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.

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,

Case No. 02-0057-0A

and

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

Intervenor-Respondents.

INTERVENOR-RESPONDENTS CHARLES J. CHVALA AND SPENCER BLACK'S RESPONSE AND SUPPLEMENTAL APPENDIX TO PETITION FOR LEAVE TO COMMENCE AN ORIGINAL ACTION

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INTRODUCTION

Intervenor-Respondents Charles J. Chvala and Spencer Black, by their attorneys, Boardman, Suhr, Curry & Field LLP, and O'Neil, Cannon & Hollman, S.C., submit this response to the Petition for Leave to Commence an Original Action.

This Court is being asked to accept original jurisdiction on a matter over which another court already has jurisdiction. The United States District Court for the Eastern District of Wisconsin ("Wisconsin Federal Court") has full jurisdiction over the issues raised by Petitioners. The Wisconsin Federal Court is able to provide full and timely relief to Petitioners, if such relief is necessary.

When a full, complete and timely remedy is available, what possible reason supports this Court asserting original jurisdiction? Indeed, to what extent is this a case of "original" jurisdiction[1] at all?

As noted herein, there are myriad reasons for this Court to decline to exercise its original jurisdiction. The Intervenor-Respondents oppose the

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[1] Original is defined as.. . . "1: of, relating to or constituting an origin or beginning: INITIAL. . . 2 a: not secondary, derivative, or imitative . . . ." Webster's New Collegiate Dictionary 803 (1980). The Petition presents a matter not at its beginning; it is imitative of the action in the Wisconsin Federal Court.

Petition because: (1) this Court is not institutionally designed to find facts and try this case; (2) a federal court has already accepted jurisdiction over this matter and is better able to address state legislative redistricting in a timely manner; (3) this case does not meet the criteria for this Court to accept original jurisdiction in that Petitioners have a full remedy in the District Court for the Eastern District of Wisconsin; (4) this Court will be embroiled in much collateral litigation, including issues of recusal and jurisdiction; and (5) Growe v. Emison does not require this Court to accept original jurisdiction over this case. Accordingly, the Intervenor-Respondents respectfully request this Court deny the Petition for Leave to Commence an Original Action.

STATEMENT OF FACTS

On February 1, 2001, seventeen plaintiffs filed suit in the District Court for the Eastern District of Wisconsin against the State of Wisconsin's Elections Board as well as the individual members of that Board. (See Intervenors' App., Ex. A.)[2] The plaintiffs are all citizens of the nine congressional districts for Wisconsin. They challenged the constitutionality

[2] The Intervenor-Respondents Charles J. Chvala and Spencer Black filed an Appendix with their Motion to Intervene which contained most of the relevant documents. The Intervenor-Respondents will cite to that Appendix as "Intervenors' App., Ex. _____."

of the current apportionment of Wisconsin's congressional districts. They sought both declaratory and injunctive relief requesting that a three-judge panel declare the current apportionment of Wisconsin's congressional districts unconstitutional and establish a judicial plan for apportionment if the Legislature and the Governor did not act in a timely fashion. A three-judge panel was appointed pursuant to 28 U.S.C. § 2284.

On February 5, 2001, eighteen members of the Wisconsin State Senate filed a Motion to Intervene in the suit ("State Legislators"). (See Intervenors' App., Ex. B.) These State Legislators filed a proposed Complaint with the Motion to Intervene seeking to place before the three-judge panel the potential redistricting of State Senate and Assembly districts. (See Intervenors' App., Ex. B.) Shortly thereafter, on February 21, 2001, the Petitioners in this action, State Assembly Majority Leader, Scott R. Jensen, and State Senate Minority Leader, Mary E. Panzer, also filed a Motion to Intervene in the federal district court case. (See Intervenors' App., Ex. C.)

On November 28, 2001, the Wisconsin Federal Court issued an order granting the State Legislators' Motion to Intervene and granting Representative Jensen and Senator Panzer's Motion to Intervene. (See Pet. App., Ex. A.) The three-judge panel also accepted jurisdiction over the state

legislative districts and ordered the State Legislators to file the proposed Complaint that they had submitted with their Motion to Intervene. The Complaint was filed on December 6, 2001.

The court also asked the plaintiffs' counsel to discuss a proposed schedule with all parties and to respond to the court by December 19, 2001 with a proposed scheduling order. The plaintiffs, the State Legislators, and the Elections Board agreed upon a trial schedule for both the congressional and the state legislative redistricting. The plaintiffs proposed a congressional schedule beginning with the disclosure of expert witnesses on January 25 and culminating with a three day trial on March 4 - 6. (See Intervenors' App., Ex. F.) The plaintiffs also proposed a schedule for determining the state legislative districts with corresponding deadlines two weeks after each congressional deadline. Accordingly, the state legislative districts were to be tried on March 18 - 20. The Petitioners in this action, Representative Jensen and Senator Panzer, objected to the scheduling order as proposed by the plaintiffs. (See Intervenors' App., Ex. G.) They submitted an alternative schedule to the Wisconsin Federal Court.

On Friday, January 4, 2002, just prior to the Monday scheduling conference, Representative Jensen and Senator Panzer withdrew their

objection to the congressional redistricting schedule as set out by the plaintiffs but indicated to the court they still believed their state legislative redistricting schedule was more appropriate. (See Intervenors' App., Ex. H.)

On Monday, January 7, 2002, Representative Jensen and Senator Panzer filed this Petition for Leave to Commence an Original Action with this Court. Representative Jensen and Senator Panzer never disclose in their Petition to this Court the existence of the Wisconsin Federal Court action or the procedural history in that case. They do mention the case on page 15 of their Memorandum in Support of their Petition for Leave to Commence an Original Action, but mislead this Court in stating that the federal district court case concerns only congressional districts and not state legislative districts. Specifically, they state in their Memorandum, "the Arrington matter was limited in scope to congressional redistricting and the original Complaint does not mention State legislative districts or State Constitutional standards." (Pet. Mem. at 15.) What Representative Jensen and Senator Panzer neglect to inform this Court is that the three-judge panel on November 28, 2001, took jurisdiction over the state legislative districts and that their Petition asks this Court to seek jurisdiction over the same legal issues already before the Wisconsin Federal Court.

Representative Jensen and Senator Panzer also assert in their Petition that "[t]he redistricting process is at an impasse," and that election "deadlines loom," citing the initial deadline of May 14, 2002. (Pet. at ¶¶ 16, 18.) In contrast to that statement here, Petitioners in the federal court action have urged the court to delay consideration of state legislative redistricting so that the legislature may take action. (See Intervenor-Respondents' Supplemental Appendix, Ex. A at 9.) Specifically, the Petitioners represented to the federal court that no court activity with respect to state legislative redistricting should occur prior to March 15, 2002 in order to give deference to the legislative process.[3] (See Mem. of Jensen and Panzer, 12/19/2001 at 2-3; Intervenors' App., Ex. G.) Additionally, they took issue with the federal court plaintiffs who suggested that earlier dates were needed because of the May 14, 2002 deadline, stating:

> The Arrington plaintiffs suggest that the date on which the Elections Board is to issue certain notices concerning the fall elections, May 14, 2002, requires a much earlier schedule. This suggestion is erroneous. May 14, 2002 is merely a preliminary notice date. While the statutes specify certain dates for the Elections Board to provide notices of elections

[3] Representative Jensen and Senator Panzer focus upon this date because the state legislative calendar provides for floor periods of January 27 to February 7 and February 26 to March 14 during which time the legislature may act on proposed legislation.

> along with the circulation and filing of nomination papers for state and national offices, *see* § 10.72(1) to (3), Stats., the date to file nomination papers for those offices does not occur until July 9, 2002. § 10.72(3)(c)(1), Stats. Moreover, the July 9, 2002 date for filing nomination papers applies "unless the deadline for filing is extended." *Id.* . . . .

(See Mem. of Jensen and Panzer, 12/19/2001 at 4 n.1; Intervenors' App., Ex. G.)

Thus, while Petitioners attempt to have this Court believe, incorrectly, that state legislative redistricting is not before the Wisconsin Federal Court, Petitioners also assert here – in direct contradiction to representations in the Wisconsin Federal Court[4] – that court action is imperative and the election deadlines are critical.

On January 9, 2002, Senate Majority Leader Chvala and Assembly Minority Leader Black filed a Motion to Intervene in this matter and requested permission from this Court to file a response to the Petition for

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[4] Petitioners here assert that legislative redistricting is at an impasse. The Democrats in the Senate take the same position here as in their Motion to Intervene filed in the Wisconsin Federal Court on February 5, 2001: "The State Senators intend to work with other members of the legislature, including Assembly Republicans who hold the majority in the Assembly, to produce legislation redistricting Wisconsin's Congressional, Senate and Assembly Districts." (Intervenors' App., Ex. B, at 2.) To date, Assembly Republicans have been unwilling to engage in discussions on redistricting with Senate Democrats. Since it takes two to tango, an impasse may exist, but not due to any refusal of the Senate to consider redistricting.

Leave to Commence an Original Action and the Memorandum in Support thereof. On January 16, 2002, this Court granted that Motion to Intervene and granted Senator Chvala and Representative Black permission to file a response to the Petition. Senate Majority Leader Chvala and Assembly Minority Leader Black do not support the Petition and do not believe that this Court should exercise its powers of original jurisdiction. Accordingly, the Intervenor-Respondents respectfully request that this Court deny the Petition for Leave to Commence an Original Action.

ARGUMENT

I. THIS COURT SHOULD DECLINE THE PETITION FOR ORIGINAL JURISDICTION BECAUSE THE COURT IS NOT INSTITUTIONALLY DESIGNED TO TRY A REDISTRICTING CASE.

A. The Supreme Court Is Not Equipped To Try Facts, As Would Be Required Here.

This Court has long recognized it is ill equipped to accept petitions for original jurisdiction that involve the determination of questions of fact. In discussing whether the Court should ever accept petitions for original jurisdiction, this Court recognized that "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). In prior cases where the Court accepted a petition for original jurisdiction, this Court has repeatedly noted in its opinions that the material facts were agreed to by the parties and thus, action could be taken as a matter of law. See e.g., Citizens' Util. Bd. v. Klauser, 194 Wis. 2d 484, 488 n.1, 534 N.W.2d 608 (1995). Alternatively this Court has required the parties to file stipulations of fact prior to any determination of the merits. See, e.g., State ex rel. Cramer v. Schwarz, 2000 WI 86, ¶5, 236 Wis. 2d 473, 613 N.W.2d 591; Jackson v. Benson, 218 Wis. 2d 835, 886, 578 N.W.2d 602 (1998). In fact, counsel could not find one case where the Supreme Court has accepted original jurisdiction in a dispute that required the Court to hold a trial and make evidentiary findings of fact. This Court's own internal operating procedures state that "the Supreme Court is not a fact-finding tribunal" and that "it generally will not exercise its original jurisdiction in matters involving contested issues of fact." Supreme Court Internal Operating Procedures II.B.3.

If this Court accepts Representative Jensen and Senator Panzer's Petition for Original Jurisdiction, it will be required to hold a trial, become

a fact-finding tribunal and make multiple findings of fact. For example, the Court will be asked to find:

- The population of Wisconsin and the population goal for each Senate and Assembly district;
- How much alteration of perfect numerical equality should be allowed to account for the state constitutional requirement of compactness -- which will require this Court to take expert testimony on how compact various plans are;
- Whether districts are contiguous which required the federal district court in the 1992 litigation to rule on whether island territory (territory belonging to a city, town or village but not contiguous to the main part thereof) was contiguous;
- Whether districts are bounded by county, precinct, town or ward lines, and whether any splitting of municipalities is acceptable (which will also require this Court to find whether municipalities or other entities are split, and if so, how many);
- Whether the district lines are drawn with proper consideration to communities of interest which would include what constitutes a community of interest;

- Whether any proposed plan satisfies the Voting Rights Act of 1965, 42 U.S.C. § 1971 et seq., including whether minorities are given the opportunity to select the legislators of their choice; such a finding would require this court to determine whether: (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority group is politically cohesive; and (3) the white majority votes sufficiently as a block to enable it to defeat the minority group's preferred candidate; it is likely that all of these factors would require both expert and lay witness testimony;
- The level at which a proposed plan has disenfranchised voters or legislators from one election to another by virtue of the staggered terms of office;
- Whether a plan is politically fair in the number and party of incumbents that are paired given the changing of district lines.

These are only a handful of factual issues that this Court will need to address if it accepts original jurisdiction in this case. As the federal district court in the 1992 litigation recognized:

> As for competing norms: there is a nearly infinite set of district configurations that would generate approximate population equality across districts, and no one supposes that a

> court should be indifferent among all members of the set. It would be possible to create a district of 49,000 Wisconsinites by assembling census blocks from all over the state, by joining a Milwaukee neighborhood with a rural area in the northwestern corner of the state, hundreds of miles away, by cutting a corridor 200 hundred miles long and a quarter of a mile wide that would snake through the state, and in a million other ways. It would be possible to create a senatorial district by combining three widely separated assembly districts. With the right computer program a complete reapportionment map for the state can be created in days and modified in hours and we have no doubt that the parties examined hundreds of possible plans before submitting the handful that we have been asked to consider.

Prosser v. Elections Bd., 793 F. Supp. 859, 863 (W.D. Wis. 1992).

This redistricting case certainly will require a trial (the Wisconsin Federal Court anticipated at least two or three full days), experts, discovery, and all other proceedings routinely conducted in civil trials. The proposed trial schedule offered by the federal plaintiffs suggested three full days for trial and allowed each party five hours to present its case. (See Intervenors' App., Ex. F.) That proposed scheduling order also allowed each party to call up to eight witnesses whose testimony they intended to present at trial and were allowed an additional two rebuttal witnesses. The scheduling also provided for discovery and a date for determining any motions in limine or other pretrial motions.

Representative Jensen and Senator Panzer suggest in their Memorandum in Support of their Petition for Leave to Commence an Original Action that this Court could properly hear the legislative redistricting matter. (Pet. Mem. at 13.) Specifically, they state:

> So too here, the Court's review process need not provide for direct testimony, but rather may call upon the parties to submit appropriate suggestions for legislative redistricting (i.e., maps), with supporting documentation (i.e., demographic data and briefs). Following that submission, the Court, in consultation with the Legislative Reference bureau or other experts, could draft an appropriate redistricting plan. The computer based programs for drafting redistricting plans and for analyzing the plans proposed by each of the parties are relatively simply and are immediately available for the Court's use through the State of Wisconsin.

(Pet. Mem. at 13.) In suggesting this Court could conduct these proceedings by Briefs alone, Representative Jensen and Senator Panzer blur the lines of this Court's responsibility; their suggestion would reduce the fundamental rights of parties to a full hearing.

Even if this Court were to require the initial direct testimony of witnesses to be provided by affidavit as Representative Jensen and Senator Panzer urge, all parties would still need to cross examine these witnesses.

Such cross examination must be done in person.[5] The credibility of witnesses, especially the methods and biases of experts will be critical in any evaluation of the maps as proposed by various parties. Such conduct is uniquely in the province of the trial courts and not for a seven member appellate court.

This Court has traditionally accepted petitions for original jurisdiction only where it has not been asked to enter the fact-finding fray. In essence, only if the case could be decided on a motion for summary judgment or a judgment on the pleadings would this Court take original jurisdiction and look to determine the legal issues. However, myriad issues facing a court in redrawing legislative lines makes it particularly inappropriate for such legal determinations. Indeed, the proposed scheduling order of the federal court plaintiffs specifically provided that the federal court would not even entertain any motions for summary judgment or any other dispositive motions given the complexity and circumstances of this case. (See Intervenors' App., Ex. F.)

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[5] Representative Jensen and Senator Panzer have already conceded that cross examination of witnesses would be necessary in this case. In their submissions to the federal district court, they have proposed that cross examination and redirect examination of all witnesses be accomplished through courtroom testimony. (See Proposed Scheduling Order at 3, 6; Intervenors' App., Ex. G.)

Because the redistricting case would require this Court to find facts, which it is ill-equipped to undertake, and because the matters are now before the Wisconsin Federal Court well-equipped to undertake the fact-finding, the Petition should be dismissed.

B. The Wisconsin Supreme Court Has Not Heard A Redistricting Case In The Forty Years Since Federal Courts Obtained Jurisdiction Of Such Cases.

The Wisconsin Supreme Court has not addressed redistricting in nearly 40 years. While this Court sometimes heard redistricting disputes prior to that, the timing of these old redistricting cases is significant. Prior to the United States Supreme Court decision of Baker v. Carr, 369 U.S. 186 (1962), the federal courts had consistently held that they lacked jurisdiction over redistricting and apportionment matters. It was Baker, and a subsequent case, Reynolds v. Sims, 377 U.S. 533 (1964), that changed the legal landscape of redistricting and apportionment cases. Baker held that federal courts do have jurisdiction over redistricting and apportionment because of the federal constitutional claims involved. See Baker, 369 U.S. at 204. Reynolds held that a federal court has the power to affirmatively reapportion a legislature when a state legislature fails to do so. Reynolds, 377 U.S. at 586-87.

Since these two landmark decisions, federal courts can and do hear these types of cases routinely. The last two redistricting matters for Wisconsin have been heard and determined by a federal district court.[6] In fact, a federal statute, 28 U.S.C. § 2284, specifically provides for a three-judge panel for any suit involving redistricting or apportionment. In establishing a procedure and a statutory right for three-judge panel to hear these cases, the United States Congress has recognized the importance of this type of case and the need for efficient judiciary action in redistricting and apportionment.

Since the Baker and Reynolds decisions, the federal courts have developed an expertise in the area of redistricting and apportionment. These judges are better suited to handle the redistricting case for several reasons. First, because the three-judge panel includes two district court judges, the three-judge panel has significant experience in conducting trials, holding scheduling conferences, and ruling upon motions in limine and other pretrial matters. In fact, 28 U.S.C. § 2284(b)(3) provides that a single judge may

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[6] Following the 1970 decennial census, the legislature was able to enact redistricting legislation without court intervention. The federal courts were involved following the 1980 and 1990 decennial census.

conduct all the proceedings except the trial, thus addressing the problems raised by discovery issues, motions in limine, etc.

Second, federal court judges are appointed for life and are therefore removed from the rough and tumble of electoral politics. These judges do not have to run for re-election, nor must they raise funds for campaigning. This Court is not in the same position. In fact, a decision by a three-judge federal panel insulated from partisan politics may be viewed more legitimately by the public and seen as less political because of the federal judges' life tenure.

Finally, redistricting of the state legislature does not present a novel issue of state law. This case will not assist the Court in the development of the law of the State of Wisconsin.

C. The Old Wisconsin Supreme Court Cases On Redistricting Cited By The Petitioners Are Not On Point Because They Did Not Require Fact-Finding.

A close examination of the cases cited by Representative Jensen and Senator Panzer regarding apportionment demonstrate that this Court has not, in fact, previously held a trial and taken evidence in redistricting and apportionment matters. In three of the cases cited by Representative Jensen and Senator Panzer, this Court was asked to take original jurisdiction and consider apportionment legislation that had been enacted by the legislature and

signed by the Governor. See State ex rel. Attorney General v. Cunningham, 81 Wis. 440, 51 N.W. 724 (1892); State ex rel. Bowman v. Dammann, 209 Wis. 21, 243 N.W. 481 (1932); State ex rel. Thomson v. Zimmerman, 264 Wis. 644, 60 N.W.2d 416 (1953). Accordingly, in these cases, the petitioners were challenging those apportionment laws as unconstitutional. As such, the Court was presented a question of law and not asked to find facts. These cases are easily distinguishable from the Petition presented here.

Additionally, all of the cases cited by Representative Jensen and Senator Panzer occurred prior to the United States Supreme Court decision of Reynolds v. Sims. Prior to 1962, the federal courts would not take jurisdiction over redistricting cases and as such, the Wisconsin Supreme Court was in a different position than this Court is in now.

Two other cases cited by Representative Jensen and Senator Panzer, State ex rel. Reynolds v. Zimmerman, 22 Wis. 2d 544, 126 N.W.2d 551 (1964) ("Zimmerman I") and State ex rel. Reynolds v. Zimmerman, 23 Wis. 2d 606, 128 N.W. 16 (1964) ("Zimmerman II"), occurred between the United States Supreme Court decisions of Baker v. Carr, and Reynolds v. Sims, and demonstrate both the federal and state courts' difficulties in determining how

to act in apportionment cases given the changing landscape established by the United States Supreme Court. Specifically, in Zimmerman I, the Governor of Wisconsin filed a petition for original jurisdiction to enjoin the Secretary of State from holding the 1964 elections pursuant to the Rosenberry legislative plan. The procedural history of the case began in 1962, when three bills on reapportionment passed both houses of the legislature but were vetoed by then Governor Nelson. Zimmerman I, 22 Wis. 2d at 549. The Attorney General commenced an action in the federal district court seeking to enjoin the 1962 State legislative elections, citing Baker v. Carr. A three-judge panel was convened but the federal court dismissed the State's action. Id. at 550. It did so not on the constitutional merits, but rather on the grounds that given the imminence of the 1962 elections, any affirmed relief would be too disruptive on the state electoral process so as not to be justified. Id. The district court granted the Attorney General leave to resume the action subsequent to the 1962 elections.

After the 1962 elections, the action was not resumed in a federal court but rather the Governor petitioned the Wisconsin Supreme Court to enjoin the 1964 legislative elections. The Secretary of State had stated that he would conduct the 1964 elections based upon the districts found in the Rosenberry

bill that passed both houses of the legislature but that was vetoed by the Governor. Id. As a result, the Wisconsin Supreme Court was presented with five questions of law that ranged from whether the Governor had standing to whether an apportionment plan that was not signed by the Governor could be used for the 1964 elections. After answering the questions of law, and determining that reapportionment plan was unconstitutional, the Court decided to refrain from redistricting the legislature and gave the legislature further opportunity (until May 1, 1964) to enact a valid apportionment plan.

Zimmerman II, which was decided on May 14, 1964, redistricted the state legislature by Court order. It does not appear from the opinion that the Supreme Court took any evidence, held a trial, received any submissions prior to redistricting the legislature. Rather, the Court gave the parties six days to file any objections or motions to the Court's plan. Zimmerman II, 23 Wis. 2d at 618. Zimmerman II was decided approximately one month before the U.S. Supreme Court decision of Reynolds v. Sims.

Accordingly, this Court has never held a trial and received evidence in any redistricting or apportionment case, and it has not taken original jurisdiction over any redistricting matters since the Baker and Reynolds

decisions. The cases cited by Representative Jensen and Senator Panzer do not support this Court's exercise of original jurisdiction on this matter.

D. This Court Would Need To Wrestle With Numerous Procedural Issues To Hear This Case.

For example, this Court would need to rule on any objections raised during direct testimony and cross examination of both lay and expert witnesses. How will this Court constitute itself to be a trier of fact? Will all seven justices vote on the factual issues and determine each objection? Will all seven justices need to vote on whether a witness has the necessary foundation to testify regarding a matter? Will the trial be held in front of all seven justices? Will the Court vote on each factual issue and evidentiary dispute, and sustain any objection if four justices vote to sustain the objection? Will all seven need to agree?

These same questions could be asked about each phase of the trial. For example, how will the Court determine any discovery disputes? Will each of the seven members vote upon any motions in limine that are brought? Will the Court require the filing of a complaint, with an answer and other pretrial motions?

Counsel recognizes that Wis. Stat. § 751.09 allows this Court to refer issues of fact to a circuit court or referee for determination. However, even if this Court decides to utilize this process, the above problems will not disappear. First, if this Court has a circuit court or referee decide the factual issues, it will be basically asking that fact-finder to decide the legal merits as well. The remedy asked for in this case is for the Court to draw the new boundaries. That can only be done by taking into account the underlying factual determinations, such as what is a community of interest, and whether drawing a certain boundary would affect a factual ruling on contiguity, etc. The factual and legal issues in redistricting are intertwined such that separation is simply not practical.

Second, this Court will essentially be asking one judge to hear this complex and important issue instead of a panel of judges as anticipated by Congress. The policy reason behind requiring more than one judge on redistricting and apportionment cases is to reduce the risk of partisan politics and allow more than one legal mind to address the hard task of determining appropriate boundaries for the multitude of districts involved. This policy reason is abrogated by one judge determining all the factual issues.

Finally, this Court will face the same issue of not being able to provide a timely remedy. Whatever factual determinations are made by a circuit court or a referee may be challenged by one of the parties. It is highly unlikely that this Court will have sufficient time to review those determinations prior to ruling upon the legal issues in this case. This will be especially true if the federal court sets a deadline for the state legislature or judiciary to act.[7] Accordingly, these procedural issues make this Court an inappropriate forum for this case.

II. STATE LEGISLATIVE REDISTRICTING DOES NOT MEET THE CRITERIA FOR THIS COURT TO EXERCISE ORIGINAL JURISDICTION.

Representative Jensen and Senator Panzer state that their Petition fully satisfies the criteria for the Court to exercise its original jurisdiction (Pet. Mem. at 5), citing Petition of Heil, 230 Wis. 428, 284 N.W. 42 (1939). However, an examination of cases in which this Court has accepted original jurisdiction demonstrate that the underlying principles for original jurisdiction are not met here.

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[7] Motions have been filed with the Wisconsin Federal Court asking that it set a deadline of March 14, 2002, for any legislative action on redistricting.

A. Acceptance of a Petition Is Discretionary With This Court.

The Petitioners contend that because they can satisfy one of the examples in In Petition of Heil, 230 Wis. 428, 284 N.W. 42 (1939), that this Court must grant the Petition for Original Jurisdiction in this action. This is incorrect. The decision whether to accept original jurisdiction is entirely discretionary with this Court. In re Anderson, 164 Wis. at 2; State v. City of Oak Creek, 2000 WI 9, ¶42, 232 Wis. 2d 612, 605 N.W.2d 526 ("it is this court's prerogative to accept or deny . . . a petition [for original jurisdiction]").

In its discretion, this Court should decline to accept the Petition because the Wisconsin Federal Court has jurisdiction; it is better equipped as a trier of fact to make the determinations needed in this case; the Wisconsin Federal Court is further removed from electoral politics because of life tenure and is thus a more appropriate forum; the Wisconsin Federal Court has more experience in dealing with claims under the Voting Rights Act of 1965; the Wisconsin Federal Court will provide a more a timely remedy because it does not have to deal with issues of recusal or conflicts of interest; and the Wisconsin Federal Court has had this case for nearly one year and will be a more efficient judicial use of resources, particularly since Congressional

redistricting will be before that court also. For any and all of these reasons, this Court should exercise its discretion and decline to accept original jurisdiction in this case.

B. This Court Should Decline Jurisdiction Because The Wisconsin Federal Court Can Provide A Full, Timely Remedy.

In exercising its original jurisdiction, the Wisconsin Supreme Court has repeatedly emphasized two factors in deciding whether to accept jurisdiction. First, the Court has looked to the adequacy of time in affording relief. Second, the Court has examined whether there is an adequate remedy available to the Petitioners. For example, In re Mielke, 120 Wis. 501, 504, 98 N.W. 245 (1904), this Court noted that it would not "'exercise its jurisdiction when there is another adequate remedy, by appeal or otherwise, nor unless the exigency is of such an extreme nature as obviously to justify and demand the interposition of the extraordinary superintending power of the court of last resort of the state.'" (Citation omitted.) And again in 1935, this Court stated "the mere fact that it would be more desirable" for the Supreme Court to take jurisdiction rather than the circuit court "does not warrant this court in taking original jurisdiction when there are other courts which have adequate jurisdiction in all other respects." In re Zabel, 219 Wis. 49, 50, 261

N.W. 669 (1935). This Court reiterated these principles further in 1939 when it stated:

> Mere expedition of causes, convenience of parties to actions, and the prevention of a multiplicity of suits are matters which form no basis for the exercise of original jurisdiction of this court. Because it is the principal function of the circuit court to try cases and of this court to review cases which have been tried, due regard should be had to these fundamental considerations.

State ex rel. Attorney General v. John F. Jelke Co., 230 Wis. 497, 503, 284 N.W. 494 (1939). These factors, the adequacy of time in affording relief and the availability of an adequate remedy in another court demonstrate that this Court should not accept original jurisdiction in this case.

In many cases in which the Court was asked to exercise its original jurisdiction, it examined whether there was adequate time for a trial on the merits and for the issue to be properly appealed to the Court. Only if there was insufficient time did the Court generally grant jurisdiction. See e.g., State ex rel. Barber v. Circuit Court, 178 Wis. 468,190 N.W. 563 (1922) (granting the petition because the petitioner would be unable to obtain timely relief in a circuit court); Labor & Farm Party v. Elections Bd., 117 Wis. 2d 351, 344 N.W.2d 177 (1984); (granting the petition for original jurisdiction because of the shortness of time available before the ballots were to be

printed). Thus, the time constraints of the underlying action are often considered by the Court in deciding whether to accept original jurisdiction.

While the Petitioners assert in their Petition that "the redistricting process is at an impasse," and that the election "deadlines loom," these same Petitioners in the Wisconsin Federal Court action have urged the court to delay consideration of the state legislative redistricting so that the legislature may take action. (Pet. at ¶¶16, 18.) Specifically, the Petitioners represented to the federal court that no court activity with respect to legislative redistricting should occur prior to March 15, 2002 in order to give deference to the legislative process. (See Intervenors' App., Ex. G.) Given that Representative Jensen and Senator Panzer have urged the federal court to delay consideration of state legislative redistricting, they cannot satisfy this Court's factor of having inadequate time to obtain relief from another court.

Additionally, if time is truly of the essence in this case as Representative Jensen and Senator Panzer maintain, the Wisconsin Federal Court proceeding has been underway for almost a year and will be a more timely and efficient vehicle for handling this matter, especially given its expertise and its head start on the proceedings. The Wisconsin Federal Court will be the forum for any judicial determination of Congressional

redistricting.[8] The Wisconsin Federal Court is prepared to hear and decide matters on legislative redistricting. Given the related issues in the two matters, judicial efficiency demands that one, not two, courts take up redistricting.[9] This Court, in contrast to the Wisconsin Federal Court, will

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[8] Representative Jensen and Senator Panzer have not petitioned this Court to accept original jurisdiction over congressional redistricting. In their response to Senator Chvala and Representative Black's Motion to Intervene, Petitioners state: "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." (Pet. Resp. at 10.) Intervenor-Respondents are puzzled by this pronouncement. The federal court plaintiffs are proceeding with their case and no dismissal papers have been filed. Based upon statements made to the federal court, it is likely that Representative Jensen and Senator Panzer were suggesting that legislation was going to be enacted with respect to congressional redistricting. However, as the federal court pointed out to Petitioners' counsel, simply because a bill may pass the Assembly does not mean that the bill will become law. Any congressional redistricting bill must pass both houses of the legislature and be signed into law by the Governor. (See Intervenor-Respondents' Supplemental App., Ex. A at 6-8.)

[9] In their response to Senator Chvala and Representative Black's Motion to Intervene, Petitioners contend that state legislative redistricting and congressional redistricting are governed by distinct and separate standards, and suggest that Senator Chvala and Representative Black were attempting to back peddle on this point, despite having argued its merits to the federal court. (See Pet. Resp. at 8-11.) On the contrary, Senator Chvala and Representative Black are in full agreement that congressional and state legislative redistricting are governed by separate and distinct constitutional and statutory standards. However, Senator Chvala and Representative Black maintain that these matters should be tried by one court because both require an indepth analysis of census data and both require similar factual findings and similar questions of law. For example, both congressional redistricting

need to make extreme modifications to its schedule in order to hear the case in a timely manner.

This Court also focuses upon the adequacy of relief in a trial court in determining whether to accept original jurisdiction. For example, this Court has declined to exercise its original jurisdiction where there was an adequate remedy furnished by statute for a challenged violation. See, e.g., In re Anderson, 164 Wis. 1, 159 N.W. 559 (1916); In re Price, 191 Wis. 17, 210 N.W. 844 (1926); State ex rel. Ahlgrimm v. State Elections Bd., 82 Wis. 2d 585, 263 N.W.2d 152 (1978). Thus, the presence or absence of a timely remedy is an important consideration for the Court in determining whether to exercise its original jurisdiction.

In this case, a three-judge panel in the District Court for the Eastern District of Wisconsin has taken jurisdiction over state legislative redistricting and is ready to hear the case. It has already determined initial questions of jurisdiction, has accepted amended pleadings, has ordered the parties to provide proposed scheduling orders and has held a status conference regarding preliminary motions and setting the schedule for both congressional and state

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and state legislative redistricting require adherence to the Voting Rights Act. Accordingly, judicial efficiency requires one court to hear both matters.

legislative redistricting. Discovery has commenced in the Wisconsin Federal Court.[10] The Wisconsin Federal Court has indicated that it believes trials will be held for both congressional and state legislative redistricting in March or April of this year. The Petitioners in this case have an adequate remedy in federal court and this Court does not need to accept original jurisdiction to prevent any miscarriage of justice.

Because emergency circumstances do not exist and the Petitioners have an adequate remedy by the federal court proceeding, this Court should decline to accept original jurisdiction in this matter. See State ex rel. State Central Committee v. Board of Election Comm'rs, 240 Wis. 204, 213, 3 N.W.2d 123 (1942) (declining to take original jurisdiction where there was "no present emergency or no need for action").

C. This Court Should Decline Jurisdiction Because It May Not Be Able to Act Timely.

This Court may not be able to address the issues in this case in a timely manner. In order to effectively proceed with elections this fall, a

[10] The proceedings in the Wisconsin Federal Court are moving quickly. Thus, it is no longer accurate to state that no discovery has begun or no motions have been set. (See Pet. Resp. at 2.) Since the filing of this Petition, discovery has commenced and a motion is scheduled to be heard on January 29, 2002, to decide whether to set a date for the state legislature to act.

redistricting order should be issued by May 1, 2002. The deadline of May 14, 2002, for initial Elections Board notices (see Wis. Stat. § 10.72(1)) is one all parties recognize.

Even if this Court were to assume jurisdiction as early as mid-February, it would still need to establish procedures for hearing the case. It is unlikely that discovery could be conducted, a trial could be held, and a decision reached in a period of 8-10 weeks. The balance of this Court's work would grind to a halt.[11]

Moreover, this Court may not have until May 1 to reach a decision. The Wisconsin Federal Court may establish a deadline, perhaps as early as March 14, for the state to act. If no redistricting plan is in place by that time, the federal court will proceed to a hearing and decision. Not only does this suggest the difficulties of this Court acting in a timely manner, but it may involve this Court in jurisdictional disputes with the federal court, and require a dual trial track that is time-consuming, expensive, and inefficient.

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[11] Accepting this Petition could also have consequences for this Court's future calendar. Redistricting by law occurs every ten years and future redistricting litigants may utilize a decision by this Court to accept this petition as grounds for petitioning this Court to take jurisdiction in the future. Will this Court hold a trial on this matter every ten years?

D. This Court Should Decline Jurisdiction Because The Petition Will Require The Court To Address A Number Of Collateral Issues, Including Jurisdiction And Recusal, Not Dealing With The Substance Of Redistricting.

Once this Court accepts jurisdiction of the Petition, the Court and the parties will certainly become embroiled in a number of collateral issues not directly related to the substance of redistricting. In addition to the procedural issues pointed out above, this will also include issues of potential recusal of justices, and jurisdictional disputes with the federal court system.

If this Court accepts this case, issues with respect to recusal of several members of this Court will necessarily arise. One of the Petitioners has served as the campaign manager for one member of this Court and as a paid campaign consultant to another member. Additionally, a member of the Court was involved in an investigation by the named respondent, the Elections Board. Still another member is a former Minority Leader of the Wisconsin Assembly, was a named litigant in the 1990s redistricting case, and was represented by the same counsel who brings this request for original jurisdiction. Motions for the recusal of justices and questions regarding conflicts of interest would necessarily slow this Court's ability to expedite this matter. If one or more justices determined to recuse themselves, this

Court might face the prospect of an evenly divided court -- and no decision might be rendered. There is no reason for this Court to enter this quagmire.

Moreover, acceptance of original jurisdiction by this Court may very well be futile. Following the 1980 decennial census, various plaintiffs filed suit in federal court challenging the constitutionality of the legislative districts which were established in 1972. See Wisconsin State AFL-CIO v. Elections Bd., 543 F. Supp. 630, 631 (E.D. Wis. 1982). The then-Governor moved to intervene and subsequently filed a Petition with the Wisconsin Supreme Court asking it to take original jurisdiction over the matter. Id. at 632. Although the Supreme Court initially granted the petition, its jurisdiction was short-lived. The action was quickly removed to the United States District Court for the Western District of Wisconsin pursuant to the Federal Rules of Civil Procedure. Id. at 633. Accordingly, even if this Court grants the Petition in this case, its jurisdiction might be stunted by the subsequent removal of the case to federal court.

Finally, as will be noted below, these Intervenor-Respondents strongly dispute Petitioners' suggestion that acceptance of jurisdiction by this Court means the Wisconsin Federal Court will step aside. Growe v. Emison, 507 U.S. 25 (1993), is not the talisman suggested by Petitioners, but a case

requiring the balancing of interests, and on which the Wisconsin Federal Court takes a much more vigorous view of its jurisdiction than do Petitioners. (See infra text pp. 42-45.) If this Court were to accept the Petition, it will necessarily enter into a jurisdictional conflict of some degree with the Wisconsin Federal Court that already has jurisdiction.

E. This Court Should Decline Jurisdiction Because Petitioners Have Failed To Timely Pursue Jurisdiction In This Court.

"The doctrine of laches has been defined as: '[A] recognition that a party ought not to be heard when he has not asserted his right for unreasonable length of time or that he was lacking in diligence in discovering and asserting his right in such a manner so as to place the other party at a disadvantage.'" In re Estate of Flejter, 2001 WI App 26, ¶40, 240 Wis. 2d 401, 421, 623 N.W.2d 552 (Ct. App. 2000). The elements of laches are: (1) unreasonable delay; (2) knowledge of and acquiescence in the course of events; and (3) prejudice to the party asserting laches. Id. at ¶41. This Court has stated that laches operates:

> [A]s a bar upon the right to maintain an action by those who unduly slumber upon their rights. There is no fixed rule as to the lapse of time necessary to bar a suitor in a court of equity. Each case must stand upon its own particular facts. Great lapse of time, if reasonably excused and without damage to the defendant, has been ignored; while slight delay, accompanied

> by circumstances of negligence, apparent acquiescence, or change of defendant's position, has been held sufficient.

Likens v. Likens, 136 Wis. 321, 327, 117 N.W. 799 (1908). With respect to interpretation of election laws, this Court has previously noted that the timeliness with which a petitioner files a petition for original jurisdiction is of primary importance. See Labor & Farm Party, 117 Wis. 2d at 354 (noting the dispatch within which the petitioners filed their petition with the court).

In this case, laches bars any attempt by Representative Jensen and Senator Panzer to have this Court take jurisdiction. It was February 1 of last year that the plaintiffs in the federal court case filed their complaint challenging the current apportionment of the congressional districts, and February 5, 2001, that a motion to intervene placing legislative redistricting before the Wisconsin Federal Court was filed. It was less than three weeks later, on February 21, 2001, that Representative Jensen and Senator Panzer moved to intervene in that suit. At that point, the State Legislators had already filed their motion to intervene and had already requested that the Wisconsin Federal Court take jurisdiction over state legislative redistricting. Despite being aware for nearly eleven months that the federal court was being asked to take jurisdiction over legislative redistricting, Representative Jensen

and Senator Panzer represent to this Court that time is of the essence. At any time before the Wisconsin Federal Court accepted jurisdiction, Petitioners could have asked this court to assume jurisdiction. They did not.[12] Intervenor-Respondents respectfully submit to this Court that Petitioners have failed to timely pursue this Court's jurisdiction and accordingly, the doctrine of laches bars this Petition.

III. GROWE V. EMISON DOES NOT REQUIRE THIS COURT TO ACCEPT ORIGINAL JURISDICTION IN THIS CASE.

Representative Jensen and Senator Panzer also urge this Court to accept original jurisdiction over this matter based upon the U.S. Supreme Court decision, Growe v. Emison, 507 U.S. 25 (1993). In their Memorandum in Support of their Petition for Original Jurisdiction, Representative Jensen

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[12] Additionally, other evidence demonstrates that the Petitioners have unreasonably delayed in seeking this Court's jurisdiction. As reported by the *Milwaukee Journal Sentinel*, Assembly Republicans hired their current counsel in July of 2000 to advise them regarding redistricting and by as early as February 22, 2001, their counsel had already billed $46,000 for services related to redistricting. (See Richard P. Jones, State Giving Assembly GOP $2 Million for Redistricting Fight, *Milwaukee Journal Sentinel*, February 22, 2001; Intervenor-Respondents Supplemental App., Ex. B.) Recent news reports suggest the figure for legal fees for Petitioners may exceed $900,000. (See Intervenor-Respondents Supplemental App., Ex. C.) This is not a case where one party did not have adequate representation and, therefore, was unaware of his or her legal options. Indeed, given the amount spent to date on redistricting, one wonders why the Petition wasn't filed until four months before the first election deadline.

and Senator Panzer state: "The U.S. Supreme Court has expressly noted that federal courts must give way to state courts in matters of legislative redistricting." (Pet. Mem. at 16.) They go on to state that Growe is "entirely dispositive" of redistricting actions filed in both state and federal courts. Representative Jensen and Senator Panzer then represent that a federal court could not proceed with redistricting while a state action was underway.

Representative Jensen and Senator Panzer's reading of Growe is itself a reason why this Court should decline to accept original jurisdiction over this matter. A careful reading of Growe demonstrates that Growe is not an absolute bar to federal courts proceeding with redistricting; rather, it demonstrates that there must be a balancing of interests between federal and state courts. To fully understand this point, a recitation of the facts and holding of that case is illuminative.

In Growe, a group of Minnesota voters filed a state court action alleging that the current districts were malapportioned. A second group then filed a similar action in federal court after the state court had already begun proceedings regarding redistricting. Growe, 507 U.S. at 27-28. Then, the Minnesota State Legislature adopted a legislative redistricting plan. Id. at

28. It was soon recognized that the redistricting legislation contained many technical errors, rendering the plan unconstitutional if adopted as is. Id. The federal court set a deadline for the legislature to act on redistricting but did not include the state court in its deadline. The state court, having found the new legislative districts defective because of the drafting errors, issued a redistricting plan correcting the errors but ordered that the plan was to be held in abeyance to provide some time for the legislature to correct the errors. Id. at 29. Before the state court could take additional action, however, the federal court stayed all the proceedings in the state court and enjoined the parties from attempting to enforce the state court's redistricting plan. Id. at 30. The federal court stated that such action was necessary to prevent the state court from interfering with redistricting.

The U.S. Supreme Court vacated the stay issued by the federal district court. The state court then issued a final order adopting its legislative plan and then held hearings on the congressional plan submitted by the parties. Id. Before the state court could issue a congressional plan, however, the federal court adopted its own redistricting plan, both legislative and congressional and again permanently enjoined interference by the state court with implementation of those plans. Id. at 31.

The case then went to the United States Supreme Court for a second time. The Court held that the federal court erred in not deferring to the state court's timely efforts to redraw the legislative and congressional districts. The Court stated that federal courts should defer when a state, through its legislative or judicial branch, **has begun in a timely fashion** to address the issue. Id. at 33 (emphasis added). The Court went on to state that it would have been appropriate for the federal court to set a deadline for reapportionment directed at both the state legislature **and** the state courts for reapportionment. Id. at 36 (emphasis added). Where the federal court erred, according to the U.S. Supreme Court, is that it actively **prevented** the state court from issuing its plans by staying the court proceedings and enjoining the state court from interfering with the plans adopted by the federal court. Id. at 34 (emphasis added.)

The Court did not hold that a federal court must stay its proceedings once a redistricting case is filed in state court. In fact, the opposite is true because the Court held that it would have been appropriate for the federal court to establish a deadline by which the state legislature and the state judiciary had to act. Additionally, Growe is distinguishable from this case because in Growe, the suit was filed and pending in state court when the

federal court took jurisdiction. Further, the federal court on two separate occasions in Growe attempted to enjoin the state judiciary from acting. The Court's holding, that it was improper for the federal court to enjoin the state court from acting, is not the same as saying whenever a state court action is filed, the federal court must stop what it is doing. Under Representative Jensen and Senator Panzer's reading of Growe, a federal court, who had held a trial, taken all the evidence, and begun redrawing the lines, would be required to stay the proceedings if on the eve of its decision, a state court action is filed. Contrary to Representative Jensen and Senator Panzer's contentions, Growe is not so broad.

In fact, Representative Jensen and Senator Panzer asked the Wisconsin Federal Court to stay the proceedings for state legislative redistricting at the scheduling conference held on January 7, 2002. In doing so, Representative Jensen and Senator Panzer represented to the federal court that if this Court accepted original jurisdiction, the federal court should stay its proceedings pending the outcome of the state court action. The Honorable Charles N. Clevert, who presided over the scheduling conference, disagreed with Representative Jensen and Senator Panzer's reading of Growe. He stated at the status conference:

The Court: Are you suggesting by your comments that where a, 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, otherwise we would have, as I said, a Federal Court addressing the same matters as the State Court when the Supreme Court and other courts have made it extraordinarily clear -

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: Where 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 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?
>
> Mr. Troupis: Well, I don't think so because –
>
> The Court: Those actions did not begin before this Court obtained jurisdiction over this matter, correct?
>
> Mr. Troupis: This is true, but the Growe case –
>
> The Court: I've heard enough on that point.
>
> Mr. Troupis: That's fine. Thank you, Your Honor.

(Intervenor-Respondents Supplemental App., Ex. A at 9-12.)

Accordingly, Judge Clevert reads Growe to be more limited than the Petitioners claim it to be here.

This dispute regarding Growe will only grow; because of it, this Court should decline to exercise its original jurisdiction. By accepting original jurisdiction in this matter, this Court is setting itself up for a jurisdictional battle between the Wisconsin Federal Court and this Court. Both courts will

necessarily have to determine what Growe means. This conflict between the courts can be avoided if this Court declines to exercise its original jurisdiction. The Wisconsin Federal Court was required to take jurisdiction over this matter once the complaint was filed. This Court, however, has a choice, and in the exercise of discretion, this Court should choose to avoid this potential conflict.

CONCLUSION

This Court is not equipped to hold a three day trial, take evidence, address discovery issues, handle objections for cross examination of witnesses, or to address other trial matters that will require attention by this case. In its previous exercise of original jurisdiction, this Court has taken cases which could be decided as a matter of law. Because the redistricting case is not such a case, this Court should decline Representative Jensen and Senator Panzer's Petition to Commence an Original Action.

Further, the Wisconsin Federal Court in Milwaukee has jurisdiction over this matter, is a trial court designed to find facts, and is better able to handle the redistricting cases. Since the U.S. Supreme Court decisions of Baker v. Carr and Reynolds v. Sims, this Court has not accepted original jurisdiction over the redistricting cases, but rather those cases have proceeded

in the federal courts. Those courts have developed the expertise to try these cases.

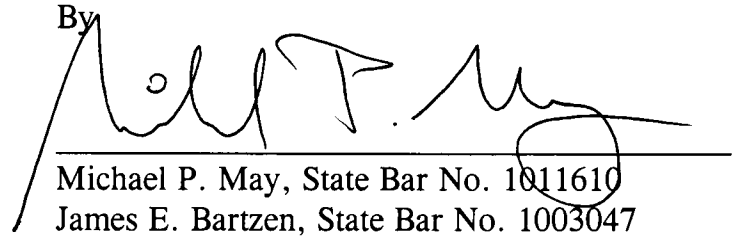
State legislative redistricting is not a proper one for original jurisdiction. There are no emergency time constraints which require this Court to accept jurisdiction, and any time constraints that do exist suggest that the Wisconsin Federal Court proceeding would provide a more timely remedy. Additionally, pretrial motions for recusal of justices would only slow the process and thus prevent this Court from expediting the matter. Further, the Petitioners have an adequate remedy in Wisconsin Federal Court.

A full, complete and timely remedy is available to Petitioners in the Wisconsin Federal Court, which has the "original" jurisdiction of Petitioners' claims. This Court should leave the original jurisdiction in place.

For the foregoing reasons, the Intervenor-Respondents request that this Court deny Representative Jensen and Senator Panzer's Petition for Leave to Commence an Original Action.

Dated this 25th day of January, 2002.

BOARDMAN, SUHR, CURRY & FIELD LLP
By



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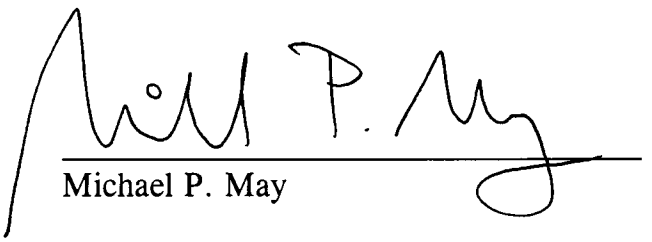
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.81 for a Response and Supplemental Appendix produced with a proportional serif font.



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