# In the Supreme Court of Wisconsin

Case No. 2025AP996-OA

Elizabeth Bothfeld, Jo Ellen Burke, Mary Collins, Charlene Gaebler-Uhing, Paul Hayes, Sally Huck, Tom Kloosterboer, Elizabeth Ludeman and Linda Weaver,
Petitioners,
v.
Wisconsin Elections Commission, Don Millis, Robert F. Spindell, Jr., Marge Bostelmann, Ann S. Jacobs, Mark L. Thomsen, Carrie Rieple, in their official capacities as commissioners of the Wisconsin Elections Commission; and Meagan Wolfe, in her official capacity as administrator of the Wisconsin Elections Commission,
Respondents.

## NON-PARTY BRIEF OF WISCONSIN MANUFACTURERS AND COMMERCE INC.

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## INTRODUCTION

The Petitioners ask this Court to toss out Wisconsin's current congressional map because, in their eyes, the people of Wisconsin got it wrong. Taking issue with the partisan split of Wisconsin's congressional delegation, the Petitioners advance claims that, if decided in their favor, would result in electoral victories predetermined by a "rough proportionality" standard. In other words, the Petitioners ask this Court to ensure that Wisconsin's congressional delegation is divided evenly along partisan lines, allowing political parties to choose their voters. The Petitioners have requested an original action from this Court to hear their claims. But the Petitioners' claims require extensive fact finding and ask the Court to answer a political question. For either reason, this Court should deny the petition for an original action.

## ARGUMENT

This Court should deny the Petitioners' request for an original action.

### A. Because the Petitioners' claims require extensive fact finding, this Court should not exercise its original jurisdiction here.

The Petitioners present four claims. Toward the first three, they broadly argue the existing congressional map is a partisan gerrymander that advantages one political party and so violates their constitutional rights. The Petitioners then develop three sub-theories, each supporting an individual claim. They allege, to be exact, that Wisconsin's congressional map violates the Wisconsin Constitution's Equal Protection Clause, Free Speech and Association Clauses, and Free Government Clause. The Petitioners' fourth and final claim rests on our system of separated powers and the judiciary's role within it. Toward

that claim, they argue Wisconsin's congressional map is so fundamentally biased that to keep it in place would be to shirk a judicial duty.

Whatever the slight legal differences between them, each of these claims entails fact finding because each relies on the premise that Wisconsin's congressional map is deeply and odiously unfair. That conclusion—a legal conclusion—is inextricably linked with questions of fact this Court is ill equipped to answer. For instance, to conclude the map is even a smidge unfair, the Court will need to ascertain Wisconsin's political makeup, an ever-changing statistic.[1] That task is difficult (and likely impossible). Even though Wisconsin leaned blue in the last election, who's to say it won't lean far red in the next? In Wisconsin—where nearly one-third of voters identify as independent[2]—swings like that can happen. And if the next election were to play out that way, then who could say the current map, even if it does lean 6-2 Republican, was ever so unfair on the ground to begin with? The Petitioners' claims rest on shifting sand. How anybody, much less a Court, and still less a *law-developing* court, can really ascertain this state's political makeup—Petitioners do not say.

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[1] The Petitioners do not suggest that an unlawful partisan gerrymander requires a showing of intent. This is a break from the mainstream understanding, which does require intent be shown. *See, e.g.*, *Rucho v. Common Cause*, 588 U.S. 684, 737 (2019) (Kagan, J., dissenting) (explaining "when political actors have a specific and predominant intent to entrench themselves in power by manipulating district lines, that goes too far"); (explaining the lower courts there "(like others around the country) used basically the same three-part test to decide whether the plaintiffs had made out a vote dilution claim. As many legal standards do, that test has three parts: (1) intent; (2) effects; and (3) causation"). If the Petitioners must show intent in order to win, only more fact finding becomes necessary.

[2] Voter Project, *Wisconsin Voter Statistics*, (last updated Oct. 1, 2024), https://independentvoterproject.org/voter-stats/wi.

All four claims are thus unfit for this Court's original jurisdiction. Indeed, "[t]his court will, with the greatest reluctance, grant leave for the exercise of its original jurisdiction in all such cases, especially where questions of fact are involved." *Petition of Heil,* 230 Wis. 428, 436, 284 N.W. 42 (1938); *see also* Wis. S. Ct. IOP III.B.3. (April 20, 2023) ("The Supreme Court is not a fact-finding tribunal, and although it may refer issues of fact to a circuit court or referee for determination, it generally will not exercise its original jurisdiction in matters involving contested issues of fact."). Because this Court reserves its "original jurisdiction for rare cases that involve purely legal questions," *Gahl on behalf of Zingsheim v. Aurora Health Care, Inc.*, 2023 WI 35, 413 Wis. 2d 418, 492, 989 N.W.2d 561 (Dallet, J., dissenting from order granting leave to commence an original action), this Court should deny the petition for an original action.

### B. This Court has already stated it will not entertain claims of partisan gerrymandering in original actions.

Just two terms ago, this Court reached that easy conclusion described above. In that case, *Clarke*, this Court declined to exercise original jurisdiction over a partisan-gerrymandering claim "due to the need for extensive fact-finding." *Clarke v. Wisconsin Elections Comm'n*, 2023 WI 79, ¶7, 410 Wis. 2d 1, 998 N.W.2d 370 (citing *Clarke v. Wis. Elections Comm'n*, 2023 WI 70, 409 Wis. 2d 372, 995 N.W.2d 779).

Just like the Petitioners here, the *Clarke* petitioners relied on three legal theories to advance their claim of partisan gerrymandering. Specifically, they alleged that the partisan gerrymandering of our state's legislative maps violated the Wisconsin Constitution's Equal Protection

Clause, Free Speech and Association Clauses, and Free Government Clause. *See Clarke*, 409 Wis. 2d at 381–82 (Ziegler, C.J., dissenting).[3]

Because the partisan-gerrymandering issues in *Clarke* would have required "extensive fact-finding (if not a full-scale trial)," *Clarke*, 409 Wis. 2d at 375, the same is true of the Petitioners' four claims here. Despite those similarities, the Petitioners spend not one word explaining how their claims are meaningfully different from the claims that this Court rightly declined to hear in an original action in *Clarke*. That oversight alone should doom this petition.

In a single-paragraph effort to assure the Court these issues are within its wheelhouse, the Petitioners point to *Johnson II*.[4] They note that, there, analyzing written expert reports of "partisan skew" proved to be "well within the competency of this Court to evaluate." (Pet. Mem. at 15.) They argue, as a result, the same will be true here. But that argument ignores a major difference between this case and *Johnson II*. In *Johnson II*, the Court was tasked with choosing between already-written remedial maps. *Johnson II*, ¶7, 8. Here, the Petitioners ask the Court not to choose between ready-drawn proposals but to declare the *current* congressional map an unconstitutional partisan gerrymander. Because that question would entail so much fact finding, when state high courts review claims of partisan gerrymandering, they do so *after* a trial has been held on the issue. *See, e.g.*, *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018); *Graham v. Sec'y of State*

[3] The *Clarke* petition for an original action is available at https://acefiling.wicourts.gov/document/eFiled/2023AP001399/687203. The supporting memorandum is available at https://acefiling.wicourts.gov/document/eFiled/2023AP001399/687204.

[4] Full cite: *Johnson v. Wisconsin Elections Comm'n,* 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402, *cert. granted, opinion rev'd sub nom. Wisconsin Legislature v. Wisconsin Elections Comm'n*, 595 U.S. 398 (2022), and *overruled by Clarke v. Wisconsin Elections Comm'n*, 2023 WI 79, 410 Wis. 2d 1, 998 N.W.2d 370.

*Michael Adams*, 684 S.W.3d 663 (Ky. 2023); *Rivera v. Schwab*, 512 P.3d 168 (Kan. 2022).

In short, because the questions presented here are so similar to those the Court eschewed in *Clarke*, this Court should deny the petition for an original action.

### C. The Petitioners ask this Court to answer a political question.

The "need for extensive fact-finding," *Clarke*, 410 Wis. 2d 1, ¶7, is not the only reason to deny this petition. The Petitioners also ask the Court to answer a political question unfit for judicial determination in general.

In an effort to propose a neutral and manageable standard for remedying their claims, the Petitioners urge this Court to use principles of partisan fairness. This is no solution, however. Partisan fairness is too amorphous to be a manageable criterion. To see why, suppose our state's electorate were perfectly split: exactly half votes Republican while half votes Democratic. If, under one map, Democrats yield five congressional seats, and Republicans yield only three, is that representation "fair"? Some might say so; others might not. While the Democratic share of the representation—63% of seats—is no doubt higher than its half-share of the electorate, it is only slightly higher, given there are only eight seats. But now assume Democrats win six seats after receiving the same slice of the votes. Is that fair, after the divergence has expanded to 25%? The question only becomes more difficult to answer. Finally, what if the divergence shoots up still even further? What if Democrats receive 100% of the seats despite receiving 50% of the vote? A 50% divergence—that *must be* unfair. So at some point between 50% and 0% the map gives Democrats an unfair advantage. Yet where exactly is that point? And

how does one even begin to find it? One's personal conception of fairness is the only lodestar, and that's why questions of partisan fairness and gerrymandering are inherently "political, not legal." *Rucho v. Common Cause*, 588 U.S. 684, 737 (2019). Such questions cannot be managed neutrally by courts.

There are several reasons why there is no judicially manageable standard for deciding what constitutes a politically fair map. "To begin with, measuring a state's partisan divide is difficult." *Johnson v. Wisconsin Elections Comm'n* (*Johnson I*), 2021 WI 87, ¶43, 399 Wis. 2d 623, 967 N.W.2d 469.[5] "Even if a state's partisan divide could be accurately ascertained, what constitutes a 'fair' map poses an entirely subjective question with no governing standards grounded in law." *Id.* ¶44. What is more, to ensure proportional party representation, a court would need to disregard constitutionally required redistricting criteria. *Id.* ¶¶47–49.

"Perhaps the easiest way to see the flaw in proportional party representation is to consider third party candidates. Constitutional law does not privilege the 'major' parties; if Democrats and Republicans are entitled to proportional representation, so are numerous minor parties." *Id.* ¶49. "If Libertarian Party candidates receive approximately five percent of the statewide vote, they will likely lose every election; no one deems this result unconstitutional." *Id.* "Only meandering lines, which could be considered a gerrymander in their own right, could give the Libertarians (or any other minor party) a chance." *Id.*

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[5] In *Clarke*, this Court overruled *Johnson I* to the extent it had made "passing statements about the contiguity requirements of Article IV, Sections 4 and 5" and to the extent it had "mandate[d] a least change approach" for selecting remedial maps. *Clarke v. Wisconsin Elections Comm'n*, 2023 WI 79, ¶¶24, 63, 410 Wis. 2d 1, 998 N.W.2d 370, 384.

This Court has recognized before that redistricting in general is inherently political. In *Jensen*, for example, the Court made clear that "redistricting remains an inherently political and legislative—not judicial—task." *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶10, 249 Wis. 2d 706, 639 N.W.2d 537. And this Court has also, more specifically, recognized that claims about partisan gerrymandering are inherently political too. Indeed, in *Johnson I* this Court recognized that "the people have never consented to the Wisconsin judiciary deciding what constitutes a fair partisan divide." *Johnson I*, 399 Wis. 2d 623, ¶45.

Nothing legally relevant has changed since *Jensen* and *Johnson I* were decided. To prevent a perception of political motivation, this Court should honor its previous wisdom and deny the petition here. As ever, partisan fairness eludes judicial management.

## CONCLUSION

This Court should deny the petition for an original action.

Dated this 6th day of June 2025.

Respectfully submitted,

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## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 1,912 words.

Dated this 6th day of June 2025.

*Electronically signed by*
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