

SUPREME COURT OF WISCONSIN

No. 20-03

In re Petition for Proposed Rule to Amend Wis.
Stat. § 809.70 (Relating to Redistricting)

FILED

MAY 14, 2021

Sheila T. Reiff
Clerk of Supreme Court
Madison, WI

On June 3, 2020, Attorney Richard M. Esenberg, Brian McGrath, and Anthony F. LoCoco, on behalf of Scott Jensen and the Wisconsin Institute for Law and Liberty (WILL), filed a rule petition asking the court to amend the "original action" rule, Wis. Stat. § 809.70, to create a procedural mechanism for the court to consider anticipated legal challenges to redistricting plans.¹

The petitioner states that the goal of this rule petition is to ensure that state courts, rather than federal courts, oversee redistricting litigation in Wisconsin. The petition specifically seeks to ensure that this court assumes original jurisdiction over

¹ In Wisconsin, legislative redistricting is the initial responsibility of the state legislature, which must complete its process by the end of the first session after the census. Wis. Const. art. IV § 3 ("the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants."); see also Wis. Const., art. V, § 10; State ex rel. Reynolds v. Zimmerman, 22 Wis. 2d 544, 126 N.W.2d 551 (1964). However, redistricting is frequently resolved through litigation rather than legislation. Jensen v. Wisconsin Election Board, 2002 WI 13, ¶10, 249 Wis. 2d 706, 639 N.W.2d 537.

redistricting litigation. The petitioner reminds the court that this court stated its intent to adopt redistricting procedures in Jensen v. Wisconsin Election Board, 2002 WI 13, ¶24, 249 Wis. 2d 706, 639 N.W.2d 537, but has not done so.² After the Jensen decision, the court solicited and considered a proposal recommending procedural rules to be used by the court in the event of a future redistricting challenge, but ultimately voted not to pursue the recommendation.³

² In January 2002, then-Wisconsin Assembly Speaker Scott Jensen and then-Senate Minority Leader Mary Panzer, representing Assembly and Senate Republicans, filed an original action petition seeking this court's involvement in redistricting due to a legislative impasse. This court agreed that Jensen's petition warranted this court's exercise of original jurisdiction, but ultimately dismissed the case, explaining the court lacked procedures to resolve the matter expeditiously. The Jensen court explained:

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., ¶20. We further stated: "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." Id., ¶24.

³ After the Jensen decision, on November 25, 2003, then-Chief Justice Shirley S. Abrahamson appointed a Redistricting Committee that was tasked with proposing procedural rules to be used by the court in the event of a future redistricting challenge. In September 2007, the Redistricting Committee filed a report with this court proposing procedures for handling redistricting challenges. The court invited public comment on the report, requested and received a supplemental memorandum from the Redistricting Committee, and discussed the matter

The court discussed the pending rule petition at a closed administrative rules conference on September 30, 2020 and voted to obtain written comments and schedule a public hearing. Letters were sent to interested persons on November 4, 2020. Over 70 written comments were received. Some of the written responses collected and presented responses from a number of individuals, including numerous comments received from citizens and public interest organizations suggesting that the proposal is partisan. Some comments offered detailed legal analysis, identified technical concerns with the proposal, and raised concerns about the petition's proposed fact-finding mechanism. Some described in detail the court's 2009 discussions pertaining to the 2007 report proposing a rulemaking procedure. The petitioner filed a response dated December 14, 2020 addressing the comments received and maintaining that the court should adopt procedures to handle an anticipated redistricting challenge. The petitioners also filed a clarification letter dated January 15, 2021.

The court conducted a public hearing on Thursday, January 14, 2021, via videoconference. Attorney Richard Esenberg presented the petition to the court on behalf of Scott Jensen and WILL.

The following speakers appeared in support of the rule petition: Petitioner Scott Jensen, Attorney Misha Tseytlin, Troutman Pepper Hamilton Sanders LLP; Attorney Kevin M. St. John, Bell Giftos St. John

in open administrative conferences on April 8, 2008 and January 22, 2009. Ultimately, the court voted to take no further action on the report; the Redistricting Committee was discharged and the matter dismissed. See S. Ct. Order 02-03, *In the matter of the adoption of procedures for original action cases involving state legislative redistricting*, issued Jan. 30, 2009.

LLC; C.J. Szafir, President, Institute for Reforming Government; and Attorney Lucas Vebber, Executive Director, Wisconsin Manufacturers & Commerce.

The following speakers appeared in opposition to the rule petition: Terese Carr; Attorney Annabelle E. Harless, Campaign Legal Center; Rabbi Bonnie Margulis, Executive Director, Wisconsin Faith Voices for Justice; Christopher Ford, Chair, People's Maps Commission; Lena Eng; the Honorable Pete Anderson; Beth Bauer; Sachin Chheda, Director, Fair Elections Project; Janet Brandt, Member of Iowa County Fair Maps Team; Zachary D. Clopton, Professor of Law, Northwestern Pritzker School of Law; Robert Yablon, Associate Professor of Law, University of Wisconsin Law School; Beth Furumo; David Levi Armbrust-Faust; Nicholas O. Stephanopoulos, Professor of Law, Harvard Law School; Attorney Joan Schwarz, Schwarz Law Office; Attorney Allen Arntsen; Attorney Sara Greenen, Counsel for the Wisconsin Building Trades Council, The Previant Law Firm, S.C.; Carlene Bechen, Fair Maps Organizer; Attorney Deborah J. Patel; Douglas M. Poland, Litigation Directory; Elizabeth Treviño, Wisconsin State Director, All On The Line; and Attorney Jay A. Urban, Wisconsin Association for Justice.

The court discussed the rule petition and the comments received at several closed administrative rules conferences. The court determined that, as drafted, the procedures proposed in this administrative rule petition are unlikely to materially aid this court's consideration of an as yet undefined future redistricting challenge, and voted to deny the petition. Our decision in this rule matter should not be deemed predictive of this court's response to a petition for review asking this court to review a lower court's ruling on a redistricting challenge

or a request that we assume original jurisdiction over a future redistricting case or controversy. It remains well-settled that redistricting challenges often merit this court's exercise of its original jurisdiction. See, e.g., Jensen, 249 Wis. 2d 706, ¶17 ("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."). Therefore,

IT IS ORDERED that the petition is denied. The State Bar of Wisconsin shall provide notice of this order.

Dated at Madison, Wisconsin, this 14th day of May, 2021.

BY THE COURT:

Sheila T. Reiff
Clerk of Supreme Court

