SUPREME COURT OF WISCONSIN
NO. 20-03

IN THE MATTER OF RULE PETITION 20-03, FOR PROPOSED RULE TO AMEND WIS. STAT. § 809.70 (RELATING TO REDISTRICTING)

COMMENTS FROM LAW FORWARD, INC. ON PROPOSED REDISTRICTING PROCEDURES

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INTEREST OF LAW FORWARD, INC.

Law Forward, Inc. is a law firm founded to advance and nurture a functioning democracy in Wisconsin, across all three branches of government. A 501(c)(3) nonprofit, Law Forward exists to promote fundamental democratic principles, revive Wisconsin's traditional commitment to clean and open government, and advance a progressive vision through impact litigation, administrative process, and public education. We partner with other nonprofits across the state to make the law and government accessible and to every Wisconsinite. Our victories advance the rule of law and public trust in representative government.

At Law Forward, we recognize redistricting as core to any aspiration to make our government work for the people. Through their elected representatives in the Wisconsin State Legislature and in the United States Congress, Wisconsinites shape our state's and our nation's future. Nothing is more important than ensuring those elected representatives are freely chosen by and accountable to their constituents during their time in office. Wisconsin's constitution vests the task of redistricting primarily with the Legislature, but this Court has an important role as well, both in deciding disputes and exercising appropriate restraint. We offer the following comments on Petition 20-03 because we believe adopting this proposal would dangerously alter the Court's role in the redistricting process, create dysfunctional procedural guides, and ultimately erode public faith in both redistricting and its product: fair and truly representative government in Wisconsin.

INTRODUCTION

No issue that Wisconsin lawmakers confront–the State Legislature through its legislative powers, and the Governor through his veto power–is more intertwined with partisan politics than the decennial redrawing of state legislative and congressional districts, commonly known as "redistricting." Redistricting disputes, and their resulting shifts in political power, predate the founding of the country. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (U.S. 2019). Given the high stakes of redistricting, it is no surprise that pitched battles over district lines have often spilled beyond the political branches and into the judiciary. The United States Supreme Court decisions in the "one person, one vote" cases in the 1960s[1] worked a fundamental change in the way that states redraw their legislative and congressional districts, requiring states to redistrict to equalize population in their districts following each decennial census. Since then, all but one round of redistricting in Wisconsin has resulted in litigation adjudicated by panels of three federal court judges, where lifetime tenure insulates judges from partisan political pressure and popular opinion. *See Baldus v. Members of the Gov't Accountability Board*, 849 F. Supp. 2d 840 (E.D. Wis. 2012) (per curiam); *Baumgart v. Wendelberger,* Case No. 01-C-0121, 2002 WL 34127471, (E.D. Wis. May 30, 2002) (per curiam); *Arrington v. Elections Board*, 173 F. Supp. 2d 856 (E.D. Wis. 2001); *Prosser v. Elections Bd.*, 793 F. Supp. 859 (W.D. Wis. 1992) (per curiam); *Wisconsin State AFL-CIO v. Elections Board*, 543 F. Supp. 630

[1] *See Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964).

(E.D. Wis. 1982); *see also Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *vacated and remanded*, 138 S. Ct. 1916 (U.S. 2018).

In 2002, this Court initiated the process of crafting rules Wisconsin state courts could use to fairly and expeditiously adjudicate redistricting disputes. *See Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶24, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam). Potential rules would need to account for "factfinding (by a commission or panel of special masters or otherwise); opportunity for public hearing and comment on proposed redistricting plans; established timetables for the factfinder, the public and the court to act; and if possible, measures by which to avoid the sort of federal-state court 'forum shopping'…." *Id.* After seven years of evaluating the issue, the Court decided against wading into the political morass of redistricting. It closed the rulemaking proceeding without adopting any special rule to govern redistricting litigation, including the rule recommended by the committee it had appointed.[2]

Now, Scott Jensen, a former Speaker of the Wisconsin Assembly, asks this Court to reverse the decision at which it arrived in 2009 after seven years of consideration and study, and to adopt a completely new rule, only a matter of months before the redistricting process will begin anew. Mr. Jensen has taken the liberty to draft rules for the Court (the "Jensen Proposal")—rules that depart markedly from not only the proposals this Court considered during its prior rulemaking proceeding, but also from the principles articulated by a bevy

[2] *See* Rule Petition 02-03, *In the matter of the adoption of procedures for original action cases involving state legislative redistricting. (Matter dismissed and administrative conference canceled)* (January 30, 2009), available at https://www.wicourts.gov/sc/scord/DisplayDocument.html?content=html&seqNo=35414

of State leaders, including Mr. Jensen himself, for how any rules this Court might adopt should work. Mr. Jensen also presses the Court to adopt his proposal quickly, without any of the safeguards previously built into the process for rulemaking in this highly politically charged and vital area. The Court should decline his invitation.

The current Jensen Proposal is contrary to this Court's previously articulated objectives, is logistically unworkable, and rife with potential pitfalls. It abandons the factors laid out in this Court's *Jensen* decision and would place this Court in precisely the position it determined merited rejection of *any* redistricting rule in 2009. Rather than create a framework that buffers the Court from the hyper-partisan redistricting process, the Jensen Proposal would thrust the judiciary into the morass of partisan politics, requiring this Court to exceed its role and act as a quasi-legislative body, without the benefit of either lower-court consideration or appellate review. It gifts the political branches with an improper escape hatch from performing their constitutional duties. Beyond these disqualifying shortcomings in principle, the Jensen Proposal fails in practice; in form and effect, the Jensen Proposal is impracticable. This Court should decline the invitation to adopt a rule that does nothing to advance its goals, and only hinders its functioning. If the Court is inclined to create a redistricting rule, the Court should engage in a thorough study and evaluation of the subject matter, inviting broad participation and input, rather than rushing to adopt a fatally flawed proposal offered by a partisan actor at the eleventh hour.

ARGUMENT

I. The reasons the Supreme Court articulated in 2008-2009 for not adopting rules unique to redistricting cases apply with even greater force today.

In 2009, after nearly seven years of study and analysis, this Court closed its rulemaking proceeding without adopting new rules specific to redistricting cases. A majority of the justices expressed grave concerns about partisan politicization of the Court and undermining the constitutional role of the state judiciary. In the decade that followed this Court's decision, those concerns have not only persisted, but amplified. The Jensen Proposal would fully immerse this Court in a heated partisan political dispute. It goes further than the proposal that the justices considered and rejected last decade and would place the Court at the center of a protracted redistricting battle, before the Legislature has even attempted to draw maps and the Governor has had the opportunity to accept or reject them through his constitutional veto power.

A. The Jensen Proposal would encourage litigation at the expense of making every effort to resolve these political debates through the operations of the political branches of Wisconsin's government.

Wisconsin's Constitution commands the state's political branches to "apportion and district anew the members of the senate and assembly, according to the number of inhabitants." Wis. Const. art. IV § 3. The people of Wisconsin consented to this procedure as a condition upon Wisconsin's founding to secure the blessings of freedom, "form a more perfect government, insure domestic tranquility and promote the general welfare…." Wis. Const. Preamble. When the people of Wisconsin elect their representatives, they do so with the knowledge that legislators necessarily must make difficult decisions, including drawing

new legislative districts. Creating new rules specific to litigation arising from the redistricting process must not short-circuit the legislative process itself and incentivize Wisconsin's political branches to abandon their constitutional duties. Deliberately or not, the Jensen Proposal provides Wisconsin's elected representatives an easy escape from their constitutional obligations, and, even worse, it transfers the political branches' redistricting responsibilities, and the attendant public scrutiny, to this Court.

In recent years the Court increasingly has been asked to arbitrate politically charged disputes between the Legislature and Governor over their respective constitutional and statutory power and duties. In resolving those cases, this Court has repeatedly implored the Legislature and Governor to resolve their disputes through political processes. *See Wisconsin Legislature v. Palm,* 2020 WI 42, ¶57, 391 Wis. 2d 497, 942 N.W.2d 900 ("we place the responsibility for this future law-making with the Legislature and DHS where it belongs"); *id.*, ¶77 (R.G. Bradley, J. concurring) ("It is for the political branches, not the judiciary, to respond to the public's wishes."); *id.,* ¶168 (Hagedorn, J. dissenting) ("We are a court of law. ... We are not here to step in and referee every intractable political stalemate."); *Bartlett v. Evers*, 2020 WI 68, ¶257, 393 Wis. 2d 172, 945 N.W.2d 685 ("Engaging in this line-drawing may lead to uncertainty for political actors and entangle the judiciary in more political and policy fights. And sometimes we make things worse, not better….") (Hagedorn, J. concurring); *Wisconsin Legislature v. Evers*, Case No. 2020AP608-OA, Order at https://www.wicourts.gov/news/docs/2020AP608_2.pdf (April 6, 2020) (acknowledging that, despite the seriousness of conducting an election during the COVID-19 pandemic, the "Legislature and Governor also could have moved the election

or changed the rules governing it"); *League of Women Voters of Wis. v. Evers*, 2019 WI 75, ¶37, 387 Wis. 2d 511, 929 N.W.2d 209 ("No court may intermeddle in purely internal legislative proceedings." (internal quotation marks omitted)).

Because it decides for an entire decade the basis of representation of the People of Wisconsin in the State Assembly, State Senate, and United States House of Representatives, the decennial redistricting process is uniquely subject to partisan political pressure, sparring, and manipulation.[3] This Court has recognized as much and openly expressed concerns about involving itself in that political battle.

The last time a rule on redistricting was proposed, the Court had the benefit of a member who had seen the redistricting issue from both sides. Justice David Prosser, a former member of the State Legislature and Speaker of the Assembly (as well as lead plaintiff in the 1992 redistricting litigation), shared his concerns freely at two Open Administrative Conferences. Justice Prosser was opposed to adopting any rule that would insert the Court prematurely in the redistricting process, stating he would vote *against* taking original jurisdiction "every time."[4] He argued: "The plan, whatever the details are, would inject this court into the process. We would be saying, 'Legislature, we want you to do your thing, but we are here and ready to take over if you fail.' That's almost like an invitation to fail."[5]

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[3] *See, e.g., Baldus.*, 849 F. Supp. 2d 840 at 844-46.

[4] Wisconsin Supreme Court Open Administrative Conference on April 8, 2008. Justice Prosser at 1:58:10. Available at https://wiseye.org/2008/04/08/supreme-court-rules-hearing-and-open-administrative-conference-part-3-of-4/

[5] *Id.* at 16:14.

Justice Prosser, despite his unique experience as a legislator and redistricting litigant, was not alone in his opposition to adopting a unique redistricting rule. Chief Justice Roggensack stated "I'm really concerned about putting that burden on the court when the political implications, the partisan political implications, will be sure to follow if we get involved.... I have a real problem unless it's absolutely necessary with this court taking on something that's so inherently partisan political."[6] Chief Justice Roggensack also doubted that "it's really best for this court to get involved in redistricting. Redistricting is inherently political. And, I think, frankly our court is pushed on enough politically."[7]

Justice Ziegler concurred that the previously proposed rule placed "this Court or the court of appeals squarely within the sights of the partisan political framework.[8]" Justice Ziegler elaborated:

> Our court is truly nonpartisan and should be. We call the balls and the strikes. We don't decide which team we're rooting for. And I think this puts us out of the field of being the umpire and into the range of being one of the players. And I don't think that's good for this court in any way.[9]

Justice Gablemen echoed that sentiment, stating:

> I look to the courts and to the judicial branch as the branch that must stay away from partisanship, must remove itself from partisanship, from partisan politics. ... I see as a mechanism by which this court will be immersed in partisanship and the partisan aspect of the political process.[10]

Justice Gableman further argued against the rule because it would

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[6] *See* https://wiseye.org/2008/04/08/supreme-court-rules-hearing-and-open-administrative-conference-part-3-of-4/ at 1:29:27, 1:31:24, 1:34:52 (last visited November 19, 2020).

[7] *Id.* at 1:30:15.

[8] https://wiseye.org/2009/01/22/supreme-court-open-administrative-conference-3/ at 1:05:02.

[9] *Id.* at 1:07:06.

[10] *Id.* at 1:08:49.

> create an avenue by which the legislative function would be supplanted by our work and by a process that we set up is ...dangerous to the institution of this court.... This court will necessarily be implicated.... We will have the ultimate determination, and I think that to allow ourselves at this point to create that avenue by which we will be immersed in the partisan political process would be a mistake.[11]

Those concerns expressed by the justices still exist today, and instead of mitigating the issues the justices themselves identified, the current Jensen Proposal only intensifies them. This is bolstered by a growing public awareness of and interest in redistricting, which is certain to bring an increased level of scrutiny and skepticism to any intrusion by the Court into the political sphere.

The previous proposal aimed to mitigate the Court's direct involvement in redistricting by appointing a panel of multiple court of appeals judges to perform the fact-finding, legal-analysis, and (if necessary) line drawing in the first instance. By contrast, the current Jensen Proposal does not insulate the Court whatsoever. The current proposal instead puts this Court in the eye of the storm, short-circuiting the traditional judicial process and transforming this Court into the sole arena for partisan combat, even before the political branches have made any attempt to discuss, much less negotiate, new districts.

Accordingly, the Jensen Proposal will immerse the Court in a pitched political battle, elevating the danger that—no matter what decision it may make—the Court itself will be perceived as inherently partisan rather than as an institution providing impartial justice. The Jensen Proposal exacerbates that danger by ensuring that a panoply of partisan actors–and ***only*** partisan actors, at least by necessity– will be involved in every redistricting

[11] *Id.* at 1:09:30.

case. (*See* Subsection (5)(b) ("The Governor, the Senate, the Assembly and political parties shall be granted intervention as of right.")) But unlike the right of participation the Jensen Proposal would grant to partisans, nonpartisan municipal governments, citizen groups, businesses, trade associations, labor unions, engaged citizens, and anyone else would be deprived of automatic participation. It follows that the Court would hear primarily (if not exclusively) from partisan actors, furthering the perception that any outcome is primarily a partisan political one, with the Court choosing sides among the political parties.

The genesis of the current Jensen Proposal amplifies the partisan taint that would attach to the Court were the proposal adopted. There is little justification for the Court to abruptly adopt an imprecise, barely vetted proposal advanced at the eleventh hour by a sole, prominent Republican insider. The last time the Court sought to address this issue it appointed a broad nonpartisan committee of experts, who developed an approach through years of study and refined it based on repeated input from both the justices and the public. That the Court still found the committee's proposal lacking is a testament to how thorny this particular topic is. Were the Court to rush headlong into adopting the Jensen Proposal—without safeguards, with minimal process, and ignoring the partisan source—it will diminish public trust in the judiciary. We do not suggest that the Court never should become involved in partisan legal disputes, nor do we suggest that the Court never should wade into redistricting-related litigation; indeed, there may be legal issues arising from the redistricting process that are inherently ones for state courts, not federal courts, to decide.[12]

[12] *See Baldus*, 849 F. Supp. 2d at 859.

Our point here is that if the Court wishes to revisit rulemaking for redistricting cases, it should do so in a way that ensures an open, deliberative, and nonpartisan process, above political suspicion or reproach. The Jensen Proposal falls woefully short of that goal.

B. By encouraging early redistricting litigation with partisan actors, the Jensen Proposal threatens to undermine the public's confidence in the Court as a nonpartisan institution.

Partisanship has intensified in Wisconsin over recent years, drawing this Court into increasingly intense political skirmishes. Wisconsin is split fairly evenly ideologically. Earlier this month, the 2020 presidential election was decided in Wisconsin by roughly 20,000 votes—out of approximately 3.3 million cast. Other recent elections have been even closer. Among statewide races in the past 20 years–the presidential races in 2000 and 2004, the attorney general contest in 2018, and elections for justices on this Court in 2011 and 2019–all resulted in narrower margins of victory. The Governor is a Democrat and both legislative chambers are controlled by Republicans. Wisconsin's two U.S. Senators belong to the two major political parties: Senator Baldwin, a Democrat, and Senator Johnson, a Republican. Wisconsin is routinely identified as a crucial swing state in national elections and a place where both Democrats and Republicans see opportunities for expanding their power and influence. Unsurprisingly, the political parties, the public, and the media have increasingly focused on ostensibly nonpartisan judicial races, and have tended to treat those races as an extension of partisan politics.

Campaigns for seats on the Court have become increasingly high-profile and attracted national attention.[13] Campaigns for seats on the Court of Appeals, and especially on this Court, have become more sharply polarized.[14] Campaigns for seats on the Court have also—and probably concomitantly—become exponentially more expensive in the past dozen years. In 2008, the two candidates for a seat on this Court spent a combined $1,181,016 on the election. In 2020, that number jumped more than four-fold, to $4,834,090.[15] And that omits the millions more that outside groups spend advocating for and attacking candidates.

This increased partisanship has been reflected at the Court over the past two terms, with high-stakes litigation between the political branches becoming more common. Use of the original-action mechanism is at a fever pitch, and the Legislature has made extensive use of new statutory authority to hire private counsel and litigate in its own name.[16] Several of these cases have drawn the Court into more and more partisan political disputes.

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[13] *See* https://www.nytimes.com/2018/04/03/us/wisconsin-election-supreme-court.html (last visited November 18, 2020); https://www.cbsnews.com/news/wisconsin-supreme-court-race-too-close-to-call-1-2-million-votes-brian-hagedorn-lisa-neubauer/ (last visited November 18, 2020); https://www.nytimes.com/2020/04/13/us/politics/wisconsin-primary-results.html (last visited November 18, 2020); https://apnews.com/article/fa1041db1e794f06929ff443e6f0c0d1 (last visited November 18, 2020).

[14] https://www.latimes.com/opinion/story/2020-04-15/opinion-judicial-selection-shouldnt-be-a-partisan-political-battle (last visited November 18, 2020).

[15] *See* https://www.wisdc.org/follow-the-money/130-campaign-finance-profiles-2020/6430-campaign-2020-supreme-court (last visited November 27, 2020).

[16] *See, e.g.*, *Palm*, 2020 WI 42 (Legislature filed original action); *Democratic Nat'l Comm. v. Bostelmann*, 2020 WI 80, 394 Wis. 2d 33, 949 N.W.2d 423 (Legislature initiated original action and certification of question of law from the Seventh Circuit); *Wisconsin Legislature v. Evers*, Case No. 2020AP608-OA (Legislature filed original action); *Vos v. Kaul*, Case No. 2019AP1389-OA (petition for original action denied September 22, 2020) (Republican members of the Legislature filed petition for original action); *Jefferson v. Dane Cty*, Case No. 2020AP557-OA (Republican Party initiated an original action and Legislature filed amicus brief in support of motion for temporary injunction); *Whitford*, 218 F. Supp. 3d

The Court rightly recognizes that its power and authority are derived from public perception of the Court as an honest arbiter of the law, separate and apart from politics. *See Aicher ex rel. LaBarge v. Wis. Patients Comp. Fund*, 2000 WI 98, ¶20, 237 Wis. 2d 99, 613 N.W.2d 849 ("the judiciary is not positioned to make the economic, social, and political decisions that fall within the province of the legislature"); *Palm*, 2020 WI 42, ¶168 (Hagedorn, J. dissenting) ("It is no doubt our duty to say what the law is, but we do so by deciding cases brought by specific parties raising specific arguments and seeking specific relief…. If we abandon that charge and push past the power the people have vested in their judiciary, we are threatening the very constitutional structure and protections we have sworn to uphold."); *State v. Holmes*, 106 Wis. 2d 31, 44, 315 N.W.2d 703, (1982) ("Both the judiciary and the legislature are empowered to ensure not only that the fairness and integrity of the courts be maintained but also that the operation of the courts be conducted in such a manner as will avoid even the suspicion of unfairness."); *Vincent v. Voight*, 2000 WI 93, ¶192, 236 Wis. 2d 588, 614 N.W.2d 388 (Sykes, J. concurring in part, dissenting in part) ("The judiciary should not be drawn into deciding issues that are essentially political in nature, exclusively committed by the constitution to another branch of government and not susceptible to judicial management or resolution."). Indeed, "[t]he very concept of an impartial judiciary depends upon the belief that judges can manage

837 (Assembly intervened); *League of Women Voters of Wis. v. Evers*, 2019 WI 75, (Legislature intervened); *Taylor v. Milwaukee Election Comm'n*, 452 F. Supp. 3d 818 (E.D. Wis. 2020) (Legislature intervened); *Clean Wis., Inc. v. DNR*, 2016AP1688 (Legislature intervened); *Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020) (Legislature intervened on remand).

through their biases, news feeds, political supporters, former co-workers, and neighbors to render decisions without fear or favor to any party." *In re Paternity of B.J.M.*, 2020 WI 56, ¶123, 392 Wis. 2d 49, 944 N.W.2d 542, *cert. denied sub nom. Carroll v. Miller*, No. 20-165, 2020 WL 6037237 (U.S. Oct. 13, 2020) (Hagedorn, J. dissenting).

One of the safeguards that protects the Court's authority is its adherence to procedural rules that have been carefully calibrated and time-tested to help courts discover the truth and uphold the law. The "law is generally best developed when issues" have been "tested by the fire of adversarial briefs and oral arguments." *City of Janesville v. CC Midwest, Inc.*, 2007 WI 93, ¶68, 302 Wis. 2d 599, 734 N.W.2d 428 (A.W. Bradley, J., concurring) (internal quotation marks omitted). The Court "risk[s] serious error when we issue broad rulings based on legal rationales that have not been tested through the crucible of adversarial litigation." *Palm*, 2020 WI 42, ¶254 (Hagedorn, J. dissenting). "The whole purpose of an adversarial justice system is the ascertainment of the truth." *State v. Coffee*, 2020 WI 1, ¶57, 389 Wis. 2d 627, 937 N.W.2d 579 (Kelly, J., concurring); *see also, e.g.*: *Polk Cty. v. Dodson*, 454 U.S. 312, 318 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness."). *Mackey v. Montrym*, 443 U.S. 1, 13 (1979) ("[O]ur legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error…").

If the Court decides to adjudicate redistricting disputes, it should do so in a way that ensures complete adversarial process—including workable procedures for winnowing a mountain of evidentiary submissions, weighing disparate expert analyses, making credibility determinations, issuing detailed findings of fact, answering legal questions by

applying the law to the factual findings, and some degree of appellate review. This alone can protect the Court from charges of partisanship in these increasingly partisan times. Not coincidentally, the best method to generate such a rule is through an open and thorough process that gathers input from competing points of view, carefully considers facts and law, and analyzes potential impacts of the rule. A commitment to such process is incompatible with the Jensen Proposal, which requests a rushed, narrow rulemaking process immediately prior to the imminent 2021 redistricting. The Jensen Proposal would increase the risk of erroneous judgments, increase perceptions of partisanship, and erode public trust in the judiciary.

II. Even if the Court is inclined to adopt rules unique to redistricting cases, the Jensen Proposal is deeply flawed and should not be accepted.

The Jensen Proposal's flaws are numerous and disqualifying. The Jensen Proposal abandons principles established by this Court, and contravenes the factors this Court identified in the 2002 decision that began the discussion of rulemaking on this topic. Furthermore, the Jensen Proposal is littered with poor drafting. The following are the critical shortcomings of the Jensen Proposal:

- Encourages premature litigation and discourages the political resolutions preferred by the Wisconsin Constitution.
- Inappropriately identifies parties, in ways that are both over- and under-inclusive and that directly contravene the will of Wisconsinites.
- Undermines the fundamental importance of fact-finding in adjudicating any redistricting dispute.
- Does not provide guidance on procedural rules, such that the parties lack notice of how a redistricting challenge would be litigated and the public may feel that rules were manipulated in any given case to favor one side or the other.

- Encourages the Court to prematurely propose its own redistricting plan.
- Is unclear as to who participates once the Court has proposed a plan.
- Lacks details on what a "hearing" entails, while also improperly constraining the timing and outcome of the hearing.
- Creates an unworkable timeline that is too close to the deadline for circulating nominating papers.
- Outlines an illusory process that offers no benefits above and beyond the existing procedural rules and that is expressly subject to change.

These Jensen Proposal's flaws would further immerse the Court in partisan politics as it attempts to navigate the countless ambiguities that would inevitably attend litigation under the proposed rules.

A. The Jensen Proposal would encourage premature litigation, foreclosing political solutions and hamstringing this Court's ability to exercise considered discretion on whether to exercise jurisdiction.

Proposed subsection (4) of the Jensen Proposal provides that a petition asking this Court to accept a redistricting dispute as an original action "is ripe any time after the U.S. Census Bureau delivers apportionment counts to the President and Congress as required by law." (Pet. at 2-3.)[17] That leaves no opportunity for municipal and county governments to revise ward and supervisory district lines, which the Wisconsin statutes provide must be

[17] Jensen wrote his petition at a time when the Census Bureau was working under the assumption Census data would not be delivered until July 31, 2021. Recent developments suggest there might not be such a delay, and that the more typical March 31 delivery date will apply in 2021. Much of Jensen's argument hinges on the timing of litigation triggered by the delivery of the data on July 31, 2021. Regardless of the delivery date for the data, the Jensen Proposal is flawed and the rule it proposes is not needed for this Court to manage its own docket in consideration of any delays.

accomplished in the several months following the release of the census data, potentially into the latter part of 2021. Wis. Stat. §§ 5.15(1)(b), 59.10(3)(b). If this Court were to adjudicate state legislative district boundaries even before counties and municipalities have adjusted their own supervisory and ward district boundaries, there would be no opportunity for legislators to consider, as one factor in drawing state legislative districts, how the local governments believe it most prudent to subdivide and order their own populations for governance purposes. It would allow no consideration of "communities of interest" that reside within counties and municipalities, nor any way to ensure that state legislative districts are "bounded by county, precinct, town or ward lines," in ways that guarantee they "consist of contiguous territory … in as compact form as practicable." Wis. Const. art. IV, § 3.

Instead, before there is even any basis for a dispute, the Jensen Proposal declares that a petition would be ripe and justiciable. Jensen acknowledges this in the memorandum filed in support of the petition. (Mem. at 5 & n.6.) This is a departure from Wisconsin law, under which a petition asking any court to decide a dispute that does not yet exist would be dismissed as unripe and premature. *See, e.g., State ex rel. La Follette v. Dammann*, 220 Wis. 17, 264 N.W. 627, 629 (1936); *Lister v. Bd. of Regents of Univ. of Wis. Sys.*, 72 Wis. 2d 282, 309, 240 N.W.2d 610 (1976); *Colby v. Columbia Cty.*, 202 Wis. 2d 342, 362, 550 N.W.2d 124 (1996). Jensen says this is necessary "to put state court actions on par with federal court actions, since litigation in the federal court is almost certain to begin as soon as the census bureau reports are completed." (Mem. at 5.) But this comparison of apples to oranges presents a red-herring argument. The state-court litigation that Jensen seeks to

protect is an action to vindicate a newly enacted statute providing for new districts that properly reflect the new census data and satisfy the requirements of Wisconsin law. But the referenced federal-court litigation has a different focus: it may involve federal constitutional or statutory claims such as those, for example, alleging that the existing districts no longer comply with the federal one-person, one-vote requirement, or that districts violate the Voting Rights Act of 1965. *See, e.g.*, *Baker*, 369 U.S. 186 at 208; *Reynolds*, 377 U.S. 533 at 558; *Baldus*, 849 F. Supp. 2d at 854-858. Such claims may become ripe once the census data becomes available, whereas forward-looking state claims under Wisconsin law do not ripen until and unless the political branches fail to properly draw new districts. While the federal claims can undoubtedly be brought in state court, there is no compelling reason to provide a state-court forum for federal claims while the state court claims are not yet ripe.

In 2008, when discussing the prior proposal, Chief Justice Roggensack expressed grave concerns regarding premature ripeness. She opined that advocates may push the redistricting dispute into court prematurely, creating additional partisan politicization pressures:

> That to me seems really to put your foot in the political hole because if we're going to set up a plan before the legislature has failed and now they fail and we got this plan ready to go, boy I think that's really putting the court right in the middle of where I don't want to be.[18]

The Jensen Proposal invites that exact problem by pitting the premature initiation of judicial action against the prospects for a resolution through the legislative process. This

[18] https://wiseye.org/2008/04/08/supreme-court-rules-hearing-and-open-administrative-conference-part-3-of-4/ at 2:04:12.

conflict—allowing the courts to be used in a way diametrically opposed to the framers' intentions in assigning the redistricting task to the political branches—was a consistent theme in comments to the previous redistricting rulemaking proposal.

In fact, Jensen himself then inveighed against this Court allowing premature redistricting litigation, precisely because doing so precludes the proper functioning of the legislative process. In a comment submitted to this Court in 2003, Jensen objected that, when "in the 2000 cycle, suit was filed on Congressional, and shortly thereafter State Legislative, redistricting even before final census figures were available," that meant "[t]he Legislature did not have even an elemental opportunity to act." 2003 Jensen Comment at 7. "Such premature filing," he declared, "is improper and the exercise of original jurisdiction would be inappropriate in that circumstance." *Id.* Accordingly, Jensen argued for the Court to set a definitive standard for legislative impasse (which Jensen argued could not occur until after wards were redrawn under Wis. Stat. § 5.15(1)(b), and no earlier than in the *second* year following a census), and to authorize jurisdiction only once the political branches had reached such a defined impasse. 2003 Jensen Comment at 7-8. Jensen then argued that any court exercise of jurisdiction before predicate facts established an actual legislative impasse would be inconsistent with the separation of powers. *Id.* at 8. Jensen's prior reasoning is antithetical to the rule he now proposes, which mandates this Court exercise its judicial function to intrude on the legislative redistricting process before it even begins. Adopting the current proposal, including Jensen's unexplained about-face, would fuel the perception that this Court has now chosen to venture into partisan political and legislative territory it distinctly and resoundingly rejected a decade ago.

The Jensen Proposal not only kicks in too soon, but also sweeps too broadly. It would mandate this Court take ***all*** actions relating to redistricting. Jensen Proposal Subsection (4). Myriad challenges could be understood to "relate" to redistricting. If the Court is to adopt a rule specific to redistricting litigation, that rule should be more carefully delineated, applying only when the political branches have reached an impasse and maintaining this Court's considered discretion over its docket.[19] Other types of redistricting litigation, such as a suit challenging a duly enacted redistricting plan's compliance with federal law, require even more intensive fact-finding and adversarial process, compounding the mismatch between such disputes and adjudication under this Court's original jurisdiction.

The Jensen Proposal creates an illusion of addressing the ripeness concern in subsection (5)(a), allowing that, "[i]f a petition for an original action is filed prior to the time that the Legislature has adopted a new redistricting plan, the court may stay all, or part, of the action until the Legislature has adopted a plan." (Pet. at 3.) But this highlights, rather than ameliorates, the problem. If the petition is ripe for filing before there is a plan, much less a dispute over that plan, how can the Court adequately assess the petition and exercise its discretion over whether to grant the original action? This is a designed feature, not a bug, of the Jensen Proposal: it effectively *mandates* that this Court must always exercise original jurisdiction over Wisconsin's decennial redistricting, and to accomplish

[19] In Jensen's 2003 comment to the Court, he proposed a rule that would only allow the Court to take jurisdiction after a political impasse, as opposed to any matter "related" to redistricting. This is yet another example of Jensen's unexplained reversal of principle.

that it treats redistricting cases as the only instances where the Court lacks *any* discretion over whether to hear a proposed original action. It is nonsensical to remove the Court's discretion in deciding to take cases that may relate to redistricting. The Court should maintain the discretion to accept cases as it sees fit, not make itself subservient to the coequal branches by ceding authority over its docket to political actors.

Subsection 5(a) of the Jensen Rule also improperly removes the Governor from the political equation by allowing a stay of redistricting litigation until the *Legislature* "adopts" a redistricting plan. But even once the Legislature has *passed* a redistricting plan, the Governor still must take legislative action to sign or veto that plan. *See* Wis. Const. art. V, § 10. Lifting a stay prior to the Governor's acting would be premature, and again short-circuit the political process. Allowing an original action to proceed prior to impasse does away with the traditional notions of justiciability and ripeness, and unnecessarily creates separation-of-powers controversies.

B. The Jensen Proposal takes an inappropriate approach to identifying parties, in ways both over- and under-inclusive, and that directly contravene the will of Wisconsinites.

The Jensen Proposal illogically addresses who may petition the Court for redistricting purposes. Subsection (5)(b) provides that the "Governor, the Senate, the Assembly and political parties shall be granted intervention as of right." (Pet. at 3.) This provision is both unclear and unwise—and inconsistent with the history of redistricting litigation in Wisconsin.

In terms of clarity, the parties are ill-defined. The Jensen Proposal would presumably preclude minority party Assembly and Senate caucuses from participation.

Those groups would ostensibly have valuable input and a stake in the outcome of redistricting legislation because their then-existing representative districts would be modified and they would be part of any legislative deliberations and a possible impasse.

The Jensen Proposal also guarantees "political parties" the opportunity to intervene as of right, but it neither defines nor modifies that term. This raises significant interpretive questions. Does the Jensen Proposal apply to *all* political parties, even those lacking representation in the Legislature or significant public support? The proposed language presumably would extend to any political party, regardless of whether the party has any members in the Legislature. Moreover, if the Court wanted to limit political party participation, how can the Court legally define or establish criteria governing which "political parties" can participate? This lack of clarity is yet another shortfall in the Jensen Proposal, ripe for problematic litigation should it be adopted.

The Jensen Proposal also fails to include municipal entities, which unquestionably have a stake in redistricting. Wisconsin's current legislative maps split each of DeForest and Appleton into three assembly districts, none of them fully embodied in municipal boundaries.[20] Sheboygan and Marshfield are each divided into two assembly districts, none of them fully embodied in city boundaries.[21] Both Sauk and Jefferson Counties contain four assembly districts, and none of those districts is fully embodied in a single county.[22] Both counties contain a series of moderate-sized towns/cities that work together on county-

[20] *See* https://docs.legis.wisconsin.gov/document/statutes/ch.%204.pdf at 58 and 78.

[21] *Id.* at 52 and 53.

[22] *Id.* at 53.

wide policies enacted at the county-board level, yet are represented by different assembly representatives. Should these bizarre splits be perpetuated by future maps, or crop up elsewhere, municipal entities would surely want to advocate for less divided legislative representation in redistricting legislation.

While the Jensen Proposal guarantees that litigation will include all conceivable partisan interests, it makes no allowance at all for nonpartisan or bipartisan interests. Jensen's memorandum provides a brief and selective history of redistricting litigation unequivocally showing that nonpartisan organizations frequently participated in this litigation. (*See* Mem. at 6-8.) It is unclear why the Court should deviate from the established statutory threshold for intervention as of right—Wis. Stat. § 803.09(1) requires courts to consider timeliness and the adequacy of representation of interests by another party. Surely nonpartisan groups will have interests not adequately represented by political branches or parties. After all, neither political party has an interest in establishing districts that do not advantage them, and no incumbent legislator has an interest in a fair, contiguous district that dramatically alters their existing constituency. This exclusion is also sure to inspire public outcry if *only* partisan actors' interests are considered while individual citizens are excluded.

Here again, the current Jensen Proposal contravenes the principles previously delineated by Jensen himself. In 2003, Jensen advocated that any rule should invite a broader array of participation by guaranteeing that "any person otherwise permitted to bring an action in the State of Wisconsin may bring an action seeking Original Jurisdiction on matters of Redistricting." 2003 Jensen Comment at 9. Jensen's 2003 comment further

stated "[a]micus status shall be liberally granted for the purpose of written comments." *Id.* That rationale is consistent with how redistricting litigation has traditionally functioned. Yet the current Jensen Proposal seeks to further politicize the Court by ensuring that politicians and political parties can participate, while leaving non-partisan groups with a stake in the result on the outside.

The Jensen Proposal's prioritization of partisan interests, to the exclusion of other likely intervenors, amplifies the partisan dimensions of redistricting. This runs counter to the expressed wishes of the vast majority of Wisconsinites, who overwhelmingly prefer draining partisanship out of the redistricting process. Of Wisconsin's 72 counties, 54—fully three-quarters of them—have passed resolutions in favor of fair, nonpartisan redistricting.[23] Voters in 28 counties passed countywide referendums in favor of a nonpartisan redistricting process.[24] In fact, redistricting referendums have passed 100% of the time when on the ballot for a public vote, and most have passed with more than 70% support.[25] This is not surprising, given that the Marquette Law School Poll has consistently shown that 70% of Wisconsinites support nonpartisan redistricting.[26] Again, adopting a proposal that so clearly reverses course and elevates political partisans over the public

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[23] *See* https://www.wisdc.org/reforms/support-fair-voting-maps (last visited November 18, 2020).

[24] *Id.*

[25] *See* https://www.wisdc.org/news/commentary/6621-all-referendums-pass-to-ban-gerrymandering-overturn-citizens-united?fbclid=IwAR2eVsiSO7anMO3ZHTg0LAT852Ds2zZzO2_Rsn9ACAJZkw01nWTDCA0gzMs (last visited November 27, 2020).

[26] *See* https://law.marquette.edu/poll/2020/02/27/new-marquette-law-school-poll-finds-sanders-support-rising-among-democrats-and-tight-races-between-trump-and-each-democratic-candidate-for-president/ (last visited November 18, 2020).

interest will not only exclude relevant voices, but also weaken public trust in the judiciary as a nonpartisan referee.

C. The Jensen Proposal gives short shrift to the fundamental importance of fact-finding in adjudicating any redistricting dispute.

Fact-finding is integral to redistricting litigation. Nonetheless, subsection (5)(c) of the Jensen Proposal all but dismisses this important judiciary function by allowing, and seemingly preferring, resolution without any adversarial discovery process, testimony by fact and expert witnesses, development of an evidentiary record, or presentation to the Court.

The opening clause of proposed subsection 5(c) anticipates resolution of the original action solely upon the petition and associated briefs directed to whether the Court should accept the original action in the first instance; it does not even require briefing—much less a hearing or an evidentiary presentation—on the merits. The remainder of proposed subsection 5(c) allows for a more fulsome presentation of legal arguments, but it provides no guidance on how the Court would resolve evidentiary disputes, what rules of evidence would apply, who would decide evidentiary objections, or how fact-finding would be handled.

The importance of fact-finding in redistricting disputes cannot be overstated. With technological advancements, a party could propose hundreds—if not thousands—of separate maps that comply with equal population requirements but differ greatly in the way that they treat the constitutional and traditional redistricting criteria such as contiguity, compactness, and preservation of communities of interest (as well as federal statutory and

constitutional interests). The ease with which partisan actors can manipulate maps in the age of computers and specialized redistricting software makes a robust fact-finding process all the more crucial to determining the legal merits of any particular map. The data underlying any map proposed by a party must be carefully scrutinized and evaluated by experts. And, indeed, that is precisely what has occurred in previous redistricting litigation in federal court. *See, e.g., Whitford*, 218 F. Supp. 3d 837; *Baldus*, 849 F. Supp. 2d 840. An inadequate fact-finding procedure reduces the judiciary's insulation from the partisan politicization because it could be tantamount, inadvertently or otherwise, to the Court silencing one political party in favor of another.

The Jensen Proposal's inadequate fact-finding procedure is also revealed in subsection (5)(e), which authorizes (but does not require) the referral of oral testimony to a circuit court or referee.[27] Proposed subsection (5)(e) provides no guidance on how the Court would choose between referral to a circuit court or a referee. Nor does proposed subsection (5)(e) provide guidance on who would choose the circuit court or referee to which the matter would be referred. Instead, proposed subsection (5)(e) merely references

[27] Jensen's 2003 comment recommended the Court appoint a panel of judges to oversee fact-finding. 2003 Jensen Comment at 18. This Court would have then presumably remained a court of review. Jensen argued "The most widely accepted form of fact finding in redistricting remains factual determination by three judge federal panels…This format is readily adaptable to State rulemaking given the long history of its use in the federal system. Both *Prosser* and *Arrington* illustrate the effectiveness of that process in Wisconsin. Adapting that process in a meaningful way is one of the objectives of the rule proposed here." 2003 Jensen Comment at 11.

The Jensen Rule presently before the Court dismisses the importance and need for fact-finding, and presumes that the Court itself will oversee the process.

Wis. Stat. §§ 751.09 and 805.06, which were not designed in anticipation of the highly charged, hyper-partisan litigation that the Jensen Proposal invites.

Jensen argues that, "[b]ecause the proposed rule merely references and incorporates existing statutory provisions there should be nothing controversial regarding this part of the proposed rule." (Mem. at 8-9.) This argument myopically ignores what the justices understood—and repeatedly expressed—in the 2008 and 2009 open administrative conferences: that redistricting litigation places partisan political pressure on the Court in ways that differentiate it from other cases. It follows that the procedures used in other cases do not necessarily fit redistricting cases well because the politically charged nature of redistricting conflicts with the independent and non-partisan role of the Court. Any rule must carefully consider and account for how the judiciary can remain above the political fray while handling politically fraught matters. Past rule proposals recommended going beyond the three-judge panel model of a federal court, establishing a five-judge panel to cover the geographic diversity of the state. A multi-member panel structure was embraced by the public comments of interested parties between 2002 and 2008, including Jensen's own 2003 comment, where he advocated the appointment of a special three-member panel similar to federal practice. *See* 2003 Jensen Comment at 12-13 ("By elevating the matter…to a three-judge panel, as opposed to the ordinary consideration by a single-county or single referee, the Court … would be assuring the public of consideration commensurate with the critical importance of the matter.").

Proposed subsection (5)(e) also allows only for resolution of "disputed issues of material fact [that] must be resolved on the basis of oral testimony." (Pet. at 3.) That narrow

category excludes the plethora of material facts that must be resolved based on census data, quantitative analysis, and expert analysis. *See, e.g.*, *Prosser*, 793 F. Supp. 859 at 862 (parties provided expert evidence in support of various plans). It is impossible to properly adjudicate a redistricting suit without robust fact-finding and allowing evidence in different formats.

Nothing in the incomplete adversarial processes anticipated by Jensen Proposal subsections (5)(c) or (5)(e) allows for the kind of fact-finding necessary for redistricting litigation. Nor is proposed subsection (5)(f) up to the task; it glosses over the possibility of any challenge to the facts found by the Court in the first instance or by a circuit court or referee on referral. Again, the Jensen Proposal raises significant questions for potential litigants. Is the applicable standard that the facts stand unless they are clearly erroneous (as in Wis. Stat. § 805.06(5)(b), for reports from a referee), or some other standard? How are the parties to know what the standard is? And when would the parties have the opportunity to raise such a challenge, given that proposed subsection (5)(f) says that that the step after the Court receives any evidentiary report it has requested is for it to propose a redistricting plan? These significant questions cannot be resolved during redistricting litigation because doing so would be publicly perceived as partisan, regardless of how the Court answers the questions. But, given the immense stakes of redistricting cases and the fact that they recur only once per decade, these questions must be resolved.

These issues further underscore this Court's role not a trial court, but as a court of review. *See e.g., In re Exercise of Original Jurisdiction of Supreme Court*, 201 Wis. 123, 229 N.W. 643, 645 (1930) (per curiam) ("The circuit court is much better equipped for the

trial and disposition of questions of fact than is this court and such cases should be first presented to that court."). The Jensen Rule creates a nondescript evidentiary process for handling a politically charged issue that is inherently fact intensive, and then invalidates the little guidance it does provide by rendering it optional in subsection (5)(j). Navigating these issues will require the Court to establish more precise and rigorous fact-finding rules than Jensen proposes.

D. The Jensen Proposal provides insufficient guidance on procedural rules, such that the parties would lack notice of how a redistricting challenge would be litigated and the public may feel that the rules were manipulated in any given case to favor one side or the other.

Although the Jensen Proposal purports to create an efficient and effective procedure for redistricting litigation (Mem. at 3), it lacks any definite procedure that parties can rely upon. Subsection (5)(d) allows that "the court *may* determine that any of the rules set forth in Chapters 802–804 governing cases in the circuit courts shall serve as a guide to the procedure to be followed." (Pet. at 3 (emphasis added).) This provides the illusion of a rule, but actually gives the Court a blank check. The word "may" is permissive. *Scanlon v. City of Menasha*, 16 Wis. 2d 437, 443, 114 N.W.2d 791 (1962). Thus the Court would be free to utilize the rules in chapters 802–804, *or* to apply any alternative rules it may choose.

There is no purpose in establishing a rule to govern original jurisdiction of redistricting cases if the Court can ignore the rule altogether. Allowing the Court to make new rules as redistricting litigation proceeds would only exacerbate concerns about judicial partisanship. Although some discretion is desirable, the Court, the parties, and, most importantly, the public, must have confidence that there will be some definite structure to

how this Court will handle redistricting cases. Adopting such a structure grants more protection to the Court from partisan influences and perceived partisanship. Proposed subsection (5)(d) is wholly unnecessary, as this Court always has inherent authority to control cases on its docket.

The Jensen Proposal also confusingly omits Chapters 805 (trial procedure), 807 (miscellaneous circuit court procedures), and 901–911 (Rule of Evidence). It is unclear whether only Chapters 802-804 would apply, or whether other rules typically applied in Wisconsin courts would apply as well. If those rules do not apply, such as the Rules of Evidence, what rules would serve as a substitute? The *expressio unius est exclusio alterius* canon of construction would infer the Jensen Proposal excludes all rules not mentioned. *See FAS, LLC v. Town of Bass Lake*, 2007 WI 73, ¶27, 301 Wis. 2d 321, 733 N.W.2d 287. But that provides no guidance on what would fill the resultant gap. This significant unanswered question only underscores the fact that the Jensen Proposal is filled with drafting errors.

E. The Jensen Proposal anticipates, and even invites, the Court to propose its own redistricting plan, which was the greatest concern expressed by the justices in the open administrative hearings held in 2008-2009.

Subsection (5)(f) expressly anticipates that the Court might prepare its own redistricting plan, rather than adjudicating the propriety of one or more plans proposed by the parties. However, this would further entangle the Court in partisan pressures involved in redistricting. If the Court wholesale approves a map proposed by one of the parties, which under the Jensen Proposal necessarily will be a partisan political actor, then the public perception, whether fair or not, would be that the Court is acting in a partisan matter.

If the Court were instead to approve its own map, it would be wandering deeper into the political thicket. Essentially, the Jensen Proposal puts the Court in a no-win position where it is fully engaged in a partisan process and making quasi-legislative decisions that the political branches have found too difficult to make.

That is precisely the work that the majority of justices previously determined this Court must eschew. At the January 22, 2009 open administrative conference, Justice Prosser strongly pushed against the Court's involvement in redistricting because adopting a set of rules for redistricting litigation "quite honestly [] is going to turn this court into a much more political operation."[28] Chief Justice Roggensack similarly argued against the previous rule because "redistricting is inherently political. And, I think, frankly our court is pushed on enough politically."[29] She reiterated those concerns: "I believe it has the probability, to increase the political pressures on this court in a partisan way that is totally inconsistent with our jobs as nonpartisan judiciary."[30] Justice Ziegler, commenting on the prior rule, stated it would put the Court "squarely within the sights of the partisan political framework."[31] Justice Gableman agreed that the Court should not involve itself in map drawing, arguing "There's a world of difference between reviewing the work that's been done by the Legislature to make sure that it comports with the fundamental constitutional

[28] *See* https://wiseye.org/2009/01/22/supreme-court-open-administrative-conference-3/ (last visited November 19, 2020) at 57:14.

[29] *See* https://wiseye.org/2008/04/08/supreme-court-rules-hearing-and-open-administrative-conference-part-3-of-4/ at 1:30:15 (last visited November 19, 2020).

[30] *See* https://wiseye.org/2009/01/22/supreme-court-open-administrative-conference-3/ at 33:16 (last visited November 19, 2020).

[31] *Id.* at 1:05:02.

requirements and the process as outlined here, which, as I understand it, would actually have us take a part in creating the lines."[32] Those concerns still exist today, even more so with the Jensen Proposal because it explicitly grants the Court authority to draw maps.

Jensen argues that, once the Court has either chosen a map proposed by a party or has drawn its own map, all that is left is fine-tuning. (Mem. at 9.) In other words, before the parties have even briefed the merits of the proposed map, it is nearly final according to Jensen. In reality, all parties will likely have extensive argument and expert analysis to submit regarding any proposed map. Those facts, analyses, and arguments could lead to wholesale redrafting, instead of mere tinkering.

Jensen describes the feedback anticipated in proposed subsections (5)(f) and (5)(g) as a chance to "offer proposed corrections to any perceived errors or mistakes in the proposed map before it becomes final." (Mem. at 9.) That presupposes that nothing the Court might hear would cause it to reconsider the fundamental principles of the map as proposed. This is particularly true if the Court is operating from less than a full appellate record, and potentially limited discovery, by nature of the proposed rule when drafting or adopting this map. In other words, there is every reason to believe the map-drawing process will be far more time consuming and complex than Jensen suggests.

[32] *Id.* at 1:11:59.

F. The "hearing" that the Jensen Proposal contemplates is fundamentally flawed.

1. The Jensen Proposal is exceedingly unclear about who it anticipates participating once the Court has proposed a plan.

Subsection (5)(f) of the Jensen Proposal requires the Court to propose a plan—whether one initiated by the Court or one provided by a party—at least 30 days before a hearing. (Pet. at 3.) Yet the Jensen Proposal does not articulate a clear process for public input.

Subsection (5)(f) expressly says the plan must be provided "for consideration of the parties and the public" as well as "for public inspection." (Pet. at 3.) There is no clear distinction between "consideration of … the public" and "public inspection." One of the oft-cited canons of construction this Court applies is that a text is "read where possible to give reasonable effect to every word, in order to avoid surplusage." *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. Applying this canon to the Jensen Proposal, public inspection must have a different meaning than "for consideration of the … public." However, the text does not produce a clear and unambiguous result. This would open the door to challenges over the meaning of this phrase if members of the public felt they were denied sufficient access to proceedings.

The Jensen Proposal is further lacking in what public inspection entails. What aspects of the plan would be made available for inspection? Just the district boundaries? All underlying data, analyses, and metrics? Any opinions or guidance provided by experts retained by the parties and/or the Court to assist it in this line-drawing function? Would a party be required to disclose all of its underlying data to the public if the court chooses a

party map as a starting point? The Jensen Proposal does not provide any answers to these important questions.

Subsection (5)(g) requires the court to set deadlines and other procedures for "filing objections and rebuttal to the proposed plan in advance of the hearing." (Pet. at 3.) But it is unclear who will have the opportunity to weigh in. Would comments be limited only to parties in the original action? Could any member of the public having an interest and opinion weigh in? (If so, would they need to intervene before doing so?) Would there be any opportunity for some type of discovery relating to the proposed plan, so that there is a full and fair opportunity to object? An expansive interpretation would inundate the Court with comments given the subject matter, but a restricted interpretation would exclude germane information and result in a negative public perception of the Court.

Unlike the legislative process that typically includes public hearings on proposed legislation, it seems unlikely that the Jensen Proposal means to open the door to comments or briefing by any and all members of the public. Yet, if the Jensen Proposal is not intended to create a public forum, why does it belabor the idea of public consideration and inspection? Filings on the Court's docket are generally public information, such that there's no need for special rules to make docket materials available to the public. Like other portions of the Jensen Proposal, the public-input provisions are not well drafted, and as a result, unclear, further demonstrating the need to engage in a thorough process if the Court decides to pursue rulemaking on this topic again.

2. The Jensen Proposal provides for "a hearing" without any clarity on what that entails.

Like the public-participation aspects of the Jensen Proposal, subsection (5)(h), which provides for "a hearing on the proposed plan" (Pet. at 3), is ambiguous in scope. One major question is whether participation would be limited to the parties, or could any member of the public who submitted comments speak at the hearing? Members of the public have a large stake in the outcome of the hearing and would likely appreciate the opportunity to be heard. However, if members of the public participate, what rules would apply? People unfamiliar with court decorum and procedure would likely become frustrated with the process, unlike at a legislative hearing where commenting is less formal.

Another issue is whether the scope of hearing would exclude argument on any plans proffered by parties and not proposed by the Court. When arguing the merits, or lack thereof, of a plan, comparisons could be very helpful. But the Jensen Proposal is not clear whether it allows such argument, or what a relevant argument is.

Furthermore, it is unclear if the hearing would be focused on facts related to the Court's proposed plan, on legal argument about the proposed plan, or both. Facts and legal argument would presumably be relevant during the hearing. However, the Jensen Proposal simply does not articulate what will happen at the hearing.

Similarly, the Jensen Proposal does not address whether new evidence may be submitted at the hearing. A party might want to provide presentations by experts and opinions relating to the proposed plan. Those critical arguments and facts could only be

discovered after the Court has revealed its redistricting plan. But the Jensen Proposal does not explain whether that falls within the scope of the hearing.

Clearly public participation is an important aspect of any rule that the Court adopts to govern redistricting litigation. However, the Jensen Proposal does not clearly convey whether the public would have meaningful participation or even what that participation would look like. Instead, the Jensen Rule uses inexact language and would put the Court in the position of needing to address and resolve all of the ambiguities created by the glaring omissions in the Jensen Rule as the fast-paced litigation unfolds, rather than before litigation begins.

3. The Jensen Proposal improperly constrains the timing and outcome of the hearing.

Subsection (5)(i) requires that "after making any revisions to the proposed plan that the court considers necessary, the court shall order a redistricting plan for congressional districts and state legislature no later than 15 days prior to the statutory deadline for candidates to file nomination papers for the primary or general election in the next calendar year ending in a '2.'" (Pet. at 3-4.) This improperly suggests that the Court must issue some modified version of the plan proposed and used as the basis of the hearing. The Court's deliberations should not be so constrained. If the Court determines as a result of objections and the hearing that it proposed the wrong plan and should instead adopt a plan offered by another party, a variation of a plan already submitted, or even a wholly new plan, it should have the flexibility to do so.

The Jensen Proposal calls that flexibility into question. For all intents and purposes, it locks the Court into only slightly modifying the proposed map after the hearing. This presupposes that no valid issues will arise at the hearing. And, if that is the case, the public and parties truly would not have meaningful participation in the hearing.

The timing mechanism of subsection (5)(i) is also perilously unclear. Timing is all based on action prior to the nomination papers deadline "in the next calendar year ending in a '2.'" (Pet. at 4.) For the partisan primary (which applies to elections for legislative and congressional seats), that nomination deadline is June 1 of the same year in which the election will be held in November. *See* Wis. Stat. §§ 8.15(1), 8.20(8)(a). Thus, if the Court holds a hearing in early-spring of a calendar year ending in a "2," subsection (5)(i) would give the court a decade—until the *next* calendar year ending in a "2"— to issue a ruling.

The timing mechanism could also be confounded by a special election for a legislative or congressional seat held prior to the regularly scheduled partisan primary in a calendar year ending in a "2." Special elections are not that uncommon. Since 2018 there have been several legislative special elections and a congressional special election.[33] The Jensen Rule does not specify whether that affects the Court's deadline to act or not.

G. The Jensen Proposal provides for a ruling too close to the deadline for nominating papers.

Subsection (5)(i) anticipates a ruling by the Court as close as 15 days to the deadline for candidates to submit their nomination papers, which does not provide candidates or the public sufficient time to prepare for the election.

[33] *See* https://elections.wi.gov/elections-voting/results (last visited November 27, 2020).

Confusingly, Jensen seems to argue that the proposed rule requires a ruling at least 15 days before the first date on which candidates can begin *circulating* nomination papers, not the last date on which they can submit those completed papers to the Wisconsin Elections Commission. (Mem. at 9.) That conflicts with the proposed rule. The Jensen Proposal states the deadline is "15 days prior to the statutory deadline for candidates to *file* nomination papers…" (emphasis added). "Filing" nomination papers means submitting nomination papers to the Wisconsin Elections Commission, not circulating nomination papers for signatures. Wis. Stat. § 8.15(1).

This is a big difference. The suggestion in Jensen's memorandum would shorten the window for judicial action by more than 45 days. *See* Wis. Stat § 8.15(1) (setting April 15 as the first day for candidates to circulate nomination papers and June 1 as the deadline for submitting those papers).

The deadline in subsection (5)(i) ignores the fact that there are significant questions of federal law, as well as state law, implicated in the redistricting process. Any ruling from this Court on an issue of federal law could still be subject to a collateral challenge in federal district court or appellate review by the U.S. Supreme Court. As the Court has expressly recognized, any "redistricting plan adopted by this court—like one adopted by the legislature—would be subject to collateral federal court review for compliance with federal law. … At the very least, the outcome [of an original action on redistricting] would be subject to later review in federal court." *Jensen*, 2002 WI 13, ¶16 (citing federal precedents). If the Court were to issue a ruling that altered Wisconsin's legislative and/or congressional districts only 15 days before the deadline for candidates to submit

nomination papers, there would not be sufficient time for a party to seek U.S. Supreme Court review and for candidates to prepare their election papers. In that instance, the sole recourse of impacted parties would be to file an action in federal district court seeking to enjoin the implementation of a districting scheme that violates federal statutes or the U.S. Constitution. Consequently, a ruling coming so close in time to the deadline for submission of nomination papers would sow confusion among the public and candidates attempting to gather signatures, and lead to nomination paper challenges based on signatures of electors removed from the legislative district.

It is improper to adopt a rule that foreseeably jams federal appellate review of the Court's work. *Cf. Hawkins v. Wisconsin Elections Comm'n*, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877 (Declining to accept original jurisdiction due to the lack of sufficient time to complete review and award any effective relief for ballot-access issue). This would create confusion for candidates, but more importantly electors, as they would not know if they could even sign nomination papers for a particular candidate. Thus the Jensen Proposal's deadline would in all likelihood be unworkable.

H. Finally, notwithstanding the reticulated process set forth in the Jensen Proposal, the entire mechanism is illusory and is expressly subject to change.

Subsection (5)(j) allows "the court upon its own motion or upon the motion of a party" to "alter any deadline … or dispense with the requirements" of the earlier proposed subsections. (Pet. at 4.) Accordingly, the Jensen Proposal is not a rule at all, but a guidance document that can be ignored or disposed of whenever the Court sees fit.

Subsection (5)(j) limits the exercise of this authority to circumstances with "good cause," though it is unclear if that threshold must be met only if a party seeks relief or also if the court acts *sua sponte*. (Pet. at 4.) That ambiguity would potentially put the Court in the middle of an interpretive battle between parties.

Regardless, as with proposed subsection (5)(d), where the rule provides that it is optional, that renders it illusory. Rather than establishing a full set of procedures, as Jensen argues (Mem. at 10), the proposed rule actually offers little guidance, followed by this major exception to the little it spells out. This is particularly troublesome with respect to the timing requirements of proposed subparagraphs (5)(f)-(i), because it allows for gamesmanship in which the Court or a party could attempt to limit opportunities for input on a proposed plan and/or for seeking federal appellate review of a ruling.

III. If the Supreme Court adopts rules unique to redistricting cases, those rules should adhere to a specific set of principles that have firm grounding in our legal and political traditions and that provide sufficient resources and opportunities for the Court and interested parties to fully determine the impact of the proposed districts on representation of Wisconsin residents.

The fatal flaws of the Jensen Proposal are not a bar to the Court pursuing rules specific to exercising its original jurisdiction in redistricting cases, or precluding state courts from adjudicating legal challenges to redistricting plans entirely. However, the high-stakes political game of redistricting should give the Court pause about rushing the process to craft such a rule. There is no need to create a rule prior to the upcoming redistricting process, as the federal courts have been able to handle such disputes and the Court retains its discretion to act as needed and prudent. Rather, if the Court chooses to craft a unique rule, it should do so in a deliberative manner and draft its own set of procedures that

properly balance the competing interests while maintaining the judiciary's proper constitutional role. When crafting a rule, the Court must consider numerous factors. The factors described below should be carefully evaluated and incorporated into any rule the Court adopts.

A. Minimize the Actual or Apparent Partisan Politicization of the Judiciary.

It is imperative for any redistricting rule to insulate the Court as much as possible from either acting in a partisan way, or appearing to act in a partisan way. When considering the previously proposed rule, many justices expressed grave concerns about engaging in an inherently political area. *See* Section II.E. *supra.*

Above all else, the public must believe that the Wisconsin Judiciary is, in its interpretation and application of Wisconsin law, nonpartisan and independent, and that it will decide important matters fairly and impartially. That is what separates the judicial branch from the political branches, and is consistent with the Court's role as the "umpire." Reducing partisan politicization is a means of maintaining public support for and faith in the state judiciary. Redistricting litigation will undoubtedly affix the eyes of the public on the Court throughout litigation. Every move or decision made by the Court will be scrutinized for any hint of partisanship. Consequently, the Court must consider rules that will effectively limit partisan politicization of the Court.

B. Incentivize the Legislature and Governor to Reach Resolution.

A redistricting rule should make litigation a last resort, and even painful, for the political branches during the redistricting process. The Jensen Proposal incentivizes the

parties to seek out the Court immediately in redistricting, rather than treating the Court as the final measure for resolving a legislative stalemate. In 2009, former Justice Prosser commented that the rules proposed at the time created an "invitation to fail."[34] His words ring truer today under the Jensen Proposal, which presupposes that the political branches will abdicate their constitutional duties by allowing the filing of a petition before the Legislature even attempts to draw maps.

The Jensen Proposal turns on its head the constitutional mandate for the political branches to redistrict. The people of Wisconsin elect their representatives to fulfill constitutional duties, not shy away from politically difficult or unpopular decisions. A good redistricting rule would ensure that process has every opportunity to succeed instead of forcing the judiciary into a quasi-legislative role where it is drawing maps. Doing so respects the separation of powers between the political branches and the Court, and ensures the political branches, the ones most accountable to the electors, are not abdicating their responsibilities.

C. Provide participation to proper parties, including nonpartisan interests and Citizens.

A redistricting rule should allow for robust participation by groups affected by redistricting, including non-partisan organizations and individual citizens. Redistricting litigation traditionally has not precluded non-partisan groups from participating. *See, e.g.*, *Wisconsin State AFL-CIO*, 543 F. Supp. 630. Likewise, the two most recent lawsuits

[34] https://wiseye.org/2009/01/22/supreme-court-open-administrative-conference-3/ at 16:14 (last visited November 19, 2020).

challenging Wisconsin's legislative and congressional districts have been brought by individual citizens. *See, e.g.*, *Baldus*, 849 F. Supp. 2d 840; *Whitford*, 218 F. Supp. 3d 837. This is logical because these organizations and citizens have a stake in the outcome of redistricting and provide unique arguments and perspectives beyond the traditional partisan organizations. Non-partisan participation only increases the likelihood of a fair map drawing process because it adds more parties to the adversarial process.

D. Adopt a process that allows for fair, expedited fact-finding that maintains the key elements of the crucible of adversarial litigation.

Redistricting litigation is fact-intensive. There are countless data points to evaluate and technical demographic analyses that must occur to effectively evaluate the fairness of any proposed map. The nature of redistricting therefore mandates a fair, but expedited, fact-finding process. Technological advances have made legislative map drawing, and manipulation, easier than ever. Any map proposed by a party or the Court must undergo thorough scrutiny by the litigants to not only to determine whether the map complies with constitutional and federal requirements, but also to evaluate the merits of any individual map. Only adversarial litigation, expert analysis, cross-examination, and legal briefing can ensure that the process will be as fair as possible.

Federal courts use a special statutory process to expedite redistricting through a three-judge panel that is appointed by the Chief Judge of the Seventh Circuit to conduct the litigation in district court. *See* 28 U.S.C. § 2284(a). Wisconsin courts should employ a similar mechanism, like the Court's 2007 Redistricting Committee recommendation for a five-member panel comprised of Court of Appeals judges.

Because of the highly technical and sophisticated nature of the statistical and demographic analyses involved in redistricting litigation, the Court should ensure that it has the benefit of knowledgeable, neutral experts so that it can fairly understand and evaluate proposed plans, as the Pennsylvania Supreme Court did in 2018 and as this Court's Redistricting Committee recommended. Having independent technical experts deeply experienced in the disciplines relevant to redistricting would add to the proceeding because those experts provide more information and perspectives. It would further help the Court to evaluate proposed maps and proffered experts, because the Court could weigh the partisan arguments against politically-neutral viewpoints. This would become especially important if the Court did in fact have to draw its own map.

E. Provide advance notice of clear, binding procedures and rules for how any redistricting case will be handled in Wisconsin courts.

If the Court chooses to adopt redistricting rules, those rules should be strictly followed and easily understood. The Jensen Proposal is neither clear nor a rule because it can be easily modified or tossed aside.

Both the Court and potential parties would greatly benefit from clear and binding rules. It would be manifestly unfair to parties to create a procedure that can be disregarded at any time. Parties relying on rules should not be disadvantaged for that reliance. Furthermore, a clear procedure expedites redistricting litigation because it potentially reduces litigating the meaning or application of a rule.

Binding procedures also further insulate the Court from the hyper-partisan nature of redistricting. Rules granting broad discretion will lead to exercising that discretion. If the

Court casts aside procedures, it will likely be viewed by the public through a partisan lens, eroding the public confidence in the Court and the process.

F. Adopt a process that allows for expedited appellate review of erroneous fact-finding to ensure the process concludes with time for ancillary or collateral federal proceedings and to allow orderly administration of the next elections.

It is almost guaranteed that if the Court adopts a redistricting procedure, a party will disagree with the final legislative maps approved by the Court. A matter as important as redistricting necessitates additional layers of scrutiny to reduce the risk of mistakes. Consequently, any rule adopted by this Court should provide for a sufficient but expedited appeal process for parties to pursue potential factual errors. One potential mechanism, for example, would be for a rule providing that the Court would appoint an independent body to draw initial maps, but the Court would retain authority to review those maps. Such a process would ensure partisan fairness and insulate the Court from charges of partisanship, yet still provide the Court with an opportunity for review.

Moreover, any appellate review of legal challenges must be conducted in an expedited manner to allow time for federal review that could follow and to finalize districts so that the Wisconsin Elections Commission, candidates, and voters can have adequate time to prepare for the first elections conducted after the census data are released. An example of a procedure that both provides for appellate review but requires that review to be conducted expeditiously may be found in the rule proposed by the previous Redistricting Committee that created an expedited procedure to review the special court's decision, allowing an aggrieved party to appeal to the Wisconsin Supreme Court. 2007 Committee

Report at 8.[35] Retaining a level of appellate review, while respecting the time-sensitive nature of the redistricting process, will minimize mistakes and instill public trust in the outcome. Although a time crunch will likely occur in any case, a faster deadline for this Court to approve a final redistricting plan will both help protect the rights of all litigants on appeal and respect the need of candidates for office and elections administrators to have final districts in place for the next round of elections.

G. Any proposed rule must consider the financial costs of entering redistricting disputes.

Court resources are required to properly adjudicate any redistricting dispute. The Jensen Proposal does not answer any questions as to how the Court would handle the substantial resources required. Chief Justice Roggensack raised this exact issue with the rule proposed in 2008 when she said "[t]here's nothing that's been put out that I've seen about (a) how are we going to staff this, and (b) where are we going to get the money for it."[36] The Court will undoubtedly need its own experts to resolve questions of fact, and their analyses could be costly. If the Court draws its own map that will come at a financial cost. The Court must determine how it will handle those costs before settling on a final rule.

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[35] Available at https://www.wicourts.gov/supreme/docs/0203report.pdf (last visited November 29, 2020).

[36] *See* https://wiseye.org/2008/04/08/supreme-court-rules-hearing-and-open-administrative-conference-part-3-of-4/ at 1:37:18 (last visited November 19, 2020).

IV. The memorandum Jensen provided in support of his proposal misrepresents what the United States Supreme Court has said about redistricting litigation in state and federal courts.

In support of the rules petition, Jensen argues that "redistricting is primarily a state and not a federal prerogative." (Mem. at 2.) Accordingly, Jensen argues, it is incumbent upon state courts, rather than federal courts, to adjudicate redistricting disputes. That argument distorts U.S. Supreme Court ("SCOTUS") case law.

SCOTUS has held that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Growe v. Emison*, 507 U.S. 25, 34 (1993) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)). SCOTUS has also held that "[a]bsent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Growe*, 507 U.S. at 34.

SCOTUS recognizes two fundamental principles in redistricting litigation. ***First***, redistricting is a political task delegated by the U.S. Constitution to the states. *See Growe*, 507 U.S. at 33 (redistricting is a "highly political task"); *Miller v. Johnson*, 515 U.S. 900, 914 (1995) (recognizing that "redistricting in most cases will implicate a political calculus in which various interests compete for recognition"); *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("Politics and political considerations are inseparable from districting and apportionment."); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 416 (2006) ("Underlying this principle is the assumption that to prefer a court-drawn plan to a legislature's replacement would be contrary to the ordinary and proper operation of the political process."); *Vieth v. Jubelirer*, 541 U.S. 267, 285-86 (2004) ("The Constitution

clearly contemplates districting by political entities, *see* Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics."); *Karcher v. Daggett*, 462 U.S. 725, 739 (1983) ("We have never denied that apportionment is a political process."); *Growe*, 507 U.S. at 34 (citing U.S. Const. art. I, § 2) ("[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts."); *Miller*, 515 U.S. at 915 ("Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests."); *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 543 (2013) ("Drawing lines for congressional districts is likewise primarily the duty and responsibility of the State." (internal quotation marks omitted)); *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (U.S. 2018) ("Redistricting is primarily the duty and responsibility of the State, and federal-court review of districting legislation represents a serious intrusion on the most vital of local functions." (internal quotation marks omitted)); *Cf. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (U.S. 2015) (affirming legality of Arizona referendum to transfer primary responsibility for redistricting from legislature to independent commission).

Second, where a state actor—including a court—has already begun to weigh in on redistricting before federal litigation is initiated, federal courts should defer and let that process play out. *Growe* definitively commands that federal litigation cannot impede the reapportionment process timely underway in state political branches or state courts. *Growe*, 507 U.S. at 34. This Court recognized that principle in *Jensen*. "*Growe* requires federal courts '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.'" *Jensen*, 2002 WI 13, ¶15 (quoting *Growe*, 507 U.S. at 33)

Neither principle requires—or even favors—this Court injecting itself in redistricting litigation against the justices' own better judgment. These principles create deference to state actors timely completing the redistricting process. However, when state courts *choose* not to engage in redistricting, that deference is inapplicable. SCOTUS precedent is not a directive that state courts must engage in redistricting litigation, but a rule that respects the constitutional roles of the states and federal judiciary within our constitutional system.

Two examples demonstrate this deferential principle. In *Growe*, the Supreme Court overturned a federal district court injunction because the Minnesota state courts had already begun a timely process for redistricting, and there was no indication the state courts would not provide maps in a timely fashion. *Growe* 507 U.S. at 33. Conversely, in *Branch v. Smith*, 538 U.S. 254 (2003), the Mississippi Supreme Court was involved in drawing legislative maps, but the federal district court had doubts as to whether a plan would be in place in a timely manner. The district court set a deadline for the Mississippi court to finalize a plan. After the state court failed to meet that deadline, the federal court imposed its map on the state and prohibited a future state court map from going into effect. The Supreme Court found "unlike in *Growe*, there is no suggestion that the District Court failed to allow the state court adequate opportunity to develop a redistricting plan" because the Mississippi court did not act timely. *Branch*, 538 U.S. at 262. Therefore the federal judiciary had jurisdiction over Mississippi's failure to adopt a redistricting plan. This

makes clear that there is an appropriate role for federal courts; if state courts were the sole proper venue for redistricting disputes, *Branch* would have been decided differently.

Also apparent is that the federal judiciary remains the final voice on issues of federal law. *Branch* involved a state redistricting plan subject to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, which provided an alternative ground for federal courts exercising jurisdiction. Thus, the Supreme Court's analysis in *Branch* hinged on interpretation of federal law. Regardless of proceedings before this Court or other state courts to adjudicate redistricting-related claims, federal courts retain jurisdiction over any disputes that arise under federal law, whether statutory (such as claims under the Voting Rights Act of 1965) or constitutional (such as claims for violation of the Equal Protection or Due Process clauses of the U.S. Constitution).

Fully appreciating the principles that redistricting is primarily a state responsibility, and that federal courts will defer to state courts on issues of state law, this Court determined in 2009 not to wade into the political thicket and, on that sound basis, declined to promulgate rules that would invite redistricting litigation. Rather, the Court determined that the federal judiciary was better suited to handle redistricting disputes.

Jensen is incorrect to argue that this Court has not kept its promise, in *Jensen*, to consider new rules. (Mem. at 2.) The Court thoroughly considered new rules. The post-*Jensen* rules petition was submitted on July 30, 2002, only months after deciding *Jensen*. This Court, in November of 2003, convened a Redistricting Committee for the purpose of studying potential redistricting rules. After nearly four years of studying the issue, the Redistricting Committee drafted preliminary recommendations and sought further

comment from interested parties on September 21, 2007. One year later, the Redistricting Committee issued a supplemental memorandum further modifying the recommendations and seeking additional public comment.[37] The Court then held two open administrative conferences to discuss the proposed rules. After studying the issue for *over seven years*, this Court decided against promulgating redistricting litigation rules.

That Jensen dislikes this Court's decision is distinct from whether the Court made a decision. The Court engaged in a thoughtful and thorough evaluation immediately after the *Jensen* decision, and it ultimately decided the risks to the judiciary were too great to justify the perceived benefits of the rulemaking proposal.

One reason cited by justices for not enacting a rule was that federal courts were better suited to handle redistricting cases. Justice Prosser, who prior to becoming a justice was a Republican legislator and Speaker of the Assembly, stated "I just think it is the wrong assignment for this Court, at almost any time, because I'm not sure people fully understand what redistricting is."[38] He further opined: "It is almost a conflict [of interests] for us to make these decisions, either extremely carefully or blindfolded, and then go back to those folks and ask for support of this court. It's an inherent conflict of interests."[39] Chief Justice Roggensack expressed that federal courts were better suited to handle redistricting, saying "the federal courts have done a very good job, and the federal courts are not elected officials

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[37] Available at https://www.wicourts.gov/supreme/docs/0203supplementalmemo.pdf (last visited November 29, 2020)

[38] *See* https://wiseye.org/2009/01/22/supreme-court-open-administrative-conference-3/ at 18:04 (last visited November 19, 2020).

[39] *Id*. at 20:45.

that are apt to be seen as partisans when they do the job of redistricting."[40] She later asserted: "There is under no set of circumstances that the federal courts could not take this. They've taken it twice before and could take it easily again. ... I would vote not to take it. It takes four votes to start an original jurisdiction, and I say 'No.'"[41] Justice Ziegler had similar thoughts, pointing out that "[w]e have a federal court who has lifetime appointments and they have done this three times and apparently have done it successfully. It's a minority of states that have attempted to tackle this issue, and ... the majority of the minority have justices who are appointed."[42] These comments all either explicitly or tacitly endorsed a continuation of the federal courts presiding over redistricting disputes because those courts are better forum to do so.

It is well within the province of this Court to make such a decision and decline to adopt new rules specific to redistricting disputes. To the extent that Jensen presents federal precedent as precluding that decision, it distorts the law.

CONCLUSION

The Jensen Proposal is an eleventh-hour attempt to drastically change this Court's procedures related to redistricting litigation, and it will politicize and hamstring the Court if adopted. The Court itself has, after extended study and consideration, previously declined to engage in this type of rulemaking. If it determines it must reverse course today, the only path forward is to thoroughly vet and study new proposals, encourage substantive public

[40] *Id.* at 34:25.

[41] *Id.* at 1:14:13.

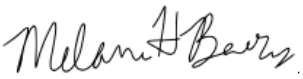
[42] *Id.* at 1:05:02.

input, and only then adopt a rule well in advance of the next decennial redistricting so that the Court's motives and fairness cannot be questioned. For the above-stated reasons, the Court should reject Rule Petition 20-03.

Dated: November 30, 2020

Respectfully submitted,

LAW FORWARD, INC.



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