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**No. 2025AP000999-OA**

# IN THE SUPREME COURT OF WISCONSIN

KATE FELTON, LOREN DE LONAY, KYLE JOHNSON, RAYMOND SPELLMAN, VALERIA CERDA, LYNN CAREY, RAFAEL SALAS, CURTIS GAUTHIER, AND PATRICIA SCIESZINSKI,

*Petitioners,*

*v.*

WISCONSIN ELECTIONS COMMISSION; ANN S. JACOBS, MARK L. THOMSEN, CARRIE RIEPL, DON M. MILLIS, ROBERT F. SPINDELL, JR., AND 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 THE WISCONSIN LEGISLATURE AS *AMICUS CURIAE* IN OPPOSITION TO PETITION FOR AN ORIGINAL ACTION

**CONSOVOY MCCARTHY PLLC**
TAYLOR A.R. MEEHAN*
DANIEL M. VITAGLIANO*†
MARIE E. SAYER, SBN 1127350
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
703.243.9423
taylor@consovoymccarthy.com
dvitagliano@consovoymccarthy.com
mari@consovoymccarthy.com

**AUGUSTYN LAW LLC**
JESSIE AUGUSTYN, SBN 1098680
1835 E. Edgewood Dr.
Suite 105-478
Appleton, WI 54913
715.255.0817
jessie@augustynlaw.com

* *Pro hac vice motions forthcoming*
† *Supervised by principals of the firm admitted to practice in VA*

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## INTRODUCTION

This Court already resolved malapportionment claims for Wisconsin's congressional districts years ago. Beginning in 2021, with the Legislature and the Governor at an impasse over new redistricting legislation, this Court oversaw an original action challenging those districts, bringing them to near-perfect population equality in accordance with the 2020 census. *Johnson v. Wis. Elections Comm'n* (*Johnson I*), 2021 WI 87, ¶¶2, 5, 399 Wis. 2d 623, 967 N.W.2d 469. With more than two dozen parties before this Court, including the Governor, the Legislature, the Wisconsin Elections Commission, Senate Democrats, the congressional delegation, non-profit organizations, and myriad individual voters, and after submissions by a dozen experts, this Court ordered congressional districts to be revised as the Governor proposed. *Johnson v. Wis. Elections Comm'n* (*Johnson II*), 2022 WI 14, ¶52, 400 Wis. 2d 626, 971 N.W.2d 402. Any reasonable observer would have thought congressional redistricting was done for the decade. *See, e.g.*, Order, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Mar. 1, 2024) (rejecting request to re-open congressional redistricting litigation).

But now—years after sitting out *Johnson*—Petitioners ask this Court to start over. Why? Because *one district* has *one person* too many. Based on

what? An unwritten rule in the Wisconsin Constitution, which no longer addresses congressional redistricting *at all*. *Compare* Wis. Const. art. XIV, §11 (1848) (repealed 1982) (addressing congressional districting), *with* Wis. Const. art. IV, §3 (addressing only state assembly and senate districts); *accord Johnson I*, 2021 WI 87, ¶13 (observing no provision of the state constitution addresses congressional districts).

The Wisconsin Constitution's redistricting provisions have not changed between *Johnson* and now. There has been no new census. The only explanation for Petitioners' years-delayed original action is politics: two intervening judicial elections. But "[t]he decision to overturn a prior case must not be undertaken merely because the composition of the court has changed." *Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶95, 264 Wis. 2d 60, 665 N.W.2d 257. The congressional districts are settled. A redraw cannot be squared with the Elections Clause of the U.S. Constitution. Petitioners' novel theory is meritless. Entertaining their late-breaking action rewards their delay. And it raises serious due process questions. The petition must be denied.

## ARGUMENT

Petitioners ask the Court to decide that the Court itself violated Article I, Section 1 of the Wisconsin Constitution in *Johnson* because *one district* has *one person* too many. Pet.2; *id.* ¶¶33-39. Their goal is clearly stated: they want a redraw not to fix that supposed malapportionment but to achieve their version of "political neutrality." Pet.Memo.31. That redraw runs roughshod over the federal and state constitutions.

### I. This Court does not have "free rein" to redistrict congressional districts anew.

The U.S. Constitution tasks "the Legislature" with congressional redistricting. U.S. Const. art. I, §4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof … .").

Applied here, the Legislature enacted new congressional districts in 2011. *See* 2011 Wis. Act 44 (codified at Wis. Stat. §§3.11-3.18). Act 44 was challenged and upheld in federal court, *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 853-54 (E.D. Wis. 2012) (three-judge court), and used in the ensuing five congressional elections. Then in 2021, the census showed those districts were malapportioned. With the

Legislature and the Governor at impasse over new districts, voters challenged the 2011 districts, and this Court remedied their malapportionment claims by making only slight adjustments to existing lines. *Johnson II*, 2022 WI 14, ¶52. Consistent with the judicial power, the Court issued an injunction, with the effect of restoring each district's population to differ by only one or two people—within .0003% of perfect. *Id.* ¶21.

With that injunction, the Court did not itself "redistrict" *carte blanche* as though it were the Legislature. Rather, the injunction had the effect of moving "the fewest number of people into new districts." *Id.* ¶19. For when a state court is put in the unsavory position of adjusting districts, it "follow[s] the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature." *Branch v. Smith*, 538 U.S. 254, 274 (2003) (cleaned up); *see also White v. Weiser*, 412 U.S. 783, 795 (1973) (explaining courts "honor state policies in the context of congressional reapportionment"). To do more would assume legislative power, not "judicial power." Wis. Const. art. VII, §2. Redistricting is "an inherently … legislative—not judicial—task." *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶10, 249 Wis. 2d 706, 639 N.W.2d 537 (per

curiam); *see Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 7 (2024). Had the Court "[t]read[] further than necessary to remedy" malapportionment, *Johnson I*, 2021 WI 87, ¶64, the Court would have raised the specter of a federal Elections Clause violation, *see Moore v. Harper*, 600 U.S. 1, 25 (2023) ("whatever authority [i]s responsible for redistricting, that entity remain[s] subject to constraints set forth in the State Constitution").

There is nothing left for this Court to do. Petitioners' request that this Court redistrict anew, considering "partisan impact" satisfying their version of "political neutrality," Pet.Memo.31, is an invitation to err by assuming responsibilities that the federal Constitution assigns to the Legislature. *See Moore*, 600 U.S. at 34. When addressing congressional districts, "state courts do not have free rein." *Id.* They "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; *accord id.* at 38 (Kavanaugh, J., concurring) (same).

Among other problems with this petition, there is nothing that could justify this Court's redrawing congressional districts anew based on the theory that *one district* contains *one person* too many. Especially not when that's

all pretext to achieve "political neutrality." Pet.Memo.31. The Wisconsin Constitution provides "'no plausible grant of authority' to the judiciary" and "no governing standards grounded in law" to determine "what constitutes a 'fair' map." *Johnson I*, 2021 WI 87, ¶¶44, 52. For this Court to exercise "free rein" and redraw congressional districts, in pursuit of a particular political outcome and despite any legal basis for doing so, would "arrogate to [itself] the power vested in state legislatures to regulate federal elections" under the Elections Clause. *Moore*, 600 U.S. at 34, 36.

## II. Petitioners' claim is meritless.

Petitioners contend their petition raises an issue "of first impression" about whether the Wisconsin Constitution "imposes a *stricter* equality requirement for congressional districts" than the U.S. Constitution that this Court overlooked in *Johnson*. Pet.2-4; Pet.Memo.17. They are wrong. There is no issue of first impression; it is impossible to impose a requirement stricter than the U.S. Constitution; and *Johnson* overlooked no such issue.

**A.** The Wisconsin Constitution provides that "[a]ll people are born equally free." Wis. Const. art. I, §1. That provision is coextensive with the U.S. Constitution's Equal Protection Clause. *State ex rel. Sonneborn v. Sylvester*, 26 Wis. 2d 43, 49-50, 132 N.W.2d 249 (1965) (collecting cases); *see, e.g.*,

*Metro. Assocs. v. City of Milwaukee*, 2011 WI 20, ¶22, 332 Wis. 2d 85, 796 N.W.2d 717 (applying "same interpretation"); *State v. Heft*, 185 Wis. 2d 288, 293 n.3, 517 N.W.2d 494 (1994) (clauses "require[] the identical interpretation"). This Court has said so for more than a century. *See Mayo v. Wis. Injured Patients & Fams. Comp. Fund*, 2018 WI 78, ¶35, 383 Wis. 2d 1, 914 N.W.2d 678; *State ex rel. Kellogg v. Currans*, 111 Wis. 431, 87 N.W. 561, 562 (1901); *Black v. State*, 113 Wis. 205, 89 N.W. 522, 527 (1902); *Pauly v. Keebler*, 175 Wis. 428, 185 N.W. 554, 556 (1921).

Petitioners offer no textual basis to think the Wisconsin Constitution imposes a stricter equality requirement for congressional districts than the U.S. Constitution. *See State v. Roberson*, 2019 WI 102, ¶56, 389 Wis. 2d 190, 935 N.W.2d 813. The federal Equal Protection Clause—the Wisconsin Constitution's analog—presumptively allows up to 10% population deviations for state legislative districts. *See Gaffney v. Cummings*, 412 U.S. 735, 751 (1973). As for congressional districts, the more specific text in Article I of the U.S. Constitution imposes a "more stringent standard[]." *Mahan v. Howell*, 410 U.S. 315, 324 (1973); *see* U.S. Const. art. I, §2, cl. 3 (requiring districts to be "apportioned among the several States … according to their respective

Numbers"). Article I does not permit "*de minimis*" deviations for congressional districts; *any* deviation must be justified by traditional districting principles or other state policies. *Karcher v. Daggett*, 462 U.S. 725, 731-34, 740-41 (1983) (holding "absolute population equality" is "the paramount objective" for congressional districts).

The Wisconsin Constitution, meanwhile, is silent on congressional districts. *Johnson I*, 2021 WI 87, ¶13. The notion that the constitution's general reference to "equally free" imposes a stricter standard than the foregoing federal constitutional provisions "go[es] beyond the meaning of constitutional language" and so "must be … rejected." *Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n*, 2023 WI 38, ¶22 n.6, 407 Wis. 2d 87, 990 N.W.2d 122. This Court has "never held any provision of the Wisconsin Constitution imposes a one person, one vote requirement on congressional districts," *Johnson I*, 2021 WI 87, ¶13 n.4, let alone one more demanding than the "absolute population equality" required for congressional districts by the U.S. Constitution, *Karcher*, 462 U.S. at 732.

If it were otherwise, this Court would have had to say so in *Johnson*. Instead, the Court explained how adjustments to existing districts—the

Governor's proposed remedy—"comply[] with all relevant state and federal laws." *Johnson II*, 2022 WI 14, ¶25. The parties "disputed" whether state and federal requirements were co-extensive; this Court answered that dispute "would not have any substantive impact on our decision." *Id.* ¶20 n.13. Given the U.S. Constitution's "more stringent standard[]," *Mahan*, 410 U.S. at 324, any lesser (or absent) standard in the Wisconsin Constitution would not be outcome-determinative.

**B.** Nor is it possible for the Wisconsin Constitution to impose a stricter population equality standard when the U.S. Constitution already chose the strictest standard for congressional districts. In *Karcher*, for example, the Supreme Court rejected a rule that would allow congressional districts to vary by 1%, even when that 1% variation could be avoided. 462 U.S. at 735-36. The Court reiterated that the U.S. Constitution requires the "rigor" of "absolute population equality," absent some "legitimate state objective." *Id.* at 732-33, 740-41. Deploying that strictest rule here, this Court held that the existing districts pass, and the U.S. Supreme Court rejected arguments to overturn that holding. *Johnson II*, 2022 WI 14, ¶25, *stay denied sub nom. Grothman v. Wis. Elections Comm'n*, 142 S. Ct. 1410 (2022).

Under that strictest standard, there is "no case" from this Court or elsewhere rejecting a congressional map with a mere "two-person deviation." *Id.* ¶23. Previous courts to consider congressional maps with similarly tiny deviations upheld them without hesitation. *See, e.g.*, *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 664 (D.S.C. 2002); *Carter v. Chapman*, 270 A.3d 444, 459-60, 465-67 (Pa. 2022). There, as here, States may justify small deviations—here *one person*—as "necessary to achieve some legitimate state objective." *Karcher*, 462 U.S. at 740-41.

Petitioners' own arguments identify the justification for the miniscule variance here. Wisconsin's third congressional district varies by two, not one, to avoid a county split. *See* Pet.Memo.29-31. While Petitioners contend (wrongly) that this is a reason for the Court to redraw districts from scratch, it's actually an argument for keeping the districts just as they are. *Id*. With that argument, Petitioners show that CD3's one-person variance is permissible to avoid a new county split, not a basis for redrawing districts anew. *See Johnson II*, 2022 WI 14, ¶¶22-23; *Tennant v. Jefferson Cnty. Comm'n*, 567 U.S. 758, 764 (2012) (per curiam).

**C.** If there were any doubt about the petition's lacking merit, consider Petitioners' requested relief. They do not challenge any statute but instead collaterally attack this Court's final judgment. They seek a declaration that "the current congressional map" violates the Wisconsin Constitution and ask the Court to enjoin it. Pet.12. That "map" exists by virtue of the mandatory injunction granted in *Johnson II*. *See* 2022 WI 14, ¶52. Petitioners thus ask this Court to declare its own decision unconstitutional and enjoin its own injunction. The Elections Commission cannot simply ignore the *Johnson II* injunction. *See Cline v. Whitaker*, 144 Wis. 439, 129 N.W. 400, 400-01 (1911) ("An injunctional order, within the power of the court, must be implicitly obeyed so long as it stands . . . unless there is a want of jurisdiction."); *In re Terrell*, 39 F.4th 888, 890 (7th Cir. 2022) ("All judgments are binding" and "an injunction must be obeyed unless stayed, modified, or reversed."). Courts modify prior injunctions in redistricting cases to account for the decennial census, as required by federal and state law. *See* U.S. Const. art. I, §2, cl. 3; Wis. Const. art. IV, §3. No intervening census could explain abandoning the *Johnson II* injunction—only intervening judicial elections.

While this Court may make exceptions for such collateral attacks for the State's own legislative districts, *Clarke v. Wis. Elections Comm'n*, 2023 WI 79, ¶¶51-54, 410 Wis.2d 1, 998 N.W.2d 370, permitting that collateral attack for congressional districts implicates the federal Elections Clause. Such an extraordinary action "transgress[es] the ordinary bounds of judicial review." *Moore*, 600 U.S at 36. Petitioners' invitation for this Court to "arrogate" to itself "the power vested in state legislatures to regulate federal elections" under the Elections Clause, *id.*, must be rejected.

**III. Laches bars Petitioners' claim.**

Laches bars Petitioners' late-breaking original action because Petitioners "unreasonably delayed in bringing the suit." *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶14, 393 Wis. 2d 308, 946 N.W.2d 101 (dismissing original action for undue delay). By delaying, Petitioners flouted their "special duty to bring" election-related "claims in a timely manner." *Trump v. Biden*, 2020 WI 91, ¶30, 394 Wis. 2d 629, 951 N.W.2d 568. Petitioners waited 1,164 days after this Court's judgment in *Johnson II*, 580 days after the *Clarke* litigation began to revisit the legislative districts, and 478 days after other parties unsuccessfully asked to revisit the congressional districts. After all

that delay, Petitioners request lightning-fast proceedings for new congressional districts "in place for the 2026 election." Pet.Memo.29. Their delay leaves less than a year before candidate qualifying begins, Wis. Stat. §8.15, and no time for the normal trappings of litigation. Petitioners' inexcusable delay precludes the extraordinary equitable relief they seek. *See Trump*, 2020 WI 91, ¶¶10-22.

Petitioners claim this action is timely because "[i]t was not until *Clarke* that this Court overruled 'least change.'" Pet.Memo.15 n.5. But that was 503 days ago. Other parties tried to get a redraw of the congressional maps only weeks after that decision. And still, this Court rightly rejected that request. Order, *Johnson*, No. 2021AP1450-OA (Mar. 1, 2024). Where were Petitioners then?

Nothing stopped Petitioners from participating in *Johnson* years ago. But instead, they waited until last month's judicial election. Their decision to "sleep on their rights" is unreasonable and unexplained. *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶14, 389 Wis. 2d 516, 936 N.W.2d 587. "[E]quity aids the vigilant," *id.*, not the opportunistic. That is particularly true in the elections context. Courts cannot "allow persons to gamble on the outcome

of an election contest and then challenge it when dissatisfied"—or satisfied—"with the results, especially when the same challenge could have been made before the public is put through the time and expense of the entire election process." *Trump*, 2020 WI 91, ¶11.

Petitioners contend they did not sue earlier because "it was not feasible to challenge the congressional map … in time for the spring 2024 election deadlines." Pet.Memo.15 n.5. But that does not explain their failure to bring this action earlier and seek relief for the 2026 election. Litigants seeking relief before 2026 elections initiated their challenges in other States years ago. *See, e.g.*, Compl., *Tenn. State Conf. of the NAACP v. Lee*, No. 3:23-cv-832 (M.D. Tenn. Aug. 9, 2023); Pls.' Mot. for Summary Judgment on Count V, at 28-30, *League of Women Voters v. Utah Legis.*, No. 220901712 (Utah 3d D. Ct.) (Aug. 28, 2024) (case initiated in March 2022).

As for the other laches factors, there was no reason to expect this belated challenge, especially after Petitioners sat back for *years* after *Johnson II*, 550-plus days after *Clarke* overruled "least change," and 450-plus days after other petitioners asked to revisit congressional districts. *See Trump*, 2020 WI 91, ¶23; *Brennan*, 2020 WI 69, ¶18. And everyone—voters, constituents,

candidates, congressmembers, and election officials—are prejudiced by their untimeliness. *See Trump*, 2020 WI 91, ¶24. A statewide redraw will "result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). And there is insufficient time to educate voters or for candidates to campaign adequately. *See Chestnut v. Merrill*, 377 F. Supp. 3d 1308, 1317 (N.D. Ala. 2019) (raising concerns about "educat[ing] voters on where the newly drawn district lines lay"); *Simkins v. Gressette*, 495 F. Supp. 1075, 1081 (D.S.C.) (candidates "would have to begin the campaign process again in a new district," losing "the benefit of the campaigning they have already undertaken" and "money already spent"), *aff'd*, 631 F.2d 287 (4th Cir. 1980). All the parties who litigated *Johnson* would "surely [be] placed 'in a less favorable position'" by Petitioners' delay—forced to re-litigate redistricting anew on a schedule that will deprive parties of the opportunity to do so fully and fairly. *See Brennan*, 2020 WI 69, ¶¶24-25. The disruption to voters, constituents, candidates, and congressmembers is unjustified. Allowing it, despite Petitioners' thousand-day delay, again raises the specter of whether this

action "transgress[es] the ordinary bounds of judicial review." *Moore*, 600 U.S at 36.

## IV. Entertaining this original action raises serious due process questions.

### A. Due process would require recusal.

The Due Process Clause of the Fourteenth Amendment "guarantees 'an absence of actual bias' on the part of a judge." *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016). Recusal thus is necessary when a judge's participation in a case creates a "serious risk," "based on objective and reasonable perceptions," of "actual bias or prejudgment." *Caperton v. A.T. Massey Coal. Co.*, 556 U.S. 868, 884 (2009).

**1.** Campaign promises indicate this case was invited and give the appearance that it's pre-decided. *See Williams*, 579 U.S. at 12. Here's a sampling first in 2023 and then in 2025: "You look at Congress—you know, we have eight seats—six are red, two are blue, in a battleground state. So, we know something's wrong."[1] "We know the maps are not fair."[2] "[T]he maps"—

[1] Channel 3000 / News 3 Now, *Wisconsin Supreme Court debate presented by News 3 Now and WisPolitics,* at 29:40-29:49, YouTube (Mar. 21, 2023), https://bit.ly/3HAtZtv.

[2] A.J. Bayatpour, *In only state Supreme Court debate, candidates trade accusations of partisan ties*, CBS 58 (Mar. 21, 2023), https://perma.cc/87BY-66CB.

adopted in *Johnson*—"are wrong."[3] The Court should "have a fresh look at our maps."[4] After all, "[p]recedent changes when things need to change to be fair."[5] Judicial elections are a "chance to put two more House seats in play for 2026."[6] "[W]inning this race," campaign materials read, "could also result in Democrats being able to win two additional US House seats." Order App'x A, *Felton v. Wis. Elections Comm'n*, No. 2025AP999-OA (May 15, 2025) (Grassl Bradley, J., dissenting). These and other promises "pushed the envelope for a judicial candidate by offering voters explicit declarations of her views"[7] and "broke with the staid traditions."[8]

Where, as here, campaigns promise to "change" Wisconsin's congressional delegation,[9] the promise of fairness enshrined in the Due Process Clause is broken. Due process entitles every litigant "to 'a proceeding in

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[3] Corrinne Hess, *Wisconsin Supreme Court candidate Janet Protasiewicz assails state's election maps as 'rigged,'* Milwaukee J. Sentinel (Jan. 9, 2023), https://perma.cc/8T33-Z5M6.

[4] Shawn Johnson, *In a supreme court race like no other, Wisconsin's political future is up for grabs*, NPR (Apr. 2, 2023), https://perma.cc/W2YA-WPA2.

[5] Matt Mencarini, *How could the 2023 Wisconsin Supreme Court election impact medical malpractice lawsuits?*, PBS Wis. (Mar. 31, 2023), https://perma.cc/V87K-LC4C.

[6] Scott Bauer, *Wisconsin Supreme Court candidate criticized for attending briefing with Democratic donors*, AP (Jan. 29, 2025), https://bit.ly/3Zw0hiL.

[7] Ronald Brownstein, *The First Electoral Test of Trump's Indictment*, Atlantic (Mar. 31, 2023), https://perma.cc/CL5C-W5QY.

[8] *The Downballot: The inside story on winning the Wisconsin Supreme Court (transcript)*, Daily Kos (Jan. 25, 2024), https://perma.cc/NV3S-3BJR.

[9] Mencarini, *supra* n.5.

which he may present his case with assurance' that no member of the court is 'predisposed to find against him.'" *Williams*, 579 U.S. at 16. Statements promising to "ma[k]e new law" to achieve a desired outcome, *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986), give the appearance of unconstitutional prejudgment, *see Franklin v. McCaughtry*, 398 F.3d 955, 962 (7th Cir. 2005).

**2.** There also is a serious risk of actual bias given record-breaking Democratic Party campaign contributions. The Democratic Party of Wisconsin spent nearly $10 million on the winning candidate in 2023[10] and another $10 million (at least) on the winning candidate this year.[11]

The U.S. Supreme Court has warned "there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds … when the case was pending or imminent." *Caperton*, 556 U.S. at 884. And here, as in *Caperton*, there was "disproportionate" support from a single donor with a vested interest in proceedings to upend the current congressional map. *Id.* The

[10] *Campaign contributions: PAC and Political Committee Contributors to: Janet C Protasiewicz (NP) – Supreme Court*, Wis. Democracy Campaign, https://perma.cc/9EZD-V69A.

[11] Anya van Wagtendonk, *Trump and Musk's backing wasn't enough to flip Wisconsin Supreme Court*, NPR (Apr. 1, 2025), https://perma.cc/K6NQ-XPG6.

Democratic Party's $10 million contributions to each of their campaigns is more than three times the size of the problematic contribution in *Caperton* and unquestionably "had a significant and disproportionate influence on the electoral outcome[s]." *Id.* at 885.

Moreover, as in *Caperton*, the "temporal relationship" between this petition and promises on the campaign trail create a "serious, objective risk of actual bias." *Id.* at 886. It was "reasonably foreseeable," *id.*, that a new challenge to Wisconsin's congressional districts would come. Everyone knew "Democrats [we]re hoping th[is] court will redraw congressional lines."[12] Now that challenge is here, with Petitioners requesting new congressional districts more favorable to Democrats. Pet.Memo.31. To avoid "serious, objective risk of actual bias," recusals would be required. *Caperton*, 556 U.S. at 886 (holding U.S. Constitution required recusal where the newly elected justice "would review a judgment that cost his biggest donor's company $50 million"); *cf. State v. Herrmann*, 2015 WI 84, ¶40, 364 Wis. 2d 336, 867 N.W.2d 772 (Walsh Bradley, J.) ("judges must be perceived as beyond

[12] Bauer, *supra* n.6.

price"); *see also Williams*, 579 U.S. at 14 (bias infects proceedings with reversible "structural error").

### B. Departures from normal procedures would compound due process concerns.

The Due Process Clause "imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair." *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 33 (1981). It requires "the opportunity to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). In the redistricting context "this court must act *as a court*, and provide, in this as in any other case, all of the procedural protections that due process and the right to be heard require." *Jensen*, 2002 WI 13, ¶22. "The hearing must be 'at a meaningful time and in a meaningful manner.'" *Goldberg*, 397 U.S. at 267. And "where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Id.* at 269; *see also Greene v. McElroy*, 360 U.S. 474, 496 & n.25 (1959) ("confrontation and cross-examination are basic ingredients in a fair trial"). Wisconsin law prohibits courts from resolving factual disputes without "an evidentiary hearing." *See, e.g.*, *Indus. Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶66 n.13, 299 Wis. 2d 81, 726 N.W.2d 898. And here, Petitioners' requested remedial

proceedings to redistrict anew and consider "partisan impact" will generate substantial factual disputes, as the *Clarke* re-litigation showed. *See, e.g.*, *Ohio A. Philip Randolph Inst. v. Householder*, 367 F. Supp. 3d 697, 717-19 (S.D. Ohio 2019) (finding genuine disputes of material fact on "partisan effect" of legislative maps); *Whitford v. Nichol*, 180 F. Supp. 3d 583, 591-97 (W.D. Wis. 2016) (finding "fact issues that need to be resolved at trial" regarding efficiency gap).

There is insufficient time before the 2026 election to adjudicate this case with all the procedural protections that due process requires. *See Jensen*, 2002 WI 13, ¶22. It would violate due process to deny parties an opportunity to cross-examine experts, a hearing for factfinding, and other features of ordinary civil litigation on a normal schedule, rather than rush to judgment before the 2026 elections. Any "depart[ure] from the accepted and usual course of judicial proceedings," *Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010) (per curiam), will deprive parties of a meaningful opportunity to litigate the merits and proposed remedies. "Courts enforce the requirement of procedural regularity on others, and must follow those requirements themselves." *Id.* at 184. Exempting this case from normal procedural rules and

judicial impartiality will only compound the due process violations. *See Allen v. Georgia*, 166 U.S. 138, 140 (1897); *accord Jordan v. Massachusetts*, 225 U.S. 167, 174-75 (1912). Departing from normal scheduling rules, rewarding Petitioners for their delay, and entertaining a meritless constitutional theory never before accepted by any court would leave the unacceptable impression that this case has been rushed to judgment for a major political party.

## CONCLUSION

This Court should deny the petition for an original action.

Dated this 30th day of May, 2025.

Respectfully submitted,

Electronically signed by
*/s/ Marie E. Sayer*

**AUGUSTYN LAW LLC**
JESSIE AUGUSTYN, SBN 1098680
1835 E. Edgewood Dr.
Suite 105-478
Appleton, WI 54913
715.255.0817
jessie@augustynlaw.com

**CONSOVOY MCCARTHY PLLC**
TAYLOR A.R. MEEHAN*
DANIEL M. VITAGLIANO*†
MARIE E. SAYER, SBN 1127350
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
703.243.9423
taylor@consovoymccarthy.com
dvitagliano@consovoymccarthy.com
mari@consovoymccarthy.com

* *Pro hac vice motions forthcoming*
† *Supervised by principals of the firm admitted to practice in VA*

*Attorneys for Non-Party Amicus,*
*The Wisconsin Legislature*

## CERTIFICATION REGARDING LENGTH AND FORM

I certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm), and (c), as modified by the Order of this Court. Excluding the portions of this brief that may be excluded, the length of this brief is 4,305 words as calculated by Microsoft Word.

Dated this 30th day of May, 2025

Respectfully submitted,

Electronically signed by
/s/ *Marie E. Sayer*

**CONSOVOY MCCARTHY PLLC**
MARIE E. SAYER, SBN 1127350
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
703.243.9423
mari@consovoymccarthy.com