STATE OF WISCONSIN

IN SUPREME COURT

No. 02-0057-OA

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.

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

Respondents,

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

Intervenors-Respondents.

RESPONSE TO PETITION TO COMMENCE ORIGINAL ACTION

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The respondents, Wisconsin Elections Board, Jeralyn Wendelberger, David Halbrooks, R.J. Johnson, John P. Savage, John C. Schober, Steven V. Ponto, Brenda Lewison, Christine Wiseman and Kevin Kennedy (collectively "Board"), agree with the basic premises asserted in the petition for leave to commence an original action in the Wisconsin Supreme Court. They agree that Wisconsin's state legislative districts must be reapportioned to correctly reflect the shifts in population reported by the 2000 census, that it is unlikely the Legislature will be able to timely concur on a valid redistricting plan and that the judiciary should step in to remap the state legislative districts to conform to constitutional requirements for equal representation.

However, there is another case seeking the same relief, as well as reapportionment of the state's congressional districts, presently pending before a three-judge panel in the United States District Court for the Eastern District of Wisconsin. Many of the parties in

that case, *Rev. Olen Arrington, Jr., et al. v. Jeralyn Wendelberger, et al.*, No. 01-C-0121, are also parties in this case. The plaintiffs in *Arrington* include Charles Chvala and Spencer Black who are intervening defendants in this case. The defendants in *Arrington* are the members and executive director of the Elections Board, who are also the defendants in this case. Scott Jensen and Mary Panzer, the petitioners in this case, are intervening defendants in the federal case.

So the real question is not whether a court should exercise its jurisdiction to reapportion the state legislative districts in the absence of legislative action, but which court should exercise its concurrent jurisdiction to accomplish that result.

The United States Supreme Court has held that although both federal and state courts have jurisdiction to consider redistricting, federal judges should usually defer to state courts when the state courts have begun to address that highly political task themselves. *Growe v. Emison*, 507 U.S. 25, 32-33 (1993). The Supreme Court emphasized, though, that deferral does not mean abstention, so that in some situations a federal court may act despite the presence of a parallel case in a state court. *Id.* at 35 and 37.

The federal constitution is concerned not only that state legislative districts be properly reapportioned according to present population, but also that the reapportionment be accomplished in time to have a practical effect at the next scheduled election. *Id.* at 33-35. So a federal court may be justified in adopting its own plan if it is apparent that a state court will not develop a redistricting plan in time for the primaries. *Id.* at 36; *Wesch v. Folsom*, 6 F.3d 1465, 1473 (11th Cir. 1993), *cert. denied*, 510 U.S. 1046 (1994).

Thus, the federal rule is that a "[s]tate should be given the opportunity to make its own redistricting decisions so long as that is practically possible and the State chooses to take the opportunity." *Lawyer v. Department of Justice*, 521 U.S. 567, 576 (1997).[1]

At a meeting of the Board held January 17, 2002, the seven members present voted four to three to advise their counsel that they believe the best policy is for legislative redistricting to be done by the state courts if not by the state Legislature. The Board must candidly advise the Court, however, that this vote was largely along the same party lines that divide the principal litigants in this case, with the four Republican appointees voting in favor of state court jurisdiction and the two Democratic appointees present voting along with the Court's appointee against it.

There can be no disagreement, though, that, as the United States Supreme Court has noted, expeditiousness is a significant factor in determining which entity should undertake the task of redistricting. The Legislature should have the initial opportunity to draw up a plan, but if the Legislature cannot do so in a timely fashion, the courts should take up the task. The state courts should have the next opportunity to draw up a plan, but if the state courts cannot do so in a timely fashion, the federal courts should draw the lines.

2002 is an election year. Primaries are scheduled for early September with the general election to be held in early November. But Labor Day is not the target date for redistricting.

[1]Of course, if a state reapportionment decision contravenes federal law the federal interest trumps the state interest. *Sexson v. Servaas*, 33 F.3d 799, 802-03 (7th Cir. 1994).

As correctly stated in the petition, and as the members of the Court holding elective office well know, preparations for the election must begin well in advance of the day voters go to the polls.

Nomination papers for numerous state offices must be filed by July 9 to give candidates a couple months to campaign before the primary. Those papers must be circulated for signatures first, and the starting date for circulation is June 1.

Persons contemplating political office cannot make the decision whether to run and begin circulating their nomination papers until they know the district they would be running in as determined by the location of the boundaries surrounding their residence. Thus, the Board is supposed to certify the boundaries of all the state senate and assembly districts by May 14. And to enable the Board to certify boundaries that meet constitutional requirements for equal representation, redistricting in accord with the 2000 census should be finished within a reasonable time to permit the Board to prepare the certification of 129 different districts. A reasonable date would be May 1, coincidentally Law Day.

Prompt action on reapportionment is not just a procedural nicety. A significant delay could theoretically affect the results of some elections. Incumbents would be less affected by a delay since they have name recognition among the electorate and campaign machinery in place ready to go as soon as the Board gives its okay. Those running for the first time could be disadvantaged because they need more time to get their campaign organized as well as more time to campaign, especially if they must overcome the advantages of incumbency.

Because it is already the end of January, there is concern whether the Supreme Court can finish the task of redistricting in time to allow the election process to

proceed on schedule. The Court has not yet decided whether to take the case so it obviously has not set a schedule for the various parties to take steps such as interrogatories and discovery in preparation for an evidentiary hearing needed to resolve the facts which have been contested by the parties in their pleadings in the federal case. Nor has it set a mechanism for the resolution of the disputed factual issues.

By contrast, the federal court has set a schedule for pretrial matters which has already commenced. It has also set tentative trial dates for late April.

CONCLUSION

It is therefore respectfully submitted that the Court should carefully consider whether it would be able to render a final decision on redistricting "'within ample time . . . to be utilized in the [upcoming] election,'" *Growe*, 507 U.S. at 35 (ellipses and brackets in original), in deciding whether to exercise its original jurisdiction in this case. If the Court concludes that it cannot act expeditiously for any reason, it should allow the federal court to complete the redistricting process that is already

underway. *See Prosser v. Elections Bd.*, 793 F. Supp. 859 (W.D. Wis. 1992); *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630 (E.D. Wis. 1982).

Dated this 25 day of January, 2002.

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CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. § 809.62(4)(b) for a response produced with a proportional serif font. The length of this response is 1,248 words.

Dated this 25 day of January, 2002.

THOMAS J. BALISTRERI
Assistant Attorney General