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# Supreme Court of Wisconsin

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September 22, 2021

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You are hereby notified that the Court has entered the following order:

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No. 2021AP1450-OA Johnson v. Wisconsin Elections Commission

On August 23, 2021, petitioners Billie Johnson, et al., four Wisconsin voters who claim that the results of the 2020 census show that Wisconsin's congressional and state legislative districts——including the voters' districts——are malapportioned and no longer meet the requirements of the Wisconsin Constitution, filed a petition for leave to commence an original action under Wis. Stat. § (Rule) 809.70, together with a supporting memorandum. The petitioners ask, inter alia, that we assume original jurisdiction, then "stay this matter until the Legislature has adopted a new apportionment plan" or if the legislative process fails, that this court adopt a new apportionment plan.

On September 3, 2021, the named respondents, Wisconsin Elections Commission, et al., filed a response, opposing the petition, arguing primarily that existing original jurisdiction

procedures cannot accommodate the fact-finding intensive requirements of this case and noting that there are two cases pending in federal district court that raise similar claims.[1]

On September 7, 2021, the court received motions for leave to file a non-party brief/amicus curiae from: (1) the Wisconsin Legislature; (2) Congressmen Glenn Grothman, Mike Gallagher, Brian Steil, Tom Tiffany, and Scott Fitzgerald; (3) Attorney Daniel R. Suhr; (4) Lisa Hunter, et al. (plaintiffs in Hunter v. Bostelmann, No. 21-CV-512 (W.D. Wis. Aug. 13, 2021)); and (5) Black Leaders Organizing for Communities, et al. (plaintiffs in Black Leaders Organizing for Communities v. Spindell, No. 21-CV-534 (W.D. Wis. Aug. 23, 2021)). By order dated September 8, 2021, the court granted each of these motions. The non-party briefs and their appendices, if any, were accepted for filing.

This court has long deemed redistricting challenges a proper subject for the court's exercise of its original jurisdiction. See, e.g., Jensen v. Wisconsin Elections Board, 2002 WI 13, ¶17, 249 Wis. 2d 706, 639 N.W.2d 537 (2002) ("there is no question" that redistricting actions warrant "this court's original jurisdiction; any reapportionment or redistricting case is, by definition, *publici juris*, implicating the sovereign rights of the people of this state."); State ex rel. Reynolds v. Zimmerman, 22 Wis. 2d 544, 557, 126 N.W.2d 551 (1964) (observing that reapportionment "is vital to the functioning of our government").

We are mindful that judicial relief becomes appropriate in reapportionment cases *only* when a legislature fails to reapportion according to constitutional requisites in a timely fashion after having had an adequate opportunity to do so. See e.g., Zimmerman, 22 Wis. 2d at 570. We cannot emphasize strongly enough that our Constitution places primary responsibility for the apportionment of Wisconsin legislative districts on the legislature. See Wis. Const. art. IV §§ 3, 4. Redistricting plans must be approved by a majority of both the Senate and Assembly, and are subject to gubernatorial veto. Id.; Wis. Const., art. V, § 10; Zimmerman, 22 Wis. 2d at 558 (recognizing that the legislature must present redistricting legislation to the governor for approval or veto under the Wisconsin Constitution's Presentment Clause; both the governor and the legislature are indispensable parts of the legislative process).

As the respondents observed, the petitioners do not say how long this court should give the Legislature and the Governor to accomplish their constitutional responsibilities before the court would need to embark on the task the petitioners have asked of us in order to ensure its timely completion. We would benefit from the parties' input on this issue, and we would benefit from the input of amici and prospective intervenors on the issue as well. Accordingly,

IT IS ORDERED that the petition for leave to commence an original action is granted;

[1] Hunter v. Bostelmann, No. 21-CV-512 (W.D. Wis. Aug. 13, 2021) and Black Leaders Organizing for Communities v. Spindell, No. 21-CV-534 (W.D. Wis. Aug. 23, 2021).

IT IS FURTHER ORDERED that any prospective intervenor must file a motion to intervene together with a supporting memorandum addressing the requirements of Wis. Stat. § (Rule) 809.09 no later than 4:00 p.m. on October 6, 2021;

IT IS FURTHER ORDERED that the parties, amici, and proposed intervenors may each file a single response to the collective motions to intervene no later than 12:00 p.m. on October 13, 2021, provided that amici who seek to intervene may file only a single response to the proposed intervention motions, which shall be filed in their capacity as amici. Each response shall not exceed 15 pages if a monospaced font is used or 3,300 words if a proportional serif font is used;

IT IS FURTHER ORDERED that the parties and prospective intervenors are each directed to submit simultaneous letter briefs no later than 4:00 p.m. on October 6, 2021, addressing the following question:

> When (identify a specific date) must a new redistricting plan be in place, and what key factors were considered to identify this date?

Amici may, but are not required to file a response to this question. The simultaneous letter briefs shall not exceed 15 pages if a monospaced font is used or 3,300 words if a proportional serif font is used;

IT IS FURTHER ORDERED that the parties, each amicus, and each proposed intervenor may file a single response to the letter briefs addressing timing, which shall not exceed 15 pages if a monospaced font is used or 3,300 words if a proportional serif font is used, by no later than 12:00 p.m. on October 13, 2021;

IT IS FURTHER ORDERED that if the court determines that additional briefing or a reply will assist the court, it will request additional briefing; given the time sensitive nature of this action, unsolicited briefing and requests for briefing extensions will be disfavored;

IT IS FURTHER ORDERED that all filings in this matter shall be filed as an attachment in pdf format to an email addressed to clerk@wicourts.gov. See Wis. Stat. §§ 809.14, 809.80, and 809.81. A paper original and 10 copies of each filed document must be received by the clerk of this court by 4:00 p.m. of the business day following submission by email, with the document bearing the following notation on the top of the first page: "This document was previously filed via email."

We deem the petitioners' other requests to be premature. We decline to formally declare, at the onset, that a new apportionment plan is needed. While the parties and amici generally concur that this is true, we have, as yet, an inadequate record before us upon which to make such a pronouncement. We also decline to stay this action at this time and we deny the petitioners' request that we enjoin the respondents "from administering any election for Congressional, State or Assembly seats" until a new plan is in place. To the extent this order does not address other requests for relief contained in the petition, we take no action on those requests at this time.

REBECCA GRASSL BRADLEY, J. (*concurring).* Nearly 150 years ago, shortly after statehood, this court declared, "the purpose of the constitution was: 'To make this court indeed a supreme judicial tribunal over the whole state; . . . a court of first resort on all judicial questions affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people.'" Petition of Heil, 230 Wis. 428, 436, 284 N.W. 42 (1938) (per curiam) (quoting Attorney Gen. v. Chicago & N.W. Ry., 35 Wis. 425, 518 (1874)) (emphasis added). More recently, in 2002, we unanimously declared in Jensen v. WEC, "[i]t is an established constitutional principle in our federal system that congressional reapportionment and state legislative redistricting are primarily state, not federal prerogatives." 2002 WI 13, ¶5, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam) (denying petition for leave to commence an original action) (citations omitted) (emphasis added). The United States Supreme Court agrees: "[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." Growe v. Emison, 507 U.S. 25, 34 (1993) (citing U.S. Const. art. I, § 2)).

Consistent with the Constitution, "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 that highly political task itself." Id. at 33; see also id. at 34 (quoting Chapman v. Meier, 420 U.S. 1, 27 (1975)) ("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 a federal court."). "Absent evidence that these state branches will fail to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." Id. at 34; see also Scott v. Germano, 381 U.S. 407, 409 (1965) (internal citations omitted) ("The 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. The case is remanded with directions that the District Court enter an order fixing a reasonable time within which the appropriate agencies of the State of Illinois, including its Supreme Court, may validly redistrict the Illinois State Senate[.]").

Spurning this longstanding precedent, including the United States Supreme Court's clear directive that states are primarily responsible for redistricting, with federal courts standing by only as a last resort, Growe, 507 U.S. at 33, Justice Rebecca Frank Dallet insists this case belongs in federal court. It doesn't. The petitioners are Wisconsin voters who allege they live in malapportioned districts. Following our unequivocal statement in Jensen that "congressional reapportionment and state legislative redistricting are primarily state, not federal prerogatives," they filed this case against the Wisconsin Elections Commission (WEC) and its commissioners in their official capacity, expressly relying on Article IV of the Wisconsin Constitution. It is primarily the duty of this court, not any federal court, to resolve such redistricting disputes.

Although this court has punted its responsibilities to the federal courts in the past, we have previously exercised our original jurisdiction to hear redistricting cases, and we have implemented a judicially-created redistricting plan when the political branches have reached an impasse. State ex rel. Reynolds v. Zimmerman, 23 Wis. 2d 606, 128 N.W.2d 16 (1964) (per curiam). See

generally Michael Gallagher, Joseph Kreye & Staci Duros, Redistricting in Wisconsin 2020, at 20 (2020), https://docs.legis.wisconsin.gov/misc/lrb/wisconsin_elections_project/redistricting_wisconsin_2020_1_2.pdf ("Prior to the 1960s, redistricting disputes in Wisconsin were typically filed with the state supreme court under that court's original jurisdiction. . . . [I]n pre-1960s redistricting cycles, the Wisconsin Supreme Court would entertain challenges to existing redistricting laws, and occasionally invalidate redistricting plans it found unconstitutional."). Justice Dallet must misunderstand the gist of our decision in Jensen if she actually believes it stands for the proposition that this court should abandon Wisconsin's sovereign prerogative to implement redistricting plans to federal courts. As Justice Ann Walsh Bradley characterized Jensen during a 2009 administrative conference concerning whether this court should establish rules to handle redistricting petitions: "I start with [what] the unanimous court said, in the Jensen case, noting the established constitutional principle that redistricting is primarily a state, not federal prerogative. That's what a unanimous court said. . . . I think that was correct then, and I think it is correct now. . . . I see this as a matter of doing your job."[2]

While in Jensen we denied a petition for original action requesting this court to consider redistricting claims, our decision was driven by the timing of the petition, which was filed on January 7, 2002. Jensen, 249 Wis. 2d 709, ¶1. By the time we denied the petition, analogous federal litigation had been ongoing for more than a year. Id., ¶13. The federal litigation was "well along[.]" Id. We were concerned about disrupting Wisconsin's upcoming elections but reaffirmed the long-established principle that this court should decide any disputes related to redistricting:

> There is no question but that this matter warrants this court's original jurisdiction; any reapportionment or redistricting case is, by definition, publici juris, implicating the sovereign rights of the people of this state. See Petition of Heil, 230 Wis. 428, 443, 284 N.W. 42 (1939). The people of this state have a strong interest in a redistricting map drawn by an institution of state government—ideally and most properly, the legislature, secondarily, this court. Growe unequivocally reaffirmed that the principles of federalism and comity establish the institutions of state government—legislative and judicial—as primary in matters of reapportionment and redistricting. Had our jurisdiction been invoked earlier, the public interest might well have been served by our hearing and deciding this case. As it stands, it is not.

Id., ¶17 (emphasis added). Justice Dallet does not acknowledge this key factual distinction between this petition and the one in Jensen. As then-Chief Justice Shirley Abrahamson explained: "[I]n Jensen, we said 'no' for the reasons set forth, but it wasn't a jurisdictional matter. It was a discretionary matter based on the facts and circumstances."[3] None of the facts or circumstances

[2] Supreme Court Open Administrative Conference, at 39:36 (Jan. 22, 2009) (statement of Ann Walsh Bradley, J.) (emphasis added), https://wiseye.org/2009/01/22/supreme-court-open-administrative-conference-3/.

[3] Id. at 1:03:03 (statement of Shirley S. Abrahamson, C.J.).

inducing denial of the Jensen petition warrant leaving our responsibilities to the federal courts this time. The two federal cases were filed just a few weeks ago, and they are far from "well along."

Justice Dallet criticizes the petitioners for bringing this dispute "prematurely" and "inject[ing] the court into the political process[.]" By contrast, in rejecting an original action filed against the WEC last year, she—along with a majority of this court—faulted the petitioner for nothing more than a negligible delay, speculating it would disrupt the election. Hawkins v. WEC, 2020 WI 75, ¶5, 393 Wis. 2d 629, 948 N.W.2d 877 (per curiam) (denying petition for leave to commence an original action) ("Although we do not render any decision on whether the respondents have proven that the doctrine of laches applies under these circumstances, having considered all of the parties' filings, we conclude the petitioners delayed in seeking relief in a situation with a very short deadline and that under the circumstances, including the fact that the fall 2020 general election has essentially begun, it is too late to grant petitioners any form of relief that would be feasible and not cause confusion and undue damage to both the Wisconsin electors who want to vote and the other candidates in all of the various races on the general election ballot."); id., ¶86 (Rebecca Grassl Bradley, J., dissenting from denial of petition for leave to commence an original action) ("The majority pretends the court lacks 'sufficient time to complete our review and award any effective relief.' What nonsense. Wisconsin law unquestionably requires that Mr. Hawkins and Ms. Walker appear on the ballot.").

A federal court just rejected the argument that Justice Dallet embraces in this case. Two similar lawsuits were filed in federal court and recently consolidated.[4] Just last week, the federal court denied a motion by the Wisconsin Legislature to dismiss the case for lack of ripeness. It wrote:

> The Legislature . . . says that the . . . plaintiffs' injuries are purely speculative because the legislative redistricting process has not yet had a chance to fail. Dkt. 9-2. In making these arguments the Legislature relies heavily on Growe v. Emison, a case in which the [United States] Supreme Court held that a federal three-judge panel had erred in not deferring to the Minnesota courts' redistricting efforts and by enjoining the state courts from implementing their own plans. 507 U.S. 25, 37 (1993) ("What occurred here was not a last-minute federal court rescue of the Minnesota electoral process, but a race to beat the [state courts'] Special Redistricting Panel to the finish line."). . . .
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> This court understands the state government's primacy in redistricting its legislative and congressional maps. . . . But the Growe Court did not conclude that the federal case was unripe . . . . And this panel is not impeding or superseding any concurrent state redistricting process, steps that that [sic] might run afoul of Growe.
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> . . . .

[4] Black Leaders Organization for Communities v. Spindell, No. 21-CV-534 (W.D. Wis. Aug. 23, 2021); Hunter v. Bostelmann, No. 21-CV-512 (W.D. Wis. Aug. 13, 2021).

> These parties argue that the panel should forestall from any action until the state court system hears the case. But there is yet no indication that the state courts will entertain redistricting in the face of an impasse between the legislature and governor. . . . The court and the parties must prepare now to resolve the redistricting dispute, should the state fail to establish new maps in time for the 2022 election.

Hunter v. Bostelmann, Nos. 21-CV-512 & 21-CV-534, slip op., at 6–8 (W.D. Wis. Sept. 16, 2021). By granting this petition, we now inform the federal court that we "will entertain redistricting in the face of an impasse between the legislature and governor[,]" recognizing, as the federal court does, that both this "court and the parties must prepare now to resolve the redistricting dispute" in order to ensure resolution "in time for the 2022 election." If instead we chose to sit idly by, the federal courts would logically interpret our inaction as a sign that we would not act should the political branches reach an impasse.[5] As a matter of comity,[6] we owe the federal courts an answer on how we plan to proceed, and we furnish that answer by granting this petition.

Justice Dallet argues federal courts have "done this [redistricting] three times" but since 1964, "we have never done it." This court, however, resolved redistricting challenges on numerous occasions before 1964.[7] Even if we had not, Justice Dallet's rationale offers flimsy support for her

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[5] Justice Dallet asserts "by granting the petition now, the court fails to give space for the legislature to fulfill its constitutional duties." The legislature itself apparently disagrees, having filed an amicus brief in support of the petition. It contends the plaintiffs in the federal cases "raced to the federal courthouse. . . . These [federal] cases threaten to usurp the State's primacy in redistricting. . . . To protect the State's constitutional prerogative in redistricting and to prevent federal interference, the Court should exercise original jurisdiction over this action." Legislature's Amicus Br. at 6–7.

[6] Comity, Garner's Dictionary of Legal Usage (3d ed. 2011) ("comity = courtesy among political entities (as nations or courts of different jurisdictions)[.]").

[7] Michael Gallagher, Joseph Kreye & Staci Duros, Redistricting in Wisconsin 2020, at 40–54 (2020), https://docs.legis.wisconsin.gov/misc/lrb/wisconsin_elections_project/redistricting_wisconsin_2020_1_2.pdf (discussing several redistricting cases in which this court exercised its original jurisdiction: (1) State ex rel. Attorney General v. Cunningham, 81 Wis. 440, 51 N.W. 724 (1892); (2) State ex rel. Lamb v. Cunningham, 83 Wis. 90, 53 N.W. 35 (1892); (3) State ex rel. Bowman v. Dammann, 209 Wis. 21, 243 N.W. 481 (1932); (4) State ex rel. Broughton v. Zimmerman, 261 Wis. 398, 52 N.W.2d 903 (1952); (5) State ex rel. Reynolds v. Zimmerman, 22 Wis. 2d 544, 126 N.W.2d 551 (1964); (6) State ex rel. Reynolds v. Zimmerman, 23 Wis. 2d 606, 128 N.W.2d 16 (1964) (per curiam)); see also Supreme Court Open Administrative Conference, supra note 1, at 41:56 (statement of Ann Walsh Bradley, J.) ("I look at our history since 1920, and in 1920 the districts were reapportioned by the legislature. In the 1930s, it went into state court. [Bowman]. In the 1940s, it again went into state court. [Martin v. Zimmerman, 249 Wis. 101, 23 N.W.2d 610 (1946) (denying petition for leave to commence original action)] . . . . In the 50s, it

conclusion to deny this petition—it is a self-fulfilling prophecy. We should not abrogate our duty now just because we have done so in the past.

Justice Dallet is convinced the issues presented in the petition will require substantial factual development. Perhaps, although she seems to be making some assumptions about ultimate remedies, which is putting "the cart before the horse[.]" Wis. Voter Alliance v. WEC, No. 2020AP1930-OA, unpublished dispositional order, at 4 (Roggensack, C.J., dissenting from denial of petition for leave to commence an original action). "We grant petitions to exercise our jurisdiction based on whether the legal issues presented are of state wide concern, not based on the remedies requested." Id. (citing Heil, 230 Wis. 428). The respondents suggest that if we decide to implement a judicially-created redistricting plan, we will have to start from scratch—a position Justice Dallet seems to accept. While that may be one option, federal courts often start with the existing plan and use it "as a template[.]" Baumgart v. Wendelberger, No. 01-C-0121, 2002 WL 34127471, at *7 (E.D. Wis. May 30, 2002); see also Hippert v. Ritchie, 813 N.W.2d 374, 380 (Minn. Spec. Redistricting Panel 2012) (quoting LaComb v. Growe, 541 F. Supp. 145, 151 (D. Minn. 1982)) ("Because courts engaged in redistricting lack the authority to make the political decisions that the Legislature and the Governor can make through their enactment of redistricting legislation, the panel utilizes a least-change strategy where feasible.").

Justice Dallet may be confusing a one person, one vote claim with a partisan gerrymandering claim, which the United States Supreme Court has declared nonjusticiable in the federal courts. "[T]he one-person, one-vote rule is relatively easy to administer as a matter of math. The same cannot be said of partisan gerrymandering claims, because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly." Rucho v. Common Cause, 139 S. Ct. 2484, 2501 (2019). For this reason, among others, the United States Supreme Court has

> concluded that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions. "[J]udicial action must be governed by standard, by rule," and must be "principled, rational, and based upon reasoned distinctions' found in the Constitution or laws. Judicial review of partisan gerrymandering does not meet those basic requirements."

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went into state court in [Broughton], and a couple of other cases in the 50s. In the 60s, it went into both the federal and state court in [Wisconsin v. Zimmerman, 205 F. Supp. 673 (W.D. Wis. 1962)] and [Reynolds]. In the 70s, after the 1970 census, the reapportionment legislation was not challenged. 1971 law, chapter 304. 1980s it went into the federal court in [AFL-CIO v. Elections Board, 543 F. Supp. 630 (1982)] . . . . In the 90s it went into the federal court, and again we know [Jensen v. WEC, 2002 WI 13, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam) (denying petition for leave to commence an original action)] in the 2000s it went into . . . federal court and state court.").

Id. at 2506–07 (quoting Vieth v. Jubelirer, 541 U.S. 267, 278, 279 (2004) (plurality opinion)).

Nevertheless, the court may use existing mechanisms should Justice Dallet's concern become reality. See State ex rel. Ozanne v. Fitzgerald, 2011 WI 43, ¶148, 334 Wis. 2d 70, 798 N.W.2d 436 (Crooks, J., concurring/dissenting) (quotations omitted) ("There are mechanisms which have been utilized, such as appointment of a special master, perhaps a reserve judge, to conduct fact-finding under the continued jurisdiction/supervision of this court."). "[W]hen the legal issue that we wish to address requires it, we have taken cases that do require factual development, referring any necessary factual determinations to a referee or to a circuit court." Wis. Voter Alliance, No. 2020AP1930-OA, at 4 (Roggensack, C.J., dissenting from denial of petition for leave to commence an original action) (citations omitted). Justice Dallet does not explain why these mechanisms do not present viable options, should the need arise for fact-finding.

Next, Justice Dallet misinterprets our statutes by asserting we are "circumvent[ing] the statutory process for addressing redistricting challenges." Wisconsin Stat. § 801.50(4m) (2019–20) provides:

> Venue of an action to challenge the apportionment of any congressional or state legislative district shall be as provided in s. 751.035. Not more than 5 days after an action to challenge the apportionment of a congressional or state legislative district is filed, the clerk of courts for the county where the action is filed shall notify the clerk of the supreme court of the filing.

(Emphasis added). This statute governs only a case filed in the circuit court, not an original action filed in this court. Wisconsin Stat. § 751.035 provides:

> Upon receiving notice under s. 801.50 (4m), the supreme court shall appoint a panel consisting of 3 circuit court judges to hear the matter. The supreme court shall choose one judge from each of 3 circuits and shall assign one of the circuits as the venue for all hearings and filings in the matter.

Collectively, these statutes prevent a single judge in a single county from deciding—at least in the first instance—important redistricting questions of statewide importance. They have no bearing on the present petition.

More fundamentally, Justice Dallet misunderstands the nature of our original jurisdiction. She inaccurately asserts "the legislature has established a specific process for resolving redistricting claims, and we should not allow the parties to ignore it" while also acknowledging "nothing necessarily prevent[s] us from granting" this petition. The Wisconsin Constitution establishes our original jurisdiction. Article VI, § 3(2) states, "[t]he supreme court . . . may hear original actions and proceedings." This grant of original jurisdiction has been described as

"extraordinarily broad"[8] and "practically unlimited in scope."[9] In contrast, Article VII, § 5(3), which established the court of appeals' subject matter jurisdiction, provides: "The appeals court shall have such appellate jurisdiction in the district, including jurisdiction to review administrative proceedings, as the legislature may provide by law[.]" (Emphasis added). The text of our constitution is clear: "No statute . . . can circumscribe the constitutional jurisdiction of the Wisconsin Supreme Court to hear this (or any) case as an original action. 'The Wisconsin Constitution IS the law—and it reigns supreme over any statute.'" Trump v. Evers, No. 2020AP1971-OA, unpublished dispositional order, at 5–6 (Wis. Dec. 3, 2020) (Rebecca Grassl Bradley, J., dissenting from denial of petition for leave to commence an original action) (quoting Wisconsin Legis. v. Palm, 2020 WI 42, ¶67 n.3, 391 Wis. 2d 497, 942 N.W.2d 900 (Rebecca Grassl Bradley, J., concurring)); see also Skylar Reese Croy, As I See It: Examining the Supreme Court's Original Jurisdiction, Wis. Law. July-Aug. 2021, at 30, 32, https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=94&Issue=7&ArticleID=28514 ("Several sources support the proposition that the Wisconsin Supreme Court's original jurisdiction cannot be limited by statute.").

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This court remains mindful of the political nature of redistricting, the responsibility for which rests with the people's elected representatives in the legislature. In Jensen, we explained:

> [R]edistricting remains an inherently political and legislative—not judicial—task. Courts called upon to perform redistricting are, of course, judicially legislating, that is, writing the law rather than interpreting it, which is not their usual—and usually not their proper—role. Redistricting determines the political landscape for the ensuing decade and thus public policy for years beyond. The framers in their wisdom entrusted this decennial exercise to the legislative branch because the give-and-take of the legislative process, involving as it does representatives elected by the people to make precisely these sorts of political and policy decisions, is preferable to any other.

Jensen, 249 Wis. 2d 706, ¶10. However, we have also recognized that "[t]he Wisconsin Constitution sets forth standards for redistricting" and "there is no reason for Wisconsin citizens to have to rely upon the federal courts for the indirect protection of their state constitutional rights." Id., ¶¶6, 8 (quoted source omitted). Because "this court is the final arbiter of questions arising under the Wisconsin Constitution" it must "stand ready to carry out its responsibility to

[8] Skylar Reese Croy, As I See It: Examining the Supreme Court's Original Jurisdiction, Wis. Law. July-Aug. 2021, at 30, 31, https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=94&Issue=7&ArticleID=28514.

[9] Jay E. Grenig, 1 Wisconsin Pleading and Practice Forms § 2:34 (2020).

faithfully adjudicate any such questions in appropriate circumstances, should that become necessary." Id., ¶25 (citation omitted).

Since Jensen, and after this court declined in 2009 to establish procedures for resolving redistricting actions, the United States Supreme Court removed political questions—such as partisan gerrymander claims—from federal judicial review, denying federal judges any "license to reallocate political power between the two major political parties[.]" Rucho, 139 S. Ct. at 2507. This circumscription of the judicial role in redistricting challenges to the interpretation and application of law should alleviate any concerns about the courts exercising anything but judicial power in these matters.[10]

In a perfect world, the political branches—not the judiciary—would implement a redistricting plan after every decennial census. Our precedent says the legislature can enact a redistricting plan only if the plan is subject to presentment. State ex rel. Reynolds v. Zimmerman, 22 Wis. 2d 544, 559, 126 N.W.2d 551 (1964); see State ex rel. Broughton v. Zimmerman, 261 Wis. 398, 407–08, 52 N.W. 93 (1952), overruled in part by Reynolds, 22 Wis. 2d 544 ("The power and duty imposed upon the legislature by the constitution to reapportion the state after each federal census can only be exercised by both the houses of the legislature passing a bill that becomes a law upon the signature of the governor, or, if the governor should veto it, upon repassage by the required vote over his veto, and publication."); see also State ex rel. Cunningham v. Attorney General, 81 Wis. 440, 506, 51 N.W. 724 (1892) (Pinney, J., concurring) ("[B]y an unbroken usage extending from the organization of the state, more than 40 years ago, . . . [the power of apportioning and redistricting] has been used and exercised as a legislative power executed in the form of a law, approved by the governor, and published in the General Laws."). In a state with a history of divided government, our precedent has created a constitutional conundrum.

Under the United States Constitution, states are effectively required to redistrict after every decennial census to comply with a principle commonly called "one person, one vote."[11] Similarly,

[10] Justice Dallet cites League of Women Voters v. Pennsylvania, 178 A.3d 737 (Pa. 2018) for the proposition that "claims of partisan gerrymandering are cognizable under the Pennsylvania Constitution[.]" Why this matters is unclear. Additionally, she fails to mention that the Pennsylvania Constitution contains a Free and Equal Elections Clause; no analogous provision exists in the Wisconsin Constitution. This clause states: "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Pa. Const. art. I, § 5. In League of Women Voters, the Pennsylvania Supreme Court held partisan gerrymandering claims were justiciable under that particular provision. 178 A.3d at 813–14. The court went so far as to note that claims under the Fourteenth Amendment's Equal Protection Clause are "distinct" and "remain subject to entirely separate jurisprudential considerations." Id. at 813.

[11] Article I, § 2 of the United States Constitution requires members of the House of Representatives to be chosen "by the People of the several states." The United States Supreme Court has construed this section to mean "that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's." Wesberry v. Sims, 376 U.S. 1, 7–8

Article IV, Section 3 of the Wisconsin Constitution states: "At its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants." Applying our precedent to redistricting disputes arising during a time of divided government, the political branches can quickly reach an impasse if the legislature passes a redistricting plan and the governor vetoes it. Courts then face a choice: On one hand, the court can avoid the "political thicket"[12] by refusing to do anything. This course of action prevents the judiciary from exercising powers vested in the political branches but it has a remarkable drawback: It allows inequality in the political process to go unchecked. As Justice Ann Walsh Bradley has explained, "[a]lthough . . . separation of powers is a cornerstone of our democracy, so is equal representation."[13] Alternatively, courts can enter the thicket.

Since the 1890s, this court has often chosen the latter course. In State ex rel. Attorney General v. Cunningham, we stated, while discussing restrictions on the legislature's redistricting power:

> The right of the people to make their own laws through their own representatives, so fundamental in and essential to free government, the convention sought to guard by these restrictions. That most dangerous doctrine, that these and other restrictions upon the power of the legislature are merely declaratory, and not mandatory, should not be encouraged even to the degree of discussing the question. The convention, in making a constitution, had a higher duty to perform than to give the legislature advice.

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(1964). Under the Fourteenth Amendment's Equal Protection Clause, the Court has articulated a similar requirement for state legislative districts. Reynolds v. Sims, 377 U.S. 533, 577 (1964) ("By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."); see also Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656, 674–75 (1964) (holding even state senate districts must comply with one person, one vote).

[12] Colegrove v. Green, 328 U.S. 549, 556 (1946) (plurality opinion), abrogation recognized by Evenwel v. Abbott, 577 U.S. 937 (2016) ("Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress. The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action.").

[13] Supreme Court Open Administrative Conference, supra note 1, at 40:50 (statement of Ann Walsh Bradley, J.).

81 Wis. at 485 (majority opinion) (emphasis added). We concluded, "the restrictions on the power of the legislature to make apportionment, found in sections 3, 4, and 5 of article 4 of the constitution are mandatory and imperative, not subject to legislative discretion." Id. at 486 (emphasis added). We also emphasized "the judicial power to declare . . . [an] apportionment act unconstitutional, and to set it aside as absolutely void[.]" Id. It remains the province of the judiciary to declare, in cases presented to us, the constitutional obligations of (and limitations on) the other branches of government.

In Wisconsin's modern history, redistricting has primarily fallen to the judiciary. In Jensen we noted, "in the four decades since Baker v. Carr . . . and Reynolds v. Sims . . . the matter of redistricting has been resolved by the legislature without court involvement exactly once, in 1972." 249 Wis. 2d 706, ¶7. We have a history of letting federal courts handle these matters, perhaps because it removes us from the thicket of political conflicts. Our job, however, is not to avoid controversy but to declare the law. See State v. Hermman, 2015 WI 84, ¶156, 364 Wis. 2d 336, 867 N.W.2d 772 (Ziegler, J., concurring) (quoting John G. Roberts, Chief Justice, U.S. Supreme Court, 2011 Year–End Report on the Federal Judiciary, at 9 (Dec. 31, 2011), http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf)). After all, "[o]ur fundamental role is to pass on the constitutionality [of laws]."[14]

"Elections are the foundation of American government and their integrity is of such monumental importance that any threat to their validity should trigger not only our concern but our prompt action." Trump, No. 2020AP1971-OA, at 5 (Rebecca Grassl Bradley, J., dissenting from denial of petition for leave to commence an original action) (quoted source omitted). Redistricting ensures fair elections by preserving constitutionally-guaranteed equal representation for the people. See James Wilson Lectures on Law (1791), in 2 Collected Works of James Wilson 837 (2007) ("[A]ll elections ought to be equal. Elections are equal, when a given number of citizens, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state. In this manner, the proportion of representatives and of constituents will remain invariably the same."). It is beyond question that "the court has the power to declare a legislative plan constitutional or unconstitutional. The court has the power, . . . on a legal finding of unconstitutionality, to draw lines and exercise its constitutional function of equal representation."[15] Fundamentally, this court has a duty to resolve redistricting disputes; doing so does not threaten the separation of powers nor does it risk a concentration of power in the judicial branch:

> [T]he courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a

[14] Id. at 45:32 (statement of Ann Walsh Bradley, J.).

[15] Id. at 1:42:23 (statement of Shirley S. Abrahamson, C.J.).

> fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.

The Federalist No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed. 1961). While some may wish to "let this cup pass" this is "our job . . . . Let's do our job."[16] For all of these reasons, I concur with the court's decision to grant this petition.

REBECCA FRANK DALLET, J. (*dissenting*). As is often the case with original-jurisdiction petitions, the question is not whether we can grant the petition but whether we should. After the political process has an opportunity to play out, we may need to get involved in redistricting. But now is not the time and this petition is not the way. The majority's order prematurely injects the court into the political process, risks undermining the court's independence, and circumvents the statutory process for addressing redistricting challenges. The court should therefore deny the petition. I dissent.

There are good reasons for the court to avoid inserting itself into the redistricting process at all. Under the Wisconsin Constitution, it is the legislature's duty, not the court's, to pass a redistricting plan after each national census.[17] See, e.g., Wis. Const. arts. IV, VII; see also James Madison, The Federalist No. 47 (1788) (explaining the heightened threat to citizens' liberty when the judiciary acts as the legislature). Indeed, avoiding usurping the legislature's role is an important reason the court has stayed out of previous redistricting battles. See Jensen v. Wis. Elections Bd., 2002 WI 13, ¶10, 249 Wis. 2d 706, 639 N.W.2d 537 ("Courts called upon to perform redistricting are, of course, judicially legislating, that is, writing the law rather than interpreting it, which is not their usual—and usually not their proper—role." (emphasis omitted)). As Chief Justice Ziegler and Justice Roggensack have noted, should the court take control of the redistricting process, the court would impermissibly transform itself into a "super-legislature"[18] by "insert[ing itself] into the actual lawmaking function."[19] See also, e.g., id., ¶10 ("The framers in their wisdom entrusted this decennial exercise [of redistricting] to the legislative branch because the give-and-take of the legislative process, involving as it does representatives elected by the people to make precisely these sorts of political and policy decisions, is preferable to any other.").

Redistricting is, in other words, an inherently political and partisan endeavor. Yet the court must strive to be apolitical—or at least nonpartisan. Both current and former members of the court have explained that it "would be a mistake" to "immerse[ the court] in the partisan political

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[16] Id. at 45:36 (statement of Ann Walsh Bradley, J.) (emphasis added).

[17] "At its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants." Wis. Cont. art. IV, § 3.

[18] https://wiseye.org/2009/01/22/supreme-court-open-administrative-conference-3/.

[19] Id.

process"[20] of redistricting because doing so "is totally inconsistent with our jobs as [a] nonpartisan judiciary."[21] Those apt observations ring even truer today given Wisconsin's hyper-partisan politics.

That said, there are times when a court must become involved in redistricting. If the legislature fails to fulfill its constitutional duty by either enacting no new district maps or enacting unconstitutional maps, then the voters may turn to the courts to vindicate the right to vote in equally populated districts that are "convenient [and] contiguous" and "as compact . . . as practicable". See Wis. Const. art. IV, §§ 2-5; Jensen, 249 Wis. 2d 706, ¶¶7–11. Here, the legislature has not even proposed, let alone enacted, new district maps. The political process has not failed; it has barely started. The majority recognizes as much, explaining that the court should involve itself in redistricting only after the legislature has had an "adequate opportunity" to act. Yet by granting the petition now, the court fails to give space for the legislature to fulfill its constitutional duties.[22] We should let this political process play out in the political branches.

Of course, if the political process fails, then courts have a role to play. Either state or federal courts may hear redistricting challenges, although there are some such challenges that only a state court can hear. For instance, while the federal courts have held that partisan gerrymandering claims are nonjusticiable under the federal constitution, Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019), it is up to state courts to determine whether the same is true under their state constitutions. See id. at 2507; see also League of Women Voters v. Pennsylvania, 178 A.3d 737, 814, 821 (Pa. 2018) (holding that claims of partisan gerrymandering are cognizable under the Pennsylvania Constitution and striking down the state's Congressional map on that basis). We have never addressed whether partisan gerrymandering may violate the Wisconsin Constitution, and, so far, no party has raised such a claim here.

For other redistricting claims, there are several reasons why it is best for the federal courts to handle them, particularly when they involve federal law. First, since the United States Supreme Court revolutionized the law on redistricting in Reynolds v. Sims, 377 U.S. 533 (1964), the federal

[20] Id. (Justice Gableman).

[21] Id. (Justice Roggensack).

[22] The legislature made these same points in arguing for the dismissal of a redistricting action in federal court, pointing out that such litigation is "wildly premature" because the legislature's process is barely underway. See Hunter v. Bostelmann, No. 3:21-cv-512-jdp-ajs-eec (W.D. Wis. Aug. 17, 2021), ECF No. 9-3, at 6–7.

courts have "done this [redistricting] three times."[23] See Baumgart v. Wendelberger, No. 01-C-0121, 2002 WL 34127471 (E.D. Wis. May 30, 2002); Prosser v. Elections Bd., 793 F. Supp. 859 (E.D. Wis. 1992); Wis. State AFL-CIO v. Elections Bd., 543 F. Supp. 630 (E.D. Wis. 1982). Post-Reynolds, we have never done it. The last time we drew district maps was in May 1964, before Reynolds was decided. See State ex rel. Reynolds v. Zimmerman, 23 Wis. 2d 606 (1964). Second, the federal courts have experience with the unique complexities of federal Voting Rights Act claims, the resolution of which is "integral to the drawing of statewide maps." See, e.g., Hunter v. Bostelmann, No. 3:21-cv-00512-jdp-ajs-eec (W.D. Wis. Sept. 16, 2021), ECF No. 60, at 5. We have no such experience. Third, unlike this court, the federal courts are made up of judges serving lifetime appointments, so they are "not . . . apt to be seen as partisans when they do the job of redistricting."[24] Finally, the federal courts will likely have the last word anyway. Whatever plan the legislature or this court adopts, it will be subject to challenge in a separate action filed in federal court and appealable to the United States Supreme Court. See Jensen, 249 Wis. 2d 706, ¶16. Thus, any new district maps will be final only after the completion of both direct and collateral review in federal courts, raising the specter of further uncertainty and delay. See id. ("At best, such a scenario would delay and disrupt the [upcoming] election season . . . .").

Despite all of the reasons for preferring a federal forum, this court has chosen to step in via our original jurisdiction. But the legislature has established a specific process for resolving redistricting claims, and we should not allow the parties to ignore it. Following the last round of redistricting, the legislature enacted Wis. Stat. §§ 751.035 and 801.50(4m). See 2011 Wis. Act 39, §§ 28, 29. Under those statutes, a party may file a challenge to legislative or congressional apportionment in the circuit court. The circuit court must notify this court of that filing, at which point we are required to appoint a panel of three circuit court judges to hear the case. Parties may appeal the panel's decisions to this court, but not to the court of appeals. § 751.035(3). This process mirrors the federal one, under which redistricting challenges are typically heard by a three-judge district court, whose decisions are appealable only to the United States Supreme Court. See generally 28 U.S.C. §§ 1253, 2284. The process under §§ 751.035 and 801.50(4m), like the well-tested federal process, thus ensures swift appellate review of the panel's work while delegating to trial judges traditional trial-court tasks, such as motion practice and fact finding.

There is little doubt that substantial motion practice and extensive fact finding will be necessary in a case like this one. Both federal law and the Wisconsin Constitution require that any court-ordered redistricting plans account for many competing interests, among them are:

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[23] https://wiseye.org/2009/01/22/supreme-court-open-administrative-conference-3/ (Chief Justice Ziegler). In 2008, Justice Prosser promised to vote "every time" against granting an original action related to redistricting. See https://wiseye.org/2008/04/08/supreme-court-rules-hearing-and-open-administrative-conference-part-3-of-4/. Instead, he would "let [the parties] go to the federal court." Id.

[24] https://wiseye.org/2009/01/22/supreme-court-open-administrative-conference-3/ (Justice Roggensack).

- minimizing district changes (sometimes called "core retention");
- population equality;
- "compactness";
- maintaining traditional communities of interest;
- avoiding splitting municipal or ward boundaries;
- compliance with the federal Voting Rights Act; and
- minimizing so-called "disenfranchisement," which occurs when voters are shifted from odd- to even-numbered senate districts, thus temporarily depriving them of a vote for a state senator.

See, e.g., Baumgart, 2002 WL 34127471, at *3. The list makes clear that, while the one-person-one-vote principle may be "relatively easy to administer as a matter of math," see Rucho, 139 S. Ct. at 2501, it gets much more complicated after that. "Population equality" is but one of the myriad fact-intensive and often countervailing factors courts must balance. Not to mention that "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." See Prosser, 793 F. Supp. at 863. Courts must therefore balance the population-equality factor against many others, a task that requires extensive fact finding and consideration of experts' and other witnesses' testimony. Simply put, it requires a trial court, which we are "obviously not." See Jensen, 249 Wis. 2d 706, ¶20 (adding that "our current original jurisdiction procedures would have to substantially modified in order to accommodate the requirements" of redistricting litigation).

We need only look to the last court-ordered redistricting of Wisconsin to appreciate the arduous task the court likely faces. There, a three-judge district court considered sixteen plans suggested by a variety of parties. See Baumgart, 2002 WL 34127471, at *4–7. It ultimately adopted none of them because each had "unredeemable flaws." See id. at *6. The federal court had to create its own plan, which "involved some subjective choices," such as deciding "which communities to exclude from overpopulated districts and to include in underpopulated districts." Id. at *7. In doing so, the court relied on the parties' affidavits, expert testimony, and testimony at a multi-day trial in which the parties "vigorously" disputed several factual questions. See id. at *4, *7. In the end, the court spelled out—in a discussion spanning more than twenty pages and delving down to the ward level—the precise districts across the entire state. See id. at *8–31.

Baumgart demonstrates that courts addressing redistricting challenges inevitably face myriad factual questions, questions we are ill equipped to handle as a court of last resort. See Jensen, 249 Wis. 2d 706, ¶20. This court's proper role—to resolve complex legal issues involving undisputed facts—is accounted for in Wis. Stat. §§ 751.035 and 801.50(4m), which reserve fact-finding for the circuit court and appellate review for this court. The majority offers no rationale for ignoring this workable process.

The majority's resort to Jensen fails to justify exercising our original jurisdiction here. Indeed, Jensen counsels squarely against it, seeing as there are two ongoing consolidated federal redistricting cases. Just last week, the three-judge district court declined to dismiss those cases.

See Hunter, No. 3:21-cv-512-jdp-ajs-eec (W.D. Wis. Sept. 16, 2021), ECF No. 60, at 9. Moving forward, the court suggested that although it may impose a "limited stay" to let the state process run its course, it would also set a "schedule that will allow for the timely resolution of the case should the state process languish or fail." Id. at 8. Our adding this original action to the mix "put[s] this case and any redistricting map it would produce on a collision course" with the pending federal cases," risking further uncertainty for both voters and candidates in the 2022 elections. See Jensen, 249 Wis. 2d 706, ¶16. Although we acknowledged in Jensen that redistricting challenges likely meet our criteria for original jurisdiction, see id., ¶17, that was nine years before the legislature enacted Wis. Stat. §§ 751.035 and 801.50(4m). Moreover, whether this petition meets our original-jurisdiction criteria is beside the point. Again, the question is not whether we can take the case but whether we should.

We have been in this situation before. Just last term, we denied then-President Trump's original action petition challenging the recount of the presidential election results because Wis. Stat. § 9.01(11) requires candidates to file such challenges in the circuit court. See Trump v. Evers, No. 2020AP1971-OA, order (Wis. Dec. 3, 2020). As in this case, nothing necessarily prevented us from granting Trump's petition, but we rightly decided that when the legislature establishes a process for specific actions, we should follow that process. See id. (Hagedorn, J., concurring). There is no reason to chart a different course now.

The majority's order charts no course whatsoever. It drops the court into the redistricting wilderness without even a compass. The order sets forth no plan for how seven Justices with no experience in drawing district maps should go about this Herculean task while simultaneously attending to the rest of the court's docket. Although I trust my colleagues as jurists, I do not share their confidence that we can simultaneously be legislators, cartographers, and mathematicians. Acting as if we can is bad for the court and worse for the people of Wisconsin. Redistricting is a difficult process when it involves only two branches of government. The majority now prematurely, inappropriately, and recklessly involves the third.

For all of these reasons, the court should deny the petition. I dissent.

I am authorized to state that Justices ANN WALSH BRADLEY and JILL J. KAROFSKY join this dissent.

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