IN THE SUPREME COURT OF WISCONSIN
Rules Petition 20-03

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

RESPONSE MEMORANDUM IN SUPPORT OF PETITION FROM SCOTT JENSEN AND WISCONSIN INSTITUTE FOR LAW & LIBERTY

INTRODUCTION

A number of groups and individuals have submitted materials in opposition to our Petition. The objections are in support of one overarching theme: the opponents do not want the inevitable litigation regarding redistricting maps to take place in this Court. They hope to achieve that objective not by explaining why a federal forum is preferable to a state one, but by attempting to cause this Court to be ill-equipped to handle the case. Although the United States Constitution places the responsibility for drawing the boundaries of Congressional districts with the various state legislatures and Art. IV, sec. 3 of the Wisconsin Constitution directs the state legislature to apportion state assembly and senate districts, the opponents prefer their chances in a federal court. Almost all of the many objections lodged against the Petition, e.g., that litigation might be filed before the legislature has drawn a new map, that redistricting litigation is controversial and hedged with partisan concerns, that courts must exercise judgment regarding the identity of the parties, the manner of proceeding and whether evidence proffered by the parties is admissible and the opportunity for public comment – apply equally to federal courts. Although one may be unique - this Court is not a trial court – it is perfectly capable of employing a referee or circuit judge to take evidence and address questions of fact. Given that these objections do not (and could not) call into question the jurisdictional propriety and competence of this Court to hear redistricting litigation, one can only conclude that the opponents underlying call is for this Court to step aside and allow

federal courts to handle the litigation that is all but certain to occur. In their view, these state functions ought to be reviewed in federal court.

But that has the matter backwards. As this Court has pointed out, "[i]t is an established constitutional principle in our federal system that congressional reapportionment and state legislative redistricting are primarily state, not federal, prerogatives." *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶20, 249 Wis.2d 706, 639 N.W.2d 537. Eighteen years ago, this Court said it would adopt rules to enable this state law function. Given that it is all but certain that the state's redistricting will wind up in court, it is time to adopt those rules.

Collectively, the opponents to the Petition make the following arguments: (1) adopting a rule will encourage redistricting litigation and will interfere with the Legislature's responsibility for redistricting; (2) the Court should not adjudicate any redistricting disputes because redistricting disputes are said to be overly partisan; (3) redistricting disputes are said to be too fact-intensive for this Court; and (4) the opponents have objections to specific parts of the proposed rule. The Petitioners will reply to those arguments in the order listed above.

I. Redistricting litigation will continue to occur in Wisconsin with or without a rule to govern it and having this Court as the forum will not interfere with the Legislature's primary responsibility over redistricting.

Wisconsin history provides a clear rebuttal to the first argument. Wisconsin has never had a rule like that proposed by the Petitioners but it certainly has had an abundance of redistricting disputes which needed to be resolved by the courts. There has been litigation in Wisconsin involving redistricting disputes after the 1930, 1940, 1950, 1960, 1980, 1990, 2000 and 2010 censuses.[1] Litigants have required no encouragement.

[1] *See, State ex rel. Bowman v. Dammann*, 209 Wis. 21, 243 N.W. 481 (1932); *State ex rel. Martin v. Zimmerman*, 249 Wis. 101 23 N.W.2d 610 (1946); *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644 60 N.W.2d 416 (1953);

We know that when there is not a trifecta of single party control, redistricting will be done by the courts. As this Court, itself, noted in *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶20, 249 Wis.2d 706, 639 N.W.2d 537, "[R]edistricting is now almost always resolved through litigation rather than legislation."

The State of Wisconsin currently has divided government with a Democratic Governor and a Republican Legislature. And even though redistricting is the Constitutional responsibility of the Legislature under art. IV, Section 3 of the Wisconsin Constitution, Governor Evers has already turned up the heat by creating his own People's Maps Commission to create a redistricting map to compete with whatever redistricting map is adopted by the Legislature. Redistricting litigation is in the cards whether or not this Court adopts a rule to deal with it. The only question is whether this Court, as promised in *Jensen*, is going to prepare to handle it.

A number of opponents to the Petition have mischaracterized the proposed rule as some sort of attempt to have this Court replace the Legislature in the redistricting process. That, of course, is not what the proposed rule says or is intended to accomplish. The proposed rule only deals with the circumstances where the existing apportionment map is challenged after the census has concluded and the Legislature, for some reason, fails to enact a new map or where the Legislature does create a new map and someone challenges the constitutionality of the new map. Both scenarios are well within this Court's constitutional responsibility regarding judicial review and neither improperly interferes with the Legislature's powers. In that regard, Wisconsin's Legislative Leadership have submitted comments to this Court in favor of the proposed rule stating that "The proposed rule protects the legislature's constitutionally conferred primary role in

State ex rel. Reynolds v. Zimmerman, 23 Wis.2d 606 (1964); AFL-CIO v. Elections Board, 543 F. Supp. 630 (E.D. Wis. 1981); *Prosser et al. v. Elections Board et al*., 793 F. Supp. 859 (W.D. Wis. 1992); *Baumgart et al. v. Wendelberger et al*. (Case No. 01-C-0121, E.D. Wis.); *Baldus v. Members of Wisconsin Government Accountability Bd.*, 849 F.Supp.2d 840 (E.D Wis. 2012)

redistricting." *See* 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 at p. 1.

Adopting a rule will not encourage litigation that would not otherwise occur or in any way interfere with the Legislature's constitutional role in redistricting. The history of redistricting tells us that litigants need no such encouragement. While we hope that the legislature can draw a set of maps that will satisfy everyone, the proposed rule does nothing more than allow this Court to be prepared for litigation if that does not occur. Several of the opponents to the Petition have referred to comments made by members of this Court in 2009 when they rejected a previous proposed rule regarding redistricting - a proposal that would have had this Court appoint Court of Appeals judges to handle redistricting cases in the first instance. And we do appreciate the preference for a legislative solution. But there is no reason to believe that, if the Court is unprepared for litigation, political actors will reach a compromise and decline to bring it. As Justice Crooks pointed out, without a rule, the Court was likely to face a Petition for an Original Action with no procedures in place for doing so and then have to create procedures in the middle of the dispute.[2] This Court benefits from creating a procedure in advance rather than waiting to come up with rules crafted on an ad hoc basis with no notice.

II. The fact that redistricting litigation will involve individuals affiliated with political parties does not mean that such cases should not be adjudicated by this Court.

A repeated refrain from opponents of the Petition is that this Court should not adopt a rule because redistricting disputes are said to be "partisan." What does this mean? It cannot be that, because it is "partisan," these opponents believe it is nonjusticiable and not subject to judicial

[2] https://wiseye.org/2009/01/22/supreme-court-open-administrative-conference-3/ at 25:22

review. None of them make that argument and for good reason. Some of them have urged the United States Supreme Court to invalidate prior maps on a variety of grounds. Others can be expected to be at the forefront of litigation challenging maps that might be drawn by the Legislature next year. To the contrary, the argument is that the matter is too partisan for this Court and should be left to resolution solely in the federal courts. Put differently, they argue that the people of the state of Wisconsin are not entitled to have their own courts determine whether proposed maps comport with state law and the state Constitution. To obtain that result, they propose that this Court remain unprepared to exercise its jurisdiction. To repeat the argument is to refute it, and a closer examination reveals why.

The United States Constitution directly endows the States with the primary duty to redraw their congressional districts. U.S. Const. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof[.]") And, although the federal and state courts have concurrent jurisdiction to decide redistricting matters, the U.S. Supreme Court has made it clear that the states' role is primary. *Growe v. Emison*, 507 U.S. 25, 34(1993). As noted in *Growe*, 507 U.S. at 34:

> [R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.' *Chapman v. Meier*, 420 U.S. 1, 27, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975). Absent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it.

As noted above, this Court said the same in *Jensen*, 2020 WI 13, at ¶ 5, "It is an established constitutional principle in our federal system that congressional reapportionment and state legislative redistricting are primarily state, not federal, prerogatives." And, as we shall see, redistricting litigation does take place in state courts, including the courts of Wisconsin.

Given that the state's role is primary, this Court has recognized that if, for political reasons the Legislature cannot enact a new redistricting map, this Court's "participation in the resolution

of these issues would ordinarily be highly appropriate." *Id.* at ¶ 4. This Court has said that in our State, "[t]he people . . . have a strong interest in a redistricting map drawn by an institution of state government—ideally and most properly, the legislature, secondarily, this court." *Id.* at ¶ 17. Put differently, redistricting is a state matter, both with respect to the legislative function and the judicial function. Any argument that this Court should tell the people of Wisconsin that they must resort to a federal court, and only a federal court, to protect their state constitutional rights and to complete a redistricting process that, for whatever reason was not completed by the Legislature, gets the priority established by the United States Constitution backwards.

That argument is wrong as a matter of state constitutional law as well. In *State ex rel. Reynolds v. Zimmerman*, 22 Wis.2d 544,564, 126 N.W.2d 551 (1964) this Court said with respect to redistricting cases that such cases involve a denial of voting rights under the equal protection clause and that such a denial was both a violation of the Fourteenth amendment to the U.S. Constitution **and art. IV of the Wisconsin Constitution**. In that regard, this Court said that "**there is no reason for Wisconsin citizens to have to rely upon the federal courts for the indirect protection of their state constitutional rights**." *Id*. (Emphasis added.) In no other situation has this Court concluded that Wisconsin citizens must resort to federal court, and federal court only, to vindicate their rights under the Wisconsin Constitution.

Of course, redistricting is a matter in which the disputants are often political actors. This may affect the way in which courts approach redistricting disputes. For example, the United States Supreme Court has declined to entertain claims of a "political gerrymander" (maps that are said to wrongfully favor one party over another) as non-justiciable political questions. *Rucho v. Common Cause*, 139 S.Ct. 2884 (2019) But that does not mean that all such questions are nonjusticiable. As noted above, both federal and Wisconsin courts have held that malapportionment of districts

by unequal populations among them – something that will certainly be the case after the 2020 census - is unconstitutional and susceptible to a judicial review and remediation. There is no reason to conclude that the "partisans" involved in a redistricting litigation (typically the Governor and members of the Legislature) as well as the ordinary citizens, who are also frequently parties in redistricting litigation, should be unable to invoke the jurisdiction of their state's highest Court.

As noted earlier, there will be litigation in which opponents of the rule such as the Brennan Center, Law Forward, ACLU and League of Women Voters will almost certainly be participants.[3] Their argument that this litigation ought to be in federal court must be premised on the unstated assumption that this Court is somehow unable to fairly handle a dispute in which some or all of the parties are "partisans" or that has political implications. But why is that? Perhaps the opponents do not believe that elected judges can impartially adjudicate disputes in which there is intense political interest. But that argument is unavailable here. The people of Wisconsin, in choosing an elected judiciary, have said that they want an elected judiciary with general jurisdiction. They do trust elected judges.[4]

This Court decides controversial cases involving "partisans" all of the time, as it should. This Court has recently, or is currently handling, cases involving the Governor's line item budget powers,[5] the powers of the Governor, the Secretary-designee of DHS, and local units of government to respond to the COVID-19 pandemic in various ways,[6] the Legislature's powers versus the powers of the Executive Branch related to laws passed in a so-called "lame duck"

[3] *See, e.g.*, U. S. Supreme Court Docket No. 18-422, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (list of amici curiae), *available at* https://www.supremecourt.gov/docket/docketfiles/html/public/18-422.html.
[4] For this reason, the opponents' argument is not helped by invoking the "appearance of impropriety."
[5] *Bartlett v. Evers*, 2020 WI 68, 393 Wis. 2d 172, 945 N.W.2d 685.
[6] *Fabick v. Evers* No. 2020AP1718; *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900; *Wis. Council of Religious and Indep. Schools, et al. v. Heinrich, et al.* 2020AP1420.

session,[7] and whether the Wisconsin Election Commission complied with its statutory election law duties.[8] Just forty-eight hours ago, it heard arguments in a case alleging that certain officials had not followed state law in administering the 2020 fall election and that, as a result, the certification of the state's vote for President of the United States should be invalidated.[9] Each of these cases involve or involved: (1) parties who are so-called "partisans" or issues of interest to the political parties; (2) numerous amicus briefs submitted by other interested parties reflecting the "partisan" nature of these disputes; and (3) substantial press coverage which highlighted the public interest in these disputes. Yet this Court did not shy away from deciding them or deny the parties to these disputes a forum in this Court.

And, of course, this Court has handled redistricting cases in the past. Most recently, this Court created the redistricting maps for Wisconsin in the 1960's. *State ex rel. Reynolds v. Zimmerman*, 23 Wis.2d 606 (1964). There is no reason that the so-called, "partisan" nature of a redistricting dispute should cause this Court to deny a forum in this Court to parties asserting their state constitutional rights relating to redistricting and voting.

The opponents to the Petition have argued that by failing to adopt the proposed rule in 2009 to have a panel of Court of Appeals judges appointed by this Court handle redistricting cases, this Court has, in essence, already rejected this Petition. But the rejection of the prior proposal does not change or redeem the promise made by this Court unanimously in *Jensen* "to assure the availability of a forum in this court for future redistricting disputes." *Id.* at ¶ 24. The claim by opponents that this Court should deny Wisconsin citizens the right to vindicate their rights under the Wisconsin Constitution before this Court should be rejected.

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[7] *League of Women Voters of Wisconsin v. Evers*, 2019 WI 75, 387 Wis. 2d 511, 929 N.W.2d 209.
[8] *Zignego v. Wisconsin Election Commission*, Appeal No. 2020AP112.
[9] *Trump v. Biden,* Appeal No. 2020AP2038

III. There is no reason to believe that factual disputes would exist that would prevent this Court from properly handling a redistricting dispute.

There are two principal ways in which a redistricting dispute can be brought to a court. One is a request to review a map created by the Legislature to determine if it passes muster under the federal and state constitutions and other applicable legal standards such as the Voting Rights Act and state statutory requirements. The other is a claim that the pre-existing apportionment map no longer satisfies the "one person, one vote" principle based upon the population changes as established by a new census and that the Legislature has failed to enact a suitable replacement map. The latter category of cases are often, as we shall see, brought almost immediately after the new census becomes available, well before the legislature has had an opportunity to act. Both situations may or may not involve the court having to draw a map, itself. Unfortunately, as pointed out above, this map-drawing by courts has become a regular fixture of Wisconsin redistricting litigation and this Court, like any other court, should be equal to the task. This Court did it in 1964 (*see Zimmerman, supra*) and other examples of state supreme courts doing so recently are Pennsylvania in *League of Women Voters v. Commonwealth*, 645 Pa. 1, 178 A.3d 737 (2018) and Minnesota in *Hippert v. Ritchie*, 813 N.W.2d 374 (Minn. 2012).

In doing so, this Court requires a process by which parties can propose and critique maps. Wis. Stat. § 751.09 provides that "[i]n actions where the supreme court has taken original jurisdiction, the court may refer issues of fact or damages to a circuit court or referee for determination." The proposed rule submitted by the Petitioners incorporates § 751.09 and also incorporates Wis. Stat. § 805.06 which contains procedures for the appointment of a referee. Of course, a significant part of this Court's original jurisdiction involves cases of attorney discipline and this Court regularly relies on a referee to resolve factual disputes in such cases. Thus, the Court is no stranger to this method of fact-finding in cases involving its original jurisdiction.

To be sure, this Court generally does not exercise its original jurisdiction if fact-finding is required. But as the rules providing for such fact-finding make clear, and the *Jensen* Court recognized, this is not a hard and fast rule. While certain of their opponents wave their hands at this issue and assert that there is something special about fact-finding in redistricting litigation that makes fact-finding in an original action impossible, they do not explain why. Redistricting litigation usually involves proposed maps and critique of those maps based on claims around their demographic composition, voting patterns, contiguity and compactness, correlation with political boundaries, etc. While it is not impossible to imagine a question of credibility, the issues to be judicially resolved generally assess the legal impact of the differences among proposed maps identified by the parties. Thus, the difference between this Court's review of the report of a referee or appointed judge and review of the decision of a lower court is not as significant as the opponents claim.

Some of the opponents also contend that there are particular problems with this Court having to draw a map if the Legislature is not able to enact one. But as pointed out above, this Court has done so before as have other state supreme courts. One solution to simplify whatever problems might be perceived to exist in this regard would be to simply adopt one of the proposals made by the study commission appointed by this Court back in 2003. That Committee recommended if the Court is required to draw a map that the Court simply start with the existing map (in this case the one that has been in place since the 2010 census) and only approve changes necessary to comply with the traditional redistricting criteria of population equality, contiguity, compactness, respect for political subdivisions and communities of interest and adherence to Voting Rights Act requirements. September 21, 2007 Draft Report at p. 7.

This rule - sometimes called "the least-change" strategy - is the legal rule in Minnesota. *Hippert v. Ritchie*, 813 N.W.2d 374, 380 (Minn. 2012) ("Because courts engaged in redistricting lack the authority to make the political decisions that the Legislature and the Governor can make through their enactment of redistricting legislation, the panel utilizes a least-change strategy where feasible.") Preparing a map in this fashion would be a relatively simple and straightforward task and adding the Committee's proposal may be a useful addition to the proposed rule.

Given that the rule provides a method for fact finding, redistricting litigation is a prime candidate for the exercise of this Court's original jurisdiction. It certainly "trigger[s] the institutional responsibilities of the Supreme Court." *See Petition of Heil*, 230 Wis. 428, 436, 284 N.W. 42, 45 (1939) ("[T]he purpose of the constitution was, 'To make this court indeed a supreme judicial tribunal over the whole state; a court of last resort on all judicial questions under the constitution and laws of the state; a court of first resort on all judicial questions affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people.'" (quoted source omitted)). It certainly presents questions "of such importance as under the circumstances to call for [a] speedy and authoritative determination by this court in the first instance"); *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶98, 334 Wis. 2d 70, 798 N.W.2d 436, (Abrahamson, C.J., dissenting) ("The concept of original jurisdiction allows cases involving matters of great public importance to be commenced in the supreme court in the first instance." (quoted sources omitted)).

IV. The various subsections of the proposed rule would allow this Court to efficiently and effectively handle redistricting litigation.

The opponents to the Petition argue against various subsections of the proposed rule on a variety of grounds. The Petitioners believe that the various subsections of the proposed rule respond to the concerns of this Court, itself, expressed in *Jensen*, where this Court said:

> We have no established protocol for the adjudication of redistricting litigation in accordance with contemporary legal standards. A procedure would have to be

> devised and implemented, encompassing, 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. 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, 2002 WI 13, ¶20.

But we also concede that there is more than one way to achieve that same result. For example, this Court could easily change the timelines in the proposed rule, change the description of the parties allowed to intervene as of right, change the section on the proposed public hearing and achieve an equivalent or perhaps even better process than that proposed by the Petitioners. With that caveat in mind and recognizing that this Court may choose to modify the proposed rule, the Petitioners will respond to some of the objections set forth by the opponents. But before doing so, it is necessary to address a general theme.

No rule can anticipate every issue that may arise and resolve it. Nor should it try. The objectors to the proposed rule attempt a strategic "paralysis by analysis" by attempting to list every issue that might arise. Rules of procedure are not instruction manuals written to anticipate and resolve every question. The first is not possible and the second would not be desirable. This Court will have to decide whether to accept the petition, what fact-finding will be required, who will be permitted to intervene, etc., in the context existing when those questions are presented. This distinguishes an original action brought pursuant to the proposed rule from exactly no other litigation.

The proposed rule has five key components: (1) how and when a redistricting case gets to the Supreme Court; (2) who should be able to intervene as a matter of right; (3) how any necessary fact-finding shall occur; (4) the Court's selection of a proposed map and obtaining public comment

on the proposed map; and (5) establishing necessary deadlines. In short, the proposed rule deals with all of the issues identified in *Jensen*.

A. The appropriate path for redistricting cases to come before this Court is via an original action and on a timely basis to ensure a state forum.

The first part of the proposed rule would add a new subsection (4) to Wis. Stat. § 809.70 which provides that "Requests to the Supreme Court to take jurisdiction of any case which relates to congressional and/or state legislative redistricting shall be through a petition for an original action under this section." Although many opponents say that the rule "deprives" litigants from the possibility of other forums, it does no such thing. It does not require this Court to accept such a petition. It recognizes that it can – something which is also true in its absence - but having this Court take redistricting actions through an original action is consistent with this Court's existing jurisprudence on the subject.

Indeed, *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551 (1964) was accepted as an original action and in *Jensen* this Court unanimously said that "there is no question" that redistricting actions warrant "this court's original jurisdiction; any reapportionment or redistricting case is, by definition, *public juris*, implicating the sovereign rights of the people of this state." *Jensen*, 249 Wis.2d 706, ¶ 17. As noted above, a redistricting case is a quintessential candidate for an original action. It presents questions "of such importance" as to call for a "speedy and authoritative determination by this court in the first instance." *Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 50 (1938) It is certainly of statewide importance. *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 11, 391 Wis. 2d 497, 511, 942 N.W.2d 900, 907 (this Court will accept original jurisdiction where "the Secretary-designee of DHS issued an order in violation of the laws of Wisconsin—an order that impacts every person in Wisconsin, as well as persons who come into Wisconsin.")

As noted in *Jensen*, "there is no question" that redistricting litigation meets this standard and handling such cases under a state supreme court's original jurisdiction makes perfect sense. Three of our neighboring states expressly give original jurisdiction to their state supreme courts for redistricting litigation. The Iowa Constitution states that, "The supreme court shall have original jurisdiction of all litigation questioning the apportionment of the general assembly or any apportionment plan adopted by the general assembly." Iowa Constitution art. III, section 36. Likewise, the Illinois Constitution states that its "Supreme Court shall have original and exclusive jurisdiction over actions concerning redistricting." Ill. Const. art. IV, § 3. Michigan has accomplished the same thing by rule which provides that the Michigan Supreme Court should take such cases under its original jurisdiction. *See* Michigan Compiled Law Annotated 3.74.

Our fourth neighbor, Minnesota, by statute, allows the Chief Justice of the state supreme court to assign any judge to serve and discharge the duties of any judge of any court, *see also* Minn. Stat. §§ 2.724 and 480.16 (2010). The Chief Justice used that authority to appoint a special redistricting panel to draw the redistricting map for Minnesota after the 2010 census when the Legislature and Governor could not agree on a new map. *Hippert v. Ritchie*, 813 N.W.2d 391, 393 (Minn. 2012). The proposed rule does nothing more than assist the court in exercising its original jurisdiction as is the case in Minnesota, Iowa, Michigan and Illinois.

For example, the proposed rule enables this Court to accept a case at a time that will ensure a state forum. The proposed rule permits an original action to be filed after the Census Bureau has delivered apportionment counts to the President and Congress as required by law. The deadline for that is December 31st, 2020 (which this time around may be delayed due to COVID-19). That deadline precedes the date that the Census Bureau delivers the relevant data to the states. That means, of course, that the rule authorizes the filing of an action prior to the Legislature submitting

a proposed map or even having an opportunity to fully consider new proposed maps and some of the opponents to the proposed rule object on that basis.

The reason the Petitions included this particular timing provision in the proposed rule is to put state court actions on par with federal court actions. In *Arrington v. Elections Bd.*, 173 F. Supp. 2d 856 (E.D. Wis. 2001) the court held that plaintiffs had standing and a redistricting action was ripe in federal court at any time after the Census Bureau has delivered the apportionment counts to the President and Congress as required by law (the same time frame adopted in the proposed rule). This is so, the court held, because as of that date the current apportionment law is unconstitutional (due to the population changes made apparent by the census results). *Arrington*, 173 F. Supp. 2d at 866. The court in *Arrington* determined that an action filed on February 1, 2001 (about one month after the census apportionment was complete) was ripe even though the Wisconsin Legislature did not yet have any opportunity to adopt a new map but stayed the action until the Legislature had a reasonable opportunity to do so and the proposed rule likewise provides for a similar stay.

Although standing and ripeness in a redistricting case has not been adjudicated in a Wisconsin state court, there is no reason for different rules in state and federal courts. In particular, there is no reason to reward plaintiffs who race to federal court ahead of plaintiffs who file in state court. The proposed rule simply codifies the method adopted by the federal court in *Arrington* and provides for identical rules in state and federal court. We understand that certain of the opponents are potential redistricting litigants who prefer a federal forum and want to win that race. But that does not mean that this Court should place state court litigants at a disadvantage. None of the opponents to the Petition offer any explanation as to why a level playing field is unfair.

This aspect of the proposed rule does not take redistricting "away" from the legislature or discourage a political resolution any more than *Arrington* did. If an original action is filed and accepted by this Court prior to the drawing of maps by the legislature, this Court can – and should – hold the matter in abeyance and the proposed rule allows for that process.

B. The proposed rule has a provision for making sure all appropriate parties will be before the Court.

A number of the opponents to the proposed rule object that it allows intervention as a matter of right for certain parties. Specifically, the second part of the proposed rule would add a new subsection (5) to Wis. Stat. § 809.70 which provides that "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. The Governor, either or both branches of the Legislature and political parties shall be granted intervention as of right."

This is a good example of a part of the proposed rule that the Petitioners understand could be modified in a variety of ways and the rule would still make perfect sense. This Court could allow some, all or none of the parties mentioned in the proposed rule to intervene as a matter of right and there could be additions to the proposed list as well. But the Petitioners would make two points for this Court's consideration.

First, there are many potential plaintiffs with standing to commence a redistricting action and it is a logical certainty one of them will be the first to do so. But there is no reason to make the plaintiff who is quickest to sue the only plaintiff permitted in the lawsuit. Others will have an equal right to pursue a vindication of their rights and it would make no sense to handle these as separate claims, so some mechanism should exist to permit those additional plaintiffs to intervene in an existing case rather than commence a multitude of cases. By allowing some parties to intervene as a matter of right, the proposed rule is not intended to interfere with the ability of any

other citizens to intervene in a pending redistricting case. Those requests for intervention would be handled as they always have been handled in the past.

Second, the Petitioners listed the parties they did in the proposed rule as intervenors as a matter of right simply as a practical matter. The Governor and the Legislature (along with individual voters) have been protagonists to such litigation in this State in the past. For example, in the litigation following the 1980 census (when the Democrats controlled the legislature and the Republicans held the Governorship) the parties included a union, the Democratic Party of Wisconsin and a member of the State Senate as plaintiffs and the Republican Party of Wisconsin, individual Republican legislators and the Governor as Defendants. See, *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 632 (E.D. Wis. 1982).

In the litigation following the 1990 census (when the Democrats again controlled the legislature and the Republicans held the Governorship) the parties included Republican legislators from both the Assembly and the Senate who originally filed the suit along with individual voters, the Democratic leaders of the Wisconsin legislature, who were permitted to intervene, as were a number interested groups, including the Wisconsin Education Association Council and individuals, including Annette Williams, a black representative from Milwaukee, and several other black and Hispanic legislators. *See Prosser v. Elections Board*, 793 F. Supp. 859 (W.D. Wis. 1992).

In the litigation following the 2000 census (when partisan control of the two houses of the legislature was split), the action was started by a group of individual voters and then two groups of legislators (one group of Democrats and one group of Republicans) were allowed to intervene along with two individual African-American legislators. *Baumgart v. Wendelberger*, 2002 WL 34127471 (E.D. Wis. 2002).

The point is that the Governor, members of the Legislature and political parties have significant interests in redistricting and have historically participated in such litigation. The proposed rule recognizes these historical facts and permits them to intervene as a matter of right to save the time and effort of filing motions to intervene. This Court can reduce or add to this list and the Petitioners understand that other citizens or citizen groups may desire to intervene and the proposed rule is not intended to preclude such a result. Again, the Petitioners do not quarrel with the fact that there are a number of proposed ways to handle intervention in such a case. And as matter of judicial policy, we believe that the Court should entertain intervention requests in redistricting litigation with a spirit of liberality. Petitioners have simply made one suggestion for the Court's consideration. We believe that it makes sense for the proposed rule to provide for participation by parties who are historically present and to permit other intervenors whose participation is proper under existing intervention standards. But this Court could easily adopt, modify, replace, or exclude this part of the proposed rule altogether.

C. The proposed rule has a method for fact-finding.

To the extent that the opposition to the proposed rule was based on the alleged difficulty with respect to factual disputes, that issue has already been addressed in Section III above. With respect to the method of any necessary fact-finding, the proposed rule simply incorporates existing statutory provisions for doing so. The proposed rule states as follows:

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

Thus, the rule incorporates the provisions of Wis. Stat. § 751.09 and Wis. Stat. § 805.06. Because the proposed rule merely references and incorporates existing statutory provisions there

should be nothing controversial regarding this part of the proposed rule. As noted above, some of the opponents want the proposed rule to do what cannot and should not be done. They want all possible questions to be anticipated and resolved. Many are answered by § 805.06. The opponents offer no explanation why this existing rule – which works in all sorts of cases – cannot work here.

D. The proposed rule contains procedures for proposing a map and obtaining public comment.

Some of the opponents to the proposed rule object to the rule on the alleged basis that it does not provide sufficient opportunity for public input. But that is simply not the case. The proposed rule provides a two-step procedure for the Court to adopt a map. The first step is for the Court to select a proposed map – either one proposed by one of the parties or one prepared by the Court – and publish that proposed map for inspection and comment by the public and to have a hearing on that proposed map prior to finalizing the map. The proposed process specifically provides a way for the Court to allow the public at large and the parties to comment on and offer proposed corrections to any perceived errors or mistakes in the proposed map before it becomes final.

The Petitioners again concede that there are certainly other ways for this Court to accomplish the same result. In order for the proposed rule to be complete and to address all of the issues raised by this Court in *Jensen*, the Petitioners proposed a specific mechanism that fits in with the rest of the proposed rule. If someone else proposes a better mechanism, so be it. The Court can decide the best way to accomplish public input whether it is the way proposed by the Petitioners or someone else.

E. *The proposed rules contain the relevant information for establishing deadlines*.

The proposed rule recognizes that a new map must be in place in time for candidates to begin circulating nomination papers for the fall primary and general elections (because to do so

the candidates need to know the boundaries of the districts in which they will be running). Under the current statutes, candidates may begin circulating nomination papers on April 15, so that is the ultimate deadline for a final map for purposes of, for example, the 2022 election. The Court would presumably want to provide candidates with the final map at some time prior to that deadline (the Petitioners proposed 15 days). All other deadlines must work backwards from that date and all briefing, fact-finding and argument would have to be complete in time for the Court to meet that deadline.

The Petitioners have offered a proposed set of deadlines. Whether the time frames proposed by the Petitioners are best alternative is for the Court to decide. Alternatively, the rule could contain no deadlines and they could be determined by this Court in a scheduling order in the case after it is filed. The Petitioners proposed deadlines because this Court in *Jensen* said that such a rule should contain "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.

Moreover, because circumstances can always change, the final subsection of the rule allows the Court to change any or all of the deadlines or eliminate some of the steps contained in the rule, upon motion of the parties or upon the Court's own motion. Thus, setting forth deadlines in the rule as proposed by this Court in *Jensen* will produce no unintended consequences because the proposed rule expressly provides that the deadlines in the proposed rule can be changed by the Court at any time.

F. The proposed rule is not deficient for failure to provide for review or "mandatory" fact-finding.

Certain of the opponents complain that there is no provision for "review" of this Court's decision. That is not quite true. Federal questions are always subject to review in the United States

Supreme Court and, were the matter to be filed in federal court, that would also be the only review available. Of course, this Court would have the final word on questions law. But that is a function of our state constitution, not the proposed rule.

Other opponents complain of the absence of a provision requiring fact-finding. Of course, no court must do fact-finding if the law does not require it. But all courts must do fact-finding if the law does so require. The proposed rule provides a mechanism for that fact-finding. There is no reason to suppose that this Court will ignore the law and not do what it requires.

CONCLUSION

In *Jensen*, this Court said that it needed to create new rules for original actions relating to redistricting that would include provisions governing fact-finding, opportunity for public comment on proposed redistricting plans, and establishing timetables for the process. The proposed rule does that and more. It establishes a full set of procedures that would allow this Court to efficiently handle such litigation under its original jurisdiction and the Petitioners request that this Court enact the proposed rule in order to avoid a frenzy of last-minute litigation occurring in the absence of clearly-defined rules.

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