November 30, 2020

Wisconsin Supreme Court
Attention: Deputy Clerk-Rules
P.O. Box 1688
Madison, WI 53701-1688

RE: Rule Petition 20-03 Relating to Redistricting

Dear Honorable Justices of the Supreme Court:

The Campaign Legal Center ("CLC") respectfully submits these comments regarding Rule Petition 20-03 (the "Petition" or "Proposed Rule"). CLC requests the opportunity to present at the remote rulemaking hearing scheduled for January 14, 2021.

I. Introduction

CLC is a nonpartisan, nonprofit organization dedicated to protecting and strengthening the democratic process across all levels of government. Since the organization's founding in 2002, CLC has served as counsel or *amicus curiae* in numerous voting rights and redistricting cases. *See, e.g.*, *Daunt v. Benson*, 956 F.3d 396 (6th Cir. 2020); *Holloway v. City of Virginia Beach*, 2:18-cv-00069 (E.D. Va.); *Aguilar v. Yakima County*, No. 20-2-00180-19 (Sup. Ct. Wash.); *League of Women Voters of N.C. v. Rucho*, 279 F. Supp. 3d 587 (M.D.N.C. 2018); *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016); Brief of National and Missouri-Based Civil Rights Organizations as Amici Curiae, *Pippens v. Ashcroft*, No. WD83962 (W.D. Mo. Ct. App. 2020); Brief of the Campaign Legal Center et al. as Amici Curiae, *Benisek v. Lamone*, 139 S. Ct. 2484 (2019); Brief of Campaign Legal Center as Amicus Curiae, *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 576 (2018); Brief of League of Women Voters of Va. as Amicus Curiae, *Vesilind v. Va. State Bd. of Elections*, 295 Va. 427 (2018); Brief of the Campaign Legal Center et al. as Amici Curiae, *Cooper v. Harris*, 137 S. Ct. 1455 (2017); Brief of Former Directors of the U.S. Census Bureau as Amici Curiae, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016); Brief of League of Women Voters of Ill. et al. as Amici Curiae, *Hooker v. Ill. State Bd. of Elections*, 63 N.E.3d 824 (Ill. 2016); Brief of the Campaign Legal Center et al. as Amici Curiae, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015); Brief of Jurisdictions that Have Bailed out in Support of Respondents as Amici Curiae, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

CLC also has experience litigating Wisconsin redistricting cases, specifically. *See Gill v. Whitford*, 138 S. Ct. 1916 (2018); *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016). Through this work, CLC has developed expertise in the legal issues and processes involved in redistricting. CLC strongly believes that fair districting plans—and by extension, fair and adequate procedures for resolving redistricting disputes—are vital to our democracy.

CLC opposes the Petition on a number of grounds. First, the Court should not create a specialized vehicle for litigants to bring redistricting litigation directly to this Court. Trial courts are better equipped to adjudicate redistricting cases, which require extensive fact-finding, appreciation of local nuances, and significant judicial resources, in the first instance. Moreover, enabling litigants to petition the Wisconsin Supreme Court directly would place this Court at the center of redistricting disputes every decade. Such a rule would risk making the Court appear unduly partisan and undermine the Court's institutional legitimacy.

Second, even if the Court is inclined to issue specialized rules for redistricting disputes, the Proposed Rule has numerous flaws. Most notably, the Proposed Rule: (1) invites premature litigation; (2) mistakenly suggests that the legislature can adopt new districts without presenting those districts to the governor for approval or veto; (3) prioritizes involvement of partisan interests as parties; (4) short shrifts or, at the Court's discretion, omits entirely the fact-finding process necessary to resolve redistricting disputes; and (5) establishes inadequate procedures governing proposed maps.

Finally, the Wisconsin Supreme Court should not rush to enact a rule. The last time this Court considered enacting specialized rules for redistricting litigation, it devoted multiple years to hearings and deliberation before ultimately deciding to reject the proposal in 2009. If the Court is seriously considering enacting such a rule, it should do the same here. Redistricting significantly impacts the lives of Wisconsinites for an entire decade, and the Court should give this issue the thorough deliberation it deserves.

II. This Court should not create a specialized process for litigants to bring redistricting cases directly to this Court.

This Court should decline to establish a procedural vehicle for litigants to bring redistricting cases directly before this Court. Such a rule would require this Court to adjudicate highly resource-intensive and fact-bound claims that are best addressed by state circuit courts or federal district courts in the first instance. It would also significantly increase the chances that this Court would be at the center of redistricting disputes every decade. Given the politically charged nature of redistricting cases, encouraging litigants to bring these disputes directly to the Wisconsin Supreme Court would jeopardize the Court's institutional legitimacy.

A. Trial courts are better positioned to resolve redistricting litigation in the first instance.

The Wisconsin Supreme Court is not the appropriate venue to adjudicate redistricting cases in the first instance, rather than on appeal. Redistricting litigation is highly fact- and resource-intensive. It typically involves months of pre-trial discovery, dispositive motion briefing and oral argument, multiple days of trial with expert and fact witness testimony, and a remedial process. In *Whitford v. Gill*, the most recent redistricting case in Wisconsin, for instance, the parties engaged in over nine months of pre-trial discovery including multiple expert reports and depositions, interrogatories, requests for production, requests for admission, and fact witness depositions. *See* Docket Report, No. 3:15-cv-00421-JDP (W.D. Wis. 2015-2016). After the close of discovery, the district court conducted a four-day trial with eight witnesses, including four experts. *Whitford v. Gill*, 218 F. Supp. 3d 837, 857 (W.D. Wis. 2016). Together, the plaintiffs and defendants sought to introduce over 400 exhibits and 23 deposition transcripts. Joint Pre-Trial Report, No. 3:15-cv-00421-JDP, ECF No. 125 at 88-120 (W.D. Wis. May 9, 2016). The case was then remanded from the U.S. Supreme Court back to the district court, where the parties engaged in an additional eight months of discovery, including written discovery and around 50 depositions of experts, plaintiffs, the Wisconsin State Assembly, and fact witnesses. *See id.* ECF Nos. 301, 301-1, 301-2, 302 (W.D. Wis. June 14, 2019).

Whitford v. Gill is no outlier. Other cases resolving redistricting disputes in Wisconsin over the past three decades have all required extensive fact-finding. In *Baldus v. Brennan*, a 2012 redistricting case, the court held a two-day trial after months of contentious pre-trial discovery, including several discovery disputes brought before the court. *See* 849 F. Supp. 2d 840, 847 (E.D. Wis. 2012). The parties introduced over three hundred exhibits, including more than a dozen expert reports. Joint Final Pre-Trial Report, No. 2:11-cv-00562, ECF No. 158, Ex. F (E.D. Wis. Feb. 14, 2012). At the hearing, the court heard testimony from four experts, in addition to other fact witnesses. *Baldus*, 849 F. Supp. 2d at 851, 854-56. Similarly, in *Baumgart v. Wendelberger*, the court held a two-day trial with multiple expert witnesses and hundreds of exhibits. *See* Hearing Minutes, No. 2:01-cv-00121-CNC, ECF No. 418-19 (E.D. Wis. Apr. 11-12, 2002); *see also Prosser v. Elections Board*, 793 F. Supp. 859, 862 (W.D. Wis. 1992) (two-day hearing with expert witnesses).

Redistricting cases from across the country have followed the same pattern. *See, e.g.*, *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014) (nine-day bench trial with over 3,500 exhibits introduced); *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 811 (M.D.N.C. 2018) (four-day trial); *Harris v. McCrory*, 159 F. Supp. 3d 600, 609 (M.D.N.C. 2016) (three-day bench trial).

The process of evaluating and potentially developing district maps is also particularly resource-intensive. There are a number of criteria a map-drawer must follow when creating district plans, including state and federal law requirements. These criteria include population deviation thresholds, compliance with the federal Voting Rights Act, compactness, contiguity, and more. *See* Wis. Const., art. IV, §§ 3-5; 52 U.S.C. § 10101; *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gaffney v. Cummings*, 412 U.S. 735 (1973); *Karcher v. Daggett*, 462 U.S. 725 (1983), *Thornburg*

v. Gingles, 478 U.S. 30 (1986). Map-drawers also often consider treatment of communities of interest and partisan fairness.

Given the technical, data-based nature of these criteria, most parties must retain experts to assess proposed or enacted redistricting plans, and most courts require expert assistance in drawing maps or evaluating district plans in the remedial process. *See, e.g.*, *Covington v. State of North Carolina*, 1:15-cv-00399, ECF No. 202 (M.D.N.C. Oct. 26, 2017) (three-judge panel appointing a special master to help with remedial map process). In past cases in Wisconsin, for instance, determining compliance with Section 2 of the Voting Rights Act has required extensive expert data analysis. *See, e.g.*, *Baldus v. Brennan*, 862 F. Supp. 2d 860, 862-63 (finding Section 2 violation and establishing map that "create[d] a new Assembly District 8 with a Hispanic Citizen Voting Age Population (HCVAP) of 55.22% and a new Assembly District 9 with 34.78% HCVAP" based on expert testimony regarding the necessary HCVAP for the Milwaukee Latinx community to have "an effective majority-minority Assembly District 8"); *see also Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127473, at *1 (E.D. Wis. July 11, 2002) (noting involvement of two technical advisors, in addition to the parties' experts); *Prosser*, 793 F. Supp. at 865 (reviewing ten proposed plans based on expert testimony, and ultimately developing a court-created plan after finding flaws in every proposal).

In fact, the last time this Court resolved a redistricting case on the merits in 1964, it concluded that the appropriate remedy was to give the assembly and governor an opportunity to enact a valid plan within a set timeframe, rather than issue a map created by the Court. *See State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 570 (1964).

As this Court has noted, the Wisconsin Supreme Court is "obviously not a trial court." *Jensen v. Wisconsin Elections Bd.*, 249 Wis. 2d 706, 719 (2002). Taking on redistricting cases in the first instance, rather than reviewing decisions on appeal, would require this Court to shift significant resources to the fact-finding and data analysis necessary for redistricting litigation. Given the unique role of the Wisconsin Supreme Court and its necessary focus on appellate issues, it would be unwise to create a specialized vehicle for litigants to bring redistricting cases directly to this Court.

B. Encouraging litigants to bring redistricting cases directly to this Court would undermine the Court's institutional legitimacy.

In 2009, after years of deliberation, this Court declined to adopt specialized rules for redistricting cases in large part because it feared such rules would jeopardize the nonpartisan role of the Court. As now-Chief Justice Roggensack put it, "setting up rules puts us, by the fact that we've set up the rules, into the redistricting process in a very formal and a very affirmative way. I believe that has the potential, and actually 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."

January 22, 2009 Administrative Conference at 33:16;[1] *see also id.* at 38:06 ("Redistricting is a huge danger to put on the court's plate and a danger we do not need to accept. It threatens the very . . . integrity of the court.").

Justice Ziegler shared the same apprehensions. *Id.* at 1:05:02 ("I'm concerned with the idea that [the rules] place[] this court . . . squarely within the sights of the partisan political framework."). As did then-Justice Gableman. *Id.* at 1:08:49 ("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 [this proposal] as a mechanism by which this court will be immersed in partisanship and the partisan aspect of the political process.").

These well-founded concerns, with which we agree, apply no less to the current proposal for specialized redistricting litigation rules. If anything, they apply with greater force. Inviting litigants to bring redistricting cases directly to the Wisconsin Supreme Court effectively guarantees this Court will play a prominent role in redistricting every decade. Such a rule would make this Court the first stop for resolving these "inherently partisan" disputes, and undermine public confidence in the nonpartisan nature of the Court. April 8, 2008 Administrative Conference at 1:34:52 (Roggensack, J.).[2] This Court should decline to adopt any rule that encourages litigants to bring redistricting cases directly before it in the first instance, just as it did in 2009.

III. Even if this Court is inclined to adopt specialized rules for redistricting litigation, the Proposed Rule is flawed.

The Proposed Rule suffers from a number of serious flaws—both in substance and drafting. To begin with, the Proposed Rule invites premature litigation that undermines the separation of powers prescribed by the Wisconsin Constitution and conflicts with ripeness doctrine. The Proposed Rule also mistakenly suggests that the legislature can adopt district plans without presenting those districts to the governor for approval or veto. Additionally, the Proposed Rule prioritizes partisan interests as parties to litigation, ignoring the various nonpartisan interests in redistricting and exacerbating the risk that the public will view the Court as picking between political winners and losers. Furthermore, the proposed procedures for fact-finding and evaluating map proposals are inadequate, unclear, and incompatible with the practical realities of redistricting litigation.

If enacted, the Proposed Rule would impede the Court's ability to effectively adjudicate redistricting cases and undermine public confidence in the outcome of any cases governed by these provisions for decades to come. As such, even if this Court is seriously considering adopting specialized rules for redistricting litigation, the Court should not enact this Proposed Rule.

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

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

A. The Proposed Rule invites premature redistricting litigation.

The Proposed Rule asks this Court to assume jurisdiction over redistricting disputes well before the legislature can begin developing—let alone enact—redistricting legislation. Proposed subdivision (4) provides that "[a] petition for an original action [to resolve a redistricting dispute] 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." Rule Petition 20-03 at 2-3 (Wis. June 2, 2020). Under the Proposed Rule, litigants could file petitions for this Court to exercise its original jurisdiction to resolve redistricting litigation as early as December 31 of the year the census is conducted. *See* 13 U.S.C. § 141(b).

Inviting litigants to initiate redistricting litigation at such an early stage would have serious practical and legal ramifications. First, as a practical matter, the Proposed Rule would enable litigants to bring redistricting cases to this Court before the Census Bureau has even delivered block-level population data to the State. *See* Michael Keane, *Redistricting in Wisconsin*, Wis. Legislative Reference Bureau 16 (Apr. 1, 2016) (noting Census Bureau typically transmits block-level data to Wisconsin in February or March the year after the federal census), https://www.wisdc.org /images/files/pdf_imported/redistricting/redistricting_april2016_leg_ref_bureau.pdf. Census data are obviously necessary to assess current districts and draft new redistricting plans. It is unclear what factual allegations litigants could even raise in a complaint under the Proposed Rule's accelerated timeline; if a litigant files a petition immediately "after the U.S. Census Bureau delivers apportionment counts to the President and Congress," as the Proposed Rule permits, Pet. at 2-3, it could be months until the public has access to block-level population data for Wisconsin. Likewise, this Court would have no basis on which to evaluate redistricting claims without the new census data. The Proposed Rule fails to account for these practical realities.

Second, the Proposed Rule conflicts with the separation of powers established by the Wisconsin Constitution. The Wisconsin Constitution makes clear that the legislature and governor together are responsible for developing redistricting plans after each federal decennial census. Article IV provides: "At its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants." Wis. Const., art. IV, § 3. The legislature and governor are then jointly responsible for enacting this redistricting plan into law. *See* Wis. Const., art. V, § 10; *Reynolds*, 22 Wis. 2d at 558 (recognizing that the legislature must present redistricting legislation to the governor for approval or veto under the Wisconsin Constitution's Presentment Clause).

Establishing a specialized procedural vehicle for this Court to take jurisdiction over redistricting cases before the legislature has even received census data would undermine the legislature and governor's constitutionally-prescribed roles in redistricting. *See id.*; *Jensen*, 249 Wis. 2d at 713. Such a change would risk shifting the duty of evaluating and adopting redistricting plans in the first instance from the legislature and governor to the judiciary—as members of this Court have observed before. *See* January 22, 2009 Administrative Conference at 1:05:02 (Ziegler, J.) ("I'm concerned about the court acting kind of as a super-legislature."); *see also id.* at 38:06

(Roggensack, J.) ("Redistricting is a huge danger to put on the court's plate and a danger we do not need to accept. It threatens the very separation of powers for the state of Wisconsin's tripartite system of government.").

Third, the Proposed Rule's accelerated timeline is incompatible with ripeness doctrine. "The basic rationale of the ripeness doctrine is to prevent the courts through the avoidance of premature adjudication from entangling themselves in abstract disagreements over . . . legislative policies." *Tooley v. O'Connell*, 77 Wis. 2d 422, 439 (1977). For a claim to be ripe, "the facts [must] be sufficiently developed to allow a conclusive adjudication." *Olson v. Town of Cottage Grove*, 309 Wis. 2d 365, 387 (2008) (citing *Milwaukee Dist. Council 48 v. Milwaukee Cty.*, 244 Wis. 2d 333 (2001)).

Establishing that a redistricting claim "is ripe any time after the U.S. Census Bureau delivers apportionment counts to the President and Congress," as the Petitioners request, Pet. at 2-3, would directly contradict this Court's case law on ripeness. The Proposed Rule permits litigants to file suit before they have access to the block-level population data necessary to substantiate their claims. At the time of filing, the relevant facts would not be known to the plaintiffs, let alone be "sufficiently developed to allow conclusive adjudication." *Olson*, 309 Wis. 2d at 387.

Indeed, courts regularly dismiss redistricting claims filed the day census data is released or shortly after on ripeness grounds. *See, e.g.*, *Mayfield v. Texas*, 206 F. Supp. 2d 820, 824 (E.D. Tex. 2001) (dismissing redistricting claims filed "on the day the 2000 Census figures were released" as not ripe); *Carter v. Virginia State Bd. of Elections*, No. 3:11-CV-7, 2011 WL 665408, at *2 (W.D. Va. Feb. 15, 2011) (same for claims filed the day after the Census Bureau published state-level data). The Proposed Rule is incompatible with this body of precedent.

Proposed subdivision (5)(a) does not cure this defect. That subdivision provides: "If 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. However, when a claim is not ripe, courts do not simply stay the action until it becomes ripe. To the contrary, because ripeness is a jurisdictional requirement, courts typically dismiss claims that are not ripe. *See, e.g.*, *Miller Brands-Milwaukee, Inc. v. Case*, 162 Wis. 2d 684, 697 (1991) (reversing and remanding "with directions to dismiss the complaint" because the action was not ripe); *Mayfield*, 206 F. Supp. 2d at 826 (dismissing the case "without prejudice for lack of standing and ripeness").

To be sure, litigants do not have to wait indefinitely to challenge outdated redistricting plans in court. *See, e.g.*, *Baldus*, 849 F. Supp. 2d 840 (per curiam); *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471 (E.D. Wis. May 30, 2002) (per curiam). However, it is one thing for courts to resolve redistricting cases in the normal course of their duties, considering ripeness on a case-by-case basis at the trial court level in the first instance. It is another thing entirely for this Court to explicitly invite litigants to initiate redistricting suits at this Court well before the Census Bureau has even made block-level population data available, and to codify such an invitation in law.

In sum, this Court should decline to enact a rule that deliberately invites premature redistricting litigation. Encouraging litigants to file redistricting suits before the Census Bureau even releases state block-level data ignores the practical realities of redistricting litigation, undermines the Wisconsin Constitution's carefully crafted separation of powers, and contradicts well-settled ripeness precedent.

B. The Proposed Rule mistakenly suggests the legislature can adopt redistricting plans without the governor's involvement.

The Proposed Rule's characterization of the legislature's authority in the redistricting process either contains a drafting error or reflects a mistaken understanding of Wisconsin law. Proposed subdivision (5)(a) provides: "If 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 (emphasis added).

This language is incompatible with the Presentment Clause of the Wisconsin Constitution and Wisconsin Supreme Court precedent. The Wisconsin Constitution provides: "[e]very bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor." Wis. Const., art. V, § 10. The governor then has the power to approve or veto the bill. *Id.* Based on Article V, Section 10 and provisions governing apportionment, this Court has made clear that the "legislative districts of the state of Wisconsin cannot be apportioned without the joint action of the legislature *and the governor*." *Reynolds*, 22 Wis. 2d at 559 (emphasis added). In the same case, this Court confirmed that the legislature may not adopt a legislative redistricting plan by joint resolution. *See id.* (invalidating the legislative redistricting plan that the legislature had adopted as a joint resolution in an attempt to bypass the governor).

This Court's decision in *Reynolds* was grounded in over a century of precedent. For the last century and a half, Wisconsin's redistricting process has always "been accomplished in this manner by laws enacted by the legislature" where "a bill . . . becomes a law upon the signature of the governor and publication, or, if the governor should veto it, upon repassage by the required vote over his veto, and publication." *Id.* at 558 (quoting *State ex rel. Broughton v. Zimmerman*, 261 Wis. 398, 407-08 (1952)).

It is no surprise, then, that the Petitioners themselves assume the governor will be required to approve any redistricting legislation following the 2020 Census. In the first sentence of their memorandum, the Petitioners remind this Court that "[t]he State of Wisconsin currently has divided government with a Democratic Governor and a Republican Legislature." Memorandum in Support of Rule Petition 20-03 at 1 (Wis. June 2, 2020). According to the Petitioners, this means "adopting a new map for redistricting after the 2020 census will likely be difficult and any dispute will end up in the courts (as it did the last time Wisconsin had divided government in 2001)." *Id.* These statements correctly assume that the governor has the power to veto redistricting plans passed by the legislature.

When it comes to the language of the Proposed Rule itself, however, the Petitioners erroneously suggest that the legislature alone may "adopt" a redistricting plan. *See* Pet. at 3, § (5)(a). The term "adopt" is typically used in reference to joint

resolutions, which the legislature may pass without the concurrence of the executive. Given the Petitioners' own statements in their memorandum—as well as binding case law, a clear constitutional mandate, and over a century of precedent—this Court should reject any Proposed Rule that suggests the legislature may bypass the governor and adopt redistricting plans independently.

C. The Proposed Rule prioritizes partisan interests.

The Proposed Rule prioritizes participation by partisan groups, while ignoring important nonpartisan interests. Proposed subdivision (5)(b) provides: "The Governor, the Senate, the Assembly and political parties shall be granted intervention as of right." Pet. at 3.

The Petitioners justify this rule by claiming that "the Governor and the Legislature (along with individual voters) have been the real protagonists to such litigation in this State in the past." Mem. at 7. That is incorrect. Petitioners fail to recognize the important role that organizations have consistently played in Wisconsin redistricting litigation—and the fact that parties besides partisans have an interest in redistricting. For example, in redistricting litigation following the 2010 Census, Voces De La Frontera and four Latinx voters living in Milwaukee brought a case that was ultimately consolidated with *Baldus v. Brennan*. *See* 849 F. Supp. 2d at 847. The Voting Rights Act ("VRA") claim raised by Voces De La Frontera was the only claim that the district court concluded was meritorious. *Id.* at 859 (holding that the redistricting act violated the VRA by "fail[ing] to create a majority-minority district for Milwaukee's Latino community").

Individual voters have also played a central role in Wisconsin redistricting litigation. The plaintiffs in the *Baldus* case included 23 individual voters. *See* 849 F. Supp. 2d 840. And, in *Whitford v. Gill*, the plaintiffs consisted solely of individual voters across the state of Wisconsin, each with unique interests and local knowledge. The *Whitford* case started with 12 individual voter plaintiffs, *see* 218 F. Supp. 3d 837, and expanded to 40 individuals from over 30 different municipalities and 22 counties after the case was remanded from the U.S. Supreme Court, *see Whitford,* 3:15-cv-00421, ECF No. 201 (W.D. Wis. Sept. 14, 2018). The Proposed Rule completely ignores the important interests of individual voters and nonpartisan organizations, and instead prioritizes the participation of partisan groups.

Moreover, by guaranteeing that the governor, legislature, and all "political parties" can participate, the rule amplifies the appearance that the Court is favoring partisan interests in redistricting litigation—and ultimately picking political winners and losers. Pet. at 3. In 2009, this Court declined to adopt specialized rules for redistricting litigation in large part because it was concerned the Court would become too entangled in partisan conflicts. As Justice Ziegler put it: "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." January 22, 2009 Administrative Conference at 1:07:06; *see also* April 8, 2008 Administrative Conference at 1:31:24 (Roggensack, J.) ("I'm really

concerned about putting [this] burden on the court when the political implications, the partisan political implications, will be sure to follow if we get involved.").

The Proposed Rule would only exacerbate those concerns. Requiring the Court to permit each branch of government, along with any political party, to intervene as of right, without considering the importance of nonpartisan groups and individual voters, will only increase the "inherently partisan" nature of the redistricting disputes before this Court. *Id.* at 1:34:52.

What is more, the rule itself is also poorly drafted. It fails to define the term "political parties," opening the door to litigation over which groups qualify. Pet. at 3. And if this Court were to try to cabin such a term, it could lead to suits by political parties seeking to participate: the Communist Party USA, Progressive Dane, the Libertarian Party, the Green Party, and more. For these reasons, enacting the Proposed Rule, and specifically proposed subdivision (5)(b), would threaten this Court's institutional legitimacy and effectiveness.

D. The Proposed Rule short shrifts the fact-finding process necessary for resolving redistricting disputes.

In addition to the above shortcomings, the Proposed Rule fails to provide for adequate fact-finding procedures. As discussed earlier, redistricting litigation is highly fact-intensive. *See* Part II.A *supra*. Typically, the parties and courts devote months to pre-trial discovery, dispositive briefing, and multi-day or week-long trials. *Id.* Yet proposed subdivision (5)(c) states the Court could "dispose of the case on the documents filed under sub. 3." Pet. at 3. Those documents include the "petition [for the Court to exercise its original jurisdiction], the response, supporting memoranda and argument." Pet. at 2, § 3. In other words, the Proposed Rule contemplates that this Court would resolve the entire redistricting dispute based on the petition papers alone, without any additional fact-finding. That proposal is incompatible with the practical realities of redistricting litigation and could lead to unintended consequences. This is especially so because, barring successful legal challenges, redistricting maps are in place for an entire decade.

Additionally, the Proposed Rule outsources fact-finding to circuit courts or appointed "referees." Subdivision (5)(e) provides: "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." Pet. at 3. Importantly, this provision only underscores why state or federal trial courts are better suited to resolve redistricting litigation in the first instance: they have the resources and time-tested processes to engage in extensive fact-finding. This Court should not outsource fact-finding in redistricting cases when it would be better served by reviewing a full appellate record.

The Proposed Rule also fails to give parties adequate notice of the procedures that would govern redistricting litigation. Proposed subdivision (5)(d) gives the Court discretion over which rules from "Chapters 802-804 governing cases in the circuit courts" will control the procedure for redistricting litigation. Pet. at 3. Indeed, the

Proposed Rule states the Court "may determine" that any of those rules "shall serve as a guide to the procedure to be followed in a particular case." *Id.* Relatedly, it is not clear why the Proposed Rule omits the Rules of Evidence in Chapters 901-911, Chapter 805 on trial procedure, and Chapter 807, which contains miscellaneous circuit court procedures. This Court should not adopt such an ill-defined set of procedures to govern litigation that is uniquely complicated and important for the democratic process.

E. The Proposed Rule establishes inadequate procedures governing proposed maps.

The Petitioners' proposed procedures to evaluate and develop districting plans fail to provide guidance to litigants, the public, and the Court on key issues. Proposed subdivisions (5)(f)-(h) lay out a process for parties to propose maps and for the Court to solicit public comment once a map is selected. Pet. at 3. These provisions leave much unanswered. To start, it is not clear who may submit map proposals. Subdivision (5)(f) provides "the court shall propose a plan (either one *submitted by one of the parties or one prepared by the court*) for consideration of the parties and the public." *Id.* (emphasis added). However, subdivision (5)(c) states: "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*." *Id.* (emphasis added). This drafting anomaly would create confusion as to whether only parties and the court, or parties, the court, and "interested persons who have been allowed to intervene" may submit maps. *Id.* Notably, these provisions fail to provide members of the public with an opportunity to propose plans as well.

The Proposed Rule is also silent on whether the People's Map Commission, a nonpartisan commission established by Governor Tony Evers to draw maps for the 2020 redistricting cycle, will be permitted to submit a map proposal or comment on other plans. *See* Exec. Order No. 66, Wis. Admin. Reg. 770A1 (Jan. 27, 2020), https://docs.legis.wisconsin.gov/code/register/2020/770A1/register/executive_orders/eo_66/eo_66.

Similarly, the rule mentions that the Court may prepare its own plan, but does not lay out what process the Court would follow in doing so. Pet. at 3, § (5)(f). As detailed earlier, map-drawers must comply with a number of criteria, including state and federal law requirements. *See* Part II.A *supra*. They also typically consider additional factors, such as communities of interest and partisan fairness. *Id.* It is best practice for map-drawers to clearly state what criteria they are considering in drawing a map, and provide the data that is being used, so that the map can be evaluated on legal and fairness grounds. Given the technical expertise required to draw maps that meet these criteria, in the past, courts have relied on experts to assist them if the court chooses to draw its own map. *See, e.g.*, *Baumgart*, 2002 WL 34127473, at *1 (noting involvement of two technical advisors). Yet the Proposed Rule provides no guidance on how the Court would go about developing district maps on its own, who would assist the Court, if anyone, and what criteria the court would consider in evaluating maps from the parties, itself, or other interested groups.

When it comes to evaluating proposed plans, the rule also fails to clarify the process for filing objections and rebuttals to proposed maps. Instead, the Proposed Rule simply states "the court shall prescribe, by order or otherwise" these procedures. Pet. at 3, § (5)(g). Furthermore, the proposal only requires one public hearing and does not specify how the Court will conduct the hearing. *Id.* § (5)(h). For instance, it fails to state what will be made available to the public before the hearing. As such, the public is left to wonder if they will have the opportunity to review all of the parties' proposed maps and the underlying data, just a few chosen maps, or none of the above. The Proposed Rule is also silent on who could comment and in what format, where the hearing would be located, whether it would be evidentiary, and whether remote access would be provided for members who may not be able to travel across the State.

The failure to provide guidance on these central procedural questions demonstrates the Proposed Rule's lack of thoroughness. If enacted, this rule would not only create confusion for this Court and future litigants; it would also undermine transparency and public trust in the ultimate outcome of any redistricting case adjudicated under the rule.

IV. This Court should not rush to enact specialized rules for redistricting litigation.

If this Court is seriously considering enacting specialized rules for redistricting cases, it should take the time to thoroughly deliberate and evaluate the Proposed Rule. According to the Petitioners, this Court must act quickly to enact a rule to ensure redistricting disputes are resolved before the 2022 elections. Mem. at 4-5. To support this point they reference a four-month delay at the Census Bureau caused by the COVID-19 pandemic. Mem. at 4. As a threshold matter, the Census Bureau has since retracted the statements it made over the summer, and recent reports indicate the delays will be shorter (likely one to two months). *See* Michael Wines and Emily Bazelon, *Census Officials Say They Can't Meet Trump's Deadline for Population Count*, NY Times (Nov. 19, 2020) (recounting reports from Census Bureau officials that the population counts will likely be delayed "until Jan. 26, and perhaps to mid-February"), https://www.nytimes.com/2020/11/19/us/2020-census-data.html.

Even if there are delays in the 2020 Census timeline, however, this Court should still give this Proposed Rule the proper, thorough deliberation it deserves. Indeed, the last time this Court considered enacting such a rule, it devoted multiple years to hearings before ultimately deciding to reject the proposal. Such deliberation is critical to developing a well-crafted rule—especially in such an important, procedurally complicated, and politically charged area of law. It is also necessary to properly investigate and weigh the potentially enormous ramifications of directly involving this Court in redistricting litigation every decade. If anything, delays counsel even more in favor of this Court taking the necessary time to deliberate over the Proposed Rule.

Furthermore, rushing the rulemaking process to adopt a rule in time for the 2020 redistricting cycle, as the Petitioners ask this Court to do, Mem. at 4, would open the Court up to criticism that it is acting on partisan interests. Such criticism would be avoided by adopting a new rule well in advance of the next round of 2030

redistricting, before political balance and any perceived partisan advantages would be clear.

If this Court is seriously considering enacting specialized rules for redistricting cases, it should take the time to ensure the rules are free from flaws that could undercut the Court's effectiveness and institutional legitimacy for decades to come. Rushing to enact a rule in less than a handful of months would be irresponsible and unwise.

V. Conclusion

In conclusion, CLC urges this Court to reject the Proposed Rule. Free and fair elections—and by extension fair districts—are the bedrock of our democracy. As a nonpartisan institution, the judiciary has a vital role to play in ensuring fair redistricting. And the procedures that courts use to adjudicate redistricting litigation, including all necessary fact-finding and hearings, are equally important.

With those principles in mind, CLC believes this Court should not create a specialized vehicle for litigants to bring redistricting cases directly to the Wisconsin Supreme Court. Moreover, even if this Court is inclined to enact such a rule, the Proposed Rule is seriously flawed and would harm both the democratic process in Wisconsin and this Court's institutional legitimacy. We appreciate the opportunity to submit public comments regarding this important rulemaking.

Respectfully submitted,

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