To: Clerk of the Supreme Court and Court of Appeals, December 18, 2020

I have not submitted written comments on this proposed rule change, primarily because I was not aware of it. Now that I am, I believe I can offer a perspective that I hope will be regarded as court-friendly. At the same time, I should be upfront about my interests in redistricting litigation. I have voted Democratic in nearly every election since I was 20; I volunteered for the Democratic Party in several elections; I regard the 2011 legislative and congressional redistricting in this state as Republican gerrymanders; and most importantly, I think there is a real possibility that I will be involved in any redistricting litigation that may take place in the next two years. I am hoping the outcome of redistricting, whether done by this Court, a three-judge federal court, or the two political branches working together, will be a map that favors neither political party. I would also favor maps that tend to reduce the tendency towards political polarization.

In the 1990's I appeared as a state assistant attorney general in several elections-related actions. In 1992, I represented the state Elections Board in the federal redistricting case that was heard by Judges Posner, Crabb and Curran in the U.S. District Court for the Western District of Wisconsin. From 1991-96, I served as lead counsel for Wisconsin in a case involving the validity of the 1990 census, a case we ultimately won 9-0 in the United States Supreme Court. Beginning around the middle of that decade I served as lead counsel for Governor Thompson (sued in his official capacity) in a Voting Rights Act challenge to the at-large election of judges in Milwaukee County. Kathleen Falk served as co-counsel. Also on that case, representing the Wisconsin Trial Judges Association but seeking the same outcome as the state, were Attorneys Tom Shriner and Rick Esenberg of Foley and Lardner. Rick and I argued the case as well in the Seventh Circuit. Some of the members of the Court will also recognize me as a now-retired Dane County Circuit Court judge, having served in that capacity from 2009 until this past August.

My main point at this time is that the Court is not being asked to do itself any favors. The petitioners appear to be trying to--I'm not going to use the word "rig," let's say, orchestrate--a race to the courthouse, in which the state-filed action beats out any potential federal case. While there's some mention of state interests for preferring this Court, based on my experience, this is fairly thin. In a redistricting case, federal interests plainly predominate--under the Equal Protection Clause, the 15th Amendment, and the Voting Rights Act. Moreover, just as this Court has jurisdiction to hear cases arising under the United States Constitution, a federal three-judge panel has the authority and duty to consider state law districting requirements in fashioning its remedy. My recollection of the 1992 litigation is that state interests were given at most lip service, if they were even mentioned, by any of the parties. I am not suggesting that this Court should presumptively refrain from redistricting litigation, given that it would have jurisdiction. However, I view the petitioners' proposal as an effort to rewrite the Wisconsin Constitution, through the device of rule-making, to make the Supreme Court, rather than the Legislature and Governor, the starting, rather than ending, point of this intense decennial process.

The main, I would say sole, issue in these cases is remedy, which means the drawing of maps. There is little reason for either petitioners or this Court to believe that this Court, as opposed to a federal three-judge panel, provides the better forum for this task. A three-judge court will very likely be comprised of one judge generally regarded as liberal and two generally regarded as conservative, commonly one circuit judge and two district judges. Its judgment will be subject to a right of direct appeal to the United States Supreme Court, whose current composition is six conservatives and three liberals. I am confident that whatever the composition of the three-judge panel, its members will seek to produce a fair map that does not favor either party. It's very likely the court will be unanimous. In contrast, my strong hunch is that the petitioners believe that if they can have the case heard by this Court, they will obtain a map more favorable to the Republican Party.

I do not believe this an outcome that this Court would pursue. One problem is that it will be immediately obvious whether a map tends to favor one party over the other. Particularly if the favored party is the Republican Party, I cannot imagine this Court not being divided. I think it very likely such an outcome would trigger serious challenges both to the legitimacy of the Court's judgment and to the Court itself. The United States Supreme Court would almost certainly end up deciding the matter. In Wisconsin, the task of redistricting is vested with the political branches. When they fail to accomplish their constitutional duty, a Court's job is not to become the third political branch.

Notwithstanding what appear to the public as deep divisions among its members, I can envision this Court producing a unanimous redistricting map. It could do this by directing a Special Master to come up with a map that was essentially neutral as between the two political parties, but which appropriately took into account specific local and state interests, as well as identified policy objectives such as avoiding the creation of an overabundance of safe districts for either party. But who could the Court appoint who would do better than a three-judge district court? A three-judge court can and will do the work that is required, do it professionally and fairly, come up with a map that will be workable for the next ten years, all while likely avoiding claims of improper favoritism. Or if such claims end up being raised (I don't recall any from the 1992 case), a three-judge federal court should be able to safely weather whatever criticism the public elects to offer. Moreover, there is no cost to the state in utilizing a three-judge court. This is a federal function.

In short, this Court knows much better than I what it is like for a divided Court to take up divisive issues in deeply polarized times. There are enough occasions where the Court is compelled to take on these very important but often thankless endeavors. Redistricting is one occasion where there is no such compulsion.

This basically summarizes the points I would make to the Court if given an opportunity to speak. Whether or not I am given that opportunity, I would respectfully ask that you share these brief written comments with the Court and its staff and, in accordance with your procedures, with the public. As shown above, Attorney Esenberg is being copied on this e-mail.

Thank you in advance for your consideration. I hope you, the members of the Court, as well as its staff, enjoy safe and happy holidays.

Very truly yours,

Pete Anderson

Madison