportionment and redistricting," because "[t]he people of this state have a strong interest in a redistricting map drawn by an institution of *state*

[2] While the Congressmen file this Nonparty Brief today, consistent with this Court's August 26, 2021, Order, they would intend to intervene in any granted original action or Act 39 action regarding their districts.

government—ideally and most properly, the legislature, secondarily, *this court*." *Jensen*, 2002 WI 13, ¶¶ 17–18 (emphases added). There is "no reason for Wisconsin citizens to have to rely upon the federal courts" instead of the state courts to adjudicate redistricting disputes because resolving such disputes is Wisconsin courts' constitutional responsibility. *Id.* ¶ 8 (citation omitted; emphasis omitted); *see State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 564, 571, 126 N.W.2d 551 (1964).

While state courts have primacy over redistricting disputes in the event of a political deadlock, they can lose that primacy—and thus improperly surrender the State's sovereignty—by failing to make clear that they will timely resolve redistricting issues and thus protect the citizens' constitutional rights. *Growe*, 507 U.S. at 33–34. As the U.S. Supreme Court has explained, *only* where there is "evidence that [ ] state branches"—including the state judiciary—"will fail timely to perform th[eir] duty" may a "federal court" act in this sensitive, sovereignty-implicating field. *Id.* at 34. Unfortunately, given the prior lack of such signals from the Wisconsin courts in recent decades, the federal courts have assumed the predominant role in adjudicating Wisconsin's redistricting controversies, in violation of Wisconsin's core sovereignty. *See Jensen*, 2002 WI 13, ¶¶ 7, 9; Legislative

Reference Bureau, *Redistricting In Wisconsin 2020: The LRB Guidebook* 58–73 (2020).[3]

B. In light of the above-described principles, as well as the time-sensitive exigencies of this particular redistricting cycle, this Court should act quickly and unequivocally to make clear that the Wisconsin courts *will* carry out their *Growe* responsibilities in the event of a political deadlock.

Time is of the essence for this Court to make clear that the Wisconsin courts will *not* "fail timely to perform th[eir] duty" in the event of a political deadlock. *Growe*, 507 U.S. at 34. As noted, *see supra* p. 1, a federal court is currently considering a lawsuit that raises equal-population-based objections to Wisconsin's congressional maps. That federal court has—even while considering a motion to dismiss—required the parties to try to come to an agreement on how to proceed quickly on the merits, given the upcoming mid-term elections and the delays in the Census Bureau's delivery of census data. *Id.* If this Court does not make clear that Wisconsin courts will timely act if a political deadlock occurs, then the federal court may feel obliged to take it upon itself to act, thereby depriving Wisconsin of a core portion of its sovereignty.

[3] Available at https://docs.legis.wisconsin.gov/misc/lrb/wisconsin_elections_project/redistricting_wisconsin_2020_1_2.pdf (all websites last accessed Sept. 7, 2021).

This Court should also act to discourage the improper "federal-state court 'forum shopping'" that the plaintiffs in the federal court action have engaged in. *Jensen*, 2002 WI 13, ¶ 24. Despite the availability of the Wisconsin state courts—and *Growe*'s and *Jensen*'s express holdings that state courts have priority over such matters—the federal plaintiffs "ma[de] an early forum-choice decision," *id.* ¶ 13, and "race[d]" to federal court to try "to beat" the Wisconsin state courts to the redistricting "finish line," *Growe*, 507 U.S. at 37. There is, of course, no serious doubt that the federal plaintiffs avoided the Wisconsin state courts specifically to sidestep this Court's involvement in any redistricting litigation, given that the lead counsel for the federal plaintiffs in *Hunter* has filed multiple equal-population challenges in state courts in this very election cycle. *See* Compl., *Carter v. Degraffenreid*, No. 132 MD 2021 (Pa. Commw. Ct., filed Apr. 26, 2021) (Pennsylvania); Compl., *English v. Ardoin*, No. 2021-03538-C § 10 (La. Civ. Dist. Ct., filed Apr. 26, 2021) (Louisiana); Compl., *Sachs v. Simon*, No. 62-CV-21-2213 (Minn. Dist. Ct., filed Apr. 26, 2021) (Minnesota); *see generally* Reid Wilson, *First Redistricting Lawsuits Filed By Democratic Group*, The Hill (Apr. 27, 2021, 10:28 AM).[4]

[4] Available at https://thehill.com/homenews/campaign/550439-first-redistricting-lawsuits-filed-by-democratic-group.

II. This Petition Presents Three Paths For Making Clear That The Wisconsin Courts Will Carry Out Their Constitutional Responsibility If A Deadlock Occurs

This Petition presents this Court with the proper vehicle for making clear that the Wisconsin courts will carry out their constitutional responsibility. The Congressmen below discuss three paths that this Court could take to make clear that Wisconsin courts will carry out their redistricting function if a political deadlock occurs.

A. This Court Should Grant The Petition And Then Stay The Case Until The Political Branches Act

1. This Court considers several factors when deciding whether to grant a petition for an original action. Wis. Const. art. VII, § 3; *see generally* Wis. Sup. Ct. IOP III. Most importantly, this Court considers whether the petition raises questions of "*publici juris*." *Petition of Heil*, 230 Wis. 428, 443–46, 284 N.W. 42 (1939). Additionally, this Court may also consider whether the Petition raises any "exigency." *Id.*

This Court has repeatedly recognized that petitions asserting redistricting claims raise questions of *publici juris*, thus readily satisfying this Court's original-jurisdiction criteria. Indeed, "this court has taken original jurisdiction in cases concerning legislative redistricting on no fewer than five previous occasions." *Jensen*, 2002 WI 13, ¶ 18 (collecting original action cases). This is because "[r]edistricting determines the political landscape for the ensuing decade and thus public policy for years beyond," *id.* ¶ 10, and also "raises

important state and federal legal and political issues that go to the heart of our system of representative democracy," *id.* ¶ 4; *accord Cunningham*, 51 N.W. at 729–30 ("highest and most sacred rights and privileges of the people;" "a matter of the highest public interest").

As to the exigency factor, redistricting disputes often require expeditious resolution because of the need for "clear, authoritative map[s] of [ ] districts going into the upcoming election season." *Jensen*, 2002 WI 13, ¶ 19. There is often a short time window between the federal government's delivery of "census enumeration" data necessary for the State to draft redistricting maps and "the official commencement of the next election season," which depends on those new maps. *See id.* ¶¶ 12, 21. So, if the Legislature and the Governor "gridlock" over the "politically sensitive task [of] redistricting" and fail to enact a plan, the court subsequently tasked with breaking that deadlock must adopt a map expeditiously, so as not to "delay and disrupt the [upcoming] election season." *Id.* ¶¶ 13, 16, 21. Notably, as *Jensen* recognized, the need for such accelerated court action could functionally prohibit this Court's review if a federal court has already begun a substantial review of an identical redistricting dispute for some time. *See id.* ¶¶ 16, 22. So, given those timing realities, this Court has recognized the need to "invoke[ ]" its jurisdiction "earlier," so that "the public interest might . . . be[ ] served by [its] hearing and deciding th[e] case." *Id.* ¶ 17.

2. The Petition plainly satisfies this Court's original-jurisdiction criteria, as it presents issues of *publici juris*: it is a "reapportionment or redistricting case," which, "by definition," implicates "the sovereign rights of the people of this state." *Jensen*, 2002 WI 13, ¶ 17. Petitioners raise three redistricting or reapportionment claims relating to the unequal population of Wisconsin's congressional districts that will result in the event of a deadlock between the Legislature and the Governor. *See* Pet.1; *Reynolds*, 22 Wis. 2d at 562–64.

The Petition also satisfies the "exigency" consideration for granting an original action petition because the people of Wisconsin are entitled to "clear, authoritative map[s] of [ ] districts going into the upcoming election season." *Jensen*, 2002 WI 13, ¶ 19. Given the delay in the Census Bureau's delivery of census data, this Court will need to act especially quickly to ensure that a constitutional congressional map is in place for the 2022 mid-term cycle, in the event of a deadlock. Pet.15–18. If this Court awaits that deadlock and only then considers and grants a new petition for original action and then adjudicates inevitable motions to intervene from interested parties (including nonparties such as the Congressmen), before reaching the merits, valuable weeks will be lost. It would be far preferable for this Court to grant this Petition now, resolve all motions to intervene, and then stay the case pending a political deadlock. This would put this Court in the best position to perform its constitutional duty, while also sending a clear signal to the federal courts

that Wisconsin courts *will* act "timely to perform th[eir] duty" in the event of a political deadlock. *Growe*, 507 U.S. at 34.

Notably, the current status of the federal litigation discussed above, *see supra* p. 1, is entirely different from the stage of the federal litigation in *Jensen*. In *Jensen*, the federal litigation had begun "over a year ago" and was "well along," with the federal court having "established a schedule that contemplate[d] discovery, pretrial submissions and [ ] trials." 2002 WI 13, ¶¶ 13–14. Here, in marked contrast, the federal litigation is in its very infancy. Thus, unlike in *Jensen*, this Court granting the Petition in this case would not involve any "unjustifiable duplication of effort and expense" of, or interference with, the federal court. *Id.* ¶ 18.

Finally, Respondents' primary argument against this Court granting the Petition—that redistricting claims may be "fact-finding intensive," Resp.4; *see* Resp.5–15—does not support their position. As a threshold matter, this case could well not include any such factual complications if this Court adopts from the outset Petitioners' entirely sensible suggestion of simply ordering "the least amount of changes necessary to the existing maps as are necessary to meet the requirement of equal population and the remaining traditional redistricting criteria." Pet. Mem. 8. But if this Court does determine that adjudicating this original action will involve a significant number of factual disputes, this Court could always "refer issues of fact . . . to a circuit court

or referee for determination," Wis. Stat. § 751.09, thereby resolving every single one of Respondents' practical concerns.

B. Alternatively, This Court Should Convert The Petition Into A Filing Under Act 39 And Appoint A Three-Judge Panel Immediately

In enacting Act 39 in 2011, the Legislature created a special procedure for adjudicating redistricting disputes. Act 39 requires this Court to appoint a three-judge panel of circuit-court judges to hear redistricting challenges and enables litigants to petition this Court directly to review any order of that panel. 2011 Act 39, §§ 28–29 (creating Wis. Stat. §§ 751.035 & 801.50(4m)). In particular, Section 801.50(4m) states that "[v]enue of an action to challenge the apportionment of any congressional or state legislative district shall be as provided in [Wis. Stat. §] 751.035." Wis. Stat. § 801.50(4m). Section 751.035, in turn, provides that "the supreme court shall appoint a panel consisting of 3 circuit court judges to hear" any action challenging apportionment under Section 801.50(4m), with "one judge from each of 3 circuits." Wis. Stat. § 751.035(1). "An appeal from any order or decision issued by the [three-judge] panel . . . may be heard by the supreme court and may not be heard by a court of appeals for any district." Wis. Stat. § 751.035(3).

The Congressmen strongly believe that this Court should grant the Petition because this case plainly satisfies this Court's original action criteria. *Supra* Part II.A. Further, granting the Petition would allow this Court to establish the

guiding principle for any remedial map at the outset of the litigation, including potentially mandating "the least amount of changes necessary to the existing maps as are necessary to meet the requirement of equal population and the remaining traditional redistricting criteria," Pet. Mem. 8, rather than having to invalidate a court-drawn remedial map created under different, erroneous principles.

Having said that, if this Court is inclined to deny the Petition, the Congressmen respectfully submit that this Court should instead use its broad supervising authority to "issue all writs necessary in aid of its jurisdiction," Wis. Const. art. VII, § 3(2)—including "control[ing] the course of ordinary litigation in [the] inferior courts," *State ex rel. CityDeck Landing LLC v. Cir. Ct. for Brown Cty.*, 2019 WI 15, ¶ 6, 385 Wis. 2d 516, 922 N.W.2d 832 (citation omitted)—to appoint a three-judge panel under Act 39 for this dispute. In particular, if this Court would prefer that a three-judge court adjudicate Petitioners' population-based claims in the first instance, with prompt review in this Court, this Court should construe the Petition as the filing of an action under Act 39, immediately appoint a three-judge panel, and then instruct that panel to stay the case (after deciding any intervention motions) to see if a deadlock will occur. That would have many of the benefits of granting the Petition discussed above, including making clear that Wisconsin courts *will* "timely [ ] perform th[eir] duty" to adjudicate the equal-population-

based problems with the current congressional maps, in the event of a political deadlock. *Growe*, 507 U.S. at 34.

C. At The Minimum, If This Court Were To Deny The Petition, It Should Make Clear That It Will Either Grant A Similar Petition Or Appoint A Panel Under Act 39 If Deadlock Occurs

If this Court does not wish to take either of the paths described immediately above, it should—at the absolute minimum—make clear that it will grant a petition for original action and/or appoint promptly a three-judge panel under Act 39 if a political deadlock occurs. Such unambiguous clarity is *absolutely essential* given the speed with which such a redistricting case would need to be adjudicated, given the fast-approaching 2022 mid-term election cycle, as well as the reality that a federal court is considering right now whether to stay its hand under *Growe*. Again, an outcome-determinative factor for the federal court in making that decision is whether State courts will "timely [ ] perform th[eir] duty," if a political deadlock occurs. *Growe*, 507 U.S. at 34.

CONCLUSION

This Court should grant the Petition, or alternatively, take one of the other actions described above to ensure that Wisconsin courts will resolve any redistricting dispute in the event that a political deadlock occurs.

Dated: September 7, 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) and this Court's August 26, 2021 Order in this case for a brief produced with a proportional serif font. *See* Order, No.2021AP1450-OA (Wis. Aug. 26, 2021). The length of this Brief is 3,020 words.

Dated: September 7, 2021.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12), AND OF SERVICE

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. § (Rule) 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.

A copy of this certificate has been served with the paper copies of this Brief filed with the Court and served on all opposing parties.

Dated: September 7, 2021.

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