STATE OF WISCONSIN **IN SUPREME COURT**

In re amendment to SCR 72.01(8), 72.01(9), and 72.01(10), relating to retention of records in eviction cases **Petition 22-03**

Petitioner's Responses to Comments on Rule Petition 22-03

Dear Honorable Justices,

Thirty-five individuals or organizations have submitted comments on Rule Petition 22-03. Thirty-one comments support Rule Petition 22-03; two comments oppose the Petition. Two comments do not take a position on whether the Court should adopt Rule Petition 22-03, but do provide valuable information and perspectives for the Court to consider. Legal Action of Wisconsin's responses to these comments are set forth below.

1. Support for Rule Petition 22-3

Rule Petition 22-03 has received overwhelming support from a broad and diverse group of commenters, ranging from individual attorneys and members of the public[1] to other law firms and community groups.[2] It is rare to see a Supreme Court Rule Petition with such public support. The supporters of the Petition highlight the severe and widespread harm that eviction records have on renters in Wisconsin. Many of the comments also tell the stories of renters who have struggled to find housing

[1] Attorneys Sophie Crispin and Grace Kube; Matthew Desmond; Revered Steven Howland; Bruce Grau; Sally McCoy; Attorney Mitch; Anne Reynolds; Tijana Sagorac Gruichich; Honorable Richard Sankovitz, retired; Attorney Mark Silverman; and Attorney David Sparer.

[2] American Civil Liberties Union Foundation of Wisconsin; Cia Siab, Inc.; Community Advocates, Inc.; Coulee Tenants United; Dane County National Association for the Advancement of Colored People; Greater Wisconsin Agency on Aging Resources, Inc.; Habitat for Humanity La Crosse Area; Homeless Services Consortium of Dane County; Judicare Legal Aid; Justified Anger Court Observers; League of Women Voters of Beloit; Legal Aid Society of Milwaukee; Madison Street Medicine; Metropolitan Milwaukee Fair Housing Council; Milwaukee Justice Center; Pathfinders Milwaukee; Safe & Sound, Inc.; Tenant Resource Center; United Way of Greater Milwaukee & Waukesha County; and YWCA Madison.

because of the existence of an eviction court record. These comments also reinforce Legal Action's Supporting Memorandum: our clients' experience with landlords and their propensity to deny the rental application of any renter with any evictions record is not unique. Practitioners and community leaders throughout the state have reported to this Court on the problems renters with eviction records have in finding safe and affordable housing. Legal Action thanks these individuals and groups for their support.

2. Director of State Court Comments

Legal Action also thanks the Director of State Courts for his informative comments. Adoption of Rule Petition 22-03 may result in more work for CCAP staff and clerks of courts.[3] This is true, however, of any change made to SCR 72. This increased workload should be considered in light of the decreased workload of circuit court judges who currently review motions to seal or redact a renter's name in the court record. Clerks themselves may also see a reduced workload if fewer motions to seal or redact a renter's name are filed, as they will not have to manage the scheduling of the motions or the sealing and redaction of the court records after a judge grants the motion. To the extent that there may be a lack of clarity in the application of the proposed rule, the Director's office could provide guidance to clerks on how to implement the rule. The Director also asks the Court to consider the interaction of the rule with Wis. Stat. § 758.20(2). This statute is discussed in the Supporting Memorandum and in more detail below on pages 3-4. While the legislature may have implemented this statute which places a limit on the Director's office, this statute does not place any limit on this Court's ability to modify its own rules on records retention.

3. Wisconsin Clerks of Circuit Court Association Comments

The Legislative Committee of the Wisconsin Clerks of Circuit Court Association has also not taken a position for or against Rule Petition 22-03, but instead helpfully discusses the practical impacts of the proposed changes to clerks of court. Legal Action is well aware that the records retention periods are minimum retention periods, and

[3] The Director is correct about his staff's comments to Legal Action about the proposed rule changes being "feasible" and not "minimal." Legal Action used the word "minimal" in its Supporting Memorandum only to describe the potential changes relative to what would be significantly more work under the more complicated scheme for records retention periods Legal Action proposed in Rule Petition 20-08, and did not intend to misstate the Director's staff's comments.

that some eviction records may not be purged for some time after the proposed one-year retention period. The Clerks Association is also correct that regardless of when a court file is purged, the display period on the Wisconsin Circuit Court Access website is tied to minimum retention period. If the Court adopts Rule Petition 22-03, the records of eviction cases which have retention period of one year may still exist at the courthouse, however, they will not appear online on the WCCA website after one year. Even if the records are maintained for more than one year, it will still be a tremendous benefit to renters to have these cases removed from the WCCA website.

4. Opposition Comments

The only comments filed in opposition to Rule Petition 22-03 are from Attorney Heiner Giese and Frank Lubotsky.[4] Their comments do not rebut the voluminous research documenting the harms eviction records have on renters.[5] Their comments also do not rebut the research documenting the disparate impact eviction records have on renters of color.[6] Their comments also do not articulate any business reason why landlord may need to view these eviction records. Giese instead identifies five main reasons he asks the court to deny Rule Petition 22-03, which we address below.

A. Rule Petition 22-03 Does Not Invalidate Wis. Stat. § 758.20

With respect to Wis. Stat. § 758.20, nothing in the Petition would "invalidate" existing legislation. Giese Comment, p. 2. As noted in Legal Action's Supporting Memorandum, the language of Wis. Stat. § 758.20(2) prohibits the Director of State Courts from removing case management information from the WCCA site for civil cases that are "**not** a closed, confidential, or sealed case." (Emphasis added) This Petition asks simply that the Wisconsin Supreme Court – not the Director of State Courts – revise an existing Supreme Court Rule to address a group of cases explicitly

[4] Attorney Giese states his views represent the views of the Apartment Association of Southeastern Wisconsin, Inc., Wisconsin Realtors Association, and Wisconsin Apartment Association. Lubotsky's comments are his own and do not represent the views of any organization.

[5] The comments in support of Rule Petition 22-03 also discuss these harms in detail.

[6] The comments of American Civil Liberties Union Foundation of Wisconsin; Cia Siab, Inc.; Community Advocates, Inc.; Attorneys Sophie Crispin and Grace Kube; Dane County National Association for the Advancement of Colored People; Madison Street Medicine; Metropolitan Milwaukee Fair Housing Council; Anne Reynolds; and United Way of Greater Milwaukee & Waukesha County also discuss this research.

not addressed in Wis. Stat. § 758.20. The Petition does not seek to invalidate a statute, as it is asking this Court – a body not identified in the statute in question – to take action regarding a group of cases also not identified in the statute. Giese contends that reading the statute to include the word "not" – a word included in the statute – would render it meaningless and ineffective. Giese Comment, p. 3. Read as written, Wis. Stat. § 758.20(2) prohibits the Director from removing case information from WCCA for three types of cases: 1) open cases (i.e., pending and "not" "closed"); 2) cases that are not confidential; and 3) cases that are not sealed. There is nothing about that prohibition that is meaningless.

Even if Wis. Stat. § 758.20 is read to apply to closed cases, it is limited in its applicability to the Director of State Courts, not the Supreme Court. Giese attempts to expand the statute's governance beyond the Director to the Supreme Court itself, but that is not supported by the language of the statute and ignores principles of comity. "Comity endorses the principle of mutual respect between legal systems, recognizing the sovereignty and sovereign interests of each governmental system and the unique features of each legal system." *Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians*, 2003 WI 118, ¶ 69, 265 Wis. 2d 64, 665 N.W.2d 899 (Abrahamson, C.J., concurring). While the legislature may have restricted the Director's authority with respect to records, there is no indication that it intended to extend that restriction to the Supreme Court. That distinction reflects the principle of comity and an implicit recognition of the Supreme Court's expertise and sovereignty over its branch of government and rule-making powers. As established by the numerous rules already in place addressing management of case records, the topic of record retention is well-within the confines of the Court's sovereignty and expertise.

B. The Changes Sought to the Record Retention Rules Are Not Remedies Substantially Available to Renters

The reduced retention period for eviction cases sought by Rule Petition 22-03 is not "substantially available" at this time. Giese Comment, p. 1. Giese points to Wis. Stat. § 758.20 in support of the claim that the Director of State Courts is "authorized under that statute" to remove cases from WCCA if no money judgment is docketed two years after dismissal. Giese Comment, p. 1. However, Wis. Stat. § 758.20 is not an enabling statute that empowers the Director to take certain actions. It is a restriction

on the Director's powers, expressing what the person in that role cannot do, and prohibiting the Director from removing information from WCCA until a minimum time period has passed. As noted above, it is also a restriction that pertains to a party and group of cases not at issue here.

To the extent that Giese contends that a two-year window of record availability is substantially the same as a one-year window, the voluminous record of information demonstrating the harmful impact eviction records have on renters' ability to find housing speaks to the contrary.[7] It is a position of privilege and callous indifference to think that spending two years unable to find safe and secure housing is the same as one. For a family facing homelessness, loss of family, loss of property, and countless other traumas due to their eviction record, individual days matter, let alone an entire year.

Giese cites to Milwaukee County and motions filed there to seal and redact eviction records, claiming that "sealing of evictions for defendants is occurring quickly and often and with almost no opposition from plaintiffs." Giese Comment, p. 7. This is accurate in some respects, but profoundly incorrect in others. Milwaukee eviction cases in which a lawyer represents a renter will frequently end in a motion to seal or redact which, as Giese correctly notes, are almost always unopposed by landlords and are almost always granted by the circuit court. That fact reinforces how little public interest there is in these records as even the landlords involved are raising no objection to this action. It also demonstrated the circuit courts' recognition that sealing or redacting a renter's name in an eviction case is frequently necessary for the administration of justice.[8]

Where Giese's assessment of motions to seal or redact in Milwaukee County is wrong is the concept that records are being addressed quickly and often. Legal Action's attorneys have filed motions to seal or redact in Milwaukee County in August of this year, but have hearings on these motions scheduled as far out as February of

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[7] Matthew Desmond, Weihua An, Richelle Winkler, and Thomas Ferriss, *Evicting Children*, 2 Social Forces 92 (2013): 303-27; Matthew Desmond and Tracey Shollenberger, *Forced Displacement from Rental Housing: Prevalence and Neighborhood Consequences*, Demography 52 (2015): 1751-72; Matthew Desmond, Carl Gershenson, and Barbara Kiviat, *Forced Relocation and Residential Instability among Urban Renters*, Social Service Review 89 (2015): 227-62. All the comments in support of the Petition also emphasized the detrimental impact eviction records have on families' ability to find housing.

[8] The comments of the Milwaukee Justice Center also speak to these issues in Milwaukee County.

2023. There is a significant delay between when a motion to seal or redact is filed, and when the court reviews and decides the motion.[9] Furthermore, it is important to note that sealing or redaction of court records requires a motion and decisions or proceedings from the court. In cases where a renter is pro se, there is no assurance that a motion to seal or redaction will be filed, either because renters do not know that they can or because they do not know how to do it without hiring an attorney. There is nothing automatic about this process, and many cases will still remain in the record for up to twenty years. Given the considerable number of pro se renters throughout the state, the Court's grant of this Petition would go a long way towards standardizing the handling of eviction records and minimizing the harm they cause, particularly to unrepresented individuals and families.

C. The Elected Wisconsin Supreme Court Is Well Within Its Authority to Address the Retention of Court Records

Giese suggests the issue of eviction records retention is an issue best left to the legislature, not this Court. Giese Comments, p. 3. This suggestion, however, ignores the request of the Rule Petition to modify a Supreme Court Rule, not a state statute. The legislature has already given this Court the mandate to create rules which guide the practice and procedure of the court system. Wis. Stat. § 751.12 states the Court shall "regulate pleading, practice, and procedure in judicial proceedings in all court." The Wisconsin Constitution also clearly places this authority with this Court, not the legislature. Wis. Const. art. VII, § 3.

While there are numerous examples of this Court creating or modifying state statutes, the legislature has never created or modified Supreme Court Rules.[10] There are also statutes which have been modified by both this Court and the legislature. Wis. Stat. § 802.05(2m) is an example of a statute this Court created in 2013, the Legislature modified in 2018, then this Court modified again in 2019. Sup. Ct. Order No. 13-10, 2017 WI Act 317, Sup. Ct. Order No. 19-16.

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[9] In the experience of Legal Action attorneys, this significant delay is an issue unique to Milwaukee County eviction cases. In the other counties our attorneys file these motions, judges usually review and decide the motions in a matter of days or weeks, almost always without a hearing. The number of eviction cases filed in Milwaukee County, however, represent 45-55% of all evictions filed in the entire state.

[10] Some recent examples of this Court's Orders which have created, or modified state statutes include Sup. Ct. Orders Nos. 21-05, 21-04, 21-03, 20-05, and 19-16.

SCR 72 is a creation of this Court. The only modifications to SCR 72 have been via this Court's orders. Sup. Ct. Orders Nos. 93-08, 93-09, 97-03, 05-03, 06-01, 09-02, 12-05, 20-08. Just last year, this Court modified SCR 72 to reduce the records retention period for some family court cases and modify the retention period for criminal cases. Sup. Ct. Order No. 20-08. The rules on retention of court records are therefore squarely within the purview of this Court, not the legislature.

D. Eviction Actions are Disproportionately Filed Against Renters of Color

Giese states that Legal Action of Wisconsin's arguments about racialized decision making within the rental housing system are "completely unfounded." Legal Action's arguments rely on peer-reviewed research published in nationally recognized journals. The arguments also rely on state-wide, multi-year data the State of Wisconsin has compiled.

Giese also misunderstands Legal Action's argument. As discussed in the Supporting Memorandum, research demonstrates landlords file evictions disproportionately against renters of color. We also know that eviction patterns are impacted by the lasting effects of past practices of red-lining, restrictive covenants, zoning ordinances excluding specific populations, and white-only federal lending programs. Eviction data reflects our history and practice. It also reflects the outcomes of racialized decision making. Using this data to make rental decisions incorporates racial bias into a landlord's business practices, regardless of intent.

This is a foundational reason Legal Action is asking this Court to reduce the record retention time: to reduce the harm inflicted by this skewed data. Legal Action of Wisconsin does not pretend the proposed change would remedy decades of injustice within this country's housing system. We propose instead one step forward. We propose to eliminate one barrier. A proposal that ultimately impacts all renters – families, students, friends, and neighbors – for the better.[11]

[11] Giese's arguments rely on his assertion that most eviction cases are based on rent payments. He does not cite published research or studies which support this assertion. Rather, Giese is positing a subjective interpretation of the executive summary of a one-month survey the Apartment Association of Southeast Wisconsin, Inc. conducted in Milwaukee County. Giese has not shared with the Court whether AASEW's full has been peer-reviewed or published anywhere other than the AASEW's website.

E. Reducing Eviction Records Retention Periods Is Not Contrary to the State's Open Records Policy

Finally, both Giese and Lubotsky assert that Rule Petition 22-03 would be offensive to the State's open records policy contained in Wis. Stat. § 19.31, however, that is not true because the open records law does not apply to record retention issues. In *Gehl v. Connors*, 2007 WI App 238, 306 Wis. 2d 247, 742 N.W.2d 530, the Court of Appeals held that the "alleged failure to keep sought-after records may not be attacked under the public records law." *Id*. at ¶ 13. That court emphasized that Wis. Stat. § 19.21 "relates to records retention and is not a part of the public records law." *Id*. The *Gehl* court's distinction between retention and access is helpful given that, were the Petition granted, the public would still have access to those records, the retention period would simply change to provide access for an entire year.

Even if records retention issues were within the ambit of the open records policy, this policy is premised on the notion that people are entitled to information regarding "the affairs of government, . . ." Wis. Stat. § 19.31. Although WCCA records may be a useful tool for decision-making from a business perspective, that business concern is not one that should be the basis for keeping them available under the open records policy.[12] The majority of rental relationships involve private contracts between private landlords and private tenants. Governmental involvement in the eviction process is limited to the court issuance of a writ of eviction and the subsequent execution or supervision of execution of the writ by the Sheriff's office (which retains its own public records which would not be impacted by this Petition). Government involvement in the eviction process from the perspective of the court is minimal.

The cases Giese cites are quite different from the typical rental scenario as they involve disclosure of public governmental entity records. In *Hagen v. Board of Regents of the Univ. of Wis. Sys.*, 2018 WI App 43, 383 Wis.2d 567, 916 N.W.2d 198, the documents sought were related to disciplinary proceedings conducted by a public university. In *Friends of Frame Park, U.A. v. City of Waukesha*, 2022 WI 57, 403 Wis. 2d 1, 976 N.W.2d 263, the documents involved a draft contract to which the City of

[12] The comments of the American Civil Liberties Union of Wisconsin; Judicare Legal Aid; Legal Aid Society of Milwaukee; Milwaukee Justice Center; and Honorable Richard Sankovitz, retired also speak to the interaction of Rule Petition 22-03 with Wisconsin's open records laws.

Waukesha was a party. The court in *Hagen* even noted that denial of access may be appropriated in cases "when the facts are such that the public policy interests favoring nondisclosure outweigh the public policy interest favoring disclosure, notwithstanding the strong presumption favoring disclosure." *Hagen*, 2018 WI App 43, ¶ 5 (quoting *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 63, 284 Wis. 2d 162, 699 N.W.2d 551).

It is important to remember that if this court grants Rule Petition 22-03, the impacted records are not hidden; rather, they remain readily available for an entire year. As demonstrated in the Supporting Memorandum and all of the comments in support of the Petition, the public policy interests favoring reducing the availability of eviction records far outweigh the public interest in long-term access to those records.

5. Conclusion

Legal Action of Wisconsin appreciates the supportive comments and the lively debate on Rule Petition 22-03. For the reasons set forth in its Supporting Memorandum and this Response, Legal Action respectfully requests the Court hold a public hearing on Rule Petition 22-03 and grant the Petition.

Respectfully submitted this 7th day of September, 2022

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