BEFORE THE STATE OF WISCONSIN SUPREME COURT

Rules Petition 20-03

IN RE: PETITION FOR PROPOSED RULE TO AMEND WIS. STAT. § 809.70
(RELATING TO ORIGINAL ACTIONS)

OBJECTION TO PROPOSED RULE 20-03
BY ATTORNEY JAMES A. OLSON

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. PERSONAL BACKGROUND

I am an attorney in good standing with the State of Wisconsin Bar Association since June 6, 1966. I have also been admitted to practice law in the U.S. Federal Court for the Western and Eastern District Courts of Wisconsin, the Seventh Circuit Court of Appeals, and the United States Supreme Court. I am currently admitted *pro hoc vice* to the Federal District Court of Massachusetts.

Since admitted to practice I have been employed by Lawton & Cates, S.C. of Madison, Wisconsin. My principal work has been as a trial attorney and I have been certified as a Civil Trial Advocate by the National Board of Trial Attorneys since 1987. My trial work has included complex litigation and also redistricting work in the case of *Baldus v. GAB,* 849 F. Supp. 2d 840 (E.D. Wis., 2012).

I respectfully make these objections to the proposed rule.

II. CURRENT POLITICAL SITUATION IN WISCONSIN

Currently, both houses of the Legislature are controlled by the Republican Party. The Governor is a Democrat. The Governor could veto a redistricting plan adopted by the Legislature. The Republican Legislature would have insufficient votes to override the veto. This could result in a deadlock that would prevent the passage of a redistricting plan.

However, Governor Evers has appointed a non-partisan commission to recommend a redistricting proposal. This could provide a basis for adoption of a plan that will be approved by the Legislature and signed by the Governor.

III. THE MOST RECENT REDISTRICTING PROCESS IN WISCONSIN WAS HIGHLY PARTISAN AND CONDUCTED IN SECRET

Following the 2010 census the Republicans controlled both houses of the Wisconsin Legislature and also the governorship. The Republican-controlled Assembly and Senate hired

the same private law firm to assist in preparing a redistricting plan. The plan was developed in secrecy in the lawyers' office by two aides to the Republican caucuses and two consultants retained by the Assembly and Senate using software that permitted drawing districts of equal population. Republican members of the Assembly and Senate were allowed to view only their new proposed districts, and Democratic members were not allowed to view the proposed districts at all until days before the Legislature voted on the proposed plan. Only a small cadre of Republican legislative leadership viewed the plan as a whole before it was unveiled to the public shortly before the hearing. In a pre-trial order the three-judge Federal panel in *Baldus, supra* was highly critical of the process:

> What could have — indeed should have — been accomplished publicly instead took place in private, in an all but shameful attempt to hide the redistricting process from public scrutiny,..

See news report attached as Exhibit A.

The plan that was developed created State Assembly districts that allowed Republicans to capture over half of the Assembly seats even though Democratic candidates collected over fifty percent of the total votes statewide. In short, it was a classic gerrymander.[1] However, since there was no recognized standard for finding a redistricting plan unconstitutional due to political gerrymandering (see *Vieth v. Jubelier,* 541 U.S. 267 (2004)), the gerrymandered redistricting plan survived.

The developers of the plan claimed that it was developed without partisan considerations. However, the three-judge panel in *Baldus* found this "almost laughable."

> We come to that conclusion not because we credit the testimony of Foltz, Ottman, and the other drafters to the effect that they were not influenced by partisan factors; indeed, we find those statements to be almost laughable. 849 F. Supp. 2d at 852.

[1] See *Baldus, supra,* at 846 for a description.

That conclusion was bolstered by the conclusion of a different three-judge panel in the subsequent *Whitford v. Gill* partisan gerrymandering action that 2011 Wisconsin Act 43 was an unconstitutional partisan gerrymander. *See* 218 F. Supp. 3d 837 (W.D. Wis. 2016). The United States Supreme Court later vacated the judgment on standing grounds but did not address the merits of the district court's opinion.

IV. THE 2020 REDISTRICTING PLAN COULD BE DRAWN BY A COURT

Since we have a divided government in Wisconsin, it is possible that no plan will be enacted through the political process. This means that the redistricting map must be drawn by a court. In the past, a three-judge panel of the federal court has been appointed to perform that role. The panel has performed a fact-finding process where competing plans were presented and full discovery conducted. Ultimately the court drew the lines. In *Prosser v. Election Board,* 793 F. Supp. 2d 859 (W.D. Wis. 1992), the court drew the lines for 99 Assembly districts and 33 Senate districts. Most importantly, unlike the gerrymandered Wisconsin 2010 redistricting, "the court-drawn plans have consistently and scrupulously striven to be politically neutral." *Id.* at 867.

The proposed rule attempts to develop a procedure for the Wisconsin Supreme Court to ultimately draw the redistricting map. The petitioners argue that redistricting is a state function. However, when the state legislative process has failed, federal courts have stepped in to perform the function. *Prosser, supra.* In the previous decade, the State Supreme Court considered adopting a rule to facilitate redistricting litigation under its jurisdiction, but ultimately declined, determining after a six-year study by a neutral committee that federal courts were a viable venue, with fewer political pressures than elected state justices. *See,* Wisconsin Supreme Court Open Administrative Conference April 8, 2008, Justice Prosser at 1:58:10: "Let them go to the federal

court,"[2] *and* Wisconsin Supreme Court Open Administrative Conference January 22, 2009, Justice Roggensack at 34:25: "[b]ut the federal courts have done a very good job, and the federal courts are not elected officials that are apt to be seen as partisans when they do the job of redistricting."[3]

V. THE PROPOSED RULE IS DEFICIENT IN SEVERAL RESPECTS

A. The proposed rule is designed to exclude three-judge federal panels

The initial proposal reads:

> (4) Requests to the supreme court to take jurisdiction of any case which relates to congressional and/or state legislative redistricting shall be through a petition for an original action under this section. A petition for an original action under this section may be filed and is ripe any time after the U.S. Census Bureau delivers apportionment counts to the President and Congress as required by law.

This provision asks the court to take jurisdiction of the case before a redistricting plan has even gone before the legislature. It asks the court to step in before there is a case or controversy. The only reason for the provision is to attempt to deprive a federal court from exercising jurisdiction since the federal court would only take jurisdiction if a case or controversy was presented (of course actions for violation of federal statutes or federal constitutional violations worked by any districting plan would remain actionable in federal court). The obvious reason for this provision is that petitioners believe that a Wisconsin court, rather than a federal court, would be more favorable to a plan that they might develop.

B. The rule makes certain entities super intervenors.

> (b) The Governor, the Senate, the Assembly and political parties shall be granted intervention as of right.

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

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

If a plan has not been approved, all voters in Wisconsin are aggrieved. Intervention should be allowed by *any* interested voter or organization, with no priority given to political parties as intervenors as of right. In *Prosser, supra,* numerous individuals and organizations were permitted to intervene, and a full scope of issues were raised by those intervenors.

C. The rule subsection that permits disposal of the case pursuant to documents filed in connection with a petition for intervention is absurd.

Redistricting is a fact-intensive undertaking which involves massive discovery. To even suggest that it can be resolved on initial filings or on the filing of plans is ludicrous. The proposed rule reads:

> (c) The court may dispose of the case on the documents filed under sub. 3 or may order further briefing or may call for additional evidence and for briefs and argument after such evidence has been received. If the court does not dispose of the case on the documents filed under sub. 3, then the court shall provide, by order, for the submission of proposed redistricting plans by the parties and interested persons who have been allowed to intervene and the following additional procedures shall apply.
>
> (d) Whenever appropriate, and subject to order of the court, 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 in a particular case.

Any plans submitted must be subject to examination under oath. In *Baldus* there was extensive discovery including discovery in the evening following a court session. A rule that contemplates no discovery or taking of evidence cannot serve fairness or thoroughness, and will increase perceptions of partisan side-taking.

D. The fact-finding provision is deficient.

> (e) If the court determines that disputed issues of material fact must be resolved on the basis of oral testimony, the court may refer such issues of fact to a circuit court or referee for determination per sec. 751.09 to take testimony and to report findings of fact and recommendations to the supreme court. The appointment of a referee shall be as set forth in Wis. Stat. § 805.06.

Every redistricting case involves disputed issues of fact. How that takes place is vital. Fact-finding in these cases usually involves a three-judge panel of federal judges. A master or circuit court judge could be overwhelmed or perceived as partisan. In fact, this court recognized the preference for a multi-member body in *Jensen v. Wisconsin Election Board,* 249 Wis. 2d 706, 721, 639 N.W.2d 706 (2002).

> Components of a new procedure could include: provisions governing factfinding (by a commission or panel of special masters or otherwise)….

In addition, the rule should provide standards for recommending a plan to guide those evaluating or creating maps. These should include, among others:

1. The recommended plan shall be consistently and scrupulously politically neutral.

2. The plan shall follow the Voting Rights Act. 42 U.S.C. 1973.

3. "[R]epresentative democracy cannot be achieved merely by assuring population equality across districts," *Prosser,* 793 F. Supp. 2d at 863. Factors like homogeneity of needs and interests, compactness, contiguity, and avoidance of breaking up counties, towns, villages, wards, and neighborhoods are all necessary to achieve this end. *Id*

The proposed rule is vague regarding fact-finding and the report. Does the report require the fact-finder to find facts regarding each issue for each plan? For example, would it find that plan A was more compact in most districts but less than plans B, C, D, and E? However, plan C has the least population deviation followed by E, B, A, and D. Similar fact-finding would follow for all issues for all plans.

This would then require the fact-finder or Supreme Court to craft a plan for 99 Assembly districts, 33 Senate districts, and 8 Congressional districts. Furthermore, the Supreme Court would not have the benefit of live testimony.

VI. FEDERAL-THREE JUDGE REDISTRICTING PANELS HAVE A HISTORY OF BEING CONSISTENTLY AND SCRUPUOUSLY POLITICALLY NEUTRAL

Contrast proposed Rule 20-03 to the procedure of a three-judge federal panel. The panel would set the procedure, hear live testimony, and participate in questioning. In addition, the three-judge panel typically is a combination of appellate and trial court judges. Also, the three-judge panel usually has judges appointed by presidents of different parties. In *Prosser,* Judges Posner and Curran were Reagan appointees while Judge Crabb was a Carter appointee. In *Baldus,* Judge Wood was a Clinton appointee; Judge Stadtmueller was a Reagan appointee; and Judge Dow was a George W. Bush appointee. This ensures balance and the appearance of neutrality and is a reason why federal three-judge redistricting panels are reputed to be consistently and scrupulously politically neutral.

Federal three-judge redistricting panels have a long history of managing redistricting litigation. There is no reason to change.

CONCLUSION

The petitioners stress the need for speed in the redistricting process and brag about the speed with which the process was carried out in 2011. (Memo at 4). That speed was accomplished by a secret process that excluded the Democratic Party and that really only achieved equality of population across districts. The plan was not politically neutral and greatly favored the Republican Party.

The citizens of Wisconsin deserve more. They are entitled to fair redistricting maps that are the result of a transparent, deliberative process that follows recognized standards and that shall be consistently and scrupulously politically neutral. Federal three-judge panels have unswervingly met those needs. Rule 20-03 does not.

Dated: November 25, 2020.

Respectfully submitted,

/S/
JAMES A. OLSON
Attorney at Law, Emeritus
3984 Plymouth Circle
Madison, WI 53705
608-233-4455
State Bar No. 1009442

EXHIBIT A

Federal court issues harsh order that GOP must release redistricting records

- Mary Spicuzza | Wisconsin State Journal
- Feb 17, 2012 Updated May 22, 2012
- Available at: https://madison.com/wsj/news/local/govt-and-politics/federal-court-issues-harsh-order-that-gop-must-release-redistricting-records/article_9c007086-58e5-11e1-ad4d-0019bb2963f4.html

Using especially tough language, a three-judge panel in Milwaukee on Thursday ordered Republican lawmakers to release a collection of emails and documents related to redistricting legislation, despite vigorous attempts by GOP leadership to keep the records secret.

In the order, the panel chastised Republican lawmakers for trying "to cloak the private machinations of Wisconsin's Republican legislators in the shroud of attorney-client privilege."

"What could have — indeed should have — been accomplished publicly instead took place in private, in an all but shameful attempt to hide the redistricting process from public scrutiny," read the order, written by U.S. District Judge J.P. Stadtmueller.

Neither Senate Majority Leader Scott Fitzgerald, R-Juneau, nor Assembly Speaker Jeff Fitzgerald, R-Horicon, had any immediate comment on the ruling.

Stadtmueller was appointed to the federal bench by Republican President Ronald Reagan. He was joined by Robert Dow, appointed by Republican President George W. Bush, and Diane Wood, appointed by Democratic President Bill Clinton.

States are required to redraw legislative and congressional districts every 10 years to reflect population changes, which are reflected in the U.S. Census. The Legislature has set aside $400,000 to pay for the process.

Even before the new maps, which were drawn by Republicans who control the Legislature, were released, a group of Democratic citizens sued in federal court challenging the maps' constitutionality.

Immigrant rights group Voces de la Frontera also has sued.

It was learned this month that most of the state's Republican lawmakers signed a legal agreement not to comment publicly about redistricting discussions.

Republican lawmakers and attorneys with the firm Michael Best & Friedrich had argued that 84 documents were covered by attorney-client privilege and should not be released.

Thursday's ruling is similar to a string of recent orders that said such documents were not protected by attorney-client privilege. The judges said the Legislature's process blurred the lines between political, strategic, and legal advice. A trial in the redistricting lawsuit is scheduled to begin on Tuesday.

The emails show a concerted effort to line up political support for maps leaders knew would be highly controversial, going so far as to orchestrate supporting testimony before the potential testifiers had even seen the maps.

In an email dated July 11, 2011, attorney Jim Troupis discussed with Republican legislative staffers how to prepare for the supporting testimony of conservative Dane County Sup. Eileen Bruskewitz. In the message, Troupis said Bruskewitz will testify in favor of the maps if they "call her and provide her the numbers, district lines, and other information today and then walk her through things."

Reached by phone Thursday, Bruskewitz, defended the actions by saying she was trying to make the process less partisan.

"I don't think I had seen a copy of (the map), but I knew it would be favorable to Republicans," she said.

A similar email exchange took place concerning the support of Rick Esenberg, a Marquette University law professor.

"Professor Rick Esenberg has agreed to testify next Friday in support of the map," Troupis wrote in an email to the staffers. "He needs a.) the maps; b) the numbers; c) a summary of eq. population, compact /contiguous, minority responsiveness aspects of the map."

Esenberg told the State Journal that his position was that it's difficult to win a lawsuit alleging partisan gerrymandering.

"I was testifying that I didn't think it was susceptible to legal challenge," Esenberg said. "We never discussed what I would say."

Many of the emails dealt with the Latino communities in the Milwaukee area. In one email, Troupis discusses the potential endorsement of the maps by MALDEF, a large Latino civil rights foundation.

Troupis wrote "this will take the largest legal fund for the Latino community off the table in any later court battle."

Assembly Minority Leader Peter Barca, D-Kenosha, said the emails were revealing.

"It undermines the credibility of their testimony," Barca said.

Contact Clay Barbour at cbarbour@madison.com or 608-252-6129; contact Mary Spicuzza at mspicuzza@ madison.com or 608-252-6122.