In the Supreme Court of Wisconsin

Petition 20-3

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

COMMENTS OF SPEAKER OF THE WISCONSIN STATE ASSEMBLY ROBIN VOS AND MAJORITY LEADER OF THE WISCONSIN STATE SENATE SCOTT FITZGERALD, SUPPORTING ADOPTION OF PETITION 20-03

If adopted, Petition 20-03 would amend Supreme Court Rules to establish procedures as well as a schedule for the Court to consider matters relating to congressional and state legislative redistricting. Legislative Leadership supports the proposed rule for three main reasons:

(1) The proposed rule protects the legislature's constitutionally conferred primary role in redistricting.

(2) The proposed rule protects the state's constitutionally conferred primary role in redistricting and minimizes the potential for federal court intrusion.

(3) The proposed rule promotes the sovereign interests of the citizens of this state.

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This upcoming legislative session is the first session after the completion of the federal census. As a result, new congressional, state assembly, and state senate districts must be adopted. While the legislature has every intention meeting its duties and obligations to enact new districts in accordance with traditional redistricting criteria, sometimes this process fails to produce new legislation. When there is an impasse and that process fails, courts intervene, as they did for Wisconsin following the 1980, 1990, and 2000 censuses. *See Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630 (E.D. Wis. 1982); *Prosser v. Elections Bd.*, 793 F. Supp. 859 (W.D. Wis. 1992); *Baumgart v. Wendelberger*, Nos. 01-C-0121 & 02-C-0366, 2002 WL 34127471 (E.D. Wis. May 30, 2002).

Petition 20-03 requests the Court amend its Rules to provide a structure and timeline for resolving possible redistricting impasses through original actions. Among its key features, the proposed rule (1) defines when a case is ripe; (2) expressly provides for staying actions to enable legislative adoption of redistricting plans; (3) identifies who is a proper party as of right; (4) provides a mechanism for judicial fact-finding; and (5) provides a timeline for decision that allows candidates to meet filing deadlines and the electorate to have a new map in place for the first fall election after a census is completed. Wis. Stat. (Proposed Rule) §§ 809.70 (4), (5)(a), (b), (e), and (i).

Legislative Leadership support the proposed rule's adoption principally for the following reasons:

1. **The proposed rule protects the legislature's role in redistricting**.

The obligation to revise the state's congressional and state legislative boundaries falls to the Wisconsin legislature. *See* U.S. Const. Art. I, § 4, cl. 1; Wis. Const. Art. IV, § 3. This task must be accomplished every ten years, after each federal census. *See* U.S Const. Art. I, § 2, cl. 1; Wis. Const. IV, § 3. The legislature's power and duty to create legislative districts is among its most fundamental responsibilities. As a result, any rule adopted by the Court should properly respect the legislature's powers, duties, and interests regarding redistricting.

The proposed rule does so in two important ways. First, it recognizes expressly that impasse litigation should be stayed to allow for the legislative process to run its course. If court intervention becomes inevitable because of an impasse, the Court must allow itself time to do so with appropriate processes. A second feature of the proposed rule – intervenor-as-a-right status for the Wisconsin Assembly and Wisconsin Senate – enables the legislature to participate in procedural questions (such as whether there is an impasse) and to participate in the substance of the proceedings should an impasse occur.

This is appropriate and necessary. Courts have long recognized the unique interest that state legislative bodies have in districting-related litigation. *See, e.g., Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. 787, 799-803 (2015) (state legislature has standing to challenge constitutionality of independent redistricting committee); *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 194 (1972) (state senate "appropriate legal entity for purpose of intervention" in districting dispute); *Whitford v. Gill*, 15-C-421 (W.D. Wis. Nov. 13, 2018) (granting Wisconsin State Assembly's motion to intervene in redistricting litigation).

Moreover, Wisconsin state law and decisions of this Court further recognize the legislature's right to intervene in cases affecting the validity of state law or the legislature's institutional interests. *See, e.g.,* Wis. Stat. § 803.09(2m); *Democratic National Committee v. Bostelmann,* 2020 WI 80, ¶ 14, 394 Wis. 2d 33, 949 N.W.2d 423; *Service Employees Int'l Union v. Vos*, 2020 WI 67, ¶ 72, 393 Wis. 2d 38, 946 N.W.2d 35. Redistricting impasse cases involve both of these issues. Every impasse case rests on the fact maps created by current law become malapportioned with a new census and the legislature has numerous institutional interests in litigation that affects the manner by which its membership is elected.

2. The proposed rule protects the state's constitutionally conferred primary role in redistricting.

Not only is redistricting a legislative responsibility in terms of separation of powers, this Court and the United States Supreme Court have recognized it is fundamentally a *state* responsibility as a matter of federalism. *See Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶ 5, 249 Wis. 2d 706, 639 N.W.2d 537 (per curium); *Growe v. Emison*, 507 U.S. 25, 34 (1993) ("the Constitution leaves the States primary responsibility for apportionment of their federal congressional and state legislative districts"). So if a state's legislative process fails to result in new districts, federal courts must still defer to state *judicial* processes. "Absent evidence that the[] state [legislative and judicial] branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to impede it." *Growe*, 507 U.S. at 34.

By adopting the proposed Rule, Wisconsin sends a clear message that the state has a mechanism for timely resolving redistricting impasse cases. This keeps redistricting decisions where they constitutionally belong – with the state sovereign.

3. The proposed rule promotes the sovereign interests of the citizens of this state.

For several reasons, the proposed rule promotes the sovereign interests of the citizens of this state.

First, as explained above, the proposed rule keeps redistricting decisionmaking in the state. And by having redistricting litigation heard by original action, remedial maps will be adopted by justices representative of the entire state, not a few judges elected by a geographic faction. Adopting this rule also has the added benefit of eliminating forum shopping and races to the courthouse – strategies aimed to benefit the litigant or partisan interests, and not the public.

Second, this Court has long recognized that original actions are the appropriate vehicle for handling issues that affect the sovereign rights of the people. As this Court recognized five years into statehood:

> Why was original jurisdiction given to the supreme court….? Because these [original jurisdiction writs] are the very armor of sovereignty…. [I]t would never do to dissipate and scatter these elements of the state sovereignty among five, ten, twenty or forty tribunals, and wait their tardy progress through them to the supreme tribunal….

Attorney General v. Blossom, 1 Wis. 317, 330 (1853).

Redistricting and reapportionment are matters directly affecting sovereignty. They determine the geographic boundaries by which the state's citizens elect their federal and

state representatives. Put plainly, "any reapportionment or redistricting case is, by definition, *publici juris*, implicating the sovereign rights of the people of the people of this state," and thus warrants original jurisdiction. *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶ 17, 249 Wis. 2d 706, 639 N.W.2d 537.

Third, the proposed rule provides timeline that assures constitutionally apportioned districts will be in place in time for candidates to file and citizens to vote in the fall of 2022. Again, the fact the proposed rule creates a predictable process for original actions rather than circuit court actions is essential to this outcome. The alternative is "pursuing a time-consuming course of appeal and ultimate review in this court." *State ex rel. Swann v. Elections Bd.*, 133 Wis. 2d 87, 94, 394 N.W.2d 87 (1986). The public's interest is simply not enhanced by time-consuming appeals and maps that may shift as cases work through the judicial process.

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Ideally, redistricting will be accomplished through the legislative process. Should this process fail, however, the citizens of this state and their elected legislative bodies would be well-served by the Court's adoption of the proposed rule and its ultimate exercise of its original jurisdiction over redistricting matters covered by the proposed rule.

Dated this 30th day of November, 2020.

Respectfully submitted,

Electronically Signed by Kevin M. St. John

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