

November 30, 2020

Clerk of the Wisconsin Supreme Court
16 East State Capitol
P.O. Box 1688
Madison, WI 53701-1688

Re: *Petition for Proposed Rule to Amend Wis. Stat. § 809.70 (Relating to Original Actions)*

To the Honorable Justices of the Supreme Court:

The Brennan Center for Justice at New York University School of Law (the “Brennan Center”) writes to offer comments on Rules Petition 20-03, which would significantly change practices for drawing Wisconsin’s legislative and congressional maps in the event of political deadlock. We appreciate this opportunity to provide input on a subject of vital importance that could have adverse ramifications for the decade to come if the process is poorly designed.

The Brennan Center is a nonpartisan public policy and legal institute that works to reform, revitalize, and defend our country’s system of democracy and justice. For more than two decades, this work has included studying redistricting processes around the country. We offer the comments below to help place the processes proposed in Rules Petition 20-03 in a national context. As noted below, Rules Petition 20-03 would make Wisconsin an outlier in several key respects and could hamper the redrawing of maps.

1. It is unusual to bypass lower courts and have original proceedings take place in a state’s highest court.

Courts are a critical safeguard for ensuring that legally compliant districting plans are in place in the event the political branches deadlock in the redrawing of maps after the census. However, Rules Petition 20-03 is unusual in requesting that the Wisconsin Supreme Court act as the court of first instance should there be deadlock. Indeed, out of the fifty states, just seven require that a state’s supreme court draw maps in the event of a redistricting

deadlock.¹(An additional state, Connecticut, also gives its state supreme court the power to draw maps but only after both legislative process and a backup commission deadlock.²)

The far more common practice in the event of political deadlock is for the mapdrawing process to start in a trial court or a before panel of specially designated judges, with the state supreme court providing review of the process. In 2011, this is how state courts drew maps in Colorado, Minnesota, Missouri, New Mexico, and Nevada.³ It also is the practice for federal trial courts, rather than higher courts, to draw maps when the process falls to them.⁴

There are major benefits to allowing the mapdrawing process to begin in the lower courts rather than in this Court. First, redistricting is highly fact intensive and technical, often requiring extensive expert as well as lay testimony. Disputes often take weeks to try. In addition, redistricting cases can frequently involve a series of ancillary disputes over production of documents, assertions of legislative privilege, the admissibility of experts, and other discovery disputes. It is simply a better use of judicial resources to allow fact finding and initial rulings in the case, including a decision on proposed maps, be made in lower courts. A second reason for lower courts to handle the matter in the first instance is the need for meaningful review. This opportunity is especially important given the complex nature of redistricting. This opportunity would be undercut if the Wisconsin Supreme Court also served as the trier of fact.

2. It is typical for courts to refer mapdrawing to a special master or to trial judges given the specialized nature of redistricting and the need for factual development.

Rules Petition 20-03 would allow this Court the discretion to designate a circuit court or appoint a referee to hear factual disputes. If this Court decides to take original jurisdiction in cases arising from redistricting deadlock, this referral should be made mandatory rather than

¹ CONN. CONST. art. III, § 6(d); FLA. CONST. art. III, § 16(b), (f); IA. CONST. art. III, § 36; LA. CONST. art. III, § 6(B); ME. CONST. art. IV, pt. 1, § 3; N.J. CONST. art. II, § 2, ¶ 7 (congressional districts); S.D. CONST. art. III, § 5.; WASH. CONST. art. II, § 43(6).

²If legislature fails to adopt plan by the deadline, the backup commission is convened and must adopt plan with the approval of 5 members by November 30 (CONN. CONST. art. III, § 6(c), amended by CONN. CONST. amend. art. XVI; XXVI; XXX). If backup commission fails to adopt plan by the deadline, the state supreme court can compel the backup commission to adopt a plan or adopt its own plan (CONN. CONST. art. III, § 6(d), amended by CONN. CONST. amend. art. XVI; XXVI; XXX).

³ Colorado - *Moreno v. Gessler*, No. 11CV3461, 2011 WL 8614878 (Colo. Dist. Ct. Nov. 10, 2011); Minnesota - Order Appointing Five-judge Redistricting Panel, *Hippert v. Ritchie*, No. 86-CV-11-433 (Minn. Dist. Ct., Wright County 2011), <https://redistricting.ills.edu/files/MN%20hippert%2020110601%20order.pdf>; Missouri - Supreme Court Appoints Judges to Reapportionment Commission, <https://www.courts.mo.gov/page.jsp?id=90222>; New Mexico - *Egolf v. Duran*, No. D-101-cv-201102942 (N.M. 1st Judicial Dist. Ct. 2011); Nevada - *Guy v. Miller*, No. 11-OC-00042-1B (Nev. Dist. Ct., Carson City 2011).

⁴ See *Essex v. Kobach*, 874 F. Supp. 2d 1069 (D. Kan. 2012); *Smith v. Hosemann*, 852 F. Supp. 2d 757 (S.D. Miss. 2011); *Favors v. Cuomo*, 285 F.R.D. 187, 195 (E.D.N.Y. 2012).

discretionary and should include the power to draw maps and not just decide factual issues.

In the 2011 round of redistricting, nine states had their maps drawn by courts due to redistricting deadlock.⁵ Of these, five used special masters or trial courts to consider map proposals and, if appropriate, to draw alternative maps.⁶ Special masters are nonpartisan professionals who can aid courts in drawing and approving maps by providing specialized knowledge and technical insight. For example, courts in New York and Connecticut relied on the expertise of Stanford Law School professor Nathaniel Persily, who specializes in the law of redistricting.⁷ Likewise, in Kansas, the three-judge federal panel was aided by the principal analyst for the Kansas Legislative Research Department.⁸ Special masters also are frequently used by both state and federal courts to assist with redrawing maps that have been struck down for legal violations.⁹

Given the fact-intensive and highly technical nature of redistricting, appointing a referee or panel of judges to hear the initial phases of the case would allow for the process of developing redistricting plans to be as robust as possible.

3. The proposed rules are more restrictive than practices in most states on who can participate in proceedings and unduly prioritizes insiders and partisan interests.

Rules Petition 20-03 falls short of normal practices when it comes to providing for public participation. Redistricting is a complicated process where stakeholders have a variety of overlapping interests and concerns, only some of which are rooted in partisan politics. In 2011 in California, for example, the state's independent redistricting commission heard testimony about how areas badly affected by wildfires were being poorly represented in the state legislature because the affected areas were fractured among multiple legislative districts. In response, the commission adopted a redistricting plan that kept the affected areas together as a single state assembly district in order to better serve the representational needs of the people in those areas.¹⁰ Public participation, in short, is important to ensuring fair maps.

⁵ Colorado, Connecticut, Kansas, Minnesota, Mississippi (congressional only), Missouri (legislative only), New Mexico, New York (congressional only), and Nevada. See <https://redistricting.lls.edu/>.

⁶ Colorado, Connecticut, Kansas, New York, and Nevada. *Id.*

⁷ Order Directing Special Master, *In re Petition of Reapportionment Commission*, Ex. Rel., No. SC 18907 (Conn. Sup. Ct. 2011) https://www.jud.ct.gov/external/news/SC18907_010312.pdf; Magistrates Order at 7, *Favors v. Cuomo*, No. 1:11-cv-05632 (E.D.N.Y. 2012), <https://www.nyed.uscourts.gov/pub/docs/cv/324457/1.11.cv.5632.6746199.0.pdf>.

⁸ *Essex v. Kobach*, 874 F. Supp. 2d at 1079.

⁹ See Order Appointing Special Master, *Bethune-Hill v. Va. State Bd. of Elections*, No. 3:14-cv-00852 (E.D. Va.), <https://redistricting.lls.edu/files/VA%20bethune%2020181018%20special%20master.pdf>; Order Directing Parties to Submit Data at 2, *League of Women Voters of PA v. Pennsylvania* (also *Turzai v. Brandt*), No. 159-MM-2017 (Pa. Sup. Ct. 2018), <https://redistricting.lls.edu/files/PA%20lwv%2020180126%20order.pdf>.

¹⁰ See State of California Citizens Redistricting Commission, Final Report on 2011 Redistricting (August 15, 2011), https://wedrawthelines.ca.gov/wp-content/uploads/sites/64/2011/08/crc_20110815_2final_report.pdf.

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It is also critical to ensuring broad public acceptance of the legitimacy of the outcome.

Yet under Rules Petition 20-03, only the two houses of Wisconsin General Assembly, the Governor, and political parties would be guaranteed intervention as of right. Cities, counties, and other communities would not have a similar right, even though their interests are often significantly and adversely affected by redistricting. Black, Latino, and other minority lawmakers and members of Congress, likewise, would have no guaranteed right to be heard.

The right of members of the general public to participate in the process are even more proscribed unless they formally intervene in the case. Under section 809.70(5)(f) of the proposed rule, the general public is permitted to “inspect” the Court’s proposed plan. However, the rule makes no provision for the public to be able to have access to the data needed to analyze plans, comment on a plan or propose alternatives, or offer legal – or pragmatic – objections to the Court’s proposed lines. These limitations are highly out of line with practices around the nation and will artificially limit the amount of information available to the Court.

In Minnesota, by contrast, the five-judge redistricting panel appointed to draw the state’s maps in the 2011 held eight public hearings in which the panel heard from many interests not affiliated with political parties.¹¹ Twenty-one states, likewise, expressly allow *any* voter to raise objections and petition for judicial review of an enacted plan.¹²

The last round of redistricting in Wisconsin was contentious, in part because the process was very closed door. Notably, voters in “fifty-one Wisconsin counties, representing almost 80 percent of the people of Wisconsin have passed resolutions or referenda supporting nonpartisan redistricting.”¹³ Limiting participation in these proceedings, as Rules Petition 20-03 proposes to do, will only unnecessarily involve this Court in a highly political matter and add to concerns about bias.

Thank you for consideration of the Brennan Center’s comments. If the Court has any questions, we would be happy to supplement our responses.

Respectfully submitted,

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¹¹https://www.mncourts.gov/Documents/0/Public/Court_Information_Office/Redistricting2011Final/Final_Order_Adopting_A_Legislative_Redistricting_Plan.pdf.

¹² AK., AR., CA., CN., HI., IL., IA., LA., ME., MD., MI., MA., N.J., OH., OK., OR., PA., SD., VT., WA.

¹³ <https://govstatus.egov.com/peoplesmaps>.