To: Jonathan Cervas, Ph.D.; Bernard Grofman, Ph.D.; Justine Kawa, J.D. Candidate

From: Scott Matsuda

Date: 8/3/2023

Case Briefing **[WISCONSIN – Legislative Maps]**

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| **Citation** | * Petition to the Supreme Court of Wisconsin to Take Jurisdiction of an Original Action, *Clarke v. Wisconsin Elections Comm’n*, No. 2023AP001399 (Wis. Aug. 2, 2023). |
| **Parties** | * Petitioners   + Rebecca Clarke, Ruben Anthony, Terry Dawson, Dana Glasstein, Ann Groves-Lloyd, Carl Hujet, Jerry Iverson, Tia Johnson, Angie Kirst, Selika Lawton, Fabian Maldonado, Annemarie McClellan, James McNett, Brittany Muriello, Ela Joosten (Pari) Schils, Nathaniel Slack, Mary Smith-Johnson, Denise (Dee) Sweet, and Gabrielle Young. * Respondents   + Wisconsin Elections Commission (WEC); Don Millis, Robert F. Spindell, Jr., Mark L. Thomsen, Ann S. Jacobs, Marge Bostelmann, and Joseph J. Czarnezki, **in their official capacities as members of the WEC**;   + Meagan Wolfe, **in her official capacity as the Administrator of the WEC**; and   + Senator André Jacque, Senator Tim Carpenter, Senator Rob Hutton, Senator Chris Larson, Senator Devin LeMahieu, Senator Stephen L. Nass, Senator John Jagler, Senator Mark Spreitzer, Senator Howard L. Marklein, Senator Rachael Cabral-Guevara, Senator Van H. Wanggaard, Senator Jesse L. James, Senator Romaine Robert Quinn, Senator Dianne H. Hesselbein, Senator Cory Tomczyk, Senator Jeff Smith, and Senator Chris Kapenga, **in their official capacities as members of the Wisconsin Senate**. |
| **Judicial Breakdown / Partisan or Nonpartisan** | * N/a.[[1]](#footnote-1) |
| **Procedural History** | * The Wisconsin Supreme Court granted a petition for original action in *Johnson v. Wisconsin Elections Commission*, No. 2021AP1450-OA (“*Johnson I*”), seeking: (1) an injunction against the then-extant 2011 legislative and congressional plans as unconstitutionally malapportioned; and (2) entry of a mandatory injunction imposing a remedial plan that made undefined “least changes” to the defunct, malapportioned plan.   + By a 4-3 vote, the Court announced it would follow a “least-changes” approach in imposing a remedy, but no majority agreed on a definition of “least changes.” * Following submissions by various parties, the Court voted 4-3 to impose the legislative plans proposed by Governor Evers because they moved the fewest number of people to new districts—a metric called “core retention.” *See Johnson v. Wisconsin Elections Comm’n*, 971 N.W.2d 402 (“*Johnson II*”). * The U.S. Supreme Court reversed the Court’s order in *Johnson II*, holding that it had conducted an insufficient analysis of whether an additional Black majority assembly district was required under the Voting Rights Act in Milwaukee. *See Wisconsin Legislature v. Wisconsin Elections Comm’n*, 142 S. Ct. 1245, 1251 (2022). * On remand, by another 4-3 vote, the Court imposed the Legislature’s proposed remedy—the identical SB 621 maps that the Governor had vetoed—as the remedial plan, because the Legislature’s counsel indicated the map had been drawn without consideration of race. *See Johnson III.* |
| **Disposition** | * N/a. |
| **Facts** | * On 11/12/2021, the Legislature passed 2021 SB 621 to reapportion WI’s legislative districts following receipt of the 2020 Census data. * On 11/18/2021, Governor Evers (D) vetoed that legislation. |
| **Issue(s) or**  **Question(s)**  **Presented** | * Whether the state legislative redistricting plans proposed by the Legislature and imposed by the Wisconsin Supreme Court in *Johnson v. Wisconsin Elections Comm’n*, 972 N.W.2d 559 (“*Johnson III*”):   + (1) Are extreme partisan gerrymanders that:     - (a) violate Article I, § 1 of the Wisconsin Constitution’s guarantee of equal protection under law;     - (b) retaliate against voters based on their viewpoint and exercise of free speech and abridge the ability of voters with disfavored political views to associate with others to advance their political beliefs in violation of Article I, §§ 3 and 4 of the Wisconsin Constitution;     - (c) fail to “adhere[] to justice, moderation, temperance, frugality, and virtue, ... [and] fundamental principles” in violation of Article I, § 22 of the Wisconsin Constitution; and     - (d) are justiciable in Wisconsin courts.   + (2) Violate the requirement of Article IV, §§ 4 and 5 of the Wisconsin Constitution that legislators be elected from districts consisting of “contiguous territory.”   + (3) Violate the separation-of powers principle inherent in the Constitution’s division of legislative, executive, and judicial power by usurping the Governor’s core constitutional power to veto legislation and the Legislature’s core constitutional power to override such a veto. |
| **The Rule(s)** | * Wis. Const. art. I, § 1 (**equal protection under law**).   + “All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.” * Wis. Const. art. I, § 3 (**freedom of speech**).   + “Every person may freely speak, write and publish his sentiments on all subjects….and no laws shall be passed to restrain or abridge the liberty of speech or of the press.” * Wis. Const. art. I, § 4 (**freedom of association**).   + “The right of the people to peaceably assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged.” * Wis. Const. art. I, § 22 (**equal treatment under the law**).   + “The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles.”   + Protects the right to equal treatment under the law, as well as extreme and unreasonable legislative action. * Wis. Const. art. IV, § 4 (**assembly districts -- contiguousness**).   + States that assembly districts must be “bounded by county, precinct, town or ward lines [and] consist of contiguous territory.” * Wis. Const. art. IV, § 5 (**senate districts -- contiguousness**).   + States that senate districts must be “single districts of convenient contiguous territory.” * Separation-of powers principles; generally. |
| **Holding(s)** | * N/a. |
| **Rationale** | * N/a. |
| **Arguments of Parties** | **Petitioners’ Arguments:**   * The SB 621 maps are extreme partisan gerrymanders.   + First, the “least-changes” approach reflected in SB 621 amounted to a “gerrylaunder.”[[2]](#footnote-2)     - “The 2011 map was enacted using a ‘sharply partisan methodology’ by a legislature no longer in power [in 2021] and a governor whom the voters have since rejected.”     - The drafters of the plan in 2011 implemented a singular goal of maximizing and entrenching the power of Republican voters for an entire decade and diminishing the ability of Democratic voters to translate their votes into representation.     - The drafters’ analyses showed that Republicans would retain control of the Legislature regardless of any likely electoral scenario, ensuring that Republicans would retain majority control of the Assembly with less than 47% of the statewide vote, whereas Democrats could not gain majority control with anything less than 54% of the statewide vote.       * That is, voting would no longer matter—the partisan control of each house of the Legislature would remain consistent regardless of fluctuations in the electorate’s preferences.       * Since 2012, even when Democrats have won as much as 53% of the statewide vote, they have held no more than 39 of the 99 assembly seats.         + In the same period, even when Republicans have won as little as 44.8% of the statewide vote, they have held no fewer than 60 of the 99 assembly seats.   + Second, the Legislature exacerbated the partisan gerrymander with SB 621—the plan vetoed by the Governor and nevertheless imposed by this Court.     - It reduced by two (from 37 to 35) the number of assembly districts carried by President Biden (who won the 2020 election in Wisconsin) and converted districts that only leaned Republican by the end of the last decade to more safely Republican seats.     - These machinations cannot be explained by any “least-change” rationale, as they were unnecessary to balance population and frequently were counterproductive to balancing population.     - Across the state, the Legislature made changes that contravened a goal of population balance in order to target Democratic voters and to prevent them from achieving success at the ballot box in competitive seats.     - By every metric, Wisconsin’s legislative plans score among the most—if not the most—skewed in the nation. * The SB 621 districts do not consist of “contiguous territory” as required by the Wisconsin Constitution.   + In *Johnson I*, this Court assumed, without any analysis of the plain text or original meaning of the Constitution’s contiguity requirement, that districts could be noncontiguous so as to include “municipal islands” created as a result of annexations—a phenomenon that developed a century after the Constitution was written.     - This conflicts with this Court’s consistent adherence to the plain meaning of “contiguous territory” from the earliest days of statehood.       * This Court first interpreted the term “contiguous territory” in 1880, when it held that several orders of the Board of Supervisors of Oconto County, which attached to the Town of Oconto “lands separated and detached, and not contiguous to the main body of lands in said town,” violated the constitutional requirement that towns must be composed of “contiguous territory.”       * The first interpretation of the term “contiguous territory” in the redistricting context came in *State ex rel. Lamb v. Cunningham*, where this Court, interpreting Article IV, Section 4, held that it “requires that each assembly district must consist of contiguous territory; that is to say it cannot be made up of two or more pieces of detached territory.”         + More recently, this Court interpreted the term “contiguous territory” when used in a statutory context to have the same meaning. (*See* pp.30-31).       * The Legislature has likewise previously understood the Constitution to require actual contiguity.   + The current assembly and senate districts violate this plain text constitutional requirement.     - Remarkably, 55 of the current assembly districts, each consisting of between 2 and 40 disconnected pieces of territory, are noncontiguous.     - And 21 of the current senate districts, each consisting of between 2 and 34 disconnected pieces of territory, are noncontiguous.     - Over two-thirds of Wisconsinites reside in either noncontiguous senate or assembly districts. * **Count One:** The Current State Assembly and Senate Maps Are Partisan Gerrymanders in Violation of the Wisconsin Constitution’s Equal Protection Guarantee Article I, § 1.   + The current maps violate Article I, § 1 of the Wisconsin Constitution because they have the purpose and effect of depriving a disfavored class of Wisconsin voters of an equal opportunity to elect state legislative representatives.   + [T]hey arbitrarily classify voters based on partisan affiliation and target the disfavored class of voters for negative differential treatment compared to other similarly situated Wisconsinites.   + Heightened scrutiny applies because the current maps implicate Petitioners’ fundamental right to vote … and create impermissible and suspect classifications.     - Respondents lack a compelling, or even reasonable, justification for the adverse differential treatment of Petitioners in the current state legislative maps. * **Count Two:** The Current State Assembly and Senate Maps Are Partisan Gerrymanders in Violation of the Wisconsin Constitution’s Free Speech and Association Guarantees Article I, Sections 3 and 4.   + The current legislative maps violate Petitioners’ free speech and association rights because they retaliate against Petitioners based on their protected political views and past votes, restrain their ability to express their viewpoints, and abridge their ability to band together with others to advance their political beliefs.   + The current legislative maps divide voters of opposing political viewpoints and guarantee less-favored voters are not represented in any meaningful way because of their disfavored views.   + Heightened scrutiny applies because the current maps implicate Petitioners’ fundamental rights to free speech and association…. Defendants have no legitimate, much less compelling, interest in restraining, abridging, or retaliating against Petitioners for their political views and associations. * **Count Three:** The Current State Assembly and Senate Maps Are Partisan Gerrymanders in Violation of the Wisconsin Constitution’s Free Government Guarantee Article I, Section 22.   + The current maps violate Article I, Section 22 of the Wisconsin Constitution because they are an extreme departure from a “firm adherence to justice, moderation, temperance, frugality and virtue” and a “frequent recurrence to fundamental principles.”   + The current legislative maps violate Article I, Section 22 by disfavoring Democratic-supporting voters and preventing them from having an equal opportunity to participate in the political process.   + Seeking partisan advantage in the drawing of state legislative districts is not moderate, and furthers no rational state interest, let alone a compelling state interest. * **Count Four:** The Current State Assembly and Senate Maps Violate the Contiguity Requirement Article IV, Sections 4 and 5.   + The current maps violate Article IV, Sections 4 and 5 on their face because they contain 55 assembly districts and 21 senate districts that have detached, noncontiguous territory.   + The noncontiguous districts in the current maps are not necessary, as it is possible to draw maps that are “bounded by county, precinct, town or ward lines” and contiguous. * **Count Five:** Violation of Separation of Powers Doctrine   + The Governor’s power to veto legislation and the Legislature’s power to override that veto are core powers of both branches of government that are protected by the Wisconsin Constitution.   + This Court usurped these powers in *Johnson III* by imposing the exact legislation vetoed by Governor Evers in violation of the Constitution. * Reasons Why This Court Should Take Jurisdiction.   + Original jurisdiction is appropriate where “the questions presented are of such importance as under the circumstances to call for [a] speedy and authoritative determination by this court in the first instance” jurisdiction.     - This Court should grant such a petition when the case is a matter of significant public concern and importance, such that it affects the entire state.   + Only two years ago, this Court explained that cases involving the composition of Wisconsin’s legislative districts should be heard as original actions: “We granted the petition in this case because ‘[t]here is no question ... 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.’” *Johnson I*.   + In addition to these general reasons favoring original jurisdiction, Petitioner’s Memorandum of Law provides four reasons why only this Court can fully and efficiently adjudicate Petitioners’ constitutional challenges to the existing legislative districts and provide an appropriate remedy that ensures that all future Wisconsin legislative elections are conducted in accordance with our Constitution. |
| **Notes/**  **Reactions** | * N/a. |

1. In 2023, the Wisconsin Supreme Court “flipped,” becoming a liberal majority. The court is comprised as follows:

   Chief Justice Annette Kingsland Ziegler (R), Justice Ann Walsh Bradley (D), Justice Rebecca Grassl Bradley (R), Justice Rebecca Frank Dallet (D), Justice Brian Hagedorn (R), Justice Jill J. Karofsky (D), and Justice Janet C. Protasiewicz (D).

   *See* Dee J. Hall, *Who are the liberal and conservative members of the Wisconsin Supreme Court?*, Wisconsin Watch (Apr. 5, 2023), <https://wisconsinwatch.org/2023/04/who-are-the-liberal-and-conservative-members-of-the-wisconsin-supreme-court/>. [↑](#footnote-ref-1)
2. “Gerrylaundering” occurs when “mapmakers seek to perpetuate their favorable position by carrying forward key elements of the existing map.” *See* Robert Yablon, *Gerrylaundering*, 97 N.Y.U. L. Rev. 985, 987 (2022). [↑](#footnote-ref-2)