IN THE SUPREME COURT
OF THE STATE OF WISCONSIN

SCOTT R. JENSEN, personally and as the 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)

RESPONSE OF THE WISCONSIN EDUCATION ASSOCIATION COUNCIL OPPOSING THE 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 ASSOCIATION COUNCIL, a voluntary association, STAN JOHNSON, its elected president, and several of its members, TOMMIE LEE GLENN, PAUL HAMBLETON and DIANNE CATLIN LANG,

Intervenor-Respondents.

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The Wisconsin Education Association Council ("WEAC"), for itself and its members, intervening of right in this matter pursuant to the Supreme Court's January 18, 2002 Order, opposes the Petition for Leave to Commence an Original Action (the "Petition") filed earlier this month by two state legislative leaders.

The issue is not whether this Court has the authority to grant the petition and to hear and decide the substantive issues necessary to reapportion the state's 33 senate and 99 assembly districts. It surely has the authority.

Nor is the issue whether the state's legislative districts require redistricting in the wake of the 2000 census and the significant changes in population since 1992 when a federal court last established legislative boundaries. They surely do require redistricting.

Rather, the Petition presents a question of discretion, not power or authority.

The legislature's leadership has asked this Court – legislative leaders from one major political party as the petitioners and from the other as intervening respondents – to do what they, as elected representatives of the citizens of Wisconsin, have been unable or unwilling to even attempt to do:

fulfill their constitutional mandate to "apportion and district anew the members of the Senate and Assembly, according to the number of inhabitants." Wis. Const. art. IV, § 3. The Court should decline the invitation. Instead, it should direct the legislative leadership forthwith to introduce redistricting plans, to conduct public hearings on them, and to bring them to the state Senate and the state Assembly for debate and consideration.

The Court should not permit itself to be used in a legislative duel where the participants have the remedy within their own grasp. Nor, except as a last resort, should it even consider becoming involved in the political and judicial thicket of state legislative redistricting, at the request of the legislature's leadership, when there has been, literally, no effort by the legislature to meet its own constitutional responsibilities in adopting a legislative redistricting plan.

One thing is certain: if the Court grants the petition, there will be no incentive for the legislature to carry out its constitutional mandate. And it will not. The legislative branch may be willing to delegate its constitutional responsibility but, if it does, this Court should not be complicit.

STATEMENT OF THE CASE

The Petition for Leave to Commence an Original Action, filed with a supporting memorandum on January 7, 2002 by Scott Jensen for the state Assembly's majority and by Mary Panzer for the state Senate's minority, describes the parties and provides a partial factual context for legislative redistricting. The Motion to Intervene, filed on January 9, 2002 by Charles Chvala for the state Senate's majority and by Spencer Black for the state Assembly's minority, supplements that discussion and describes the pending federal district court litigation more comprehensively than the Petition.[1] The recent history of redistricting, however, requires more focused attention.

[1] The counsel for WEAC in this matter also represents the plaintiffs who brought the federal district court case, almost a year ago, solely on the question of congressional redistricting. *See Arrington. v. Wendelberger*, Case No. 01-C-0121 (E.D. Wis.), 173 F. Supp. 2d 856 (Nov. 28, 2001 decision affirming jurisdiction). Unlike the petitioners, the plaintiffs in the federal court case are private citizens. So are WEAC's members, the intervening parties here. They have not been elected to the state legislature, unlike the other parties, and they are unable to enact a plan of redistricting through the legislative process. Asking a court to "establish a judicial plan of apportionment" for the state's eight new congressional districts, or its legislative districts, is a citizen's only way to participate directly and effectively in the redistricting process.

REDISTRICTING IN WISCONSIN

The first Wisconsin legislature, convened in 1848, had 66 assembly districts and 19 senate districts. Between 1848 and 1921, the number of legislative districts increased, their lines adjusted several times, to accommodate Wisconsin's new counties, municipal boundaries, and a fast growing population. *See* H. Rupert Theobald, "A Chronology of Wisconsin Reapportionment, 1836 to 1970," *Wisconsin Blue Book* p. 237 (1970).

Since then, full statewide legislative redistricting has occurred five times: in 1951, in 1964, in 1972, in 1982, and in 1992. On several occasions, most recently in 1964, the State Supreme Court became involved in the process, *see* Petition, p. 12, ¶ 25 (cases collected) – all under the mandate of the state constitution because, until 1964, the U.S. Supreme Court had not identified a federal constitutional guarantee applicable to state legislative representation. Only once, however, in 1964, has this Court actually drawn district lines. *See State ex rel. Reynolds v. Zimmerman*, 23 Wis. 2d 606, 129 N.W.2d 16.

In 1946, the U.S. Supreme Court decided *Colegrove v. Green*, 328 U.S. 549, 66 S. Ct. 1198, in which it found substantive claims involving

apportionment non-justiciable, famously warning the judiciary of the dangers in the "political thicket" of redistricting. *Id.* at 556. By 1964, however, the Court had established the federal constitutional principle of one person-one vote: under Article I for congressional districts and under the Fourteenth Amendment's equal protection clause for state legislative districts. *See Wesberry v. Sanders,* 376 U.S. 1, 84 S. Ct. 526 (1964); *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964).

The federal constitution is not the only source of constitutional rights or limitations on legislative redistricting, of course, nor – in this state, at least – was it historically the first source. The Wisconsin constitution imposes size, composition, and geographical restrictions on state assembly and senate districts. *See* Wis. Const. art. IV, §§ 2-5. Indeed, long before the federal courts ventured into the "thicket" of redistricting, the Wisconsin Supreme Court confronted state constitutional challenges to state legislative redistricting.

The Wisconsin constitution, like the federal constitution, requires population equality. The state constitution directs the legislature to "apportion" its own senate and assembly districts following each federal census "according to the number of inhabitants." Wis. Const. art. IV, § 3.

Indeed, the Wisconsin Supreme Court applied this rule to redistricting as early as 1892 in *State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 51 N.W. 724 (1892), more than 70 years before the U.S. Supreme Court recognized the federal constitutional principle.

Yet it is the federal constitutional principle on equal population – and the federal courts – that have largely (though not exclusively) occupied the field of legislative redistricting, especially since the decision in *Brown v. Thomson,* 462 U.S. 835, 103 S. Ct. 2690 (1983), that a state need not justify an overall deviation from precise population equality of less than 10 percent for state legislative districts. *See, e.g., Marylanders for Fair Representation, Inc. v. Schaefer,* 849 F. Supp. 1022 (D. Md. 1994); *Gorin v. Karpan,* 788 F. Supp. 1199 (D. Wyo. 1992); *Rural West Tenn. African-Am. Affairs Council Inc. v. McWherter,* 836 F. Supp. 447 (W.D. Tenn. 1993). Since 1964, accordingly, the federal courts in Wisconsin have twice established the state's legislative district boundaries with virtually no involvement by the state courts. *See infra,* pp. 31-32, n. 2.

The 1980 Redistricting

The 1980 census led to the development of two legislative redistricting plans, both challenged in federal district court. In February

1982, a number of organizations brought an action in the federal district court in Milwaukee seeking a declaration that the state's legislative and congressional districts were unconstitutionally apportioned.[2] Three weeks later, the federal court declared the existing districts unconstitutional, establishing deadlines for the submission of proposed redistricting plans. In June 1982, the federal court promulgated a redistricting plan – effective, it said, until the state legislature developed its own plan. *See Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 639 (E.D. Wis. 1982). The November 1982 general election and several special elections were conducted under the plan established by the federal court.

In July 1983, the legislature passed and the governor signed into law a redistricting bill that changed the configuration of the districts drawn by the federal court. In August, one of the state's political parties sued in federal court challenging the constitutionality of the new districting plan.

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[2] On March 15, 1982, notably, the governor filed a petition for original jurisdiction with this Court. *See State ex rel. Dreyfus v. Elections Bd.* (Case No. 82-458-OA). The Court granted the petition for legislative redistricting, but the respondent-petitioners – the State Elections Board and its members – removed the proceeding to the federal district court in Madison under 28 U.S.C. § 1441(a), and the case then was consolidated with the proceeding that already had been filed in the federal district court in Milwaukee. (In part, section 1441(a) provides: "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court...where such action is pending.")

Republican Party v. Elections Bd., 585 F. Supp. 603, 605 (E.D. Wis. 1984), *vacated, summarily rev'd*, 469 U.S. 1081, 105 S. Ct. 582 (1984). In response, the federal court declared the 1983 legislative redistricting plan unconstitutional and ordered that the 1982 plan – the plan it had drawn – govern the state's elections until the legislature enacted a valid plan. *Id.* at 606.

The state promptly asked the U.S. Supreme Court to take the extraordinary step of staying the federal district court's decision pending an appeal. Through Justice Stevens, the Court granted the stay. As a result, the 1984 elections took place under the legislatively-enacted 1983 plan. In December 1984, the U.S. Supreme Court summarily reversed the district court's judgment and ordered the case dismissed. *See* 469 U.S. at 1081. The plan adopted by the legislature governed the state's elections for the balance of the decade.

The 1990 Redistricting

The redistricting process after the 1990 census, though contentious, was more easily resolved than the 1980 redistricting. It was still resolved, however, in the federal court. After the Wisconsin legislature received the new census data, it began to develop a redistricting plan in the spring of

1991. At that time, one political party controlled both houses of the legislature. Believing that any legislatively-drawn plan probably would not reflect their best interests, Republicans in January 1992 filed suit in the federal district court in Madison.

Under 28 U.S.C. § 2284, a three-judge panel heard two full days of testimony. "Expert evidence in support of the various plans was introduced in written form, so that the hearing could be devoted to cross-examination of the experts and to opening and closing arguments of counsel." *Prosser v. Elections Bd.*, 793 F. Supp. 859, 862 (W.D. Wis. 1992). During the pendency of the litigation, the legislature passed a redistricting bill, but the governor vetoed it. The suit had not asked the court to consider the constitutionality of any particular plan, however, and the *Prosser* panel developed its own redistricting plan. *Id.* at 865.

In creating its own plan, the judicial panel began with ten redistricting proposals from the legislature's Republicans, its Democrats, and various interest groups, including WEAC. Although the federal court discussed simply choosing from among these plans, it finally created its own plan using a combination of the plans. *Id.* at 865, 870. There was no

appeal from the decision, and the federal court's plan continues in effect today. *See* ch. 4, Stats. (annotations).

ARGUMENT

Much of the Petition and the supporting memorandum begs the question. Of course the districts drawn in 1992 are malapportioned. Of course they must be reapportioned before the 2002 electoral process begins. Of course the State Elections Board cannot conduct elections under the 1992 district lines. Yet does that automatically trigger original jurisdiction?

This case is not about right but about remedy. Indeed, it is *only* about remedy: which branch of government, at least in the first instance, should develop the remedy – a valid plan of redistricting for the state legislature – and, if it is to be the judicial branch after a concerted but unsuccessful effort by the legislature, which court? And when?

In filing the Petition, the legislative leadership asks too little of itself and too much of this Court. The legislature is institutionally suited to resolving the political and factual issues inherent in redistricting. The Court, for a variety of reasons including the demands of its own docket, is not. The Court should deny the Petition without prejudice.

I. THE PETITIONERS HAVE NOT ATTEMPTED TO MEET THEIR CONSTITUTIONAL DUTIES AND, ACCORDINGLY, CANNOT ASK THIS COURT FOR A REMEDY THROUGH ORIGINAL JURISDICTION.

The legislative districts drawn by the federal court in 1992 are now malapportioned "and, thus, do not meet the federal and state constitutional requirements of one person/one vote." Petition, p. 3, ¶ 2. While the constitution charges the state legislature with the responsibility for redistricting, the Petition concedes, "no plan of apportionment...has been enacted into law" because "no such plan has been introduced in either body of the Legislature...." *Id.* As a result, the Petition intones, the "Legislature is at an impasse." That leads the petitioners to "request that this Court adopt a judicial plan of redistricting...in light of the Legislature's failure to adopt such a plan." *Id.*

Yet there cannot be a failure without an attempt. There cannot be an impasse without an effort to reconcile established differences. While it is surely accurate to state that no plan of apportionment has been introduced, let alone adopted, only the petitioners and the intervening legislative respondents have the ability – not to mention the constitutional obligation – to introduce and debate legislation. Basic principles of equity should

preclude these parties from turning to this Court for relief when they have made no effort to adopt a plan of apportionment for the state's legislative districts.[3] It is not enough for the legislative leadership to declare an "impasse" or acknowledge "failure" without even considering any redistricting proposals.

The statutory procedure for redistricting in this state begins with local government. *See* §§ 5.15(1)(b), 59.10(3), Stats.; Petition, pp. 7-8, ¶ 15. "The ward drawing process is prescribed by statute..., and it was substantially completed in the Fall of 2001." *Id.* It was, indeed, which might well raise several pointed questions: Why didn't the legislature at least begin to address the issue last year? Why didn't the legislature, if indeed there were an impasse, bring the matter to this Court last year or, preferably, to any circuit court, which could and would conduct a trial on

[3] Legislation embodying a plan (and map) for congressional redistricting, Assembly Bill (A.B.) 711, already has been debated and tentatively approved by the Assembly. The Assembly Census and Redistricting Committee conducted a public hearing on the proposed redistricting plan on January 10, 2002, and the Committee on January 15, 2002 approved the bill and reported it for consideration by the full Assembly. On Tuesday, January 22, 2002, after debate, the Assembly defeated three substantive amendments to the bill, and it is scheduled for a final vote on January 29, 2002. While A.B. 711 has the public support of a number of state senators, no redistricting proposal of any kind has been introduced in the Senate and, to date, the Senate has taken no action of any kind on a redistricting plan.

the complex factual issues legislative redistricting inevitably presents? *See infra* at pp. 15-17.

Yet, the Court has been told, "the matters raised by this Petition are of such urgency that original jurisdiction of the Supreme Court is essential." Petition, p. 10, ¶ 21. Moreover, "[v]oters are severely disadvantaged by the delay in redistricting in many ways...." *Id.,* ¶ 23. That is true. Yet who placed the state, its voters – and, not incidentally, the Court – in this position?

"No redistricting plan for the State Senate or Assembly...has been introduced into either body of the Wisconsin legislature....The redistricting process is at an impasse." *Id.*, p. 8., ¶ 16. Those two statements, which appear consecutively in the Petition, collide with each other. If no plan "has been introduced," how can the legislature be at an "impasse"?

"The proper apportionment of Senate and Assembly districts is a matter which affects the rights of every citizen in the State of Wisconsin. A citizen's right to vote is a fundamental right...." *Id.*, p. 9, ¶ 20; *see also* Petitioners' Memorandum, p. 5. Precisely. Unlike the petitioners and the other intervening respondents, however, WEAC and its members – with all of the other citizens of the state – are unable to introduce redistricting

legislation or to cast a vote on it, whether in a committee or in the legislature itself.

In contrast to the inactivity on state legislative redistricting, the Assembly on January 29, 2002 almost certainly will adopt Assembly Bill 711, which provides for congressional redistricting. There have been committee hearings, both in Milwaukee and in Madison, and committee deliberations, floor debate and votes on the bill and amendments. *See supra* at p. 12, n. 3. There is no inherent institutional reason, certainly not at this stage, for the legislative leadership to declare itself at an "impasse" on legislative redistricting.

On the record before it, this Court should not grant the Petition. It is, at best, presumptuous for the petitioners to come here for relief from the duty imposed on them and every other legislator by the state constitution. Redistricting is quintessentially a political process, *see Bush v. Vera*, 517 U.S. 952, 964, 116 S. Ct. 1941 (1996), and that process should be given the opportunity to work before the state judiciary intervenes – especially at the request of the state legislature.

II. EVEN IF EQUITY SUPPORTED THE PETITION, THE COURT SHOULD NOT GRANT ORIGINAL JURISDICTION.

Any petition for original jurisdiction seeks this Court's discretionary involvement in a pending dispute. Practical and precedential factors guide the exercise of that discretion. So, too, do the alternatives available to the parties and their own conduct. Every factor – precedential and practical, legal and equitable – suggests that this Court should deny the Petition even if it had not been brought here by the very parties able, more than any other institution of government, to provide their own remedy.

A. The Court Cannot Redistrict the State Without Hearing Evidence and Engaging in Extensive Fact Finding.

The Petition presents this Court with practical as well as equitable difficulties. The last time a court, a federal court, addressed state legislative redistricting, 10 years ago, it took evidence over two days. *Prosser*, 793 F. Supp. 859. The parties presented a number of witnesses, who were subject to cross-examination, and that testimony played an important role in the federal court's decision:

> Unhappily for the plaintiffs, the ground for using the 1986 and 1990 state treasurer's races as base races [with which to compare the partisan political effect of the competing redistricting proposals] was destroyed in cross-examination. The distinguished political scientist

> who conducted the base race analysis for the plaintiffs is not a Wisconsinite or familiar with Wisconsin politics, and he relied totally on the selection of base races by another expert, who while a reputable political scientist at the University of Wisconsin is also a high-level Republican activist. Cross-examination brought out that the state treasurer's race in Wisconsin, far from being a quiet arena for old-fashioned party politics, is riven by special factors.

Id. at 868. (This is, apparently, some of the "very limited testimony" to which the petitioners refer in suggesting that the Court need not be concerned about becoming involved in a trial. Petitioners' Memorandum, p. 12.)

If the legislature cannot or does not adopt a redistricting plan, the parties in any litigation will present competing plans of districting, competing expert and lay witnesses, and competing arguments. A court will need to determine statistical and demographic credibility. It is not enough to say, as the petitioners do, that the Court could simply "call upon the parties to submit appropriate suggestions for legislative redistricting...with supporting documentation." Petitioners' Memorandum, p. 13. The architects of these proposals need to be heard and cross-examined – for the Court's benefit, if not to meet basic standards of due

process that, if treated lightly, might well provide a basis for appeal to the U.S. Supreme Court on that ground alone.[4]

The issue, again, is not whether the Court *can* undertake and meet the responsibilities of a trier of fact, but whether it is practical or prudent – in light of the Court's docket and its own constitutional responsibilities – for the Court to do so. And that is especially true where, as here, there are at least three other forums available for the resolution of the issue presented by the petitioners: any of the state's circuit courts and the federal district court in Milwaukee, to be sure, but principally the legislature itself. *See supra* at p. 12.

This Court consistently has refused to exercise its original jurisdiction in cases that involve factual issues. Only "with the greatest reluctance [will it] grant leave for the exercise of its original jurisdiction... especially where questions of fact are involved. The circuit court is much better equipped for the trial and disposition of questions of fact than is this court[,] and such cases should be first presented to that court." *In re Exercise of Original Jurisdiction*, 201 Wis. 123, 128, 229 N.W. 643 (1930)

[4] The U.S. Supreme Court's most recent redistricting decision turned on the deference afforded to the trial court's finding of fact. *See Hunt v. Cromartie*, 532 U.S. 234, 121 S. Ct. 1452 (2001).

(per curiam) (citing *State ex rel. Hartung v. Milwaukee*, 102 Wis. 509, 78 N.W. 756 (1899)).[5] Deference to a fact-finding tribunal, a trial court, is this Court's policy for resolving factual issues presented in an original action:

> The criteria for the granting of a petition to commence an original action are a matter of case law. *See, e.g., Petition of Heil*, 230 Wis. 428 (1939). The Supreme Court is not a fact-finding tribunal, and although it may refer issues of fact to a circuit court or referee for its determination, it generally will not exercise its original jurisdiction in matters involving contested issues of fact.

Internal Operating Procedures of the Wisconsin Supreme Court, § II(B)(3) (adopted May 24, 1984, including amendments through October 1, 2001); § 751.09, Stats.

It is ironic that, to support their argument for original jurisdiction, the petitioners have relied in part on this Court's original action decision in *Wisconsin Prof'l Police Ass'n v. Lightbourn*, 2001 WI 59, 243 Wis. 2d 512, 627 N.W.2d 807, *cert. denied,* 70 U.S.L.W. 3427 (U.S. Jan. 7, 2002), which indeed affected "the community at large." *See* Petitioners' Memorandum, pp. 5, 8. That case involved complex factual issues and a complex record – albeit a record established by stipulation. *See* 2001 WI 59, ¶ 6. The Court

[5] Similarly, in *In re Anderson*, 164 Wis. 1, 3, 159 N.W. 559 (1916), the Court declined to exercise original jurisdiction where it "seem[ed] certain that there would be an issue of fact which would have to be sent to the circuit court for trial.... If it appeared that the case could [have been] decided upon an issue of law without the trial of any fact, the question would [have been] different."

gave it the thoughtful and deliberate consideration it deserved, but the Court did not face the extraordinary pressures of time that legislative redistricting could now present.

Here, there has been no stipulation. Moreover, since the legislative leadership already has declared itself at an "impasse," the ability of the parties' respective counsel to develop a stipulated record might well be a matter of considerable doubt.[6] By contrast, the other original action cases cited by the petitioners did *not* involve fact-finding or even factually complex matters but, rather, facial challenges to state law or the conduct of state officers. *See, e.g., State ex rel. Wisconsin Senate v. Thompson*, 144 Wis. 2d 429, 424 N.W.2d 385 (1988) (involving governor's veto power); *Thompson v. Craney*, 199 Wis. 2d 674, 546 N.W.2d 123 (1996) (involving statutory provisions reallocating power of state officials), both cited with approval, Petitioners' Memorandum, p. 7, n.3.

Almost 40 years ago, in *State ex rel. Reynolds v. Zimmerman*, 23 Wis. 2d 606, this Court did indeed grant original jurisdiction and developed a judicial plan establishing new boundaries for the state's legislative

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[6] The parties also may be unwilling to waive any due process objections that might be asserted.

districts. It did that in conjunction with the Legislative Reference Bureau, as the petitioners here have suggested this Court might do. *See id.* at 618; Petitioners' Memorandum, p. 13. The plan promulgated by the Supreme Court, however, had population deviations far greater than those since found constitutionally permissible. "For no assembly district," the Court wrote, "does the 1960 population exceed by *more than one-third* the state wide average population of assembly districts: 39,528." 23 Wis. 2d at 607 (emphasis added).

Moreover, while there were competing plans in 1964, there is no evidence that the Court heard any testimony. In fact, the Court apparently did not even consider any submissions from the parties until after it had promulgated its plan, giving them six days "to file objections or motions relating to such apportionment." *Id.* at 629.[7] The redistricting process, since 1964, has become far more technically sophisticated and legally and factually complicated.

This Court itself has identified that "two important elements... hav[e] an important bearing upon the propriety of exercising original jurisdiction and superintending control... (1) the absence of any other

[7] This portion of the *State ex rel. Reynolds v. Zimmerman* opinion is archived later in the regional reporter, at 128 N.W.2d 349.

adequate remedy and (2) the fact that unless this court intervenes petitioner will suffer great and irreparable hardship." *Application of Sherper's, Inc.*, 253 Wis. 224, 228, 33 N.W.2d 178, 180 (1948). Both elements should be dispositive here.

The petitioners themselves are in the best position to avoid any hardship. They can propose, debate, and perhaps adopt redistricting legislation. "As a general rule," moreover, "the original jurisdiction of the supreme court may not be invoked if there is an adequate and speedy remedy in some other competent tribunal." 1 *Callaghan's Wisconsin Pleading and Practice* § 2.34 (4th ed. 1997) (citing *In re Anderson*, 164 Wis. 1; *State ex rel. Rosenhein v. Frear*, 138 Wis. 173, 119 N.W. 894 (1909)). The petitioners have expressed no concern about the competence of the U.S. District Court for the Eastern District of Wisconsin, nor do they question its efficiency (a schedule is already in place) or the adequacy of the remedies it may order.[8]

[8] The federal district court has scheduled a status conference for January 29, 2002, at which it will hear a motion to establish a deadline for legislative approval of congressional district boundaries.

B. No Precedent, State or Federal, Requires this Court to Hear this Case.

The petitioners suggest that their request for original jurisdiction is grounded in federal as well as in state law. In that request, however, the petitioners twist *Growe v. Emison*, 507 U.S. 25, 113 S. Ct. 1075 (1993), beyond recognition in asserting that it is "entirely dispositive when redistricting actions are filed in both federal and state courts." Petitioners' Memorandum, p. 16. To the contrary, nothing in *Growe* addresses whether or not a state court should assert jurisdiction, let alone after a federal court has first asserted jurisdiction. Rather, *Growe* addresses federal court involvement *after* a state court has first taken jurisdiction in a redistricting matter.

In *Growe*, the Supreme Court found clear error when a federal district court enjoined a state court from proceeding on legislative redistricting, already underway, where the state court action had been filed prior to the federal action. 507 U.S. at 27-31, 42. Similarly, in *Scott v. Germano*, 381 U.S. 407, 85 S. Ct. 1525 (1965), the Supreme Court reversed a district court's order involving state legislative redistricting, where an action previously had been filed in state court. Both cases involved a

federal district court's interference after state redistricting proceedings already had begun.

Legislative redistricting is indeed a matter of state concern, Petition, p. 1, ¶ 1, but in *Growe*, the Supreme Court rejected a bright line rule requiring federal courts to abstain entirely from hearing redistricting cases. *See* 507 U.S. at 36-37. In so doing, "the Court acknowledged that a state's interest in its redistricting is not exclusive; there is a strong federal interest in having valid [redistricting] plans in place in time for elections." *Federal Court Involvement in Redistricting Litigation*, 114 Harv. L. Rev. 878, 892 (2001) (citing *Growe*, 507 U.S. at 36-37); *see also Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525 (2000) (holding that federal courts may assert jurisdiction to protect fundamental rights under state election law).

The Supreme Court's holding in *Growe* provides guidance to federal courts facing redistricting matters with state court proceedings already underway. It does not mandate that redistricting actions be brought in state court, either first or foremost. The decision in *Growe* does not pretend to tell state courts how to proceed. And *Growe* clearly does not direct, or even discuss, when a state court should use an extraordinary remedy, like original jurisdiction, after a federal redistricting case has already begun.

The petitioners contend, relying on *Growe,* that the "U.S. District Court *must* stay its hand as this Court acts on State legislative districts." Petitioners' Memorandum, p. 20 (emphasis added). The petitioners' counsel offered that suggestion to the judge chairing the federal district panel on January 7, 2002, the same day they filed this Petition. That triggered a colloquy between the petitioners' counsel, who also represents them in the federal litigation, and Judge Charles Clevert:

> THE COURT: Are you suggesting by your comments that ...where a federal action has been initiated and there is a subsequent state action [,] that *Growe* in effect dictates to the Federal Court that it should not proceed?
>
> MR. TROUPIS: I believe *Growe* does. I also believe that as a matter of comity generally that would be an appropriate result. The[n], otherwise we would have, as I said, a Federal Court addressing the same matters as the State Court ....
>
> THE COURT: Now, if I recall correctly [,] *Growe* is a case where the state action was filed first, true?
>
> MR. TROUPIS: That's right.
>
> THE COURT: Whereas here the federal action was filed first. And *Growe* also indicated that the Federal Court could proceed and that in that particular case the problem was that the District Court in Minnesota, Judge Tunheim, issued an injunction barring the State Supreme Court from going forward in the erroneous belief that it was in aid of the Federal Court's jurisdiction. That case did not say that Judge Tunheim could not go ahead. Wouldn't you agree?

MR. TROUPIS: I would agree that the sequence is what Your Honor said. I believe that the principle of *Growe* straightforwardly is that two actions pending, state and federal action, must not continue simultaneously to achieve the same result which, in fact, they would not receive. They would receive a different type.

THE COURT: Aren't you giving that [*Growe*] perhaps a little elasticity that isn't warranted? Doesn't it say must not?

MR. TROUPIS: I believe that the Court said the Court has required federal judges to defer consideration of disputes involving redistricting where the state through its legislative or judicial branch has begun to address the highly ----

THE COURT: *Has begun. That's the key. This is not a case where anyone has begun. Correct? There is no bill pending in the legislature and there is no action that has, in fact, been taken up by the State Supreme Court. Isn't that true?*

MR. TROUPIS: The action was filed. The Court has not yet granted original jurisdiction. That is correct.

THE COURT: So no action has taken place, correct?

MR. TROUPIS: I believe that once the action is filed, just as in other areas of the law once it's filed that has the effect of being filed and, therefore, is ongoing until the Court itself determines to decline it or send it to another forum. It doesn't, it isn't ----

THE COURT: So at this stage the race to the courthouse, so to speak, was won by the parties who brought the action here. And the Wisconsin Supreme Court has not accepted original jurisdiction of the action that you just filed, correct?

MR. TROUPIS: That is correct. It has not granted it.

> THE COURT: So if you apply that set of facts to *Growe* you do not have a case where actions have begun on the state level, isn't that true?
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> MR. TROUPIS: Well, I don't think so because ----
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> THE COURT: Those actions did not begin before this Court obtained jurisdiction over this matter, correct?
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> MR. TROUPIS: That is true. But the *Growe* case ----
>
> THE COURT: I've heard enough on that point.

Arrington Hearing, Jan. 7, 2002, Transcript, pp. 9-12 (E.D. Wis.) (emphasis added).

There is a judicial thicket to avoid, in redistricting cases, as well as a political thicket. Whatever the federal district court "must" or must not do, it will make its own decision. And so will this Court.

C. The Petition, Even If Granted, May Be Removable to Federal Court.

If a plaintiff brings a case in state court based even in part on federal law, a defendant may ask the federal court to "remove" it – to transfer the lawsuit to federal court. *See* 28 U.S.C. § 1441. The petitioners themselves assert that Wisconsin's legislative districts "do not meet the *federal* and state constitutional requirements of one person/one-vote." Petition, p. 3,

¶ 2 (emphasis added). They are correct: their allegations necessarily and unavoidably implicate federal constitutional and statutory law as well as state law.

In light of the removal provisions of federal law, the petitioners' emphasis on the role of state constitutional rights is understandable. *See* Petitioners' Memorandum, pp. 9-11. It fails to inoculate this case against removal, however, as even the petitioners seem to acknowledge. *See* Petition, p. 3, ¶ 2. It is not the "cryptic description of reapportionment" in Article I of the federal constitution, Petitioners' Memorandum, p. 10, that requires one person-one vote for state legislative districts. It is the equal protection clause of the Fourteenth Amendment. *See Reynolds v. Sims*, 377 U.S. 533. While state legislative districting implicates state constitutional rights, to be sure, it implicates the federal constitution as well. And that may trigger the removal statute.[9]

The petitioners maintain that the U.S. Supreme Court "has unequivocally acknowledged that the states, through their courts, are the

[9] The nominal respondents, the eight-member State Elections Board, voted 4-3 on January 17, 2002 (with one member absent) to support the Petition. Whether that vote, by one of the three respondent groups, precludes removal would be a matter for the federal court to decide. *See generally* 16 James Wm. Moore, et al., *Moore's Federal Practice* § 107.01 (3d ed. 2001); 28 U.S.C. § 1441(b) (2001).

most appropriate forum for addressing redistricting." Petitioner's Memorandum, p. 11. They are incorrect. The question is not what forum is "most appropriate" – for if that were the standard, the only answer is that the *state legislature* is the most appropriate forum. While either the federal courts *or* the state courts are "appropriate" for state legislative districting cases, the litany of federal court decisions deciding state legislative cases is both long and distinguished. *See, e.g., Watkins v. Mabus,* 771 F. Supp. 789 (S.D. Miss. 1991), *aff'd,* 502 U.S. 954 (1991); *Gorin v. Karpan*, 775 F. Supp. 1430; *Johnson v. DeGrandy,* 512 U.S. 997, 114 S. Ct. 2647 (1994); *Marylanders for Fair Representation v. Schaefer,* 849 F. Supp. 1022; *Scott v. U.S. Dept. of Justice,* 920 F. Supp. 1248 (M.D. Fla. 1996), *aff'd sub nom., Lawyer v. Dept. of Justice*, 521 U.S. 567, 117 S. Ct. 2186 (1997).

Any issues of racial vote dilution under the Voting Rights Act, 42 U.S.C. § 1973(a), are exclusively federal issues. The petitioners themselves have alleged that "[v]oters and potential candidates in areas containing high concentrations of African-Americans, Hispanics and Native Americans are subject to the greatest disadvantage if redistricting is not completed in an expeditious manner...." Petition, p. 11, ¶ 24. Under the

discriminatory effects test, a plaintiff establishes a violation of the Voting Rights Act by demonstrating that:

> [T]he political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [a protected minority] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973(b).

Since 1982, when it was last amended, Section 2 of the Voting Rights Act has figured prominently in voting rights and redistricting litigation in federal court. The petitioners contend that those federal statutory rights may well be at issue in state legislative redistricting, and the petitioners are correct. The State Supreme Court should not grant a petition for original jurisdiction, however, where that act might well be followed – as it has been followed in the past, *see supra* at p. 7, n. 2 – by the mandatory removal of the case to federal court under federal law.

III. THE COURT SHOULD DISMISS THE PETITION, WITHOUT PREJUDICE, AND DIRECT THE LEGISLATIVE PARTIES TO CARRY OUT THEIR CONSTITUTIONAL OBLIGATIONS.

"It is the duty of [the] Wisconsin legislature," the Petition states, "to adopt a plan of apportionment...." Petition, p. 7, ¶ 14. In response to the

Petition, the Court should direct the legislature to meet that duty by introducing and debating legislative redistricting – just as it has at least begun to do with congressional districting.

Even if a legislative effort actually results in an "impasse," with one chamber controlled by one major political party and the other chamber by the other political party, the citizens of this state will be able to evaluate what has (or has not) been accomplished. The democratic process may well influence the legislature's work, positively, in ways that no one can anticipate. Moreover, if it ultimately falls to a court to establish district boundaries in the event of an actual impasse, that court will have the benefit of plans actually adopted – in one house or the other, if not both – by the people's elected representatives.

In responding to the Chvala-Black intervention motion, the petitioners themselves made this very point persuasively: "Petitioners have consistently suggested that the legislature be given every possible opportunity to reach a legislative solution." Petitioners' Response, p. 7. This Court has scheduled oral argument on the Petition for February 5, 2002. By all accounts, the first statutory deadline is more than three

months distant: on May 14, 2002. *See* Petition, p. 8, ¶ 18; *see also* §§ 10.01(2)(a), 10.72(1), Stats.

The Court need not "give" the legislature any "opportunity." The legislature has had and continues to have that opportunity, and that duty, under the state constitution. Yet this Court can provide an incentive by directing the legislature to do what the constitution commands it to at least try to do.

This Court, as the petitioners themselves have emphasized, has the power "to require valid reapportionment" not just to formulate a redistricting plan itself. Petitioners' Memorandum, p. 1 (quoting *Scott v. Germano*, 381 U.S. at 409). The petitioners argue as well, of course, that this Court "is the most appropriate forum to resolve redistricting...." *Id.* According to the state constitution, however, the "most appropriate forum" remains the state legislature, not the judicial branch.

When this Court has involved itself in redistricting, the last time almost 40 years ago, *State ex rel. Reynolds v. Zimmerman*, 23 Wis. 2d 606, it did so only after the legislature itself had made a concerted effort to adopt a valid plan of redistricting.

> The power and duty imposed upon the legislature by the [state] constitution to reapportion the state after each

> federal census [is] exercised by both the houses of the legislature passing a bill that becomes a law upon the signature of the governor and publication, or, if the governor should veto it, upon repassage by the required vote over his veto, and publication. All prior reapportionments of the state during the past 104 years of its history have been accomplished in this manner by laws enacted by the legislature.

State ex rel. Broughton v. Zimmerman, 261 Wis. 398, 407-08, 52 N.W.2d 903 (1952). That effort, the adoption by the legislature of a redistricting plan, was unsuccessful only because of the governor's veto. Yet there was an effort that, ultimately, assisted the Court when – for the only time in its history – it actually established district boundaries.[10]

No one would suggest that this Court can order the legislature to adopt a valid plan of legislative redistricting. "The legislature being a co-ordinate branch of the government may not be compelled by the courts to perform a legislative duty even though the performance of that duty be required by the constitution." *State ex rel. Martin v. Zimmerman*, 249 Wis. 101, 104, 23 N.W.2d 610 (1946). Yet this Court can establish or reinforce constitutional standards and requirements, *see e.g.*, *Vincent v. Voight*, 2000

[10] The Court credited "the [Legislative] Reference Bureau's maps, statistics, and analysis of all the legislative apportionment proposals considered by the Legislature since 1960...." *See* Theobald, *Wisconsin Blue Book*, p. 258. Since 1960, no less than a dozen bills had been proposed on legislative redistricting, and they were available for consideration by the Court. *Id.* at 256-58. To date, in this redistricting cycle, not one legislative redistricting bill has been introduced.

WI 93, 236 Wis. 2d 588, 614 N.W.2d 388, and it can cite a co-ordinate branch's failure to meet those standards and requirements in the exercise of its own discretion to decline original jurisdiction. The dismissal of the Petition without prejudice would emphasize two fundamental principles: the constitutional obligation of the state legislature for redistricting and the constitutional obligation of the Court to assume original jurisdiction only where there is no real alternative.

The only way for WEAC and its members to directly and effectively participate in the adoption of a redistricting plan is to petition a judicial body – state or federal – for relief. In contrast, the petitioners and intervening respondents are in a unique position in which they – and only they – can actually legislate a redistricting plan. The involvement of the judicial branch, at the request of the legislature, should not occur, if at all, until the legislative parties have at least attempted to carry out their constitutional obligations to adopt a plan of redistricting for the state's legislative districts.

CONCLUSION

For the reasons stated above, the Court should dismiss the Petition for Original Jurisdiction without prejudice. It also should direct the

petitioners and the intervening respondents to address their constitutional responsibilities by introducing, debating, and considering plans for legislative districting for the 2002 election.

Dated: January 25, 2002.

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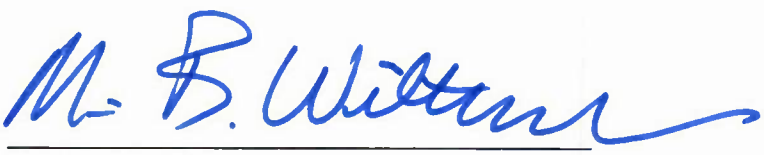

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