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IN THE SUPREME COURT OF WISCONSIN
No. 2026AP001008

Wisconsin Business Leaders for Democracy, John A. Scott, Nicholas G. Baker, Beverly Johansen, Rachel Ida Buff, Kimberly Suhr, Sarah Lloyd, Nancy Stencil, Vikas Verma and James T. Lyerly,

Plaintiffs-Appellants,

v.

Wisconsin Elections Commission, Marge Bostelmann, Ann S. Jacobs, Don Millis, Robert F. Spindel, Jr., Carrie Riepl, Mark L. Thomsen and Meagan Wolfe,

Defendants-Respondents,

Billie Johnson, Chris Goebel, Aaron Gunther, Charles Hanna, Tim Higgins, Lou Kowieski, Chris Muller, Eric O’Keefe, Craig Rosand, Ruth Streck, Ronald Zahn, Glenn Grothman, Bryan Steil, Tom Tiffany, Scott Fitzgerald, Derrick Van Orden, Tony Wied, Gregory Hutcheson, Patrick Keller, Patrick McCalvy, Mike Moeller and Wisconsin State Legislature,

Intervenors-Defendants-Respondents,

Frederick B. Wade,

Amicus.

On Appeal from Dane County Circuit Court, Three-Judge Panel pursuant to
Wis. Stat. § 751.035, The Honorable David Conway, Michael Moran, and
Patricia Baker, Presiding
Case No. 2025CV002252

**NON-PARTY BRIEF OF *AMICUS CURIAE* FREDERICK B. WADE
IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICUS*

Frederick B. Wade is a Wisconsin Attorney, who did graduate work in constitutional and legal history at the University of Wisconsin under the late Stanley Kutler, before earning his law degree from the University of Wisconsin Law School. He has maintained professional and personal interests in constitutional law, the work of this Court, and the rule of law since that time.

He is the author of “*The Origin and Evolution of Partial Veto Power*,” which was published in the *Wisconsin Lawyer Magazine* in March of 2008. He has also authored guest columns about the Wisconsin Constitution and the jurisprudence of this Court that have appeared in the *Capital Times*, the *Wisconsin State Journal*, and the *Milwaukee Journal Sentinel*.

INTRODUCTION

This Court has recognized that it is the “fundamental purpose” of the Wisconsin Constitution “to create and define the institutions whereby a representative democratic form of government may effectively function.” *State ex. rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 555, 126 N.W.2d 551 (1964). This brief contends that an anti-competitive gerrymander cannot be reconciled with the representative form of government that the Wisconsin Constitution has established, because it subverts, impairs and thwarts the most basic constitutional function that a representative government is designed to perform.

The premise of a representative form of government is that equally free and independent people are sovereign, and therefore, have an inherent right to make their own laws, by means of representation in a legislative assembly. As John Adams put it, in his 1776 *Thoughts on Government*, a “representative assembly . . . should be in miniature, an exact portrait of the people at large,” so that it may “*think, feel, reason, and act like them*” (emphasis added, III. *Thoughts on Government*, April 1776). *The Founder’s Constitution*, Univ. of Chicago Press.

<https://founders.archives.gov/documents/Adams/06-04-02-0026-0004>

But, if the allegations of the complaint are true, Wisconsin's congressional delegation has actually been chosen by members of the legislature, and not "by the people" at large, as the Wisconsin Constitution requires. As a result, our congressional delegation cannot "*think, feel, reason, and act*" as a proxy for "the people at large" in determining whether legislation will be given the approval and consent of the governed.

A representative form of government cannot perform its most basic constitutional function of enabling the people to make their own laws, by giving their approval and consent to legislation through their legislative representatives, if it is not actually representative of the people. That is why the intentional suppression of electoral competition at issue here cannot be reconciled with the text, design and structure of the Wisconsin Constitution.

ARGUMENT

I. THE WISCONSIN CONSTITUTION HAS ESTABLISHED A REPRESENTATIVE FORM OF GOVERNMENT THAT SECURES THE RIGHT OF THE PEOPLE TO MAKE THEIR OWN LAWS.

A. The Wisconsin Constitution Secures the Right of the People to Make Their Own Laws.

The Wisconsin Constitution is part of the ongoing American experiment in representative self-government. In this context, our state Constitution, and the Constitution of the United States, were both written to secure “the right of the people to make their own laws,” through representation in the legislative branches of our state and national governments. See *State ex. rel. Attorney General v. Cunningham*, 81 Wis. 440, 485, 51 N.W. 724 (1892), *Hurtado v. California*, 110 U.S. 516, 535 (1884). As the U.S. Supreme Court stated in *Hurtado*, the greatest security for “those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . resides in the right of the people to make their own laws . . .” through their elected representatives.

The Wisconsin Constitution secures this right of popular self-government with a “finely wrought and exhaustively considered” prescription for legislative action that is designed to “preserve [the]

freedom.” of self-government. See *Evers v. Marklein*, 2025 WI 36, 22 N.W.3d 789, 800, quoting *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764 (1983). As set forth below, this prescription for legislative action makes clear that the anticompetitive gerrymander cannot be reconciled with the purpose and function of the representative government that has been established by the text, design and structure of the Wisconsin Constitution.

For example, it vests “the legislative power” in “the people of the state of Wisconsin, represented in senate and assembly.” Wis. Const, Art. IV, Sections 1 and 17(1). It provides for popular election of representatives of the people to choose the laws under which we all must live, and it prescribes a bicameral deliberative process of “enactment by bill” for the consideration of all proposed laws. Art. III, Sections 2-3, Art. IV, Sections 1-7 and Section 17. And, finally, it requires that each bill must be given the approval and consent of the governed by requiring that “[e]very bill . . . shall have passed the legislature . . . before it becomes a law.” Wis. Const., Article V, Section 10 (1)(a).

B. The Wisconsin Constitution Gives More Protection to the Right of Representative Self-Government Than the Constitution of the United States.

The Wisconsin Constitution and the Constitution of the United States have substantially similar prescriptions for legislative action. See *Evers v. Marklein*, supra. Each constitution has established a representative form of government that effectively requires the approval and “consent” of the governed for legislation, by providing that “[e]very bill . . . shall have passed” the representatives of the people, either in our state legislature, or the House of Representatives in Congress. Compare Wis. Const. Art. V, Section 10 and U.S. Const. Art. I, Section 2.

However, the Wisconsin Constitution differs from the Constitution of the United States. It declares the paramount purpose of a representative form of government by paraphrasing the Declaration of Independence in Section 1 of Article I. In addition, it contains several provisions that clarify how our representative form of government is supposed to function. Taken together, these provisions provide additional support for the proposition that the anti-competitive germander is incompatible with the text, design and structure of the Wisconsin Constitution.

- 1. Article I, Section 1, Declares the Paramount Purpose and Function of Wisconsin’s Representative Form of Government by Recognizing That Laws Must Have the Approval and Consent of the Governed.**

Section 1 of Article I paraphrases the Declaration of Independence as follows:

All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.

These words constitutionalize two fundamental principles of a representative form of government: (a) that “governments are instituted” in order “*to secure*” certain “*inherent rights*” of “*equally free and independent*” people and (b) that the means of “securing” such rights is a process of “*deriving their just powers from the consent of the governed*” (emphasis added) Art. I, Section 1. This Court has recognized that these words establish “the substructure on which our whole constitutional system is bottomed.” *State ex. rel. McGrael v. Phelps*, 144 Wis. 1, 14, 128 N.W. 1041 (1910).

In this context, it is important to recall that the American Revolution was a response to the claim of the British Parliament that it had the power to legislate for the people of the American colonies “in all cases whatsoever.” In its reply to that claim, the First Continental Congress issued a Declaration of Rights on October 14, 1774, with two declarations that are relevant here. The first states that the English colonists “have the

following rights . . . [including] life, liberty, and property, and they have never ceded . . . a right to dispose of either *without their consent* (emphasis added).” The second relevant declaration (# 4 in the cited document) contends that:

The foundation of English liberty and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented . . . in the British parliament, they *are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved.*

(emphasis added, First Cont. Cong. Declaration of Rights, 1774, Yale Law School Avalon Project,

https://avalon.law.yale.edu/18th_century/resolves.asp.)

In short, the Continental Congress asserted that the rights to representation, and “a free . . . power of legislation,” were part of the “liberty” that the colonists were entitled to enjoy as Englishmen. In this context, Section 1 of Article I of the Wisconsin Constitution expresses the same ideas in different words, by classifying “liberty” as one of “inherent” rights of “equally free and independent” people, and by implicitly recognizing that legislative assemblies are the necessary means of determining how a government may “derive” powers from “the consent of the governed,” and enable the people to exercise their “free and exclusive

power of legislation.”

2. Article IV, Section 17(2) Explains How Government May Derive Powers “From the Consent of the Governed.”

The Wisconsin Constitution recognizes in Art. IV, Section 17(2) that the need for “derivation” of governmental powers requires a process for determining, and documenting, what the will of “equally free and independent” people may be with respect to the approval of legislation. The Wisconsin Constitution supplies that need with a command that “[n]o law shall be enacted except by bill,” (Art. IV, Section 17(2)), and as noted above, it implements that command with the detailed prescription for legislative action that is contained in Articles IV and V of the Wisconsin Constitution.

This process gives the meaning to the “consent of the governed” phrase that is contained in both the Declaration of Independence and Section 1 of Article I of the Wisconsin Constitution, because a bill requires the approval (and therefore the “consent”) of the representatives of the people in order to pass.

The process for the enactment of bills originated in the Parliament of Great Britain in 1414, more than 600 years ago, to guarantee that all

statutes would have the approval and consent of the House of Commons. In that year, the King agreed that “‘henceforth nothing [would] be enacted . . . whereby . . . [the House of Commons] should be bound without their assent.’” See Bernard Schwartz, *The Roots of Freedom: A Constitutional History of England*, 86 (New York, 1967).

The process of enactment by bill was extended to the provincial legislatures of the American colonies beginning in 1619 with the establishment of the Virginia House of Burgesses. Accordingly, when the Declaration of Independence was adopted in 1776, the colonists had used their provincial legislatures, and the process of enactment by bill for decades, and in the case of Virginia, for more than 150 years.

Under these circumstances, the concept of “deriving. . . powers” of government “from the consent of the governed” was plainly a familiar one at the time. It was the essence of the founder’s concept of liberty.

3. Article IV, Section 17(1) Makes Clear That Wisconsin Laws Must Have the Consent of the Governed.

The Wisconsin Constitution requires that each bill must have an enacting clause, which represents that a passed bill actually has the approval and consent of the governed. Section 17(1), Art. IV. The

prescribed clause for each passed bill does this by stating that the passage of a bill constitutes an “act” of “the people of the state of Wisconsin, represented in senate and assembly.” This requirement confirms that “the consent of the governed” is a prerequisite for the making of a law, because a bill cannot be passed into law without the approval (and consent) of a majority of the representatives of the people in the Senate and the Assembly. And the fact that the enactment of a bill is an “act” of the people makes clear that the law must have “the consent of the governed.”

4. Article I, Section 22, Recognizes That The Wisconsin Constitution Has Established “A Free Government” That Needs to Be Maintained.

Finally, the Wisconsin Constitution recognizes that Wisconsin has a free representative government that needs to be “maintained.” In pertinent part, it states:

Maintenance of Free Government. Section 22 . . . a free government can only be maintained by . . . frequent recurrence to fundamental principles.

This Court has recognized that “the right of a free people . . . to make their own laws through their own representatives . . . [is] essential to a free government.” *State. ex rel. Attorney General v. Cunningham*, supra., 81 Wis. at 485. In this context, it is evident that the Wisconsin Constitution has established “a free government” for the people of Wisconsin, because

Section 1 of Article I, Section 17 of Article IV, and the Constitution's prescription for legislative action, taken together, are plainly designed to "secure" the right of equally free people "to make their own" laws through their legislative representatives.

II. THE ANTI-COMPETITIVE GERRYMANDER IS INCOMPATIBLE WITH THE TEXT, DESIGN AND STRUCTURE OF THE WISCONSIN CONSTITUTION BECAUSE IT IS DESIGNED TO SUBVERT, IMPAIR, AND THWART THE FUNCTIONING OF OUR REPRESENTATIVE FORM OF SELF GOVERNMENT.

A republican form of government is based on the premise that legislative representatives will be chosen by the people. For example, the Wisconsin Constitution is explicit in stating that our legislative representatives "shall be chosen . . . by the qualified electors of the several districts." Art. IV, Section 4. It also guarantees the right to vote in "an election for national . . . office" Art. III, Section 2.

If the allegations of the complaint are proved, the anti-competitive gerrymander has constrained the opportunity of the voters to choose congressional representatives, by drawing district lines to suppress electoral competition to favor the re-election of incumbents. Legislators have effectively usurped the right of electors to choose their representatives. These consequences cannot be reconciled with the proposition that the

legislative representatives of the people “*shall be chosen . . . by the qualified electors*” of the State of Wisconsin. Art. IV, Section 4 (emphasis added).

Moreover, there is no legitimate governmental interest to justify what the legislature has done. The intentional rigging of congressional elections is an invidious practice that cannot be reconciled, with the need to have a House of Representatives that is capable of functioning as a proxy for the people in determining which bills will be given the approval and “the consent of the governed,” and which shall not.

In this context, it has been argued that the Constitution has delegated the redistricting power to the legislature. However, it is evident that this power has been given to the legislature for a reason -- to assure that legislative districts are apportioned “according to the number of inhabitants,” and comply with other applicable constitutional criteria. See Section 4 of Article IV. This duty to redistrict should not be construed as a delegation of unlimited discretion to rig the outcome the elections before any votes are cast on the basis of criteria that are not contained in the text of the Wisconsin Constitution. There is nothing in the text of the Wisconsin Constitution that authorizes the legislature to draw district lines for the

purpose of rigging election outcomes on the basis of criteria other than apportionment “according to population,” and the criteria contained in Section 4 of Article IV.

Finally, the practice of rigging the outcome of elections goes beyond this gerrymander and the right to vote. It impairs and distorts the deliberative process of enactment by bill that is intended to permit the people to consider the merits of proposed laws by means of representation in their legislative assembly. It also subverts, impairs and thwarts the ultimate right of the people to choose the laws under which we all must live, by passing bills with the approval and “consent of the governed,” as determined by their representatives.

CONCLUSION

A representative form of government cannot perform its most basic constitutional functions if it is not actually representative of the people. Accordingly, this Court should: (1) “construe . . . [the Constitution] in relation to the fundamental purpose of the constitution as a whole.” *State ex. rel. Reynolds v. Zimmerman*, supra, 22 Wis. 2d at 555; (2) declare that the anti-competitive gerrymander is unconstitutional; (3) order the legislature to draw remedial maps that do not use an extra-constitutional

criterion for rigging the outcome of elections; and (4) declare that the Court will draw remedial maps if the legislature does not do so within a reasonable time.

Dated: August 20, 2026.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8(b), (bm), and (c) for a brief. The length of this brief is 2,743 words.

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