WISCONSIN ASSOCIATION *for* JUSTICE
*formerly the Wisconsin Academy of Trial Lawyers*

**SENT VIA ELECTRONIC MAIL AND U.S. MAIL**

To: Sheila Reiff
Clerk of the Wisconsin Supreme Court and Court of Appeals
P.O. Box 1688, Madison, WI 53701-1688
Attention: Deputy Clerk-Rules

From: Wisconsin Association for Justice

Date: November 30, 2020

Re: Comments in Opposition to Rule Petition 20-03

## I. About WAJ

The Wisconsin Association for Justice (WAJ) is the state's largest voluntary bar association. WAJ's core mission is to preserve full and fair access to the courts for redress of wrongs and protecting the constitutional right to a trial by jury. Our members actively participate in court proceedings in civil cases in every corner of the state.

Consistent with WAJ's core mission, we have long supported sensible reforms to court practice and procedure where doing so helps to ensure that courts continue to operate efficiently and effectively. WAJ also seeks to persuade the court to adopt rules and procedures that preserve and enhance court's esteem as a body capable of the neutral administration of justice. Where a proposed rule change may have the opposite result, or where there are countervailing factors that may not have been adequately considered, WAJ has historically sought to provide input in order to bring that additional perspective to the forefront for consideration. We feel compelled to do so here in connection with Rule Petition 20-03.

## II. Introduction

The justice system functions best when our courts are viewed as honest interpreters of the law, removed from partisan politics. Recognizing the courts exist to resolve disputes, even those colored by politics, WAJ does not oppose concept of adopting procedures in Wisconsin state courts to handle redistricting disputes. There is an inherent tension, however, between relying on the courts as a forum to resolve an intractable political conflict like redistricting and the desire for courts to remain above the partisan fray. Courts have traditionally sought to minimize this tension by embracing robust procedural safeguards and by requiring, where possible, the other branches to exhaust their options before turning to the courts.

Rule Petition 20-03 departs from this tradition. It does so by thrusting the Court into a situation where it must consider an original action over redistricting litigation immediately at the delivery of census data. The petition also lacks the procedural safeguards to demonstrate a genuine, non-partisan commitment to fact finding and adjudication. Lastly, it too easily allows the Court to essentially take on the entire reapportionment process on its own, without adequate fact-finding and transparency.

Any rules adopted by this Court to handle redistricting disputes should embrace universal principles that are embedded in the political and legal traditions of this state. Such rules should also feature the same commitment to clarity and procedural fairness that are found in both the Wisconsin and federal rules of practice and procedure (both civil and appellate).

The procedures created by Rule Petition 20-03 are inferior to those used by the federal courts and allow complete departures from longstanding Wisconsin procedural law. While the bill references several longstanding rules of civil procedure, it omits others and gives the Court permission to ignore even those referenced. The Court is further enabled to dispense with deadlines and other requirements that the proposed rule is notionally creating. Given the clear procedures and proven ability of federal courts to handle these matters, this Court should decline to adopt new rules now.

The Court's prior examination of this issue is exemplary and should be repeated.[1] The concerns that convinced the Court to pause over a decade ago are echoed substantially today. In short, where there is concurrent jurisdiction, as there is here, the legal regime adopted by this Court should strive to avoid embracing partisan disputes while remaining as committed to robust factfinding, procedural fairness, and adversarial presentation as can be found in existing law. This petition falls short in each regard.

[1] See, e.g., *In the matter of adoption of procedures for original actions cases involving state legislative redistricting*, No. 02-03 (Wis. Jan. 30, 2009).

## III. Timing

New rules governing redistricting litigation should be promulgated well in advance of the reapportionment process. Comments to this petition are being submitted to meet a November 30 deadline that is mere weeks from the beginning of the next legislative session. In Wisconsin, decennial redistricting is the primary responsibility of the legislature[2] and subject to veto by the executive.[3] The beginning of this legislative session, therefore, marks the beginning of the reapportionment process. While the legislature is bound to complete the process by the end of the 2021 calendar year's legislative session, the process should be expected to start immediately after the session begins.[4] Maps are likely to be created by the spring for legislative evaluation, even if not yet public or subject to potential litigation.[5]

Proper deliberation of the proposed rule, given the substantial public input that is before the Court, raises the potential that new rules will be imposed in the middle of a process that the Court should strive to let play out. The rushed timeframe alone risks the Court's reputation by demonstrating a willingness to prematurely involve itself in this dispute. The specific procedures included in the petition, specifically language allowing the filing of original action petitions before there is even a legislative impasse,[6] only magnify the grave risk that the Court will become an unnecessarily political actor in the process.

## IV. Principles

Redistricting requires an even greater commitment to neutrality and procedural fairness than ordinary legal disputes. Its product is the very basis of our representative democracy. As a threshold matter, the Legislature "is the proper forum for redistricting because of an explicit constitutional assignment and because of the political nature of the process."[7] The Wisconsin Supreme Court should involve itself in these disputes only when there is an impasse within the Legislature, where the Legislature cannot craft a reapportionment plan that is signed into law, or in the review of maps enacted by the political branches for consistency with constitutional requirements.

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[2] Wis. Const. Art. IV, § 3.
[3] *State ex rel. Reynolds v. Zimmerman,* 22 Wis. 2d. 544 (1964).
[4] *See*, *e.g.*, *Baldus et al. v. Brennan et al.*, No. 2:2011cv00562 - Document 210 (E.D. Wis. 2012) at 5.
[5] *Id*. at 6.
[6] Petition 20-03, proposed Wis. Stat. § 809.70(4), which states:

> A petition for an original action under this section may be filed and is ripe any time after the U.S. Census Bureau delivers apportionment counts to the President and Congress as required by law.

[7] *In the matter of adoption of procedures for original actions cases involving state legislative redistricting*, No. 02-03 (Wis. Sept. 24, 2007).

While the Wisconsin Supreme Court has the authority to hear these cases,[8] because it is not a fact-finding court, special care is necessary to ensure that the Court adopts adequate fact-finding procedures. Because reapportionment impacts the political representation of every resident of this state, the Court must also be capable of recognizing all parties who may have an interest the case and allow their intervention. Moreover, the Court should have clear rules that encourage thorough, adversarial presentation. The process must also take place on a timetable that allows for the hearing and resolution of collateral federal proceedings that are likely to be taking place.

Lastly, because redistricting is a task delegated to by the constitution to the states, federal court will defer to state processes and procedures for resolving redistricting disputes.[9] *Growe v. Emison* stands for the principle that federal courts will abstain from evaluating redistricting disputes where state processes, including litigation, can find resolution. The Supreme Court's jurisprudence does not, however, require the rushed adoption of inadequate rules and procedures to hear redistricting cases. Nor does it compel any state court involvement at all.

In the past forty years, this Court has largely elected not to exercise its jurisdiction to hear redistricting claims. In that timeframe, the federal courts have proven capable of marshalling a resolution every time they were called upon--three out of four decennial rounds.[10] This Court's previous examination of this issue demonstrates that the deferral to federal courts was a considered decision based on the desire to remain apolitical and an acknowledgement that federal courts had developed considerable expertise along with clear procedures for handling these cases. This petition does not present a compelling rationale for the Court to end its considered deference to the federal process.

## IV. Procedural Shortcomings

A prior committee of this Court correctly concluded that an original action under Wis. Stat. § 809.70 "is not the best forum to engage in factfinding and draw [new] districts."[11] Like this petition, that committee's efforts focused on creating principles and procedures, some of which we amplify in our comment today, to address shortcomings of the original action framework.

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[8] Wis. Const. Art. VII §3 (2).
[9] *Growe v. Emison*, 507 U.S. 25, 34 (1993).
[10] *See Wisconsin State AFL-CIO v. Elections Board*, 543 F. Supp. 630 (1980 census); *Prosser v. Elections Board*, 793F. Supp. 859 (W.D. Wis. 1992) (after the 1990 census); *Arrington v. Elections Board*, 173F. Supp. 2d 856(E.D. Wis. 2001) (after the 2000 census) and *Baumgart v.Wendelberger*, Nos. 01 121 and 02 366, 2002 WL 34127471 (E.D. Wis. May 30, 2002) (per curiam), amended by 2002 WL 34127473 (E.D. Wis. July 11, 2002). Since 1980, the 2010 reapportionment cycle was the only period where the political branches where able to avoid an impasse requiring court intervention.
[11] *In the matter of adoption of procedures for original actions cases involving state legislative redistricting*, No. 02-03 (Wis. Sept. 24, 2007).

Though presented as a framework to allow fair adjudication of a redistricting impasse, the current proposed rule suffers from procedural shortcomings that discourage the political branches from finding resolution. In fact, this regime may encourage a race to the courthouse that short circuits the legislative process, despite the state constitution's assignment of this task to the political branches.

Even if the process does not result in a race to the courthouse and premature litigation, the procedures remain inadequate to the task at hand. The process this petition envisions, once commenced, does not allow for the adequate gathering of facts nor does it subject them to a proper adversarial process. Even where the proposal specifies procedures, they lack the clarity to uphold a commitment to fairness and finality that this process requires.

This Court should not adopt a procedure that allows resolution without fact-finding and adversarial advocacy. Proposed section 809.70(5)(c) allows this Court to resolve a redistricting impasse on the pleadings alone.[12] While subsection (5)(e) allows for an optional, limited opportunity for the gathering of facts through oral testimony, it does not require any minimum level of fact-finding, nor does it provide any appellate review of an appointed referee's findings of fact. This limitation is compounded by the fact that the proposal restricts who may intervene as a matter of right to an unusually narrow subset of the relevant interested parties under proposed section 809.70(5)(b).

The proposal lacks clear rules to govern any redistricting claim. Proposed section (5)(d) states that this "court *may* determine that any of the rules set forth in Chapters 802 – 804 governing cases in the circuit courts shall serve as a *guide* to the procedure to be followed." (emphasis added). Notably, the subsection omits Wis. Stat. ch. 805 (governing trial procedure), ch. 807 (miscellaneous circuit court procedures), and does not require adherence to the rules of evidence. (Wis. Stats. chs. 901-911). Even where it does suggest a procedural framework, nothing in the proposal requires the Court to follow it. The only mandated procedure is that the referee shall be appointed consistent with Wis. Stat. § 805.06, if the Court elects to use a referee at all. In other words, this petition proposes a framework that might feature longstanding rules of practice and procedure – or it may follow none at all.

The procedure for evaluating a proposed redistricting plan is equally flawed. Subsection (5)(f) contemplates the Court offering its own redistricting plan or putting forward one submitted by the parties. The rule does not detail how the Court is to accomplish this task. The Court is then given no guidance over setting procedures that parties may use to respond to this proposal.[13] Similarly, presumably following the

[12] The Court is also empowered to begin the process even if the legislative process has not concluded under proposed Wis. Stat. § 809.70(5)(a). Taken to the extreme, the rule could allow the parallel creation of legislative maps in a way that raises substantial separation of powers concerns.
[13] Proposed Wis. Stat. § 809.70(5)(g).

submission of objections and rebuttal briefing, a hearing is to be held under subsection (5)(h). That subsection, however, does not detail the scope of the hearing or offer any details as to what procedures are to be employed.

The final subsections of the rule do not allow adequate time for federal court review. While it is within the power of this Court to rule on redistricting claims, the deadlines imposed by subsection (5)(i) allow the Court to finalize a redistricting plan as late as two weeks before the deadline to submit nomination papers. This timeframe unduly forces candidates to prepare nomination papers for legislative districts that may have dramatically changed, while simultaneously seeking review in federal court. Together with the Court's ability to waive these deadlines altogether,[14] without defining the standards for such departures, this proposal again fails to provide the commensurate procedural safeguards that redistricting disputes require.

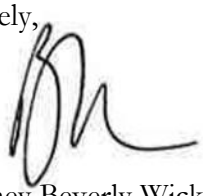
## V. Conclusion

This Court should refrain from adopting Rule Petition 20-03. Our justice system functions best when our courts are viewed as capable of dispensing justice independent from partisan allegiances. The Court's commitment to robust fact-finding, adversarial advocacy, and procedural fairness should be greatest when handling inherently political disputes like redistricting litigation. This proposal gives short shrift to these principles at every turn.

The next round of decennial redistricting is likely to begin within weeks. There is no compelling reason for this Court to rush the adoption of new procedures, especially those that do not adhere to longstanding Wisconsin traditions of pleading and practice and which also fall short of those capably employed by federal courts.

Thank you for your time and consideration.

Sincerely,



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[14] Proposed Wis. Stat. § 807.90(5)(j).