IN THE SUPREME COURT OF WISCONSIN
Rules Petition 20-__

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

INTRODUCTION

The State of Wisconsin currently has divided government with a Democratic Governor and a Republican Legislature. That state of affairs is likely to continue after the November 2020 elections which means that adopting a new map for redistricting after the 2020 census will likely be difficult and any dispute will end up in the courts (as it did the last time Wisconsin had divided government in 2001). *See, Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶20, 249 Wis.2d 706, 639 N.W.2d 537 ("[R]edistricting is now almost always resolved through litigation rather than legislation.").[1]

When this Court was asked to hear the redistricting case arising after the 2000 census, it ultimately declined and instead deferred to the federal courts because this Court believed that it was ill-prepared to handle a redistricting lawsuit. *See Jensen* at ¶20. Specifically, this Court said:

> We have no established protocol for the adjudication of redistricting litigation in accordance with contemporary legal standards. A procedure would have to be devised and implemented, encompassing, at a minimum, deadlines for the development and submission of proposed plans, some form of fact finding (if not a full-scale trial), legal briefing, public hearing, and decision. We are obviously not a trial court; our current original jurisdiction procedures would have to be substantially modified in order to accommodate the requirements of this case.

Id.

[1] Three of the last four redistricting maps in Wisconsin have been drawn by the courts rather than the Legislature.

This Court noted that redistricting was primarily a state and not a federal responsibility, *Jensen*, 249 Wis.2d 706, ¶ 5 ("It is an established constitutional principle in our federal system that congressional reapportionment and state legislative redistricting are primarily state, not federal, prerogatives"), but nevertheless this Court deferred to the federal courts because of the perceived procedural problems.

However, as part of deferring to the federal courts in *Jensen*, this Court promised that it would not be in the same position in the future (deferring a primarily state matter to the federal courts) and would engage in the rulemaking process to cure the perceived procedural problems. *Jensen*, 249 Wis.2d 706, ¶ 24 ("to assure the availability of a forum in this court for future redistricting disputes, we will initiate rulemaking proceedings regarding procedures for original jurisdiction in redistricting cases"). It is time to redeem that promise.

I. Redistricting is primarily a state and not a federal prerogative.

Although the federal and state courts have concurrent jurisdiction to decide redistricting matters, the law is clear that under principles of federalism and comity the states' role is primary. *Growe v. Emison,* 507 U.S. 25, 34(1993); *Chapman v. Meier,* 420 U.S. 1, 27 (1975); *Scott v. Germano,* 381 U.S. 407, 409 (1965).

As noted in *Growe,* 507 U.S. at 34:

> [R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.' *Chapman v. Meier,* 420 U.S. 1, 27, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975). Absent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it.

It is incumbent on this Court to have rules in place that allow the Court to meet this State's responsibility for the redistricting process rather than defer to the federal courts as occurred in *Jensen*.

II. The Proposed Rule would allow this Court to efficiently and effectively handle Redistricting Litigation.

In *Jensen*, this Court stated that any new procedure should include provisions governing fact-finding, opportunity for public comment on proposed redistricting plans, and established timetables for the process. *Jensen*, 249 Wis.2d 706, ¶ 24. The proposed rule submitted herewith accomplishes all of the above.

The proposed rule has five key components: (1) how a redistricting case gets to the Supreme Court, (2) who should be able to intervene as a matter of right, (3) how any necessary fact-finding shall occur, (4) the Court's selection of a proposed map and obtaining public comment on the proposed map, and (5) establishing necessary deadlines. In short, the proposed rule deals with all of the issues identified in *Jensen*.

A. The appropriate path for redistricting cases to come before this Court is via an original action.

The first part of the proposed rule would add a new subsection (4) to Wis. Stat. § 809.70 which provides that "Requests to the Supreme Court to take jurisdiction of any case which relates to congressional and/or state legislative redistricting shall be through a petition for an original action under this section."

Having this Court take redistricting actions through an original action is consistent with this Court's existing jurisprudence on the subject. First, as this Court held in *State ex rel. Reynolds v. Zimmerman,* 22 Wis.2d 544, 562–64, 126 N.W.2d 551 (1964), Wisconsin citizens have the right to "one person, one vote" under the Wisconsin Constitution as well as the U.S. Constitution and that right can be vindicated in state court as well as federal court. Specifically this Court said that "there is no reason for Wisconsin citizens to have to rely upon the federal courts for the indirect protection of their state constitutional rights." *Id*. at 564. Thus, an action by Wisconsin citizens to uphold their constitutional right to "one person, one vote" is appropriate in state court.

While, in theory, such a case could be commenced in circuit court and then later reviewed by the Supreme Court (under Wis. Stat. § 751.035), the time for redistricting litigation is so short (especially this cycle with the delay in the completion of the census due to COVID-19) that completing both a circuit court action and a Supreme Court review within that period of time would be extremely difficult.

The U.S. Census Bureau has announced that due to COVID -19 the deadline for the delivery of apportionments to the President will be delayed from December 31, 2020 to April 30, 2021 and the deadline for the delivery of redistricting counts to the States will be delayed from April 1, 2021 to July 31, 2021. That means that the Legislature cannot likely even begin drawing maps until approximately August 1, 2021 and it will certainly take several months to complete proposed maps.

Even with receiving the redistricting counts earlier in previous rounds of redistricting it took months to complete the proposed maps. The redistricting map after the 1990 census was not completed by the Legislature until April 14, 1992, and was vetoed by the Governor on April 28, 1992.[2] No redistricting map was approved by the Legislature after the 2000 census; each house approved its own map on March 7, 2002 but neither house acted on the other's proposed map.[3] The redistricting map after the 2010 census was approved by the Legislature on July 19, 2011 (but that date was based on receiving the redistricting counts from the Census Bureau on March 10, 2011) and signed by the Governor on August 9, 2011.[4] The 2011 maps were the quickest done by the Legislature in the last three decades of redistricting. Assuming that the Legislature acted with the same efficiency in 2021 and received the redistricting counts at the current deadline announced

[2] https://www.wisdc.org/images/files/pdf_imported/redistricting/redistricting_april2016_leg_ref_bureau.pdf at p. 14
[3] *Id.*
[4] *Id.* at 15.

by the Census Bureau that would mean the first date by which the Legislature would be likely to approve maps would be approximately December 9, 2021.

Under current law, candidates may begin circulating nomination papers for the 2022 fall elections on April 15, 2022, which papers must be filed no later than June 1st.[5] Given the probable timeline for maps discussed in the previous paragraph, litigation regarding the Legislature's proposed maps cannot proceed very far until approximately December, 2021 (or maybe even later) when the Legislature has completed proposed maps,[6] but the case must be must be completed in time for candidates to begin circulating nomination papers by April 15, 2022. That would be an extremely difficult time frame for both a circuit court action and Supreme Court review.

Moreover, in *Jensen* this Court said that "there is no question" that redistricting actions warrant "this court's original jurisdiction; any reapportionment or redistricting case is, by definition, *publici juris*, implicating the sovereign rights of the people of this state." *Jensen*, 249 Wis.2d 706, ¶ 17.

The proposed rule permits an original action to be filed after the Census Bureau has delivered apportionment counts to the President and Congress as required by law. The deadline for that is December 31st, 2020 (which this time around has been moved to April 30th). That deadline precedes the date that the Census Bureau delivers the relevant data to the states. That means, of course, that the rule authorizes the filing of an action prior to the Legislature submitting a proposed map or even having an opportunity to fully consider new proposed maps. The reason for this is to put state court actions on par with federal court actions, since litigation in the federal court is almost certain to begin as soon as the census bureau reports are completed. That is the

[5] *See* Wis. Stat. § 8.15.
[6] The action may be filed prior to December but the maps which will be the focus of the litigation will likely not be available for analysis, briefing and argument this time around until approximately December.

way it happened in 2001, and that is what led to this Court's ultimate decision in *Jensen* to defer to the federal courts.

On February 1, 2001 (about one month after the census apportionment was complete), democratic plaintiffs in Wisconsin filed an action in federal court alleging a claim based upon "one person, one vote" and asserting that the then existing districts were malapportioned based upon the most recent census data. *Arrington v. Elections Bd.,* 173 F. Supp. 2d 856 (E.D. Wis. 2001). Despite noting that "that the state legislature had not yet attempted to create a constitutional apportionment plan (indeed, had not yet had the opportunity to do so)" the federal court held that the plaintiffs had standing to do file the claim and that the action was ripe. *Id* at 866-67.

The court in *Arrington* did temporarily stay the action to see what the Legislature would do and decided that through a stay it could, under its docket-management powers, set a time when it would take evidence and adopt its own plan if the Legislature had by then failed to act. *Id*. at 865. This Court could, of course, do the same and the proposed rule provides for that option.

The proposed rule simply codifies the method adopted by the federal court in *Arrington* and provides for a stay for all or part of the action until the Legislature has adopted a new plan. At the same time, it assures that the Wisconsin Supreme Court will, as it should, consider and resolve the redistricting dispute as a matter of primary jurisdiction.

B. The proposed rule has a provision for making sure all appropriate parties will be before the Court.

The second part of the proposed rule would add a new subsection (5) to Wis. Stat. § 809.70 which provides that "The court shall provide, by order, for the submission of proposed redistricting plans by the parties and interested persons who have been allowed to intervene. The Governor,

either or both branches of the Legislature and political parties shall be granted intervention as of right."

This part of the proposed rule is modeled in part on Michigan Compiled Law Annotated 3.74 which deals with original actions involving redistricting in the Michigan Supreme Court. The Michigan statute says that its Supreme Court shall "Provide, by order, for the submission of proposed redistricting plans by political parties and other interested persons who have been allowed to intervene. Political parties shall be granted intervention as of right." The proposed rule is the same as the Michigan rule in allowing interested parties to submit proposed plans but is slightly broader in allowing not only political parties but the Governor and either or both branches of the Legislature to also intervene as of right. That is because, as a practical matter, the Governor and the Legislature (along with individual voters) have been the real protagonists to such litigation in this State in the past.

For example, in the litigation following the 1980 census (when the Democrats controlled the legislature and the Republicans held the Governorship), the parties included a union, the Democratic Party of Wisconsin and a member of the State Senate as plaintiffs and the Republican Party of Wisconsin, individual Republican legislators and the Governor as Defendants. See, *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 632 (E.D. Wis. 1982)

In the litigation following the 1990 census (when the Democrats again controlled the legislature and the Republicans held the Governorship), the parties included Republican legislators from both the Assembly and the Senate who originally filed the suit along with individual voters, the Democratic leaders of the Wisconsin legislature, who were permitted to intervene, as were a number interested groups, including the Wisconsin Education Association Council and individuals, including Annette Williams, a black representative from Milwaukee, and several other

black and Hispanic legislators. *See Prosser v. Elections Board*, 793 F. Supp. 859 (W.D. Wis. 1992).

In the litigation following the 2000 census (when partisan control of the two houses of the legislature was split), the action was started by a group of individual voters and then two groups of legislators (one group of Democrats and one group of Republicans) were allowed to intervene along with two individual African-American legislators. *Baumgart v. Wendelberger*, 2002 WL 34127471 (E.D. Wis. 2002).

The point is that the Governor and members of the Legislature have significant interests in redistricting and have historically participated in such litigation. The proposed rule recognizes these historical facts and permits them to intervene as a matter of right. Political parties are interested as well, and rather than having to act through representatives who hold some state office, are permitted to intervene on their own behalf.

C. The proposed rule has a method for fact-finding.

Assuming that some fact-finding may be necessary to resolve a redistricting dispute pending before the Court as an original action, the proposed rule incorporates existing statutory provisions for doing so. The proposed rule states as follows:

> If the court determines that disputed issues of material fact must be resolved on the basis of oral testimony, the Supreme Court may refer such issues of fact to a circuit court or referee for determination per sec. 751.09 to take testimony and to report findings of fact and recommendations to the Supreme Court. The appointment of a referee shall be as set forth in Wis. Stat. § 805.06.

Thus, the rule incorporates the provisions of Wis. Stat. § 751.09 which provides that "In actions where the supreme court has taken original jurisdiction, the court may refer issues of fact or damages to a circuit court or referee for determination." The proposed rule also references Wis. Stat. § 805.06 which contains procedures for the appointment of a referee. Because the proposed

rule merely references and incorporates existing statutory provisions there should be nothing controversial regarding this part of the proposed rule.

D. The proposed rule contains procedures for proposing a map and obtaining public comment.

Although the task of drawing a redistricting map is delegated under Article IV, Section 3 of the Wisconsin Constitution to the Legislature, the reality is that due to political gridlock the courts have actually drawn the map for this state in the 1960s, the 1980s, the 1990s and the 2000s. The proposed rule simply recognizes that reality in the event that agreement is not reached between the two political branches.

The proposed rule provides a two-step procedure for the Court to adopt a map. The first step is for the Court to select a proposed map – either one proposed by one of the parties or one prepared by the Court – and publish that proposed map for inspection and comment by the public and a hearing on that proposed map prior to finalizing the map. Such a two-step process is the best way for the Court to allow the public at large and the parties to comment on and offer proposed corrections to any perceived errors or mistakes in the proposed map before it becomes final.

E. *The proposed rules contain the relevant information for establishing deadlines*.

The proposed rule recognizes that a new map must be in place in time for candidates to begin circulating nomination papers for the fall primary and general elections (because to do so the candidates need to know the boundaries of the districts in which they will be running). The proposed rule sets forth the deadline for the new map to be in place 15 days prior to that date. Under the current statutes, candidates may begin circulating nomination papers on April 15, so the deadline for a final map in 2022 would be March 31st. All other deadlines would work backwards from that date. The public hearing on the proposed plan selected by the Court would be no later 15 days prior to that and the Court would identify the proposed plan at least 30 days before the

public hearing. All briefing, fact-finding and argument would have to be complete in time for the Court to meet those deadlines.

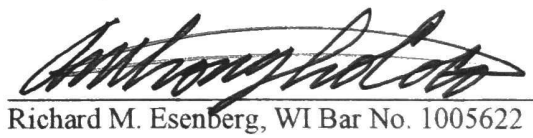
Because circumstances can always change, such as the delay in the census this time around, the final subsection of the rule allows the Court to change any or all of the deadlines or eliminate some of the steps contained in the rule, upon motion of the parties or upon the Court's own motion.

CONCLUSION

In *Jensen*, this Court said that it needed to create new rules for original actions relating to redistricting that would include provisions governing fact-finding, opportunity for public comment on proposed redistricting plans, and establishing timetables for the process. The proposed rule does that and more. It establishes a full set of procedures that would allow this Court to efficiently handle such litigation under its original jurisdiction authority and the Petitioners request that this Court enact the proposed rule in order to avoid a frenzy of last-minute litigation occurring in the absence of clearly-defined rules.

Dated: June 2, 2020

WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Petitioners



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