FILED
06-06-2025
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2025AP996-OA

ELIZABETH BOTHFELD, JO ELLEN BURKE, MARY COLLINS, CHARLENE GAEBLER-UHING, PAUL HAYES, SALLY HUCK, TOM KLOOSTERBOER, ELIZABETH LUDEMAN AND LINDA WEAVER,

Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION, DON MILLIS, ROBERT F. SPINDELL, JR., MARGE BOSTELMANN, ANN S. JACOBS, MARK L. THOMSEN, CARRIE RIEPLE, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF THE WISCONSIN ELECTIONS COMMISSION; AND MEAGAN WOLFE, IN HER OFFICIAL CAPACITY AS ADMINISTRATOR OF THE WISCONSIN ELECTIONS COMMISSION,

Respondents.

ORIGINAL ACTION

# NON-PARTY BRIEF OF GOVERNOR TONY EVERS IN SUPPORT OF PETITION FOR AN ORIGINAL ACTION

JOSHUA L. KAUL
Attorney General of Wisconsin

COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7636
(608) 294-2907 (Fax)
rothct1@doj.state.wi.us

MEL BARNES
State Bar #1096012

Office of Governor Tony Evers
Post Office Box 7863
Madison, WI 53707-7863
(608) 266-1212
mel.barnes@wisconsin.gov

CHRISTINE P. SUN*
MARINA EISNER*
SALLY C. MARSH*

States United Democracy Center
1101 17th Street, NW, Suite 250
Washington, DC 20036
(202) 999-9305
christine@statesunited.org
marina@statesunited.org
sally@statesunited.org

* Application for admission *pro hac vice* forthcoming

Attorneys for Non-Party Governor
Tony Evers

## TABLE OF CONTENTS

INTRODUCTION ..... 1
ARGUMENT ..... 2
I. The people of Wisconsin deserve fair congressional maps. ..... 2
A. Wisconsin's congressional maps are unfair. ..... 2
B. The Court has since rejected the "least change" approach that produced unfair congressional maps. ..... 5
II. The Court should grant the petition for an original action. ..... 7
CONCLUSION ..... 9

## TABLE OF AUTHORITIES

**Cases**

*Adams v. DeWine*,
195 N.E.3d 74 (Ohio 2022) ..... 3

*Allen v. Milligan*,
599 U.S. 1 (2023) ..... 5

*Att'y Gen. v. Chicago & N.W. Ry. Co.*,
35 Wis. 425 (1874) ..... 7

*Carter v. Chapman*,
270 A.3d 444 (Pa. 2022) ..... 3

*Clarke v. Wisconsin Electio*ns Comm'n ("*Clarke I")*,
2023 WI 70, 409 Wis. 2d 372, 995 N.W.2d 779 ..... 8

*Clarke v. Wisconsin Elections C*ommission *("Clarke II")*,
2023 WI 79, 410 Wis. 2d 1, 998 N.W.*2d 370* ..... 1, 6, 9

*Gaffney v. Cummings*,
412 U.S. 735 (1973) ..... 2

*GRACE, Inc. v. City of Miami*,
684 F. Supp. 3d 1285 (S.D. Fla. July 30, 2023) ..... 5

*Jacksonville Branch of NAACP v. City of Jacksonville*,
635 F. Supp. 3d 1229 (M.D. Fla. 2022) ..... 6

*Jensen v. WEC*,
2002 WI 13, 249 Wis. 2d 706, 635 N.W.2d 537..... 8

*Johnson v. Wis. Elections Comm'n*,
2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469..... 1, 5, 8

*Johnson v. Wisconsin Elections Comm'n*,
2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402..... 9

*League of Women Voters of Ohio v. Ohio Redistricting Comm'n*,
192 N.E.3d 379 (Ohio 2022)..... 3

*League of Women Voters v. Commonwealth*,
178 A.3d 737 (Pa. 2018) ..... 3

*Ohio A. Philip Randolph Inst. v. Householder*,
367 F. Supp. 3d 697 (S.D. Ohio 2019) ..... 3

*Petition of Heil*,
230 Wis. 428, 284 N.W. 42 (1938)..... 7, 8

*Reynolds v. Sims*,
377 U.S. 533 (1964) ..... 2

*Robinson v. Ardoin*,
605 F. Supp. 3d 759 (M.D. La.)..... 6

*State ex rel. Att'y Gen. v. Cunningham*,
81 Wis. 440, 51 N.W. 724 (1892)..... 7–8

*State ex rel. Reynolds v. Zimmerman*,
22 Wis. 2d 544, 126 N.W.2d 551 (1964) ..... 8

*Wattson v. Simon*,
970 N.W.2d 42 (Minn. 2022)..... 3

**Statutes**

Wis. Stat. § 751.09 ..... 9

Wis. Stat. § 805.06 ..... 9

Wis. Stat. § 7.15 ..... 9

Wis. Stat. § 8.15(1) ..... 9

**Constitutional Provisions**

Wis. Const. art. I, § 1 ..... 2

Wis. Const. art. VII, § 3(2) ..... 7

**Other Authorities**

Grofman, Bernard and Gary King, *The future of partisan symmetry as a judicial test for partisan gerrymandering after LULAC v. Perry*,
6 Election L.J. 2 (2007) ..... 3

McDonald, Michael and Robin E. Best, *Unfair partisan gerrymanders in politics and law: A diagnostic applied to six cases*,
14 Election L.J. (2015) ..... 3

Stephanopoulous, Nick and Eric McGhee, *The Measure of a Metric: The Debate Over Quantifying Partisan Gerrymandering*,
70 Stan. L. Rev. 1503 (2018) ..... 3

## INTRODUCTION

The people of Wisconsin deserve fair congressional maps that ensure elections reflect the will of the people. On this score, Wisconsin's current maps get a failing grade. Because their unfairness results from a map-drawing rule this Court has since rightly discarded, the Court should now revisit the skewed congressional maps, as it already did with the state legislative maps.

Fair maps are the cornerstone of representative democracy, and the judiciary—when necessary—must ensure their fairness. But in *Johnson v. Wis. Elections Comm'n*, 2021 WI 87, ¶ 81, 399 Wis. 2d 623, 967 N.W.2d 469, the Court selected unfair maps after tying the hands of map drawers—including the Governor—by requiring them to prioritize making minimal changes to the previous maps at the expense of fairness. This choice locked in a second generation of unfair congressional maps. But the Court wisely abandoned that "least change" methodology in *Clarke v. Wisconsin Elections Commission*, 2023 WI 79, 410 Wis. 2d 1, 998 N.W.2d 370 ("*Clarke II*"). The Governor agrees that this methodology distorted the last round of mapmaking, even though it led to the adoption of congressional maps he had proposed.

A core purpose of redistricting is to promote democracy by ensuring representative, responsive government. The Court should grant the petition to consider new maps that respond to the will of the people, adhere to constitutional mandates, and avoid the partisan bias that has long infected Wisconsin's congressional maps.[1]

---

[1] The Governor is aware of *Felton v. Wisconsin Elections Commission*, No. 2025AP000999 (filed May 8, 2025), another original action petition seeking review of Wisconsin's congressional

## ARGUMENT

### I. The people of Wisconsin deserve fair congressional maps.

Two principles lie at the heart of a representative democracy: All votes should carry equal weight, and the electoral process must reflect the will of the governed.

Fair maps are a necessary ingredient of both. Electoral maps determine whether politicians serve and reflect voters' preferences or those of a political party seeking merely to entrench its power. When maps "achiev[e] . . . fair and effective representation for all citizens," politicians are responsive and accountable to their voters. *Gaffney v. Cummings*, 412 U.S. 735, 748 (1973) (quoting *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964)). The resulting democratic government derives its "just powers from the consent of the governed." Wis. Const. art. I, § 1. And when maps are instead unfair, these democratic principles suffer.

On virtually every measure, Wisconsin's current congressional maps are unfair because of the "least change" standard adopted in *Johnson* and then abandoned in *Clarke II*.

#### A. Wisconsin's congressional maps are unfair.

Above all, the maps used to elect the people's representatives should be "responsive to the popular will." *Reynolds,* 377 U.S. at 565. Yet Wisconsin's congressional

---

maps. The Governor agrees that the maps at issue in both petitions are flawed and thus that both petitions should be considered and consolidated.

maps get an F for partisan fairness from the Gerrymandering Project.[2] Unfortunately, that is a fair grade for unfair maps.

This harsh judgment is supported by multiple rigorous, neutral metrics of responsiveness and partisan fairness used by multiple courts. *See, e.g.*, *Wattson v. Simon*, 970 N.W.2d 42, 51 (Minn. 2022); *Carter v. Chapman*, 270 A.3d 444, 470 (Pa. 2022), *cert. denied sub nom. Costello v. Carter*, 143 S. Ct. 102 (2022); *Adams v. DeWine*, 195 N.E.3d 74, 91 (Ohio 2022); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 192 N.E.3d 379, 411 (Ohio 2022); *League of Women Voters v. Commonwealth*, 178 A.3d 737, 777, 820 (Pa. 2018); *Ohio A. Philip Randolph Inst. v. Householder*, 367 F. Supp. 3d 697, 718–19 (S.D. Ohio 2019).[3]

First, the state's congressional maps are the worst in the nation according to the efficiency gap.[4] The efficiency gap rests on the commonsense observation that in competitive, fair districts, each vote efficiently translates to political power for the voter. In a responsive district, each vote is precious, and each voter has a significant impact on the electoral

---

[2] *Gerrymandering Project, Wis. 2021 Gov.'s Off. Final Cong. Plan – Enacted*, Princeton Univ. (last visited June 6, 2025), https://gerrymander.princeton.edu/redistricting-report-card/?planId=recAW6q19I516nHpc.

[3] *See also* Nick Stephanopoulos and Eric McGhee, *The Measure of a Metric: The Debate Over Quantifying Partisan Gerrymandering*, 70 Stan. L. Rev. 1503 (2018) (efficiency gap); Michael McDonald and Robin E. Best, *Unfair partisan gerrymanders in politics and law: A diagnostic applied to six cases*, 14 Election L.J. 312 (2015) (mean-median difference); Bernard Grofman and Gary King, *The future of partisan symmetry as a judicial test for partisan gerrymandering after LULAC v. Perry*, 6 Election L.J. 2 (2007) (partisan symmetry).

[4] *Wisconsin 2022-2024 Redistricting Plan*, PlanScore, https://planscore.org/wisconsin/#!2022-plan-ushouse (last visited June 3, 2025).

outcome. But votes in gerrymandered districts are inefficient. When a candidate wins by a landslide in a gerrymandered district, the votes cast for the losing candidate and the excessive surplus of votes for a winning candidate are "wasted" (which, in gerrymandering parlance, means they have virtually no impact on the outcome).

Another test, partisan bias, checks a basic principle of electoral fairness: each party should receive the same share of seats when they get identical shares of votes. In other words, a party that gets half the votes in a state should get half the seats in a fair system. But Wisconsin's congressional maps show more partisan bias than 99% of all other plans nationwide.[5]

Still another test—declination—reveals the same pattern. Wisconsin's congressional maps are in the bottom two percent of all maps in the nation using the declination test, which looks at the asymmetry in vote distribution among cracked and packed districts.[6]

And Wisconsin's congressional maps score in the bottom six percent in the mean-median gap. This metric measures the difference between a party's vote share in the median district and its average vote share across all districts, thereby demonstrating unfair partisan advantage in translating votes to seats.[7]

Wisconsin's recent congressional elections have delivered the results predicted by these tests, further justifying the maps' failing grade. They have reliably and unfairly given unmerited partisan advantage to one political party and to incumbents and have been unresponsive to changes in the electorate. In 2022 and 2024, despite an almost

---

[5] *Id.*

[6] *Id.*

[7] *Id.*

equally divided vote between Democrats and Republicans statewide, Republicans were elected to 75% of Wisconsin's congressional seats. By any measure, such skewed results do not reflect the voters' will.

### B. The Court has since rejected the "least change" approach that produced unfair congressional maps.

Wisconsin's congressional maps are unfair for a simple reason: in 2021, the Court mandated a flawed and now-rejected standard to design and pick them.

After the 2020 census, a political impasse arose over new maps, forcing the Court to adopt new maps for the state's Assembly, Senate, and congressional districts. The old maps were badly gerrymandered[8], but the Court declined to consider partisan fairness when selecting new ones. *Johnson*, 399 Wis. 2d 623, ¶ 39. Instead, it directed interested parties to propose maps with the least possible changes from the state's decade-old maps. *Id.* ¶ 81.

This "least change" mandate tied the Governor's hands when he submitted proposed maps, despite his clear warnings against that flawed methodology.[9] As the Governor noted

---

[8] *Wisconsin 2012-2020 Redistricting Plan*, PlanScore, https://planscore.org/wisconsin/#!2012-plan-ushouse-eg (last visited June 3, 2025).

[9] Many courts have recognized that "adherence to a previously used districting plan" is problematic when the original map was deficient. *See Allen v. Milligan*, 599 U.S. 1, 22 (2023) (rejecting state's use of a "core retention metric" for selecting new redistricting plan where new plan "resembled an old racially discriminatory plan"); *GRACE, Inc. v. City of Miami*, 684 F. Supp. 3d 1285, 1304, 1308 (S.D. Fla. July 30, 2023) (rejecting decision to "rely on redistricting considerations that have the potential to carry forward the effects of the constitutional violation" and noting "high core retention rates provide circumstantial evidence of legislative intent to preserve the features of the previously

during *Johnson,* "[i]t is no secret that the old maps were drawn under one-party control and were designed for substantial and enduring partisan advantage. If this Court were to adopt those maps as the starting point for its task, it would not be neutral or apolitical—instead, it would be highly partisan, something courts designing maps must studiously avoid." Nov. 1, 2021, Br. of Gov. Evers at 6, *Johnson*. The Governor also warned then that the least change approach "would mean that an extreme partisan gerrymander would entrench partisan advantage." Oct. 25, 2021, Br. of Gov. Evers at 13. That result, he said then, would be "incompatible with any notion of democratic fairness" and "simply antidemocratic. *Id.* at 25; *see also* Nov. 1, 2021, Br. of Gov. Evers at 6, 7, 16, *Johnson*. As shown above, the Governor's warnings have come to pass.

The Court has since recognized the flawed nature of its approach. When it recently adopted new state legislative maps, it overruled all portions of *Johnson* "that mandate a least change approach," holding that "least change" is "unworkable in practice." *Clarke II*, 410 Wis. 2d 1, ¶ 63. The Court rightly explained how "[i]t is impractical and unfeasible to apply a standard that (1) is based on fundamentals that never garnered consensus, and (2) is in tension with established districting requirements." *Id.*

Abandoning "least change" has made a big difference for Wisconsin's state legislative maps. Because of *Clarke II*, last

---

unconstitutional district") (cleaned up); *Robinson v. Ardoin*, 605 F. Supp. 3d 759, 831 (M.D. La.) (finding core retention "allow[s] states to forever enshrine the status quo regardless of shifting demographics") *vacated and remanded on other grounds*, 86 F.4th 574 (5th Cir. 2023); *Jacksonville Branch of NAACP v. City of Jacksonville*, 635 F. Supp. 3d 1229, 1288 (M.D. Fla. 2022) ("To apply core preservation in the way the City asserts in this case would mean that once enacted, a legislature could perpetuate racially gerrymandered districts into the future merely by invoking a 'neutral' desire to maintain existing lines.").

year's elections for Wisconsin's Assembly and Senate were conducted using fair maps. Those post-*Clarke II* state maps not only got an A for partisan fairness from the Princeton Gerrymandering Project,[10] but also the 2024 election was the most competitive and responsive to the will of the voters in more than a decade.[11]

The time has come for the Court to finish the job it started in *Clarke II* by revisiting congressional maps that remain infected by the rightly abandoned "least change" methodology.

## II. The Court should grant the petition for an original action.

This Court may "hear original actions and proceedings." Wis. Const. art. VII, § 3(2). Whether to do so is left to the Court's discretion, and it generally exercises such authority "on all judicial questions affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people." *Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 45 (1938) (quoting *Att'y Gen. v. Chicago & N.W. Ry. Co.*, 35 Wis. 425, 518 (1874)); *see also, id.* at 50.

This Petition presents issues of great public importance that merit original jurisdiction. It challenges congressional district maps that are demonstrably unfair and that continue to violate the constitutional rights of Wisconsinites. As this court remarked more than 100 years ago in another unconstitutional gerrymandering original action: "If the

---

[10] *Gerrymandering Project, Wis. 2024 Assembly – Gov.'s Proposal – Enacted*, Princeton Univ. (last visited June 6, 2025), https://gerrymander.princeton.edu/redistricting-report-card/?planId=recIxCOrhDOodyAmh.

[11] John Johnson, *Donald Trump won 50 Wisconsin Assembly Seats. So did Tammy Baldwin*, Marquette University Law School Faculty Blog, https://law.marquette.edu/facultyblog/2024/11/donald-trump-won-50-wisconsin-assembly-seats-so-did-tammy-baldwin/ (Nov. 15, 2024).

remedy for these great public wrongs cannot be found in this [C]ourt, it exists nowhere." *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 730 (1892).

Because our state's congressional maps are fundamentally unfair—diminishing the power of our votes and violating constitutional guarantees—Petitioners' claims squarely implicate these questions of statewide importance. Granting Petitioners' petition is thus an appropriate exercise of the Court's jurisdiction because a redistricting case "is, by definition *publici juris*, implicating the sovereign rights of the people of this state." *Johnson*, 399 Wis. 2d 623, ¶ 20 (quoting *Jensen v. WEC*, 2002 WI 13, 249 Wis. 2d 706, ¶ 17, 639 N.W.2d 537).

"[T]here is no question" that redistricting cases warrant this Court's exercise of jurisdiction. *Jensen,* 249 Wis. 2d 706, ¶ 17. The "[C]ourt has long deemed redistricting challenges a proper subject" for original actions. *Clarke v. Wisconsin Elections Comm'n*, 2023 WI 70, 409 Wis. 2d 372, 374, 995 N.W.2d 779, 779–81 ("*Clarke I*") (citing *Jensen*, 249 Wis. 2d 706, ¶ 17); *see also Cunningham*, 81 Wis. 440. This practice of using original jurisdiction to hear redistricting challenges has long included challenges to already-existing maps. *See, e.g.*, *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 564, 572, 126 N.W.2d 551 (1964); *Johnson*, 399 Wis. 2d 623; *Clarke I*, 409 Wis. 2d 372.

Moreover, this case presents time-sensitive issues that further justify original jurisdiction. When a matter of public importance is time-sensitive, original actions are even more appropriate. *See Petition of Heil*, 284 N.W. at 48–49 (noting relevance of "exigency"). Absent an original action, the current unconstitutional congressional map would likely remain in place during yet another congressional election cycle while lower court litigation proceeds. (*See* Pet. for

Original Action ¶¶ 96, 103.)[12] Wisconsinites deserve fair maps now, not years from now.

Finally, although some factual development of Petitioners' gerrymandering claims would likely be necessary, that lies well within the Court's competency. In both *Johnson* and *Clarke II*, the Court solicited and itself reviewed expert analysis of district maps. *See Johnson v. Wisconsin Elections Comm'n*, 2022 WI 14, ¶ 5, 400 Wis. 2d 626, 634, 971 N.W.2d 402, 406; *Clarke II*, 410 Wis. 2d 1, ¶75. And the Court can always refer factual issues to neutral third parties, if it so chooses. *See* Wis. Stat. § 751.09 (allowing Court, in an original action, to "refer issues of fact or damages to a circuit court or referee for determination"); Wis. Stat. § 805.06 (allowing courts to appoint referees).

## CONCLUSION

The Petition for Original Action should be granted.

Dated this 6th day of June 2025.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Colin T. Roth
COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

[12] Preparation for the August primary and November general elections requires that clerks and potential candidates know the district boundaries by no later than the middle of March 2026 to accommodate circulation of nomination papers. *See* Wis. Stat. §§ 7.15, 8.15(1).

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7636
(608) 294-2907 (Fax)
rothct1@doj.state.wi.us

MEL BARNES
State Bar #1096012

Office of Governor Tony Evers
Post Office Box 7863
Madison, WI 53707-7863
(608) 266-1212
mel.barnes@wisconsin.gov

CHRISTINE P. SUN*
MARINA EISNER*
SALLY C. MARSH*

States United Democracy Center
1101 17th Street, NW, Suite 250
Washington, DC 20036
(202) 999-9305
christine@statesunited.org
marina@statesunited.org
sally@statesunited.org

* Application for admission *pro hac vice* forthcoming

Attorneys for Non-Party Governor
Tony Evers

## CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 6th day of June 2025.

Electronically signed by:

Colin T. Roth
COLIN T. ROTH
Assistant Attorney General