STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

Elizabeth Bothfeld, et al.

Plaintiffs,

v.

Case No. 2025-CV-2432

Wisconsin Elections Commission, et al.

Defendants.

JOHNSON INTERVENORS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Plaintiffs bring four claims in this action. Claim one is a "separation of powers" claim that does not allege any actual separation of powers violation. Claims two, three, and four are all "partisan gerrymandering" claims brought under various sections of the Wisconsin constitution. All three of those partisan gerrymandering claims are squarely foreclosed by the Supreme Court's decision in *Johnson I*, a part of which *Clarke* did not overrule. *Johnson v. WEC*, 2021 WI 87, ¶¶ 53–63, 399 Wis. 2d 623, 967 N.W.2d 469 (holding that "[t]he Wisconsin Constitution says nothing about partisan gerrymandering"); *Clarke v. WEC*, 2023 WI 79, ¶ 63, 410 Wis. 2d 1, 998 N.W.2d 370 (overruling those "portions" of *Johnson I* "that mandate a least change approach").

Plaintiffs' lawsuit is an attempt to redraw our state's congressional districts solely for partisan gain and this Court should not be drawn into that effort. Courts

"must remain politically neutral." *Clarke*, 2023 WI 79, ¶ 70. Deciding how many seats candidates of one party "should" win or even whether or how much the results of eight different district-based elections should track the results of certain statewide elections can never be neutral. Partisan redistricting may be constitutionally permissible for a state legislature, but it is not an activity to be undertaken by courts.

More important, this particular lawsuit is procedurally and substantively improper, barred by laches, and granting the relief sought would violate federal law and the U.S. Constitution. This Court should dismiss this action in its entirety. Allowing this case to proceed will undermine faith in the rule of law and "creat[e] instability and dislocation in the electoral system." *White v. Daniel*, 909 F.2d 99, 104 (4th Cir. 1990).

This case is only the most recent in a long series of cases based on the old saw that "if you don't succeed, try, try again." This is at least the fourth try raising essentially the same arguments. Our state Supreme Court has rejected each of the previous attempts to challenge the current Congressional maps. *See* Order Denying Motion for Relief from Judgment, *Johnson v. WEC*, No. 21AP1450-OA (Mar 1, 2024); *Bothfeld v. WEC*, No. 2025AP996-OA (original action petition denied June 25, 2025); *Felton v WEC*, No. 2025AP999-OA (same). Enough is enough.

Even setting aside the merits of the claims made, Plaintiffs' lawsuit is inappropriate as a procedural matter. Just last year, the very same Plaintiffs, represented by the exact same lawyers, told the Supreme Court that it and *only* it could hear the claims they now raise before this panel. In their words, because the

current map "was adopted by [the Supreme] Court, no other court can provide Petitioners' requested relief."[1] After their claim was rejected by the Supreme Court—unanimously—they brought this action in Dane County Circuit Court doing the very thing they said was prohibited, filing a collateral attack on the Supreme Court's judgment. They were right the first time.

Finally, if any case is barred by laches, this is it. According to Plaintiffs, the problem is not, primarily, the map drawn in late 2021 during the *Johnson* litigation (that map, after all, is Governor Evers' map and was adopted by the Supreme Court), but instead the map drawn in 2011. Their theory is that a supposed partisan gerrymander from 2011 was "perpetuated" in 2021. Dkt. 9, ¶ 75. But if that claim had any merit at all (which as shown herein, it does not), this case could have and should have been brought 14 years ago when the alleged partisan gerrymander occurred.

Of course, it was brought. And it lost. A three-judge panel rejected a challenge to the 2011 maps, noting that the congressional maps drawn back then were the product of a "bipartisan process" that "incorporate[d]… feedback" from Democratic and Republican members of Congress, "avoided putting incumbents together in the same district," and "did not flip districts from majority-Democrat to majority-Republican or *vice versa*." *See Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 854 (E.D. Wis. 2012) (per curiam) (emphasis in original).

[1] Pet. for Original Action, ¶ 98, *Bothfeld v. Wis. Elections Comm'n*, No. 2025AP996-OA (filed May 7, 2025).

As a matter of fact, the 2011 maps did not result in any change in the party breakdown in Wisconsin's congressional delegation. In the 2010 election (the one immediately preceding the 2011 maps), the breakdown was five republican seats and three democratic seats. The 2011 maps did not change that. The partisan breakdown was 5-3 in the 2012 election and continued to be 5-3 for a number of elections thereafter. There simply was no "partisan advantage" in the 2011 maps to be "perpetuated" by the Supreme Court in 2022, as falsely alleged by the Plaintiffs.

But the important point here from a timing standpoint, was that if Plaintiffs thought there was a claim of some type available under state law to challenge the alleged "partisan advantage" of the 2011 maps, they could have filed this lawsuit in 2012, after one election under the 2011 map … or in 2014, after two election cycles … or in 2016, after three … or in 2018, after four … or in 2020, after five … or in 2022, after six … or in 2024, after seven. Yet they waited until now, for reasons that no one needs to guess.

Wisconsin's voters, candidates, and everyone affiliated with the electoral process deserve some stability and faith in the rule of law. This case is a fig leaf (and a tiny one, at that) to hide a naked grab at raw political power. But what they want this panel to do, state law does not allow. The panel should dismiss this action in its entirety.

BACKGROUND

The elections clause vests the power to set Congressional district boundaries in the various state legislatures. Wisconsin's legislature exercises this power by

establishing Congressional district boundaries in the Wisconsin state statutes. *See* Wis. Stat. Ch. 3. Following the 2010 decennial census the legislature adopted, and the governor signed into law, new congressional district lines. 2011 Wisconsin Act 44. Following the 2020 decennial census, those district lines needed to be updated again. Only at that time "the legislature drew maps, [and] the governor vetoed them[.]" *Johnson v. WEC*, 2021 WI 87, ¶2, 399 Wis.2d 623, 967 N.W.2d 469 ("*Johnson I*"). To resolve this impasse, the Wisconsin Supreme Court agreed to exercise its original jurisdiction to hear the case. *Johnson I*, 2021 WI 87, ¶6.

In the *Johnson* litigation, when the Supreme Court reviewed the then-malapportioned 2011 maps (following the 2020 census), it stated that it "will remedy that malapportionment, while ensuring the maps satisfy all other constitutional and statutory requirements." *Johnson I*, 2021 WI 87, ¶4. The Court began by first rejecting any partisan gerrymandering claims (the same claims brought here) as nonjusticiable political questions. *Id.* (explaining that partisan gerrymander claims "have no basis in the constitution or any other law and therefore must be resolved through the political process and not by the judiciary."); *See also* Id. ¶¶ 55, 59–60, 62 (concluding that Wis. Const. Art. I, §§ 1, 3, 4, and 22 do not provide justiciable standards for partisan gerrymandering).

In *Johnson v. WEC*, 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402 ("*Johnson II*"), the Wisconsin Supreme Court adopted Governor Evers' proposed maps finding that they "move[d] the fewest number of people into new districts" from Wisconsin's most recently adopted 2011 maps. *Id.* ¶ 19.

What ensued from there has been a multi-year effort to reverse the Supreme Court's adoption of those maps. First, in January of 2024, several intervenors in the original *Johnson* litigation filed what they called a "Motion for Relief from Judgement" arguing that, in light of *Clarke*, the adoption of Congressional Maps in *Johnson II* should be overturned and new maps should be selected. Motion for Relief from Judgment, *Johnson v. WEC*, No. 21AP1450-OA (Jan. 16, 2024). That motion was denied. Order Denying Motion for Relief from Judgment, *Johnson v. WEC*, No. 21AP1450-OA (Mar 1, 2024).

Last year, two separate petitions for original actions were filed with the Supreme Court. *See* Pet. for Original Action, *Bothfeld v. Wis. Elections Comm'n*, No. 2025AP996-OA (filed May 7, 2025); Pet. for Original Action, *Felton v. Wis. Elections Comm'n*, No. 2025AP999-OA (filed May 8, 2025). The *Bothfeld* petition, brought by several of the same Plaintiffs here, is nearly identical in form to this action. The *Felton v. WEC* petition similarly sought to throw out the *Johnson* congressional map and replace it with something new. Both petitions were unanimously denied by the Wisconsin Supreme Court.

Following those failed attempts, Plaintiffs filed this action in the Dane County Circuit Court on July 21, 2025. (Dkt. 9). On July 22, 2025, the Dane County Clerk of Courts notified the Supreme Court of the filing and informed the court that an action was filed under 801.50(4m) and requesting that the Court appoint a panel consisting of 3 circuit court judges to hear the case.

On November 25, 2025, the Wisconsin Supreme Court appointed this three-judge panel to hear this case (*Bothfeld, et al. v. Wis. Elections Comm'n, et al.*, 2025 WI 53). The panel subsequently entered an initial scheduling order (Dkt. 121), and now pursuant to that order, the Johnson Intervenors file this motion to dismiss this action in full.

STANDARD OF REVIEW

Pursuant to Wis. Stat. § 802.06(2)(a), particular defenses to a claim for relief may be presented "by motion" including the defense of "failure to state a claim upon which relief can be granted." Wis. Stat. § 802.06(2)(a)6.

"[T]o satisfy Wis. Stat. § 802.02(1)(a), a complaint must plead facts, which if true, would entitle the plaintiff to relief." *Data Key Partners v. Permira Advisors LLC*, 2014 WI 86, ¶ 21, 356 Wis. 2d 665, 849 N.W.2d 693. To avoid dismissal, "[p]laintiffs must allege facts that plausibly suggest they are entitled to relief." *Id.* ¶ 31. In determining the sufficiency of a complaint, a court will "assume the facts set forth in the complaint are true and consider only the facts set forth therein." *Peterson v. Volkswagen of America, Inc.*, 2005 WI 61, ¶ 15, 281 Wis. 2d 39, 697 N.W.2d 61. The court does not accept legal conclusions as true. *Data Key Partners*, 356 Wis. 2d 665, ¶ 19.

ARGUMENT

The complaint does not "plead facts, which if true, would entitle the [P]laintiff[s] to relief." Id. ¶ 21. This Panel should therefore grant the motion and dismiss this case pursuant to Wis. Stat. § 802.06(2)(a)6.

I. Plaintiffs' suit is an Improper Collateral Attack on a Judgment of the Supreme Court and Should Be Dismissed

The Supreme Court's mandate in *Johnson II* "adopt[ed] the Governor's proposed congressional … maps," "enjoined [the Wisconsin Elections Commission] from conducting elections under the 2011 maps," and "ordered [it] to implement the congressional … maps submitted by Governor Evers for all upcoming elections." 2022 WI 14, ¶ 52, 400 Wis. 2d 626, 971 N.W.2d 402.

As Plaintiffs themselves previously told the Supreme Court, their lawsuit (*see n. 1, supra*), would require a lower court to overrule and/or modify the Supreme Court's judgment in *Johnson II*. But this panel lacks the authority to take such an action.

The Wisconsin Supreme Court is "the only state court with the power to overrule, modify or withdraw language from a previous supreme court case." *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). "Neither [the court of appeals] nor the circuit court may overrule a holding of our supreme court." *State v. Arberry*, 2017 WI App 26, ¶5, 375 Wis. 2d 179, 895 N.W.2d 100.

Likewise, lower courts have "no power to vacate or set [ ] aside" a judgment of the Supreme Court, *Tietsworth v. Harley-Davidson, Inc.*, 2007 WI 97, ¶ 50, 303 Wis. 2d 94, 735 N.W.2d 418 (quoting *Hoan v. J. Co.*, 241 Wis. 483, 485, 6 N.W.2d 185 (1942), or do anything that "conflict[s] with the expressed or implied mandate of the appellate court." *Id.* ¶ 32. If a party believes an order of the Supreme Court warrants modification, the proper vehicle is a motion, filed with the Supreme Court, to amend its judgment. *Id.* ¶ 48. As noted above, that was already tried—by the same lawyers

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

Even setting aside the basic hierarchy of our court system, the Supreme Court has also "recognized [a] general disfavor of allowing collateral challenges" because "they disrupt the finality of prior judgments and thereby tend to undermine confidence in the integrity of our procedures and inevitably delay and impair the orderly administration of justice." *In re Brianca M.W.*, 2007 WI 30, ¶ 28, 299 Wis. 2d 637, 728 N.W.2d 652 (citations omitted).

The complaint should be dismissed for that reason alone.

II. Plaintiffs' Lawsuit is Barred By Laches

Laches is a "well-settled doctrine" that applies to bar relief "when a claimant's failure to promptly bring a claim causes prejudice to the party having to defend against that claim." *Trump v. Biden*, 2020 WI 91, ¶ 10, 394 Wis. 2d 629, 951 N.W.2d 568; *Wisconsin Small Businesses United, Inc. v. Brennan*, 2020 WI 69, ¶ 11, 393 Wis. 2d 308, 946 N.W.2d 101. And laches "has particular import in the election context," where unreasonable delay causes "obvious and immense" prejudice to "election officials, [ ] candidates, … and to voters statewide." *Trump*, 2020 WI 91, ¶¶ 11–12.

Courts have applied laches to bar tardy redistricting challenges because "voters have come to know their districts and candidates, and will be confused by change," and because Court-ordered redistricting can result in "voter confusion, instability, dislocation, and financial and logistical burden on the state." *Fouts v. Harris,* 88 F. Supp. 2d 1351, 1354–55 (S.D. Fla. 1999), *aff'd sub nom. Chandler v. Harris*, 529 U.S. 1084 (2000); *White,* 909 F.2d at 104; *see also Knox v. Milwaukee*

Cnty. Bd. of Elections Comm'rs, 581 F. Supp. 399, 405, 408 (E.D. Wis. 1984) (applying laches and denying motion for a preliminary injunction in a Milwaukee County redistricting lawsuit).

There are three elements to a laches claim: "unreasonable delay, lack of knowledge a claim would be brought, and prejudice." *Brennan*, 2020 WI 69, ¶ 1. Once each element is proven, "application of laches is left to the sound discretion of the court asked to apply this equitable bar." *Id.* ¶12. All three elements are easily met here.

First, unreasonable delay. As explained above, Plaintiffs' theory as to why the current Congressional map is a partisan gerrymander is based on how it was adopted *back in 2011*. Dkt. 9, ¶¶ 35–56. Although that map has since been replaced, Plaintiffs allege that its alleged flaws were "perpetuated" in 2021. *Id.* Yet no fewer than *seven* Congressional elections have occurred during the fourteen years since the supposed constitutional violation in 2011: 2012, 2014, 2016, 2018, 2020, 2022, and 2024. Courts have found similar delay—even much less delay—to be unreasonable in redistricting cases. *Fouts*, 88 F. Supp. 2d at 1354 (7 years, 4 elections); *White*, 909 F.2d at 102–103 (17 years). And even Plaintiffs' "separation of powers" claim amounts to an unreasonable delay. *Knox*, 581 F. Supp. at 404 ("31 months after the approval of the tentative proposal and 22 months after the adoption of the final plan.").

Second, lack of knowledge. Neither the Defendants nor the other interested parties (voters, the Congressmen, the Legislature, etc.) had any reason to believe this claim would be brought fourteen years and seven elections after it could have been

filed. This element is easily satisfied. *See Trump*, 2020 WI 91, ¶ 23; *Brennan*, 2020 WI 69, ¶ 18.

Lastly, Plaintiffs' unreasonable delay causes multiple kinds of prejudice. First, courts have recognized that long-delayed redistricting cases prejudice voters, who "have come to know their districts and candidates, and will be confused by change." *Fouts*, 88 F. Supp. 2d at 1354; *White*, 909 F.2d at 104 ("two reapportionments within a short period of two years would greatly prejudice the County and its citizens by creating instability and dislocation in the electoral system"); *see also Reynolds v. Sims*, 377 U.S. 533, 583 (1964) ("Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system."). The current representatives will be prejudiced in the same way, having come to know their districts and constituencies. The state—and its taxpayers—will also be prejudiced by the "financial and logistical burden" caused by rinse-and-repeat redistricting. *E.g.*, *Fouts*, 88 F. Supp. 2d at 1354; *White*, 909 F.2d at 104 (emphasizing "great financial and logistical burdens").

Finally, Plaintiffs' unreasonable delay causes "evidentiary prejudice." *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶ 33, 389 Wis. 2d 516, 936 N.W.2d 587. Plaintiffs heavily emphasize the *intent* of the drafters of the 2011 map. Dkt. 9, ¶¶ 35–40. But proving or disproving intent is much more difficult fourteen years after the fact. Only one of the Congressional representatives in place at the time is still in office, and the federal court, reviewing the evidence much closer in time, noted that that the congressional maps were the product of a "bipartisan process" that

"incorporate[d]… feedback" from Democratic and Republican members of Congress, "avoided putting incumbents together in the same district," and "did not flip districts from majority-Democrat to majority-Republican or *vice versa*." *See Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 854 (E.D. Wis. 2012) (per curiam) (emphasis in original).

The Supreme Court has recognized that "the loss of evidence," the unavailability of a witness, and the "unreliability of memories" are "precisely the kind of thing[s] laches is aimed at." *Wren*, 2019 WI 110, ¶¶ 33–34.

Plaintiffs waited far too long to bring their claim, and the Panel can and should dismiss it for that reason.

III. Plaintiffs' Claims Are Foreclosed and Unworkable

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

Plaintiffs' legal theory is that the 2011 Congressional map was an unlawful "partisan gerrymander" that was "perpetuated" in 2021. Dkt. 9, ¶¶ 8–10 Although nothing in the Wisconsin Constitution addresses "gerrymandering" of any kind, they invoke Article I, §§ 1, 3, 4, and 22, separation of powers, and/or some mysterious combination of all of these. Dkt. 9, ¶¶ 76–97.

The immediate problem, of course, is that the Supreme Court has already held that these exact provisions (sections 1, 3, 4, and 22 of Article I) do not "say [any]thing about partisan gerrymandering" or impose any "limits on redistricting." *Johnson I*, 2021 WI 87, ¶¶ 53–63. As the Supreme Court noted, the text of these provisions does not mention districts, redistricting, or gerrymandering (of any flavor). *Id.* ¶¶ 55–58,

62. Instead, the "only Wisconsin constitutional limits" on redistricting are found in "Article IV, Sections 3, 4, and 5." *Id.* Put differently, "Article IV [is] the exclusive repository of state constitutional limits on redistricting." *Id.* ¶ 63. "To construe Article I, Sections 1, 3, 4, or 22 as a reservoir of additional requirements would violate axiomatic principles of interpretation, … while plunging this court into the political thicket lurking beyond its constitutional boundaries." *Id.* While *Clarke* overruled parts of *Johnson I*, it did not overrule this part. 2023 WI 79, ¶¶ 24 (overruling any "passing statements about the contiguity requirements), 63 (overruling "any portions … that mandate a least change approach").

Even were this not the latest in a long series of kicks at the can, there is no basis to upset the existing maps. Invoking separation of powers is quite the stretch. Dkt. 9, ¶¶ 76–82. Both the state and federal constitutions assign to *state legislatures* the task of drawing new maps. U.S. Const. art. I, § 4; Wis. Const. art. IV, § 3. Yet Plaintiffs ask this Court to arrogate that power to itself—and make up a new claim and standard along the way, found nowhere in the Wisconsin Constitution. *That* would be a separation of powers violation.[2]

But it is not a separation of powers violation to allow, as happened here, for courts to choose new maps when the political branches are unable to do so. This often happens when we have divided government. It is not a separation of powers violation for various litigants—including the legislature, legislators and the Governor—to

[2] The Johnson Intervenors further address the separation of powers claim specifically in their response to Plaintiff's motion for judgment on the pleadings, filed simultaneously with this brief.

submit maps for consideration and for a Court to independently adopt one. That's the way that judicial redistricting almost always proceeds.

The other major problem, of course, is that Plaintiffs do not offer any workable theory for deciding how much "partisanship" in redistricting is too much. The U.S. Supreme Court has held that "partisan gerrymandering" claims are non-justiciable, precisely because the Court "ha[d] struggled without success over the past several decades to discern judicially manageable standards for deciding such claims." *Rucho v. Common Cause*, 588 U.S. 684, 691, 139 S.Ct. 2484 (2019). Even before *Rucho*, the federal panel reviewing a partisan gerrymandering claim against the 2011 Wisconsin Congressional map came to the exact same conclusion. *Baldus*, 849 F. Supp. 2d at 854 ("[W]e are unable to discern what standard the intervenor-plaintiffs propose."). So has our state Supreme Court. *Johnson I*, 2021 WI 87, ¶¶ 53–63 (holding that "[t]he Wisconsin Constitution says nothing about partisan gerrymandering.")

Plaintiffs' complaint does not offer any workable standard. They briefly invoke four supposedly "objective" measures—"the efficiency gap," "partisan bias" score, the "mean-median difference," and the "declination score" (Dkt. 9, ¶69)—but how these are supposed to interact, or where to draw the line, is anyone's guess. And, again, none of this has any textual basis in the Wisconsin Constitution. Each are, in essence, measures of how closely district elections match statewide partisan outcomes or of the relative concentration of partisan voters.

But there is no reason to believe that the aggregate partisan outcome of multiple single member geographic district elections will match statewide partisan

outcomes. If the voters of one party are more geographically concentrated than those of another party, for example, they will not. If one party has fashioned a message with broader geographic support (as opposed to one appealing only to densely populated parts of the state), they will not. If the voters of one party are more geographically concentrated than voters of the other party, then they will also tend to be more concentrated in even neutrally drawn legislative districts.

Each of those metrics has major problems that have caused them to be rejected as a proper tool by a court and they were specifically rejected in *Rucho v. Common Cause*, 588 U.S. 684, 710, 139 S. Ct. 2484, 2502, 204 L.Ed. 2d 931 (2019). In that case, the U.S. Supreme Court noted that none of the proffered "tests" meets the need for a limited and precise standard that is judicially discernible and manageable. The U.S. Supreme Court was undeniably right when it came to that conclusion.

IV. Any Relief for Plaintiff Would Violate the Elections Clause

Finally, if this Court allows this case to proceed and ultimately invalidates the current Congressional maps, it will violate the federal elections clause.

Article I, section 4, of the United States Constitution vests in State *Legislatures* the authority to "prescribe" the "times, places and manner of holding elections for Senators and Representatives." In *Moore v. Harper*, 600 U.S. 1, 143 S.Ct. 2065 (2023), the United States Supreme Court held that, while "the Elections Clause does not exempt state legislatures from the ordinary constraints imposed by state law, state courts do not have free rein." 600 U.S. at 34. State Courts "may not transgress the ordinary bounds of judicial review such that they arrogate to

themselves the power vested in state legislatures to regulate federal elections." *Id.* at 36.

While Courts have a role to play in resolving impasses in the redistricting process, as our Supreme Court did when it selected the Congressional maps in *Johnson*, that role is limited. To take this mid-decade second bite at the apple that Plaintiffs are seeking here under a novel and never-before recognized legal theory would almost certainly "transgress the ordinary bounds of judicial review" in a way that would violate the elections clause.

As explained above, Plaintiffs' claims are meritless and without any textual or historical support. If this Court were to accept them and move forward with drawing new maps in this case, it would transgress this high standard.

CONCLUSION

For the reasons herein, the Panel should grant this motion and dismiss this case in its entirety.

Dated January 12, 2026.

Respectfully Submitted,

WISCONSIN INSTITUTE
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Electronically signed by
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