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CLERK OF SUPREME COURT
OF WISCONSIN

December 6, 2011

BY TELEFACSIMILE, ORIGINAL BY MAIL

Mr. A. John Voelker
Acting Clerk of Supreme Court
Wisconsin Supreme Court
110 East Main Street, Suite 215
Madison, WI 53703

Re: *Dennis Clinard, et al. v. Michael Brennan, et al.*
Case No. 2011AP2677-OA

Dear Mr. Voelker:

This letter is submitted in response to the Court's November 30 and December 1 Orders directing issues to briefed by noon today.

November 30 Order

As stated in my December 5 letter, Petitioners have submitted their Notice withdrawing the Petition. Their action does not concede that this Court's exercise of original jurisdiction over apportionment issues would have been improper. Rather, as stated, Petitioners determined that judicial economy is not served by proceeding in this Court on the validity of the 2001 Redistricting Plan in light of the pending federal court proceeding.

It is my understanding that the Clerk of Circuit Court for Waukesha County has now filed with the Clerk of this Court what is apparently a notice under § 801.50(4m). I have not been served with such notice, but assuming it has been filed, it is in error because, while the original Circuit Court Complaint arguably raised apportionment issues, the Amended Complaint does *not* directly challenge mal-apportionment, and does *not* seek a re-apportionment remedy.

Rather, the *sole* claim under the Amended Complaint presents unique, state constitutional challenges under ART. XIII, SEC. 12.¹ It alleges that GAB has adopted its October 19 guidance memo and that, in doing so, intends to proceed in violation of ART. XII SEC. 12. Thus, the Amended Complaint is *not* an "apportionment" challenge as contemplated under §§ 801.50(4m) and 751.035.

¹ The opening summary language of the Amended Complaint states at page 2, "This amounts to a clear violation of the constitutional provision concerning the recall of elective officer set forth in Article XIII, Section 12 of the Wisconsin Constitution."

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It is also my understanding that Intervenor in this Petition have also moved to intervene in the Waukesha County action. Conceivably, they may take the position that the Amended Complaint *does* raise an apportionment challenge under §§ 801.50(4m) and 751.035. If so, that would present an issue for further proceedings and briefing, as either the circuit court or this Court may direct. Whatever the future course of the circuit court litigation, such an issue is certainly not a matter to be decided hypothetically in context of this Court's procedurally straightforward decision whether to exercise jurisdiction over a Petition which has already been withdrawn.

December 1 Order

Intervenor's submission is styled as a "Motion to Dismiss," which implies that the Court's disposition of the Petition might somehow be a disposition on the merits. Of course, the only issue before this Court is whether to accept jurisdiction. Regardless of how it is styled, Intervenor's "Motion to Dismiss" is, procedurally, simply a "response" as mandated under § 809.70, Stats.

Again, the issue before the Court is *only* whether to accept or deny the Petition. To reach the merits, the Court would have to first *accept* the Petition, which is, of course, what Intervenor's oppose in their response/motion. Denial of the Petition is necessarily without prejudice, in that a court reach a disposition on the merits without first exercising jurisdiction. *See, e.g. Jensen v. Wisconsin Elections Bd.*, 249 Wis.2d 706, 721, 639 N.W.2d 537, 544 (2002) ("For the foregoing reasons, the petition for leave to commence an original action is denied, without prejudice.") Accordingly, the Court should simply acknowledge Petitioner's Notice to withdraw and end the matter.

Thank you. Counsel are being served by copy of this letter.

Sincerely,



Michael D. Dean

MDD:jm

Enc.

cc: Maria S. Lazar, Esq.
Brady Williamson, Esq.
Rebecca Mason, Esq.
Kevin J. Kennedy, Esq.

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