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VIA PAPER FILING AND EMAIL

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Ms. Sheila Reiff
Clerk of Supreme Court
Attention: Deputy Clerk-Rules
P.O. Box 1688
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Re: Written Comment From Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Congressman-Elect Scott Fitzgerald, In Their Capacities As Probable Candidates For Re-Election To The U.S. House Of Representatives In 2022, Regarding Rule Petition 20-03 – Amendment to Wis. Stat. § 809.70 (Redistricting)

Dear Justices of the Supreme Court:

I write on behalf of Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Congressman-Elect Scott Fitzgerald—in their capacities as probable candidates for re-election to the U.S. House of Representatives in 2022—in support of Rule Petition 20-03 as it relates to congressional districts.[*] The Rule Petition asks this Court to amend its original-action rule, Wis. Stat. § (Rule) 809.70, to create a mechanism for the Court to consider anticipated legal challenges to Wisconsin's redistricting maps, including plans for Wisconsin's congressional districts. Rule Pet. 2. We support Rule Petition 20-03 for three reasons. First, it would restore the primacy of this Court vis-à-vis the federal courts in resolving any impasse in Wisconsin's congressional-redistricting process. Second, it meets this Court's criteria in *Jensen v. Wisconsin Elections Board*, 2002 WI 13, ¶ 20, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam), for "establish[ing] [the] protocol for the adjudication of redistricting litigation." Third, it puts forth a process that will allow the Justices of this Court—who are elected by the people statewide to serve on the State's highest court—to adjudicate any dispute over the congressional districts well before statutory deadlines for the Fall 2022 Elections, which may not be possible if this Court were to allow such redistricting disputes to proceed first in the circuit court or federal district court.

I. In "our federal system," it is an "established constitutional principle" that "congressional reapportionment and state legislative redistricting are primarily state, not federal, prerogatives."

[*] The Court's public docket for this Rule Petition is found at https://www.wicourts.gov/scrules/pending/2003.htm.

Jensen, 2002 WI 13, ¶ 5 (citing, among other authorities, *Growe v. Emison*, 507 U.S. 25, 34 (1993)). The U.S. 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[.]"); *Growe*, 507 U.S. at 34 (citing U.S. Const. art. I, § 2).

Wisconsin has exercised its sovereignty over redistricting to grant the Legislature the primary duty to adopt the "redistricting map" for its congressional districts, while also affording this Court a "secondar[y]" role in the event of legislative impasse. *See Jensen*, 2002 WI 13, ¶ 5, 17; Wis. Stat. §§ 3.001, et seq.; *see generally* Wis. Const. art. IV, § 1; *accord Reynolds v. Zimmerman*, 22 Wis. 2d 544, 553–59, 126 N.W.2d 551 (1964) (noting that the Governor may veto a redistricting map). So, when the Assembly, the Senate, and/or the Governor are unable to agree on the State's congressional maps, this Court has the constitutional authority to resolve that dispute in an appropriate case. *Reynolds*, 22 Wis. 2d at 564, 571. Or, as this Court explained in *Jensen*, "[i]n the absence of a timely legislative compromise" on a redistricting map, this Court's "participation in the resolution of these issues would ordinarily be highly appropriate." 2002 WI 13, ¶ 4; *see generally* Legislative Reference Bureau, *Redistricting In Wisconsin 2020: The LRB Guidebook* 40–42 (2020) (hereinafter "*Redistricting In Wisconsin 2020*") (tracing this Court's redistricting jurisprudence to 1892).[†] Thus, 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." *Jensen*, 2002 WI 13, ¶ 17.

Despite this Court's well-recognized authority to resolve Wisconsin's redistricting disputes when necessary, the *federal* courts in recent decades have assumed the predominant role in adjudicating these state controversies. *See Jensen*, 2002 WI 13, ¶¶ 7, 9; *Redistricting In Wisconsin 2020*, *supra*, at 58–73 (describing history of federal-court challenges to 1980, 1990, 2000, and 2010 redistricting efforts). Indeed, "[t]he last time this [C]ourt was involved in redistricting" and took substantive action was 1964. *Jensen*, 2002 WI 13, ¶ 7. The lack of this Court's involvement, however, was not for want of litigation over redistricting. As this Court recognized in *Jensen*, "redistricting is now almost always resolved through litigation rather than legislation." *Id.* ¶ 10; *see also id.* ¶ 7; *accord Redistricting In Wisconsin 2020*, *supra*, at 19–20 ("While the Wisconsin Constitution empowers the legislature to redistrict the senate and the assembly, recent decades have seen legislative redistricting plans put in place by courts.").

The federal courts' unfortunate primacy in recent decades in resolving Wisconsin redistricting disputes is both contrary to the State's sovereign redistricting prerogatives discussed above and inconsistent with longstanding U.S. Supreme Court precedent. For more than 50 years, the U.S. Supreme Court has expressed the "teaching that state courts have a significant role in redistricting," in preference to the federal courts. *Growe*, 507 U.S. at 32–33 (applying "the principles of *Scott v. Germano*, 381 U.S. 407 (1965) (per curiam)"). Thus, the U.S. Supreme Court has unambiguously "encouraged" the "possibility and legitimacy of state *judicial*

[†] Available at http://lrbdigital.legis.wisconsin.gov/digital/collection/p16831coll2/id/1942/rec/1.

redistricting" or "state judicial supervision of redistricting" as part of "the States[']primary responsibility for apportionment of their federal congressional and state legislative districts." *Id*. at 34. So, the U.S. Supreme Court has expressly held that "a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it"—including when a redistricting dispute is before a state court. *Id.* at 34. That is, "[i]n the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or judicial branch*, has begun to address that highly political task itself." *Id*. at 33 (emphasis added); *see also Germano*, 381 U.S. at 409 (holding that the federal court "should have stayed its hand" in light of "appropriate action" by "the State of Illinois, including its Supreme Court"). Only where there is "evidence that these state branches will fail timely to perform th[eir] duty" may a "federal court" act to displace such state proceedings. *Growe*, 507 U.S. at 34. These principles apply in full to the redistricting of congressional districts. *See, e.g.*, *Branch v. Smith*, 538 U.S. 254 (2003).

This Court too, consistent with *Growe*, has unequivocally recognized its own primacy with respect to the federal courts in resolving the State's redistricting disputes. In *Jensen*, this Court explained that it has its own "institutional interest in vindicating the state constitutional rights of Wisconsin citizens in redistricting matters," as compared to the federal courts. 2002 WI 13, ¶¶ 9–10, 22. Further, this Court correctly "read *Growe* as the United States Supreme Court's effort to put the state supreme courts back into the [redistricting] equation," rather than continuing the lower federal courts' "seemingly permanent residency" in such matters. *Id.* ¶ 11.

Nevertheless, in *Jensen* this Court *declined* to exercise its original-action jurisdiction to resolve a post-2000 redistricting dispute because, as relevant here, the Court had "no established protocol for the adjudication of redistricting litigation in accordance with contemporary legal standards." *Id.* ¶ 20. Accordingly, *Jensen* called for new "procedures for original jurisdiction in redistricting cases," so as to "assure the availability of a forum in this court for future redistricting disputes." *Id.* ¶ 24. Such original-action procedures are especially called for because "*any* reapportionment or redistricting case is, by definition, *publici juris*, implicating the sovereign rights of the people of this state." *Id.* ¶ 17 (emphasis added) (citing *Petition of Heil*, 230 Wis. 428, 443, 284 N.W. 42 (1939)); *see also State ex rel. Attorney Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 725 (1892).

Jensen specifically identified a number of desirable protocols that this Court would need "for the adjudication of redistricting litigation in accordance with contemporary legal standards." 2002 WI 13, ¶ 20. The Court would need "deadlines for the development and submission of proposed [redistricting] plans" from any interested parties. *Id.* It would need "some form of factfinding" procedure with respect to those competing plans, since the Court is "obviously not a trial court." *Id.*; *accord* Wis. S. Ct. IOP § III.B.3 ("The Supreme Court is not a fact-finding tribunal[.]"). The Court would need provisions for "legal briefing" from the parties, as well as rules for a "public hearing." *Jensen*, 2002 WI 13, ¶ 20. And finally, it would need to provide for the issuance of its own "decision." *Id.*

Beyond these protocols, *Jensen* emphasized the need to resolve finally redistricting disputes with dispatch, so as not to disrupt any ongoing election through the imposition of new district maps mid-campaign. *Id.* ¶ 21. Such delayed resolution of these "complex and consequential" disputes "would have serious practical and political ramifications for the people of this state and their elected officials." *Id.* Therefore, the original-action procedures governing redistricting disputes must take into account "the timing and circumstances" of the redistricting process, thereby "allow[ing]" the Court "to responsibly exercise original jurisdiction in a way that would do substantial justice in the case." *See id.* ¶ 22.

II. Here, Rule Petition 20-03 restores this Court's rightful place as the primary arbiter of congressional redistricting disputes after an impasse, satisfies this Court's call in *Jensen* for proper original-action protocols to govern these cases, and allows the Court to resolve timely any redistricting challenges prior to the start of the 2022 congressional-election cycle.

First, Rule Petition 20-03 furthers the State's sovereign interests by "put[ting] the state supreme court[ ] back into the [redistricting] equation" as the primary adjudicator of any impasse in Wisconsin's redistricting process. *Id*. ¶ 11. The Rule Petition provides this Court with the framework to accept and adjudicate redistricting disputes in its original-action jurisdiction, Rule Pet. 2–4—disputes that this Court has long considered, "by definition, *publici juris*, implicating the sovereign rights of the people of this state." *Jensen*, 2002 WI 13, ¶ 17; *Cunningham*, 51 N.W. at 725. That framework, in turn, would affirmatively demonstrate to the federal courts that this Court will "timely [ ] perform [its] duty" to resolve any redistricting dispute, thereby prohibiting the federal courts from "affirmatively obstruct[ing]" or "imped[ing]" this "state reapportionment" process. *Growe*, 507 U.S. at 34; *accord Jensen*, 2002 WI 13, ¶ 15–24.

Second, Rule Petition 20-03 answers this Court's call in *Jensen* to "establish protocol[s] for the adjudication of redistricting litigation," through the inclusion of each of the protocols that the Court identified as desirable. *Compare Jensen*, 2002 WI 13, ¶¶ 20, 24, *with* Rule Pet. 2–4. The Rule Petition provides for "deadlines for the development and submission of proposed [redistricting] plans" from the competing parties. *Jensen*, 2002 WI 13, ¶ 20; *see* Rule Pet. 3 (points (5)(c) and (f)). It establishes "some form of factfinding," *Jensen*, 2002 WI 13, ¶ 20, via appointment of a circuit court or referee, Rule Pet. 3 (point (5)(c)), appropriately recognizing that "[t]he Supreme Court is not a fact-finding tribunal," Wis. S. Ct. IOP § III.B.3 (relating to original actions); *Jensen*, 2002 WI 13, ¶ 20. It provides for fulsome "legal briefing" from the interested parties. *Jensen*, 2002 WI 13, ¶ 20; Rule Pet. 3 (point (5)(g)); *see also* Rule Pet. 3 (point (5)(c)). And the Rule Petition protects the public's rights by providing for public comment on any proposed plan, *see* Rule Pet. 3 (points (5)(f)–(g)); *accord Jensen*, 2002 WI 13, ¶ 22, as well as a "public hearing," *Jensen*, 2002 WI 13, ¶ 20; Rule Pet. 3 (point (5)(h)). Finally, the rule provides for the issuance of the Court's own "decision," *Jensen*, 2002 WI 13, ¶ 20, "order[ing] a redistricting plan for congressional districts," Rule Pet. 4.

Third, this Rule Petition's procedures would allow this Court to adjudicate promptly any disputes over the impending congressional-redistricting map *before* the next congressional-

election cycle. *Jensen*, 2002 WI 13, ¶¶ 21–22. As Petitioners have explained, the Legislature appears unlikely to begin drawing proposed redistricting maps until well into 2021. Pet. Memo 4–5. The 2022 congressional-election cycle, however, begins on April 15, 2022, with the start of the period for the circulation of nomination papers. *Redistricting In Wisconsin 2020*, *supra*, at 32–33 (providing full 2022 election timeline). The Rule Petition facilitates this Court's "responsibl[e] exercise" of its "original jurisdiction" to resolve congressional redistricting disputes before this deadline. *Jensen*, 2002 WI 13, ¶¶ 21–22. It expressly authorizes the filing of a redistricting original action "any time after the U.S. Census Bureau delivers apportionment counts to the President and Congress as required by law." *See* Rule Pet. 2–3. It provides for the Court's "order [of] a redistricting plan for congressional districts . . . no later than 15 calendar days prior to the [relevant] statute deadline for candidates." Rule Pet. 3–4. And it states that "[a]ll deadlines imposed by the court under [the Rule] will be with this deadline in mind." Rule Pet. 4. Failure to adopt such a process, thereby allowing any such dispute to go to circuit court (or, worse yet, from the point of view of state sovereignty, to federal district court), would threaten to upend all of these timeframes, creating the possibility that this Court would be unable to review any trial-court-adopted map before the beginning of the 2022 congressional-election cycle.

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We strongly agree with Rule Petition 20-03 for the reasons explained above. We also respectfully request to appear through undersigned counsel at this Court's January 14, 2021, public hearing, so that we may further present our views for the benefit of the Court.

Sincerely,

Misha Tseytlin

cc: Richard M. Esenberg, Wisconsin Institute For Law & Liberty
(via electronic and paper mail)