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November 30, 2020

Clerk of Supreme Court
Attention: Deputy Clerk-Rules
P.O. Box 1688
Madison, WI 53701-1688

Re: Rule Petition 20-03, In re Petition for Proposed Rule to Amend Wis. Stat. § 809.70 (Relating to Redistricting)

Dear Clerk of Supreme Court:

The American Federation of State, County and Municipal Employees and AFSCME Wisconsin Council 32 ("AFSCME") write to express opposition to the above-referenced rule petition ("Petition"). The Petition proposes the Court adopt an administrative rule to establish an exclusive forum for resolving, on a fast-track, streamlined and narrow basis, litigation arising from decennial redrawing of legislative district boundaries (the "Petitioned-for Rule"). For the following reasons, the Petitioned-for Rule should be rejected, and the Petition denied.

AFSCME is a labor union representing members employed in the public and private sectors across the state of Wisconsin. AFSCME members live and work in communities all around Wisconsin, serving the public in a variety of occupations and services—from nurses to sheriff's deputies, from transportation to public works. AFSCME advocates for fairness in the workplace, excellence in public services, and freedom and opportunity for all working families. As an organization, we represent the collective voice of this diverse group of hard-working and passionate Wisconsinites.

AFSCME members not only work in the public service, they live in the communities they serve, and are deeply engaged within their local communities. AFSCME is not a political party, nor affiliated with any political party. Rather, we are a member-driven and participatory organization that reflects the values of our membership. These values transcend the platforms of any one political party and are often rooted in the local needs of our members' communities. No matter the political orientation or issues, AFSCME views as paramount its members' right to engage in meaningful political participation with receptive elected officials and legislators. It is for these reasons that AFSCME takes seriously the decennial redistricting process, and firmly believes the process should serve and elevate the

interests of the electorate and not merely the entrenched interests and desires of specific political parties or politicians.

1) The Petition appears to present a solution in search of a problem. The existing process by which redistricting actions may be brought in Wisconsin state courts is able to protect the rights of all members of the body politic and to allow their participation in disputes regarding redistricting plans. Moreover, the existing process allows a detailed, fact-oriented review of any legislatively-enacted redistricting plan to occur as a result of a process that is the hallmark of American justice: A public, adversarial trial conducted in adherence to established rules of procedure by an experienced trial judge, through which facts are established by submission of evidence and witness testimony subject to cross examination. Trial decisions are public and appealable for error, ensuring that any final decision is the result of multiple reviews and cross-checks at each level of the judicial branch.

There is little need to change this process. Although the Petition suggests that expediency requires streamlining and expediting the judicial review process, the existing process serves at least two important functions. First, if the Legislature is aware its redistricting plans will be subject to a meticulous fact-oriented review at multiple levels of the judiciary, then it will be motivated to avoid over-reach and ensure its final plan adheres closely to Constitutional requirements and democratic principles. Second, the existing process permits the public to gain an understanding and involvement in a detailed, public-facing and accessible judicial review process.

But even if a need for expediency under current circumstances warranted the Court's taking of original jurisdiction over a redistricting plan, the Petitioned-for Rule does not advance that purpose because the Court already has discretionary authority to do so when circumstances warrant. *See* Wis. Stat. section 809.70(1). The Petitioned-for Rule merely limits the Court's discretion and control over its own docket.

2) The Court should not accept the Petitioned-for Rule's attempt to relegate the important function of judicial review to a cursory process that originates with the Supreme Court. This Court is a court of last resort within a two-tier appellate review structure. Because its discretionary power to hear cases is a function of its role in declaring the law, it is not as equipped as the trial or appellate courts to develop factual records through trial. Not due to any shortcoming, but because it has other priorities and functions. Each level of the judiciary plays a distinct and critical role while ensuring that judicial decision-making is a reticulated, error-catching process that must constantly earn the public's trust. The Petitioned-for Rule urges elimination of these assurances for the sake of "expediency," making this Court the court of both first and last resort. Such a process is unusual and contrary to the longstanding functions of American judiciaries. The Petitioned-for Rule also fails to secure the expediency it promises because its lack of clarity may only invite collateral litigation.

Judicial review of redistricting plans can be time consuming and exacting, particularly when a legislature approaches redistricting with creative alacrity and a strong appetite to entrench current political special interests. But this does not counsel in favor of adopting the Petitioned-for Rule. The deliberate, detailed and meticulous process allowed by a fact-trial and appellate reviews is necessary because the issue involves such important, individual fundamental rights. The United

States Supreme Court has observed the right to vote "is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote *must be carefully and meticulously scrutinized*." *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) (emphasis added). The Court explained that "[m]ost citizens" exercise their "inalienable right to full and effective participation in the political process" by voting for their elected representatives. *Id*. at 565, 865 "Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature." *Id.* at 565. However, it is also inaccurate to suggest that the level of care and meticulous review required cannot be accomplished in the timeframe needed for redistricting disputes. Federal courts have successfully managed this review under time pressures for several decades, including here in Wisconsin. There is no reason to assume Wisconsin courts could not do the same (should they be conscripted into redistricting litigation). The Petitioned-for Rule would only artificially constrain judicial review in ways that appear, based on the experience of our state, to be unnecessary and counterproductive.

AFSCME is concerned that the Petitioned-for Rule undermines the rule of law and the legitimacy the state court system has earned in the eyes of Wisconsinites. By subverting the standard process of adjudication of facts and fulsome development of a record through public trials, subject to appellate review for error, the Petitioned-for Rule effectively enacts a "skip-to-the-finish" process, with no public involvement or assurance of a diverse airing of interests.

3) The proposed Rule Petition would contravene "[t]he core principle of republican government… that the voters should choose their representatives, not the other way around." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 824, (2015) (internal quotation marks omitted). Although AFSCME recognizes that the redistricting process has become increasingly partisan in nature, the Petition would make it more so. The Petitioned-for Rule appears to ignore the basic principle that it is the voices of individual Wisconsinites—and not partisan officials of the political parties—that *most matters* and whose input should be considered most valuable when the Court reviews redistricting plans. It does so by providing for intervention as a matter of right *only to* political parties and partisan elected officials.

As a result, the Petitioned-for Rule would establish a partisan-driven and circumscribed process for resolving litigation arising around redistricting, which would extend the Court's involvement and possibly render meaningless the Legislature's role in drawing the maps to begin with. First, the Petitioned-for Rule provides for the filing of an action with the Court even before the Legislature has adopted a redistricting plan or such a plan can be enacted into law. This suggests compromise in the Legislature, and between the Legislature and the Governor, is impossible and that any plan is pre-ordained to be determined by the Court. (All without the benefit of a detailed factual record and the crystalizing of positions that occurs as a result of the exacting adversary trial process).

The Petitioned-for Rule would not only circumvent the Legislative process but would ensure what would become the Court's adoption of a map informed by purely political partisan interests. By granting intervention as of right to a select group of inherently political entities and persons (the Senate, the Assembly, the Governor and "political parties"), the Petitioned-for Rule

simply extends the opaque partisan redistricting process into the chambers of this Court. Even where a redistricting plan is the result of a political compromise in the Legislature, the Petitioned-for Rule would not ensure that disadvantaged or non-partisan constituencies would have participation or input in the judicial review process.

The petitioners make the inaccurate statement that granting intervention as of right for the Governor, the Senate, the Assembly, and political parties will ensure that "all appropriate parties will be before the Court." Petitioners' Memorandum in Support of Rules Petition, p. 6. In making this statement, Petitioners intimate that the automatic inclusion of these few partisan officials and entities is sufficient to represent the wide spectrum of viewpoints across Wisconsin. Their assertion reveals their view that legal challenges to redistricting plans are simply an extension of the partisan process that plays out in the Legislature, rather than a venue at which injured parties—voters themselves—challenge and seek redress for their own injuries. As noted above, AFSCME is not a political party or a partisan organization, and its members have diverse political viewpoints notwithstanding their shared interests. The inclusion of non-partisan organizations assists the judiciary in evaluating plans and, further, can ensure that plans are non-discriminatory across a range of attributes, not merely partisan. The Petitioned-for Rule's preferencing of political parties and elected officers impedes this goal.

In fact, Petitioners' preferencing of political parties and politicians over other groups is contrary to Wisconsin's experience in this field and would appear to be for the purpose of limiting the variety of interests that can participate in challenges to redistricting plans. The Court need only review the cases upon which Petitioners rely in the petition, which all involved challenged brought by groups or individuals other than political parties and politicians. *See, Wisconsin State AFL- CIO v. Elections Bd.*, 543 F. Supp. 630, 632 (E.D. Wis. 1982) (Wisconsin AFL-CIO a plaintiff); *Prosser v. Elections Board*, 793 F. Supp. 859 (W.D. Wis. 1992) (Wisconsin Education Association Council permitted to intervene)*; Baumgart v. Wendelberger*, 2002 WL 34127471 (E.D. Wis. 2002) (action initiated by a group of individuals). History shows, therefore, that the courts are a venue for the citizens—not political parties—to ensure their rights to a free and fair vote are preserved. Indeed, the Petitioned-for Rule could be read as providing for a judicial review process for the sole purpose of "checking-the-box" in a race to enact a partisan-driven redistricting plan.

To grant special privilege to certain political officials and political parties in redistricting cases is innately unfair and provides a distinct advantage to such parties, at a cost to individual voters. Further, it implies that such partisan figures are the most appropriate parties to bring a redistricting action. It also suggests that political considerations closely aligned with party views are the most important, or pertinent to, redistricting challenges when, in fact, political parties are incapable of providing nuanced or textured consideration, but rather present matters in "black-and-white," or "red-and-blue," as the case may be.

Because the rights at stake in redistricting cases are so important to so many—the entire body politic—review of the Legislature's redistricting plans requires a careful, public trial-based process at which diverse interests are represented. The Petitioned-for Rule achieves none of this and limits the Court's review of these vital issues.

For the foregoing reasons, the Court should deny the Petition.

Respectfully submitted,

Judith Rivlin
General Counsel
AFSCME

Teague P. Paterson
Deputy General Counsel
AFSCME

TP:df

cc: Paul Spink, President, AFSCME Council 32, AFSCME Int'l Vice President
Patrick Wycoff, Executive Director, AFSCME Council 32
W.I.L.L. (via email: rick@will-law.org)