

**GODFREY & KAHN** S.C.ONE EAST MAIN STREET, SUITE 500 • POST OFFICE BOX 2719  
MADISON, WISCONSIN 53701-2719

TEL • 608.257.3911 FAX • 608.257.0609

www • GKLaw.COM

December 6, 2011

Direct: 608-284-2625  
dpoland@gklaw.com**BY HAND DELIVERY**A. John Voelker  
Acting Clerk  
Wisconsin Supreme Court  
110 E. Main Street, Suite 215  
Madison, WI 53703-1688**RECEIVED**  
DEC. 06 2011  
CLERK OF SUPREME COURT  
OF WISCONSIN*Clinard, et al. v. Brennan, et al.*, Case No. 2011AP2677-OA

Dear Mr. Voelker:

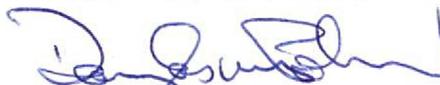
In accordance with the Court's November 30, 2011 order, on behalf of the "involuntary petitioners," we are enclosing for filing an original and 12 copies of each of the following documents:

- Involuntary Petitioners' Memorandum Opposing the Petition and in Support of Their Combined Motion: To Dismiss the Petition with Prejudice or, in the Alternative, to Dismiss Themselves as Parties and to Consolidate or Stay Petitioners' Waukesha County Circuit Court Action
- Involuntary Petitioners' Appendix – Volume I
- Involuntary Petitioners' Appendix – Volume II

We are serving the counsel and parties identified in the Court's orders of November 30 and December 1, 2011, taking into account the petitioners' substitution of counsel filed yesterday.

At the outset, the petitioners unilaterally designated the "involuntary petitioners" and their counsel. Please change the Court's record of appearances and mailing list to note that the involuntary petitioners are represented by Douglas Poland and Rebecca Mason.

GODFREY &amp; KAHN, S.C.

Douglas M. Poland  
Rebecca K. MasonDMP:aeg  
Enclosurescc: Maria S. Lazar (w/encl.)  
J.B. Van Hollen (w/encl.)  
Michael D. Dean (w/encl.)  
Kevin J. Kennedy (w/encl.)  
Joseph L. Olson (w/encl.)  
Jeremy P. Levinson (w/encl.)

7189832\_1

STATE SUPREME COURT  
STATE OF WISCONSIN

**FILED**

**DEC 06 2011**

Appeal No. 2011AP002677-OA

CLERK OF SUPREME COURT  
OF WISCONSIN

---

DENNIS CLINARD, ERIN M. DECKER, LUONNE A. DUMAK,  
DAVID A. FOSS, LaVONNE J. DERKSEN, PAMELA S. TRAVIS,  
JAMES L. WEINER, JEFF L. WAKSMAN, and KEVIN CRONIN,

Petitioners,

and

ALVIN BALDUS, CINDY BARBERA, CARLENE BECHEN,  
ELVIRA BUMPUS, RONALD BIENDSEIL, LESLIE W. DAVIS III,  
BRETT ECKSTEIN, GLORIA ROGERS, RICHARD KRESBACH,  
ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON,  
JEANNE SANCHEZ-BELL, CECELIA SCHLIEPP, and  
TRAVIS THYSSEN,

Involuntary Petitioners,

THE COMMITTEE TO RECALL WANGGAARD, RANDOLPH  
BRANDT, THE COMMITTEE TO RECALL MOULTON, JOHN KIDD,  
THE COMMITTEE TO RECALL SENATOR PAM GALLOWAY,  
NANCY STENCIL, and RITA PACHAL,

Petitioner Intervenors,

v.

MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL,  
THOMAS CANE, THOMAS BARLAND and TIMOTHY VOCKE  
each in his official capacity as a member of the WISCONSIN  
GOVERNMENT ACCOUNTABILITY BOARD, and KEVIN  
KENNEDY, Director and General Counsel for the WISCONSIN  
GOVERNMENT ACCOUNTABILITY BOARD,

Respondents.

---

**INVOLUNTARY PETITIONERS' MEMORANDUM OPPOSING  
THE PETITION AND IN SUPPORT OF THEIR COMBINED  
MOTION: TO DISMISS THE PETITION WITH PREJUDICE OR,  
IN THE ALTERNATIVE, TO DISMISS THEMSELVES AS  
PARTIES AND TO CONSOLIDATE OR STAY PETITIONERS'  
WAUKESHA COUNTY CIRCUIT COURT ACTION**

---

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	2
PROCEDURAL SUMMARY.....	4
STATEMENT OF THE ISSUES PRESENTED.....	7
ARGUMENT.....	8
I. THE PETITION SHOULD BE DISMISSED BECAUSE A FEDERAL COURT ACTION BY INVOLUNTARY PETITIONERS HAS BEEN PENDING SINCE JUNE 2011. ....	8
A. The Petition And The Companion Waukesha County Circuit Court Case, If Not Dismissed, Will Unnecessarily Duplicate The Federal Court Action, Creating Uncertainty, Conflict, And Delay.....	8
B. Involuntary Petitioners Have The Right To Redress In Federal Court, And They Are Exercising That Right. ....	11
II. THE PETITION CONTRAVENES ESTABLISHED STATE LAW.....	13
A. The Petition And Petitioners' Waukesha County Circuit Court Action Should Be Dismissed With Prejudice—The Challenge To 2002 Legislative Boundaries Lacks Merit On Its Face.....	13
B. The Petition And Companion Case Should Be Dismissed Under Wis. Stat. § 802.06(2)(a)10, The First-Filed Rule And Principles Of Laches And Estoppel.....	16

C. The Petition Was Improperly Filed In This Court And, Regardless Of Its Propriety, This Court Should Exercise Its Discretion To Dismiss The Petition And The Waukesha County Case.....20

III. IF THE PETITION IS NOT DISMISSED WITH PREJUDICE IN ITS ENTIRETY, INVOLUNTARY PETITIONERS SHOULD BE DISMISSED BECAUSE THEY HAVE NO INTEREST IN THE ACTION.....25

IV. THE PETITION AND THE WAUKESHA COUNTY CIRCUIT COURT COMPLAINTS WERE IMPROVIDENTLY FILED AND WITHOUT ANY REASONABLE BASIS. ....27

CONCLUSION.....32

## TABLE OF AUTHORITIES

	<u>Page</u>
<b>CASES</b>	
<i>Affordable Erecting, Inc. v. Neosho Trompler, Inc.</i> , 2006 WI 67, 291 Wis. 2d 259, 715 N.W.2d 620 .....	20
<i>Arrington v. Elections Bd.</i> , 173 F. Supp. 2d 856 (E.D. Wis. 2001) .....	9
<i>Barricade Flasher Serv., Inc. v. Wind Lake Auto Parts, Inc.</i> , No. 2011AP64, 2011 Wisc. App. LEXIS 863 (Ct. App. Nov. 16, 2011) .....	17
<i>Baumgart v. Wendelberger</i> , Nos. 01-cv-121, 02-cv-366, 2002 WL 34127471 (E.D. Wis. May 30, 2002), <i>amended by</i> 2002 WL 34127473 (July 11, 2002) .....	8
<i>Flejter v. Estate of Flejter</i> , 2000 WI App 26, 240 Wis. 2d 401, 623 N.W.2d 552 .....	19
<i>George Williams College v. Williams Bay</i> , 242 Wis. 311 (1943) .....	23
<i>Gonzalez-Servin v. Ford Motor Co.</i> , Nos. 11-1665, 08-2792, 2011 WL 5924441 (7th Cir. Nov. 23, 2011) .....	30
<i>Grove v. Emison</i> , 507 U.S. 25 (1993) .....	12
<i>Helgeland v. Wisconsin Municipalities</i> , 2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d 1 .....	26
<i>In re Estate of Koenigsmark</i> , 119 Wis. 2d 394, 351 N.W.2d 169 (Ct. App. 1984) .....	31
<i>Jensen v. Wisconsin Elections Bd.</i> , 2002 WI 13, , 249 Wis. 2d 706, 639 N.W.2d 537 .....	9, passim

<i>League of United Latin American Citizens v. Perry</i> , 548 U.S. 399 (2006) .....	15
<i>Likens v. Likens</i> , 136 Wis. 321, 117 N.W. 799 (1908).....	19
<i>Mannheim Video, Inc. v. County of Cook</i> , 884 F.2d 1043 (7th Cir. 1989) .....	30
<i>McNally CPA's &amp; Consultants, S.C. v. DJ Hosts, Inc.</i> , 2004 WI App 221, 277 Wis. 2d 801, 692 N.W.2d 247 .....	25
<i>Mississippi State Conf. of N.A.A.C.P. v. Barbour</i> , No. 11-cv-159, 2011 WL 1870222 (S.D. Miss. May 16, 2011), <i>summarily aff'd</i> , No. 11-82, 80 U.S.L.W. 3260 (U.S. Oct. 31, 2011) .....	15, 30
<i>Political Action Conference v. Daley</i> , 976 F.2d 335 (7th Cir. 1992) .....	15
<i>Prosser v. Elections Bd.</i> , 793 F. Supp. 859 (W.D. Wis. 1992) .....	8
<i>Ramos v. Illinois</i> , 781 F. Supp. 1353 (N.D. Ill. 1991).....	15
<i>Settipalli v. Settipalli</i> , 2005 WI App 8, 278 Wis. 2d 339, 692 N.W.2d 279 .....	30, 31
<i>Sexson v. Servaas</i> , 33 F.3d 799 (7th Cir. 1994).....	10
<i>State ex rel. Werlein v. Elamore</i> , 33 Wis. 2d 288, 147 N.W.2d 252 (1967).....	24
<i>State v. Horn</i> , 226 Wis. 2d 637, 594 N.W.2d 772 (1999) .....	22
<i>State v. Smythe</i> , 225 Wis. 2d 456, 592 N.W.2d 628 (1999) .....	31
<i>State v. Stenklyft</i> , 2005 WI 71, 281 Wis. 2d 484, 697 N.W.2d 769.....	22
<i>Syver v. Hahn</i> , 6 Wis. 2d 154, 94 N.W.2d 161 (1959).....	18
<i>Voinovich v. Quilter</i> , 507 U.S. 146 (1993).....	10

<i>Wisconsin Ass'n of Nursing Homes, Inc. v. Journal Co.</i> , 92 Wis. 2d 709, 285 N.W.2d 891 (Ct. App. 1979) .....	31
<i>Wisconsin State AFL-CIO v. Elections Bd.</i> , 543 F. Supp. 630 (E.D. Wis. 1982) .....	8

### STATUTES

Wis. Stat. § 751.035 .....	passim
Wis. Stat. § 751.035(1) .....	23, 24, 28
Wis. Stat. § 751.035(3) .....	23
Wis. Stat. § 801.50(4m) .....	passim
Wis. Stat. § 802.06 .....	6
Wis. Stat. § 802.06(2)(a)10 .....	16, 17
Wis. Stat. § 803.03 .....	7, 25
Wis. Stat. § 803.03(1)(a) .....	25
Wis. Stat. § 803.03(1)(b)1 .....	26
Wis. Stat. § 803.03(1)(b)2 .....	25, 26
Wis. Stat. § 809.25(3)(c) .....	27
Wis. Stat. § 809.25(3)(c)2 .....	31
Wis. Stat. § 809.83 .....	7, 27, 32
Wis. Stat. § 809.83(2) .....	30

### OTHER AUTHORITIES

28 U.S.C. § 2284 .....	4, 10
42 U.S.C. § 1983 .....	13

42 U.S.C. § 1988.....	13
3 Norman J. Singer and J.D. Shambie Singer, STATUTES AND STATUTORY CONSTRUCTION § 57.1 (7th ed. 2008).....	24
U.S. CONST. ART. VI, cl. 2 .....	12, 13
Voting Rights Act of 1965.....	4
Wis. Const. art. VII, § 2.....	25
Wis. Const. art. VII, § 3.....	25
2011 Wis. Act 39 .....	5, 13, 14, 23
Wisconsin Act 43 .....	passim
Wisconsin Act 44.....	passim

“Involuntary petitioners,” so characterized without statutory authority or cause, filed a motion on December 5, 2011 for their dismissal as parties and the dismissal with prejudice of the petition and the companion complaints in the Waukesha County Circuit Court, seeking the same relief. “Involuntary petitioners” are plaintiffs in a federal court case, pending since June 10, 2011, and scheduled for trial in fewer than three months. As long as that litigation remains pending, they have no interest in this proceeding or in the Waukesha County case—even should they go forward which, for the reasons stated here, they should not.

The Supreme Court should dismiss the petition in its entirety, just as it did 10 years ago on remarkably similar procedural facts. This Court also should rule that the very claims filed by these same petitioners in the Waukesha County Circuit Court cannot proceed. It should order those claims, all questions of law, dismissed with prejudice as well to avoid their re-litigation here or on appeal.

Involuntary petitioners Alvin Baldus, Cindy Barbera, Carlene Bechen, Ronald Biendseil, Elvira Bumpus, Leslie W. Davis, III, Brett Eckstein, Richard Kresbach, Rochelle Moore, Amy Risseeuw, Judy Robson, Gloria Rogers, Jeanne Sanchez-Bell, Cecelia Schliepp, and Travis

Thyssen (“involuntary petitioners”) submit this Involuntary Petitioners’ Memorandum Opposing The Petition and in Support of Their Combined Motion: to Dismiss the Petition with Prejudice or, in the Alternative, to Dismiss Themselves as Parties and to Consolidate or Stay Petitioners’ Waukesha County Circuit Court Action (“petition”) filed by Dennis Clinard, Erin M. Decker, Luonne A. Dumak, David A. Foss, LaVonne J. Dersksen, Pamela S. Travis, James L. Weiner, Jeff L. Waksman, and Kevin Cronin (“petitioners”).

### **INTRODUCTION**

The petitioners are trifling with the judicial system. Having slept on their procedural rights for months, they belatedly filed a petition on November 21, 2011 requesting this Court (or a three-judge panel) to declare the redistricting plan in Wisconsin Acts 43 and 44 constitutional, declare the legislative districts derived from the federal court’s own 2002 redistricting plan unconstitutional, and enjoin the Wisconsin Government Accountability Board (“GAB”) from conducting recall elections under the 2002 boundaries.

They have done so despite the facts that: no fewer than nine recall elections already have been held in the 2002 legislative districts; state law

expressly provides for the effective date of Act 43: it is for the fall 2012 elections, not sooner; and, the U.S. Supreme Court already has permitted the conduct of elections in 2011 under 2002 district lines. The petition flies in the face of constitutional, jurisdictional, statutory and procedural convention.

Inexplicably, the petition names as “involuntary petitioners” the plaintiffs in the pending federal redistricting case, *Baldus et al. v. Brennan et al.*, 11-cv-562 (E.D. Wis.). Months ago, these parties requested relief from the federal three-judge panel that is precisely the opposite of the relief the petitioners seek. The *Baldus* plaintiffs ask that the federal court declare the 2012 redistricting plan in Acts 43 and 44 unconstitutional and invalid. In no way do they now challenge the constitutionality of the 2002 legislative districts, nor need they do so. *See* Ex. 27 (IP-App.198-233) (*Baldus*, Second Am. Compl. ¶¶ 1-7 (Relief Sought)).<sup>1</sup>

Petitioners’ pleadings—both their petition here and the companion Waukesha County Circuit Court action—involve the 2002 *and* 2011 legislative boundaries. They are contrary to law, however, and should be

---

<sup>1</sup> The involuntary petitioners’ exhibits and a case timeline are bound in a separate appendix filed with this memorandum.

dismissed with prejudice. In the alternative, involuntary petitioners ask that they be dismissed from this action: they have no interest in petitioners' claims in the state judicial system. Nor does anything distinguish them—other than the fact that they have chosen a federal forum—from any other citizen in this state. They cannot be compelled to litigate here.

### PROCEDURAL SUMMARY

There are no facts in dispute. More than five months ago, involuntary petitioners filed their redistricting claims in a federal district court under 28 U.S.C. § 2284, asserting violations of the federal and state constitutions and the Voting Rights Act of 1965. Pet. Mem. at 2, 3; *see also* Ex. 2 (IP-App.4-17) (Compl.), 27 (IP-App.198-233) (Second Am. Compl.). Neither petitioners nor their counsel nor anyone else sought to participate in that action.<sup>2</sup>

More than four months ago, the state enacted a procedural redistricting statute that tried to vest exclusive jurisdiction to “challenge” the reapportionment plans with the state judicial system. *See* 2011 Wis. Act 39. Still, no one did anything.

---

<sup>2</sup> The state's eight Congressional representatives intervened on November 21, 2011.

More than three months ago, more than 486,000 people voted in nine recall elections under the 2002 judicially-drawn legislative boundaries petitioners now seek to have declared unconstitutional. Still, no one did anything.

But the three federal judges hearing the involuntary petitioners' suit have done something.

In response to the state's motion to dismiss, the federal district court expressly rejected the argument that the state courts had virtually exclusive jurisdiction. They also rejected the state's argument that the *Baldus* plaintiffs, the same "involuntary petitioners," had failed to state a claim for relief. *See* Ex. 10 (IP-App.76-83) (2011 WL5040666 (Oct. 21, 2011)).

Since then, the three-judge panel in *Baldus* has entered an expedited scheduling order, defendants have answered plaintiffs' second amended complaint, the parties have exchanged discovery requests, deposition subpoenas have been served, a trial date has been set, and the parties' experts are working on reports due in little more than a week. *See* Exs. 13

(IP-App.87-90) (Sched. Order), 27 (IP-App.198-233).<sup>3</sup> Again, until two weeks ago, petitioners and their counsel had done nothing.

Involuntary petitioners have pursued their litigation not “despite” precedent, Pet. Mem. at 2, as the petitioners contend. They have done so, rather, because the federal court’s three-judge panel explicitly permitted them to do so in the face of the state’s procedural and substantive challenges.

Whether pursuant to established law—including this Court’s own 2002 precedent, the Supremacy Clause, comity with the federal judiciary, principles of statutory construction, Wis. Stat. § 802.06, or the doctrines of laches and estoppel—or simply common sense, the Supreme Court should dismiss the petition with prejudice. This Court also should rule that the petitioners’ companion Waukesha County Circuit Court action, which now have been sent here and seeks the same relief, cannot proceed. The very procedural issues raised by the petition and in the amended complaint in Waukesha County either have been or will be decided by three federal judges in *Baldus*. The case will be tried by them in federal district court no later than February 21, 2012.

---

<sup>3</sup> The Court will find no reference in the petitioners’ pleadings to any of these developments.

If the Supreme Court does not dismiss the petition, it should dismiss “involuntary petitioners” as parties. They are citizens. They are no more indispensable to this proceeding than any other citizen of this state. And they already are parties seeking relief (although surely not that sought by petitioners) in a federal redistricting case they are prosecuting to trial.

### **STATEMENT OF THE ISSUES PRESENTED**

This Court in its November 30, 2011 order stated the issues it wished addressed, and they are addressed in this memorandum. These additional issues are presented, however, whether by the “involuntary petitioners” in their December 5 motion or by the intervening parties:

- Should the Waukesha County Circuit Court complaint, cited in this Court’s November 30, 2011 order and sent here, be consolidated and decided here with its eventual dismissal with prejudice?
- Should the “involuntary petitioners,” not properly parties under Wis. Stat. § 803.03 or any other statute, be dismissed from this matter?
- Can the petitioners unilaterally dismiss the petition without consequence?
- Was the petition improvidently filed, warranting a sanction under Wis. Stat. § 809.83, including dismissal with prejudice?

## ARGUMENT

Petitioners' memorandum devotes eight pages to the law of declaratory judgments and the standards for original jurisdiction. What it does not discuss are the undisputed facts and the undisputed status of the federal litigation, raising at the very least a question about petitioners' obligations to this Court.

**I. THE PETITION SHOULD BE DISMISSED BECAUSE A FEDERAL COURT ACTION BY INVOLUNTARY PETITIONERS HAS BEEN PENDING SINCE JUNE 2011.**

**A. The Petition And The Companion Waukesha County Circuit Court Case, If Not Dismissed, Will Unnecessarily Duplicate The Federal Court Action, Creating Uncertainty, Conflict, And Delay.**

Petitioners' memorandum asserts that "this Court has consistently taken original jurisdiction on matters related to redistricting." Pet. Mem. at 8. The last cited case was almost 50 years ago. The obvious reason for that, though unstated in the memorandum, is that in *each* of the last three decades, redistricting in Wisconsin has been decided by federal courts, not by the state legislature or state courts.<sup>4</sup>

---

<sup>4</sup> See *Baumgart v. Wendelberger*, Nos. 01-cv-121, 02-cv-366, 2002 WL 34127471 (E.D. Wis. May 30, 2002), amended by 2002 WL 34127473 (July 11, 2002) (state legislative redistricting action); *Prosser v. Elections Bd.*, 793 F. Supp. 859 (W.D. Wis. 1992); *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630 (E.D. Wis. 1982).

Also unnoted in petitioners' memorandum is this Court's denial of a remarkably similar petition in 2002. *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶ 1, 249 Wis. 2d 706, 639 N.W.2d 537 (denying leave to commence an original action, deferring to a federal court declaring legislative districts unconstitutional). It is déjà vu all over again—with the procedural posture of *Baldus* mirroring the posture of the claims in the 2002 federal court redistricting case (*Arrington v. Elections Bd.*, No. 01-C-121, 173 F. Supp. 2d 856 (E.D. Wis. 2001) (congressional redistricting)) that were the subject of the improvident *Jensen* petition. The 2002 federal litigation, not incidentally, led to the judicially-drawn districts still in use today.

In both cases, then and now, by the time a petition had been filed with this Court, a federal panel had assumed jurisdiction pursuant to 28 U.S.C. § 2284; a scheduling order established deadlines for depositions, written discovery, exchange of expert reports, and pretrial submissions; and trials were (and are) to begin in three months. Compare Ex. 13 (IP-App.87-90) with *Jensen*, 249 Wis. 2d 706, ¶¶ 13-14. The *Jensen* Court appropriately recognized that accepting a petition would result in “an

unjustifiable duplication of effort and expense, all incurred by the taxpayers of this state.” *See Jensen*, 249 Wis. 2d 706, ¶¶ 17-18.

The Supreme Court added this in 2002: “[h]ad our jurisdiction been invoked earlier, the public interest might well have been served by ... hearing and deciding this case. As it stands, it is not.” *See id.* Precisely.

The Court expressed its concern that simultaneous, separate efforts by the state and federal courts to address redistricting “would also have the substantial potential of creating uncertainty rather than resolution of the critical legal and political issues that surround redistricting.” *See id.* at ¶¶ 17-19. If this Court does not dismiss this petition with prejudice, as well as issue an order halting or dismissing the Waukesha County Circuit Court proceeding, any state proceedings will be on a collision course with the federal court adjudication occurring in less than three months.

Competing courts arriving at divergent decisions can only trigger further legal challenges. *See id.* at ¶ 21; *see also Voinovich v. Quilter*, 507 U.S. 146 (1993) (federal courts respect states’ apportionment choices unless those choices contravene federal requirements); *see also Sexson v. Servaas*, 33 F.3d 799, 803 (7th Cir. 1994) (if state apportionment violates federal law, the federal interest trumps the state interest). The effect of this

will “have serious practical and political ramifications” for the citizens of Wisconsin and their elected officials. *See Jensen* at ¶ 21. The uncertainty and the resulting conflict and delay are, however, eminently avoidable.

Now, as in 2002, petitioners’ belated serial state court actions should be dismissed by this Court for the same reasons—so that taxpayers will not be saddled with the unnecessary and duplicative expense of an improper petition that could have been filed months ago. It should be dismissed as well so that simultaneous efforts by federal and state courts do not create uncertainty, conflict, and delay.

**B. Involuntary Petitioners Have The Right To Redress In Federal Court, And They Are Exercising That Right.**

In eight closely-reasoned pages, the federal court on October 21, 2011 rejected the “state deference” arguments now made, belatedly and without explanation for their delay, in the petition. *See Ex. 10* (IP-App.77-78). The state legislature, whatever its authority, cannot pre-empt federal jurisdiction or the Supremacy Clause. The federal court in *Baldus* was not equivocal:

The Supremacy Clause of the United States Constitution makes the laws of the United States superior to the laws of the individual states. U.S. CONST. ART. VI, cl. 2. As a result, Wisconsin simply cannot strip litigants [by enacting Wis. Stat. §§ 751.035 and 801.50(4m)] of their ability to seek redress under federal statutes, in federal courts, for

violations of the federal Constitution. To do so would hold the laws of the state as superior to the laws of the United States.

The laws of the United States provide litigants with the right to bring a suit in federal court seeking redress for the violation of their civil rights under the United States Constitution. 42 U.S.C. §§ 1983, 1988. Wisconsin's law would strip the state's citizens of that federally-granted right, though, in cases where the redress being sought is related to the state's redistricting.

Thus, if Wisconsin's law were construed to bar the plaintiffs' access to the federal court, it would conflict with the law of the United States and would have to give way to the laws of the United States—the supreme laws of the land. U.S. CONST. ART. VI, cl. 2. Therefore, the 2011 Wisconsin Act 39 does not—and cannot—prevent this Court from hearing this case.

*See id.* (IP-App.80-81). The *Jensen* Court also recognized that while *Grove v. Emison*, 507 U.S. 25 (1993), reaffirmed that state institutions may be primary in redistricting, “[a]ccepting original jurisdiction [of the petition] would undermine principles of cooperative federalism and federal-state comity ....” *See Jensen*, 249 Wis. 2d 706, ¶¶ 17-18.

Involuntary petitioners filed their claims in federal court on June 10, 2011, and amended them as the redistricting plan was signed into law on August 9. There is no pending “challenge” to the 2011 plan in any state court. Neither the petition nor the Waukesha County claims “challenge” anything under Wis. Stat. § 801.50(4m), except an informal opinion by a state agency that unremarkably recites state law—specifically, the effective date of redistricting. It defies common sense for this Court to accept a

petition challenging boundaries drawn by a federal court in 2002 while a *challenge to an enacted 2011 redistricting plan* is under review in federal court. For this reason alone, and to avoid a collision with the Supremacy Clause, federal-state comity, and principles of cooperative federalism, the petition and companion circuit court case should be dismissed with prejudice.

## **II. THE PETITION CONTRAVENES ESTABLISHED STATE LAW.**

### **A. The Petition And Petitioners' Waukesha County Circuit Court Action Should Be Dismissed With Prejudice—The Challenge To 2002 Legislative Boundaries Lacks Merit On Its Face.**

Petitioners' belated request, whatever its motive, to have this Court declare the 2002 boundaries unconstitutional ignores the plain language of Act 39 and established case law. So, too, with petitioners' companion Waukesha County Circuit Court action, amended or not.

Petitioners' claims lack merit on their face because they "challenge" the respondents' application of the 2002 judicially-drawn legislative districts, *not* the boundaries established by the 2011 redistricting plan in Acts 43 and 44 or anywhere else. Rather, they seek validation of the new plan. Thus, the petition and companion case facially fail to meet the

jurisdictional requirement in section 801.50(4m) that it “challenge the apportionment of any congressional or state legislative district.”

The petitioners ask this Court to rewrite the law. In effect, petitioners assert that this Court and the Waukesha County Circuit Court should usurp the authority of the legislature and the Governor, by changing the unambiguous statutory effective date of the 2011 redistricting plan (the plan “first applies” to offices filled during the fall 2012 elections), to avoid having any further elections under the 2002 legislative boundaries.<sup>5</sup> Of course, 486,074 voters have already cast ballots in nine recall elections this summer under those same “unconstitutional” boundaries.

Petitioners attempt to cloak their claims with an air of legitimacy by declaring that involuntary petitioners also challenged the constitutionality of the 2002 boundaries in their federal case. Not so. In their amended pleadings, involuntary petitioners seek to have the newly-established boundaries in Acts 43 and 44 declared unconstitutional and invalid and seek, correctly, to ensure that any recall or special elections are conducted under the judicially-established boundaries in 2002.

---

<sup>5</sup> Section 10 of 2011 Act 43 states: “(1) This act first applies, with respect to regular elections, to offices filled at the 2012 general election. (2) This act first applies, with respect to special or recall elections, to offices filled or contested concurrently with the 2012 general election.”

Wisconsin, along with every other state, “operate[s] under the legal fiction that their plans are constitutionally apportioned throughout the decade, a presumption that is necessary to avoid constant redistricting, with accompanying costs and instability.” *See, e.g., League of United Latin American Citizens v. Perry*, 548 U.S. 399, 421 (2006); *see also Mississippi State Conf. of N.A.A.C.P. v. Barbour*, No. 11-cv-159, 2011 WL 1870222, at \*2, \*6-\*8 (S.D. Miss. May 16, 2011), *summarily aff’d*, No. 11-82, 80 U.S.L.W. 3260 (U.S. Oct. 31, 2011). Courts have necessarily recognized the need for “some lag-time between the release of census data and the reapportionment of a state’s legislative districts ... even when it results in elections based on malapportioned districts in the years that census data are released.” 2011 WL 1870222, at \*7; *see, e.g., Ramos v. Illinois*, 781 F. Supp. 1353 (N.D. Ill. 1991), *aff’d sub nom. Political Action Conference v. Daley*, 976 F.2d 335 (7th Cir. 1992).

In *Mississippi State Conf. of N.A.A.C.P.*, moreover, the court held that where a state statute provides for reapportionment after a decennial census, it may not impose an interim remedy to address subsequent population changes that allegedly render the reapportionment invalid. *See* 2011 WL 1870222, at \*6-8. Similarly, this Court should dismiss

petitioners' claims because they seek an improper interim remedy in the form of a declaration that the judicially-drawn legislative boundaries in 2002 are unconstitutional for recall elections. Article 3, section 4, of the Wisconsin Constitution permits legislative district reapportionment only after a decennial census. There is no better evidence of that than the recall elections held this summer under boundaries established in 2002.

**B. The Petition And Companion Case Should Be Dismissed Under Wis. Stat. § 802.06(2)(a)10, The First-Filed Rule And Principles Of Laches And Estoppel.**

Dismissal of the petition and the Waukesha County Circuit Court action with prejudice also is warranted under a host of common law and statutory principles. Involuntary petitioners' pending federal court action (filed on June 10, 2011) arises from the same underlying subject matter against the same defendants. Wis. Stat. § 802.06(2)(a)10 and the first-filed rule should lead to their dismissal.<sup>6</sup> The issues in *Baldus*, nominally raised in the petition (in the form of a declaratory judgment request), concern the

---

<sup>6</sup> Wis. Stat. § 802.06(2)(a)10 (2009-10) provides: "(a) Every defense, in law or fact, except the defense of improper venue, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or 3<sup>rd</sup>-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

....

10. Another action pending between the same parties for the same cause."

validity of Acts 43 and 44 and the boundaries under which recall or special elections are held. *Compare* Ex. 27 (IP-App.198-233) (Second Am. Compl. ¶¶ 1-7 (Relief Sought)) *with* Pet. ¶¶ 61-63.

To resolve these claims, this Court would have to perform the same legal analysis that the federal panel is performing now and will finally adjudicate in fewer than three months, dealing with the same parties (named or not). *See Barricade Flasher Serv., Inc. v. Wind Lake Auto Parts, Inc.*, No. 2011AP64, 2011 Wisc. App. LEXIS 863, \*1-\*3 (Ct. App. Nov. 16, 2011) (publication recommended) (affirming dismissal of lawsuit in another county based on the same facts and circumstances even though the relief sought was different and the defendant was not a defendant in the first case). Dismissal of the petition should be mandated by Wis. Stat. § 802.06(2)(a)10.

Dismissal of the petition and its companion case is also appropriate under the first-filed rule: the court that first acquires jurisdiction should retain jurisdiction. As this Court has stated:

Where two actions between the same parties, on the same subject, and to test the same rights, are brought in different courts having concurrent jurisdiction, the court which first acquires jurisdiction, its power being adequate to the administration of complete justice, retains its jurisdiction and may dispose of the whole controversy, and no court of coordinate power is at liberty to interfere with its action. This rule rests on comity and the necessity of avoiding conflict in the execution of judgments by

independent courts, and is a necessary one because any other rule would unavoidably lead to perpetual collision and be productive of most calamitous results.

*Syver v. Hahn*, 6 Wis. 2d 154, 158, 94 N.W.2d 161 (1959). The *Baldus* court affirmed its jurisdiction over involuntary petitioners' claims by rejecting the state statutory deference arguments presented to them. *See* Ex. 10 (IP-App.77-78). Involuntary petitioners' claims arise from the same facts presented here, and no one can doubt that the federal court is in a position to administer complete relief. It has done so 30 years running. To avoid potentially conflicting judgments and if only in the spirit of judicial comity, this Court should dismiss the petition and its companion case.

Petitioners also are barred by the doctrines of laches and estoppel from pursuing their claims in state court after doing nothing as litigation advanced before the federal panel. Involuntary petitioners filed their federal action on June 10, 2011. Petitioners waited more than five months from that filing, and less than three months before the trial date set by the federal court, to bring their own state court action. Involuntary petitioners have survived a motion to dismiss their federal complaint—which they have twice amended—and discovery is well underway in anticipation of a federal trial.

Laches “operates as a bar upon the right to maintain an action by those who unduly slumber upon their rights.” *Flejter v. Estate of Flejter*, 2000 WI App 26, ¶ 41, 240 Wis. 2d 401, 623 N.W.2d 552 (quoting *Likens v. Likens*, 136 Wis. 321, 327, 117 N.W. 799 (1908)). A party asserting laches must demonstrate: (1) an unreasonable delay by the party now seeking relief; (2) lack of knowledge or acquiescence by the party asserting laches that a claim for relief was forthcoming; and (3) prejudice to the party asserting laches caused by the delay. *Id.* The advanced procedural posture of the involuntary petitioners’ federal claims establishes that petitioners’ now six-month delay in seeking relief in state court is indefensible. Petitioners set forth no explanation, reasonable or otherwise, for their filing now.

What has changed since the recall elections in July and August, months ago, under the 2002 legislative boundaries? There are obvious answers to that question, answers with a political dimension. However, involuntary petitioners did not anticipate, and could not have anticipated, petitioners would file the same claims in state court more than five months after the commencement of the federal court action and more than three months after recall elections under the 2002 legislative boundaries. Finally,

involuntary petitioners will be substantially prejudiced by the delay in bringing the state court action because they will have to expend double the resources and time litigating duplicative claims in two different forums.

Equitable estoppel, another bar to petitioners' claims, can be asserted against a party whose "action or non-action . . . induces reasonable reliance" by another party "to the relying party's detriment." *Affordable Erecting, Inc. v. Neosho Trompler, Inc.*, 2006 WI 67, ¶ 33, 291 Wis. 2d 259, 715 N.W.2d 620. Petitioners' indifference or inertia in the face of the federal litigation induced reasonable reliance by the involuntary petitioners, who cannot be expected to suddenly switch forums well into their federal lawsuit and expend additional time and resources. Petitioners should be estopped from litigating their claims in this Court or in the Waukesha County Circuit Court.

**C. The Petition Was Improperly Filed In This Court And, Regardless Of Its Propriety, This Court Should Exercise Its Discretion To Dismiss The Petition And The Waukesha County Case.**

The petition has been improperly filed in this Court pursuant to Wis. Stat. §§ 801.50(4m) and 751.035. These untested provisions, the product of Act 39, purport to require that: 1) an action to challenge the apportionment of any congressional or state legislative district be filed in a county court

(§ 801.50(4m)); 2) the clerk of courts for the county where the action has been filed shall notify the clerk of the supreme court of the filing (*id.*); and 3) upon receiving notice under section 801.50(4m), the Supreme Court shall appoint a panel of three circuit court judges to hear the matter (§ 751.035).

The plain language of the provisions states that such an action must be filed in county court and the clerk of the Supreme Court must receive notice of the filing prior to appointing a three judge panel. All of this assumes, however, that an actual “challenge” under section 751.035 to the apportionment of any congressional or state legislative district has been made pursuant to the statute’s plain language. Even after petitioners realized their mistake and refiled essentially the same petition with the Waukesha County Circuit Court, their claims have no merit because they still fail to “challenge” the 2011 redistricting statute.

Even if the petition were not improperly filed, this Court has the discretion not to appoint a three-judge panel and to order its dismissal along with the companion case. While the meaning of “shall” is generally presumed to be mandatory when it appears in a statute, it must be interpreted in its broader statutory context to determine if it is mandatory or

permissive. See *State v. Stenklyft*, 2005 WI 71, ¶ 125, 281 Wis. 2d 484, 697 N.W.2d 769 (Abrahamson, C.J., Bradley, Crooks, Butler, J.J., concurring in part, dissenting in part); see also 3 Norman J. Singer and J.D. Shambie Singer, STATUTES AND STATUTORY CONSTRUCTION § 57.1 (7th ed. 2008) (“Singer”).

Constitutional principles involving the separation of powers favor permissive statutory interpretation relating to judicial actions even though these statutes may be expressed in mandatory terms.<sup>7</sup> The Wisconsin Constitution vests judicial authority with this Court and does not provide the legislature any authority to change its jurisdiction. Wis. Const. art. VII, § 2, 3. The Constitution states explicitly that this Court *may* hear original actions. *Id.* “[I]t is true that the statute before us here is phrased ‘shall be

---

<sup>7</sup> “The doctrine of separation of powers, while not explicitly set forth in the Wisconsin constitution, is implicit in the division of governmental powers among the judicial, legislative, and executive branches.... Each branch, separate but co-equal, is not subordinate to another, no branch to arrogate to itself control of the other.” *State v. Horn*, 226 Wis. 2d 637, 643, 594 N.W.2d 772 (1999). Analyzing separation of powers involving judicial power requires first determining if the power infringed is “within the judiciary’s core zone of exclusive power.” *Id.* at 645. Second, “[a]ny exercise of power by the legislature or executive branch within such an area is an unconstitutional violation of the separation of powers.” *Id.* In *Stenklyft*, 281 Wis. 2d 484, ¶ 40, the Court held that a statute violated the separation of powers doctrine when it required circuit courts to dismiss a defendant’s petition for review of a sentence if the prosecutor objected. *Id.*, ¶ 102. Judicial authority is conferred by the constitution, not the legislature, and the Court held the statute infringed on the exclusive authority of courts to provide for the impartial administration of justice. *Id.*, ¶¶ 89, 99. The Court construed the statute stating courts “shall” dismiss a petition as permissive to preserve its constitutionality. *Id.*, ¶ 125.

assessed,' but very often 'shall' in a statute is construed to mean 'may,' especially in order to avoid a constitutional doubt." *George Williams College v. Williams Bay*, 242 Wis. 311, 319 (1943) (statute proscribing special assessments of property value limited to evaluation of benefits to property to avoid constitutional question).

The drafters of section 751.035 raised doubt about its constitutionality, stating: "[p]lease be aware that this draft requires the supreme court to take certain actions. This may be in violation of the separation of powers doctrine, and may be rejected by the supreme court on those grounds." *See* Ex. 35 (IP-App.317-320) (Letter from Peggy Hurley to Senator Fitzgerald, *Drafter's Note from the Legislative Reference Bureau: LRB-2296* (July 1, 2011)). Apparently, in response, subsection (3) of § 751.035 was changed to read: "An appeal from any order issued by the [appointed] panel pursuant to sub. (1) *may* be heard by the supreme court and may not be heard by a court of appeals for any district." *See id.* (*Senate Amendment to Senate Bill 150*, LRBa1410 (July 15, 2011)). The Legislative Reference Bureau's doubt and the subsequent revision to the statute raise questions as to the constitutionality of the remainder of the statute, including subsection (1) of § 751.035, directing this Court to

appoint a three-judge panel. Accordingly, a permissive interpretation of “shall appoint” in subsection (1) of § 751.035 would avoid any constitutional doubt.

This Court also should consider the objective of the statute, the consequences that follow from alternative interpretations, and any penalty imposed for its violation. *See State ex rel. Werlein v. Elamore*, 33 Wis. 2d 288, 293, 147 N.W.2d 252 (1967) (finding permissive a statute requiring court to question mother in paternity suit, not mandatory).

The Court in *State ex rel. Werlein* said “[w]e have frequently stated that the word ‘shall’ is to be construed to mean ‘may’ where such construction is warranted by other circumstances.” 33 Wis. 2d at 294-95. Whatever the objective of sections 751.035 and 801.50(4m), the practical consequences for permissively interpreting “shall appoint” are nil: there is a matter pending in federal court that will resolve in fewer than three months the issues raised by the petition. But the ramifications of strictly construing “shall appoint” will include unnecessarily burdening taxpayers and putting the federal and state courts on a collision course.

**III. IF THE PETITION IS NOT DISMISSED WITH PREJUDICE IN ITS ENTIRETY, INVOLUNTARY PETITIONERS SHOULD BE DISMISSED BECAUSE THEY HAVE NO INTEREST IN THE ACTION.**

If, despite all of this, the Court accepts original jurisdiction or appoints a three-judge panel, involuntary petitioners have no business being parties. Petitioners provide no statutory basis for joining the involuntary petitioners because there is none. Only a party that is “necessary” to the action can be made an “involuntary plaintiff.” Wis. Stat. § 803.03(3); *see also McNally CPA's & Consultants, S.C. v. DJ Hosts, Inc.*, 2004 WI App 221, ¶ 21, 277 Wis. 2d 801, 692 N.W.2d 247.

“A party may be considered ‘necessary’ for one of three reasons set forth in Wis. Stat. § 803.03(1).” *McNally*, 2004 WI App 221, ¶ 22. None of those reasons applies here. The absence of involuntary petitioners will not prevent “complete relief” from being “accorded among those already parties,” Wis. Stat. § 803.03(1)(a), nor will it subject those “already parties . . . to a substantial risk of incurring double, multiple or otherwise inconsistent obligations,” *id.* § 803.03(1)(b)2.<sup>8</sup>

The only arguable basis for treating involuntary petitioners as necessary parties is that they may claim “an interest relating to the subject

---

<sup>8</sup> The Court will find no reference to the statute or the cases in petitioners’ materials.

of the action” and that their absence may “impair or impede [their] ability to protect that interest.” *Id.*; see § 803.03(1)(b)1. However, the interest claimed by involuntary petitioners is common to all residents of Wisconsin. In a “declaratory action to determine the validity of a statute,” only “the public officers charged with the enforcement of the challenged statute” are necessary parties. *Helgeland v. Wisconsin Municipalities*, 2008 WI 9, ¶ 140, 307 Wis. 2d 1, 745 N.W.2d 1. These “enactments commonly affect the interests of large numbers of people,” and “the valuable remedy of declaratory judgment would be rendered impractical and indeed often worthless” if “every person whose interests are affected by the statute” had to be joined. *Id.* The possibility that involuntary petitioners’ interests could be impaired is no reason to treat them as necessary parties here. They will protect their interests in federal court.

A determination of the constitutionality of Acts 43 and 44 by the U.S. District Court for the Eastern District of Wisconsin—no less than that by the Supreme Court of Wisconsin, a three-judge panel of state circuit judges or a Waukesha County Circuit Court judge—will bind petitioners, involuntary petitioners, respondents, and every one of the 5.7 million

inhabitants (and 3.2 million voters) of this state. Forcing involuntary petitioners to be parties to this action accomplishes nothing.

Involuntary petitioners filed their federal case, to vindicate their constitutional rights, in the forum of their choosing. Unless and until the federal district court suspends the case it will try in fewer than three months, involuntary petitioners have no immediate interest in this proceeding and should be released as parties.

**IV. THE PETITION AND THE WAUKESHA COUNTY CIRCUIT COURT COMPLAINTS WERE IMPROVIDENTLY FILED AND WITHOUT ANY REASONABLE BASIS.**

While the “involuntary petitioners” could move for an award of costs and fees against counsel (or the citizen petitioners themselves) under Wis. Stat. § 809.25(3)(c), Rule 809.83 and dismissal with prejudice provide the better remedy.

There was and is no basis in law or equity for the petition. There is no better evidence of that than the attempted withdrawal of the petition and the tortured and tortuous path of litigation taken by the petitioners that has

imposed significant economic costs on all of the other parties and, with the pre-holiday filing, unnecessarily burdened the Court and its support staff.<sup>9</sup>

Indeed, counsel's December 2, 2011 cover letter to the Waukesha County Circuit Court clerk, Ex. 36 (IP-App.321), abandons all of the claims save one, focusing solely on recall elections. That issue, now say the petitioners, "does not implicate a challenge to the apportionment of a state legislative district and, thus, does not trigger the procedures in Wis. Stat. §§ 751.035(1) and 801.50(4m) concerning notice to the Wisconsin Supreme Court and appointment of a three-judge panel." Yet that is precisely the basis for the petition itself and, not incidentally, one of the reasons this case should be dismissed with prejudice. *See infra* at 30-31.

The statute permitting the appointment of a panel of three state judges applies only to redistricting "challenges." Thus, petitioners' claims lack merit on their face because they challenge the *application* of the 2002 legislative districts, rather than its boundaries or those established by the 2011 redistricting plan in Acts 43 and 44. They seek to validate the new plan; they do *not* challenge it. Thus, the petition on its face fails to meet the

---

<sup>9</sup> The latest development is, of course, yesterday's substitution of petitioners' counsel with new counsel and the request for a two-week delay, which involuntary petitioners oppose.

requirement in section 801.50(4m) that it “challenge the apportionment of any congressional or state legislative district.”

The same statute, in language that lacks even a hint of ambiguity, makes the new districts applicable only for the fall 2012 elections and beyond. Section 10 of 2011 Act 43 states: “(1) This act first applies, with respect to regular elections, to offices filled at the 2012 general election.

(2) This act first applies, with respect to special or recall elections, to offices filled or contested concurrently with the 2012 general election.”

Whether or not petitioners’ own counsel were involved in drafting the statute they now challenge,<sup>10</sup> the language is unambiguous and inescapable. The Government Accountability Board could hardly have reached any other conclusion in its opinion, which the petitioners do challenge.

There remain the questions raised by the petition itself. In their 43 pages, the petition and supporting materials generally referred to the pending federal litigation a dozen times. Despite this, the petitioners’

---

<sup>10</sup> See Patrick Marley, *Law firm gave advice on elections law it is suing over*, Milwaukee Journal Sentinel (Nov. 28, 2011), <http://www.jsonline.com/news/statepolitics/law-firm-gave-advice-on-elections-law-it-is-suing-over-a936ssm-134574628.html>.

pleadings do not disclose, to this Court or to anyone else reading the pleadings, that:<sup>11</sup>

- The federal panel set a trial date and a rigorous litigation schedule.
- The federal panel denied the state's motion to dismiss and, in so doing, specifically found that one of the “involuntary petitioners” claims, in fact, stated a claim for relief.
- The federal panel specifically rejected the state's argument that the federal court had no jurisdiction in the face of the very statutes cited for exclusive state jurisdiction by the petitioners.

Petitioners' materials did not refer to this Court's decision in *Jensen*. Nor did they refer to the U.S. Supreme Court's decision in *Mississippi State Conf. of N.A.A.C.P. v. Barbour*.<sup>12</sup> Finally, as to involuntary petitioners, the petition materials cited no authority for their inclusion, and petitioners provided no notice before unilaterally naming them and their counsel.

Wisconsin Stat. § 809.83(2) permits the court to impose a penalty on a party or counsel for violation of court rules. Those penalties can include

---

<sup>11</sup> “Vigorous advocacy for a client, and candor with the court, are not inconsistent requirements of our legal system. Both characteristics are expected and honored by the court and by the public.” *Settipalli v. Settipalli*, 2005 WI App 8, ¶ 27, 278 Wis. 2d 339, 692 N.W.2d 279.

<sup>12</sup> The “ostrich-like tactic of pretending that potentially dispositive authority against a litigant’s contention does not exist is as unprofessional as it is pointless.” *Gonzalez-Servin v. Ford Motor Co.*, Nos. 11-1665, 08-2792, 2011 WL 5924441, at \*2 (7th Cir. Nov. 23, 2011) (quoting *Mannheim Video, Inc. v. County of Cook*, 884 F.2d 1043, 1047 (7th Cir. 1989) (Posner, J.)).

dismissal of the appeal, summary reversal, striking of a paper, imposition of a penalty or costs on a party or counsel, or other actions the court considers appropriate. *See Settipalli*, 278 Wis. 2d 339, ¶ 27. For a dismissal with prejudice, the party or the party's attorney must have demonstrated bad faith or egregious conduct. In appropriate circumstances, the bad faith or egregious conduct of the party's attorney may be imputed. *State v. Smythe*, 225 Wis. 2d 456, 469, 592 N.W.2d 628 (1999).

Courts have generally emphasized that dismissals with prejudice are most appropriate where, as with the petition and the Waukesha County complaint, the claims are unlikely to succeed or where there has been inexcusable neglect. *See, e.g., Wisconsin Ass'n of Nursing Homes, Inc. v. Journal Co.*, 92 Wis. 2d 709, 720-21, 285 N.W.2d 891 (Ct. App. 1979) (affirming trial court's dismissal with prejudice of the plaintiff's complaint for failure to state a claim where there was no likelihood that the plaintiff could succeed on the merits of the claim).

Subsection 2 of the statute authorizing costs and fees for frivolous appeals does not require a finding of bad faith or harassment. *See Wis. Stat. § 809.25(3)(c)2; see also In re Estate of Koenigsmark*, 119 Wis. 2d 394, 399, 351 N.W.2d 169 (Ct. App. 1984) (finding appellants' attorney

should have known that his argument was without any reasonable basis in law or equity). Nor does Rule 809.83 under certain circumstances.

There need be no subjective inquiry here because the Court need only reach the same conclusion the petitioners themselves apparently have readied. The parties and their counsel “knew, or should have known” that there was no basis for their petition for original jurisdiction or for the request to appoint a panel of three state judges under a statute that was, literally, inapplicable.

#### **CONCLUSION**

For the foregoing reasons, “involuntary petitioners” respectfully request that this Court enter an order dismissing petitioners’ claims, including those filed in the Waukesha County Circuit Court (now before this Court), with prejudice; staying any proceedings in the Waukesha County Circuit Court pending decisions by this Court; invoking Rule 809.83; and, notwithstanding any other relief provided by the Court, dismissing “involuntary petitioners” from the case.

Dated: December 6, 2011.

GODFREY & KAHN, S.C.

By: 

Douglas M. Poland  
State Bar No. 1055189  
Rebecca Kathryn Mason  
State Bar No. 1055500

P.O. ADDRESS:

One East Main Street, Suite 500  
Post Office Box 2719  
Madison, WI 53701-2719  
Phone: 608-257-3911  
Fax: 608-257-0609  
dpoland@gklaw.com

7180453\_1