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Supreme Court of Wisconsin

No. 2025XX001438

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,

vs.

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

PLAINTIFFS' RESPONSE BRIEF

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INTRODUCTION

The only issue before this Court is whether Plaintiffs challenge the "apportionment" of Wisconsin's congressional districts under Section 801.50(4m). Plaintiffs answer "yes," but if the Court disagrees, all that means is that the case should be heard by a single judge rather than a panel.

Amici, however, seize on the Court's request for briefing on this narrow issue to raise a host of unrelated objections to Plaintiffs' claims. The Court should not entertain those objections. The Court already passed on adjudicating Plaintiffs' claims in the first instance when it denied their petition to commence an original action. Now that the case is in circuit court, it must allow the lower court to rule on the merits of Plaintiffs' claims, which this Court can then review on appeal in the ordinary course.

Even if this Court were to look to amici's objections, none warrants dismissal.[1]

[1] Plaintiffs do not address here the motions to recuse Justices Protasiewicz and Crawford. Justice Protasiewicz has twice denied similar motions in thoroughly reasoned orders. *See Clarke v. Wis. Elections Comm'n*, 2023 WI 66, 409 Wis. 2d 249, 995 N.W.2d 735; Order Denying Mot. for Recusal, *Bothfeld v. Wis. Elections Comm'n*, No. 2025AP000996 (June 25, 2025). Justice Crawford should likewise decline to recuse. In addition to all the reasons why recusal is unwarranted already explicated by Justice Protasiewicz, recusal here and now would be particularly unwarranted because the only issue before the Court is ministerial and does not require the exercise of discretion.

ARGUMENT

I. Plaintiffs challenge the apportionment of Wisconsin's congressional districts.

A. "Apportionment" refers to both the allocation and division of congressional districts.

Amici's notion that "apportionment" refers only to the *allocation* of congressional districts among states, rather than the *division* of districts within a state, simply makes no sense in the context of Section 801.50(4m). *See* Pls.' Opening Br. at 7–10. The problem with that understanding of "apportionment" is that it is nearly impossible to conceive of any *state*-court action challenging the *allocation* of congressional districts to Wisconsin—which is done by Congress under the Enumeration Clause. U.S. Const. art. I, § 2, cl. 3.

The best amici can come up with is that, under their understanding of "apportionment," Section 801.50(4m) might apply to a suit against the U.S. Census Bureau alleging its "miscalculation of Wisconsin's population in the decennial census resulting in too few Wisconsin Representatives in Congress." Cong. Br. at 19–20. Leaving aside that a state court would lack jurisdiction over this hypothetical claim, *see* U.S. Const. art. VI, cl. 2, amici fail to identify a single example in which such a challenge has been brought, in Wisconsin or anywhere else. It would defy logic to conclude the Legislature enacted Section 801.50(4m) to

apply only to some far-fetched imaginary case but not to the types of redistricting suits routinely litigated in Wisconsin courts.

Amici's textual argument fares no better. They point to Black's Law Dictionary's third definition of "apportionment" to contend the term refers only to the "allocation" of congressional seats, Cong. Br. at 16; *see also* Leg. Br. at 7—skipping over its *first* entry defining the term as the "division" of something into "proportionate shares." *Apportionment*, Black's Law Dictionary (12th ed. 2024). In other words, "apportionment" means *both* the allocation of congressional seats among the states *and* the division or redistricting of those seats within a state. Reflecting that dual meaning, this Court has long used "apportionment" and "redistricting" interchangeably, and federal three-judge panels regularly hear redistricting challenges under a statute that mirrors Section 801.50(4m). *See* Pls.' Opening Br. at 9–10.

In fact, amici's own recitation of the legislative history of Section 801.50(4m) confirms the provision was meant to apply to redistricting challenges. *See* Leg. Br. at 9 (arguing the provision was meant to "facilitate the Legislature's *redistricting* of legislative and Congressional districts") (quoting Wis. Legis. Council Act Memo, *2011 Wis. Act 43: Congressional Redistricting* (Aug. 12, 2011)) (emphasis added).

B. Section 801.50(4m) does not distinguish between challenges to maps selected by the Legislature or by courts.

Amici also argue that Section 801.50(4m) applies only to challenges to congressional maps enacted by the Wisconsin Legislature, not to challenges to maps selected by courts. Cong. Br. at 20–24; Leg. Br. at 7–11. This distinction has no basis in the text of the statute: It broadly applies to any "action to challenge the apportionment of any congressional or state legislative district." Wis. Stat. § 801.50(4m). Amici would have this Court insert the adjective "legislative" before "apportionment"—but that is simply not what the statute says. *See State v. Neil*, 2020 WI 15, ¶ 12, 390 Wis. 2d 248, 938 N.W.2d 521 ("We may not add words to the statute's text.").

The only support amici can muster for this theory is that courts describe "[d]istricting and apportionment" as "legislative tasks in the first instance." Cong. Br. at 21 (quoting *Ely v. Klahr*, 403 U.S. 108, 114 (1971)); *see also* Leg Br. at 7–8. True, but apportionment nonetheless falls to the courts when the "political branches [reach] an impasse." *Johnson v. Wis. Elections Comm'n*, 2021 WI 87, ¶ 18, 399 Wis. 2d 623, 967 N.W.2d 469. That is what happened here: The Legislature "fail[ed] to reapportion according to constitutional requisites in a timely fashion," so this Court did so in its stead. Unpublished Order at 2, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Wis. Sept. 22, 2021, amended Sept.

24, 2021) (per curiam); *see Clarke v. Wis. Elections Comm'n*, 2023 WI 79, ¶ 193, 410 Wis. 2d 1, 147, 998 N.W.2d 370, 443 (Bradley, J., dissenting) ("Just twenty months ago, this court used its limited remedial powers to reapportion Wisconsin's legislative districts[.]"). In short, "[c]ourts called upon to perform redistricting are, of course, *judicially legislating*." *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 10, 249 Wis. 2d 706, 639 N.W.2d 537 (emphasis in original); *see also Growe v. Emison*, 507 U.S. 25, 33 (1993) (recognizing "[t]he power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan").

Nor does the doctrine of constitutional avoidance require distorting Section 801.50(4m) in this way. If that special venue provision did not apply to challenges to maps selected by courts, then the regular rules of procedure would, and a single judge would hear Plaintiffs' claims. Either way, whether the lower court has the power to grant relief here is entirely separate from which venue rules apply, despite amici's attempt to inject their arguments on the merits into an issue of pure procedure.

II. The Court should not entertain objections on the merits.

The Court ordered briefing on a narrow procedural issue: whether Plaintiffs' challenge the "apportionment" of a congressional district under Section 801.50(4m). Briefing Order at 2. Amici perplexingly took that as an open invitation to raise all

objections they have on the merits. But the merits of Plaintiffs' claims are not before the Court. In fact, this Court explicitly *declined* to be the first court to hear the merits by denying Plaintiffs' petition to commence an original action. *See* Order, *Bothfeld v. Wis. Elections Comm'n*, No. 2025AP996-OA (Wis. June 25, 2025).

The Court should not entertain amici's attempt to circumvent the regular order of review by putting the merits before the Court now. All that the Court is called to do at this point is appoint a panel of three judges and select a venue. *See* Wis. Stat. § 751.035(1) ("Upon receiving notice under [Wis. Stat. §] 801.50 (4m), the supreme court *shall* appoint a panel consisting of 3 circuit court judges to hear the matter" and "*shall* assign one of the circuits as the venue") (emphases added). That is a purely ministerial task. *See Lister v. Bd. of Regents of Univ. Wis. Sys.*, 72 Wis. 2d 282, 301, 240 N.W.2d 610, 622 (1976) (explaining a duty is "ministerial" when the law "prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion"). The Court must perform that task and let the case proceed below.

The Court should reject out of hand amici's extraordinary request for it to exert superintending authority—which must "not be invoked lightly"—to smother Plaintiffs' complaint in the crib. *State v. Jennings*, 2002 WI 44, ¶ 15, 252 Wis. 2d 228, 647 N.W.2d

142. Exercising such authority is entirely unwarranted where, as here, Plaintiffs seek merely to assert their constitutional rights in the avenue left available to them under Wisconsin law. *See Madison Tchrs., Inc. v. Walker*, 2013 WI 91, ¶ 16, 351 Wis. 2d 237, 839 N.W.2d 388 (recognizing superintending authority is appropriate only to "[e]nsure the due administration of justice" (quoting *In re Kading,* 70 Wis. 2d 508, 520, 235 N.W.2d 409, 414 (1975))). Moreover, the Court's superintending authority is intended only to "prevent irreparable mischief"—it "will not be exercised when the remedy by appeal or writ of error is substantially adequate." *In re Phelan*, 225 Wis. 314, 274 N.W. 411, 415 (1937); *see also McEwen v. Pierce Cnty*., 90 Wis. 2d 256, 269, 279 N.W.2d 469, 474–75 (1979) ("This court will not exercise its superintending power where there is another adequate remedy, by appeal or otherwise."). Amici make no effort to explain why an ordinary appeal would not be perfectly adequate here.

As this Court has already denied Plaintiffs' petition to commence an original action, refusing to let the case proceed below would effectively deny Plaintiffs *any* forum for their constitutional claims and bar any challenge to Wisconsin's congressional district map for the 2026, 2028, or 2030 elections. Plaintiffs should not be required "to live for the next [seven] years in districts defined by a map that is substantially likely to be unconstitutional." *Jacksonville Branch of NAACP v. City of Jacksonville*, No. 22-

13544, 2022 WL 16754389, at *5 (11th Cir. Nov. 7, 2022) (unpublished opinion).

III. Amici's arguments on the merits fail.

Even if this Court were to entertain amici's objections to Plaintiffs' challenge, none warrants dismissal.

A. The lower court will have the authority to grant relief.

Amici's contention that a lower court cannot enjoin Wisconsin's congressional map because that map was adopted by this Court in *Johnson II* fails to recognize both fundamental principles of judicial review and Wisconsin law's broad grant of jurisdiction and power to circuit courts.

First, amici ignore that this Court *already* overruled *Johnson II* in relevant part. *Clarke*, 2023 WI 79, ¶ 63 ("[W]e overrule any portions of *Johnson I*, *Johnson II*, and *Johnson III* that mandate a least change approach."). *Johnson II* indisputably used the least-change approach to select the challenged congressional map. *Johnson v. Wis. Elections Comm'n*, 2022 WI 14, ¶ 7, 400 Wis. 2d 626, 971 N.W.2d 402 (selecting a map based on "which map most complies with our least-change directive"). But this Court held squarely in *Clarke* that it would not allow that "judicially-created metric, not derived from the constitutional text, to supersede the constitution." *Clarke*, 2023 WI 79, ¶ 62. This case thus presents a unique circumstance: Adherence to this Court's

more recent pronouncement in *Clarke*—and to the Wisconsin Constitution—trumps the Court's prior ruling in *Johnson II*. *See* Pls.' Opening Br. at 12–14.

Second, amici's contention that a lower court lacks authority to "vacate or set [ ] aside" a map drawn by this Court, Johnson Br. at 5, is belied by Wisconsin law and finds no support in the cases amici cite. The Wisconsin Constitution grants circuit courts jurisdiction over "all matters" "[e]xcept as otherwise provided by law," Wis. Const. art. VII, § 8—and there is certainly no law *stripping* circuit courts of jurisdiction here. Wisconsin law further imbues circuit courts with "all the powers" necessary for "the full and complete administration of justice," Wis. Stat. § 753.03, which here requires enjoining Wisconsin's unlawful congressional district map. Failing to grapple with the circuit court's broad jurisdiction and powers under Wisconsin law, amici instead cite cases showing merely that an enjoined party cannot violate an injunction until it is set aside, *not* that a separate party is barred from challenging an injunction when the legal basis for it has been overruled. *See Cline v. Whitaker*, 144 Wis. 439, 129 N.W. 400 (1911) (explaining an injunction "is binding on the person restrained" until "set aside in some proper proceeding"); *State ex rel. Fowler v. Cir. Ct. of Green Lake Cnty.*, 98 Wis. 143, 73 N.W. 788, 790 (1898) (explaining the "sole remedy *of the party*" subject to an injunction is a motion to vacate) (emphasis added);

Tietsworth v. Harley-Davidson, Inc., 2007 WI 97, ¶ 50, 303 Wis. 2d 94, 735 N.W.2d 418 (holding "a trial court *whose judgment or final order has been affirmed* by the appellate court on the merits has no authority to reopen the case" (emphasis added)).

Amici's attempt to play "gotcha" by plucking a stray line from Plaintiffs' previous petition to this Court falls apart upon review of the full context. Amici point to a single sentence in Plaintiffs' petition to commence an original action to suggest Plaintiffs admitted that a circuit court cannot grant Plaintiffs relief. *See* Leg. Br. at 6 ("Because Petitioners bring purely state law claims against a map that was adopted by this Court, no other court can provide Petitioners' requested relief." (quoting Pet. for Original Action ¶ 98, *Bothfeld v. Wis. Elections Comm'n*, No. 2025AP996-OA (Wis. May 7, 2025))). But as made clear in the paragraphs that immediately followed, Plaintiffs' argument was that that no *federal* court could grant relief on their purely *state*-law claims. *See* Pet. for Original Action ¶ 100 ("Federal courts other than the U.S. Supreme Court are precluded from hearing challenges to this Court's decisions."); *id.* ¶ 101 ("And the U.S. Supreme Court does not have jurisdiction over Petitioners' purely state law claims."). Plaintiffs *never* discussed in their petition whether a lower state court could grant relief.

Ultimately, whatever decision the lower court reaches, this Court will be called upon to decide whether to keep the

congressional map it ordered in *Johnson II* in place. Amici's proposed alternative—that *no* court can ever hear Plaintiffs' claims—is simply untenable.

B. Plaintiffs' claims are not barred by laches.

Amici's attempt to invoke the doctrine of laches stumbles out of the gate because laches cannot apply to Plaintiffs' request for a "purely prospective remedy" "concerning elections to be held in future years." *Navarro v. Neal*, 716 F.3d 425, 429–30 (7th Cir. 2013) (reversing dismissal based on laches); *see also League of Women Voters of Mich. v. Benson*, 373 F. Supp. 3d 867, 909 (E.D. Mich. 2019) (vacated on other grounds) (holding "laches does not apply as a matter of law to partisan gerrymandering claims" because such claims seek prospective relief). Amici fail to point to any case from this Court applying laches to a similar request for purely prospective relief. But even if laches could apply, amici must still establish both unreasonable delay and prejudice. *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶ 12, 393 Wis. 2d 308, 946 N.W.2d 101. They can show neither.

The *Clarke* Court found no unreasonable delay when plaintiffs challenged Wisconsin's state legislative maps in August 2023—one year before the August 2024 primaries. 2023 WI 79, ¶ 42 ("Given the timing of legislative elections, filing this case in August of 2023 is not unreasonable delay."). Plaintiffs here sued in July 2025, one month *earlier* in the election cycle than the *Clarke*

plaintiffs. Laches cannot properly bar such a timely challenge. *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).

Ignoring *Clarke*, amici instead count the number of days since this Court's decision to adopt the current congressional map in *Johnson II*. *See* Leg. Br. at 16. But the relevant starting point is when the last election occurred, not when the map was adopted. *Blackmoon v. Charles Mix Cnty.*, 386 F. Supp. 2d 1108, 1115 (D.S.D. 2005); *see also Smith v. Clinton*, 687 F. Supp. 1310, 1312–13 (E.D. Ark. 1988) (finding redistricting injuries are "suffered anew each time a . . . election is held").

Amici also fail to show prejudice from delay. Amici point vaguely to disruptions to the status quo and voter confusion if the existing map is replaced. *See* Leg. Br. at 17; Johnson Br. at 7–8. But to properly invoke laches, the prejudice complained of must stem from the delay "rather than from the consequences of an adverse decision on the merits." *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1286 (11th Cir. 2015); *see also Baylor Univ. Med. Ctr. v. Heckler*, 758 F.2d 1052, 1058 (5th Cir. 1985) (similar). Moreover, as this Court explained in *Clarke*,

"any disruption to the current state legislative districts is necessary to serve the public's interest in having districts that comply with each of the requirements of the Wisconsin Constitution." 2023 WI 79, ¶ 43. So too here.

Amici's claim "evidentiary prejudice" is also easily rejected. Johnson Br. at 8. Plaintiffs' separation of powers claim presents a pure question of law and requires no evidence. *See generally* Mem. in Supp. of Pls.' Mot. J. on Pleadings. And much of the relevant evidence on partisan gerrymandering would come from statistical analysis of the current map's partisan skew—which is at no risk of going stale. *See* Compl. ¶¶ 68–74. Finally, since Plaintiffs have the burden of proof on these claims, it is *Plaintiffs'* problem if their evidence has gone stale. As such, it cannot constitute prejudice supporting laches. *See State ex rel. Wren v. Richardson*, 2019 WI 110, ¶ 33, 389 Wis. 2d 516, 936 N.W.2d 587 (explaining evidentiary prejudice occurs when a plaintiff's delay "has curtailed *the defendant's* ability to present a full and fair defense on the merits") (emphasis added).

C. The Elections Clause does not apply here.

Amici argue that because "the state and federal constitutions assign to *state legislatures* the task of drawing new maps," it would violate the U.S. Constitution's Elections Clause and separation of powers for this Court to "arrogate that power." Johnson Br. at 9, 11–12; *see also* Leg. Br. at 14–16. But Plaintiffs

challenge a congressional map selected by this Court, not by the Legislature. As a result, the Elections Clause is not relevant here. *See Moore v. Harper*, 600 U.S. 1, 19 (2023) (discussing how Elections Clause impacts judicial review of "*legislative* acts") (emphasis added).

Further, amici's argument that the Elections Clause mandates that courts called upon to redistrict "mak[e] only slight adjustments" to district lines, Leg. Br. at 15, is just a repackaging of the "least change" approach this Court rejected in *Clarke*.

D. Plaintiffs' partisan gerrymandering claims are not foreclosed or settled.

Amici are wrong that *Johnson* precludes Plaintiffs' partisan gerrymandering claims. Leg. Br. at 18–19; Johnson Br. at 9. *Johnson* was solely decided on malapportionment grounds; its comments on partisan gerrymandering are dicta. *See* 2021 WI 87, ¶ 103 (Dallet, J., dissenting) (dismissing the majority's statements on the topic as an "advisory opinion" because there was no "excessive partisan-gerrymandering claim" before the Court). This Court acknowledged as much in *Clarke*, describing the propriety of partisan gerrymandering as "an important and *unresolved* legal question." 2023 WI 79, ¶ 7 (emphasis added). Further, though amici argue *Clarke* was wrongly decided, they do not—indeed, cannot—suggest that Plaintiffs' separation of powers claim is barred.

CONCLUSION

Plaintiffs respectfully request that this Court promptly issue an order permitting this case to proceed below.

Dated: October 20, 2025

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 3,294 words excluding those portions permitted to be excluded.

Signed: *Electronically signed by Barret V. Van Sicklen*