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)

COMMENT IN OPPOSITION FROM PROFESSORS OF
PROCEDURE, JURISDICTION, AND CONSTITUTIONAL LAW

The undersigned professors of procedure, jurisdiction, and constitutional law submit this comment in response to Supreme Court Rules Petition 20-03 in light of our interests in judicial rulemaking and the allocation of jurisdiction among courts.

Based on our experience and expertise, we caution against the use of judicial rulemaking to grant jurisdiction to the Wisconsin Supreme Court over an original action that requires extensive fact-finding, is overtly political, and for which there are adequate alternative forums for resolution in the first instance. We do not challenge this Court's authority to adopt rules on original jurisdiction or to hear the types of cases described in the petition. Instead, we suggest that this Court exercise its discretion to deny the petition for the reasons described herein.

I. The Rules Petition Is Inconsistent With The Typical Allocation Of Responsibilities Among Courts.

The Wisconsin court system is divided into the Supreme Court, the Courts of Appeals, and the Circuit Courts and various other trial-level courts. *See* Wisc. Const. art. VII; Wisc. Stat. Ann. Ch. 751-753. Similarly, the federal court system is divided into the Supreme Court, the Courts of Appeals, and the District Courts. *See* U.S. Const. art. III; 28 U.S.C. §§ 1251 *et seq*.

The division of labor within court systems tracks the different competencies of the courts. Trial courts are better positioned to handle factfinding and initial determinations, whereas appellate courts are better positioned to review lower-court decisions. Indeed, one concern with original jurisdiction in the highest court is that there is no body to which an appeal can be taken. *See*, *e.g.*, *Wisconsin Legislature v. Palm*, 942 N.W.2d 900, 972 (Wis. 2020) (Hagedorn, J., dissenting) ("We risk serious error when we issue broad rulings based on legal rationales that have not been tested through the crucible of adversarial litigation. When accepting an original action, this danger is even greater.").

Throughout its history, the Wisconsin Supreme Court has exercised original jurisdiction consistent with these ideas. As this Court explained: "This court will, with the greatest reluctance, grant leave for the exercise of its original jurisdiction in all such cases, especially where questions of fact are involved. The

circuit court is much better equipped for the trial and disposition of questions of fact than is this court and such cases should be first presented to that court." *In re Exercise of Original Jurisdiction of Supreme Court*, 229 N.W. 643, 645 (Wis. 1930); *see State v. St. Croix Boom Corp.*, 19 N.W. 396, 398 (Wis. 1884) ("If we entertain jurisdiction of the case, this court might be called upon with equal reason to exert its original jurisdiction in all cases where similar obstructions existed, so that this court, instead of being an appellate tribunal to review the decisions of the circuit court, would really assume and exercise the functions of those courts. It is safe to say that the exercise of such jurisdiction was never intended by the framers of the constitution should be conferred upon it. It would be inconsistent with the judicial system which was organized and established by the fundamental law."). Or, putting it flatly: "We are obviously not a trial court." *Jensen v. Wisconsin Elections Bd.*, 639 N.W.2d 537, 543 (Wis. 2002).

The same can be said with respect to the Supreme Court of the United States. The original jurisdiction of the Supreme Court of the United States is highly circumscribed. *See* U.S. Const. art. III, sec. 2, para. 2; 28 U.S.C. § 1251; *see also Cohens v. Virginia*, 6 Wheat. 264, 19 U. S. 404 (1821). The Supreme Court of the United States has exclusive original jurisdiction only over controversies between two or more states. 28 U.S.C. § 1251(a). The Supreme Court has nonexclusive original jurisdiction over actions involving ambassadors, controversies between the United States and a state, or actions by a state against citizens of another state or aliens. 28 U.S.C. § 1251(b).

When the U.S. Supreme Court has exercised discretion over its original docket, one factor counseling against original jurisdiction has been the need for intensive fact-finding. In *Ohio v. Wyandotte Chemicals Corp.*, the Court explained: "This Court is . . . structured to perform as an appellate tribunal, ill-equipped for the task of factfinding." 401 U.S. 493, 498 (1971). The Court went on to observe that decisions to take original jurisdiction had consequences for the entire judicial system: "[T]he problem [is not] merely our lack of qualifications for many of these tasks potentially within the purview of our original jurisdiction; it is compounded by the fact that, for every case in which we might be called upon to determine the facts and apply unfamiliar legal norms, we would unavoidably be reducing the attention we could give to those matters of federal law and national import as to which we are the primary overseers. . . . What gives rise to the necessity for recognizing such discretion is preeminently the diminished societal concern in our function as a court of original jurisdiction and the enhanced importance of our role as the final federal appellate court." *Id.* at 498-99.

The Supreme Court of the United States is wary of fact finding even though it can rely on special masters. Relying on special masters raises other questions about institutional design. *See*, *e.g.*, WRIGHT & MILLER, 9C FED. PRAC. & PROC. CIV. § 2603 (3d ed.) (2020 update); *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F.2d 809, 815 (7th Cir. 1942) ("[L]itigants prefer, and are entitled to, the decision of the judge of the court before whom the suit is brought. Greater confidence in the outcome of the contest and more respect for the judgment of the

court arise when the trial is by the judge."). Relying on special masters also does not obviate the concern that original jurisdiction removes any opportunity for appellate review.

In short, therefore, it would be inconsistent with the traditional division among courts to affirmatively assert original jurisdiction over a class of disputes where intensive fact-finding is likely required and where this Court may need to serve as the final appellate body.

II. Historically And Today, Original Jurisdiction In The High Court Is Most Appropriate When There Is No Adequate Alternative Forum.

In addition to functional considerations about the court's role, an important aspect of the exercise of original jurisdiction is the presence of an alternative forum. In short, the case for original jurisdiction is much weaker when there are other courts—particularly first-instance courts—that have jurisdiction to hear the dispute.

The history of original jurisdiction in the Supreme Court of the United States is consistent with this view. Cases involving states as parties represent the most important category of original jurisdiction in the Supreme Court. In the leading history of state-party jurisdiction, Professor James Pfander shows that the Framers of the U.S. Constitution opted for original jurisdiction in these cases in order to fill a gap—to ensure that there was a forum to hear cases in which sovereign immunity and other doctrines might bar jurisdiction in any other court. *See generally* James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555 (1994). Original jurisdiction, in other words, was a last resort or a backstop.

More recently, as the Supreme Court has asserted more control over its original docket, the availability of alternative forums has been an important consideration. In *Illinois v. City of Milwaukee, Wisconsin*, the Court explained that "the question of what is appropriate [for original jurisdiction] concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." 406 U.S. 91, 93 (1972). *See Washington v. General Motors Corp.*, 406 U.S. 109, 114 (1972) ("[W]e conclude that the availability of the federal district court as an alternative forum and the nature of the relief requested suggest we remit the parties to the resolution of their controversies in the customary forum."); *California v. Texas*, 457 U.S. 164 (1982) (accepting original jurisdiction in part because no alternative forum existed). *See also Jensen v. Wisconsin Elections Bd.*, 639 N.W.2d 537 (Wis. 2002) (noting that the existence of ongoing litigation in a federal court was among the reasons to deny a petition for leave to file an original action in the Wisconsin Supreme Court).

The Rules Petition is addressed to the opposite situation. The proposed rule essentially takes away jurisdiction from both state and federal trial courts that would be open to hearing these cases. The memorandum supporting the petition concedes as much. *See In Re: Petition for Proposed Rule to Amend Wis. Stat. § 809.70 (Relating to Original Actions)*, Memorandum in Support of Petition from Scott Jensen and Wisconsin Institute for Law & Liberty. Not only would alternative forums exist to hear these cases, but also those alternative forums should apply exactly the same substantive law as this Court would. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938); *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487 (1941).

Therefore, because there are alternative forums available to ventilate these issues in the first instance, there is no need to take the extraordinary step of authorizing original jurisdiction in the Wisconsin Supreme Court.

III. The Petition Asks This Court To Use Judicial Rulemaking To Address A Highly Charged Issue Of Jurisdiction Over An Overtly Political Dispute.

This proposal injects the Wisconsin Supreme Court into a partisan dispute in a manner that is inconsistent with this Court's usual rulemaking practice and with the role of the judiciary.

Although Wisconsin separation-of-powers jurisprudence might permit this Court to make rules in this area, principles of democratic theory and the separation of powers counsel courts to avoid overtly political rulemaking decisions. This is true at the federal level. *See*, *e.g.*, Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303 (2006). And it is true in Wisconsin. *See* Wisc. Stat. 751.12 ("The rules shall not abridge, enlarge, or modify the substantive rights of any litigant."); *Wisconsin Legislature v. Palm*, 942 N.W.2d 900, 952 (Wis. 2020) (Hagedorn, J., dissenting) ("We are a court of law. We are not here to do freewheeling constitutional theory. We are not here to step in and referee every intractable political stalemate. . . . If we abandon that charge and push past the power the people have vested in their judiciary, we are threatening the very constitutional structure and protections we have sworn to uphold.").

These concerns with judicial rulemaking are acutely present here. The Rules Petition is self-consciously political, and adopting the proposal entails this Court affirmatively asserting jurisdiction over a plainly political issue. When rejecting a similar proposal in the normal course, many Justices of this Court worried about exactly these concerns. *See* Wisconsin Supreme Court Open Administrative Conference (January 22, 2009), available at https://wiseye.org/2009/01/22/supreme-court-open-administrative-conference-3/, Justice Roggensack at 33:16 ("My concern is that 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."); Justice David Prosser, Jr. at 14:58 ("I do not think the court, this court, which consists of elected officials, really ought to be jumping into this political thicket."); Justice Annette Ziegler at 1:05:02 ("I'm concerned about the court acting kind of as a super-legislature. . . . I'm concerned with the idea that it places this court or the court of appeals squarely within the sights of the partisan political framework."); Justice Michael Gableman 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 to develop rules for redistricting litigation] as a mechanism by which this court will be immersed in partisanship and the partisan aspect of the political process.").

In addition, federal judicial rulemaking has been thought to be inappropriate for issues of subject-matter jurisdiction. *See* Fed. R. Civ. P. 82 ("These rules do not extend or limit the jurisdiction of the district courts . . . ."); *see also* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PENN. L. REV. 1015 (1982) (showing that Congress did not intend the judiciary to alter rules of subject-matter jurisdiction). Yet the petition asks this Court to use rulemaking to claim jurisdiction over these political issues.

Research into the rulemaking processes of state courts have revealed them to be encouragingly nonpartisan and professional. *See generally* Zachary D. Clopton, *Making State Civil Procedure*, 104 CORNELL L. REV. 1 (2019). Courts should endeavor to maintain these standards.

Just over a decade ago, the Wisconsin Supreme Court took up the issues raised in the petition through its typical rulemaking process, considered them thoroughly, and ultimately concluded that no changes were required. The institutional separation of legislative and judicial functions may not require this Court to decline to adopt the proposed rule, but it counsels against exercising its discretion to do so. And denying this petition would have no effect on this Court's ability to make case-by-case judgments about original jurisdiction.

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In sum, this Court should decline to use its rulemaking authority to assert jurisdiction over a fact-intensive and overtly political issue for which there are alternative forums available to hear such cases in the first instance.

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Steven G. Calabresi
Clayton J. and Henry R. Barber Professor, Northwestern Pritzker School of Law
Visiting Professor of Law, Yale Law School, Fall semesters 2013-2020

Maureen Carroll
Assistant Professor of Law, University of Michigan Law School

Zachary D. Clopton
Professor of Law, Northwestern Pritzker School of Law

Michael C. Dorf
Robert S. Stevens Professor of Law, Cornell Law School

Atiba R. Ellis
Professor of Law, Marquette University Law School

Edward A. Fallone
Associate Professor of Law, Marquette University Law School

James E. Pfander
Owen L. Coon Professor of Law, Northwestern Pritzker School of Law

Martin H. Redish
Louis and Harriet Ancel Professor of Law and Public Policy, Northwestern Pritzker School of Law

David S. Schwartz
Foley & Lardner-Bascom Professor of Law, University of Wisconsin Law School

Contact: Zachary D. Clopton, Professor of Law, Northwestern Pritzker School of Law, zclopton@law.northwestern.edu