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SUPREME COURT

No. 2025AP000996-OA

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**IN THE SUPREME COURT OF WISCONSIN**

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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,  
MARGE BOSTELMANN, ANN S. JACOBS, MARK L. THOMSEN, CARRIE  
RIEPLER, 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.*

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**NON-PARTY BRIEF OF THE WISCONSIN LEGISLATURE  
AS AMICUS CURIAE IN OPPOSITION TO PETITION  
FOR AN ORIGINAL ACTION**

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## TABLE OF CONTENTS

|  |    |
|--|----|
| TABLE OF AUTHORITIES .....   | 3  |
| INTRODUCTION.....  | 8  |
| ARGUMENT .....   | 9  |
| I. This Court does not have “free rein” to redistrict congressional districts anew. .... | 9  |
| II. Petitioners’ claims are meritless. ....  | 12 |
| III. Laches bars Petitioners’ claims. ....   | 19 |
| IV. Entertaining this original action raises serious due process questions. ....         | 23 |
| A. Due process would require recusal. ....   | 23 |
| B. Departures from normal procedures would compound due process concerns.....            | 27 |
| CONCLUSION .....   | 29 |

## TABLE OF AUTHORITIES

### Cases

|   |            |
|---|------------|
| <i>Aetna Life Ins. Co. v. Lavoie</i> ,<br>475 U.S. 813 (1986) .....                                       | 25         |
| <i>Alexander v. S.C. State Conf. of the NAACP</i> ,<br>602 U.S. 1 (2024) .....                            | 10         |
| <i>Allen v. Georgia</i> ,<br>166 U.S. 138 (1897) .....  | 29         |
| <i>Baldus v. Members of Wis. Gov’t Accountability Bd.</i> ,<br>849 F. Supp. 2d 840 (E.D. Wis. 2012) ..... | 9          |
| <i>Branch v. Smith</i> ,<br>538 U.S. 254 (2003) .....   | 10         |
| <i>Caperton v. A.T. Massey Coal. Co.</i> ,<br>556 U.S. 868 (2009) .....                                   | 23, 25, 26 |
| <i>Chestnut v. Merrill</i> ,<br>377 F. Supp. 3d 1308 (N.D. Ala. 2019) .....                               | 22         |
| <i>Clarke v. Wis. Elections Comm’n</i> ,<br>2023 WI 70, 409 Wis. 2d 372, 995 N.W.2d 779 .....             | 28         |
| <i>Clarke v. Wis. Elections Comm’n</i> ,<br>2023 WI 79, 410 Wis.2d 1, 998 N.W.2d 370 .....                | 19         |
| <i>Cline v. Whitaker</i> ,<br>144 Wis. 439, 129 N.W. 400 (1911) .....                                     | 18         |
| <i>Engelhardt v. City of New Berlin</i> ,<br>2019 WI 2, 385 Wis. 2d 86, 921 N.W.2d 714 .....              | 15         |
| <i>Est. of Genrich v. OHIC Ins.</i> ,<br>2009 WI 67, 318 Wis. 2d 553, 769 N.W.2d 481 .....                | 16         |
| <i>Flynn v. Dep’t of Admin.</i> ,<br>216 Wis. 2d 521, 576 N.W.2d 245 (1998) .....                         | 18         |

|   |                       |
|---|-----------------------|
| <i>Franklin v. McCaughtry</i> ,<br>398 F.3d 955 (7th Cir. 2005) .....   | 25                    |
| <i>Goldberg v. Kelly</i> ,<br>397 U.S. 254 (1970) .....   | 27                    |
| <i>Greene v. McElroy</i> ,<br>360 U.S. 474 (1959) .....   | 27                    |
| <i>Hollingsworth v. Perry</i> ,<br>558 U.S. 183 (2010) .....  | 29                    |
| <i>In re Terrell</i> ,<br>39 F.4th 888 (7th Cir. 2022) .....  | 18                    |
| <i>Indus. Roofing Servs., Inc. v. Marquardt</i> ,<br>2007 WI 19, 299 Wis. 2d 81, 726 N.W.2d 898.....            | 28                    |
| <i>Jensen v. Wis. Elections Bd.</i> ,<br>2002 WI 13, 249 Wis. 2d 706, 639 N.W.2d 537.....                       | 10, 27, 28            |
| <i>Johnson Controls, Inc. v. Emps. Ins. of Wausau</i> ,<br>2003 WI 108, 264 Wis. 2d 60, 665 N.W.2d 257.....     | 8, 14, 15, 16         |
| <i>Johnson v. Wis. Elections Comm’n</i> ,<br>2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469.....                   | 8, 11, 12, 13, 14, 17 |
| <i>Johnson v. Wis. Elections Comm’n</i> ,<br>2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402.....                   | 8, 10, 18             |
| <i>Jordan v. Massachusetts</i> ,<br>225 U.S. 167 (1912) .....   | 29                    |
| <i>Lassiter v. Dep’t of Soc. Servs.</i> ,<br>452 U.S. 18 (1981) .....   | 27                    |
| <i>Mayo v. Wis. Injured Patients &amp; Fams. Comp. Fund</i> ,<br>2018 WI 78, 383 Wis. 2d 1, 914 N.W.2d 678..... | 14                    |
| <i>Moore v. Harper</i> ,<br>600 U.S. 1 (2023) .....   | 11, 15, 19, 22        |
| <i>Ohio A. Philip Randolph Inst. v. Householder</i> ,<br>367 F. Supp. 3d 697 (S.D. Ohio 2019) .....             | 28                    |

|   |            |
|---|------------|
| <i>Perry v. Perez</i> ,<br>565 U.S. 388 (2012) .....  | 17         |
| <i>Progressive N. Ins. v. Romanshek</i> ,<br>2005 WI 67, 281 Wis. 2d 300, 697 N.W.2d 417 .....                    | 15         |
| <i>Purcell v. Gonzalez</i> ,<br>549 U.S. 1 (2006) .....   | 22         |
| <i>Schultz v. Natwick</i> ,<br>2002 WI 125, 257 Wis. 2d 19, 653 N.W.2d 266 .....                                  | 15, 16     |
| <i>Simkins v. Gressette</i> ,<br>495 F. Supp. 1075 (D.S.C. 1980) .....  | 22         |
| <i>State ex rel. Wren v. Richardson</i> ,<br>2019 WI 110, 389 Wis. 2d 516, 936 N.W.2d 587 .....                   | 21         |
| <i>State v. Herrmann</i> ,<br>2015 WI 84, 364 Wis. 2d 336, 867 N.W.2d 772 .....                                   | 27         |
| <i>State v. Kruse</i> ,<br>101 Wis. 2d 387, 305 N.W.2d 85 (1981) .....  | 14         |
| <i>State v. Roberson</i> ,<br>2019 WI 102, 389 Wis. 2d 190, 935 N.W.2d 813 .....                                  | 15         |
| <i>State v. Sartin</i> ,<br>200 Wis. 2d 47, 546 N.W.2d 449 (1996) .....   | 14         |
| <i>Trump v. Biden</i> ,<br>2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568 .....                                      | 20, 21     |
| <i>White v. Weiser</i> ,<br>412 U.S. 783 (1973) .....   | 10, 17     |
| <i>Whitford v. Nichol</i> ,<br>180 F. Supp. 3d 583 (W.D. Wis. 2016) .....   | 28         |
| <i>Williams v. Pennsylvania</i> ,<br>579 U.S. 1 (2016) .....  | 23, 25, 27 |
| <i>Wis. Just. Initiative, Inc. v. Wis. Elections Comm’n</i> ,<br>2023 WI 38, 407 Wis. 2d 87, 990 N.W.2d 122 ..... | 12         |

|  |            |
|--|------------|
| <i>Wis. Small Bus. United, Inc. v. Brennan</i> ,<br>2020 WI 69, 393 Wis. 2d 308, 946 N.W.2d 101..... | 19, 21, 22 |
|--|------------|

## Statutes

|                        |    |
|------------------------|----|
| 2011 Wis. Act 44.....  | 9  |
| Wis. Stat. §8.15 ..... | 20 |

## Constitutional Provisions

|                                     |    |
|-------------------------------------|----|
| U.S. Const. art. I, §2, cl. 3 ..... | 19 |
| U.S. Const. art. I, §4, cl. 1 ..... | 9  |
| Wis. Const. art. IV, §3 .....       | 19 |
| Wis. Const. art. VII, §2 .....      | 10 |

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|  |    |
|--|----|
| A.J. Bayatpour, <i>In only state Supreme Court debate, candidates trade accusations of partisan ties</i> , CBS 58 (Mar. 21, 2023),<br><a href="https://perma.cc/87BY-66CB">https://perma.cc/87BY-66CB</a> .....                          | 23 |
| Anya van Wagtendonk, <i>Trump and Musk's backing wasn't enough to flip Wisconsin Supreme Court</i> , NPR (Apr. 1, 2025),<br><a href="https://perma.cc/K6NQ-XPG6">https://perma.cc/K6NQ-XPG6</a> .....                                    | 25 |
| Campaign contributions: PAC and Political Committee Contributors to: Janet C Protasiewicz (NP) – Supreme Court, Wis. Democracy Campaign,<br><a href="https://perma.cc/9EZD-V69A">https://perma.cc/9EZD-V69A</a> .....                    | 25 |
| Channel 3000 / News 3 Now, <i>Wisconsin Supreme Court debate presented by News 3 Now and WisPolitics</i> , YouTube (Mar. 21, 2023),<br><a href="https://bit.ly/3HAtZtv">https://bit.ly/3HAtZtv</a> .....                                 | 23 |
| Corrinne Hess, <i>Wisconsin Supreme Court candidate Janet Protasiewicz assails state's election maps as 'rigged,'</i> Milwaukee J. Sentinel (Jan. 9, 2023),<br><a href="https://perma.cc/8T33-Z5M6">https://perma.cc/8T33-Z5M6</a> ..... | 23 |
| Jessie Opoien & Jack Kelly, <i>Protasiewicz would 'enjoy taking a fresh look' at Wisconsin voting maps</i> , Cap Times (Mar. 2, 2023),<br><a href="https://perma.cc/THH2-VH3Q">https://perma.cc/THH2-VH3Q</a> .....                      | 24 |

|   |        |
|---|--------|
| Matt Mencarini, <i>How could the 2023 Wisconsin Supreme Court election impact medical malpractice lawsuits?</i> , PBS Wis. (Mar. 31, 2023),<br><a href="https://perma.cc/V87K-LC4C">https://perma.cc/V87K-LC4C</a> .....                | 24     |
| Ronald Brownstein, <i>The First Electoral Test of Trump’s Indictment</i> ,<br>Atlantic (Mar. 31, 2023),<br><a href="https://perma.cc/CL5C-W5QY">https://perma.cc/CL5C-W5QY</a> .....  | 24     |
| Scott Bauer, <i>Wisconsin Supreme Court candidate criticized for attending briefing with Democratic donors</i> , AP (Jan. 29, 2025),<br><a href="https://bit.ly/3Zw0hiL">https://bit.ly/3Zw0hiL</a> .....                               | 24, 26 |
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| <i>The Downballot: The inside story on winning the Wisconsin Supreme Court (transcript)</i> , Daily Kos (Jan. 25, 2024),<br><a href="https://perma.cc/NV3S-3BJR">https://perma.cc/NV3S-3BJR</a> .....                                   | 24     |
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## INTRODUCTION

This Court addressed Wisconsin's congressional districts years ago. This Court already oversaw an original action challenging those districts. *Johnson v. Wis. Elections Comm'n (Johnson I)*, 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469; *Johnson v. Wis. Elections Comm'n (Johnson II)*, 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402. And this Court already held that the Wisconsin Constitution places claims of partisan unfairness beyond the judicial power to adjudicate. *Johnson I*, 2021 WI 87, ¶¶39-63. Any reasonable observer would have thought congressional redistricting was done for the decade. *See, e.g., Order, Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Mar. 1, 2024) (rejecting request to re-open congressional redistricting litigation).

But now — years after *Johnson* — Petitioners ask this Court to start over and relitigate the same claims of partisan unfairness this Court rejected in *Johnson*. The relevant provisions of the Wisconsin Constitution have not changed between *Johnson* and now. The only explanation for Petitioners' years-delayed original action is politics: two intervening judicial elections. But "[t]he decision to overturn a prior case must not be undertaken merely because the composition of the court has changed." *Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶95, 264 Wis. 2d 60, 665 N.W.2d 257. The



congressional districts are settled. A redraw cannot be squared with the federal constitution, the state constitution, or the doctrine of laches. The petition must be denied.

## ARGUMENT

Petitioners ask the Court to decide that the Court itself violated the Wisconsin Constitution. Pet. ¶¶69-92. Their goal is clearly stated: they want two more seats for Democrats. *See* Pet. ¶¶66-67; Pet.Memo.23. Neither the federal nor state constitution permits Petitioners' action.

### **I. This Court does not have “free rein” to redistrict congressional districts anew.**

The U.S. Constitution tasks “the Legislature” specifically with congressional redistricting. U.S. Const. art. I, §4, cl. 1. Applied here, the Legislature redistricted in 2011. *See* 2011 Wis. Act 44 (codified at Wis. Stat. §§3.11-3.18). Act 44 was challenged and upheld in federal court, *Baldus v. Members of Wis. Gov’t Accountability Bd.*, 849 F. Supp. 2d 840, 853-54 (E.D. Wis. 2012) (three-judge court), and used in the ensuing five congressional elections. Then in 2021, the census showed those districts were malapportioned. With the Legislature and the Governor at an impasse over new districts, voters

challenged Act 44, and this Court remedied the malapportionment by making only slight adjustments to existing lines. *Johnson II*, 2022 WI 14, ¶52.

With that injunction, the Court did not itself redistrict anew as though it were the Legislature. Rather, the Court issued an injunction with the effect of moving “the fewest number of people into new districts.” *Id.* ¶19. For when a state court is put in the unsavory position of adjusting districts, it “follow[s] the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature.” *Branch v. Smith*, 538 U.S. 254, 274 (2003) (cleaned up); see *White v. Weiser*, 412 U.S. 783, 795 (1973) (courts “honor state policies in the context of congressional reapportionment”). To do more would assume legislative power, not “judicial power.” Wis. Const. art. VII, §2. Redistricting is “an inherently ... legislative—not judicial—task.” *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶10, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam); see *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 7 (2024).

There is nothing left for this Court to do. Petitioners’ request that this Court redistrict anew based on “partisan skew,” Pet.Memo.15, is an invitation to err by assuming responsibilities that the federal Constitution assigns

to the Legislature. *See Moore v. Harper*, 600 U.S. 1, 34 (2023). When addressing congressional districts, “state courts do not have free rein.” *Id.* They “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; *accord id.* at 38 (Kavanaugh, J., concurring) (same).

There is nothing that could justify this Court’s redrawing congressional districts anew based on Petitioners’ theory that the Court’s earlier decision in *Johnson* effectuated an unlawful “partisan gerrymander” or violated separation of powers. The Wisconsin Constitution provides “no governing standards” to determine “what constitutes a ‘fair’ partisan divide” and “‘no plausible grant of authority’ to the judiciary to determine whether maps are fair,” or to otherwise “reallocate political power between the two major political parties.” *Johnson I*, 2021 WI 87, ¶¶44-45, 52. To now ignore that constitutional reality and redraw congressional districts in pursuit of a particular political outcome would unconstitutionally “arrogate ... power vested in state legislatures to regulate federal elections.” *Moore*, 600 U.S. at 36.

## II. Petitioners' claims are meritless.

Petitioners contend that *Johnson II* effectuated a “partisan gerrymander” violating Article I, Sections 1, 3, 4, and 22 of the Wisconsin Constitution and “separation-of-powers principles.” Pet. ¶¶69-92, 93.c. This Court already held otherwise. See *Johnson I*, 2021 WI 87, ¶¶52-63, 65. There is no basis for relitigating what *Johnson* already decided. *Contra* Pet.Memo.15-40.

A. Petitioners attempt to reduce this Court’s earlier decision to “dicta.” Pet.Memo.11 n.1, 21, 33. It is not; *Johnson I* is binding precedent. See *Wis. Just. Initiative, Inc. v. Wis. Elections Comm’n*, 2023 WI 38, ¶142, 407 Wis. 2d 87, 990 N.W.2d 122 (Hagedorn, J., concurring) (“when we deliberately take up and decide an issue central to the disposition of a case, it is considered precedential”). From the start in *Johnson*, intervening parties identified partisan fairness as a legal issue. They “complain[ed] that the 2011 maps” challenged as malapportioned also “reflect[ed] a partisan gerrymander favoring Republican Party candidates,” and they “ask[ed] [the Court] to redraw the maps to allocate districts equally between the[] dominant parties.” *Johnson I*, 2021 WI 87, ¶2. Accordingly, the Court asked all parties to submit briefs addressing specifically whether “the partisan makeup of districts [is] a valid factor.” *Id.* ¶7. The Court concluded: “We hold ... the partisan

makeup of districts does not implicate any justiciable or cognizable right.” *Id.* ¶8 (plurality op.) (emphasis added); *accord id.* ¶82 n.4 (Hagedorn, J., concurring). The Court found no “right to partisan fairness in Article I, Sections 1, 3, 4, or 22 of the Wisconsin Constitution.” *Id.* ¶53 (majority op.). The Wisconsin Constitution affords the Court “no license to relocate political power between the two major political parties.” *Id.* ¶52. “Adjudicating claims of ‘too much’ partisanship” would unconstitutionally “recast this court as a policymaking body rather than a law-declaring one.” *Id.*

Far from “dicta,” *contra* Pet.Memo 11 n.1, 21, 33, *Johnson I* held that “[t]he Wisconsin Constitution contains ‘no plausible grant of authority’ to the judiciary to determine whether maps are fair to the major parties,” 2021 WI 87, ¶52. “There are no legal standards discernable in the Constitution for” deciding “what constitutes a ‘fair’ map.” *Id.* ¶44. Article I, Section 1 “has nothing to say about partisan gerrymanders,” *id.* ¶55; Sections 3 and 4 “do not inform redistricting challenges,” *id.* ¶59; and Section 22 does not provide “an open invitation to the judiciary” to “fabricate a legal standard of partisan ‘fairness,’” *id.* ¶62. “To construe Article I, Sections 1, 3, 4, or 22 as a reservoir of additional [redistricting] requirements would violate axiomatic

principles of [constitutional] interpretation, while plunging this court into the political thicket lurking beyond its constitutional boundaries.” *Id.* ¶63 (citation omitted).

These precedential holdings cannot be reduced to dicta as though they were “not essential.” *State v. Sartin*, 200 Wis. 2d 47, 60 n.7, 546 N.W.2d 449 (1996). Determining whether partisan unfairness claims were justiciable and cognizable was “decisive” for deciding what injunctive relief complied with state and federal redistricting requirements. *State v. Kruse*, 101 Wis. 2d 387, 392, 305 N.W.2d 85 (1981); *see Johnson I*, 2021 WI 87, ¶¶5-6.

**B.** Petitioners’ only basis for revisiting *Johnson* is politics. After two intervening judicial elections, Petitioners ask the Court to declare their partisan gerrymandering claims justiciable and cognizable—invoking the same constitutional provisions *Johnson I* rejected.

But this Court does not overturn precedent for politics: “The decision to overturn a prior case must not be undertaken merely because the composition of the court has changed.” *Johnson Controls*, 2003 WI 108, ¶95; *see also Mayo v. Wis. Injured Patients & Fams. Comp. Fund*, 2018 WI 78, ¶110, 383 Wis. 2d 1, 914 N.W.2d 678 (Walsh Bradley, J., dissenting) (same); *State v. Roberson*,

2019 WI 102, ¶¶97, 389 Wis. 2d 190, 935 N.W.2d 813 (Dallet, J., dissenting) (similar). This Court “scrupulously” follows “the doctrine of stare decisis” as part of its “abiding respect for the rule of law.” *Johnson Controls*, 2003 WI 108, ¶¶94. Any other rule, and “deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results.” *Schultz v. Natwick*, 2002 WI 125, ¶¶37, 257 Wis. 2d 19, 653 N.W.2d 266. Discarding settled precedent “raises serious concerns as to whether the court is implementing principles founded in the law rather than in the proclivities of individuals.” *Progressive N. Ins. v. Romanshek*, 2005 WI 67, ¶¶42, 281 Wis. 2d 300, 697 N.W.2d 417 (cleaned up). And when congressional redistricting is concerned, it would raise serious concerns that the Court has trespassed into territory the federal Constitution reserves for “the Legislature.” *Moore*, 600 U.S. at 34, 36.

The timing and substance of the petition threatens “the actual and perceived integrity of the judicial process.” *Engelhardt v. City of New Berlin*, 2019 WI 2, ¶¶24, 385 Wis. 2d 86, 921 N.W.2d 714. The words “stare decisis” appear nowhere in the petition or accompanying brief. They present no “special justification” that warrants overruling *Johnson I. Johnson Controls*, 2003 WI 108, ¶¶96. The Wisconsin Constitution remains unchanged. There

have been no “changes or developments in the law” that could “have undermined the rationale behind” *Johnson I*’s holdings on partisan unfairness, nor any “newly ascertained facts,” nor any intervening precedents calling into question its “coherence and consistency.” *Id.* ¶98. *Johnson I*’s clear rule that courts should stay out of politics is by definition workable. *Id.* ¶99. Recycled arguments that *Johnson I* got it wrong are likewise not enough. *See, e.g., Schultz*, 2002 WI 125, ¶38 (“no change in the law is justified simply by a ‘case with more egregious facts,’” especially when “facts were already before the court when it decided” an earlier case); *see also Johnson Controls*, 2003 WI 108, ¶100 (“It is not a sufficient reason for this court to overrule its precedent that a large majority of other jurisdictions, with no binding authority on this court, have reached opposing conclusions.”). Accepting Petitioners’ “end run around stare decisis” by characterizing as dicta *Johnson I*’s holdings on partisan unfairness would “undermine[] our common law tradition of fidelity to precedent.” *Est. of Genrich v. OHIC Ins.*, 2009 WI 67, ¶85, 318 Wis. 2d 553, 769 N.W.2d 481 (Walsh Bradley, J., concurring in part and dissenting in part).



C. Petitioners' separation of powers claim is equally meritless. Petitioners claim the congressional map is unlawful because the Court "declined to exercise its independent judgment," Pet.Memo.35, and "improperly substituted" the judgment of the 2011 Legislature "for its own," Pet. ¶¶91. Courts, they say, cannot "robotically defer[] to prior plans." Pet.Memo.39. By this logic, any judicial remedy in the redistricting context requires redrawing districts from scratch. *But see, e.g., Perry v. Perez*, 565 U.S. 388, 393 (2012) (per curiam) (courts "should take guidance from the State's recently enacted plan"); *White*, 412 U.S. at 795 (courts "should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary'"). Petitioners have it exactly backwards.

The approach in *Johnson*, "implementing only those remedies necessary to resolve constitutional ... deficiencies," reflects "the judiciary's properly limited role in redistricting." *Johnson I*, 2021 WI 87, ¶¶72 (plurality op.). Were state courts to "[t]read[] further than necessary to remedy ... legal deficiencies," especially for congressional districts, they would "intrude upon the constitutional prerogatives of the political branches." *Id.* ¶¶64 (majority op.). Meddling with district lines more than necessary would

transform courts into “no more than a super-legislature,” *Flynn v. Dep’t of Admin.*, 216 Wis. 2d 521, 528-29, 576 N.W.2d 245 (1998), usurping the Legislature’s constitutionally assigned duty to redistrict and implicating the federal Elections Clause. *Supra* I.

D. If there were any doubt about the petition’s lacking merit, consider Petitioners’ requested relief. They do not challenge any statute but instead collaterally attack this Court’s final judgment after their same counsel failed to re-open *Johnson*. See Order, *Johnson*, No. 2021AP1450-OA (Mar. 1, 2024). They seek a declaration that “Wisconsin’s congressional districting map” violates the Wisconsin Constitution and ask the Court to enjoin it. Pet. ¶93.c. That “map” exists by virtue of the mandatory injunction granted in *Johnson II*. See 2022 WI 14, ¶52. Petitioners thus ask this Court to declare its own decision unconstitutional and enjoin its own injunction. The Elections Commission cannot simply ignore the *Johnson II* injunction. See *Cline v. Whitaker*, 144 Wis. 439, 129 N.W. 400, 400-01 (1911) (“An injunctive order, within the power of the court, must be implicitly obeyed so long as it stands . . . unless there is a want of jurisdiction.”); *In re Terrell*, 39 F.4th 888, 890 (7th Cir. 2022) (“All judgments are binding” and “an injunction must be obeyed unless

stayed, modified, or reversed.”). Courts modify prior injunctions in redistricting cases to account for the decennial census, as required by federal and state law. *See* U.S. Const. art. I, §2, cl. 3; Wis. Const. art. IV, §3. No intervening census could explain abandoning the *Johnson II* injunction—only intervening judicial elections.

While this Court may make exceptions for such collateral attacks for the State’s own legislative districts, *Clarke v. Wis. Elections Comm’n*, 2023 WI 79, ¶¶51-54, 410 Wis.2d 1, 998 N.W.2d 370, permitting that collateral attack for congressional districts implicates the federal Elections Clause. Such an extraordinary action “transgress[es] the ordinary bounds of judicial review.” *Moore*, 600 U.S. at 36. Petitioners’ invitation for this Court to “arrogate” to itself “the power vested in state legislatures to regulate federal elections” under the Elections Clause, *id.*, must be rejected.

### **III. Laches bars Petitioners’ claims.**

Laches bars Petitioners’ late-breaking original action because Petitioners “unreasonably delayed in bringing the suit.” *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶14, 393 Wis. 2d 308, 946 N.W.2d 101 (dismissing original action for undue delay). By delaying, Petitioners flouted their

“special duty to bring” election-related “claims in a timely manner.” *Trump v. Biden*, 2020 WI 91, ¶¶30, 394 Wis. 2d 629, 951 N.W.2d 568. Petitioners waited 1,163 days after this Court’s judgment in *Johnson II*, 579 days after the *Clarke* litigation began to revisit the legislative districts, and 477 days after other parties—represented by the same law firm as Petitioners here—unsuccessfully asked to revisit the congressional districts. After all that delay, Petitioners request lightning-fast proceedings for new districts “in time for the 2026 congressional elections.” Pet. ¶¶93.e. Their delay leaves less than a year before candidate qualifying begins, Wis. Stat. §8.15, and no time for the normal trappings of litigation. Petitioners’ inexcusable delay precludes the extraordinary equitable relief they seek. *See Trump*, 2020 WI 91, ¶¶10-22.

Petitioners do not even attempt to justify their delay. While they claim *Clarke*’s overruling “least change” renders the current congressional map “lawless,” Pet. ¶¶13, 53-58, that was more than 500 days ago. Voters—represented by Petitioners’ same counsel—sought a redraw of the congressional map only weeks after that decision. And still, this Court rightly rejected that request. Order, *Johnson*, No. 2021AP1450-OA (Mar. 1, 2024). Where were Petitioners then?

Nothing stopped Petitioners from participating in *Johnson* years ago. But instead, they waited until last month's judicial election. Their decision to "sleep on their rights" is unreasonable and unexplained. *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶14, 389 Wis. 2d 516, 936 N.W.2d 587. "[E]quity aids the vigilant," *id.*, not the opportunistic. That is particularly true in the elections context. Courts cannot "allow persons to gamble on the outcome of an election contest and then challenge it when dissatisfied"—or satisfied—"with the results, especially when the same challenge could have been made before the public is put through the time and expense of the entire election process." *Trump*, 2020 WI 91, ¶11.

As for the other laches factors, there was no reason to expect this belated challenge, especially after Petitioners sat back for *years* after *Johnson II*, 550-plus days after *Clarke* overruled "least change," and 450-plus days after other petitioners asked to revisit congressional districts. *See Trump*, 2020 WI 91, ¶23; *Brennan*, 2020 WI 69, ¶18. And everyone—voters, constituents, candidates, congressmembers, and election officials—are prejudiced by their untimeliness. *See Trump*, 2020 WI 91, ¶24. A statewide redraw will "result in voter confusion and consequent incentive to remain away from the polls."

*Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). And there is insufficient time to educate voters or for candidates to campaign adequately. See *Chestnut v. Merrill*, 377 F. Supp. 3d 1308, 1317 (N.D. Ala. 2019) (raising concerns about “educat[ing] voters on where the newly drawn district lines lay”); *Simkins v. Gressette*, 495 F. Supp. 1075, 1081 (D.S.C.) (candidates “would have to begin the campaign process again in a new district,” losing “the benefit of the campaigning they have already undertaken” and “money already spent”), *aff’d*, 631 F.2d 287 (4th Cir. 1980). All the parties who litigated *Johnson* would “surely [be] placed ‘in a less favorable position’” by Petitioners’ delay—forced to re-litigate redistricting anew on a schedule that will deprive parties of the opportunity to do so fully and fairly. See *Brennan*, 2020 WI 69, ¶¶24-25. The disruption to voters, constituents, candidates, and congressmembers is unjustified. Allowing it, despite Petitioners’ thousand-day delay, again raises the specter of whether this action “transgress[es] the ordinary bounds of judicial review.” *Moore*, 600 U.S. at 36.

#### **IV. Entertaining this original action raises serious due process questions.**

##### **A. Due process would require recusal.**

The Due Process Clause of the Fourteenth Amendment “guarantees ‘an absence of actual bias’ on the part of a judge.” *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016). Recusal thus is necessary when a judge’s participation in a case creates a “serious risk,” “based on objective and reasonable perceptions,” of “actual bias or prejudgment.” *Caperton v. A.T. Massey Coal. Co.*, 556 U.S. 868, 884 (2009).

1. Campaign promises indicate this case was invited and give the appearance that it’s pre-decided. *See Williams*, 579 U.S. at 12. Here’s a sampling first in 2023 and then in 2025: “You look at Congress—you know, we have eight seats—six are red, two are blue, in a battleground state. So, we know something’s wrong.”<sup>1</sup> “[T]he maps” —adopted in *Johnson*—“are not fair.”<sup>2</sup> “[T]he maps are wrong.”<sup>3</sup> “[T]he gerrymandering decision was wrong.”<sup>4</sup>

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<sup>1</sup> Channel 3000 / News 3 Now, *Wisconsin Supreme Court debate presented by News 3 Now and WisPolitics*, at 29:40-29:49, YouTube (Mar. 21, 2023), <https://bit.ly/3HAtZtv>.

<sup>2</sup> A.J. Bayatpour, *In only state Supreme Court debate, candidates trade accusations of partisan ties*, CBS 58 (Mar. 21, 2023), <https://perma.cc/87BY-66CB>.

<sup>3</sup> Corrinne Hess, *Wisconsin Supreme Court candidate Janet Protasiewicz assails state’s election maps as ‘rigged,’* Milwaukee J. Sentinel (Jan. 9, 2023), <https://perma.cc/8T33-Z5M6>.

<sup>4</sup> Zac Schultz, *Candidates tangle over political issues, judicial perspectives at first 2023 Wisconsin Supreme Court forum*, PBS Wis. (Jan. 10, 2023), <https://perma.cc/HC4L-NFUS>.

The Court should “have a fresh look at our maps”<sup>5</sup> and “a fresh look at the gerrymandering question.”<sup>6</sup> After all, “[p]recedent changes when things need to change to be fair.”<sup>7</sup> Judicial elections are a “chance to put two more House seats in play for 2026.”<sup>8</sup> “[W]inning this race,” campaign materials read, “could also result in Democrats being able to win two additional US House seats.” Order App’x A, *Felton v. Wis. Elections Comm’n*, No. 2025AP999-OA (May 15, 2025) (Grassl Bradley, J., dissenting). These and other promises “pushed the envelope for a judicial candidate by offering voters explicit declarations of her views”<sup>9</sup> and “broke with the staid traditions.”<sup>10</sup>

Where, as here, campaigns promise to “change” Wisconsin’s congressional delegation,<sup>11</sup> the promise of fairness enshrined in the Due Process

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<sup>5</sup> Shawn Johnson, *In a supreme court race like no other, Wisconsin’s political future is up for grabs*, NPR (Apr. 2, 2023), <https://perma.cc/W2YA-WPA2>.

<sup>6</sup> Jessie Opoien & Jack Kelly, *Protasiewicz would ‘enjoy taking a fresh look’ at Wisconsin voting maps*, Cap Times (Mar. 2, 2023), <https://perma.cc/THH2-VH3Q>.

<sup>7</sup> Matt Mencarini, *How could the 2023 Wisconsin Supreme Court election impact medical malpractice lawsuits?*, PBS Wis. (Mar. 31, 2023), <https://perma.cc/V87K-LC4C>.

<sup>8</sup> Scott Bauer, *Wisconsin Supreme Court candidate criticized for attending briefing with Democratic donors*, AP (Jan. 29, 2025), <https://bit.ly/3Zw0hiL>.

<sup>9</sup> Ronald Brownstein, *The First Electoral Test of Trump’s Indictment*, Atlantic (Mar. 31, 2023), <https://perma.cc/CL5C-W5QY>.

<sup>10</sup> *The Downballot: The inside story on winning the Wisconsin Supreme Court* (transcript), Daily Kos (Jan. 25, 2024), <https://perma.cc/NV3S-3BJR>.

<sup>11</sup> Mencarini, *supra* n.7.



Clause is broken. Due process entitles every litigant “to ‘a proceeding in which he may present his case with assurance’ that no member of the court is ‘predisposed to find against him.’” *Williams*, 579 U.S. at 16. Statements promising to “ma[k]e new law” to achieve a desired outcome, *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986), give the appearance of unconstitutional prejudgment, *see Franklin v. McCaughtry*, 398 F.3d 955, 962 (7th Cir. 2005).

2. There also is a serious risk of actual bias given record-breaking Democratic Party campaign contributions. The Democratic Party of Wisconsin spent nearly \$10 million on the winning candidate in 2023<sup>12</sup> and another \$10 million (at least) on the winning candidate this year.<sup>13</sup>

The U.S. Supreme Court has warned “there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds ... when the case was pending or imminent.” *Caperton*, 556 U.S. at 884. And here, as in *Caperton*, there was “disproportionate” support from a single donor with a vested

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<sup>12</sup> *Campaign contributions: PAC and Political Committee Contributors to: Janet C Protasiewicz (NP) – Supreme Court*, Wis. Democracy Campaign, <https://perma.cc/9EZD-V69A>.

<sup>13</sup> Anya van Wagtenonk, *Trump and Musk’s backing wasn’t enough to flip Wisconsin Supreme Court*, NPR (Apr. 1, 2025), <https://perma.cc/K6NQ-XPG6>.

interest in proceedings to upend the current congressional map. *Id.* The Democratic Party’s \$10 million contributions to each of their campaigns is more than three times the size of the problematic contribution in *Caperton* and unquestionably “had a significant and disproportionate influence on the electoral outcome[s].” *Id.* at 885.

Moreover, as in *Caperton*, the “temporal relationship” between this petition and promises on the campaign trail create a “serious, objective risk of actual bias.” *Id.* at 886. It was “reasonably foreseeable,” *id.*, that a new challenge to Wisconsin’s congressional districts would come. Everyone knew “Democrats [we]re hoping th[is] court will redraw congressional lines.”<sup>14</sup> Now that challenge is here, with “Wisconsin Democrats” who “consistently vote[] for Democratic candidates for the U.S. House,” Pet. ¶¶15-23, requesting new congressional districts more favorable to Democrats, *see* Pet. ¶¶12, 66-67, 72. To avoid “serious, objective risk of actual bias,” recusals would be required. *Caperton*, 556 U.S. at 886 (holding U.S. Constitution required recusal where the newly elected justice “would review a judgment that cost his biggest donor’s company \$50 million”); *cf. State v. Herrmann*,

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<sup>14</sup> Bauer, *supra* n.8.

2015 WI 84, ¶40, 364 Wis. 2d 336, 867 N.W.2d 772 (Walsh Bradley, J.) (“judges must be perceived as beyond price”); *see also Williams*, 579 U.S. at 14 (bias infects proceedings with reversible “structural error”).

**B. Departures from normal procedures would compound due process concerns.**

The Due Process Clause “imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair.” *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 33 (1981). It requires “the opportunity to be heard.” *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). In the redistricting context “this court must act *as a court*, and provide, in this as in any other case, all of the procedural protections that due process and the right to be heard require.” *Jensen*, 2002 WI 13, ¶22. “The hearing must be ‘at a meaningful time and in a meaningful manner.’” *Goldberg*, 397 U.S. at 267. And “where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.” *Id.* at 269; *see also Greene v. McElroy*, 360 U.S. 474, 496 & n.25 (1959) (“confrontation and cross-examination are basic ingredients in a fair trial”). Wisconsin law prohibits courts from resolving factual disputes without “an evidentiary hearing.”

*See, e.g., Indus. Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶¶66 n.13, 299 Wis. 2d 81, 726 N.W.2d 898.

As this Court recognized in *Clarke*, Petitioners' partisan gerrymandering claims will require "extensive fact-finding (if not a full-scale trial)," which "counsels against addressing them." *Clarke v. Wis. Elections Comm'n*, 2023 WI 70, 409 Wis. 2d 372, 375, 995 N.W.2d 779. Petitioners' requested remedial proceedings to redistrict anew and consider "partisan skew," Pet.Memo.15, will also generate substantial factual disputes, as the *Clarke* re-litigation showed, *see, e.g., Ohio A. Philip Randolph Inst. v. Householder*, 367 F. Supp. 3d 697, 717-19 (S.D. Ohio 2019) (finding genuine disputes of material fact on "partisan effect" of legislative maps); *Whitford v. Nichol*, 180 F. Supp. 3d 583, 591-97 (W.D. Wis. 2016) (finding "fact issues that need to be resolved at trial" regarding efficiency gap).

There is insufficient time before the 2026 election deadlines to adjudicate this case with all the procedural protections that due process requires. *See Jensen*, 2002 WI 13, ¶¶22. It would violate due process to deny parties an opportunity to cross-examine experts, a hearing for factfinding, and other features of ordinary civil litigation on a normal schedule, rather than rush

to judgment before the 2026 elections. Any “depart[ure] from the accepted and usual course of judicial proceedings,” *Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010) (per curiam), will deprive parties of a meaningful opportunity to litigate the merits and proposed remedies. “Courts enforce the requirement of procedural regularity on others, and must follow those requirements themselves.” *Id.* at 184. Exempting this case from normal procedural rules will only compound the due process violations. See *Allen v. Georgia*, 166 U.S. 138, 140 (1897); accord *Jordan v. Massachusetts*, 225 U.S. 167, 174-75 (1912). Departing from normal procedures, rewarding Petitioners for their delay, and entertaining a claim this Court has squarely rejected would leave the unacceptable impression that this case has been rushed to judgment for a major political party.

### CONCLUSION

This Court should deny the petition for an original action.

Dated this 6th day of June, 2025.

Respectfully submitted,

Electronically signed by

/s/ Marie E. Sayer

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### CERTIFICATION REGARDING LENGTH AND FORM

I certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm), and (c), as modified by the Order of this Court. Excluding the portions of this brief that may be excluded, the length of this brief is 4,396 words as calculated by Microsoft Word.

Dated this 6th day of June, 2025

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