No. 2025XX1438

IN THE SUPREME COURT OF WISCONSIN

ELIZABETH BOTHFELD, JO ELLEN BURKE, MARY COLLINS, CHARLENE GAEBLER-UHING, KATHLEEN GILMORE, PAUL HAYES, SALLY HUCK, TOM KLOOSTERBOER, ELIZABETH LUDEMAN, GREGORY ST. ONGE, AND LINDA WEAVER,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION; MARGE BOSTELMANN, ANN S. JACOBS, DON M. MILLIS, ROBERT F. SPINDELL, JR., MARK L. THOMSEN, AND CARRIE RIEPLE, 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,

Defendants.

NON-PARTY BRIEF OF THE WISCONSIN LEGISLATURE AS *AMICUS CURIAE* IN OPPOSITION TO APPOINTMENT OF A THREE-JUDGE PANEL AND IN SUPPORT OF DISMISSAL

CONSOVOY MCCARTHY PLLC
TAYLOR A.R. MEEHAN*
DANIEL M. VITAGLIANO*†
OLIVIA ROGERS*†
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
703.243.9423
taylor@consovoymccarthy.com
dvitagliano@consovoymccarthy.com
orogers@consovoymccarthy.com

CRAMER MULTHAUF LLP
Matthew M. Fernholz, #1065765
1601 E. Racine Ave., Ste. 200
P.O. Box 558
Waukesha, WI 53187-0558
262.542.4278
mmf@cmlawgroup.com

* *Pro hac vice motions forthcoming*
† *Supervised by principals of the firm admitted to practice in VA*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

INTRODUCTION

Plaintiffs challenge the constitutionality of this Court's final judgment and injunction entered years ago in redistricting litigation. *See Johnson v. Wis. Elections Comm'n* (*Johnson II*), 2022 WI 14, ¶52, 400 Wis. 2d 626, 971 N.W.2d 402. That is not a challenge to the "apportionment" of congressional districts within the meaning of Wis. Stat. §801.50(4m). The statute contemplates legislative acts of redistricting, not court judgments. This case does not qualify for appointment of a three-judge panel. Indeed, there is no basis for it proceeding at all.

Only this Court—not circuit courts—can revisit the *Johnson II* injunction. The same Plaintiffs represented by the same counsel said so themselves just a few months ago when another round of original actions asked to revisit Wisconsin's congressional districts: "Because Petitioners bring purely state law claims against a map that was adopted by this Court, no other court can provide Petitioners' requested relief." Pet. for Original Action ¶98, *Bothfeld v. Wis. Elections Comm'n*, No. 2025AP996-OA (Wis. May 7, 2025). This Court refused to revisit the *Johnson II* injunction then. That marks the end of the road for Plaintiffs. Their desired redraw of congressional districts cannot be squared with the federal Elections Clause,

the doctrine of laches, or the Wisconsin Constitution. This action should be dismissed.

ARGUMENT

I. Plaintiffs do not challenge the "apportionment" of congressional districts.

Plaintiffs' complaint is not a challenge to the "apportionment" of congressional districts under Wis. Stat. §801.50(4m). It is a collateral attack on this Court's judgment in *Johnson II*. Statutory text, context, and structure show that §801.50(4m) contemplates *legislative* "apportionment" or redistricting. This action does not qualify.

Start with the text. Apportionment is the "[d]istribution of legislative seats among districts." *Apportionment*, Black's Law Dictionary (9th ed. 2009). As the U.S. Constitution, the Wisconsin Constitution, and countless judicial decisions confirm, apportionment is a distinctly legislative act. The U.S. Constitution tasks "the Legislature" with congressional redistricting. U.S. Const. art. I, §4, cl. 1. The Wisconsin Constitution requires "the legislature" to "apportion and district anew the members of the senate and assembly" after each census. Wis. Const. art. IV, §3; *see Fish Creek Park Co. v. Village of Bayside*, 274 Wis. 533, 537, 80 N.W.2d 437 (1957) ("apportionment" is "the

duty of the legislature"); *accord Johnson v. Wis. Elections Comm'n* (*Johnson III*), 2022 WI 19, ¶5 n.1, 401 Wis. 2d 198, 972 N.W.2d 559. Further, this Court has long "emphasize[d] the obvious" that 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); *accord Gaffney v. Cummings*, 412 U.S. 735, 749 (1973) ("[T]he apportionment task … is primarily a … legislative process."); *Ely v. Klahr*, 403 U.S. 108, 114 (1971) ("[D]istricting and apportionment are legislative tasks in the first instance."). This Court "assumes the legislature" enacted §801.50(4m) with that legal landscape in mind. *In re Paternity of Roberta Jo W.*, 218 Wis. 2d 225, 233, 578 N.W.2d 185 (1998).

Context and structure confirm that "apportionment" in §801.50(4m) means a legislative act. *See State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 ("statutory language is interpreted in the context in which it is used" and "as part of a whole"). Section 801.50(4m) "must be construed together" with "statutes passed in the same legislative act on the same subject." *Waranka v. Wadena Ins. Co.*, 2014 WI 28, ¶17, 353 Wis. 2d 619, 847 N.W.2d 324. Wisconsin enacted

§801.50(4m)'s "apportionment" provision as part of 2011 Wisconsin Act 39. Act 39 addresses the Legislature's role in apportionment and redistricting, with *no* mention of courts. *See* 2011 Wis. Act 39, §§3, 4, 9M (codified at Wis. Stat. §5.15(1)(c), (2)(b), (4)(c)) (specifying "an act of the legislature redistricting"); §9 (codified at Wis. Stat. §5.15(4)(a)) (specifying where "the legislature, in an act redistricting legislative districts … or in redistricting congressional districts"). And two weeks after passing Act 39, the Legislature passed Acts 43 and 44, creating new legislative and congressional districts based on the 2010 census. *See* 2011 Wis. Act 43 (codified at Wis. Stat. §§4.009, 4.01-4.99); 2011 Wis. Act 44 (codified at Wis. Stat. §§3.11-3.18). Legislative Council memos for those acts cross-reference Act 39, stating it "was enacted to facilitate *the Legislature*'s redistricting of legislative and congressional districts—in 2011 Wisconsin Acts 43 and 44, respectively." Wis. Legis. Council Act Memo, *2011 Wis. Act 43: Legislative Redistricting* (Aug. 12, 2011) (emphasis added); Wis. Legis. Council Act Memo, *2011 Wis. Act 44: Congressional Redistricting* (Aug. 12, 2011); *see Brey v. State Farm Mut. Auto. Ins.*, 2022 WI 7, ¶¶21, 25, 400 Wis. 2d 417, 970

N.W.2d 1 (consulting Legislative Council memo "to confirm plain meaning").

Construing §801.50(4m) together with "closely related" provisions "in the same statutory scheme" leads to the same conclusion. *State v. Reyes Fuerte*, 2017 WI 104, ¶28, 378 Wis. 2d 504, 904 N.W.2d 773. Surrounding statutes, not §801.50(4m), set the ground rules for when and how parties may challenge court judgments. *See James v. Heinrich*, 2021 WI 58, ¶19, 397 Wis. 2d 517, 960 N.W.2d 350 ("[A]cts *in pari materia*, and relating to the same subject, are to be taken together."). Parties may move for relief from a "judgment, order or stipulation." Wis. Stat. §806.07(1). Parties also "may seek reconsideration of the judgment or opinion of the supreme court by filing a motion under s. 809.14." §809.64. Plaintiffs' view that §801.50(4m) encompasses a collateral attack on a court judgment is not harmonious with these more-specific statutes addressing challenges to court judgments. *See James*, 2021 WI 58, ¶19; *In re T.L.E.-C.*, 2021 WI 56, ¶30, 397 Wis. 2d 462, 960 N.W.2d 391 (applying the "harmonious-reading canon").

Still more, Plaintiffs' interpretation of §801.50(4m) "unnecessarily raise[s] serious constitutional questions." *Wis. Legis. v. Palm*, 2020 WI 42,

¶31, 391 Wis. 2d 497, 942 N.W.2d 900. Appointing a three-judge panel here would flip the constitutional hierarchy of Wisconsin's judiciary on its head, empowering an inferior tribunal to override a final judgment of this Court. *See* Order, *Bothfeld v. Wis. Elections Comm'n*, No. 2025XX1438 (Wis. Sept. 25, 2025) (Bradley, J., dissenting). This Court should apply the "fundamental rule of statutory construction" and read §801.50(4m) to "avoid [a] potential constitutional violation." *U.S. Fire Ins. Co. v. E.D. Wesley Co.*, 105 Wis. 2d 305, 319-20, 313 N.W.2d 833 (1982). Section 801.50(4m) is for actions challenging legislative acts, not final decisions of this Court, leaving no basis for this Court to appoint a three-judge panel.

II. The circuit court cannot adjudicate the constitutionality of this Court's judgment in *Johnson II*.

Even if the Court reads §801.50(4m) differently, the only conceivable next step for Plaintiffs' action is dismissal by this Court. The circuit court has no power to set aside *Johnson II*'s final judgment and permanent injunction. This Court issued that injunction with instructions that it would remain in place "for all upcoming elections" and "until new maps are enacted into law or a court otherwise directs." *Johnson II*, 2022 WI 14, ¶52. Three times, this Court has been asked to revisit that injunction, and all three

times, it has declined. *See* Order, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Wis. Mar. 1, 2024) (denying motion for relief from *Johnson II* judgment); Order, *Bothfeld*, No. 2025AP996-OA (Wis. June 25, 2025) (denying petition for original action); Order, *Felton v. Wis. Elections Comm'n*, No. 2025AP999-OA (Wis. June 25, 2025) (same).

Against that procedural history, Plaintiffs cannot now seek a declaration that this Court's *Johnson II* injunction violated the Wisconsin Constitution and demand that the circuit court enjoin it. *But see* Compl. p.26 ¶¶2-3. Plaintiffs said so themselves to this Court only months ago in their petition for an original action to challenge the congressional districts: "Because Petitioners bring purely state law claims against a map that was adopted by this Court, no other court can provide Petitioners' requested relief," *i.e.*, declare Wisconsin's current congressional map unconstitutional and enjoin its use. Pet. for Original Action ¶98, *Bothfeld*, No. 2025AP996-OA (May 7, 2025). This Court then denied that petition. By Plaintiffs' own logic, that marks the end of the road for their attempt to reshape Wisconsin's congressional districts.

As Plaintiffs acknowledge, neither the circuit court nor Defendants can ignore the binding and precedential injunction issued in *Johnson II*. *See Cline v. Whitaker*, 144 Wis. 439, 129 N.W. 400, 400-01 (1911) ("An injunctional order, within the power of the court, must be implicitly obeyed so long as it stands … unless there is a want of jurisdiction."). The "sole remedy" to challenge the injunction is "by motion to vacate the injunction." *State ex rel. Fowler v. Cir. Ct. of Green Lake Cnty.*, 98 Wis. 143, 73 N.W. 788, 790 (1898). Short of that, "[i]t must be obeyed while in existence." *Id.* And as Plaintiffs agree, only this Court can entertain that motion to vacate its own injunction. *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.").

This Court has "superintending authority over all Wisconsin courts," which enables it "to control the course of ordinary litigation in the lower courts." *Madison Tchrs., Inc. v. Walker*, 2013 WI 91, ¶16, 351 Wis. 2d 237, 839 N.W.2d 388. Because the circuit court cannot adjudicate Plaintiffs' claims, this Court need not undertake the futile act of appointing a three-judge panel. *See Peshtigo Lumber Co. v. Ellis*, 122 Wis. 433, 100 N.W. 834, 836 (1904)

("A court will not undertake labor which, when completed, is in vain."); *see also E.L. Husting Co. v. Coca-Cola Co.*, 194 Wis. 311, 216 N.W. 833, 835 (1927) (construing civil procedure statute to avoid "requiring parties or courts the performing of the impossible or the going through with an idle and futile formality"). The Court should dismiss this action, just as it did a decade ago after a request in a redistricting action for a three-judge panel. *See* Order, *Clinard v. Brennan*, No. 2011XX1409 (Wis. Jan. 13, 2014).

III. Federal and state law demand dismissal too.

A. Adjudicating Plaintiffs' claims would violate the Elections Clause.

Courts do not have "free rein" to redistrict congressional districts anew. *Moore v. Harper*, 600 U.S. 1, 34 (2023). The U.S. Constitution instead 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. 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), 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, this Court

remedied voters' malapportionment claims with a mandatory injunction making only slight adjustments to existing lines. *Johnson II*, 2022 WI 14, ¶52.

The Court did not redistrict anew as though it were the Legislature. Rather, it 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; *see Johnson v. Wis. Elections Comm'n* (*Johnson I*), 2021 WI 87, ¶¶71-72, 399 Wis. 2d 623, 967 N.W.2d 469 (plurality op.); *id.* ¶85 (Hagedorn, J., concurring). Redistricting is "an inherently … legislative—not judicial—task." *Jensen*, 2002 WI 13, ¶10.

There is nothing left for any court to do. Plaintiffs' request that the circuit court redraw congressional districts to strike a new political balance is an invitation to transgress the normal bounds of judicial review three

times over. It invites the circuit court to declare invalid an injunction that only this Court can vacate. *Supra* II. It invites the circuit court to entertain an unduly delayed challenge, contrary to the doctrine of laches. *Infra* III.B. And it invites the circuit court to exercise a power that this Court has held the Wisconsin Constitution does not confer on its courts. *Infra* III.C. For any of these reasons, entertaining Plaintiffs' claims would "transgress the ordinary bounds of judicial review," "arrogate … power vested in state legislatures to regulate federal elections," and run afoul of the federal Elections Clause. *Moore*, 600 U.S at 36; *accord id.* at 38 (Kavanaugh, J., concurring).

B. Laches bars Plaintiffs' action.

Laches bars Plaintiffs' action because Plaintiffs "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. By delaying, Plaintiffs 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. Plaintiffs waited 1,238 days after this Court's judgment in *Johnson II*. They do not even attempt to justify their delay. While they claim *Clarke*'s overruling of "least change" renders the current congressional map "without a legal foundation," Compl. ¶66, that was 657 days ago. Voters—represented by

Plaintiffs' same counsel—unsuccessfully asked to revisit the congressional districts only weeks after that decision. Order, *Johnson*, No. 2021AP1450-OA (Mar. 1, 2024). Where were Plaintiffs then?

As for the other laches factors, no party could have anticipated Plaintiffs' years-delayed suit in circuit court. Five months ago, Plaintiffs said that only this Court has the power to revisit the *Johnson* injunction, and this Court then declined to revisit it. *Supra* II. There was no reason to believe that Plaintiffs would ask the circuit court to second-guess this Court. *See Brennan*, 2020 WI 69, ¶18. And everyone—voters, constituents, candidates, congressmembers, and election officials—is prejudiced by Plaintiffs' untimeliness. *See Trump*, 2020 WI 91, ¶24. A statewide redraw this far into the decade will "result in voter confusion." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). The State will soon be required to redistrict again after the 2030 census, which comes with substantial "costs and instability." *LULAC v. Perry*, 548 U.S. 399, 421 (2006) (plurality op.). And all the parties who litigated *Johnson* would "surely [be] placed 'in a less favorable position'" by Plaintiffs' delay—forced to re-litigate redistricting anew. *See Brennan*, 2020 WI 69, ¶¶24-25. Entertaining Plaintiffs' requested do-over,

despite Plaintiffs' thousand-day delay, would "transgress the ordinary bounds of judicial review." *Moore*, 600 U.S. at 36.

C. Plaintiffs' claims are meritless.

Plaintiffs contend that *Johnson II* perpetuated a partisan gerrymander originating with Act 44 that violates Article I, Sections 1, 3, 4, and 22 of the Wisconsin Constitution and "separation-of-powers principles." Compl. ¶¶7, 11, 51, 75-97. This Court already held otherwise: "We hold … the partisan makeup of districts does not implicate any justiciable or cognizable right." *Johnson I*, 2021 WI 87, ¶8 (plurality op.); *accord id.* ¶82 n.4 (Hagedorn, J., concurring). This Court found no "right to partisan fairness in Article I, Sections 1, 3, 4, or 22 of the Wisconsin Constitution." *Id.* ¶53 (majority op.). And it 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." *Id.* ¶52.

As for Plaintiffs' specific gerrymandering claims here, this Court held Article I, Section 1 "has nothing to say about partisan gerrymanders," *id.* ¶55, Article I, Sections 3 and 4 "do not inform redistricting challenges," *id.* ¶59, and Article I, 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," this Court held, "would violate axiomatic principles of [constitutional] interpretation, while plunging this court into the political thicket lurking beyond its constitutional boundaries." *Id.* ¶63 (citation omitted). Those provisions of the Wisconsin Constitution remain unchanged.

Plaintiffs' separation-of-powers claim fares no better. Plaintiffs claim the congressional map is unlawful because this Court, in employing a least-change approach, "abdicated" its obligation to "exercise its independent judgment" and "improperly substituted the partisan judgment that prevailed in the 2011 political process for its own." Compl. ¶¶10-11, 80. In other words, courts cannot defer to prior plans. 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"). Plaintiffs 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.); *accord id.* ¶85 (Hagedorn, J., concurring). 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 usurp the Legislature's constitutionally assigned duty to redistrict and implicate the federal Elections Clause. *Supra* III.A. When, as this Court explained, the least-change approach is simply "a convenient way to describe" the Wisconsin Constitution's limitations on the judicial power in redistricting cases, *Johnson I*, 2021 WI 87, ¶72 (plurality op.); *accord id.* ¶85 (Hagedorn, J., concurring), then abandoning that approach to redraw districts anew would "transgress the ordinary bounds of judicial review" and have courts "arrogate to themselves the power vested in state legislatures to regulate federal elections," *Moore*, 600 U.S. at 36.

CONCLUSION

This Court should decline to appoint a three-judge panel and dismiss this action.

Dated this 9th day of October, 2025

Respectfully submitted,

Electronically signed by Matthew M. Fernholz

CONSOVOY MCCARTHY PLLC
TAYLOR A.R. MEEHAN*
DANIEL M. VITAGLIANO*†
OLIVIA ROGERS*†
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
703.243.9423
taylor@consovoymccarthy.com
dvitagliano@consovoymccarthy.com
orogers@consovoymccarthy.com

CRAMER MULTHAUF LLP
Matthew M. Fernholz, #1065765
1601 E. Racine Ave., Ste. 200
P.O. Box 558
Waukesha, WI 53187-0558
262.542.4278
mmf@cmlawgroup.com

* *Pro hac vice motions forthcoming*
† *Supervised by principals of the firm admitted to practice in VA*

Attorneys for Non-Party Amicus,
The Wisconsin State Legislature

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). Excluding the portions of this brief that may be excluded, the length of this brief is 2,975 words as calculated by Microsoft Word.

Dated: October 9, 2025

Respectfully submitted,

Electronically signed by Matthew M. Fernholz

CRAMER MULTHAUF LLP
Matthew M. Fernholz, #1065765
1601 E. Racine Ave., Ste. 200
P.O. Box 558
Waukesha, WI 53187-0558
262.542.4278
mmf@cmlawgroup.com