STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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Clerk of the Supreme Court
Attn: Deputy Clerk-Rules
Post Office Box 1688
Madison, WI 53701-1688

Re: Rule Petition 20-03, In re Petition for Proposed Rule to Amend Wis. Stat. § 809.70 (Relating to Redistricting)

Dear Clerk of the Supreme Court:

The following comments filed on behalf of Governor Tony Evers provide multiple reasons why this Court should decline to adopt the proposed rule. The petitioners ask this Court to codify procedures that fundamentally conflict with its traditional role in original actions. And they do so in the context of especially complex trial court litigation, without meaningfully addressing the core factual and practical issues that will arise. Further, the proposal codifies court involvement in a political process and does so before that process can even begin. It also asks this Court to pre-decide legal issues, such as ripeness, that must be addressed on a case-by-case basis and not through a procedural rule.

In all, instead of offering a simplified path, the proposal ignores the many complexities, solving none of them. The Court should deny the petition in its entirety.

I. The petition asks this Court to codify fundamental alterations that are inconsistent with its traditional exercise of original jurisdiction.

This Court's exercise of original jurisdiction is subject to long-established rules and precedent, which the present petition seeks to fundamentally alter. This Court should decline the invitation.

As the petitioners point out, nearly two decades ago, this Court suggested it would explore rulemaking to potentially address redistricting through original actions. *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 24, 249 Wis. 2d 706, 639 N.W.2d 537. In the 18 years since, it has not done so. In other words, the possibility is not novel—rather, this Court has long declined to codify what the petitioners now propose.

That likely stems from something recognized in *Jensen*: "We are obviously not a trial court; our current original jurisdiction procedures would have to be substantially modified in order to accommodate the requirements of this case." *Jensen*, 249 Wis. 2d 706, ¶ 20. That is correct. The original action procedures do not contemplate this Court becoming a trial court, which the lawsuit contemplated by the petitioners would require. And neither do this Court's long-standing principles governing its exercise of original jurisdiction.

Rather, for over a century, this Court has maintained that original jurisdiction is appropriate for legal questions amenable to a "speedy and authoritative determination." *Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 50 (1938); *see also State ex rel. Hartung v. City of Milwaukee*, 102 Wis. 509, 78 N.W. 756, 757 (1899). Thus, the Court has repeatedly expressed "great[ ] reluctance" to "grant leave for the exercise of its original jurisdiction . . . where questions of fact are involved." *In re Exercise of Original Jurisdiction*, 201 Wis. 123, 229 N.W. 643, 645 (1930); *see also* Sup. Ct. Internal Operating Procedures (IOP) § III(B)(3). Rather, trial courts are "much better equipped for the . . . disposition of questions of fact than is this court," and so cases involving factual questions "should be first presented to" trial courts. *In re Exercise of Original Jurisdiction*, 224 N.W at 645 (citing *State ex rel. Hartung*).

That is still the rule: original actions are appropriate if, among other things, there are "no issues of material fact that prevent the court from addressing the legal issues presented." *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶ 19, 334 Wis. 2d 70, 798 N.W.2d 436 (Prosser J., concurring) (rejecting, as a matter of law, a challenge to the process used to pass a legislative act). This Court thus considers granting petitions for an original action where it may be disposed of "as a matter of law" and "no fact-finding procedure is necessary." *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 683, 264 N.W.2d 539 (1978) (addressing a legal question regarding partial veto authority). The petitioners' proposal turns that no-fact-finding rule on its head by attempting to codify a fact-finding-intensive original action.

As for redistricting in particular, this Court likewise has not taken on fact-finding or map-making trials, which is the consequence of what the petitioners propose. While *Jensen* identified several cases where the Court exercised jurisdiction over a redistricting-related matter, none required this Court to craft its own map or choose

between maps submitted by the parties. Such a case would involve intensive vetting of disputed facts, including competing expert testimony, and a map-drawing process that "require[s] an enormous effort." *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 638 (E.D. Wis. 1982); *see Jensen*, 249 Wis. 2d 706, ¶¶ 18, 20.

For example, in *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953), the Court highlighted that the case involved "no disputed questions of fact." *Id.* at 647. Rather, the Court addressed legal questions like whether a constitutional amendment related to districting was properly presented to the people. *Id.* at 651–55; *see also State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 726, 730 (1892) (the facts were "admitt[ed]" and the Court addressed discrete legal questions). Similarly, in *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551 (1964), the Court had no fact-finding hearings but rather invalidated an attempted redistricting based on the failure to present the bill to the Governor for his approval, as required. *Id.* at 558–59. The Court then provided time for the Legislature and Governor to produce a map, recognizing the difficulties that would arise if the Court had to do so in the first instance: "the problem of drafting a plan convinces us that there is no single plan which the constitution, as a matter of law, requires to be adopted to the exclusion of all others." *Id.* at 570; *see also State ex rel. Bowman v. Dammann*, 209 Wis. 21, 243 N.W. 481 (1932) (evaluating an existing map based on the particular legal arguments made); *Jensen*, 249 Wis. 2d 706, ¶ 9 (noting that in *State ex rel. Dreyfus v. Election Board*, No. 82–480–OA (Wis. 1982), the Court granted a redistricting-related petition "but its jurisdiction was brief and inconsequential").

Taking on what the petitioners propose, as a rule, directly conflicts with the principles that guide this Court's exercise of its original jurisdiction. Rather than disallow complex fact- and expert-based litigation in Wisconsin's highest appellate court, it would codify it in one of the most intensive areas of trial court litigation.

II. The proposed rule does not meaningfully address the complex factual and logistical issues with conducting and deciding a redistricting lawsuit.

When they arrive at a court, redistricting disputes spur a host of claims, each with its own fact- and expert-intensive inquiry. Overseeing and then deciding the matters requires the full arsenal of the trial courts that hear them. First, overseeing the litigation is no small task: there is intensive discovery and discovery disputes, frequent and rapid motion practice, voluminous disputed factual submissions, pretrial maneuvering, and multi-day trials. The cases thus spawn a series of decisions on the way to the merits. Second, the final merits decision is itself a factually and legally complex undertaking. Evaluating, selecting, and drawing maps involve a host

of factors and detailed facts, specialized software, and experts to navigate it. The proposed rule—which makes Wisconsin's highest appellate court the court of first resort—does not properly account for this reality.

First, redistricting proceedings are extensive and factually complex because the claims demand it. As the federal court that drew Wisconsin's districts following the 2000 census observed, reapportionment "requires the balancing of several disparate goals." *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at *2 (E.D. Wis. May 30, 2002). Considerations that drafters and courts must grapple with include, for example:

- Population equality and "one-person-one-vote" requirements.
- Drawing districts that are as contiguous and compact as possible.
- The requirements of the federal Voting Rights Act.
- "Core retention."
- Avoiding split municipalities and ward boundaries.
- Maintaining traditional communities of interest.
- For court-drawn maps, avoiding partisan advantage.
- Avoiding unnecessary pairing of incumbents.
- Addressing senate elections in Wisconsin where, if voters are shifted from odd to even senate districts, they will face a two-year delay in voting for state senators, referred to as "disenfranchisement."

These requirements are products of federal law and Wisconsin's Constitution. *Baumgart*, 2002 WL 34127471, at *3 (summarizing the sources of these requirements); *Whitford v. Gill*, 218 F. Supp. 3d 837, 844–45 (W.D. Wis. 2016), *vacated and remanded*, 138 S. Ct. 1916 (2018) (providing a similar summary). And each comes with its own complexities.

For instance, Wisconsin's constitutional compactness requirement "is not absolute," but rather turns on what is "practicable," which will involve consideration of natural and political-subdivision boundaries. *Wisconsin State AFL-CIO*, 543 F. Supp. at 634 (citation omitted). And a senate "disenfranchisement" claim—where voters lose their constitutional right to vote for a state senator for two years—involves particularized inquiries into the degree of voter disenfranchisement, overall population shifts, impacts on particular demographic groups, and a comparison of possible districting maps. *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 852–53 (E.D. Wis. 2012). The inquiry turns on a particular case's "own record"; there is no "hard-and-fast standard." *Id.* at 852.

The potential federal claims also are fact intensive. One example is a Voting Rights Act claim, which often arises in Wisconsin redistricting cases. Those claims turn on whether "(1) the minority groups are sufficiently large and geographically compact to create a majority-minority district; (2) the minority groups are politically cohesive in terms of voting patterns; and (3) voting is racially polarized, such that the majority group can block a minority's candidate from winning." *Baldus*, 849 F. Supp. 2d at 854. If that showing is made, courts then evaluate "the totality of the circumstances to determine whether the minority groups have been denied an equal opportunity to participate in the political process and elect candidates of their choice." *Id.*; *see also Prosser v. Elections Bd.*, 793 F. Supp. 859, 868–71 (W.D. Wis. 1992) (addressing Voting Rights Act claim).

The three-factor test will turn on both on-the-ground facts and expert opinions providing, for example, a "racial polarization analysis." *Baldus*, 849 F. Supp. 2d at 855. And the totality of circumstances inquiry "requires us to get into the weeds and decide, based on all of the facts in the record, whether [the populations at issue] have been denied an equal opportunity to participate in the political process and elect candidates of their choice." *Id.*; *see also id.* at 856 (summarizing testimony from two experts related to demography and voting opportunity).

Another common federal claim stems from the "one-person, one-vote" principle. Those claims also turn on detailed factual inquires. *Baldus*, 849 F. Supp. 2d at 849–50. The plaintiffs have the initial burden to show "(1) the existence of a population disparity that (2) could have been reduced or eliminated by (3) a good-faith effort to draw districts of equal proportion." *Id.* at 850. If that is shown, defendants must show that the variance "was necessary to achieve some legitimate goal," which involves inquiries into "core retention; avoidance of split municipalities; contiguity; compactness; and maintenance of communities of interest." *Id.* (citation omitted).

Key facts and expert opinions inevitably are disputed. However, as this Court recognizes, it "is not a fact-finding tribunal, and although it may refer issues of fact to a circuit court or referee for determination, it generally will not exercise its original jurisdiction in matters involving contested issues of fact." Sup. Ct. Internal Operating Procedures (IOP) § III(B)(3). Further, the proceedings that the petitioners propose are far from simple logistically. In *Baldus*, for instance, pre-trial proceedings included amendments to the complaint, written discovery, depositions, and expert discovery schedules, motions to compel discovery, to quash subpoenas, and for protective orders, motions for emergency hearings, summary judgment filings, pre-trial filings of proposed facts, pre-trial briefs, and motions in limine, among many other filings on the 319-item docket. *See Baldus*, No. 11-CV-562 (E.D. Wis.).

What the petitioners propose goes far beyond discrete "issues of fact." It does not involve a few easily-discerned facts that may be outsourced in a targeted way to a referee or circuit court judge. Rather, the claims are factual from top to bottom, and the ultimate decision turns on them. That requires hearings before, and findings by, the ultimate decision-makers, as occurred in the federal cases discussed.

Second, unsurprisingly, a court's ultimate decision on what maps to implement is similarly complex. Recognizing this, some federal trial panels have sought to avoid drawing maps—but, once they take on this litigation, that often is required.

In deciding these cases, the court must make detailed findings of fact, which, as explained above, the claims require. For example, in *Whitford*, the merits decision by the majority spanned over 110 pages on the docket. *Whitford*, 218 F. Supp. 3d at 843–930 (reproducing Dkt. 166 of No. 15-CV-421 (W.D. Wis.)). And that decision did not even reach implementing a new map.

Selecting or drawing a map "is a daunting task, especially for judges." *Prosser*, 793 F. Supp. at 864. When taken on by a court, it "require[s] an enormous effort." *Wisconsin State AFL-CIO*, 543 F. Supp. at 638. For example, in *Baumgart*, "sixteen plans were submitted to the court." *Baumgart*, 2002 WL 34127471, at *4. Even then, all had "various unredeemable flaws," meaning "the court was forced to draft one of its own." *Id.* at *6. Similarly, in *Prosser*, ten plans were submitted. *Prosser*, 793 F. Supp. at 862. The court intended to select a plan, as opposed to drawing one itself, but that proved unrealistic: "we have decided to retract our threat to choose the 'best' no matter how bad it was" because even the "best plans" proposed were flawed. *Id.* at 865.

Either when selecting or drawing a map, the court must sift through the plans and related evidence, which requires voluminous written submissions and multi-day trials. Most recently, in *Whitford*, the federal court held a four-day trial with testimony from eight witnesses, including five experts. *Whitford*, 218 F. Supp. 3d at 857. In *Prosser*, the court held a two-day trial, but not necessarily because there were fewer facts to discern. Rather, "evidence in support of the various plans was introduced in written form, so that the hearing could be devoted to cross-examination of the experts and to opening and closing arguments of counsel." *Prosser*, 793 F. Supp. at 862.

When then selecting or drawing a map, the standards are exacting. Under U.S. Supreme Court precedent, "court-ordered districts are held to higher standards of population equality than legislative ones." *Baumgart*, 2002 WL 34127471, at *3 (quoting *Abrams v. Johnson*, 521 U.S. 74, 98 (1997)). Further, "[j]udges should not

select a plan that seeks partisan advantage . . . even if they would not be entitled to invalidate an enacted plan that did so." *Prosser*, 793 F. Supp. at 867.[1] That is on top of the list of "disparate goals" in federal and state law that apply: promoting core retention, contiguity, and compactness; avoiding municipal and other splits; maintaining communities of interest; avoiding pairing of incumbents; and satisfying limits on senate-based "disenfranchisement" and also federal requirements, including the Voting Rights Act. *Baumgart*, 2002 WL 34127471, at *2–3.

That task requires detailed line-drawing across Wisconsin that sorts population while conforming to these state and federal requirements. That map-drawing virtually rewrites entire chapters of the Wisconsin statutes. *See* Wis. Stat. chs. 3 & 4. That can be seen in the decisions where a federal court has needed to write a plan. For example, the technical redistricting portion of the order in *Baumgart* spans 50 pages on the docket, setting out which assembly districts are to be combined into which senate districts, and what particular territory in counties, towns, cities, wards, and so on will be combined into each assembly district. *See Baumgart*, 2002 WL 34127471, at *8–31 (reproducing Dkt. 444 of No. 01-CV-121 (E.D. Wis.)); *see also Prosser*, 793 F. Supp. at 871–94.

In *Baumgart*, for example, the court had to navigate the southeastern corner of Wisconsin and the Voting Rights Act, while simultaneously needing to maintain municipal boundaries and unite communities of interest, avoid population deviation, and create physically compact districts, among other considerations. *Baumgart*, 2002 WL 34127471, at *7 (summarizing the process). That necessarily required "subjective choices," like deciding "which communities to exclude from overpopulated districts and to include in underpopulated districts." *Id* (emphasis omitted).

In contemporary times, the process involves "highly sophisticated mapping software" using layers and overlays for various boundaries and districting criteria. *Whitford*, 218 F. Supp. 3d at 847–48, 889 (describing testimony about map-drawing). For the 2010 maps, the Legislature used three map-drawers and, in addition, a professor consultant. *Id.* at 847. The process of drafting and evaluating the maps "spanned several months." *Id.* at 850.

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[1] As a matter of federal law, the U.S. Supreme Court held that a partisan gerrymandering claim is non-justiciable. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506. But, as *Prosser* recognized, that does not mean a court-drawn map may contain partisan advantage. *Rucho* also does not eliminate the various other claims that may arise. For example, only one of the nine claims in *Baldus* (claim 5) was about partisan gerrymandering. *Baldus*, *v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 854 (E.D. Wis. 2012).

The petitioners' proposal does not begin to grapple with this reality. It vaguely proposes that "the court may refer such issues of fact to a circuit court or referee," without explaining how that process will work, let alone how it will be sufficient to handle a fact-intensive redistricting case. A redistricting case is not litigation with discrete factual issues amenable to outsourced fact-finding. From beginning to end, these cases turn on presenting, finding, and then evaluating the facts. The federal decisions summarized above illustrate this, and the judges there carried out the core factual tasks. These core tasks cannot be outsourced in the way the petitioners seem to imply—it would mean the referee, for all practical purposes, decides the case, not the court.

III. The proposed rule codifies immediate court involvement in a process vested in the other branches and does so before that process can even begin.

The petitioners ask this Court to codify interbranch litigation immediately after a census. That is, petitioners seek a rule—which is, in effect, a ruling—that a lawsuit filed immediately after a census is ripe and should involve the Legislature and Governor. However, after a new census, the Legislature's and Governor's role is lawmaking: to codify new maps that properly apply districting principles given population shifts. The proposal here turns that process on its head by automatically miring those branches in litigation at the outset—"any time after the U.S. Census Bureau delivers apportionment counts to the President and Congress"—and before the redistricting process can even begin.

As this Court has recognized, "redistricting remains an inherently political and legislative—not judicial—task. Courts called upon to perform redistricting are, of course, judicially legislating, that is, writing the law rather than interpreting it, which is not their usual—and usually not their proper—role." *Jensen*, 249 Wis. 2d 706, ¶ 10. Allowing the other branches to perform their proper roles instead has "the virtue of putting in place a redistricting plan that carries political legitimacy." *Id.* at ¶ 23 (citing *Prosser*, 793 F. Supp. at 867).

That task is for the Legislature and the Governor, both "indispensable parts of the legislative process," through bicameralism and presentment to the Governor. *State ex rel. Reynolds*, 22 Wis. 2d at 558. The proposal here treats that process as an afterthought to litigation. It also omits the Governor's role. For example, the proposal discusses staying an action "if filed prior to the time the Legislature has adopted a new redistricting plan," which ignores the Governor's constitutional role in that legislation. The proposal also leaves aside the value of the People's Maps Commission, which is tasked with seeking input and drawing impartial maps for the Legislature

and Governor to consider. Rushed litigation only serves to undermine such efforts to draw fair maps outside of court.

The petitioners provide no satisfactory reason why the Court should codify litigation-first, lawmaking-second disfunction. Rulemaking by this Court is not just a one-time decision that would affect the 2020 census's redistricting but would set the framework for all redistricting. It is not the right model. As this Court recognized in *Jensen*, redistricting should, wherever possible, be the product of the legislative process. A rule should not enshrine just the opposite.

The petitioners assert that lawsuits always will be filed immediately after a census is complete, but that assumption is not supported by a fuller view of history, nor is it reason for this Court to codify such a practice. Rather, in Wisconsin, filing that early has been the exception. For example, for the 1990 census addressed in *Prosser*, the plaintiffs filed suit in January 1992, *after* the legislative process had not yielded a map. *Prosser*, 793 F. Supp. at 861–62. Similarly, for the redistricting after the 1980 census, suit was filed in early 1982, *after* the legislative process failed. *Wisconsin State AFL-CIO*, 543 F. Supp. at 632; *see also Baldus*, 849 F. Supp. 2d at 847 (voters filed suit in June 2011 and October 2011).

Lastly, it bears mentioning that private litigants often initiate redistricting suits. *See*, *e.g.*, *Baldus*, 849 F. Supp. 2d 840 (23 private plaintiffs); *Whitford*, 218 F. Supp. 3d 837 (12 private plaintiffs); *Baumgart*, 2002 WL 34127471, at *1 ("These actions were initiated . . . by a group of Wisconsin voters."). But the process proposed here instead focuses on government actors, inviting the branches to litigate. Why should that be the model encouraged by the code? It also raises, but does not answer, a host of other questions. For example, since the proposal is focused on the Legislature, Governor, and political parties, what comes of the litigants who would often bring these suits. Can a voter file one? Can other voters intervene? Which ones?

There are no good answers to these questions in the prearranged, interbranch suit proposed by the petitioners. It should be declined for this additional reason.

IV. The proposed rule improperly codifies decision-making on legal questions, including substantive ones, that must be decided on a case-by-case basis.

The petitioners also improperly attempt to use a rule to pre-decide legal issues, including substantive ones, that properly are decided on a case-by-case basis. That proposal goes beyond what is allowed by statute and ignores how courts function.

The statutes provide that this Court may promulgate rules that "regulate pleading, practice, and procedure in judicial proceedings" but "[t]he rules shall not abridge, enlarge, or modify the substantive rights of any litigant." Wis. Stat. § 751.12(1); *see also* Sup. Ct. Internal Operating Procedures (IOP) § IV(A). What the petitioners propose goes beyond that limit.

Perhaps most glaring is subsection (4) of the proposed rule. It states a blanket ruling on ripeness: "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." Declaring that a lawsuit "is ripe" is not a procedural rule; it is a decision on the merits of a legal question, which must be addressed in the context of an actual lawsuit's particular facts.

Ripeness is a question of justiciability. As a result, it "is more than a mere procedural question." *Wayside Church v. Van Buren County*, 847 F.3d 812, 816 (6th Cir. 2017); *Vacation Vill., Inc. v. Clark County,* 497 F.3d 902, 912 (9th Cir. 2007) (same). Whether a dispute is ripe requires considering the particular circumstances of that dispute, at a particular point in time: "The fourth component of justiciability, ripeness, requires that the facts be sufficiently developed to avoid courts entangling themselves in abstract disagreements," meaning facts may not be "contingent and uncertain." *Miller Brands-Milwaukee, Inc. v. Case*, 162 Wis. 2d 684, 694–95, 470 N.W.2d 290 (1991) (citation omitted).

That inquiry is not a "procedure" authorized by Wis. Stat. § 751.12(1). And, more generally, it is not a question that can or should be answered in blanket way by a court. It is a decision that must be made in the context of a particular case.

As noted above, typically Wisconsin plaintiffs have not filed their challenges as early as is proposed here. And whether a case is ripe may be subject to significant dispute. For example, dissenting in the early-filed Wisconsin redistricting case, the Seventh Circuit's Judge Easterbrook strongly disagreed that the case was justiciable: "a prediction that something will go wrong in the future does not give standing today. One might as well commence a suit as soon as some legislator introduces a bill that would be unconstitutional if enacted. Until the bill is enacted there is nothing to

litigate about." *Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 869 (E.D. Wis. 2001) (Easterbrook, J. dissenting).

A similar problem arises with the treatment of parties and intervenors. The rule proposes to pre-decide intervention requirements or, perhaps, who has standing. But those issues also are subject to legal principles and statutory standards that must be applied to specific controversies and allegations.

For example, proposed subsection (5)(b) provides that the "political parties" "shall" be allowed to intervene "as of right." But the petitioners provide no explanation of why this rule should override Wis. Stat. § 803.09. That statute requires consideration of a particular "movant" and "existing parties" when deciding intervention as of right. A "movant" must demonstrate "an interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties." Wis. Stat. § 803.09(1). That makes sense: whether a party should intervene turns on analyzing a particular request in a case.[2]

Similarly, the proposed rule seemingly embeds pre-decisions on standing. That also is improper. As the U.S. Supreme Court has indicated, standing "should be seen as a question of substantive law, answerable by reference to the statutory and constitutional provision whose protection is invoked." *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991) (quoting William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 229 (1988)).

These topics are not fodder for a procedural rule or blanket pre-decisions, but rather must be decided in the context of a case.

V. The proposed rule would not simplify potential litigation.

Lastly, the petitioners generally suggest that their proposal will simplify litigation. However, as summarized above, instead of simplifying the litigation, the proposal largely ignores the complexities that will arise and the limits of what a procedural rule can or should do.

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[2] Further, the intervention statute has been subject to legislative amendments over the years. Thus, the principle may apply that a statute "cannot be dealt with by this Court under its rule-making power." *Benton v. Inst. of Posturology*, 243 Wis. 514, 517, 11 N.W.2d 133 (1943).

Further, it does not fully account for the federal courts. For example, even if a federal court abstained during a pending state court action, it does not follow that federal courts would remain on the sidelines. This Court recognized in *Jensen* that a "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." *Jensen*, 249 Wis. 2d 706, ¶ 16. Thus, for example, the U.S. Supreme Court recognized that if the Voting Rights Act were violated, a federal district court would be right "to deny effect to the state-court legislative redistricting plan." *Growe v. Emison*, 507 U.S. 25, 38–39 (1993). The same would hold true for other federal claims, including those stemming from one-person-one-vote theories. Having the state courts go first may only defer federal litigation, not replace it.

Also, this Court has recognized the specter of removal: "While we do not speculate on either the likelihood or success of such a strategic maneuver, we note only that the prospect of removal increases the possibility for uncertainty and delay." *Jensen*, 249 Wis. 2d 706, ¶ 18 n.7 (citation omitted).

Nothing is simple about the redistricting litigation subject to the proposed rule. The proposal's failure to address the complexities does not remove them; rather, if anything, it would increase them.

VI. Conclusion

This Court should decline to codify the fundamental changes proposed by the petitioners. The proposal would formalize an unprecedented role for this Court and would do so in an especially complex area of trial court litigation. It invites that litigation instead of allowing lawmaking to play out as the default. It also goes beyond what can or should be done under this Court's rulemaking authority. The proposed rule therefore should be declined in its entirety.

Respectfully submitted,

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