Attachment A

STATE OF WISCONSIN
SUPREME COURT

SCOTT R. JENSEN, personally and as Speaker of the Wisconsin Assembly and MARY E. PANZER, personally and as Minority Leader of the Wisconsin Senate,

Petitioners,

v.

Case No. 02-0057-OA

WISCONSIN ELECTIONS BOARD, an independent agency of the State of Wisconsin; JERALYN WENDELBERGER, its chairman; and each of its members in his or her official capacity, DAVID HALBROOKS, R. J. JOHNSON, JOHN P. SAVAGE, JOHN C.
(Caption Continued – Next Page)

REPLY OF PETITIONERS TO RESPONSE OF INTERVENOR-RESPONDENTS TO PETITION FOR LEAVE TO COMMENCE AN ORIGINAL ACTION

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SCHOBER, STEVEN V. PONTO, BRENDA LEWISON, CHRISTINE WISEMAN and KEVIN J. KENNEDY, its executive director,

Respondents, and

State Senate Majority Leader CHARLES J. CHVALA, State Assembly Minority Leader SPENCER BLACK, WISCONSIN EDUCATION COUNCIL, a voluntary association, STAN JOHNSON, its elected president and several of its members, TOMMIE LEE LENN, PAUL HAMBLETON and DIANNE CATLIN LANG,

Intervenor-Respondents.

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Each party has now confirmed that they are unable to find a single case in which this Court refused to hear the merits of a Petition for Original Jurisdiction concerning legislative redistricting. This Court has taken Original Jurisdiction on no fewer than five previous occasions. *See State ex rel. Dreyfus v. Elections Bd.*, No. 82-458-OA (1982); *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551 (1964), *enforced*, 23 Wis. 2d 606, 128 N.W.2d 16 (1964) (per curiam) (hereafter "*Reynolds*"); *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953); *State ex rel. Bowman v. Dammann*, 209 Wis. 21, 23, 243 N.W. 481 (1932); *State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 51 N.W. 724 (1892).

In a long line of cases in recent years, highlighted by the unanimous decision in *Growe v. Emison*, 507 U.S. 25 (1993), the United States Supreme Court has reestablished principles of federalism. *See, e.g., Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 121 S. Ct. 675 (2001); *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740 (2000); *Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365 (1997); *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624 (1995); *Missouri v. Jenkins*, 515 U.S. 70, 115 S. Ct. 2038 (1995). Those principles of federalism, with the corollary principles of comity, are

squarely at stake here, and would be forfeited should the Court decline to undertake this most central of all issues to the State of Wisconsin—the apportionment of its citizens into legislative districts.

Curiously, the Intervenor-Respondents have placed on its head the importance of this Court's experience and knowledge. Until now, the experience that elected members of the judiciary bring to the bench would most certainly have been considered an asset, but now the Intervenor-Respondents argue such experience is no asset, but a liability. That view is contrary to Wisconsin's Constitutional structure, with three coordinate branches, each with elected leaders, (Wis. Const. arts. IV, V, VII), and we reject it.

In matters of great public importance, and everyone agrees redistricting certainly fits that description, this Court has rarely stepped-aside, or deferred to other courts (and has never deferred to a federal court) solely because certain facts may be unknown. A procedure to resolve factual concerns is articulated in the statute (Wis. Stat. § 751.09) and this Court's inherent power surely extends to creating an appropriate procedure. In 1964, this Court utilized that power to establish a procedure for submission of alternative redistricting maps and to create its own map. *See*

Petitioners' Second Supplemental Appendix (Excerpts of Record from *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551, *enforced*, 23 Wis. 2d 606, 128 N.W.2d 16 (1964) (per curiam) hereafter "2nd Supp. Appx.," Exhs. A, C, E). In 1982 this Court was apparently prepared to do the same in granting the Petition for Original Jurisdiction.[1] (2nd Supp. Appx., Exh. I (Docket sheet of *State ex rel. Dreyfus v. Elections Bd.*, No. 82-458-OA (Mar. 15, 1982)); *see also Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 632-33 (E.D. Wis. 1982).

I. PETITIONS FOR ORIGINAL JURISDICTION OVER LEGISLATIVE REDISTRICTING HAVE BEEN HEARD ON THEIR MERITS EVERY TIME REQUESTED.

The Intervenor-Respondents were unable to cite even one case in which this Court declined to consider the merits of a Petition for Original

[1] In addition to the Petitioners' prior filings directly related to the Petition, the Court is respectfully asked to incorporate and consider a number of other documents filed by Petitioner, including Response of Petitioners to Motion to Intervene of Charles Chvala and Spencer Black ("Response on Chvala Intervention"), Petitioners Supplemental Appendix and Petitioners Response to Wisconsin Education Association Council's Motion to Intervene. Each contains substantive arguments in support of the Petition not otherwise repeated here.

Jurisdiction on legislative redistricting.[2] No party requested Original Jurisdiction following the 1990 census, and as such, the 1990's case provides no guidance on the legal issues surrounding the grant of this Petition. Both 1982 and 1964, however, provide very clear guidance to this Court. Contrary to Intervenor-Respondents suggestion, (Intervenor-Respondents Charles J. Chvala and Spencer Black's Response and Supplemental Appendix to Petition for Leave to Commence an Original Action ("Chvala Opposition") pp. 15-17 (the Court "has not taken original jurisdiction over redistricting since *Baker* and *Reynolds* [*v. Sims*]")), in 1982, as in 1964, original jurisdiction for the purpose of drawing legislative districts was requested, and the Court granted the petition. (2nd Supp. Appx., Exh. I). *See Dreyfus*, No. 82-458-OA; *Reynolds*, 22 Wis. 2d 544. The Court's 1982 grant of Original Jurisdiction, which the Chvala Opposition fails to note to the Court, stands not only as an indication of this

[2] Though not cited by Intervenor-Respondents, the Petitioner is aware of one case, *State ex rel. Martin v. Zimmerman*, 249 Wis. 101, 23 N.W.2d 610 (1946), in which the language used by the Court was "Petition denied." *Id.* at 111. However, despite the Court's language, the Court appears to have actually considered that matter on its merits though it ultimately declined to enter relief. More importantly, the Court agreed that the matter of legislative redistricting affected "all the people of the state" and "on that score" jurisdiction was warranted. *Id.* The Court declined only because in the pre-1960 era it was "without power" to redistrict. *Id.* That is, of course, no longer true and the Court would, as it did in *Reynolds*, redistrict the state legislature.

Court's unbroken string of hearing the substance of such Petitions, it is, as well, a clear demonstration that the potential for later federal court action or conflict[3] will not affect the initial determination to grant the Petition.[4]

Prior to the 1960's, this Court was not authorized to draw legislative districts, but it nonetheless uniformly granted or heard the merits of each petition for Original Jurisdiction on matters of legislative redistricting to the fullest extent allowed by the jurisprudence of that era. *See State ex rel. Thomson*, 264 Wis. 644; *State ex rel. Bowman*, 209 Wis. 21; *State ex rel Attorney General*, 81 Wis. 440. As is clear from all the parties, the authority and precedent for granting a Petition for Original Jurisdiction is

[3] The Response on Chvala Intervention, filed January 15, 2002, addresses many of the issues concerning the federal court action and those matters are not repeated here.

[4] While the 1982 action was removed after this Court took Original Jurisdiction, *Growe* would bar similar removal today. Indeed, while the parties here may disagree on certain aspects of the *Growe* decision, the U.S. Supreme Court was unequivocal in holding that state courts would not be second guessed (as the Oppositions appear to suggest might happen here) simply because there was a federal statute that might be implicated. *Growe*, 507 U.S. at 35-36 (although there were allegations of Voting Rights Act violations in the federal action, "*Germano* . . . does not require that the federal and state-court complaints be identical;" the District Court must wait for the State Court to act before reviewing matters.)

unequivocal and long.[5] (*See* Response of the Wisconsin Education Association Council Opposing the Petition for Leave to Commence an Original Action, ("WEAC Opposition") at p. 1 ("It surely has the authority")). *See Dreyfus*, No. 820458-OA; *Reynolds*, 22 Wis. 2d 544; *State ex rel. Thomson*, 264 Wis. 644; *State ex rel. Bowman*, 209 Wis. at 23 ("the power of this court to review the constitutionality of a legislative reapportionment must be taken as settled . . ."). There is not a single case cited by the Intervenor-Respondents in which this Court has declined to consider, on the merits, a petition directed at legislative redistricting. *Cunningham*, 81 Wis. at 483 ("If the remedy for these great public wrongs

[5] Perhaps equally telling as precedent is this Court's consistent recognition, both in matters of Original Jurisdiction and in matters brought by review of the fundamental importance of matters concerning elections and the rights of voters. *See, e.g., Cross v. Hebl*, 46 Wis. 2d 356, 174 N.W.2d 737 (1970); *Lanser v. Koconis*, 62 Wis. 2d 86, 214 N.W.2d 425 (1974); *State ex rel. Ahlgrimm v. Elections Board*, 82 Wis. 2d 585, 263 N.W.2d 152 (1978); *Fine v. Elections Board*, 95 Wis. 2d 162, 289 N.W.2d 823 (1980); *State ex rel. LaFollette v. Democratic Party*, 93 Wis. 2d 473, 287 N.W.2d 519 (1980) (original action), *overruled, Democratic Party v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981); *McNally v. Tollander*, 100 Wis. 2d 490, 302 N.W.2d 440 (1981); *Labor & Farm Party v. Elections Board*, 117 Wis. 2d 351, 344 N.W.2d 177 (1984) (original action); *Gard v. Elections Board*, 156 Wis. 2d 28, 456 N.W.2d 809 (1990) (original action); *WEAC v. Elections Board*, 156 Wis. 2d 151, 456 N.W.2d 839 (1990); *McCarthy v. Elections Board*, 166 Wis. 2d 481, 480 N.W.2d 241 (1992) (original action); *State ex rel. Shroble v. Prusener*, 185 Wis. 2d 102, 517 N.W.2d 169 (1994); *Elections Board v. Wisconsin Manufacturers & Commerce*, 227 Wis. 2d 650, 597 N.W.2d 721 (1999).

[malapportioned legislative districts] cannot be found in this court it exists nowhere").

II. THIS COURT IS EMINENTLY QUALIFIED AND CAPABLE OF COMPLETING LEGISLATIVE REDISTRICTING.

In two of the three cycles in which courts have been allowed by law to complete legislative redistricting, this Court believed itself capable and qualified to complete the task. *See State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551 (1964) *enforced*, 23 Wis. 2d 606 128 N.W.2d 16 (1964) (per curiam) (hereafter "*Reynolds*"); *State ex rel. Dreyfus v. Elections Bd.*, No. 82-458-OA (1982). The Intervenors are simply incorrect in their explanations of the *Reynolds* case. (*See, e.g.*, WEAC Opposition, pp. 20 ("the Court apparently did not even consider any submissions . . . " [before the Court plan issued on May 14, 1964]); Chvala Opposition, p. 20 ("It does not appear from the opinion that the Supreme Court . . . received any submission prior to redistricting the legislature" (emphasis original)). In *Reynolds,* redistricting proposals and maps were, in fact, submitted by the parties and the Court considered these submissions before issuing a court plan. (2nd Supp. Appx., Exh. A-H). *State ex rel. Reynolds*, 23 Wis. 2d at 606-607.

Contrary to the Intervenor-Respondents' summaries, this Court undertook the factfinding required for legislative redistricting in *Reynolds* and completed the 1964 redistricting after following a process for the orderly receipt of proposed maps. The record of this Court is abundantly clear and shows that the Court received, reviewed and evaluated no fewer than seven different redistricting plans:

1. Rosenberry Act
(Then existing Apportionment Plan.)

2. Plaintiff's Initial Proposed Plan
(1961 Legislative Council plan with amendments.)

3. Plan Under Vetoed Bill No. 575, S, 1963
(Submitted by Plaintiff for comparison.)

4. Plan Under Prior Bill Nos. 643, S, 645, A and 812, S, 1961
(Submitted by Plaintiff for comparison.)

5. Plan Under Vetoed Bill No. 679, S, 1964
(Intervening Respondents' Proposed Plan.)

6. Plaintiff's Alternate Plan A
(Submitted by Plaintiff prior to Court's decision.)

7. Plaintiff's Alternate Plan B
(Submitted by Plaintiff prior to Court's decision.)

(2nd Supp. Appx. Exhs. B, D, F). Briefs were received addressing these various proposals, and amici, as well, were allowed. (2nd Supp. Appx. B, D, F, G, H).

This Court's 1964 procedure mirrors the procedures described and requested in the Petition. (Memorandum in Support of Petition for Leave to Commence an Original Action Seeking Declaratory Judgment and Other Relief ("Memorandum in Support"), pp. 12-14). There is no requirement whatsoever for testimony if this Court determines it is unnecessary. Indeed, the description provided by the Chvala Intervenor-Respondents of supposed facts belies the conclusion that such facts will be a barrier to resolution. The number of residents (Chvala Opposition, p. 10), the number of residents in a district (*id.*), and the present invalidity of apportionment are, for example, certainly not matters that will be disputed. Matters such as criteria to evaluate (*id.*), contiguity (*id.*) and sanctity of boundaries (*id.*) are matters this Court, with its long history of concern about State legislative districts, would, as matters of state law, find central to any inquiry. These are matters of law, not fact.

As noted by the WEAC opposition, "liability" – the key "factual" matter – is undisputed. (WEAC Opposition, p. 10). Remedy, the real matter of substance here, is a component of what this Court addresses in

virtually every case.[6] Determination of appropriate equitable relief is not primarily a factual matter, it is a matter of "equity" and as such is uniquely the focus of this Court. Redistricting is a form of remedy, and this Court is free to address that remedy in any manner it may choose.

What is particularly curious is the insistence by the Chvala Intervenors that this Court is incapable of impartiality because it is an elected body. (Chvala Opposition, pp. 17, 24, 32-33). Setting aside the Intervenors obvious failure to recognize that members of the court are elected in non-partisan elections (*See* Wis. Stat. §§ 5.58, 5.60(1)(a)) the cynicism expressed by Senator Chvala and Representative Black regarding the quality, integrity and independence of this Court is wrong as a matter of law and wrong as a matter of practice.

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[6] WEAC makes a most curious, and obviously inconsistent, suggestion as to "remedy" in arguing that the legislature should be forced to act by this Court, but then suggests this be done by dismissal without prejudice. If the Court is to direct and oversee an Order to the legislature to act it would necessarily retain the case, not dismiss it. The Court cannot, as a practical matter, force the State Senate's Majority Leader to negotiate in good faith, and dismissal will most certainly not achieve that result, it will only cede to the federal court the redistricting of Wisconsin's legislature (an outcome WEAC obviously understands and seeks, but for political reasons does not want to state clearly). The only appropriate remedy, as in every modern redistricting case, is for the Court to undertake the task. As in much litigation, the Court's most persuasive action is creation of a process that will result in the Court, rather than the parties, completing redistricting. Pressure for legislative resolution is obviously applied by granting the Petition and setting a schedule leading to a court drawn plan, if necessary. Dismissal eliminates all pressure completely.

As a matter of law, the people of Wisconsin have chosen to create an elected judiciary. Wis. Const. art. VII, §§ 4, 5, 7. While some may now believe appointment, and not election, is a better method, that is simply not the law of this State. Our Constitution establishes the right of the people to elect its judiciary, and so long as that Constitution controls, the fact that individuals on the Court are elected cannot (and must not) be given weight in the determination of whether or not a Petition to the Court will be granted.

As a matter of practice, this Court is scrupulous in its approach to matters and has impartially applied the law. It is nonsense or worse to suggest that this Court has been improperly influenced by the process of election, appointment or otherwise. This Court has addressed some of the most politically difficult matters of our time, and the matter of redistricting is no different. *See, e.g., Risser v. Klauser*, 207 Wis. 2d 176, 558 N.W.2d 108 (1997) (original action) (Governor's partial veto power); *State ex rel. Wisconsin Senate v. Thompson*, 144 Wis. 2d 429, 424 N.W.2d 385 (1988) (original action) (Governor's partial veto power); *Thompson v. Craney*, 199 Wis. 2d 674, 546 N.W.2d 123 (1996) (Powers of Supt. of Public Instruction); *Martinez v. DILHR*, 165 Wis. 2d 687, 478 N.W.2d 582 (1992)

(scope of powers of Joint Committee for Review of Administrative Rules); *Vincent v. Voight*, 2000 WI 93, 236 Wis. 2d 588, 614 N.W.2d 388 (2000) (constitutionality of state school finance system).

Indeed, it is more than a bit ironic that this Court's extraordinary background as a group and individually, would now be cited by the Intervenors as a liability rather than a great benefit. Three members of this Court are former members and leaders of the State Legislature, four members of this Court are former renowned members of the trial bench, and every member of this Court is familiar with the communities of this state and the backgrounds of its people as a consequence of the electoral process and their own long histories in this state. It is simply wrong to suggest, as the Intervenors do, that this court is not uniquely the most qualified arbiter of legislative redistricting. To suggest otherwise, is squarely contrary to a common-sense understanding of history, experience and law.

This Court can follow the precedent of 1964 and receive maps, with supporting documentation, and then rule. This Court can, following the precedent of the 1992 process, receive alternative forms of relief in the form of maps, receive affidavit testimony and then rule. The Court can

appoint some of its own members to sit, hear argument, and then report to the full court, or the Court may wish to appoint other eminent members of the judiciary or bar to receive information and then report. None of these procedures will require the Court to disrupt its schedule, nor will any of these procedures fail to accomplish the desired result—a constitutionally acceptable redistricting of the State legislature.

Before now this Court has uniformly accepted legislative redistricting as its responsibility if the legislature fails to act. This matter is no different.

III. FEDERALISM, AS REESTABLISHED BY THE U.S. SUPREME COURT IN RECENT YEARS, UNEQUIVOCALLY SUPPORTS THIS COURT'S GRANT OF THE PETITION.

Noticeably absent from the arguments of the Intervenor-Respondents, is a discussion, in any respect, of the powerful reestablishment of federalism by the United States Supreme Court, of which *Growe v. Emison*, 507 U.S. 25 (1993), is merely one example. In matters ranging from intrusion of federal law into the school yards, *United States v. Lopez*, 514 U.S. 549 (1995) (striking down Gun Free School Zones as exceeding the Commerce Clause), to state responsibility in criminal laws generally, *United States v. Morrison*, 529 U.S. 598 (2000);

Printz v. United States, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program"), to properly ceding to states the right and obligation to regulate self-contained wetlands for the benefit of, and consistent with, the high standards of States like Wisconsin, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), the U.S. Supreme Court has begun to realign the interests of states and the federal government. Such realignment insures that progressive states, like Wisconsin, will have the full power each deserves to experiment and to address concerns without second guessing by federal courts and without regressive mandates of the federal government. *United States v. Lopez*, 514 U.S. 549, 581 ("In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear").

In a matter as critical as the election of representatives to a state's own legislature, there can be no doubt that a state, not the federal

government, has a greater and more critical interest. Neither Intervenor-Respondent disputes, in any respect, that the State of Wisconsin has critical, unique and overriding interests to protect in legislative redistricting. (*See*, Petition ¶¶ 1, 20, 26; Memorandum in Support of Petition pp. 9-12).

There can be no doubt that the principles of federalism, so important to modern jurisprudence, reassure the states that they, and not the federal courts, are responsible for redistricting state legislative bodies. In that context, *Growe* is unequivocal. The State of Wisconsin judiciary is encouraged to take plenary control over the process. *Growe*, 507 U.S. at 34 ("[T]he doctrine of *Germano* prefers *both* state branches [legislative and judicial] to federal courts as agents of apportionment").[7]

[7] While each party has speculated on what the federal district court might do in the event this Court takes on its proper role and grants the Petition, that debate is for another day. The federal court will, of course, proceed to redistrict the State Assembly and Senate if both Wisconsin's legislature and Wisconsin's judiciary fail to act. Indeed, on January 29, 2002, that District Court set certain dates for trial on legislative redistricting. However, the District Court expressly noted that action by either the legislature or this Court would forestall that trial. And, as noted earlier, *Growe* and a host of other precedent strongly suggest the federal court will ultimately step aside.

CONCLUSION

The Petitioners respectfully request that the Petition be granted and that the Court take such steps as it deems appropriate to address the redistricting of the State Assembly and State Senate.

Dated this 31st day of January, 2002.

Respectfully submitted,

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