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Supreme Court of Wisconsin

No. 2025AP000996

ELIZABETH BOTHFELD, JO ELLEN BURKE, MARY COLLINS, CHARLENE GAEBLER-UHING, PAUL HAYES, SALLY HUCK, TOM KLOOSTERBOER, ELIZABETH LUDEMAN, and LINDA WEAVER,

Petitioners,

vs.

WISCONSIN ELECTIONS COMMISSION; DON MILLIS, ROBERT F. SPINDELL, JR., MARGE BOSTELMANN, ANN S. JACOBS, MARK L. THOMSEN, and CARRIE RIEPL, in their official capacities as commissioners of the Wisconsin Election Commission; and MEAGAN WOLFE, in her official capacity as administrator of the Wisconsin Elections Commission,

Respondents.

REPLY IN SUPPORT OF PETITION FOR AN ORIGINAL ACTION

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INTRODUCTION

For over a century, this Court has held that redistricting cases warrant its original jurisdiction. *See State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 730 (1892) ("If the remedy for these great public wrongs cannot be found in this [C]ourt, it exists nowhere."); *Jensen v. Wisconsin Elections Comm'n*, 2002 WI 13, ¶ 17, 249 Wis. 2d 706, 639 N.W.2d 537 ("[T]here is no question" that redistricting cases warrant this Court's exercise of jurisdiction); *Johnson v. Wisconsin Elections Comm'n*, 2021 WI 87, ¶ 20, 399 Wis. 2d 623, 967 N.W.2d 469 ("*Johnson I*") (a redistricting case "is, by definition *publici juris*, implicating the sovereign rights of the people of this state"); *Clarke v. Wisconsin Elections Comm'n*, 2023 WI 70, 409 Wis. 2d 372, 374, 995 N.W.2d 779, 779-81 (the "[C]ourt has long deemed redistricting challenges a proper subject" for original actions). Nonetheless, amici throw a series of procedural arguments at the wall, hoping to dissuade the Court from accepting this case. Nothing sticks.

First, the timing of Petitioners' filing does not preclude a remedy for their constitutional injuries. Spring 2025 is an appropriate time to bring claims aimed at preventing injuries most recently suffered in November 2024 that will otherwise be inflicted anew in November 2026. Second, the tried-and-failed arguments for disqualification have not grown more persuasive through

repetition. Neither Justice Protasiewicz nor Justice-elect Crawford have done anything to warrant recusal, and this Court may not preemptively disqualify Justice-elect Crawford. Third, this action will not require extensive fact-finding. This Court can resolve Petitioners' separation-of-powers claim on the papers in matter of weeks, obviating the need to decide the partisan gerrymandering claims at all. And in any event, the facts and data relevant to those claims are largely derived from the public record and thus readily judicially noticeable. Fourth, Petitioners' claims are not barred by stare decisis or res judicata. This Court's earlier statements about partisan gerrymandering were dicta, and Petitioners' separation-of-powers claim has never been addressed—let alone decided—in previous litigation. Finally, the Elections Clause is inapplicable here because there is no legislative act at issue. This Court should grant the Petition.

ARGUMENT

I. Petitioners' claims are not barred by laches.

Because Petitioners seek prospective injunctive relief to vindicate their rights in future elections, the Legislature and Congressmen's proposed laches defense fails at the threshold.[1]

[1] The Congressmen argue Petitioners' claims are unreasonably delayed, causing them prejudice, without explicitly invoking the laches doctrine—presumably because this Court rejected laches in *Clarke*. Nevertheless, the Congressmen's timeliness arguments fail for the same reasons that laches does not bar Petitioners' claims.

While this Court has applied laches to bar certain *post-election* challenges, it has recognized that districting claims present *pre-election* controversies that cannot be stale so long as the challenged map remains in use in future elections and sufficient time remains to litigate the claims. *See Clarke v. Wisconsin Elections Comm'n*, 2023 WI 79, ¶ 43 n.20, 410 Wis. 2d 1, 998 N.W.2d 370 (rejecting laches defense where Court was asked to "establish a process going forward so that constitutional maps are adopted in time for the next election").[2]

Even if laches were available as an affirmative defense, amici have failed to demonstrate either unreasonable delay or prejudice, each of which is independently necessary for laches to bar a claim. *See Wisconsin Small Businesses United, Inc. v. Brennan*, 2020 WI 69, ¶ 12, 393 Wis. 2d 308, 946 N.W.2d 101.

Beginning with the purported delay, courts across the country have recognized that, in the redistricting context, the

[2] Federal courts across the country have similarly rejected laches defenses in cases where plaintiffs sought prospective relief to prevent future injuries. *See, e.g.*, *Navarro v. Neal*, 716 F.3d 425, 429-30 (7th Cir. 2013) (reversing application of laches where plaintiffs sought "a purely prospective remedy" "concerning elections to be held in future years"); *Envt'l Def. Fund v. Marsh*, 651 F.2d 983, 1005 n.32 (5th Cir. 1981) ("The concept of undue prejudice, an essential element in a defense of laches, is normally inapplicable when the relief is prospective."); *League of Women Voters of Michigan v. Benson*, 373 F. Supp. 3d 867, 909 (E.D. Mich. 2019) (vacated on other grounds) (rejecting laches defense in partisan gerrymandering case because plaintiffs sought injunction against map's use in future elections); *Smith v. Clinton*, 687 F. Supp. 1310, 1312-13 (E.D. Ark. 1988) (holding districting claims were not barred by laches because "the injury alleged by the plaintiffs is continuing, suffered anew each time a[n] election is held").

laches clock resets each time "an election occurs." *Blackmoon v. Charles Mix County*, 386 F. Supp. 2d 1108, 1115 (D.S.D. 2005); *see Thomas v. Bryant*, 366 F. Supp. 3d 786, 803 (S.D. Miss. 2019) (recognizing "[i]n the redistricting context," laches "is best considered as a defense to last-minute requests for injunctive relief, and should not be wielded more than a year before an election"), *vacated as moot sub nom. Thomas v. Reeves*, 961 F.3d 800 (5th Cir. 2020) (en banc); *Miller v. Bd. of Comm'rs of Miller Cnty.*, 45 F. Supp. 2d 1369, 1373 (M.D. Ga. 1998) ("The defense of laches does not apply to voting rights actions wherein aggrieved voters seek *permanent* injunctive relief insofar as the electoral system in dispute has produced a recent injury or presents an ongoing injury to the voters."); *cf. Brown v. Ky. Legis. Rsch. Comm'n*, 966 F. Supp. 2d 709, 719 (E.D. Ky. 2013) (in redistricting case, holding injury accrued for purposes of statute of limitations in "the most recent election"). Because Petitioners were injured in November 2024, filing six months later—and 18 months in advance of the next congressional general election—was not undue delay. Indeed, redistricting challenges are routinely filed mid-decade so that plaintiffs can marshal the necessary evidence of a map's discriminatory effect. *See Davis v. Bandemer*, 478 U.S. 109, 135 (1986) (warning that "[r]elying on a single election" to show a map's partisan effects "is unsatisfactory"); *accord Whitford v. Gill*,

218 F. Supp. 3d 837, 902 (W.D. Wis. 2016), *vacated on other grounds sub nom. Gill v. Whitford*, 585 U.S. 48 (2018).

Amici further fail to demonstrate that they have been prejudiced by the timing of Petitioners' filing. Amici's purported "prejudice" stems from their apparent preference for the current map and a generalized desire to avoid disrupting the status quo. *See* Cong. Br. at 18-19; Leg. Br. at 21-22. But these consequences of an adverse judgment on the merits cannot support a laches defense. *See, e.g.*, *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1286 (11th Cir. 2015) (explaining that prejudice must stem from the delay "rather than from the consequences of an adverse decision on the merits"); *Baylor Univ. Med. Ctr. v. Heckler*, 758 F.2d 1052, 1058 (5th Cir. 1985) (rejecting laches defense because defendant's alleged "prejudice would arise essentially from a decision on the merits . . . rather than from the [plaintiff's] delay in bringing suit"). More importantly, "any disruption to the current [congressional] districts" which could result from Petitioners prevailing on the merits "is necessary to serve the public's interest in having districts that comply with each of the requirements of the Wisconsin Constitution." *Clarke v. Wisconsin Elections Comm'n*, 2023 WI 66, ¶ 43, 409 Wis. 2d 249, 995 N.W.2d 735.[3]

[3] Because the public interest weighs strongly in favor of considering the merits of this case, the Court should decline to apply laches even if it finds all elements

II. Petitioners' claims are not barred by due process considerations.

Contrary to arguments advanced by the Legislature, Congressmen, and the Johnson amici, due process does not require the recusal of Justice Protasiewicz or Justice-elect Crawford, and this action can be resolved well in advance of the 2026 elections.

As Petitioners will further detail in their opposition to the Congressmen's motion to recuse, Justice Protasiewicz is under no obligation to disqualify herself from considering this action.[4] Her limited campaign statements referencing Wisconsin's congressional map stopped far short of prejudging Petitioners' claims, and a policy that judges receiving political-party support must recuse from all election-related cases would leave the bench barren. Indeed, Justice Protasiewicz already rejected virtually identical arguments for recusal in 2023. *See Clarke*, 2023 WI 66.

Any argument for the recusal of Justice-elect Crawford is similarly baseless. Amici's argument turns on the aspirations of her supporters rather than on anything she has said or done. Cong. Br. at 25; Leg. Br. at 24; Johnson Br. at 18. In any event, amici's

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are met. *See State ex rel. Wren v. Richardson*, 2019 WI 110, ¶ 15, 389 Wis. 2d 516, 936 N.W.2d 587 ("[T]he court may—in its discretion—choose not to apply laches if it determines that application of the defense is not appropriate and equitable.").

[4] Petitioners briefly address the arguments for recusal here to the extent amici suggest it is a reason to deny the Petition. *See* Cong. Br. at 24-26; Leg. Br. at 23-27; Johnson Br. at 17-19.

call for Judge Crawford's recusal is two months premature, as that decision will belong to her alone once she is seated. *See State v. Am. T.V. & Appliance of Madison, Inc.*, 151 Wis. 2d 175, 183, 443 N.W. 662 (1989) (disqualification is not required "where one other than the judge" believes it to be warranted).

Nor is there any due process obstacle to concluding this litigation sufficiently in advance of the 2026 elections. Notably, *Johnson* (challenging State Assembly, State Senate, and congressional districts) and *Clarke* (challenging State Assembly and State Senate districts) were both initiated by petitions filed in August—three months later in the election cycle than here—and remedial maps were adopted well in advance of the next elections. Because this challenge concerns only the eight-district congressional map, its resolution is obtainable even faster than in those cases.

III. Petitioners' claims do not require extensive fact-finding.

Amici erroneously contend that each of Petitioners' claims necessarily requires intensive fact-finding. Cong. Br. at 12-18; Leg. Br. at 28; Johnson Br. at 15; WMC Br. at 4-8. There is no credible dispute, however, that Petitioners' separation-of-powers claim (Count IV) is easily resolved as a matter of law: the evidence of this Court's commitment to "least change" is irrefutable and fully contained in its opinions in *Johnson*, and the deficiencies with that "least change" approach are set forth in *Clarke*, which is now

binding precedent. Thus, liability on Count IV—which would avoid altogether the need to adjudicate the partisan gerrymandering claims—could be resolved on the papers well in advance of the 2026 election.

Petitioners' partisan gerrymandering claims, meanwhile, would not necessarily involve the extensive fact-finding amici imagine, as the relevant evidence is easily and readily presentable. For example, the auspices of the current congressional map are set forth in *Johnson*, *see, e.g.*, Evers Br. at 5-6, and this Court is empowered to take judicial notice of the facts and data relevant to its partisan effects, including district configurations and election data, *see Clarke*, 2023 WI 79, ¶ 1 n.1; *Jefferson v. Dane County*, 2020 WI 90, ¶ 10 n.2, 394 Wis.2d 602, 951 N.W.2d 556. And as Governor Evers notes, the Court has previously solicited and reviewed expert analysis of district maps and can refer factual issues to neutral third parties as needed. Evers Br. at 9; *see also* Wis. Stat. § 751.09. In short, merely because Petitioners' claims may require this Court to contend with facts does not mean this case is fact-*intensive* such that this Court should decline to exercise its original jurisdiction.

IV. Petitioners' claims are neither settled nor precluded.

Amici are wrong to assert that Petitioners' partisan gerrymandering claims have already been decided in previous litigation. *See* Cong. Br. at 9-12; Leg. Br. at 12-19; WMC Br. at 10.

As Petitioners have explained—and as the Johnson amici acknowledge—this Court's statements on partisan gerrymandering were dicta in *Johnson I*, which decided a claim of malapportionment, not partisan gerrymandering. *See* Pet. at 11, n.1; *see also* Johnson Br. at 11 ("the *Johnson* litigation was *only* about malapportionment"). In any event, this Court "may depart from stare decisis [] when a decision is unsound in principle because it misapplies the Wisconsin Constitution." *Clarke*, 2023 WI 79, ¶ 24. And this Court has already recognized that *Johnson* "misapplied the constitution" in requiring the "least change" principle to dictate district lines. *Id.* ¶¶ 24, 63. Accordingly, *Johnson I*'s passing statements about partisan gerrymandering are no reason for this Court to refrain from squarely addressing those issues now.

Tellingly, no amici argues that Petitioner's separation-of-powers claim is precluded. Nor could they—Count IV has never been decided, is ripe for consideration, and is readily resolved based on the undisputed facts and this Court's binding precedent in *Clarke*. Instead, the Congressmen and Legislature suggest that an original action here would "not [be] appropriate" because the Petition attempts to "repackag[e]" the Hunter Intervenors' motion for relief from judgment in *Johnson II*. Cong. Br. at 11; *see also* Leg. Br. at 18-19. Amici's efforts to sidestep the doctrine of res judicata in advancing this argument are understandable, since it

so plainly does not apply to preclude jurisdiction here. In order "for an earlier action to bar a subsequent action," there must be "an identity between the parties or their privies in the prior and present suits" and "a final judgment on the merits." *Fed. Nat'l Mortg. Ass'n v. Thompson*, 2018 WI 57, ¶ 31, 381 Wis. 2d 609, 912 N.W.2d 364. Neither exists here.

The Petitioners in this action are plainly different from the Hunter Intervenors who moved to reopen *Johnson II*. Amici nonetheless suggest that the parties are sufficiently identical because they are represented by the same counsel. Cong. Br. at 10-11; Leg. Br. at 18. But they fail to identify any authority establishing privity based solely on the use of the same attorney. Indeed, courts have routinely rejected that precise argument. *See, e.g.*, *Gen. Land Off. v. Biden*, 71 F.4th 264, 270 (5th Cir. 2023) (privity "requires more than a showing of parallel interests or, even, a use of the same attorney in both suits")*; Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1230 (10th Cir. 2005) ("A person is not in privity with another simply because of the . . . 'employ[ment of] the same attorney.'"); *Rodgers v. Sargent Controls & Aerospace*, 136 Cal. App. 4th 82, 93 (2006), as modified (Feb. 7, 2006) (rejecting the argument that using the same attorneys establishes privity for preclusion purposes because it would discourage solicitation of experienced attorneys).

Moreover, the Hunter Intervenors' motion for relief from *Johnson II* did not result in a final judgment on the merits of *any* claims. This Court's one-sentence order denying the motion provided no explanation of whether that decision was based on procedural or substantive reasons,[5] let alone any mention of the merits of the separation-of-powers claim Petitioners raise here. Order, *Johnson v. Wisconsin Elections Comm'n*, No.2021AP1450-OA (Wis. Mar. 1, 2024) ("*Johnson II*"). This Court should thus reject the Legislature and Congressmen's unsupported preclusion argument.

V. Petitioner's claims are not barred by the Elections Clause of the U.S. Constitution.

Amici are wrong to assert that Petitioners' claims implicate—let alone are barred by—the Elections Clause of the U.S. Constitution. Cong. Br. at 20-24; Leg. Br. at 9-11; Johnson Br. at 12-14. Relying on *Moore v. Harper*, 600 U.S. 1 (2023), amici

[5] For instance, the Court's order may have resulted from an evenly divided 3-3 vote by the participating Justices on whether to reopen the case in light of Justice Protasiewicz's decision not to participate in the motion. *Cf. In re Matthew D.,* 2016 WI 35, ¶ 146, 368 Wis. 2d 170, 880 N.W.2d 107 (Abrahamson & Walsh Bradley, JJ., dissenting) ("In prior writings reviewing the experiences and practices of this court and the United States Supreme Court, when a new justice joins the court, the conclusion was as follows: A new justice who did not participate in oral argument does not participate in the decision of the case unless the other members of the court decide that the case should be reargued. The new justice may participate in reargument.").

suggest that this Court's judicial review of its *own* map enacted in *Johnson I* would constitute "arrogat[ing] to [the Court] the power vested in state legislatures to regulate federal elections." Cong. Br. at 20 (quoting *Moore*, 600 U.S. at 36-37).

Amici's invocation of *Moore* suffers from two fatal defects. First, *Moore* is inapplicable to the Petition. *Moore* only concerns the judicial review of "legislative acts." 600 U.S. at 19. Here, there is no legislative act at issue in the Petition. Instead, the Petition raises constitutional infirmities with a judicial remedy this Court enacted in *Johnson I*. Notably, even *Johnson I* itself did not implicate "arrogating" the Legislature's authority because that case arose out of the *failure* of the Legislature to exercise its authority and redistrict the state after the 2020 Census. *Johnson I*, 2021 WI 87, ¶ 1. In that sense, this Petition is two degrees removed from any question of the Legislature's authority to redistrict under the Elections Clause. And this Court established decades ago that, in the event of legislative inaction, it is without "question but that this matter warrants this court's original jurisdiction." *Jensen*, 2002 WI 13, ¶ 17.

Second, even if a legislative act were at issue, nothing in *Moore* prohibits a state court from applying its own state constitution to the congressional redistricting process. Indeed, the express holding of *Moore* was that the "Elections Clause does not insulate state legislatures from the ordinary exercise of state

judicial review." 600 U.S. at 22. The Court went on to reaffirm nearly century-old precedent, explaining that a "legislature may not 'create congressional districts independently of' requirements imposed 'by the state constitution with respect to the enactment of laws.'" *Id.* at 26 (quoting *Smiley v. Holm*, 285 U.S. 355, 373 (1932)).

CONCLUSION

Petitioners respectfully request that this Court grant the Petition for Original Action.

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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 a proportional serif font (Century Schoolbook 13 pt. for body text and 11 pt. for quotes and footnotes). The length of this brief is 2,988 words.

Dated: June 11, 2025

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