No.2025AP999-OA

pp 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 SCIESZINKSI,

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.

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

(Counsel for the Congressmen and the Individual Voters listed on the following page)

MISHA TSEYTLIN
Counsel of Record
State Bar No. 1102199
KEVIN M. LEROY
State Bar No. 1105053
TROUTMAN PEPPER
LOCKE LLP
111 S. Wacker Dr.
Suite 4100
Chicago, IL 60606
(608) 999-1240 (MT)
(312) 759-1938 (KL)
(312) 759-1939 (fax)
misha.tseytlin@troutman.com
kevin.leroy@troutman.com

Counsel for 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

The Petition here is a nonstarter in numerous respects—including because the constitutionality of a two-person, *de minimis* population deviation is not an issue of *publici juris* by any measure, and because Petitioners filed at least three years too late without explanation. Indeed, in *Johnson v. WEC*, 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402 ("*Johnson II*"), when this Court addressed this same deviation in Governor Tony Evers' proposed congressional map, this Court found the deviation so unimportant that it did not even accept the Governor's offer to fix it "overnight." Nothing in the last three years has transformed this two-person deviation into a matter of statewide importance.

Further, the relief that Petitioners seek would violate the Elections Clause of the U.S. Constitution, daring the U.S. Supreme Court to enforce that Clause under *Moore v. Harper*, 600 U.S. 1 (2023). It is hard to imagine a case better fit for high-stakes development of *Moore*'s principle that a state-court decision cannot "transgress[ ] the ordinary bounds of judicial review," *id.* at 36, than a judicial redraw of a "least change" map mid-decade, based upon a two-person-population-deviation theory with no grounding in prior state law, where the genesis and basis for the redraw would be painfully obvious.

STANDARD FOR GRANTING PETITIONS 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 course of litigation, *Heil,* 230 Wis. 442–43, including considering whether declining review would cause "great and irreparable hardship," *Application of Sherper's, Inc.*, 253 Wis. 224, 228, 33 N.W.2d 178 (1948). 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. *Heil*, 230 Wis. at 446.

ARGUMENT

I. Whether The Wisconsin Constitution Prohibits A Two-Person, *De Minimis* Deviation From Perfect Population Equality In A Congressional Map Is Not An Unresolved Question Of Statewide Importance

The Petition raises only a single count, based upon the theory that the equal-protection guarantees in Article I, Section 1 of the Wisconsin

Constitution prohibit a two-person, *de minimis* deviation from perfect population equality in congressional districts. Whether a *de minimis* deviation violates Wisconsin's equal-protection guarantees is not even arguably "*publici juris*," *Heil*, 230 Wis. at 443–46; *see infra* Part I.A, and Petitioners' theory is wrong in any event, *infra* Part I.B.

A. The Petition does not raise a significant question of public importance. The Petition's theory is that a two-person, *de minimis* population deviation violates the Wisconsin Constitution. Black's Law Dictionary defines *de minimis* as "negligible" and "insignificant." *De Minimis*, Black's Law Dictionary (12th ed. 2024). So, resolution of whether such a *de minimis* deviation is unconstitutional cannot, by definition, qualify as having great public significance, *see Heil*, 230 Wis. at 443–46; after all, two-person, *de minimis* deviations are "negligible" and "insignificant," the antithesis of having great public import.

This Court's description of this same *de minimis*, two-person deviation in *Johnson II* confirms that this is not of great public "significance." *Clarke*, 409 Wis. 2d at 375. There, in considering this very *de minimis* deviation in the context of the maximally-stringent standard from Article I, Section 2 of the U.S. Constitution, *see infra* Part I.B, this Court explained that a two-person deviation "comes close to

perfect equality" and is only a "*minor* population deviation." *Johnson II*, 2022 WI 14, ¶¶ 21–24. Notably, if this Court in *Johnson II* had believed that there was public significance in a two-person deviation, it would have been trivially easy to correct it then. After all, "the Governor admitted that a lower deviation could be done *without issue*," *id.* ¶ 174 (Ziegler, C.J., dissenting), and explained at oral argument that he could eliminate it "overnight," Oral Argument at 2:13:00–2:15:34, *Johnson II*, 2022 WI 14.[1] There is, with all respect, no serious argument that the same two-person deviation that *Johnson II* deemed so unimportant as not to justify even an "overnight" correction, *id.*, has now transformed into an issue of "statewide significance," *Clarke*, 409 Wis. 2d at 375, justifying granting an original-action petition.

Even if this Court concludes that it was wrong not to fix this two-person deviation three years ago, that such a deviation existed at that time is a stale concern now. To redraw the *Johnson II* congressional map now, either the Legislature and the Governor or this Court would once again rely upon the now-four-year-old 2021 census data to apportion Wisconsin's congressional districts, operating under the "legal fiction"

[1] Available at https://wiseye.org/2022/01/19/wisconsin-supreme-court-oral-arguments-johnson-v-wisconsin-elections-commission/ (account required) (last visited May 29, 2025).

that Wisconsin's population has not shifted. *Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003). That "legal fiction" is not close to reality, as Wisconsin's population has been "constantly changing, often at different rates in either direction, up or down" since the release of this census data years ago. *Gaffney v. Cummings*, 412 U.S. 735, 746–47 (1973). So, drawing a new congressional map now, based upon four-year-old data, would have no relationship at all to improving actual population equality between the districts. *See id.*

B. Even putting the lack of sufficient importance of deciding the constitutionality of a two-person deviation aside, *supra* Part I.A, a straightforward application of the constitutional text and this Court's precedent refutes any suggestion that the equal-protection guarantees in Article I, Section 1 of the Wisconsin Constitution prohibit a two-person, *de minimis* deviation in a congressional map.

To understand why a two-person deviation cannot possibility violate Article I, Section 1, some background on the U.S. Constitution's population-equality requirement is helpful. Under Article I, Section 2 of the U.S. Constitution, States must apportion their congressional districts so "that as nearly as is practicable one man's vote in a congressional election is . . . worth as much as another's." *Wesberry v.*

Sanders, 376 U.S. 1, 7–8 (1964). Article I, Section 2 is *maximally-stringent* in terms of population equality—it does not permit any "de minimis population variations" in a congressional redistricting map, *Karcher v. Daggett*, 462 U.S. 725, 734 (1983), meaning every deviation must either have been "impossible" to eliminate or be "necessary to achieve some legitimate state objective," *id.* at 730–31, 734, 740. The Equal Protection Clause of the Fourteenth Amendment, on the other hand, imposes a much more flexible rule, which, as a practical matter, governs all districts except for congressional lines subject to Article I, Section 2's more stringent mandate. *Evenwel v. Abbott*, 578 U.S. 54, 59 (2016). That federal Equal Protection Clause only "requires States to make an honest and good faith effort to construct legislative districts as nearly of equal population as is practicable." *Harris v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. 253, 258 (2016) (citation omitted). "Minor deviations from mathematical equality"—defined as "a maximum population deviation under 10%"—"do not, by themselves, make out a prima facie case of invidious discrimination" requiring any "justification by the State." *Id.* at 259 (citation omitted).

The Wisconsin Constitution has no analogue to Article I, Section 2 of the U.S. Constitution, meaning, so far as redistricting is concerned,

population equality under the Wisconsin Constitution is governed only by the equal-protection guarantees found in its Article I, Section 1.[2] The text of Article I, Section 1 itself says nothing about population equality, guaranteeing only that Wisconsinites are "equally free, independent, and have certain inherent rights." Wis. Const. art. I, § 1. So, this Court has repeatedly held that the equal-protection guarantees in the Wisconsin Constitution are "coextensive" with the scope of the Equal Protection Clause of the Fourteenth Amendment. *Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶ 23 n.9, 358 Wis. 2d 1, 851 N.W.2d 337. Time and again this Court has explained that it "appl[ies] the same interpretation to the equal protection provisions of the Wisconsin and the United States Constitutions." *Metro. Assocs. v. City of Milwaukee*, 2011 WI 20, ¶ 22, 332 Wis. 2d 85, 796 N.W.2d 717; *see also, e.g.*, *Nankin v. Vill. of Shorewood*, 2001 WI 92, ¶ 11 n.5, 245 Wis. 2d 86, 630 N.W.2d 141; *Tomczak v. Bailey*, 218 Wis.2d 245, 261, 578 N.W.2d 166 (1998). Consistent with that practice, this Court has long held only that a "'wild and bold departure' from population equality was beyond the mapmaker's discretion." *Johnson II*, 2022 WI 14, ¶ 36, n.20 (citing *State*

[2] The Wisconsin Constitution contains no "explicit requirements related to congressional redistricting." *Johnson II*, 2022 WI 14, ¶ 20.

ex rel Bowman v. Damman, 209 Wis. 21, 30 (1932)). "[P]erfect exactness in the apportionment, according to the number of inhabitants, is neither required nor possible." *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 730 (1982).

Given the above, it is beyond serious dispute that a *de minimis*, two-person deviation from perfect population equality in a congressional map does not violate the equal-protection guarantees in Article I, Section 1, as such a minor deviation would also not violate the Fourteenth Amendment's Equal Protection Clause. Just three years ago, *Johnson II* held that the same "two-person deviation" here "does not violate" even the maximally-stringent standards of Article I, Section 2 of the U.S. Constitution, while noting that no "court has struck down a map on a two-person deviation." *Johnson II*, 2022 WI 14, ¶¶ 23–24; *supra* Part I.A. There is no possible basis in the Wisconsin Constitution's text or history, or this Court's case law, to now hold that the equal-protection guarantees in Article I, Section 1 of the Wisconsin Constitution are somehow more stringent than the maximally-stringent standard in Article I, Section 2 of the U.S. Constitution.

Petitioners assert that "Article I, Section 1 imposes a *stricter* equality requirement for congressional districts than Article I, Section 2

of the federal Constitution," Mem.17, without citing *any* case law or historical sources as support, *see generally* Mem.17–18. Petitioners cite only the general proposition that States may interpret their constitutions to "accord greater protection to individual rights than do similar provisions of the [U.S.] Constitution," Mem.17 (citation omitted), and the fact that the Wisconsin Constitution contains no provisions governing congressional redistricting, Mem.17–18. Neither support Petitioners' belated "discovery" of a no-two-person-deviation standard in the general language of Article I, Section 1.

In any event, Petitioners' own theory would require the Court to affirm the *Johnson II* map, notwithstanding the two-person deviation. In Petitioners' view, deviations from absolute population equality would be justified if they were "narrowly tailored" to further a "compelling state interest." Mem.18 (emphasis omitted). Here, refusing to unsettle the slight, two-person deviation in the *Johnson II* map in 2025, based upon 2021 census data, would easily satisfy that standard, given the State's interest in not redrawing a redistricting map mid-decade—with the attendant, unnecessary voter confusion and burden on reliance and stability interests—to correct a stale, *de minimis* population deviation.

See infra pp.18–19 (discussing harms from redrawing the *Johnson II* map now).

Petitioners' reliance on *Clarke* does not lead to a different conclusion. Mem.23. To begin, *Clarke* says nothing about the application of *Johnson*'s "least change" approach to *congressional maps* in light of the Elections Clause of the U.S. Constitution, *Clarke v. WEC*, 2023 WI 79, ¶¶ 60–63, 410 Wis. 2d 1, 998 N.W.2d 370—just that the Court would no longer "mandate a least change approach" with remedial state-legislative maps, *Clarke*, 2023 WI 79, ¶ 63. But even if *Clarke* did undermine the strength of this "least change" interest for Congressional maps, the justification for upholding this map now, despite the two-person deviation, is far stronger than the Court's original justification in *Johnson II*. *Johnson II* adopted the Governor's map, notwithstanding this deviation, because of the State's interest in "mov[ing] the fewest number of people into new districts," 2022 WI 14, ¶ 19—*even where it was undisputed that deviation could have been corrected "overnight" without increasing the number of people moved under the "least change" approach*, *supra* p.9. But now, because this map has governed two congressional elections, the State has a powerful reliance interest in

retaining it to avoid disrupting future congressional elections with a mid-decade redistricting for no practical benefit.[3]

II. Petitioners' Inexcusable Delay In Filing This Petition Shows That No Exigency Justifies Granting It

A. This Court typically reserves its original jurisdiction for actions involving some "exigency," *Heil*, 230 Wis. at 443, such as where "great and irreparable hardship" would occur absent original-action review, *Sherper's*, 253 Wis. at 228.

B. Petitioners' egregious delay in filing this Petition demonstrates that there is no exigency justifying consideration of the issues here in an original-action posture—especially given the prejudice that the Congressmen, the Individual Voters, and all Wisconsinites relying on the *Johnson II* map would suffer were this Court to grant the Petition.

By filing this Petition in 2025, Petitioners waited at least three years too long. Had Petitioners believed that there was an exigent need for this Court to correct this deviation in the *Johnson II* map, they would

[3] While Petitioners also briefly argue that the *Johnson II* map splits too many counties, the only claim on which they petition for an original action is the minor two-person deviation. Pet.10–11. Further, contrary to Petitioners' attempts to mislead this Court, Pet.10–11, it would be trivially easy to eliminate the two-person deviation without creating additional county splits by moving around a couple of census blocks as between districts, which is presumably what the Governor would have done "overnight" if this Court had been at all concerned about this in *Johnson II*.

have raised this issue with the Court in March 2022, when this Court adopted the *Johnson II* map. 2022 WI 14, ¶¶ 20, 23–25. At that point, Petitioners could have intervened in *Johnson II* or, at minimum, filed their Petition to present their claim.

Petitioners offer no coherent explanation as to why they waited until May 2025 to file this Petition. Petitioners assert that this Court's December 2023 decision in *Clarke* "explains the timing," Mem.15 n.5; Pet.14, as that was when this Court held that it would no longer "mandate a least change approach" with remedial state-legislative maps, *Clarke*, 2023 WI 79, ¶ 63. *But Petitioners have no explanation for why they could not have at least filed their Petition in August 2023, when the Clarke petitioners filed their own petition*, 2023 WI 79, ¶ 42—especially when the legal basis for Petitioners' claim existed since at least March 2022, when this Court decided *Johnson II*. Regardless, Petitioners also have no plausible explanation for waiting about 16 months after the *Clarke* decision to file this Petition. Notably, as *Clarke* explained, seeking relief for "the soonest [possible] election[ ]" was the only justification for the *Clarke* petitioners' delay in filing their petition after *Johnson*, 2023 WI 79, ¶ 42—which justification is entirely lacking here. That is because, in this case, the "soonest election[ ] for which relief

could [have been] granted" after *Johnson II* was *the 2024 election*, *id.*—yet Petitioners inexplicitly chose not to file *until 2025*.

Of course, there is no actual doubt as to why Petitioners waited until May 2025 to file. Petitioners filed now, 16 months after the *Clarke* decision and 38 months after *Johnson II*, because they were encouraged by the victory of then-Judge Crawford, whose supporters publicly discussed that her election "could [ ] result in Democrats being able to win two additional US House seats" from Wisconsin. Order at 2, *Felton v. WEC*, No.2025AP999 (May 15, 2025) (R.G. Bradley, J., dissenting); *see id.* App'x.A (email from then-Judge Crawford supporters making this claim and inviting supporters to join a "donor advisors briefing" with her). Exploiting a change in "the composition of th[is] [C]ourt" is not a valid reason for delay, or a recipe for instilling public "confidence in the reliability of [this Court's] decisions." *Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶ 95, 264 Wis. 2d 60, 665 N.W.2d 257.

Petitioners' yearslong delay significantly prejudices the Congressmen, the Individual Voters, and all those Wisconsinites who relied on the *Johnson II* map. *See Clarke*, 2023 WI 79, ¶ 43. Although several of the Congressman initially (and timely) opposed the *Johnson II* map when the Governor proposed it, including because of the two-person

deviation, *e.g.*, *Johnson II*, 2022 WI 14, ¶ 16, this Court rejected those objections and "adopt[ed] the Governor's proposed congressional [map]" "for all upcoming elections," *id.* ¶ 52. So, over the course of the two congressional elections since *Johnson II*, the Congressmen and their campaign volunteers and supporters—including the Individual Voters—"spent significant time and resources campaigning" for their election or reelection in the *Johnson II* map congressional districts. App.504–15 (Declarations of Individual Voters);[4] App.487–503 (Declarations of Congressmen); *compare Clarke*, 2023 WI 79, ¶ 43. The Congressmen have spent years building "significant relationship[s] with [their] constituents" and endeavoring to understand their needs—including the Individual Voters. *See* App.487–503; *compare Clarke*, 2023 WI 79, ¶ 43. Petitioners would upend this significant, yearslong, core political activity by seeking an entirely new congressional map for the State. That unquestionably causes deep, unfair prejudice to the Congressmen, the Individual Voters, and all similarly situated Wisconsinites, which is reason alone to deny the Petition. *Compare id.*

[4] Citations of "App." refer to the Appendix that the Congressmen and the Individual Voters have filed to support all of their May 29, 2025 filings.

III. Redrawing The *Johnson II* Map Because Of A Two-Person Deviation, Based On Plaintiffs' Novel State-Law Theory, Would Violate Article I, Section 4 Of The U.S. Constitution

A. The Elections Clause of the U.S. Constitution provides that "[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). As the U.S. Supreme Court held in *Moore*, the Elections Clause prohibits state courts from "transgress[ing] the ordinary bounds of judicial review" when considering the lawfulness of congressional maps drawn by state legislatures, thereby "arrogat[ing] to themselves the power vested in state legislatures to regulate federal elections." 600 U.S. at 36–37.

In *Moore*, plaintiffs challenged North Carolina's congressional map as an impermissible partisan gerrymander under their state constitution. *Id.* at 11. Legislative defendants raised an Elections Clause defense, claiming that this Clause "insulates state legislatures [drawing congressional redistricting maps] from review by state courts for compliance with state law." *Id.* at 19. In response, other parties argued that state courts have plenary authority to review congressional maps for compliance with state law, with "free rein" to say what state law is. *Id.* at 34. In all, the parties in *Moore* presented two radical theories, with fears that the Court endorsing either extreme position

would nullify the Elections Clause's protections for the Legislature's constitutional role, on the one hand, or the authority of state courts to ensure that those maps satisfied state law, on the other. *See id.* at 34–37.

The U.S. Supreme Court charted a middle ground between these two extremes, with a warning to state courts not to exert too much authority over the congressional-redistricting process and seize control from state legislatures via novel readings of state law. *See id.* While state legislatures are "not exempt . . . from the ordinary constraints imposed by state law, state courts do not have free rein" when determining whether a congressional map complies with state law, however understood. *Id.* at 34. 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 35. So, "state 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.

B. Here, this Court redrawing the "least change" *Johnson II* map mid-decade, due to a *de minimis* two-person deviation that the Court found unproblematic just three years ago—and on the grounds of an unprecedented state-constitutional *de minimis* malapportionment theory—would violate the Elections Clause, as this would "so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon" the Legislature's role, *id.*, and "arrogate to" this Court "the power vested in state legislatures to regulate federal elections," *id.* at 36.

What Petitioners ultimately seek here is a judicial redraw of the *Johnson II* congressional map, based upon a novel interpretation of a state constitution's equal-protection guarantees. As explained above, there is nothing in the text or history of the Article I, Section 1, or in this Court's precedent, even arguably suggesting that it imposes the strict population-equality requirement on congressional maps that Petitioners assert. *Supra* Part I.B. *Indeed, Petitioners have not identified any court, anywhere in the Nation adopting such an interpretation of a state constitution's equal-protection clause.* Given that complete dearth of authority, this Court injecting such an interpretation into Article I,

Section 1 to justify a fresh judicial redraw of Wisconsin's congressional map would flagrantly "exceed the bounds of ordinary judicial review," violating the Elections Clause. *Moore*, 600 U.S. at 37.

That the *Johnson II* map was itself a judicially adopted map only deepens the Elections Clause problem. The 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 v. WEC*, 2021 WI 87, ¶¶ 12, 64, 81, 399 Wis. 2d 623, 967 N.W.2d 469. So, by applying the "least change" approach in *Johnson II* itself, the Court carried forward the judgments of the Legislature and the Governor in the prior, legislatively drawn congressional map from 2011. 2022 WI 14, ¶¶ 13–19. And, in so doing, *Johnson II* held that the very same two-person deviation here was consistent even with the maximally-stringent standards of Article I, Section 2 of the U.S. Constitution. 2022 WI 14, ¶¶ 20–24. If this Court were to read an even-more-stringent-than-Article-I-Section-2 standard into Wisconsin's equal-protection guarantees, so that it could draw a new redistricting map without regard to the lines the Legislature adopted in

2011, that would flout the U.S. Supreme Court's cautious admonition to state courts in *Moore*, provoking a predictable reaction.

IV. This Case Would Be A Poor Vehicle To Consider Petitioners' Theory Because Justice Protasiewicz And Justice-elect Crawford Would Need To Recuse

This Petition is also a poor vehicle to consider Petitioners' novel state-constitutional equal-population claim because both the Due Protection Clause of the Fourteenth Amendment to the U.S. Constitution and Wisconsin law would require recusal of Justice Protasiewicz and Justice-elect Crawford (when she joins the Court on August 1, 2025).

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) (citations omitted), as well as the absence of a "serious risk" of such bias "based on objective and reasonable perceptions" of "actual bias or prejudgment," *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 884 (2009). Wisconsin law is in accord—and, indeed, is even more protective of judicial impartiality—providing that a judge "must" recuse where "she cannot, or it appears . . . she cannot, act in an impartial manner" or "has a significant . . . personal interest in the outcome of the matter." Wis. Stat. § 757.19(1), (2)(f)–(g), (4). This Court should generally not grant review of a case to resolve an

issue of statewide importance where two Justices would have to recuse. *See Clarke v. WEC*, 2023 WI 66, ¶ 41, 409 Wis. 2d 249, 995 N.W.2d 735 (opinion of Protasiewicz, J., on recusal). That is because, if "two or more justices recuse, the supreme court may be unable to issue a majority opinion," leaving "issue[s] of statewide importance unreviewed and unreviewable." *Id.*

Here, Justice Protasiewicz and Justice-elect Crawford (when she joins the Court) would need to recuse if this Court granted the Petition, making it a poor vehicle to address Petitioner's novel state-constitutional equal-population claim. As for Justice Protasiewicz, she must recuse both because—as the Congressmen and the Individual Voters fully explain in their contemporaneously filed proposed Motion To Recuse—she has, or appears to have, prejudged the issues here, and because she has, or appears to have, a personal interest due to the significant campaign contributions she received from the Democratic Party. The same is true for Justice-elect Crawford, once she joins the Court with this case still pending. Justice-elect Crawford's election campaign was "the most expensive campaign for a state supreme court seat in United States history," with her receiving $11 million from the Democratic Party. Order at 2, *Felton v. WEC*, No.2025AP999 (May 15, 2025) (R.G.

Bradley, J., dissenting). These donors "expect" Justice-elect Crawford's "presence on the court" to "result in Democrats being able to win two additional US House seats, half the seats needed to win control of the House in 2026," by redrawing the State's congressional map, *id.* (citation omitted)—which is what Petitioners request here.

Any refusal to recuse in the face of these facts would only compound the need for the U.S. Supreme Court to review this case to enforce the U.S. Constitution, including deciding the high-stakes Elections Clause issue discussed above. *Supra* Part III. Such review would, in turn, result in significant consequences for state courts throughout the Nation. This Court should not trigger such serious concerns under the U.S. Constitution, especially when the *casus belli* for the Petition is a two-person deviation so minor that this Court did not think it worth correcting "overnight" three years ago.

CONCLUSION

This Court should deny the Petition For Original Action.

Dated: May 29, 2025

Respectfully submitted,

Electronically signed by Misha Tseytlin
MISHA TSEYTLIN
Counsel of Record
State Bar No. 1102199
KEVIN M. LEROY
State Bar No. 1105053
TROUTMAN PEPPER
LOCKE LLP
111 S. Wacker Dr.
Suite 4100
Chicago, IL 60606
(608) 999-1240 (MT)
(312) 759-1938 (KL)
(312) 759-1939 (fax)
misha.tseytlin@troutman.com
kevin.leroy@troutman.com

Counsel for 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

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 4,395 words.

Electronically signed by Misha Tseytlin
MISHA TSEYTLIN
Counsel of Record
State Bar No. 1102199
TROUTMAN PEPPER LOCKE LLP
111 S. Wacker Dr.
Suite 4100
Chicago, Illinois 60606
(608) 999-1240 (MT)
(312) 759-1939 (fax)
misha.tseytlin@troutman.com