

FILED
05-08-2025
CLERK OF WISCONSIN
SUPREME COURT

IN THE SUPREME COURT OF WISCONSIN

No. _____

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

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; MEAGAN WOLFE, in her official capacity as the Administrator of the
Wisconsin Elections Commission;

Respondents.

**PETITION TO THE SUPREME COURT OF WISCONSIN TO TAKE
JURISDICTION OF AN ORIGINAL ACTION**

Elisabeth S. Theodore*
John A. Freedman*
Orion de Nevers*
ARNOLD & PORTER KAYE
SCHOLER LLP
601 Massachusetts Avenue NW
Washington, DC 20001
(202) 942-5000

Daniel S. Lenz (SBN 1082058)
CAMPAIGN LEGAL CENTER
P.O. Box 14294
Madison, WI 53708
(202) 736-2200

Mark P. Gaber*
Benjamin Phillips*
Marisa Wright*
CAMPAIGN LEGAL CENTER
1101 14th Street NW, Suite 400
Washington, DC 20005
(202) 736-2200

Annabelle E. Harless*
CAMPAIGN LEGAL CENTER
55 W. Monroe Street, Suite 1925
Chicago, IL 60603
(202) 736-2200

*Application for admission *pro hac vice*
forthcoming

Attorneys for Petitioners

ISSUE PRESENTED

Whether the congressional redistricting map imposed by this Court in *Johnson v. Wisconsin Elections Commission*, 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402 (“*Johnson I*”), is malapportioned in violation of the equality guarantee of Article I, Section 1 of the Wisconsin Constitution.

INTRODUCTION

Wisconsin’s congressional map violates the equality guarantee of Article I, Section 1 of the Wisconsin Constitution because it does not equally apportion population among Wisconsin’s eight congressional districts. Moreover, the justification for that inequality identified in *Johnson II*—that the map made the “least change” from the prior decade’s map among the options considered by the Court—does not constitute a compelling state interest sufficient to permit a deviation from mathematical equality. Indeed, since then, this Court in *Clarke* overruled *Johnson*’s adoption of the “least change” metric and held that it cannot supersede constitutional requirements for redistricting. *Clarke v. Wisconsin Elections Commission*, 2023 WI 79, ¶¶60-63, 410 Wis. 2d 1, 998 N.W.2d 370. Worse still—the singular focus on “least change” resulting in this violation also led to a congressional map that divides nearly twice as many counties as is necessary to equally populate eight districts. Unlike “least change,” minimizing split counties *is* a traditional redistricting principle that should have guided the configuration of districts once population equality was achieved.

This Court has not previously considered how Article I, Section 1’s equality guarantee applies to the question of congressional apportionment. As the Court observed

in *Johnson II*, “no party develop[ed] an argument that the Wisconsin Constitution requires something for congressional districts not already necessary under the United States Constitution.” *Johnson II*, 2022 WI 14, ¶20. The Court thus declined to decide the state-law question. *Id.* ¶20 n.13. After some parties—at oral argument—questioned the failure of the selected congressional map to achieve mathematical equality, the Court reasoned that federal law permitted a departure from mathematical equality for congressional districts to achieve a legitimate state interest. *Id.*, ¶¶22-24; *but see Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (holding that Article I, Section 2 of the federal Constitution “requires that the State make a good-faith effort to achieve *precise mathematical equality*. Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, *no matter how small.*”) (cleaned up) (emphasis added); *Tennant v. Jefferson Cnty. Comm’n*, 567 U.S. 758, 762 (2012) (per curiam) (holding that states have the burden to “show with some specificity that the population differences were necessary to achieve some legitimate state objective”) (cleaned up). Applying this federal case law, the *Johnson II* Court reasoned that “we have determined that the least change approach should guide our decision,” and the selected map “does far better on this metric than any other map,” 2022 WI 14, ¶24, thus justifying the map’s failure to achieve mathematical equality.

But three of four justices in the majority concurred, stating that “least change” never should have been accepted as a legitimate basis upon which to select a map. *Id.* ¶¶53-63 (Walsh Bradley, J., concurring). And Chief Justice Ziegler, joined by Justices Roggensack and Grassl Bradley, dissented and would have held that “under well-established

constitutional law, there is no *de minimis* deviation for congressional districts. The Governor explained that his deviation was caused by his lack of understanding that a lower deviation was required. But carelessness is not a valid justification for excessive deviation. The Governor’s (and now Wisconsin’s) congressional maps are unconstitutional.” *Id.* ¶78 (Ziegler, C.J., dissenting); *see id.* ¶¶165-75 (same).

While federal law allows a small degree of flexibility to states in equally populating congressional districts, it does not compel state courts to interpret their own state constitutional provisions as accepting that flexibility. Unlike other states’ constitutions, which expressly impose competing requirements for configuring congressional districts (*e.g.*, maintaining whole counties (W. Va. Const. art. I, § 4 and Iowa Const. art. III, § 37) or maintaining cores of prior districts (N.Y. Const. art. III, § 4(c))), Wisconsin’s Constitution contains no competing requirement to balance against Article I, Section 1’s requirement for equally populated congressional districts. This is especially so when it is the court, rather than the legislature, that is configuring districts. *Clarke*, 2023 WI 79, ¶64.

As explained in the accompanying brief, in this case of first impression arising exclusively under state law, the Court should apply strict scrutiny to congressional apportionment challenges under Article I, Section 1. “Least change”—the only justification proffered by *Johnson II* for imposing an unequally apportioned congressional map—is not a compelling state interest. *See Clarke*, 2023 WI 79, ¶63 (“[W]e overrule any portions of *Johnson I*, *Johnson II*, and *Johnson III* that mandate a least change approach.”); *id.* ¶61 (“Because no majority of the court agreed on what least change actually meant, the concept amounted to little more than an unclear assortment of possible redistricting metrics.”); *id.*

¶62 (“We cannot allow a judicially-created metric, not derived from the constitutional text, to supersede the constitution.”). The *Johnson II* Court inverted the constitutional order by sacrificing the constitutional requirement of population equality in the congressional map in favor of “least change.” That violates Article I, Section 1 of the Wisconsin Constitution.

PARTIES

1. Petitioner Kate Felton is a qualified, registered voter in the State of Wisconsin who resides in Congressional District 3, which is overpopulated. Felton is thus injured because her voting power is diluted in relation to voters in Congressional Districts 1, 2, 4, 5, 6, 7 and 8, which have fewer residents. Felton resides in Eau Claire County at 1140 City View Drive, Eau Claire, Wisconsin 54701.

2. Petitioner Loren De Lonay is a qualified, registered voter in the State of Wisconsin who resides in Congressional District 3, which is overpopulated. De Lonay is thus injured because her voting power is diluted in relation to voters in Congressional Districts 1, 2, 4, 5, 6, 7 and 8, which have fewer residents. De Lonay resides in Portage County at 3417 Center Street, Stevens Point, Wisconsin 54481.

3. Petitioner Kyle Johnson is a qualified, registered voter in the State of Wisconsin who resides in Congressional District 1. Johnson is thus injured because his Congressional District is unconstitutionally configured due to the malapportionment. Johnson lives in Kenosha County at 3002 24th Ave., Kenosha, Wisconsin 53140.

4. Petitioner Raymond (“Ray”) G. Spellman is a qualified, registered voter in the State of Wisconsin who resides in Congressional District 2. Spellman is thus injured because his Congressional District is unconstitutionally configured due to the

malapportionment. Spellman lives in Lafayette County at 132 Wisconsin Street, Darlington, Wisconsin 53530.

5. Petitioner Valeria F. Cerda is a qualified, registered voter in the State of Wisconsin who resides in Congressional District 4. Cerda is thus injured because her Congressional District is unconstitutionally configured due to the malapportionment. Cerda lives in Milwaukee County at 9151 N. Joyce Avenue, Milwaukee, Wisconsin 53224.

6. Petitioner Lynn Carey is a qualified, registered voter in the State of Wisconsin who resides in Congressional District 5. Carey is thus injured because her Congressional District is unconstitutionally configured due to the malapportionment. Carey lives in Washington County at W148 N10217 Windsong Circle East, Germantown, Wisconsin 53022.

7. Petitioner Rafael Salas is a qualified, registered voter in the State of Wisconsin who resides in Congressional District 6. Salas is thus injured because his Congressional District is unconstitutionally configured due to the malapportionment. Salas lives in Fond du Lac County at 627 Lincoln Street, Ripon, Wisconsin 54971.

8. Petitioner Curtis Gauthier is a qualified, registered voter in the State of Wisconsin who resides in Congressional District 7. Gauthier is thus injured because his Congressional District is unconstitutionally configured due to the malapportionment. Gauthier lives in Ashland County at 307 8th Street East, Ashland, Wisconsin 54806.

9. Petitioner Patricia (“Pat”) Scieszinski is a qualified, registered voter in the State of Wisconsin who resides in Congressional District 8. Scieszinski is thus injured because her Congressional District is unconstitutionally configured due to the

malapportionment. Scieszinski lives in Door County at 1218 Texas Street, Sturgeon Bay Wisconsin, 54235.

10. Respondent Wisconsin Elections Commission is an administrative body created under the laws of Wisconsin that administers and enforces Wisconsin election law and is comprised of six appointed members.

11. The Wisconsin Elections Commission has “the responsibility for the administration of chs. 5 to 10 and 12 [of the Wisconsin statutes] and other laws relating to elections and election campaigns[.]” Wis. Stat. § 5.05(1). This includes responsibilities for implementing apportionment plans. *See* Wis. Stat. § 10.06(1)(f).

12. Respondents Ann S. Jacobs, Mark L. Thomsen, Carrie Riepl, Don M. Millis, Robert F. Spindell, Jr., and Marge Bostelmann are the individual members of the Wisconsin Elections Commission and are named in their official capacity.

13. Respondent Meagan Wolfe is the Administrator of the Wisconsin Elections Commission and is named in her official capacity.

14. The Wisconsin Elections Commission, its members, and Administrator Wolfe, have their offices and principal place of business at 201 W. Washington Avenue, Second Floor, Madison, WI 53703.

STATEMENT OF FACTS

15. On November 12, 2021, the Legislature passed 2021 S.B. 622 to reapportion Wisconsin’s congressional districts following receipt of the 2020 Census data.

16. On November 18, 2021, Governor Evers vetoed the legislation. Wis. St. Leg. 2021-2022, S.B. 622.

17. This Court granted a petition for original action, *Johnson v. Wisconsin Elections Commission*, No. 2021AP1450-OA, seeking an injunction against the then-extant 2011 legislative and congressional plans as unconstitutionally malapportioned (without citing a source of law under the Wisconsin Constitution with respect to the congressional map) and entry of a mandatory injunction imposing a remedial plan that made an undefined “least change” to the defunct, malapportioned plan.

18. By a 4-3 vote, the Court announced it would follow a “least-change” approach in imposing a remedy. *See Johnson v. Wisconsin Elections Commission*, 2021 WI 87, ¶81, 399 Wis.2d 623, 967 N.W.2d 469 (“*Johnson I*”). But no majority of this Court agreed on a definition of “least change.” *Compare id.* ¶81 *with id.* ¶¶82-84 & n.4 (Hagedorn, J., concurring) (declining to join aspects of lead opinion definition of “least change” and concluding instead that equitable considerations could inform proper remedy).

19. Following submissions by various parties, the Court voted 4-3 to impose the congressional map proposed by Governor Evers because it moved the fewest number of people to new districts—a metric called “core retention.” *See Johnson II*, 2022 WI 14 ¶33. Only Justice Hagedorn concluded both that “least change” was the proper framework and that core retention was the appropriate definition. The remaining three Justices in the *Johnson II* majority would not have applied a “least-changes” framework. *See id.* ¶¶58-63 (Walsh Bradley, J., concurring). Three other Justices strongly dissented, disagreeing that “least change” meant “core retention.” *See id.* ¶134 (Ziegler, C.J., dissenting) (concluding that “least change” also means “county and municipal division and population deviation); *with id.* ¶211 (Grassl Bradley, J., dissenting) (explaining that “core retention—exists

nowhere in the . . . Wisconsin Constitution or any statutory law” and its adherence reflects a “dangerous doctrine, effectively overruling the Wisconsin Constitution” (cleaned up)).

20. The congressional districts in the plan selected by the Court in *Johnson II* did not achieve precise mathematical equality.

21. The mathematically ideal district contains 736,714.75 persons. Given eight congressional districts, this means that to come as close as possible to mathematical equality, six districts should contain 736,715 persons and two districts should contain 736,714 persons. *See id.* ¶21.

22. The congressional map imposed in *Johnson II*, however, contains districts that “have either 736,714 people, 736,715 people, or 736,716 people.” *Id.*

23. Specifically, Districts 4, 6, and 8 have 736,714 people, Districts 1, 2, 5, and 7 have 736,715 people, and District 3 has 736,716 people.

24. The *Johnson II* Court observed that no party raised any argument under the Wisconsin Constitution regarding the population deviation of the congressional map, but that some parties at oral argument questioned the deviation’s lawfulness under federal law.

25. Nevertheless, the Court reasoned that its choice to apply a “least change” approach—above any other consideration—justified, as a matter of federal law, the departure from mathematical equality.

26. In *Clarke*, this Court subsequently overruled *Johnson I*, *Johnson II*, and *Johnson III* to the extent those decisions adopted a “least change” approach to court-imposed redistricting maps, concluded that the “least change” approach was unworkable, had no definition, and could not override constitutional requirements.

27. “Least change” is the only proffered justification to support imposition of a congressional map that does not achieve mathematical equality among congressional districts. Yet “least change” is neither a compelling nor legitimate state interest.

28. It is possible to create a congressional map in Wisconsin that achieves as close to precise mathematical equality as possible, with six districts containing 736,715 people and two districts containing 736,714 people. Indeed, such maps were proposed during the *Johnson* litigation.

29. In addition to prioritizing “least change” over population equality, the congressional map chosen by the *Johnson* court also improperly prioritized “least change” over the historic, traditional redistricting criteria in Wisconsin of minimizing county splits.

30. The current congressional map splits 12 counties, some more than once. But an eight-district map need only have seven county splits to achieve population equality.

31. Yet in the current congressional map, CD3 alone splits six counties. And although for population purposes, Milwaukee County need only be split into two congressional districts, it is instead contained in all or parts of three congressional districts (1, 4, and 5).

32. Thus, in addition to being unequally populated, the current congressional map is an improper court-imposed remedy because it elevated “least change” over Wisconsin’s traditional redistricting criteria of minimizing county splits, resulting in the needless splitting apart of counties (and therefore communities of interest).

CAUSE OF ACTION

Count One

Malapportionment in Violation of the Wisconsin Constitution's Equal Protection Guarantee, Article I, Section 1

33. Petitioners restate and incorporate by reference all allegations above as though fully set forth in this paragraph.

34. The current congressional map violates Article I, Section 1 of the Wisconsin Constitution because its districts do not achieve as close to equal apportionment as possible.

35. There is no compelling interest furthered through narrowly tailored means to justify any departure from mathematical equality in the congressional map. Nor is a population deviation necessary to advance any legitimate state interest.

36. “Least change” is not a compelling or legitimate state interest to justify a population deviation from equality in a court-imposed congressional map in Wisconsin. No other justification exists to support the unequally populated districts in the current congressional map. For example, the map has nearly twice as many split counties as an equally populated congressional map would necessitate.

37. Strict scrutiny applies because the current congressional map implicates Petitioners’ fundamental right to vote. *See* Wis. Const. art III, §§ 1 & 2.

38. All Wisconsin voters are similarly situated to one another with respect to representation in Congress. There are no competing express requirements or practical considerations—as there are with state legislative or local government redistricting—that

make any Wisconsinites differently situated such that the State can be excused from achieving as close to precise mathematical equality as possible in configuring congressional districts.

39. Petitioners are therefore entitled to declaratory and injunction relief as more fully set out below.

STATEMENT OF RELIEF SOUGHT

If the Court grants the Petition, Petitioners will ask this Court to:

(1) declare the current congressional map unconstitutional and enjoin Respondents from using it in any future election (including the November 2026 election and any earlier special or primary election that may occur);

(2) provide the Legislature and Governor a reasonable period of time to enact a constitutionally-apportioned congressional map;

(3) set a schedule for the submission of proposed remedial maps from the parties in the event the political branches fail to enact a remedial map;

(4) announce, consistent with the Court's decision in *Clarke*, 2023 WI 79, ¶¶57-71, the following standards to govern the Court's remedial map selection process: (a) population equality, (b) compliance with all applicable federal law, (c) adherence to traditional districting criteria not specifically outlined in the Wisconsin or United States Constitutions for congressional maps, including minimizing county and municipal splits, compactness, and preserving communities of interest; and (d) partisan impact to ensure judicial neutrality with regards to a court-imposed redistricting map;

(5) appoint expert consultants to assess the parties' proposals for adherence to the standards announced by the Court, the cost of which to be split equally among the parties submitting map proposals;

(6) award such other relief as may be just.

STATEMENT OF THE REASONS WHY THIS COURT SHOULD TAKE JURISDICTION

Wisconsin's Constitution and rules of appellate procedure authorize this Court to take jurisdiction of and hear original actions. Wis. Const. art. VII, § 3; Wis. Stat. § 809.70. Original jurisdiction is appropriate where "the questions presented are of such importance to call for a speedy and authoritative determination by this court in the first instance." *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶ 99 n.9, 334 Wis. 2d 70, 798 N.W.2d 436 (Abrahamson, C.J., concurring in part and dissenting in part) (citing *Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 50 (1938) (per curiam)). This Court should grant such a petition when the case is a matter of significant public concern and importance, such that it affects the entire state. *State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, 362, 338 N.W.2d 684 (1983) ("We granted the petition to commence an original action because this matter is *publici juris* and requires a prompt and authoritative determination by this court in the first instance"); see also *Jefferson v. Dane Cnty.*, 2020 WI 90, ¶12, 394 Wis. 2d 602, 951 N.W.2d 556 ("Within our original jurisdiction, we have granted declaratory judgment when a judgment by the court significantly affects the community at large" (cleaned up)).

In both the *Johnson* and *Clarke* litigation, this Court explained that cases involving redistricting should be heard as original actions. "This court has long deemed redistricting

challenges a proper subject for the court’s exercise of its original jurisdiction.” *Clarke v. Wisconsin Elections Commission*, 2023 WI 70, 995 N.W.2d 779. In *Johnson I*, the Court observed that “[w]e granted the petition in this case because ‘[t]here is no question . . . that this matter warrants the court’s original jurisdiction; any reapportionment or redistricting case is, by definition *publici juris*, implicating the sovereign rights of the people of this state.’” *Johnson I*, 2021 WI 87, ¶20 (quoting *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶6, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam)).

In addition to these general reasons favoring original jurisdiction, Petitioners seek declaratory and injunctive relief that the congressional map imposed by order of this Court in *Johnson II* violates Article I, Section 1 of the Wisconsin Constitution. Only this Court—and not lower courts—can adjudicate the lawfulness of Respondents’ continued implementation of this Court’s mandatory injunction issued in *Johnson II*. Moreover, this Petition presents only a legal question—there are no factual disputes regarding the population of the districts pursuant to the 2020 Census figures and there are no disputes as to the number of counties split by the map. And this information is judicially noticeable in any event.

Petitioners bring this case now—in advance of the 2026 election—because it was not until *Clarke* that the Court overruled its “least change” framework that provided the justification for unequal population districts. But at that point, there would not likely have been time to adjudicate this claim in time to affect the 2024 election.

CONCLUSION

The Court should grant the Petition and set a case schedule.

Dated this 8th day of May, 2025.

By Electronically signed by Daniel S. Lenz

Daniel S. Lenz (SBN 1082058)
CAMPAIGN LEGAL CENTER
P.O. Box 14294
Madison, WI 53708
(202) 736-2200

Mark P. Gaber*
Benjamin Phillips*
Marisa Wright*
CAMPAIGN LEGAL CENTER
1101 14th Street NW, Suite 400
Washington, DC 20005
(202) 736-2200

Annabelle E. Harless*
CAMPAIGN LEGAL CENTER
55 W. Monroe Street, Suite 1925
Chicago, IL 60603
(202) 736-2200

Elisabeth S. Theodore*
John A. Freedman*
Orion de Nevers*
ARNOLD & PORTER KAYE
SCHOLER LLP
601 Massachusetts Avenue NW
Washington, DC 20001
(202) 942-5000

*Application for admission *pro hac vice*
forthcoming