In the Supreme Court of Wisconsin

ELIZABETH BOTHFELD, et al.,
PLAINTIFFS,

v.

WISCONSIN ELECTIONS COMMISSION, et al.,
DEFENDANTS.

On Motion to Appoint a Three-Judge Panel,
from the Dane County Circuit Court,
The Honorable Julie Genovese, Presiding,
Case No. 2025-CV-2432

NONPARTY BRIEF OF BILLIE JOHNSON, CHRIS GOEBEL, AARON R. GUENTHER, CHARLES HANNA, TIM HIGGINS, LOUIS P. KOWIESKI, CHRIS MULLER, ERIC O'KEEFE, CRAIG ROSAND, RUTH STRECK AND RONALD ZAHN IN SUPPORT OF DISMISSAL

WISCONSIN INSTITUTE FOR
LAW & LIBERTY, INC.

RICHARD M. ESENBERG
LUKE N. BERG
LUCAS T. VEBBER

330 E. Kilbourn Ave., Ste. 725
Milwaukee, WI 53202
Phone: (414) 727-9455
Facsimile: (414) 727-6385

Attorneys for Billie Johnson, Chris Goebel, Aaron R. Guenther, Charles Hanna, Tim Higgins, Louis P. Kowieski, Chris Muller, Eric O'Keefe, Craig Rosand, Ruth Streck, and Ronald Zahn

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs' lawsuit should be dead on arrival. It's procedurally improper, barred by laches, and meritless on its face. Instead of appointing a three-judge panel and wasting limited judicial resources, this Court should exercise its superintending authority and promptly dismiss this case. Allowing this case to proceed will undermine faith in the rule of law and "creat[e] instability and dislocation in the electoral system." *White v. Daniel*, 909 F.2d 99, 104 (4th Cir. 1990).

Plaintiffs' partisan gerrymandering claims are squarely foreclosed by this Court's decision in *Johnson I*, a part of which *Clarke* did not overrule. *Johnson v. WEC*, 2021 WI 87, ¶¶ 53–63, 399 Wis. 2d 623, 967 N.W.2d 469 (holding that "[t]he Wisconsin Constitution says nothing about partisan gerrymandering"); *Clarke v. WEC*, 2023 WI 79, ¶ 63, 410 Wis. 2d 1, 998 N.W.2d 370 (overruling those "portions" of *Johnson I* "that mandate a least change approach"). And this Court has already, twice, rejected attempts to challenge the current Congressional maps, both raising the exact theory brought here. Order Denying Motion for Relief from Judgment, *Johnson v. WEC*, No. 21AP1450-OA (Mar 1, 2024); *Bothfeld v. WEC*, No. 2025AP996-OA (original action petition denied June 25, 2025); *Felton v WEC*, No. 2025AP999-OA (same).

Even setting aside the merits, Plaintiffs' lawsuit is wildly inappropriate, as a procedural matter. Just a few months ago, the very same Plaintiffs, represented by the exact same lawyers, told this Court that it and only it could hear the claims they now raise in circuit court. In their words, because the current map "was adopted by this Court, no other court can provide Petitioners' requested relief."[1] After they were rebuffed by this Court—unanimously—they immediately ran to the

[1] Pet. for Original Action, ¶ 98, *Bothfeld v. Wis. Elections Comm'n*, No. 2025AP996-OA (filed May 7, 2025).

Dane County Circuit Court and did the very thing they said was prohibited, filing a collateral attack on this Court's judgment. They were right the first time.

Finally, if any case is barred by laches, this is it. According to Plaintiffs, the problem is not, primarily, the map drawn in late 2021 during the *Johnson* litigation (that map, after all, is Governor Evers' map and was adopted by this Court), but instead the map drawn in 2011. Their theory is that the supposed partisan gerrymander from 2011 was "perpetuated" in 2021. Compl. ¶ 75. But if that's Plaintiffs' theory, this case could have been brought 14 years ago. In fact, an equivalent claim *was brought* 14 years ago in federal court—and was rejected, with the Court noting that the process by which the Congressional maps were adopted was "a significantly more bipartisan process" than with the state legislative maps. *Baldus v. Members of Wisconsin Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 854 (E.D. Wis. 2012). If they thought there was a better claim under state law, they could have filed this lawsuit in 2012, after one election under the 2011 map … or in 2014, after two election cycles … or in 2016, after three … or in 2018, after four … or in 2020, after five … or in 2022, after six … or in 2024, after seven. Yet they waited until now, for reasons that no one needs to guess.

At some point the redistricting merry-go-round has to stop, to give Wisconsin's voters, candidates, and parties some stability—and faith in the rule of law. This case is a fig leaf (and a tiny one, at that) to hide a naked grab at political power. This Court should not entertain it. The Court should not only decline to appoint a three-judge panel but should instead direct the Circuit Court to dismiss this action outright.

ARGUMENT

The Congressmen's brief amply explains why this is *not* an "action to challenge the apportionment of a congressional … legislative district

under Wis. Stat. 801.50(4m).” Amici submit, however, that regardless of how this Court answers that question, it should exercise its superintending authority to dismiss this case.

I. Plaintiffs’ Suit Is an Improper Collateral Attack on This Court’s Judgment and Should Be Promptly Dismissed.

This Court is “the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.” *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). “Neither [the court of appeals] nor the circuit court may overrule a holding of [this] court.” *State v. Arberry*, 2017 WI App 26, ¶5, 375 Wis. 2d 179, 895 N.W.2d 100.

Likewise, lower courts have “no power to vacate or set [ ] aside” a judgment of this Court, *Tietsworth v. Harley-Davidson, Inc.*, 2007 WI 97, ¶ 50, 303 Wis. 2d 94, 735 N.W.2d 418 (quoting *Hoan v. J. Co.*, 241 Wis. 483, 485, 6 N.W.2d 185 (1942), or do anything that “conflict[s] with the expressed or implied mandate of the appellate court.” *Id.* ¶ 32. If a party believes an order of this Court warrants modification, the proper vehicle is a motion, filed with this Court, to amend its judgment. *Id.* ¶ 48. As noted above, that was already tried—by the same lawyers in this case—and denied. Order Denying Motion for Relief from Judgment, *Johnson v. WEC*, No. 21AP1450-OA (Mar 1, 2024).

Even setting aside the basic hierarchy of our court system, this Court has also “recognized [a] general disfavor of allowing collateral challenges” because “they disrupt the finality of prior judgments and thereby tend to undermine confidence in the integrity of our procedures and inevitably delay and impair the orderly administration of justice.” *In re Brianca M.W.*, 2007 WI 30, ¶ 28, 299 Wis. 2d 637, 728 N.W.2d 652 (citations omitted).

This Court’s mandate in *Johnson II* “adopt[ed] the Governor’s proposed congressional … maps,” “enjoined [the Wisconsin Elections

Commission] from conducting elections under the 2011 maps," and "ordered [it] to implement the congressional … maps submitted by Governor Evers for all upcoming elections." 2022 WI 14, ¶ 52, 400 Wis. 2d 626, 971 N.W.2d 402.

As Plaintiffs themselves previously told this Court, *see supra* pp. 3–4, their lawsuit would require a lower court to overrule and/or modify this Court's judgment in *Johnson II*. Their case should be dismissed for that reason alone.

II. Plaintiffs' Lawsuit Is Barred By Laches.

Laches is a "well-settled doctrine" that applies to bar relief "when a claimant's failure to promptly bring a claim causes prejudice to the party having to defend against that claim." *Trump v. Biden*, 2020 WI 91, ¶ 10, 394 Wis. 2d 629, 951 N.W.2d 568; *Wisconsin Small Businesses United, Inc. v. Brennan*, 2020 WI 69, ¶ 11, 393 Wis. 2d 308, 946 N.W.2d 101. And laches "has particular import in the election context," where unreasonable delay causes "obvious and immense" prejudice to "election officials, [ ] candidates, … and to voters statewide." *Trump*, 2020 WI 91, ¶¶ 11–12.

Courts have applied laches to bar tardy redistricting challenges because "voters have come to know their districts and candidates, and will be confused by change," and because Court-ordered redistricting can result in "voter confusion, instability, dislocation, and financial and logistical burden on the state." *Fouts v. Harris,* 88 F. Supp. 2d 1351, 1354–55 (S.D. Fla. 1999), *aff'd sub nom. Chandler v. Harris*, 529 U.S. 1084 (2000); *White,* 909 F.2d at 104; *see also Knox v. Milwaukee Cnty. Bd. of Elections Comm'rs*, 581 F. Supp. 399, 405, 408 (E.D. Wis. 1984) (applying laches and denying motion for a preliminary injunction in a Milwaukee County redistricting lawsuit).

There are three elements to a laches claim: "unreasonable delay, lack of knowledge a claim would be brought, and prejudice." *Brennan*, 2020 WI 69, ¶ 1. Once each element is proven, "application of laches is left to the sound discretion of the court asked to apply this equitable bar." *Id*. ¶12. All three elements are easily met here.

First, unreasonable delay. As explained above, Plaintiffs' theory as to why the current Congressional map is a partisan gerrymander is based on how it was adopted *back in 2011*. Compl. ¶¶ 35–56. Although that map has since been replaced, Plaintiffs allege that its alleged flaws were "perpetuated" in 2021. *Id*. Yet no fewer than *seven* Congressional elections have occurred during the fourteen years since the supposed constitutional violation in 2011: 2012, 2014, 2016, 2018, 2020, 2022, and 2024. Courts have found similar delay—even much less delay—to be unreasonable in redistricting cases. *Fouts*, 88 F. Supp. 2d at 1354 (7 years, 4 elections); *White*, 909 F.2d at 102–103 (17 years); *Knox*, 581 F. Supp. at 404 ("31 months after the approval of the tentative proposal and 22 months after the adoption of the final plan.").

Second, neither the respondents nor the other interested parties (voters, the Congressmen, the Legislature, the Governor) had any reason to believe this claim would be brought fourteen years and seven elections after it could have been filed. This element is easily satisfied. *See Trump*, 394 Wis. 2d 629, ¶ 23; *Brennan*, 393 Wis. 2d 308, ¶ 18.

Lastly, Plaintiffs' unreasonable delay causes multiple kinds of prejudice. First, courts have recognized that long-delayed redistricting cases prejudice voters, "who have come to know their districts and candidates, and will be confused by change." *Fouts*, 88 F. Supp. 2d at 1354; *White*, 909 F.2d at 104 ("two reapportionments within a short period of two years would greatly prejudice the County and its citizens by creating instability and dislocation in the electoral system"); *see also Reynolds v. Sims*, 377 U.S. 533, 583 (1964) ("Limitations on the

frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system."). The current representatives will be prejudiced in the same way, having come to know their districts and constituencies. The state—and its taxpayers—will also be prejudiced by the "financial and logistical burden" caused by rinse-and-repeat redistricting. *E.g.*, *Fouts*, 88 F. Supp. 2d at 1354; *White*, 909 F.2d at 104 (emphasizing "great financial and logistical burdens").

Finally, Plaintiffs' unreasonable delay causes "evidentiary prejudice." *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶ 33, 389 Wis. 2d 516, 936 N.W.2d 587. Plaintiffs heavily emphasize the *intent* of the drafters of the 2011 map. Compl. ¶¶ 35–40. But proving or disproving intent is much more difficult fourteen years after the fact. Only one of the Congressmen in place at the time is still in office, and the federal court, reviewing the evidence much closer in time, noted that the map was adopted in "a significantly more bipartisan process" than the state legislative maps. *Baldus*, 849 F. Supp. 2d at 854. This Court has recognized that "the loss of evidence," the unavailability of a witness, and the "unreliability of memories" are "precisely the kind of thing[s] laches is aimed at." *Wren*, 2019 WI 110, ¶¶ 33–34.

Plaintiffs waited far too long to bring their claim, and this Court can and should dismiss it for that reason alone.

III. Plaintiffs' Claims Are Foreclosed and Unworkable.

Even ignoring laches and the procedural impropriety of Plaintiffs' lawsuit, their legal claims are also meritless on their face.

Plaintiffs' legal theory is that the 2011 Congressional map was an unlawful "partisan gerrymander" that was "perpetuated" by Governor Evers in 2021. Compl. ¶¶ 8–9. Although nothing in the Wisconsin Constitution addresses "gerrymandering" of any kind, they invoke

Article I, §§ 1, 3, 4, and 22, separation of powers, and/or some mysterious combination of all of these. Compl. ¶¶ 76–97.

The immediate problem, of course, is that this Court has already held that these exact provisions (sections 1, 3, 4, and 22 of Article I) do not "say [any]thing about partisan gerrymandering" or impose any "limits on redistricting." *Johnson I*, 2021 WI 87, ¶¶ 53–63. As this Court noted, the text of these provisions does not mention districts, redistricting, or gerrymandering (of any flavor). *Id.* ¶¶ 55–58, 62. Instead, the "only Wisconsin constitutional limits" on redistricting are found in "Article IV, Sections 3, 4, and 5." *Id.* Put differently, "Article IV [is] the exclusive repository of state constitutional limits on redistricting." *Id.* 63. "To construe Article I, Sections 1, 3, 4, or 22 as a reservoir of additional requirements would violate axiomatic principles of interpretation, … while plunging this court into the political thicket lurking beyond its constitutional boundaries." *Id.* ¶ 64. While *Clarke* overruled parts of *Johnson I*, it did not overrule this part. 2023 WI 79, ¶¶ 24 (overruling any "passing statements about the contiguity requirements), 63 (overruling "any portions … that mandate a least change approach"). Thus, even if this Court appoints a three-judge panel, that panel will have to immediately dismiss the case, since it cannot overrule this Court.

Invoking separation of powers is even more of a stretch. Compl. ¶¶ 76–82. Both the state and federal constitutions assign to *state legislatures* the task of drawing new maps. U.S. Const. art. I, § 4; Wis. Const. art. IV, § 3. Yet Plaintiffs ask this Court to arrogate that power to itself—and make up a new claim and standard along the way, found nowhere in the Wisconsin Constitution. *That* would be a separation of powers violation.

The other major problem, of course, is that Plaintiffs do not offer any workable theory for deciding how much "partisanship" in

redistricting is too much. As this Court is well aware, the Supreme Court has held that "partisan gerrymandering" claims are non-justiciable, precisely because the Court "ha[d] struggled without success over the past several decades to discern judicially manageable standards for deciding such claims." *Rucho v. Common Cause*, 588 U.S. 684, 691 (2019). Even before *Rucho*, the federal panel reviewing a partisan gerrymandering claim against the *very map Plaintiffs challenge here* came to the exact same conclusion. *Baldus*, 849 F. Supp. 2d at 854 ("[W]e are unable to discern what standard the intervenor-plaintiffs propose.").

Plaintiffs' complaint does not offer any workable standard. They briefly invoke four supposedly "objective" measures—"the efficiency gap," "partisan bias" score, the "mean-median difference," and the "declination score"—but how these are supposed to interact, or where to draw the line, is anyone's guess. And, again, none of this has any textual basis in the Wisconsin Constitution.

IV. This Court Can and Should Dismiss Plaintiffs' Action, Rather Than Wasting Judicial Resources.

Article 7, section 3 of the Wisconsin Constitution gives this Court "superintending and administrative authority over all courts" in the state. *See*, *e.g.*, *Morway v. Morway*, 2025 WI 3, ¶ 36, 414 Wis. 2d 378, 15 N.W.3d 886. That "superintending authority" "enables the court to control the course of ordinary litigation in the lower courts of Wisconsin," and is "as broad and as flexible as necessary to insure the due administration of justice in the courts of this state." *Arneson v. Jezwinski*, 206 Wis. 2d 217, 226, 556 N.W.2d 721 (1996). And this power is not "limited to the situations in which it was previously applied," otherwise "it would cease to be superintending." *Koschkee v. Evers*, 2018 WI 82, ¶ 8, 382 Wis. 2d 666, 913 N.W.2d 878 (citations omitted).

This Court has exercised this authority in the past to end a meritless action in circuit court. In *State v. Zimmerman*, 202 Wis. 69, 231 N.W. 590 (1930), for example, the governor had appointed a special counsel to investigate and potentially commence an action against the lieutenant governor for (alleged) corrupt practices. *Id.* at 591. The lieutenant governor, who was then running for re-election, filed his own action in Dane County Circuit Court to preempt this action. He sought—and the circuit court granted—an order dismissing and prohibiting any action by the special counsel if it was not filed within ten days. *Id.* This Court intervened and ultimately found that the Dane County Circuit Court lacked authority to enter such an order. *Id.* at 592–93. With respect to its superintending authority, this Court held that, when a circuit court "act[s] in excess of and beyond its jurisdiction, it is within the constitutional power of this court, in the exercise of its general superintending control … to restrain the circuit court." *Id.* at 591.

As explained above, this lawsuit is procedurally improper, barred by laches, and meritless on its face. This Court should exercise its superintending authority to dismiss it now.

V. Entertaining Plaintiffs' Claims Would Violate the Elections Clause.

Finally, if this Court allows this case to proceed and ultimately invalidates the current Congressional maps, it will violate the federal elections clause.

Article I, section 4, of the United States Constitution vests in State *Legislatures* the authority to "prescribe" the "times, places and manner of holding elections for Senators and Representatives." In *Moore v. Harper*, 600 U.S. 1 (2023), the United States Supreme Court held that, while "the Elections Clause does not exempt state legislatures from the ordinary constraints imposed by state law, state courts do not have free

rein." 600 U.S. at 34. 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.

As explained above, Plaintiffs' claim is so meritless and without any textual or historical support that accepting it would transgress even this high standard.

CONCLUSION

This Court should exercise its superintending authority to dismiss this action.

Dated: October 9, 2025.

Respectfully submitted,

WISCONSIN INSTITUTE FOR
LAW & LIBERTY, INC.

Electronically signed by
Luke N. Berg

Richard M. Esenberg (#1005622)
Luke N. Berg (#1095644)
Lucas T. Vebber (#1067543)

330 East Kilbourn Avenue, Ste. 725
Milwaukee, WI 53202
Telephone: (414) 727-9455
Facsimile: (414) 727-6385

Rick@will-law.org
Luke@will-law.org
Lucas@will-law.org

Attorneys for Billie Johnson, Chris Goebel, Aaron R. Guenther, Charles Hanna, Tim Higgins, Louis P. Kowieski, Chris Muller, Eric

O'Keefe, Craig Rosand, Ruth Streck, and Ronald Zahn

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 2,882 words.

Dated: October 9, 2025.

Electronically signed by Luke N. Berg
LUKE N. BERG