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In the Supreme Court of Wisconsin

Case No. 2025AP999-OA

KATE FELTON, LOREN DE LONAY, KYLE JOHNSON, RAYMOND SPELLMAN, VALERIA CERDA, LYNN CAREY, RAFAEL SALAS, CURTIS GAUTHIER AND PATRICIA SCIESZINKSI,
Petitioners,
V.
WISCONSIN ELECTIONS COMMISSION, ANN S. JACOBS, MARK L. THOMSEN, CARRIE RIEPL, DON M. MILLIS, ROBERT F. SPINDELL, JR., MARGE BOSTELMANN, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN ELECTIONS COMMISSION AND MEAGAN WOLFE, IN HER OFFICIAL CAPACITY AS THE ADMINISTRATOR OF THE WISCONSIN ELECTIONS COMMISSION,
Respondents.

Non-Party Brief of Wisconsin Manufacturers and Commerce Inc.

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Table of Contents

Table of Authorities

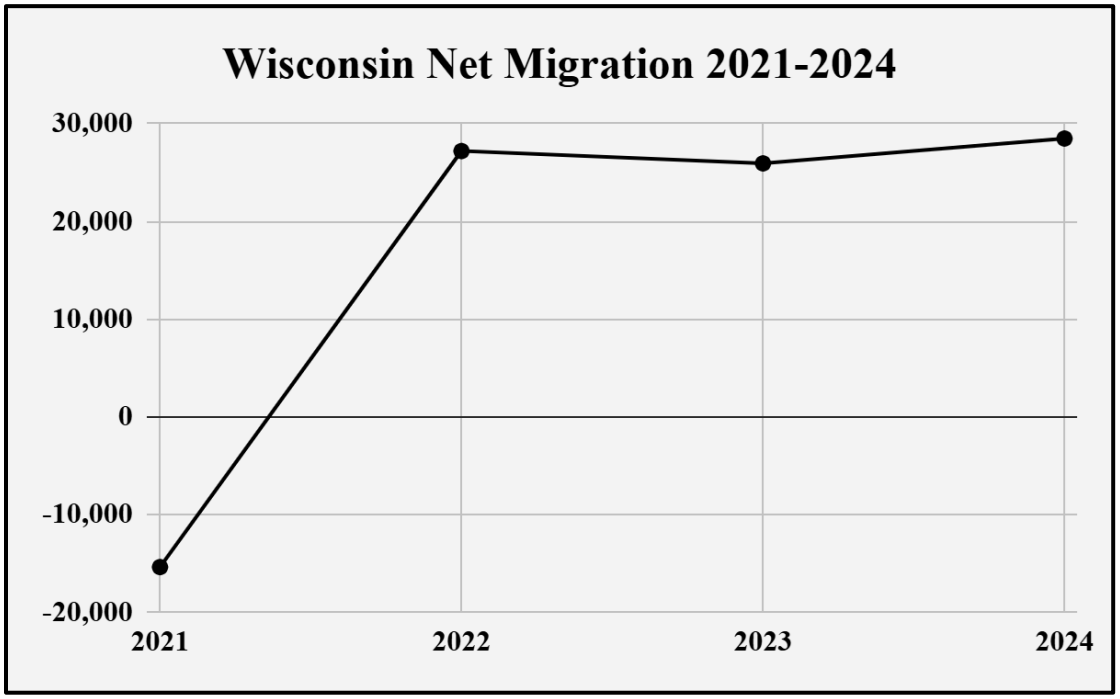
Cases

Other Authorities

Introduction

All this over a scruple, a 0.000271% deviation. And what's worse, it's incurable.

The Petitioners would have this Court toss Wisconsin's congressional map because one district is one person too big. But compulsory equality of population requires the freedom of a prison. Wisconsinites move (see below). Populations shift. On-the-ground equality is practically impossible. This Court should deny the Petitioners' request for an original action.



Discussion

This Court should deny the Petitioners' request for an original action. This Court, in *Johnson II*,[1] weighed in on the issue the Petitioners

[1] 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.*

present, and the Petitioners offer no good reason to disturb that ruling today.

A. In *Johnson II* this Court held that exact proportionality between districts is unneeded.

"Shortly after the completion of the 2020 decennial census, a group of voters petitioned this court to declare the 2011 maps unconstitutional and remedy the malapportionment." *Johnson II*, 2022 WI 14, ¶2. As a result of that litigation, the Court "received proposed congressional maps from four parties," including Governor Evers. *Id.* ¶7. After considering each of the four sets of proposed maps, the Court adopted those drawn by Governor Evers. *Id.* To choose between those four proposals, none of which were ostensibly unconstitutional, the Court used as its guide the principle of least change. *Id.* ¶¶7, 12–19. In other words, it chose the maps that were closest to the ones already in place. *Id.*

In adopting the Governor's maps, the Court also expounded on the redistricting standards contained in both the United States and Wisconsin Constitutions. Regarding the Wisconsin Constitution, the Court explained, "The Wisconsin Constitution contains no explicit requirements related to congressional redistricting." *Id.* ¶20. And even though "no party develop[ed] an argument that the Wisconsin Constitution requires something for congressional districts not already necessary under the United States Constitution," *id.*, the Court nonetheless determined that the maps it was adopting were legal—that they "'compl[ied] with all relevant state and federal laws." *id.* ¶25.

Wisconsin Elections Comm'n, 595 U.S. 398 (2022), and *overruled by Clarke v. Wisconsin Election Comm'n*, 2023 WI 79, 410 Wis. 2d 1, 998 N.W.2d 370.

Though speaking about the requirements under the United States Constitution, the Court even addressed the population differences scrutinized by the Petitioners here. In adopting the Governor's congressional map, the Court acknowledged it did not achieve complete population equality, though it did, the Court explained, "come[ ] close to perfect equality." *Id.* ¶21. Although "[s]everal parties argue[d] … that the Governor's two-person deviation violates the United States Constitution," the Court concluded those arguments, at their best, represented "a strained reading of the law." *Id.*

Outright rejecting the notion that the map created districts illegally disproportionate under the United States Constitution, the Court emphasized that "the Supreme Court has been willing to accept 'small differences in the population of congressional districts' 'so long as they are consistent with constitutional norms.'" *Id.* ¶22 (quoting *Karcher v. Daggett*, 462 U.S. 725, 740 (1983)). The Court further noted the reasons that populations sometimes deviate: "Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." *Id.* (quoting *Karcher*, 462 U.S. at 740) (internal quotation marks omitted).

This Court then spotlighted examples of legal deviations. One was a West Virginia map that contained "a 4,871-person deviation." *Id.* ¶22. That map, as this Court explained, was upheld because that "deviation advanced the state's interests in maximizing core retention and maintaining whole counties." *Id.* The Court also looked to Arkansas, whose map contained then a 428-person deviation (since, that deviation

has increased to 710[2]). *Id.* ¶23. Others, cropping up all across the nation, ranged from 2 to 628. *Id.* Today, although some states have eliminated their deviations, they still range from 2 all the way up to 2,481 (Hawaii).

That reasoning, even if used narrowly there to explain the bounds of the federal Constitution, is highly relevant to this case. Indeed, it is binding. This Court has for long made clear that it "applies the same interpretation to the state Equal Protection Clause found in Wis. Const. art. I § 1, as that given to the federal provision, U.S. Const. amend. XIV § 1." *State v. Post*, 197 Wis. 2d 279, 317 n.21, 541 N.W.2d 115 (1995). Therefore *Johnson II*, combined with *Post*, forecloses the arguments the Petitioners make here. Because the federal Constitution's Equal Protection Clause does not require a state's congressional districts to have exactly equal populations, neither does the Wisconsin Constitution's counterpart.

B. The Petitioners offer no reason to overturn this Court's decision in *Johnson II*.

It is true: "states have the power to afford greater protection to citizens under their constitutions than the federal constitution does." *State v. Roberson*, 2019 WI 102, ¶56, 389 Wis. 2d 190, 935 N.W.2d 813. But this Court has appropriately restrained itself in this respect. Tempering an otherwise impetuous power, this Court has recognized it will not supplement the federal Fourteenth Amendment with any protection that "is not supported by [the Wisconsin Constitution's] text or historical meaning." *Id.* In fact, this Court has emphasized that to do so would be to exercise a power it does not have: "A state court does not

[2] National Conference of State Legislators, *2020 Redistricting Deviation Table*, ncsl.org, https://www.ncsl.org/elections-and-campaigns/2020-redistricting-deviation-table (Nov. 9, 2023).

have the power to write into its state constitution additional protection that is not supported by its text or historical meaning." *Id.*

Even though the Petitioners advocate breaking from the federal notion of equal protection, they hardly abide by this Court's command that such a break align with text or historical meaning. Slurring over it almost entirely, the Petitioners merely cite a concurrence, written by Justice Dallet, recognizing that Wis. Const. Art. 1, §1 was a "statement of revolutionary, republican egalitarian ideology." *Matter of Adoption of M.M.C.*, 2024 WI 18, ¶57, 411 Wis. 2d 389, 5 N.W.3d 238 (Dallet, J., concurring). They reason no more whatever, which is dooming.

Justice Dallet's observation might as well be about the Federal Constitution. Indeed, the founding federal documents, like the Wisconsin Constitution, espouse the "American ideal of political equality." *City of Mobile v. Bolden*, 446 U.S. 55, 103–04 (1980) (Marshall, J., dissenting). That noble ideal was "conceived in the earliest days of our colonial existence and fostered by the egalitarian language of the Declaration of Independence." *Id.*

Given that similarity, it is unclear why the Wisconsin Constitution should be interpreted so much more stringently than the federal Constitution. As mentioned, the Petitioners conspicuously fail to offer up any persuasive explanation. As a result, this petition is no more than a thinly reasoned attempt at achieving a political moonshot.

The Petitioners argue the *Johnson II* congressional map is unconstitutional because the Court overruled the least-change approach in *Clarke v. Wisconsin Elections Commission*, 2023 WI 79, 410 Wis. 2d 1, 998 N.W.2d 370. But that argument goes nowhere. This Court used the least-change approach in *Johnson II* to choose between the four

(constitutional) sets of maps proposed there. *Johnson II*, 2022 WI 14, ¶12. Just because the Court might use different criteria today does not mean the map it chose in *Johnson II* was somehow unconstitutional. As the Court in *Johnson II* explained, the Governor's maps "comply[ ] with all relevant state and federal laws." *Id.* ¶25. This Court's least-change abandonment does nothing to disturb that good holding.

In other words, this Court's rejection of the least-change principle in *Clarke* does not render the congressional map constitutionally defective. Notably, in *Clarke*, the Court's rejection of the least-change principle was *not* a basis for requiring new state legislative maps. Instead, the Court concluded those maps "violate[d] Article IV, Sections 4 and 5 of the Wisconsin Constitution" because they contained "non-contiguous" boundaries. *Clarke*, 2023 WI 79, ¶56. After declaring the maps unconstitutional on that ground, the Court addressed which criteria it would "use in adopting remedial maps." *Id.* ¶60. The court then held that it "will not consider least change when adopting remedial maps." *Id.*

So, the Petitioners here need a legal hook for striking down the congressional map. This Court's rejection of the least-change approach does not provide the necessary hook. The Petitioners thus offer two-person deviations between congressional districts as the necessary hook for striking down the maps.

But *Clarke* forecloses that argument. Although *Clarke* overruled *Johnson II* in part, *Clarke* also recognized that "[s]tate and federal law require a state's population to be distributed equally amongst legislative districts with only minor deviations." *Id.* ¶64. The Court acknowledged that "de minimis variation" was constitutionally acceptable. *Id.* The

Court cited several cases where courts had approved deviations above 1%, *id.*—deviations that are much higher than the 0.000271% deviation being challenged here.

Because this Court recognized in both *Johnson II* and *Clarke* that minor deviations are legal, this Court should deny the petition for an original action.

C. Even if *Johnson II* should be overturned, the Petitioners' theory is impossible to enforce.

There is no good reason to overrule *Johnson II* and draw a new congressional map. That said, even if the Court disagrees on that score, it should still deny the petition for an original action. The theory the Petitioners propose this Court adopt is unworkable in practice.

Population discrepancies, such as those described above, are permitted by law not for some wicked or despicable reason. They are allowed because perfection is impossible. Indeed, as the United States Supreme Court has explained, there is "no excuse for the failure to meet the objective of equal representation for equal numbers of people in congressional districting other than the practical impossibility of drawing equal districts with mathematical precision." *Mahan v. Howell*, 410 U.S. 315, 322 (1973). That is why the Supreme Court has permitted "small differences in the population of congressional districts." *Karcher*, 462 U.S. at 740.

For that same reason, this Court should permit the small difference here to stand. The alternative—tossing the current map and adopting a new one—would hardly solve a single problem. Discrepancies are unavoidable. People move. For instance, in 2022 alone, 8.2 million Americans left one state for another (and that figure was up about

300,000 from the year before). Mehreen S. Ismail, *Number and Percentage of State-to-State Movers Increased Between 2021 and 2022*, U.S. Census Bureau (November 21, 2023).[3] Meanwhile, many more moved to a new home within the same state. *Id.* (explaining the 8.2 million who moved out of state composed only 19.9% of all American movers that year).

Wisconsin saw flux too. From 2021 to 2024, its population rose from 5,881,608 to 5,960,975, increasing by 26,455 on average per year (even though an average of 60,432 Wisconsinites also perished). *State Population Totals and Components of Change: 2010-2019*, U.S. Census Bureau (Feb. 19, 2025).[4] While births no doubt added to the rise, Wisconsin welcomed 28,478 new residents to its communities in 2024 alone. *Id.* Below is a table showing these trends.

Year	Population Total	Net Change from Prior Year	Number of Deaths	Net Migration
2021	5,881,608	-15,767	61,984	-15,414
2022	5,903,975	+22,367	63,549	+27,195
2023	5,930,405	+26,430	58,788	+25,932
2024	5,960,975	+30,570	57,405	+28,478

Id.

Enforcing absolute population equality between congressional districts is impossible. On the ground, populations ever shift. If, as the Petitioners argue, nothing works "to balance against [the Wisconsin Constitution's] command for equally populated districts," (Petitioners' Memo at 8), the Constitution should also require that voters live in one

[3] https://www.census.gov/library/stories/2023/11/state-to-state-migration.html.

[4] https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-total.html.

district until a new census begins. Only then could one person always be guaranteed one perfectly equal vote. But, of course, this is a constitution we are expounding. Therefore what matters is that districts not be drawn so, at the outset of every new decade, populations are so wildly different they violate equality per se. The current map—the Governor's map—does nothing of that sort. If this Court were to use outdated 2020 census data to order a new congressional map, the likely result would be discrepancies far greater than the two-person deviation that this Court upheld in *Johnson II*.

This Court should deny the invitation to constitutionalize the Petitioners' proposal for exact district equality. As a result, it should leave the current map in place.

Conclusion

This Court should deny the petition for an original action.

Dated this 29th day of May 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 2,069 words.

Dated this 29th day of May 2025.

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