IN THE SUPREME COURT OF WISCONSIN

KATE FELTON, et al.

Petitioners,

Case No. 2025AP000999-OA

v.

WISCONSIN ELECTIONS COMMISSION, et al.

Respondents.

AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Wisconsin (ACLU-WI) is a statewide, non-profit, non-partisan organization dedicated to the liberty and equality embodied in the United States Constitution and Wisconsin Constitution as well as the civil rights laws that mandate fair and equitable treatment under the law, including as those laws relate to the fundamental right to vote. As a membership organization, ACLU-WI has more than 18,000 members across the State of Wisconsin including members in each of Wisconsin's congressional districts. ACLU-WI submits this brief on its own behalf and on behalf of its members.

INTRODUCTION

An electoral map cannot be "almost" compliant with the law. Just like the rules that govern individual voter eligibility must be satisfied entirely before an individual voter may cast a ballot, the electoral maps themselves must be *strictly* compliant with the requirements mandated by Wisconsin and federal law, or they must be declared illegal and redrawn. These rules exist to ensure that, to the greatest extent possible, electoral maps will result in the fair and equal representation of every single voter. Fairly drawn electoral maps are essential to ensuring that every vote counts equally and that the will of the voters is accurately represented. When district boundaries are manipulated for political advantage or even negligently apportioned in violation of Wisconsin's mandatory apportionment rules, it can distort election outcomes, dilute the power of marginalized communities, and undermine public trust in the democratic process. Fair maps promote competitive elections, reflect the diversity of the population, and help maintain a government that truly represents the people. Petitioners explain in detail the reasons why the current Wisconsin congressional maps violate these rules. Because the issues raised in the petition are of significant public concern and necessarily implicate the rights of every voter across the state, and because a final resolution of the issues involved may only come from this Court, filers respectfully requests that the Court grant the petition to exercise its original jurisdiction in this case and grant Petitioners the relief they seek.

ARGUMENT

I. The fairness and legality of Wisconsin's electoral maps and the appropriate interpretation of the Wisconsin Constitution raised in this case are issues of significant importance to every voter across the State and will require ultimate resolution by the Supreme Court.

Petitioners have competently explained that the Court's original jurisdiction lies where the case is a matter of significant public concern and importance, such that it affects the entire state, and where it requires "prompt and authoritative" rulings without the delay caused by lower court review. *See State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, 362, 338 N.W.2d 684 (1983). It is further clear from the Court's jurisprudence that cases involving statewide electoral maps are clearly of this type—impacting every person across the state, of a time-sensitive nature, and of significant importance. *See Clarke v. Wisconsin Elections Commission*, 2023 WI 70, 995 N.W.2d 779 ("This court has long deemed redistricting challenges a proper subject for the court's exercise of its original jurisdiction."); *Johnson I*, 2021 WI 87, ¶20 ("There 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." (internal quotations and citations omitted); *Jensen v. Wis. Elections Bd.,* 2002 WI 13, ¶ 18, 249 Wis. 2d 706, 639 N.W.2d 537 (collecting cases).

And while the Court may have previously addressed the issues in this case pursuant to federal law in *Johnson II*, it is precisely its ruling on those federal questions that now requires the Court to take up its obligation to determine if the Wisconsin Constitution provides broader protections to voters. It is "the very premise of . . . cases that foreclose federal remedies [that creates] a clear call to state courts to step into the breach." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 503 (1977). "[L]iberties cannot survive if the states betray the trust the [Supreme] Court has put in them." *Id.* Indeed, state courts' "manifest purpose is to expand constitutional protections." *Id.*

Even had the Court not previously recognized that cases involving electoral maps are virtually *de facto* subject to its original jurisdiction, it is easy to see that

the case meets the important-issue standard as a failure to have final and authoritative ruling on the issue necessarily will cause confusion as elections approach, and failure to correct the districts are likely to distort election outcomes, dilute the power of marginalized communities, and undermine public trust in the democratic process. Moreover, when electoral maps fail to represent the voters accurately due to malapportionment, as Petitioners allege, that circumstance almost always skews toward reducing the political power of historically-marginalized communities. And finally, the timing of upcoming elections fully warrants granting the Petition for an original action. Multiple rounds of elections have now been held under maps that Petitioners claim to be an illegal malapportionment, and candidates have already begun announcing their intention to seek office under these maps in 2026, despite the Court's recent ruling that the "least change" rule that previously permitted these maps to be used has since been rejected. Any delay in adjudicating this issue thus carries substantial risks to individual candidates, local election officials, and voters who will all be uncertain as to the application of the legal principles outlined in Petitioners' claims. These millions of voters deserve to know if their maps are lawful, and if they are not, to have lawful maps put in place. As it has done virtually every time it has been asked in a redistricting case, the Court should grant Petitioners' request.

II. The Wisconsin Constitution provides greater protection of the voting rights of Wisconsinites than federal law making this case ripe for the Court's Original Jurisdiction.

The Wisconsin Supreme Court has long reserved its authority to determine that the state constitution's Declaration of Rights in Article I is broader than any federal protection, emphasizing that it "will not be bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of th[e] court that the Constitution of Wisconsin and the laws of this state require that greater protection of citizens' liberties ought to be afforded." *State v. Doe*, 78 Wis.2d 161,

172, 254 N.W.2d 210 (1977) (collecting examples across more than 100 years of cases in which the Wisconsin Supreme Court identified constitutional protections that the U.S. Supreme Court would not recognize under the federal Constitution, in some cases, until decades later); *see also State v. Ward*, 2000 WI 3, ¶ 59, 231 Wis.2d 723, 604 N.W.2d 517 ("[I]t would be a sad irony for this court to . . . act as mere rubber stamps ourselves when interpreting our Wisconsin Constitution."); *State v. Knapp*, 2005 WI 127, ¶ 60, 285 Wis.2d 86, 700 N.W.2d 899, 2005 WL 1639308 (*Knapp II*) ("While textual similarity or identity is important when determining when to depart from federal constitutional jurisprudence, it cannot be conclusive, lest this court forfeit its power to interpret its own constitution to the federal judiciary. The people of this state shaped our constitution, and it is our solemn responsibility to interpret it.") (citation omitted).

While the U.S. Constitution establishes a baseline of fundamental rights, the Wisconsin Constitution often offers additional protections that go beyond federal standards. *See County of Kenosha v. C & S Management, Inc*., 223 Wis.2d 373, 388, 588 N.W.2d 236, 244 (1999) (collecting cases and noting that "we have found within our state constitution protections that exceeded those provided our citizens by comparable clauses under the federal constitution.").

The historical expansion of rights under the Wisconsin Constitution is precisely the role that the U.S. Supreme Court has envisioned by identifying only the lowest baseline of protections that the federal Constitution offers. "State constitutions . . . are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977). Accordingly, "state courts, no less than federal [courts] are and ought to be the guardians of our liberties." *Id*. As the final arbiters of the meaning of their constitutions, state courts "may experiment all they want

with their own constitutions, and often do in the wake of [the Supreme] Court's decisions." *Kansas v. Carr*, 577 U.S. 108, 118 (2016). "And of course, state courts that rest their decisions wholly . . . on state law need not apply federal principles of . . . justiciability that deny litigants access to the courts." Brennan, *supra*, at 501.

This two-tiered federalist system is a defining feature of American constitutional governance. "[T]he state and federal founders saw federalism and divided government as the first bulwark in the rights protection and assumed the States and state courts would play a significant role, even if not an exclusive role, in that effort." Jeffrey S. Sutton, *The Enduring Salience of State Constitutional Law*, 70 Rutgers U. L. Rev. 791, 795 (2018). While some limited protections of the federal Constitution have historically been applied *against* the states, state constitutions and state courts were the key constitutional guardians of individual rights against actors other than the federal government before the Bill of Rights was imposed against states pursuant to the reconstruction amendments. *See* Jonathan Thompson, *The Washington Constitution's Prohibition of Special Privileges and Immunities: Real Bite for "Equal Protection" Review of Regulatory Legislation?*, 69 Temp. L. Rev. 1247, 1249 (1996). And, in the latter part of the twentieth century, even after the reconstruction amendments, state courts continued to recognize that state constitutional guarantees provided "greater protection than was available under the federal Constitution" in hundreds of cases. G. Alan Tarr, UNDERSTANDING STATE CONSTITUTIONS 165– 66 (1998). Indeed, much of state constitutions would be superfluous if state courts protected only those rights the federal Constitution already preserved.

Recognizing this fact, this Court has repeatedly recognized that it "need not always follow federal constitutional interpretation in lockstep" in assessing the boundaries of the state constitution. *State v. Halverson*, 2021 WI 7, ¶ 4, 395 Wis. 2d 385, 953 N.W.2d 847.

Wisconsin's Constitution sets forth a litany of rights and requirements that undergird the state's system of democracy and are not found in the federal Constitution. *Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n*, 2023 WI 38, ¶ 15, 407 Wis. 2d 87, 990 N.W.2d 122 (State constitution preamble "reflects the foundational assumption of the state's system of government: all authority resides with the people, and it is the people alone who have the authority to establish the terms and methods by which they will be governed."). Of primary concern in this case are the requirements for creating voting districts that are absolutely necessary to ensure the promise outlined in Article 1, Section 1 which expressly endorses popular sovereignty for *every* voter, providing that:

> "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed."

WIS. CONST. Art I, §1; *see also Wis. Just. Initiative*, 2023 WI 38, ¶ 15; *State ex rel. Bell v. Conness*, 106 Wis. 425, 428, 82 N.W. 288 (1900) ("The purity and integrity of elections is . . . of such prime importance . . . that the courts ought never to hesitate . . . to test them by the strictest legal standards."). This promise is only kept by ensuring that the state's districts meet strict compliance with the general conventions of redistricting outlined in the state constitution. Equality of treatment of voters, compactness and the contiguousness of districts, all of which are outlined in various ways in Article III of the state constitution, ensure the fair treatment of voters. *Cf. Teigen v. Wis. Elections Comm'n*, 2022 WI 64 ¶ 23, 403 Wis. 2d 607, 976 N.W.2d 519 (partial lead op.) ("[i]f elections are conducted outside of the law, the people have not conferred their consent on the government" as required by Article 1, Section 1 of the constitution).

CONCLUSION

For the foregoing reasons, Amicus Curiae respectfully request that the Court grant the Petition to review this case pursuant to the Court's original jurisdiction and grant the Petitioners the relief they seek.

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b), (bm), and (c) for a brief produced with serif font. The brief is set in 13-point Times New Roman. The length of this brief is 2618 words.

EFILE/SERVICE CERTIFICATION

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: May 30, 2025.

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