STATE OF WISCONSIN
SUPREME COURT

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

Case No.

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; TRAVIS THYSSEN,

Involuntary Petitioners,

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.

MEMORANDUM IN SUPPORT OF PETITION FOR LEAVE TO COMMENCE AN ORIGINAL ACTION SEEKING DECLARATORY JUDGMENT AND OTHER RELIEF

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INTRODUCTION

Petitioners, who are all qualified electors in the State of Wisconsin, have filed with this Court a Petition For Appointment of Three Judge Panel Pursuant to Wis. Stat. §§ 751.035 and 801.50(4m) or, in the Alternative, For Leave to Commence an Original Action Seeking Declaratory Judgment and Other Relief, (hereafter the "Petition"). As set forth in the Petition, the Petitioners respectfully ask that this Court appoint a panel of three circuit court judges to resolve the issues raised therein pursuant to Wis. Stat. §§ 751.035 and 801.50(4m). In the event there is any dispute concerning the validity or applicability of that newly-enacted statutory procedure for the resolution of disputes over the apportionment of congressional or legislative districts, Petitioners ask that this Court take original jurisdiction of this matter because this Court is the most appropriate forum to resolve conflicts relating to redistricting and ensure that the right of recall set forth in Article XIII, Section 12 of the Wisconsin Constitution is given proper effect for all citizens of the State of Wisconsin.

BACKGROUND

This matter concerns the reapportionment of legislative and congressional districts in the State of Wisconsin and the validity of certain legislation which, following the 2010 federal census, has established new legislative and congressional district boundaries (the "2011 Redistricting Plan"). The Petitioners seek a declaration that the 2011 Redistricting Plan is legally valid. The Petitioners also seek a declaration that the prior 2002 court-adopted redistricting plan (the "2002 Court Plan") is unconstitutional and that the Senate and Assembly districts established by the 2002 Court Plan may not be used to conduct any elections, including special or recall elections.

The 2011 Redistricting Plan, set forth in 2011 Wisconsin Acts 43 and 44, was adopted by the State Legislature in order to account for shifts in population that have occurred since the

previous 2000 census. Those shifts in population rendered the prior Senate and Assembly districts, which were established by 2002 Court Plan, unconstitutionally malapportioned and the State Legislature acted pursuant to its duty, as set forth in Article IV, Section 3 of the Wisconsin Constitution, to "apportion and district anew" those unconstitutional districts.

The above-named Involuntary Petitioners have challenged the validity of the 2011 Redistricting Plan on constitutional and other grounds by filing an action in the Federal District Court for the Eastern District of Wisconsin, Case No. 11-cv-562. (See Petition, Exhs. A, B) The Involuntary Petitioners pursued their action in federal court despite the United States Supreme Court's clear admonition that congressional and legislative reapportionment "is primarily the duty and responsibility of the State ... rather than of a federal court." *Growe v. Emison*, 507 U.S. 25, 34 (1993). In light of the challenge to the 2011 Redistricting Plan that has been initiated by the Involuntary Petitioners, the Petitioners seek a resolution to the issues raised by that challenge in the proper state forum by the Wisconsin Supreme Court. Specifically, Petitioners seek a declaration that the 2011 Redistricting Plan is legally valid under applicable constitutional and other redistricting principles.

Following the enactment of the 2011 Redistricting Plan, the Government Accountability Board ("GAB"), which is the state agency responsible for administering the laws concerning the conduct of elections in the State of Wisconsin, issued formal guidance that any recall elections which may be initiated and held prior to the general election in November of 2012, are to be conducted in the old legislative districts established by the 2002 Court Plan. (See Petition, Exh. C) GAB issued this formal guidance despite the fact there is no dispute that the prior legislative districts are unconstitutionally malapportioned. Indeed, the Involuntary Petitioners have expressly alleged in the federal lawsuit that the prior legislative districts are unconstitutional.

GAB issued this formal guidance despite also concluding that the legislative districts established by the 2011 Redistricting Plan are effective for purposes of constituent representation.

Thus, in the event that any recall elections are conducted between now and November of 2012, many electors who are now represented by a particular State Senator in a new district established by the 2011 Redistricting Plan *will not* be able to vote in a recall election concerning that Senator. Conversely, many electors who are no longer represented by that Senator, because they reside in the Senator's old district but not within the new district, *will* be entitled to vote in a recall election concerning that Senator. This amounts to a clear violation of the constitutional provision concerning the recall of elective officers set forth in Article XIII, Section 12 of the Wisconsin Constitution. Thus, Petitioners seek a declaration from this Court that recall elections may not be conducted in unconstitutionally malapportioned districts and that such elections may only be conducted in the districts established by the 2011 Redistricting Plan, which incumbent legislators now represent. The importance of this issue cannot be understated; on November 15, 2011, recall efforts were begun in four State Senate Districts.

JURISDICTION AND STANDING

Earlier this year, the State Legislature created Wis. Stat. §§ 751.035 and 801.50(4m), which collectively provide for the appointment of a panel of three circuit court judges by the Supreme Court in actions involving a challenge to the apportionment of any congressional or legislative district. Because the Petitioners challenge the apportionment of the legislative districts created by the 2002 Court Plan, the proper venue for the Petition is a three-judge panel to be appointed by this Court. The appointment of a three-judge panel is appropriate for the additional reason that the Involuntary Petitioners have challenged the apportionment of the legislative and congressional districts created by the 2011 Redistricting Plan.

Pursuant to Article VII, Section 3 of the Wisconsin Constitution, this Court "may hear original actions and proceedings." Wisconsin's Uniform Declaratory Judgments Act provides that "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Wis. Stat. § 806.04(1). The Declaratory Judgments Act further provides that "[a]ny person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity" arising pursuant to the statute. Wis. Stat. § 806.04(2). Such declaration "may be either affirmative or negative in form and effect" and "shall have the force and effect of a final judgment or decree." Wis. Stat. § 806.04(1). Significantly, the act is remedial in nature and "its purpose is to settle and to afford relief from uncertainty and insecurity." Wis. Stat. § 806.04(12). As such, the Declaratory Judgments Act "is to be liberally construed and administered." *Id.* In short, "[i]n order to have standing to bring an action for declaratory judgment, a party must have a personal stake in the outcome and must be directly affected by the issues in controversy." *Lake Country Racquet & Athletic Club, Inc. v. Village of Hartland*, 2002 WI App 301, ¶ 15, 259 Wis. 2d 107, 655 N.W.2d 189.

Petitioners clearly meet the standards articulated above and have a personal stake in the resolution of any controversy surrounding the 2011 Redistricting Plan. Petitioners are Wisconsin residents whose fundamental constitutional rights – namely the right to an equal voice within our political system and the right of recall protected by the Wisconsin Constitution – will be abridged in the event any further recall or special elections are conducted within the legislative districts created pursuant to the 2002 Court Plan. As more fully explained below, at a minimum such elections would be conducted in constitutionally malapportioned districts. Worse still, thousands of qualified electors will be denied the right to vote for their respective state senators,

while thousands more qualified electors will be subjected to the results of elections that include votes cast by unqualified electors. This imminent threat of widespread disenfranchisement is well beyond a "trifling" injury.

Petitioners also have standing to bring this action based on their status as members of the Wisconsin electorate whose constitutional rights have been put in jeopardy by the determination of the GAB that any recall elections held prior to November 2012 will be conducted in the legislative districts established by the 2002 Court Plan, despite the fact that incumbent senators currently represent the respective legislative districts established by the 2011 Redistricting Plan. "The law of standing in Wisconsin is construed liberally, and even an injury to a trifling interest may suffice. *McConkey v. Van Hollen*, 2010 WI 57, ¶ 15, 326 Wis. 2d. 1, 783 N.W.2d 855 (quoting *Fox v. DHSS*, 112 Wis. 2d 514, 524, 334 N.W.2d 532 (1983)). "Unlike in federal courts, which can only hear 'cases' or 'controversies,' standing in Wisconsin is not a matter of jurisdiction, but of sound judicial policy." *Id.* (citing *Zehetner v. Chrysler Fin. Co.*, 2004 WI App 80, ¶ 12, 272 Wis. 2d 628, 679 N.W.2d 919).

LEGAL ARGUMENT

The issues presented in the Petition fall squarely within this Court's original jurisdiction. Therefore, the Petition may be recast as a petition for original action and granted. Regardless of the label attached to it, the Petition presents issues that should be resolved by this Court in the first instance.

I. THE INVOLUNTARY PETITIONERS' CHALLENGE TO THE 2011 REDISTRICTING PLAN SHOULD BE RESOLVED BY A STATE, NOT FEDERAL, COURT.

The State Constitution vests the primary responsibility to redistrict legislative boundaries every ten years on the State Legislature. Wis. Const. art. IV, § 3; U.S. Const. art. I, § 2. The United State Supreme Court has clearly held that state legislatures and state judiciaries are to

have the primary responsibilities concerning redistricting. *Scott v. Germano*, 381 U.S. 407 (1965) (*per curiam*); *Growe v. Emison*, 507 U.S. 25, 34 (1993) ("'We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.'") (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)). The United States Supreme Court in *Growe* admonished inferior federal courts to respect the states' rights to establish their own legislative boundaries – by the legislature and then the state judiciary. "In the reapportionment context, the [U.S. Supreme] 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 that highly political task itself." *Growe*, 507 U.S. at 33 (emphasis in original).

II. THE PROPER VENUE FOR THE ISSUES RAISED IN THE PETITION IS A THREE-JUDGE PANEL TO BE APPOINTED BY THIS COURT.

In recognition of the state's primary role in the redistricting process, the Wisconsin Legislature has established a procedure for the review of disputes regarding redistricting. Pursuant to the newly enacted Wis. Stat. §§ 751.035 and 801.50(4m), the Wisconsin Supreme Court "shall appoint a panel consisting of 3 circuit court judges" to hear challenges to the apportionment of any Congressional or legislative district. This statute was enacted to address the precise situation presented in the Petition, and, as such, this Court should appoint a three-judge panel in order to resolve any issues of constitutional validity relating to the 2011 Redistricting Plan. Pursuant to this newly-enacted statute, an appeal from a decision of the three-judge panel would be taken directly to this Court.

Petitioners recognize that the proper procedure applicable to this case is the one prescribed in Wis. Stat. §§ 751.035 and 801.50(4m). However, in the event there is any dispute concerning the validity of this statutory procedure or its applicability to this action, Petitioners

contend that the matters raised in its Petition are of such immediate state wide importance that this Court should proceed to address such matters in the first instance.

III. IN THE ALTERNATIVE, THIS COURT SHOULD DECIDE THE ISSUES RAISED IN THE PETITION AS AN EXERCISE OF THIS COURT'S ORIGINAL JURISDICTION.

A. Matters Of Redistricting Are Matters Of Statewide Significance Which Satisfy The Court's Original Action Criteria.

The standards this Court applies to an original action petition are well established. "The supreme court limits its exercise of original jurisdiction to exceptional cases in which a judgment by the court significantly affects the community at large." *Wisconsin Professional Police Ass'n, Inc. v. Lightbourn*, 2001 WI 59, ¶ 4, 243 Wis. 2d 512, 627 N.W.2d 807; *State ex rel. LaFollette v. Stitt*, 114 Wis. 2d 358, 362-63, 338 N.W.2d 684 (1983) ("We granted the petition to commence an original action because this matter is *publici juris* and requires a prompt and authoritative determination by this court in the first instance."). As further guidance, the Court's Internal Operating Procedures ("IOP") note that "[t]he criteria for the granting of a petition to commence an original action are a matter of case law." Wisconsin Supreme Court, IOP § II(B)(3) (citing *Petition of Heil*).[1]

The Court's opinion in *Heil* supplies no less than eight examples of appropriate matters of original jurisdiction while conceding, as well, that other cases may also fall within the criteria. *Petition of Heil,* 230 Wis. 428, 440, 284 N.W. 42 (1939) (noting that the list was not intended to be exclusive). As the *Heil* Court concluded, original jurisdiction is appropriate in certain matters "because of their public importance or because of this importance in combination with circumstances creating an exigency making the remedy in the circuit court inadequate." *Id.* at

[1] The Statutes set out four specific elements to be addressed in a petition requesting original jurisdiction; (Wis. Stat. § 809.70(1) (a-d) (Petition should include issues, facts, relief and reasons)) and the Petition here addresses each of those elements.

442 (internal citations omitted). The present case easily satisfies this standard. The Petition presents two fundamental constitutional issues that require this Court to exercise its original jurisdiction. First, the Petition seeks to determine the constitutionality of the 2011 Redistricting Plan in the face of a federal court action challenging its validity. Second, the Petition addresses the GAB's determinations concerning the applicability of the 2002 Court Plan and the 2011 Redistricting Plan that results in the wholesale disenfranchisement of thousands of Wisconsin citizens in violation of the right to recall enumerated in Article XIII, Section 12 of the Wisconsin Constitution.

B. This Court Has Exercised Original Jurisdiction On Matters Of Redistricting In The Past.

Applying the principles articulated in *Heil* and its progeny, this Court has consistently taken original jurisdiction on matters related to redistricting. *See State ex rel Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551 (1964); *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953); *State ex rel. Bowman v. Dammann*, 209 Wis. 21, 23, 243 N.W. 481 (1932); *State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 51 N.W. 724 (1892). In *Cunningham*, the Court explained the rationale for exercising original jurisdiction in redistricting as follows:

> But, again, this apportionment act violates and destroys one of the highest and most sacred rights and privileges of the people of this state, guaranteed to them by the ordinance of 1787 and the constitution, and that is "*equal* representation in the legislature." This also is a matter of the highest public interest and concern to give this court jurisdiction in this case. If the remedy for these great public wrongs cannot be found in this court it exists nowhere.

Cunningham, 81 Wis. at 483. As this Court observed some years later "the power of this court to review the constitutionality of a legislative reapportionment must be taken as settled by the cases of *State ex rel. Attorney General v. Cunningham*." *State ex rel. Bowman*, 209 Wis. at 23.

Redistricting matters are a matter of the highest public concern and have a significant effect on "the community at large." *Lightbourn*, 2001 WI 59, ¶ 4. Accordingly, redistricting matters clearly fall within the category of "exceptional cases" requiring this Court to exercise original jurisdiction.

The United States Supreme Court has also unequivocally acknowledged that the states, through their courts, are the most appropriate forum for addressing redistricting. As the court noted, congressional and legislative reapportionment "is primarily the duty and responsibility of the State ... rather than of a federal court." *Growe v. Emison*, 507 U.S. 25, 34 (1993). Indeed, "[t]he power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." *Scott v. Germano*, 381 U.S. 407, 409 (1965) (citations omitted); *see also Growe*, 507 U.S. at 34 ("[T]he doctrine of *Germano* prefers both state branches [legislative and judicial] to federal courts as agents of apportionment").

C. The Petition Presents Matters Of Constitutional Concern Affecting The Fundamental Rights Of Every Citizen Of The State Of Wisconsin.

Following the enactment of the 2011 Redistricting Plan, the GAB, which is the state agency responsible for administering the laws concerning the conduct of elections in the State of Wisconsin, issued guidance that any recall elections which may be called prior to the general election in November of 2012, are to be conducted in the old legislative districts established by the 2002 Court Plan. (See Petition, Exh. C) GAB issued this guidance despite the fact there is no dispute that the prior legislative districts are unconstitutionally malapportioned and despite also concluding that the legislative districts established by the 2011 Redistricting Plan are effective for purposes of constituent representation. (*Id.*)

GAB's guidance creates two Constitutional issues of fundamental importance to the electorate. First, GAB has concluded that any recall or special elections taking place before the November 2012 General Election will be conducted using the old legislative districts. However, the old legislative districts have been superseded by the 2011 Redistricting Plan. In any event, the legislative districts in existence prior to the 2011 Redistricting Plan are unconstitutionally malapportioned as evidenced by data gathered during the 2010 Federal Census. Indeed, the Involuntary Petitioners have expressly alleged in the federal lawsuit, and there is no dispute, that the prior legislative districts are unconstitutional. Accordingly, any election conducted using the previous legislative districts "violates constitutional provisions," and satisfies the *Heil* criteria for original jurisdiction. *Heil*, 230 Wis. at 440.

There is no legal doubt that this Court considers malapportioned legislative districts to be "a violation of state constitutional rights." *Reynolds*, 22 Wis. 2d at 552. *See also Cunningham*, 81 Wis. at 483 (holding that state constitutional guarantee of equal representation in the legislature is violated by malapportioned legislative districts). If GAB does, indeed, conduct a recall, special, or any election within the old legislative districts, it would be doing so within districts that are unconstitutionally malapportioned in violation of the Constitutional rights of the Petitioners and other citizens of Wisconsin.

Further, in the event that any recall elections are called between now and November 2012, many electors who are now represented by a particular State Senator in a new district will not be able to vote in a recall election concerning that Senator. Conversely, many electors who are no longer represented by that Senator, because they reside in the Senator's old district, will be entitled to vote in a recall election. This represents a clear violation of the constitutional provision concerning the recall of elective officers set forth in Article XIII, Section 12 of the

Wisconsin Constitution. Article XIII, Section 12(7) of the Wisconsin Constitution specifically provides that "no law shall be enacted to hamper, restrict, or impair the right of recall." Here, any election conducted pursuant to GAB's guidance will deprive a significant number of Wisconsin residents the right of recall in direct violation of provisions the Wisconsin Constitution.

Without question, the constitutional issues outlined above impact every citizen of this State by denying them the system of government to which they are entitled under our constitution. The violation of this fundamental tenet of the American system of government cannot be countenanced even in the short term. This Court has exercised jurisdiction numerous times when such fundamental constitutional questions are presented. *See, e.g., Gard v. State Elections Bd.*, 156 Wis. 2d 28, 35, 456 N.W.2d 809 (1990) (First Amendment challenge to campaign finance laws); *Norquist v. Zeuske*, 211 Wis. 2d 241, 244-46, 564 N.W.2d 748 (1997) (Uniformity Clause challenge to the freeze on agricultural property taxes); *Libertarian Party v. State*, 199 Wis. 2d 790, 564 N.W.2d 424 (1996) (multiple constitutional challenges to the Stadium Act); *State ex rel. Thompson v. Jackson*, 199 Wis. 2d 714, 720, 546 N.W.2d 140 (1996) (Establishment Clause challenge to Milwaukee Parental Choice Program); *City of Hartford v. Kirley*, 172 Wis. 2d 191, 195, 493 N.W.2d 45 (1992) (challenge to TIF districts as unconstitutional public debt). This situation is akin to those listed above and is equally deserving of this Court's original jurisdiction.

CONCLUSION

Pursuant to Wis. Stat. §§ 751.035 and 801.50(4m), this Court should appoint a panel of three circuit court judges to resolve the issues raised in this matter. Under those statutes, an appeal from the decision of that panel would be taken directly to this Court. However, in the event that a dispute arises concerning the applicability or validity of the procedures set forth in

that newly-enacted statute, Petitioners respectfully ask that this Court exercise its constitutional authority to accept this case as an original action and resolve this matter as expeditiously as possible.

Dated this 21st day of November, 2011.

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