

In the Supreme Court of Wisconsin

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, *and* CARRIE RIEPL, *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.

On Petition To The Supreme Court To
Take Jurisdiction Of An Original Action

**PROPOSED RESPONSE IN OPPOSITION TO THE PETITION
FOR ORIGINAL ACTION OF PROPOSED
INTERVENOR-RESPONDENTS CONGRESSMEN GLENN
GROTHMAN, BRYAN STEIL, TOM TIFFANY, SCOTT
FITZGERALD, DERRICK VAN ORDEN, AND TONY WIED, AND
INDIVIDUAL VOTERS GREGORY HUTCHESON, PATRICK
KELLER, PATRICK MCCALVY, AND MIKE MOELLER**

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INTRODUCTION

In *Johnson v. WEC*, 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402 (“*Johnson II*”), this Court adopted a congressional map submitted by Governor Tony Evers, after holding that the map “complie[d] with the federal Constitution and all other applicable laws,” *id.* ¶ 7. Governor Evers, in turn, had developed this map by starting with Wisconsin’s 2011 congressional map, which map a federal court found was a bipartisan negotiated map after discovery into its drafting history. *Baldus v. Members of Wis. Gov’t Accountability Bd.*, 849 F. Supp. 2d 840, 853–54 (E.D. Wis. 2012) (per curiam). Petitioners now claim that a map that a Democratic Governor drew from a bipartisan negotiated map, and which this Court adopted thereafter, is nevertheless so favorable to Republicans that it violates a spaghetti-against-the-wall, grab-bag of provisions in the Wisconsin Constitution.

There are numerous reasons why this Court should deny the Petition. *Johnson v. WEC*, 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469 (“*Johnson I*”), held that partisan gerrymandering does not violate the Wisconsin Constitution, so this Petition involves no unsettled issues. But even if this Court wanted to reconsider that holding at some point, this case is an exceedingly poor vehicle for that for at least four reasons.

First, adjudicating partisan gerrymandering allegations here would involve deciding the issues of partisan intent and partisan effect as to the *Johnson II* map, even under Plaintiffs’ own out-of-state caselaw. As to partisan intent, this Court would have to permit fact-intensive discovery into the 2011 redistricting process—which took place 14 years ago—so that this Court can decide if the U.S. District Court for the Eastern District of Wisconsin was wrong when it concluded that the map was a bipartisan negotiated map after its own discovery process. And this Court would then have to permit discovery into Governor Evers’ process in modifying that map. As to partisan effect, while Petitioners spill much ink asserting confidently that the map entrenches the current partisan makeup of Wisconsin’s congressional delegation, neutral sources strongly suggest the opposite. The widely respected Cook Political Report classifies Districts 1 and 3 as R+2 and R+3, respectively, which means that those districts would be a toss-up given candidates of equal public appeal to those districts. *See infra* pp.15–16. Even the Democratic Congressional Campaign Committee (“DCCC”) lists these districts as two of the “35 competitive Republican-held districts” in the

Nation that it is targeting. App.524 (Democratic Cong. Campaign Comm., *DCCC Announces 2026 Districts in Play* (Apr. 8, 2025)).¹

Second, the Petition is egregiously untimely, and Petitioners have no explanation as to why they waited until 2025 to file this Petition, when their claims were ripe in 2022—two election cycles ago.

Third, adopting Petitioners’ approach and requested remedy would violate the Elections Clause of the U.S. Constitution because it would involve this Court adopting a novel, atextual interpretation of the Wisconsin Constitution to overturn its own least-changes map and replace it with a map not based in what the Legislature has enacted.

Finally, two of the members of this Court would need to recuse before this case could be adjudicated on the merits—or else raise serious Due Process Clause problems under the U.S. Constitution. Raising such federal Due Process Clause issues that would stem from a failure to recuse would, in turn, only further encourage the U.S. Supreme Court to take up this case, in order to decide not only that Due Process Clause issue, but also the federal issue of whether a sudden recognition of an

¹ Available at <https://dccc.org/dccc-announces-2026-districts-in-play/> (all webpages last visited June 5, 2025). Citations of “App.” refer to the Appendix that the Congressmen and the Individual Voters have filed to support this Proposed Response in Opposition to the Petition and their simultaneously filed Proposed Motion to Recuse Justice Janet C. Protasiewicz.

atextual prohibition on partisan gerrymandering, in order to declare that a court-drawn, least-changes map was unconstitutional and then judicially adopt a new map violates the Elections Clause.

STANDARD FOR GRANTING A PETITION FOR ORIGINAL ACTION

When determining whether to grant an original action petition, this Court considers three factors. *See* Wis. Const. art. VII, § 3. First, “the[] issues raise[d]” must be “unresolved questions of statewide significance,” *Clarke v. WEC*, 409 Wis. 2d 372, 375, 995 N.W.2d 779 (2023)—that is, unsettled issues that are “*publici juris*,” *Petition of Heil*, 230 Wis. 428, 443–46, 284 N.W. 42 (1939). Second, the petition must demonstrate “exigency” to justify the departure from the conventional litigation. *Id.* at 442–43. Finally, an original action is only appropriate where the petition involves limited material factual disputes, such that this Court can reach “a speedy and authoritative determination” on the petition’s legal questions. *Id.* at 446.

ARGUMENT

I. *Johnson I* Already Rejected Petitioners’ Theories, And This Court Declined To Reopen The *Johnson II* Congressional Map Just Last Year Based On Much The Same Arguments

A. In *Johnson I*, this Court held that partisan gerrymandering does not violate Article I, Sections 1, 3, 4, or 22 of the Wisconsin

Constitution. 2021 WI 87, ¶ 53. Beginning with Article I, Section 1’s Equal Protection Clause, this Court concluded that “[c]ontriving a partisan gerrymandering claim” from the Wisconsin’s equal protection guarantees “would require [the Court] to indulge a fiction[:] that partisan affiliation is permanent and invariably dictates how a voter casts every ballot.” *Id.* ¶ 56. This Court similarly concluded that partisan gerrymandering does not violate the freedom of speech and association guarantees enshrined in Article I, Sections 3 and 4 because “[e]ven after the most severe partisan gerrymanders, citizens remain free to” “endorse and campaign for their favorite candidates, vote, and otherwise influence the political process.” *Id.* ¶ 60 (citation omitted). And this Court concluded that Article I, Section 22 did not provide a source for a partisan gerrymandering claim either. *Id.* ¶ 62.

In *Johnson II*, this Court adopted a congressional map that complied with *Johnson I* and “all other applicable laws.” 2022 WI 14. ¶ 7. Then, just last year, this Court rejected the Elias Group’s attempt to reopen the congressional map based upon materially indistinguishable arguments, App.460 (Order, *Johnson v. WEC*, No.2021AP1450-OA (Wis. Mar. 1, 2024)), including based upon *Clarke* and allegations that the map was too favorable to Republicans. *See*

App.311–12 (Mem. In Supp. Of Mot. For Relief From J., *Johnson v. WEC*, No.2021AP1450-OA (Jan. 16, 2024)). An original action is not appropriate in these circumstances, where the Elias Group is simply repackaging its failed motion for reconsideration as a petition for original action.

B. Petitioners nevertheless attempt to get this Court to take a different approach than it did just last year, while asking this Court to ignore as “dicta” *Johnson*’s express rejections of their core theories. Mem.11, 21, 33. But whether partisan gerrymandering violates the Wisconsin Constitution was unquestionably “a question germane to [the] controversy” in *Johnson I*, *Zarder v. Humana Ins. Co.*, 2009 WI App 34, ¶ 11, 316 Wis. 2d 573, 765 N.W.2d 839, that the “parties to th[e] action” expressly raised, *Johnson I*, 2021 WI 87, ¶¶ 2, 53.

The Congressmen and Individual Voters lack the space here to rebut each of Petitioners’ scattershot efforts to invent an atextual, partisan gerrymander prohibition in the Wisconsin Constitution, including their risible theory—not even arguably suggested by any court decision that they cite, from any federal or state authority—that the separation of powers doctrine constitutionally *requires* courts to balance the expected partisan outcomes of congressional maps when redressing

malapportionment issues. It bears noting, however, that Petitioners’ invented prohibitions are in no way “ground[ed]” in the “constitution’s text or our state’s history” as this Court’s established caselaw requires. *Evers v. Marklein*, 2024 WI 31, ¶ 25, 412 Wis. 2d 525, 8 N.W.3d 395; *Coulee Cath. Schs. v. Lab. & Indus. Rev. Comm’n*, 2009 WI 88, ¶ 57 n.25, 320 Wis. 2d 275, 768 N.W.2d 868.

Petitioners’ theories are particularly meritless as applied to judicially adopted maps, and thus do not meet the standards for original action for that additional reason, given the lack of any serious, unsettled issue. *See Clarke*, 409 Wis. 2d at 375; *Heil*, 230 Wis. at 442–43. Petitioners ask this Court to be the first court in the Nation to adopt a partisan gerrymandering inquiry to test a map adopted by a court (indeed, a map adopted by *this* Court), without any basis in constitutional text, history, or any fair reading of this Court’s caselaw.

II. This Petition Is An Exceedingly Poor Vehicle For Reconsidering *Johnson*

A. Adjudicating Any of Petitioners’ Claims Involves Extensive Fact Inquiry, Including Into The 14-Year-Old Congressional Redistricting Process That A Federal Court Found Was Bipartisan

1. This Court is “especially” “reluctan[t]” to exercise its rare original action jurisdiction “where questions of fact are involved.” *In re Exercise of Original Jurisdiction of Sup. Ct.*, 201 Wis. 123, 128, 229 N.W.

643 (1930) (per curiam). When a petition “depends upon disputed factual claims,” “[t]hat alone means th[e] case is not well-suited for an original action,” App.491 (Order, *Wis. Voters All. v. WEC*, 2020AP1930-OA (Wis. Dec. 4, 2020) (Hagedorn, J., concurring, joined by Js. Bradley, Dallet, and Karofsky))—even if the petition “raise[s] important and unresolved questions of statewide significance,” *Clarke*, 409 Wis. 2d at 375. This “counsels against addressing” claims of “partisan gerrymander[ing],” which require “extensive fact-finding (if not a full-scale trial).” *Id.* at 373–75.

Petitioners’ own authorities, in turn, make clear that partisan gerrymandering claims require proof of two fact-intensive elements: partisan intent and partisan effect. *See, e.g.* Mem.16–17 (citing *Grisham v. Van Soelen*, 539 P.3d 272 (N.M. 2023); *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018); *Rucho v. Common Cause*, 588 U.S. 684 (2019) (Kagan, J., dissenting); *Szeliga v. Lamone*, No.C-02-CV-21-1816, 2022 WL 2132194, at *4 (Md. Cir. Ct. Mar. 25, 2022); *League of Women Voters of Fla. v. Detzner*, 172 So.3d 363 (Fla. 2015)). These two elements are met through “district-specific evidence” of intent to “effect political entrenchment through intentional and substantial vote dilution,” and that the map achieves that entrenchment

effect. *Grisham*, 539 P.3d at 292 (adopting “the Kagan test” found in Justice Kagan’s *Rucho* dissent)

2. Granting the Petition will require this Court to permit a fact-intensive investigation as to the Legislature’s intent in 2011, as well as the Governor’s intent in 2022, and the *Johnson II* map’s partisan effect, which is entirely inappropriate for original action review.

As to partisan intent, Petitioners’ theory would require this Court to adjudicate the disputed issue of whether the Legislature adopted the 2011 map for the purpose of entrenching Republicans in the delegation majority, considering “all evidence relevant to” its adoption. *Grisham*, 539 P.3d at 292; *see also Rucho*, 588 U.S. at 735–36 (Kagan, J., dissenting) (discussing the “catalogue[] [of] overwhelming direct evidence” the plaintiffs’ presented to show the legislators’ “predominant purpose of entrenching their own party in power”); *League of Women Voters*, 178 A.3d at 788 (considering the expert testimony, alternative plans, and other evidence of an intent to disadvantage Democratic voters). Petitioners allege that after the 2010 elections, “[t]he Republican leaders oversaw a redistricting process that was designed to maximize Republican advantage at the expense of Democrats,” and leave the Democrats in “permanent minority status.” Pet. ¶¶ 2, 29–31. These

allegations would be *hotly* disputed, to put it mildly. Notably, these allegations contradict the U.S. District Court for the Eastern District of Wisconsin’s finding that the 2011 congressional map was drafted in a “bipartisan process,” after it considered evidence that included testimony by those involved in the map’s drafting. *Baldus*, 849 F. Supp. 2d at 853–54; Pet. ¶¶ 30–33 (citing *Baldus*’s consideration of this very evidence).

Further, given that Governor Evers modified the 2011 congressional map in *Johnson* in numerous respects, Petitioners’ claim would also require discovery into the Governor’s map-drawing process in 2022 that led to the submission of the *Johnson* congressional map.

As to partisan effect, the Court will need to determine whether the map dilutes Democrat’s votes, such that politicians have “entrench[ed] themselves in office as against voters’ preferences” and “elections are effectively predetermined.” *Grisham*, 539 P.3d at 284; *Rucho*, 588 U.S. at 737–40 (Kagan, J., dissenting). While Petitioners look to the two election results since 2021 to predict that the map will always produce the same partisan split, Mem.23, by “crack[ing] Democrats into small groups across Districts 1, 3, 5, and 6, so they cannot achieve a majority in any one of those districts,” Mem.28, that will also be hotly disputed. To take just one public source, the widely respected Cook Political Index

recently concluded that two of the seats that Petitioners believe will always remain Republican would be toss ups given equal candidate quality and appeal to their districts, with ratings of R+2 (District 1) and R+3 (District 3). App.521 (Cook Political Report, 2025 Cook VSI: District Map and List (119th Congress)).² As the DCCC clearly does not believe that Democrats “cannot achieve a majority in any one of those districts,” Mem.28, as they are specifically targeting Districts 1 and 3 two of the very few highly competitive districts in the entire Nation. *See supra* pp.7–8.

In any event, to determine what evidence to credit as to whether the *Johnson II* map has the effect of entrenching a republican majority in its House delegation, this Court will need to adjudicate a “battle of the experts” of the type that the out-of-state cases that Petitioners tout did. *See Szeliga*, 2022 WL 2132194, at *40; *League of Women Voters of Pa.*, 178 A.3d at 770–81 (detailing the opinions of six different experts); *Rucho*, 588 U.S. at 738–39 (Kagan, J., dissenting) (discussing differing experts at trial). After parties submit their slate of competing experts, the parties will need to depose those experts, and then conduct “a full-scale trial” so that this Court—sitting as a fact-finder—can decide which

² Available at <https://www.cookpolitical.com/cook-pvi/2025-partisan-voting-index/district-map-and-list>.

experts’ analysis is more persuasive. *Clarke*, 409 Wis. 2d at 375. Notably, **every partisan gerrymandering case that Petitioners cite ended up having a trial to decide whether the challenger map was actually partisan gerrymandered.** *League of Women Voters of Pa.*, 178 A.3d at 767 (five-day trial); *Rucho*, 588 U.S. at 692 (four-day trial); *League of Women Voters of Fla. v. Detzner*, 172 So.3d 363, 376 (Fla. 2015) (twelve-day trial); *In Re 2021 Redistricting Cases*, 528 P.3d 40, 62 (Alaska 2023) (twelve-day trial); *Szeliga*, 2022 WL 2132194, at *3 (four-day trial); *Grisham*, 539 P.3d at 292–93 (describing the types of evidence the district court should collect when considering the gerrymandering claim). Such a trial is, of course, extremely poorly suited for the original action context. *See supra* pp.12–14.

Contrary to Petitioners’ suggestion, Mem.15, this extensive discovery and a “full-scale trial,” *Clarke*, 409 Wis. 2d at 375, would be necessary even if this Court were to grant review of only their (frankly ludicrous) separation-of-powers Count IV. *Contra* Mem.15. That Count alleges that the Court itself violated the separation of powers by “intentionally” “entrenching a partisan political advantage” in the *Johnson II* map, Mem.34, by “[d]eferring to a biased, decade-old map,” Mem.38. To decide the partisan intent prong of their unprecedented

claim, therefore, this Court would have to decide *whose* partisan intent matters for that atextual, unprecedented (in any State) separation of powers claim—the 2011 map-drawers, Governor Evers in 2022, and/or this Court in *Johnson II*—and permit discovery and then trial to decide that intent. Further, this Court would need to permit expert dispute, expert depositions, and then a trial on the alleged partisan effect of the *Johnson II* map. This would be a fact intensive inquiry, which this Court has repeatedly stated is “alone” reason to deny original action review, App.491, and is why this Court declined to consider the *Clarke* petitioners’ partisan gerrymandering claim, *Clarke*, 409 Wis. 2d at 375.

B. The Petition is Egregiously Untimely

As in *Felton v. WEC*, No.2025AP999-OA (Wis. May 8, 2025)—another petition for an original action before this Court seeking to challenge the *Johnson II* congressional map—Petitioners’ years-long, unexplained delay in filing the Petition shows that there is no “exigency,” *Heil*, 230 Wis. at 443, or “irreparable hardship,” *Application of Sherper’s, Inc.*, 253 Wis. 224, 228, 33 N.W.2d 178 (1948), justifying this Court considering the issues here in an original-action posture, especially since doing so would greatly prejudice the Congressmen, Individual Voters, and all Wisconsinites relying on the *Johnson II* map, *see* Opp. at 16–19, *Felton*, No.2025AP999-OA (May 29, 2025) (“*Felton* Opp.”). Petitioners

offer no explanation *at all* for waiting until May 2025 to file the Petition when the legal basis for their claims has existed at least since this Court adopted the *Johnson II* congressional map in 2022 and they have had ample opportunity to challenge that map’s alleged gerrymandering—including in 2023, either at the same time that the *Clarke* challengers filed their lawsuit or even immediately after *Clarke* was decided. *See Felton* Opp.16–18. Rather than bringing their challenges before “the soonest [possible] election[],” *Clarke v. WEC*, 2023 WI 79, ¶ 42, 410 Wis. 2d 1, 998 N.W.2d 370, Petitioners allowed the *Johnson II* map to govern two congressional cycles, such that “seeking an entirely new congressional map for the State” now “would upend th[e] significant, yearslong, core political activity” that the Congressmen and Individual Voters have engaged in relying on the *Johnson II* map, *Felton* Opp.19.

If anything, Petitioners’ delay is even worse than the delay in *Felton* since Petitioners’ own lawyers already tried much the same gambit when they unsuccessfully sought to reopen *Johnson II* and obtain a new map based on the Court’s rejection of the least change approach for state-legislative redistricting in *Clarke* last year. *See* App.333–37 (Mot. Relief From J., *Johnson v. WEC*, No.2021AP1450-OA (Jan. 16, 2024)). Now, just over a year later, Petitioners’ counsel return to this

Court again challenging the *Johnson II* map with new clients, hoping to deliver on a recent campaign promise by political allies. *See supra* pp.10–11.

C. Petitioners Ask This Court To Violate The Elections Clause Of The U.S. Constitution

1. Under the Elections Clause, “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature thereof*.” U.S. Const. art. I, § 4 (emphasis added). Accordingly, when adjudicating congressional maps, state courts must not “transgress the ordinary bounds of judicial review,” thereby “arrogat[ing] to themselves the power vested in state legislatures to regulate federal elections.” *Moore v. Harper*, 600 U.S. 1, 36–37 (2023).

In *Moore*, the U.S. Supreme Court addressed a challenge to North Carolina’s congressional map as an unlawful partisan gerrymander under the State’s constitution. *Id.* at 11. The legislative defendants argued that the Elections Clause “insulates state legislatures [drawing congressional maps] from review by state courts for compliance with state law,” *id.* at 19, while other parties claimed that state courts have plenary authority to review congressional maps and “free rein” to say what state law is, *id.* at 34. The Court was, thus, presented with two extreme theories: one that could potentially nullify the Elections

Clause’s protections for the Legislature’s constitutional role; and another that could undermine the authority of state courts to ensure that those maps comply with state law. *See id.* at 34–37.

The *Moore* Court opted for a middle ground between the parties’ radical positions, warning state courts not to use novel readings of state law to exert too much authority over the congressional-redistricting process and seize control from state legislatures. *See id.* While state legislatures are “not exempt . . . from the ordinary constraints imposed by state law,” that does not mean that “state courts . . . have free rein” when determining whether a congressional map satisfies state law. *Id.* at 34. Rather, state courts must “ensure that state court interpretations of [state] law do not evade federal law,” *id.*, by “read[ing] state law in such a manner as to circumvent federal constitutional provisions,” *id.* at 34–35. “[S]tate courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections.” *Id.* at 36. Should a state court “so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures by Article I, Section 4, of the Federal Constitution,” the U.S. Supreme Court stands ready “to exercise judicial review.” *Id.* at 37.

2. Here, this Court recognizing for the first time a partisan gerrymandering theory under the Wisconsin Constitution in any of Petitioners’ forms to invalidate and redraw a map mid-decade that this same Court adopted in *Johnson II* would violate the Elections Clause under *Moore*. 600 U.S. at 36. The *Moore* inquiry looks to whether a state court has “read state law in such a manner as to” “exceed the bounds of ordinary judicial review.” *Id.* at 35–37. *Johnson I* already held that the Wisconsin Constitution “has nothing to say about partisan gerrymander[ing]” and “[c]ontriving a partisan gerrymandering claim from the text of the Wisconsin Constitution” would “overstep[] [the Court’s] judicial role.” 2021 WI 87, ¶¶ 55–56. Overturning that holding now without any change in the Constitution’s text or any other relevant considerations, and doing so in order to permit this Court to redraft a new congressional map without regard to the map that the Legislature adopted in 2011, would be this Court exercising “free rein” to announce “interpretations of [state] law” that allow it “unconstitutionally intrude upon the role specifically reserved to state legislatures” in congressional redistricting—violating the Elections Clause. *Moore*, 600 U.S. at 34–37.

The *Johnson II* congressional map being a least-changes, court-drawn map exacerbates the Elections Clause issues here. This Court

endorsed the “least change” approach due to the respect owed to the political branches, *including under the Elections Clause*, because that approach carries forward to the extent possible, the judgments of the political branches in a prior, legislatively drawn map. *Johnson I*, 2021 WI 87, ¶¶ 12, 64, 81. So, by applying the “least change” approach in *Johnson II* itself, this Court carried forward the Legislature and the Governor’s judgments in the prior, legislatively drawn 2011 congressional map. 2022 WI 14, ¶¶ 13–19. If this Court were to overturn *Johnson I*’s holding that the Wisconsin Constitution is not “offended by partisan gerrymandering,” 2021 WI 87, ¶ 53, and conclude that it itself violated those provisions by adopting the gerrymander map, so that it could draw a new map without regard to the map the Legislature adopted in 2011, that would flout the Supreme Court’s cautious admonition to state courts in *Moore*.

Invalidating the *Johnson II* congressional map under Petitioners’ separation-of-power theory, *see* Pet.28–29; Mem.34–40, would just as clearly violate the Elections Clause. Petitioners claim that the separation of powers doctrine requires the Court to consider “proposed redistricting plans['] . . . partisan outcomes,” Mem.40, and to politically balance any map that it draws, *see* Mem.34–40, without “[d]eferring to”

the map “enacted by . . . [the] legislative body and signed by [the] Governor,” Mem.38. Petitioners’ assertion that this Court must “independently develop” its own congressional map specifically to change the partisan results under the map the Legislature adopted in 2011 is the type of judicial action that would most clearly violate the Elections Clause. Mem.40. Indulging Petitioners’ separation-of-powers theory would violate *Moore*’s principle by giving “state courts . . . free rein” to read state law to “transgress the ordinary bounds of judicial review” and “arrogate to themselves the power vested in state legislatures to regulate federal elections.” 600 U.S. at 34–36.

D. Justice Protasiewicz And Justice-elect Crawford Would Need To Recuse From This Case

For the same reasons the Congressmen and Individual Voters explained in *Felton*, this Petition is a poor vehicle to consider Petitioners’ novel state constitutional claims because both the Fourteenth Amendment’s Due Process Clause and Wisconsin law would require the recusal of Justice Protasiewicz and Justice-elect Crawford (when she joins the Court on August 1, 2025). *See Felton* Opp.24–26. Federal and Wisconsin law require recusal of a judge who discloses “actual bias” or where there is an objective perception of a “serious risk” of such “bias or prejudgment.” *Id.* at 24 (citing *Williams v. Pennsylvania*, 579 U.S. 1, 8

(2016); *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 884 (2009); Wis. Stat. § 757.19(1), (2)(f)–(g), (4)). Here, as the Congressmen and Individual Voters explained in *Felton* and in their contemporaneously filed Motion To Recuse, Justice Protasiewicz and Justice-elect Crawford must recuse from this case because they have, or at least appear to have, prejudged the issues presented here in light of public statements they made and/or their significant personal interest in the outcome of this matter due to relevant campaign contributions. *See id.* at 25–26. Justice-elect Crawford’s donors “expect” her “‘presence on the court’ to ‘result’ in Democrats being able to win two additional US House seats” by redrawing the congressional map. *Id.* at 25–26 (citing Order at 2, *Felton*, No.2025AP999-OA (May 15, 2025) (R.G. Bradley, J., dissenting)). Without their participation, the Court “may be unable to issue a majority opinion” in this case, leaving these issues “unreviewed and unreviewable” and counseling against granting the Petition. *Id.* at 25 (citations omitted).

Failure to recuse would only compound the Elections Clause issue discussed above, *supra* pp.20–24, making it even more likely that the U.S. Supreme Court will need to step in. This is especially the case if the *Johnson II* congressional map becomes the first judicially adopted

map in the Nation's history to be invalidated as a partisan gerrymander and then judicially redrawn, when the only change that has occurred in those three years is this Court's composition.

CONCLUSION

This Court should deny the Petition For Original Action.

Dated: June 5, 2025.

Respectfully submitted,

*Electronically signed by Misha
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FORM AND LENGTH CERTIFICATE

I hereby certify that this document conforms to the rules contained in Wis. Stat. §§ (Rule) 809.19(8)(b) and 809.81(1), as well as the length limitations contained in this Court's May 15, 2025 Order for a non-party brief produced with a proportional serif font. The length of this response is 4313 words.

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