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BUILDING TRADES COUNCIL
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November 30, 2020

Via Hand Delivery and E-Mail

Clerk
Supreme Court of Wisconsin
P.O. Box 1688
Madison, WI 53701-10688

Re: Petition for Proposed Rule to Amend Wis. Stat. § 809.70 (Relating to Original Actions) from Scott Jenson and Wisconsin Institute for Law & Liberty
Rule Petition 20-03

Dear Honorable Justices of the Supreme Court of Wisconsin:

The Wisconsin Building Trades Council (WBTC) is a non-profit organization that advocates on behalf of working people in the building and construction industry throughout the state of Wisconsin. The WBTC coordinates action among various organizations to protect, promote, and support the interests of these workers and their families. Among these interests is ensuring that every worker has a voice in statewide decisions impacting their income, working conditions, workplace safety, and job security. Their vote is their voice on these matters. Whether a worker lives in Superior, Whitewater, Shawano, Chippewa Falls, La Crosse, Janesville, Appleton, Milwaukee, Kenosha, Wausau, Madison, Racine, Oconto, or any other city, they have one vote and expect that their vote – and voice – will be heard by and meaningfully reflected in our state legislature, that their vote will matter equally with votes cast by every other voter around the State, and that elections are fair. The WBTC believes a consensual redistricting plan is most likely to achieve these objectives while ensuring confidence in the redistricting process.

The Petition for Proposed Rule to Amend Wis. Stat. § 809.70 (Relating to Original Actions) from Scott Jenson and Wisconsin Institute for Law & Liberty ("Petition") is divisive and undermines these goals. It discourages a consensual redistricting plan in favor of early litigation, encourages the development of competing redistricting plans without specifying relevant criteria, and puts forth an ill-defined judicial process that fails to contain necessary safeguards to ensure that Legislative redistricting is unimpeded and the rights of litigants and Wisconsinites are protected. The proposed rule, if adopted, would undermine the constitutional directive that the Legislature fairly reapportion state legislative and

congressional districts and shift that responsibility to this Court. For these reasons, described more fully below, the WBTC ***opposes*** the Petition.

The proposed rule elevates the role of the judiciary in redistricting disputes a manner that is inconsistent with precedent and the constitutional framer's intent. Rather than make courts the last resort, the Petition would make this Court available in the first instance. It specifies a process designed to encourage a race to the Wisconsin Supreme Court as soon as apportionment counts are delivered to Congress. By invoking the Court's jurisdiction before there is a dispute and before the Legislature has even attempted to revise district maps, the proposed rule removes incentive for legislators to work collaboratively to redraw maps fairly as a part of the legislative process they were tasked to carry out.

This Court, in 2002, explained that judicial intervention in legislative redistricting is undesirable and should be a matter of last resort. Holding that "redistricting remains an inherently political and legislative—not judicial—task," the Court clarified that "[c]ourts 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 v. Wis. Elections Bd.,* 2002 WI 13, ¶ 10, 249 Wis. 2d 706, 713, 639 N.W.2d 537, 540. This noted that the constitutional mandate contemplated a collaborative legislative process: "[t]he framers in their wisdom entrusted this decennial exercise to the legislative branch because the give-and-take of the legislative process, involving as it does representatives elected by the people to make precisely these sorts of political and policy decisions, is preferable to any other." *Id.* The involvement of any court or of this Court at the earliest possible moment does not encourage a give-and-take negotiation over district maps intended by the framers; it instead foreshadows failure by giving parties an out and permitting a race to the courthouse for a judicial solution.

A process that permits filing suit before key facts have had a chance to develop and before a cognizable legal injury occurs will interfere with the legislative process. Under current law, federal courts ordinarily defer acting in redistricting disputes if a state entity is involved. *Growe v. Emison*, 507 U.S. 25, 33, 113 S. Ct. 1075, 1080, 122 L. Ed. 2d 388 (1993). Additionally, neither state nor federal courts permit redistricting litigation that interferes with the legislative redistricting process. *Id.* Because neither state nor federal courts permit redistricting claims to be brought until there is an actual legal injury, s*ee* e.g. *Arrington v. Elections Bd.,* 173 F. Supp. 2d 856, 859 (E.D. Wis. 2001) (citing *Lewis v. Continental Bank Corp.,* 494 U.S. 472, 477, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990))[1],

[1]Petitioner notes that federal redistricting litigation was initiated before the legislature had a chance to draw new districts in 2001, but the claim in that case involved an allegation of an actual legal injury, specifically that the then newly-released census data caused an existing state statute to be unconstitutional, and the federal court determined that an actual controversy existed at the time of filing. *Arrington,* 173 F. Supp. 2d at 860.

there is no inherent timing advantage in federal law that makes sub. (4) of the proposed rule necessary.

Instead, a statutory declaration that a hypothetical redistricting dispute is "ripe" so that parties can initiate early litigation is inadvisable and will necessarily create judicial interference in the legislative process. "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 administrative or legislative policies." *Tooley v. O'Connell*, 77 Wis. 2d 422, 439, 253 N.W.2d 335, 342 (1977). Courts generally *avoid* acting unless the material facts necessary for the adjudication of the alleged constitutional violation have already occurred for this reason. *See*, *id.*

The facts necessary to adjudicate an original redistricting action will arise as the legislative redistricting process unfolds, not before. The proposed rule will cause judicial entanglement in the legislative process in two ways. First, once an original action is initiated, it could run simultaneously with the legislative process. And second, if this Court accepted a redistricting case, it would be required to accept and consider the submission of proposed redistricting plans by multiple parties and may propose one of those plans or its own for consideration of the parties and the public. The litigation of dueling redistricting plans simultaneous with the legislative process would overshadow and negatively impact the Legislature's efforts to draw up a fair redistricting plan.

The Petition proposes a process that all but ensures the failure of a consensual legislative redistricting plan at the outset. If parties propose their own plans before the Legislature even gets to work on its own redistricting proposal, any negotiations will be overshadowed by the litigation. Parties' dealings with one another are likely to be overly cautious in the name of shoring up or protecting their respective preferred map(s), claims and defenses. Agreement is less of a goal since a party's preferred map has likely already been offered and argued to the Court. Rather than aid compromise, the proposed process fosters the entrenchment of parties' ideological and legal positions rather than making a sincere, bipartisan effort to reach a consensual redistricting plan that would be the most beneficial to the people of this State.

Finally, given the rights at stake, even if the Court were inclined to adopt rules related to redistricting litigation, a fulsome, thoughtful, and transparent process is appropriate; the Petition does not set forth such a process. In 2002, this Court stated that it could not take original jurisdiction over a redistricting dispute without a procedure that encompassed, at a minimum, deadlines for the development and submission of proposed plans, some form of fact finding (if not a full-scale trial), legal briefing, public hearing, and decision…" *Jensen,* 2002 WI 13, ¶20. The proposed rules do not meet this standard or satisfy its concerns in *Jensen*. The Petition specifies no standard by which the Court (or parties) would develop, evaluate, and choose amongst proposed maps. It pays little heed to fact

finding and discovery and relies on procedures ordinarily intended for limited fact finding to resolve litigation that is generally highly fact intensive. It also fails to provide for procedural safeguards for litigants by making basic rules of civil procedure in Chapters 802 to 804, Wis. Stats., optional. In addition, sub. (j) permits the Court, on its own or at the request of a party, to eliminate or modify any of the deadlines or requirements of the proposed process. The proposed rule does not propose a transparent judicial process that recognizes the complex realities of redistricting litigation or foster public trust in and support of any legislative or judicial decision(s) that would result.

A fair and measured redistricting plan that is the result of legislative negotiations, or alternately, a transparent and conciliatory judicial process in the event legislative redistricting negotiations fail, is in the best interest of all Wisconsinites. A process that the People can trust will ensure that one person's vote is as valuable and meaningful as every other person's is a constitutional mandate is key, but this Petition does not propose such a process. Instead, it proposes a rushed process that necessarily runs counter to these goals in the name of expediency. The WBTC respectfully requests that the Court deny the Petition.

Respectfully submitted,

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