In the Supreme Court of Wisconsin

WISCONSIN BUSINESS LEADERS FOR DEMOCRACY, 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 David D. Conway, Presiding,
Case No. 2025-CV-2252

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

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INTRODUCTION AND SUMMARY OF ARGUMENT[1]

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).

The entire legal theory is that Wisconsin's current Congressional map is a so-called "anti-competitive gerrymander," and supposedly a "textbook example" of one. Compl. ¶11. Never mind that no "textbook" defines such a thing; *no case in the entire country,* either in state or federal court, has ever used that phrase or recognized such a claim. It's not even found in academia. Only two law review articles use the words "anti-competitive gerrymander," both from nearly twenty years ago, and then only in passing. And one of the two authors subsequently concluded that districting is *not* a major factor affecting competitiveness in Congressional elections. Even Plaintiffs sheepishly admit that their hot-off-the-press legal theory "has not yet been explicitly recognized in Wisconsin." Compl. ¶71.

Plaintiffs' theory is not only unheard of, it's 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 Article 1 §§ 1 and 22 do not impose "limits on redistricting"); *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

[1] Amici explain their interest in this matter in the attached motion and declarations filed herewith.

attempts to challenge the current Congressional maps, including one 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).

Plaintiffs' theory does not even make sense. If the current Congressional map is an "anti-competitive gerrymander," then so are the current *state* legislative maps. In the most recent election, the two most "uncompetitive" Congressional districts (both favoring Democrats, by the way) were won with 74.9% (Gwen Moore, District 4) and 70.1% (Mark Pocan, District 2) of the votes.[2] By contrast, in the same election, twelve of the seats in the State Assembly were won with over 70% of the vote (Districts 9, 12, 18, 36, 58, 59, 68, 69, 80, 84, 97, 98), and two by over *80%* (Districts 12, 18).[3] Another sixteen were so uncompetitive they were uncontested (Districts 8, 10, 11, 16, 17, 19, 45, 47, 62, 63, 76, 77, 78, 79, 81, 99).[4] Similar story in the State Senate: one of the sixteen seats up for election was won by over 70% of the vote (District 20) and another five were uncontested (Districts 4, 6, 16, 22, 26).[5] None of this is evidence of an unconstitutional, "anti-competitive gerrymander." This is just the normal result of geography, the candidates and issues, and localized, winner-take-all districts. Like it or not, that is the constitutional design. U.S. Const. art. I, §§ 2, 4; Wis. Const. art. IV, §§ 3–5.

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[2] *Wisconsin Election 2024 Results*, CNN (Nov. 5, 2024), https://www.cnn.com/election/2024/results/wisconsin; WEC, Election Results, https://elections.wi.gov/elections/election-results.

[3] *Election Results 2024: Wisconsin State Assembly*, WPR, https://www.wpr.org/election-results-2024-state-assembly.

[4] *Id.*

[5] *Election Results 2024: Wisconsin State Senate*, WPR, https://www.wpr.org/election-results-2024-state-senate.

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] this Court imposed the current congressional map in *Johnson II*, only this Court has the authority to enjoin that map or otherwise alter the order that requires Respondents to hold elections under the map."[6] After they were rebuffed by this Court—unanimously—they immediately ran to the 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 that map was designed to protect the incumbents at the time, and—even though only one incumbent from 2011 remains and one of the seats has flipped parties since then[7]—the "anti-competitive" features of the 2011 map were "carried forward" in 2021. Compl. ¶¶56–65. But if that's Plaintiffs' theory, this case could have been brought a decade ago. Even if "two election cycles" are necessary, *see* Compl. ¶43, they could have filed this lawsuit in 2014, after "two election cycles" under the 2011 map … or in 2016, after three cycles … or in 2018, after

[6] Proposed Compl. for Decl. and Inj. Relief On Behalf Of Wisconsin Business Leaders For Democracy, et al., ¶16, *Bothfeld v. Wis. Elections Comm'n*, No. 2025AP996-OA (filed June 5, 2025).

[7] *See*, *e.g.*, United States congressional delegations from Wisconsin, Wikipedia, https://en.wikipedia.org/wiki/United_States_congressional_delegations_from_Wisconsin.

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 briefly 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 (citations omitted), 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—

and denied. Order Denying Motion for Relief from Judgment, *Johnson v. WEC*, No. 21AP1450-OA (Mar 1, 2024).

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* p. 6, 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 "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 an "anti-competitive gerrymander" is based on how it was adopted *back in 2011*. Compl. ¶¶56–64. Although that map has since been replaced, Plaintiffs allege that its "anti-competitive" flaws were "carried forward" in 2021. *Id*. 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 claim was not raised in *Johnson v. WEC*, even though this Court granted intervention to every party that sought it, and the lawyers representing the Plaintiffs here participated in that case. *Johnson II,* 2022 WI 14, ¶2. 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. Remember, Plaintiffs' made-up test for their brand-new legal theory includes "an *intent* to suppress competition." Compl. ¶77. But proving or disproving intent is much more difficult fourteen years after the act supposedly motivated by "anti-competitive intent." Compl. ¶79. Again, only one of the Congressmen in place at the time is still in office. *Supra* p. 6. 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 as Meritless as They Come.

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

Plaintiffs' legal theory is that Wisconsin's current Congressional map is an "anti-competitive gerrymander," which, they tell us, is a "distinct [claim] from a partisan gerrymandering claim." Compl. ¶¶8–9. While they admit, in passing, that "a claim of anti-competitive gerrymandering has not yet been explicitly recognized in Wisconsin" (or anywhere else, for that matter), they represent that this new theory has "strong roots" in the "constitutional text," "principles," and "precedent." Compl. ¶71. What "text," "principles," and "precedent," exactly? Plaintiffs are a little short on details at this point, but they invoke Article I, § 1, Article I, § 22, the right to vote, and/or some mysterious combination of the three. Compl. ¶¶80–106.

The immediate problem, of course, is that this Court has already held that Article I, §§ 1 and 22, do not impose any "limits on redistricting." *Johnson I*, 2021 WI 87, ¶¶53–63. As this Court noted, nothing in the text of either provision says anything whatsoever about 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 … 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.

Even setting *Johnson I* aside, there is no textual basis for an "anti-competitive gerrymandering" claim in Article I, § 1. That provision reads: "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." No mention of districts, districting, or gerrymandering, either "partisan" or "anti-competitive."

Perhaps Plaintiffs believe that avoiding "anti-competitive gerrymandering" is one of our "inherent rights." But that would require some historical foundation for such a right—or, at the very least, some theory as to why that would be an "inherent" right—but Plaintiffs offer nothing, certainly no precedent from Wisconsin that supports their previously-unheard-of theory. Instead, the closest they come to a theory is that Article I, § 1 embodies the "ideals" and "aspirations" of "democracy" and that it is for "judges" and "lawyers" to decide what those are. Compl. ¶86. In other words, they want this Court to make it up on the fly.

Article I, § 22 is not helpful to them either. That provision reads, "The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles." Again, no mention whatsoever of districts, districting, or gerrymandering. No matter, Plaintiffs assert that their newfound right is floating somewhere among the "principles of democracy" in Article I, § 22. But again, Plaintiffs don't provide any foundation, in either history or precedent, for this new right. As this Court put it in *Johnson I*, "fabricat[ing] a legal standard" from

this provision when its text "does not supply one [ ] would represent anything but 'moderation' or 'temperance.'" 2021 WI 87, ¶62.

Invoking the "right to vote" is even more of a stretch. Nothing about the current Congressional map interferes with the right to vote. The right to vote does not include a right to elect one's preferred candidate, or even to a competitive election. If it did, every candidate who loses by a significant margin could argue that they lost because of an "anti-competitive" map—rather than their own failure to connect with the electorate in their district.

But surely some case, somewhere, has recognized an "anti-competitive gerrymandering" claim, right? Right?? Plaintiffs haven't cited one. And a Westlaw search for the phrase "anti-competitive gerrymander" (or "gerrymander*ing*") across *all* state and federal courts, at all levels, yields *zero results*. In other words, no court, in any jurisdiction, has ever used that phrase. The closest case Plaintiffs can muster is *Harkenrider v. Hochul*, 38 N.Y.3d 494, 197 N.E.3d 437 (2022), but that case involved only a "partisan gerrymandering claim," *id.* at 518–20 (which Plaintiffs say "is distinct from" their claim, Compl. ¶9), and regardless, it was based on a recent amendment to the New York State Constitution that explicitly addresses partisan gerrymandering. There is no analogue in Wisconsin.[8]

Maybe this is a new theory being developed in the hallowed halls of legal academia? Wrong again. A Westlaw search of the same phrase across 4,000 secondary sources—surveys, summaries, newsletters, over 1,000 law reviews and journals, and over 2,000 treatises—yields exactly four results, two of which are just newsletters reporting Plaintiffs'

[8] Likewise, *In re Colorado Indep. Legislative Redistricting Comm'n*, 2021 CO 76, 513 P.3d 352, is based on a unique provision of the Colorado constitution, with no comparable provision in the Wisconsin Constitution. *Id.* ¶¶12–13, 56–61.

lawsuits. Only two law review articles from the early 2000s use the phrase, and only once or twice in passing, and then only descriptively; neither attempts to develop a theory of an independent legal claim for "anti-competitive gerrymandering."

In one of the two, for example, Professor Richard Pildes speculates that redistricting has been used to "deliberately suppress competitive elections." Richard H. Pildes, *The Constitution and Political Competition*, 30 Nova L. Rev. 253, 255 (2006). But his article punts on what "specific standards courts can employ to respond" to this; he concludes that this "cannot adequately be addressed here." *Id*. at 276. And, notably, just a few years later, Professor Pildes wrote that he was "no longer convinced [that gerrymandering] is a significant cause of increased polarization, nor do I believe we could do much about it, even if it were." Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 Cal. L. Rev. 273, 308 (2011). As he writes later in that article, the empirical "evidence that gerrymandering is a major cause of the decline in competitive elections is not powerful." Instead, "the major causes for the decline in competitive elections appear to lie elsewhere than the districting process[,] … [like] the increasing geographic concentration of like-minded voters." 99 Cal. L. Rev. 273 at 312.[9]

Hilariously, notwithstanding essentially zero support for their novel legal theory, Plaintiffs boldly assert that Wisconsin's Congressional map is a "textbook example" of an "anti-competitive gerrymander." Compl. ¶11. Of course, Plaintiffs don't actually cite a textbook—or law review article, or case, or anything, for that matter. But

[9] The only other article to use the phrase "anti-competitive gerrymander" has been cited only once. Peter J. Jenkins, *The Supreme Court's Confused Election Law Jurisprudence: Should Competitiveness Matter?*, 2007 B.Y.U. L. Rev. 167 (2007).

trust them, this is a "textbook" example of something nefarious and illegal that no one has ever heard of before.

Finally, as explained above, Plaintiffs' theory does not make any sense. Every map will have a range of more and less competitive districts. Even if there were a constitutional right to a "competitive" map, Plaintiffs don't provide any way for courts to determine when a map is uncompetitive enough to violate any such right. And if this Court were to make one up, ex nihilo—which appears to be Plaintiffs' hope—it may well doom the new *state* legislative maps, which have many more "uncompetitive" districts than the Congressional map. *Supra* pp. 5–6. Round and round we go.

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,

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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 3,980 words.

Dated: October 9, 2025.

Electronically signed by Luke N. Berg
LUKE N. BERG