

IN THE SUPREME COURT OF WISCONSIN

Rules Petition 20-\_\_

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IN RE: PETITION FOR PROPOSED RULE TO AMEND WIS. STAT. § 809.70 (RELATING TO ORIGINAL ACTIONS).

PETITION FROM SCOTT JENSEN AND WISCONSIN INSTITUTE FOR LAW & LIBERTY

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*Whereas*, the federal government has commenced the 2020 census and the result of the census is likely to mean that redistricting will be necessary in the State of Wisconsin in 2021; and

*Whereas*, the State of Wisconsin currently has divided government with a Democratic Governor and a Republican Legislature, with the result being that adopting new maps for redistricting after the 2020 census will likely will end up in the courts, *see, e.g., Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶ 10, 249 Wis. 2d 706, 713, 639 N.W.2d 537, 540 (“[R]edistricting is now almost always resolved through litigation rather than legislation . . . .”)<sup>1</sup>; and

*Whereas*, when this Court was asked to hear the redistricting case arising after the 2000 census it noted that redistricting was primarily a state and not a federal responsibility, *Jensen* at ¶ 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 deferred to the federal courts because of the perceived procedural problem of a lack of rules for such a case in this Court, *see id.*, ¶ 20 ; and

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<sup>1</sup> Three of the last four redistricting maps in Wisconsin have been drawn by the courts rather than the Legislature.

*Whereas*, 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* at ¶ 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”); and

*Whereas*, to date, this Court has not yet adopted rules to cure the perceived procedural problems it noted in *Jensen*.

*Now, therefore*, the Petitioners request that this Court adopt a rule to amend Wis. Stat. § 809.70 by adding subsections (4) and (5) as set forth below. Wis. Stat. § 809.70 (1)-(3) currently read as follows:

**809.70 Rule (Original Action)**

(1) A person may request the supreme court to take jurisdiction of an original action by filing a petition which may be supported by a memorandum. The petition must contain all of the following:

- (a) A statement of the issues presented by the controversy.
- (b) A statement of the facts necessary to an understanding of the issues.
- (c) A statement of the relief sought.
- (d) A statement of the reasons why the court should take jurisdiction.

(2) The court may deny the petition or may order the respondent to respond and may order oral argument on the question of taking original jurisdiction. The respondent shall file a response, which may be supported by a memorandum, within 14 days after the service of the order.

(3) The court, upon a consideration of the petition, response, supporting memoranda and argument, may grant or deny the petition. The court, if it grants the petition, may establish a schedule for pleading, briefing and submission with or without oral argument.

The Petitioners request that Section 809.70(4)-(5) of the statutes be created as follows:

(4) 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. 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.

**(5)** If the supreme court grants the petition for an original action for a redistricting case under sub. 4, then the case shall proceed in the manner ordered by the court.

- (a) If a petition for an original action is filed prior to the time that the Legislature has adopted a new redistricting plan, the court may stay all, or part, of the action until the Legislature has adopted a plan.
- (b) The Governor, the Senate, the Assembly and political parties shall be granted intervention as of right.
- (c) The court may dispose of the case on the documents filed under sub. 3 or may order further briefing or may call for additional evidence and for briefs and argument after such evidence has been received. If the court does not dispose of the case on the documents filed under sub. 3, then 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 and the following additional procedures shall apply.
- (d) Whenever appropriate, and subject to order of the court, the 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 in a particular case.
- (e) If the court determines that disputed issues of material fact must be resolved on the basis of oral testimony, the 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.
- (f) At a time to be set by the court, but only after receiving the report described in subsection (e), if such a report is requested by the court, the court shall propose a plan (either one submitted by one of the parties or one prepared by the court) for consideration of the parties and the public, and make that plan available for public inspection at least 30 days before the time set for hearing in subdivision (h).
- (g) The court shall prescribe, by order or otherwise, the procedure for and the deadlines pertaining to filing objections and rebuttal to the proposed plan in advance of the hearing scheduled in sub. (h).
- (h) The court shall hold a hearing on the proposed plan at a time determined by the court not later than 15 calendar days prior to the deadline set forth in sub. (i).
- (i) In order to provide for the orderly election process and for candidates to meet statutory deadlines for filing and residency, and after making any revisions to the

proposed plan that the court considers necessary, the court shall order a redistricting plan for congressional districts and/or the state legislature no later than 15 calendar days prior to the statutory deadline for candidates to file nomination papers for the primary or general election in the next year ending in a "2". All deadlines imposed by the court under this section will be with this deadline in mind.

- (j) Notwithstanding pars. (c) to (i), the court upon its own motion or upon the motion of a party may for good cause alter any deadline set forth in those paragraphs or dispense with the requirements of those paragraphs.

This Petition is supported by the Memorandum filed herewith.

Dated: June 2, 2020

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