STATE OF WISCONSIN
SUPREME COURT

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Clerk of Supreme Court
Madison, WI

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

Respondents.

RESPONSE OF PETITIONERS TO MOTION TO INTERVENE OF CHARLES CHVALA AND SPENCER BLACK

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TABLE OF CONTENTS

Page

I. THERE IS NO IMPEDIMENT TO WISCONSIN STATE COURTS RESOLVING WISCONSIN LEGISLATIVE REDISTRICTING 2

A. The Motion Materially Misstates The Status of The Federal Proceedings 2

1. No Substantive Proceedings in Federal Courts 2

2. Speaker Jensen and Senator Panzer Have Consistently and Repeatedly Noted Their Intention to Seek Review of State Legislative Matters in State Forums. 5

B. It Is Indisputable That State Legislative Redistricting And Congressional Redistricting Are Governed By Distinct Rules And Standards. 8

CONCLUSION 11

TABLE OF AUTHORITIES

Page

Cases

Arrington v. Elections Bd.,
173 F. Supp. 2d 856 (E.D. Wis. 2001) 2, 3

Brown v. Thomson,
462 U.S. 835 (1983) 10

Gaffney v. Cummings,
412 U.S. 735 (1973) 10

Gorin v. Karpan,
775 F. Supp. 1430 (D. Wyo. 1991) 10

Growe v. Emison,
507 U.S. 25 (1993) 1, 3

Karcher v. Daggett,
462 U.S. 725 (1983) 10

Scott v. Germano,
381 U.S. 407 (1965) 1

State ex rel. Attorney General v. Cunningham,
81 Wis. 440, 51 N.W. 724 (1892) 4

Statutes

1971 Wis. Laws ch. 133 11

1981 Wis. Laws ch. 154 11

1981 Wis. Laws ch. 155 11

1991 Wis. Act 256 11

Wis. Stat. § 59.10(3) 3

Wis. Stat. ch. 3 11

Other Authorities

Wisconsin Legislative Reference Bureau, *Revised Guidelines for Adjusting Municipal Wards Following 1990 Census*, (Informative Bulletin 91-IB March 1991) 4

It is a day of remarkable irony when the leader of one house of Wisconsin's legislature seeks to intervene for the purpose of arguing that our State institutions are not an acceptable forum for dispute resolution. Setting aside the cynicism such a position communicates to the public, that position is without legal precedent. As the United States Supreme Court has repeatedly emphasized, state courts, not federal courts, are the appropriate judicial forum for redistricting. *Growe v. Emison*, 507 U.S. 25, 34 (1993); *Scott v. Germano*, 381 U.S. 407 (1965).

In the event the legislature is unable to resolve redistricting, Speaker Jensen and Senator Panzer welcome the intervention of Senator Chvala, the Senate Majority Leader, and Representative Black, Minority Leader of the Assembly (together "Chvala Intervenors") in this Wisconsin Supreme Court proceeding. Unfortunately, the Motion to Intervene ("Motion") and accompanying Intervenors' Memorandum of Law in Support of Their Motion to Intervene ("Chvala Memorandum" or "Chvala Mem."), misstate a number of facts which, if uncorrected, may mislead the Court. This Response of Petitioners to Motion to Intervene of Charles Chvala and Spencer Black ("Response") addresses a number of those misstatements.

I. THERE IS NO IMPEDIMENT TO WISCONSIN STATE COURTS RESOLVING WISCONSIN LEGISLATIVE REDISTRICTING.

A. The Motion Materially Misstates The Status of The Federal Proceedings.

The Motion's description of the federal court proceedings is an artful attempt to suggest those proceedings are virtually complete, and proceedings here would, as a result, be a mere redundancy. That impression is simply wrong.

1. No Substantive Proceedings in Federal Courts.

The Federal court in *Arrington v. Elections Bd.*, 173 F. Supp. 2d 856 (E.D. Wis. 2001) ("*Arrington*") has undertaken no substantive proceedings and, as of the date of this Response, no substantive proceedings are even scheduled. In fact, as the Memorandum in Support of Petition for Leave to Commence an Original Action Seeking Declaratory Judgment and Other Relief ("Petitioners' Memorandum" or "Pet. Mem.") described, the sole issue resolved to date is "ripeness" – a preliminary inquiry concerning justiciability. (Petitioners' Appendix. ("Pet. Appx.") Exh. A, (*Arrington,* Nov. 28, 2001 Order)). No evidence has been received. No discovery has begun. No motions (except intervention and amendment to pleadings) have been heard. No schedule for motions, briefs, redistricting maps or reports

has been set. No briefs, no redistricting maps, no discovery, and no expert reports have been submitted, reviewed or considered. Indeed, one of the three federal judges has indicated a belief that, even as to ripeness, the matter may ultimately be dismissed and the effort wasted. *Id.* at 868-70 (Easterbrook, J., dissenting).

To suggest, as the Chvala Intervenors have, that the "filing date" of *Arrington* is important to the issues before this Court is nonsense. There is no "first-to-file" rule in the jurisdictional lexicon of redistricting. On the contrary, *Growe* articulates a standard for determining appropriate jurisdiction which is as simple as it is unequivocal:

> ". . . the doctrine of Germano prefers both state branches [Legislative and Judicial] to federal courts as agents of apportionment."

Growe, 507 U.S. at 34 (emphasis in original).

The *Arrington* matter was filed strictly as a Congressional case. (Pet. Appx., Exh. A at 3) There was, at the time of its filing, not a single ward drawn and the State of Wisconsin had not completed even the most rudimentary steps toward redistricting. See, Wis. Stat. § 59.10(3) (describing process); Wisconsin Legislative Reference Bureau, *Revised Guidelines for Adjusting Municipal Wards Following 1990 Census*,

(Informative Bulletin 91-IB March 1991). Not until December 6, 2001, was any matter of State Legislative redistricting made a part of the *Arrington* proceedings, because it was only on that date that Senator Chvala filed an Intervening Complaint seeking adjudication of State Legislative Redistricting.[1] Thirty-two days (December 6 to January 7) is most certainly not a significant enough time period to preclude this Court's jurisdiction. Malapportionment "destroys one of the highest and most sacred rights and privileges of the people of this state, . . ." and is "a matter of the highest public interest and concern to give this court jurisdiction in this case." *State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 483, 51 N.W. 724 (1892).

[1] The Chvala Intervenors choice of words in describing the events of December is not entirely accurate. First, neither the intervenors nor the original parties in *Arrington* are the same here. Eighteen members of the legislature sought to intervene in *Arrington*, here only Senator Chvala and Representative Black seek to intervene. None of the original plaintiffs in *Arrington* seeks review here. (See, Pet. Mem., § II (describing many differences)). Second, the federal intervenors were not "ordered to file the proposed Complaint" (Chvala Mem., p. 4) and the State Senators were not "asked . . . to file the Complaint." (Motion, ¶ 6). This choice of words suggests the federal court, after extensive consideration of all options, was prescient and concluded, above all else, that it was the most appropriate forum. In fact, the federal court merely allowed the listed federal intervenors an opportunity to file a complaint, if they wished to do so, as the rudimentary result of its ripeness determination ("The proposed Complaint . . . may be filed . . . (Pet. Appx. Exh. A, November 28, 2001 Opinion and Order at 24). That court expressed no belief as to the ultimate merits or appropriateness of the filing.

2. Speaker Jensen and Senator Panzer Have Consistently and Repeatedly Noted Their Intention to Seek Review of State Legislative Matters in State Forums.

The Motion and Chvala Memorandum suggest the Petitioners have, prior to requesting Original Jurisdiction here, sought federal court intervention in state legislative redistricting. (*See, e.g.*, Motion, ¶ 5, Chvala Mem., pp. 3-4). Again, this is nonsense. The federal court specifically noted that Speaker Jensen and Senator Panzer did not seek federal review of state districts (Pet. Appx., Exh. A, Nov. 28 2001 Opinion and Order at 4 "[Jensen and Panzer] have not yet moved to join in the proposed redistricting of the state legislative districts."

The Petitioners expressly noted, no less than three times, that they were not waiving review in the proper court – the State Supreme Court – by submitting a schedule to the federal court (Appendix of Intervenors' Memorandum of Law in Support of Their Motion to Intervene ("Chvala Appx."), Exh. G Memorandum of Jensen and Panzer, Intervenor – Defendants in Support of Proposed Scheduling Order ("Jensen Scheduling Memorandum"), p. 2 ("deference to State Courts is an essential component of the redistricting process."); *Id.,* fn. 2 ("the Jensen Intervenors do not concede at this time that the Court should address in any respect the state

legislative districts. Their proposals here are at the Court's invitation and without prejudice to addressing the extent of the Court's power in this case."); *Id.* at 7 ("In the event the state fails to act, then the Court may intervene . . .") The Proposed Scheduling Order submitted by Speaker Jensen and Minority Leader Panzer to the federal court explicitly noted that the Court should give deference to the State. (Chvala Appx., Exh. G, Proposed Scheduling Order attached as Exhibit A to Jensen Scheduling Memorandum at p. 2 (*citing* Nov. 28, 2001 Opinion and Order at 4 stating "the states [have] the 'primary responsibility for apportionment . . .'")).[2]

The Federal Court is certainly aware of the Petitioners' position that the State has primary jurisdiction and responsibility. Prior to the first, and only, oral hearing in *Arrington*, and before any scheduling had or could take place, the Petitioners described their actions in filing the Petition,

[2] The Motion also suggests that "no objection" was made to the Federal intervenors' Motion in March 2001, and that failure is, in some form, a waiver of rights. (Motion, ¶ 5; Chvala Mem., p. 6). This statement fails to distinguish between rights of the "parties" and the rights of the "intervenors" in the federal proceedings. Speaker Jensen and Senator Panzer were not yet "parties" and thus had no right to object in March 2001. The Federal Court's Order of February 28, 2001 makes precisely that point by stating, "Any **party** opposing either motion to intervene shall . . . file a response. . . " (Chvala Appx., Exh. D, p. 2 (emphasis added)). A companion Order of the same date, bluntly acknowledges the difference between parties and proposed intervenors by stating "On or before March 7, 2001, the **parties** to the original lawsuit, and the **proposed intervenors** if they wish . . ." (Chvala Appx., Exh. E, p. 2 (emphasis added)).

including, of course, the election to seek original jurisdiction in this Court. (Petitioners Supplemental Appendix filed January 15, 2002 ("Pet. Suppl. Appx.") Exh. A, Letter of January 7, 2002 to the U.S. Federal District Court). No answer has been filed by Speaker Jensen and Senator Panzer to the Chvala Complaint in *Arrington*.[3]

Petitioners have consistently suggested that the legislature be given every possible opportunity to reach a legislative solution. While specific dates for substantive submissions were not suggested in the Petition and Petitioners' Memorandum, the Petitioners did describe a process which would provide appropriate deference to the legislature. As described in the Petitioners' Memorandum, pp. 12-14, as well as the 1992 Federal Court Orders attached to Petitioners' Appendix at Exhibits B-D, the process of review must begin, but need not require substantive submissions immediately.[4]

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[3] On January 7, 2002, the Petitioners described, at a conference held by Judge Clevert, the nature of the State Supreme Court proceedings and reiterated the belief that they would need leave of the Court to file an Answer to the Chvala Complaint. The Court indicated that they would have that leave to file an Answer or other pleading within five (5) days of the filing of an Amended Complaint by the Chvala Intervenors.

[4] Contrary to suggestion of the Chvala Memoranadum at p. 7, this is virtually identical to the position Petitioners took in submissions concerning scheduling to the federal court. Petitioner attached the same 1992 Federal Court Orders provided to this Court to that submission in order to provide an outline for a possible process. (Chvala Appx., Exh. G).

In any event, the Chvala Intervenors would surely concede that their participation here is not taken as a waiver of a right to seek federal court review in the event this court, or other state courts, decline to address State Legislative redistricting. So too, the Petitioners mere participation in the federal action does not preclude, in any sense, the Petition to this Court.

B. It Is Indisputable That State Legislative Redistricting And Congressional Redistricting Are Governed By Distinct Rules And Standards.

In order to justify intervention, the Chvala Memorandum argues that the federal action on Congressional redistricting has predominantly the same or common questions with the State action. (Chvala Mem., § II(B)). The Memorandum fails to note, however, that Senator Chvala, as one of the Federal Court intervenors, expressly noted that State Legislative redistricting and Federal Congressional redistricting were distinct and different. The Proposed Order submitted by Senator Chvala in the Federal Court, included the following provision on the distinct legal rules applied to Congressional as opposed to State Legislative redistricting:

> **The two processes, one congressional and one legislative, are separate and distinct.** They are the subject of separate statutes, *see* Chs. 3, 4, Stats., and historically they have been the subject of legislation.

> Ultimately, moreover, legislatively – enacted congressional redistricting and state legislative redistricting are subject to judicial review under **different federal constitutional standards** – congressional redistricting to the exacting standards of Article I, sec. 2, and legislative redistricting under the less demanding standards of the Fourteenth Amendment. Should this Court find it necessary to redistrict either the state's congressional districts or its legislative districts or both, the Court too would apply **different constitutional standards.**

(Chvala Appx., Exh. F, Proposed Order, pp. 3-4 (emphasis added)).

Senator Chvala continued to urge the federal court to adopt a different and separate schedule for legislative and congressional redistricting based on distinctly different practical considerations, as well, noting:

> The practical dimensions of the two processes **[Congressional and Legislative redistricting] suggest their separation as well.** Only eight congressional districts need be created while state legislative redistricting will require the construction of 33 state senate districts, each circumscribing three state assembly districts. Accordingly, this order treats the two processes separately – emphasizing, of course, that the Court need not intervene if the legislature promptly adopts appropriate legislation that the governor signs into law.

(*Id.* (emphasis added)).

While both Congressional and State Legislative redistricting involve census information, they are governed by distinctly different lines of legal authority. *Compare Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (Congressional redistricting requires equal population "as nearly as is practicable") *with Gaffney v. Cummings*, 412 U.S. 735, 745 (1973) (allowing "minor deviations" that would not be tolerated for Congressional redistricting). *See also, Brown v. Thomson*, 462 U.S. 835 (1983) (approving state legislative redistricting which honors political subdivisions in spite of resulting population deviation); *Gorin v. Karpan*, 775 F. Supp. 1430, 1446 (D. Wyo. 1991) (state would be required to justify deviations exceeding 10% among legislative districts). The standards applied for state legislative redistricting are controlled by state law, in contrast to federal congressional redistricting. (*See*, Pet. Mem., pp. 9-11 and 15-20 (discussion of critical state interests)).

As a practical matter, the Petitioners have no desire to bring Congressional redistricting to this Court because they have already settled the claims of the *Arrington* plaintiffs in the federal case. As noted in a letter authorized by every member of Wisconsin Congressional delegation, there is "unanimous bipartisan agreement" for the passage of LRB-4410/1

(Pet. Suppl. Appx., Exh. B (Letter of Congressman Obey and Congressman Sensenbrenner, dated January 4, 2002 ("Bipartisan Letter"), p. 1)). Petitioners have agreed to support that legislation, and believe, based on the number of sponsors, that it will pass the Assembly. Recognizing that fact, the Congressional Representatives also note in the Bipartisan Letter, that judicial review of the Congressional reapportionment should be "*separate and distinct from state legislative redistricting* . . ." (*Id.* at 3 (emphasis added)).

The resolution of Congressional redistricting without court intervention is, of course, consistent with past practice. *See, e.g.*, Wis. Stat. ch. 3; 1971 Wis. Laws ch. 133, codified at Wis. Stat. § 3.01, *et seq.* (1971); 1981 Wis. Laws ch. 154 and ch. 155, codified at Wis. Stat. § 3.001, *et. seq.* (1981-82); 1991 Wis. Act 256, codified at Wis. Stat. § 3.001, *et seq.*, (1991-92). In Wisconsin, judicial intervention has never been required to draw Congressional districts.

CONCLUSION

Petitioner, Speaker Scott Jensen and Minority Leader Senator Mary Panzer do not object to the intervention of Senate Majority Leader Charles Chvala and Assembly Minority Leader Spencer Black. The Petition for

Original Action should be allowed and the matter should be set for appropriate scheduling on the substantive issues raised by the Petition. The Petitioners would welcome an opportunity to address orally the matters set forth here and in the Petition.

Dated this 15th day of January, 2002.

Respectfully submitted,

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