STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

Elizabeth Bothfeld, et al.,

Plaintiffs,

v.

Case No. 2025-CV-2432

Wisconsin Elections Commission, et al.,

Defendants.

REPLY OF INTERVENOR-DEFENDANTS BILLIE JOHNSON ET AL. IN SUPPORT OF THEIR MOTION TO DISMISS

INTRODUCTION

Plaintiffs' underlying claims are little more than an attempt to relitigate the settled maps adopted by the Wisconsin Supreme Court in *Johnson v. Wis. Elections Comm'n, (Johnson II)*, 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402. But their arguments all fail: they ignore binding precedent, misread *Clarke*, and offer no coherent responses to the jurisdictional bars or laches arguments made by Intervenor-Defendants. For these reasons, Intervenor-Defendants' motion to dismiss should be granted.

Plaintiffs' delay in bringing these claims is both unreasonable and prejudicial. And even if it were not, this Court has no authority to overturn the judgment of the Supreme Court. In addition, the claims themselves are based on a complete misconception of the law, and the federal Elections Clause precludes state courts from engaging in this exact kind of mid-decade do-over redistricting. Granting relief would

destabilize elections and violate federal law. The Intervenor-Defendants' motion to dismiss should be granted.

ARGUMENT

I. Laches bars Plaintiffs' claims.

Plaintiffs' response to Intervenors' laches arguments is that laches cannot be applied when a Plaintiff seeks prospective relief in a redistricting challenge, and that even if laches could apply, the elements are not met here. But Plaintiffs are wrong on both counts: laches absolutely can be applied to redistricting challenges seeking prospective relief, and here, all the elements of laches are satisfied.

On one hand, Plaintiffs assert that their claims originated solely from the Wisconsin Supreme Court's *Clarke* decision on December 22, 2023. However, on the other hand, Plaintiffs' underlying theory—as alleged in their complaint (*see e.g.,* Dkt. 9, ¶ 75)—is that a purported partisan gerrymander from the 2011 map was "perpetuated" in the 2022 map adopted in *Johnson II*. But if that is true then the alleged injury existed as early as 2011 (or at latest, 2022, after *Johnson II*), not just post-*Clarke*. But either way, Plaintiffs bring these claims too late and laches applies. Plaintiffs could have challenged the "perpetuation" immediately after *Johnson II* in 2022, or the original 2011 map in any of the *seven election cycles* from 2012 to 2024, but instead delayed until July 2025. That unreasonable delay means these claims are all barred by laches and should be dismissed.

A. Laches applies to claims seeking prospective relief in redistricting cases such as this.

Plaintiffs contend that litigants who come to court seeking prospective relief in election cases are categorically *not* barred by laches. *See* Dkt. 151:14–15. But the authority they rely upon is inapposite. For example, in *Clarke* (which, like here, sought prospective relief), the Supreme Court entertained a laches argument against a prospective redistricting challenge, rejecting it only because they had found there was no unreasonable delay or prejudice in that specific context. *Clarke*, 2023 WI 79, ¶¶ 41–43. Had laches been *categorically* inapplicable to prospective relief in that type of case, as Plaintiffs now argue, the Supreme Court would have said so. It did not.

Plaintiffs' reliance on federal case law fares no better. *Navarro v. Neal*, 716 F.3d 425 (7th Cir. 2013), involved ballot access, not redistricting, and found that laches should not be applied where there was no prejudice involved in waiting 10 weeks to bring suit. That case was not, as Plaintiffs seem to suggest, solely determined on the fact that the underlying case involved a "prospective" remedy. *Id.* at 429–30. Here, in a case filed *years* after the current maps were adopted and after *several* elections have already been held under them, a mid-decade redraw would absolutely cause significant disruption and upend everything from constituent services to candidate planning, voter expectations, administrative preparations, and more—the very prejudice which laches guards against.

Indeed, courts have held that these kinds of claims—brought long after maps were adopted and elections have been held—are barred by laches. *See White v. Daniel*, 909 F.2d 99, 104 (4th Cir. 1990) (applying laches to bar a mid-decade redistricting

challenge seeking prospective relief due to "instability and dislocation in the electoral system" which would be caused by the adoption of the new maps). This Court should do the same.

For similar reasons, Plaintiffs' reliance on *Blackmoon v. Charles Mix County*, 386 F. Supp. 2d 1108 (D.S.D. 2005), and *Smith v. Clinton*, 687 F. Supp. 1310 (E.D. Ark. 1988) fails. Plaintiffs cite these cases to argue that in redistricting challenges, each election "resets" the clock for laches, but neither case stands for that proposition nor says that laches *never* applies when a Plaintiff attempts to seek prospective relief in redistricting actions. Despite Plaintiffs' attempts to invent a categorical exception to laches out of whole cloth, there is no categorical rule that laches cannot be applied in redistricting cases. The question here is whether Plaintiffs' delay prejudices others, and, of course, it does. And characterizing their claims as only "prospective" does not erase the significant prejudice produced by their significant delay in seeking any relief here. Plaintiffs' claims could have and should have been brought years ago, not now, in the middle of the decade.

B. All the elements of laches are satisfied, and Plaintiffs' arguments to the contrary are meritless.

Not only *can* laches be applied to mid-decade redistricting challenges, but all elements of the laches doctrine—unreasonable delay, lack of knowledge by defendants, and prejudice—are met here. *Clarke*, 2023 WI 79, ¶ 41.

First, Plaintiffs unreasonably delayed. Plaintiffs argue their claims "arose" only after *Clarke* in December 2023. Dkt. 151:16. But as explained, their theory is based on their belief that the 2011 map's alleged gerrymander was "perpetuated" in

2022. Dkt. 9:¶ 75. If so, Plaintiffs could (and should) have challenged it in 2022, after *Johnson II*, or any time between 2012 and 2020 under the 2011 map. *See Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d at 854 (rejecting a partisan gerrymandering challenge to the 2011 maps). Instead, Plaintiffs waited to file this lawsuit until July 2025—19 months after *Clarke*, and after several failed attempts to seek similar relief at the Supreme Court. This is not the "immediate" action they claim. Dkt. 151:16. And as in *White*, 909 F.2d at 104, such delay "create[s] instability" close to elections.

Second, Intervenor-Defendants had no reason to believe this suit would be brought. After all, it was Plaintiffs themselves who announced to the world that *only* the Supreme Court could grant the relief sought in this case, and then the Supreme Court declined to do so. *See* Pet. for Original Action, ¶ 98, *Bothfeld v. Wis. Elections Comm'n*, No. 2025AP996-OA (May 7, 2025) (original action petition denied June 25, 2025). Intervenor-Defendants reasonably relied on Plaintiffs' own statements and the Supreme Court's denial of their claims as final. This element of the laches test is easily met.

Third, prejudice is evident here. "What amounts to prejudice ... depends upon the facts and circumstances of each case, but it is generally held to be anything that places the party in a less favorable position." *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶ 32, 389 Wis. 2d 516, 936 N.W.2d 587. Plaintiffs argue that any evidentiary prejudice only impacts them, rather than the Intervenors, but that argument outright ignores this element of laches altogether. Furthermore, Plaintiffs rely heavily on the

intent of the drafters of the 2011 map to argue they were gerrymandered. Dkt. 9, ¶¶35—40. But at this juncture, they are attempting to pivot away from those arguments to save their claims, arguing that intent doesn't matter. Dkt. 151:18.

"The party seeking application of laches bears the burden of proving each element." *Wisconsin Small Businesses United, Inc. v. Brennan*, 2020 WI 69, ¶ 12, 393 Wis. 2d 308, 946 N.W.2d 101. And on this element, the question is whether there is "prejudice due to the delay." *Wren*, 389 Wis.2d 516, ¶ 38. As explained, redrawing the maps now would cause significant disruption. Indeed, entertaining Plaintiffs' claims risks significant systemic harm: voter confusion, candidate confusion, election administration confusion, and more.

All the elements of laches are met, and none of Plaintiffs' attempts to re-frame their arguments carry any weight. The complaint should be dismissed.

II. This Court lacks authority to grant the relief sought.

Beyond being barred by laches, Plaintiffs' suit is also an improper collateral attack on the Supreme Court's final judgment in *Johnson II*. There is no dispute that Plaintiffs previously argued "no other court can provide [their] requested relief" because the map "was adopted by [the Supreme] Court." Pet. for Original Action ¶ 98, *Bothfeld v. Wis. Elections Comm'n*, No. 2025AP996-OA (May 7, 2025). But now, they attempt to explain away these prior statements, claiming they really meant that "no *federal* court could grant relief …" (Dkt. 151:21) (emphasis in original).

Once again, Plaintiffs were right the first time, and their halfhearted attempt to rehabilitate their prior statements regarding this court's authority to hear these claims should not be given any weight. The Supreme Court first denied a request for

relief from *Johnson II* on these very claims on March 1, 2024, and then again denied the two original-action petitions on these and similar claims in June of 2025. Those denials confirm the map's validity, and this Court cannot now overrule them. *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

Plaintiffs also argue that *Clarke*, as "the court's most recent pronouncement," mandates that challenged maps be set aside. Dkt. 151:19. But what Plaintiffs do not, and cannot, explain is why the Supreme Court in *Clarke* overturned parts of *Johnson*, but did not then take the added step of setting aside the Congressional maps. The reason is obvious: *Clarke* does not apply to the Congressional maps and did not overrule that portion of *Johnson*. Nevertheless, Plaintiffs are asking this Court to conclude that *Clarke* overruled the maps challenged here. This argument borders on frivolous, given that it ignores *Clarke's* clear limit to overruling only those "portions … that mandate a least change approach," 2023 WI 79, ¶ 63—not invalidating existing Congressional maps, or the entire decision.

In addition, there have already been *several attempts* to get the Supreme Court to overturn the Congressional maps, and all have been rebuffed. Plaintiffs would have this Court believe that the Supreme Court, in denying *every request* to set aside those maps, really meant to set those maps aside in *Clarke*, despite not saying so. But that is simply not the case.

At bottom, this Court lacks the authority to overturn the injunction entered by the Supreme Court in *Johnson*, and the Supreme Court itself has declined several times over to revisit that injunction.

III. On the merits, plaintiffs also fail to state claims upon which relief could be granted.

A. The gerrymandering claims all fail as a matter of law.

1. The Wisconsin Constitution does not mention, much less prohibit, partisan gerrymandering.

As the Supreme Court made clear in *Johnson I*: the Constitution "says nothing about partisan gerrymandering." 2021 WI 87, ¶¶ 52–63. That provision of *Johnson* still stands. *Clarke*, 2023 WI 79, ¶ 63. Indeed, the "only Wisconsin constitutional limits" on redistricting are found in "Article IV, Sections 3, 4, and 5." *Johnson I*, 2021 WI at ¶63. Put differently, "Article IV [is] the exclusive repository of state constitutional limits on redistricting[,]" and therefore, "[t]o 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.* ¶ 63.

Equal Protection. First, the Wisconsin Constitution's guarantee of equal protection in Art. I, § 1, does not prohibit partisan gerrymandering. To argue otherwise, Plaintiffs cite several cases, none of which relate to partisan gerrymandering. Indeed, Plaintiffs' entire legal theory is based upon the fiction that voters' political choices are immutable and unchanging—and that independent voters who chose candidates of both parties simply do not exist in this state. Pure nonsense.

To allege their partisan gerrymandering equal protection claim, Plaintiffs cite to a handful of cases that say nothing about partisan gerrymandering. Plaintiffs first cite to *In re Christoph*, 205 Wis. 419, 237 N.W. 134, 135 (1931) and *Black v. State*, 113 Wis. 205, 89 N.W. 522, 528 (1902) for the nonremarkable principles that equal

protection guarantees prevent the granting of special privileges to any favored person or class. Next, they point to *State ex rel. Binner v. Bauer*, 174 Wis. 120, 182 N.W. 855, 858 (1921) and *State ex rel. Atty Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 735 (1892) to argue that equal protection guarantee applies to voting rights. But that's all black letter equal protection law. It does not speak to partisan gerrymandering in any way. And while *Cunningham* is a case involving a redistricting challenge, it says absolutely nothing about partisan gerrymandering.

Plaintiffs next rely on *State ex rel. Sonneborn v. Sylvester,* 26 Wis. 2d 43, 55, 132 N.W.2d 249 (1965), to argue that the equal protection clause guarantees the right to secure equal representation. But that case dealt with nonpartisan elections for county board seats, and likewise said nothing of partisan gerrymandering at all. Ironically, in *Sonneborn,* the Court also made clear that the Wisconsin Constitution's guarantee of equal protection is the same as its federal counterpart, explaining "there is no substantial difference between the two constitutions" and that "Art. I, Sec. 1, is to be equated with the 14th Amendment." *Id.* at 50. It simply cannot do what Plaintiffs want it to do. Plaintiffs' attempts to spin basic equal protection challenges into some new-fangled protection to fit their needs in this case are telling. These cases simply do not stretch where they want them to stretch.

Nonetheless, they try to go even further and point to two out-of-state cases where different state courts are interpreting different state constitutions. The Alaska Supreme Court, in *In re 2021 Redistricting Cases*, 528 P.3d 40 (Alaska, 2023), explained that "Alaska's equal protection clause requires a more demanding review

than its federal analog." *Id.* at 57. That's not the same as here in Wisconsin, where, as just explained, our Supreme Court has repeatedly said the state's equal protection guarantee is interpreted to provide the same protection as its federal counterpart. *E.g., Sonneborn*, supra. Alaska's unique constitutional interpretation is of no help here. Nor is *Grisham v. Van Soelen*, 539 P.3d 272, 284 (N.M., 2023), helpful for Plaintiffs, and for similar reasons: Wisconsin's equal protection clause is not, and never has been, interpreted the way Plaintiffs seek.

Free speech and association. Likewise, the Wisconsin Constitution's guarantees of free speech and association, Art. I, §§ 3 and 4, do not prohibit partisan gerrymandering. Plaintiffs claim gerrymandering "abridges" political speech and association by making such speech "less effective" based on viewpoint. Dkt. 151:36. But those claims have no textual support, and their attempt to read a "vote dilution" theory into the Wisconsin Constitution's free speech and association guarantees where none has ever existed would be the first time a Wisconsin court has so held.

Free government. Lastly, Plaintiffs cite the Constitution's guarantee of free government, Art. I, § 22. But this argument seeks to turn an aspirational declaration of principles into an enforceable catch-all for any policy disputes. As the Court has explained in rejecting this exact argument, the free government clause provides no "justiciable standards" and itself is not actionable and to find otherwise "would represent anything but 'moderation or 'temperance[.]'" *Johnson I*, 2021 WI 87, ¶ 62. The prior caselaw cited to by Plaintiffs is inapposite here.

2. The claims are not justiciable.

What's more, all of Plaintiffs' claims are political questions, without any judicially manageable standards. *Johnson I*, ¶¶ 59–60. This is why it is state *legislatures* which are exclusively given the task of drawing new maps for both Congressional seats and state legislatures. U.S. Const. art. I, § 4; Wis. Const. art. IV, § 3.

Federal cases confirm the difficulty of taking up these questions. As Intervenor-Defendants explained in their opening brief, 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). And years before *Rucho*, taking up the 2011 maps from which all these claims stem, the federal panel reviewing a partisan gerrymandering claim against those maps 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.").

In this action, Plaintiffs propose various tests intended to measure the intent or effects of partisanship on maps. But each of those tests is unworkable, as they require judging "how much" partisanship is "too much." *Clarke*, 2023 WI 79, ¶ 157 (Ziegler, C.J., dissenting); *see also Rucho*, 588 U.S. 684, 691. And there are no textual standards in Wisconsin law to answer those questions—which is exactly why our founders left these difficult tasks to the political branches to figure out.

The partisan gerrymandering claims brought by Plaintiffs are nonjusticiable and should be dismissed.

3. Plaintiffs' claims are also precluded by prior decisions.

These exact claims have already been rejected by the Wisconsin Supreme Court, noting that "[t]he Wisconsin Constitution says nothing about partisan gerrymandering." *Johnson I*, 2021 WI 87, ¶¶ 52–63. Plaintiffs try to get around this by arguing those statements are merely dicta from the Court and therefore not binding. Dkt. 151:41. Of course, lower courts in Wisconsin may not dismiss *any* statements from the Supreme Court as mere dicta. *See Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶ 58, 324 Wis. 2d 325, 782 N.W.2d 682 ("[T]o uphold the principles of predictability, certainty, and finality, the court of appeals may not dismiss a statement from an opinion by this court by concluding that it is dictum.")

Johnson is controlling here. The Supreme Court could have easily overturned the entire *Johnson* decision in *Clarke*, but instead, it limited itself to overturning only very specific parts of *Johnson.* Plaintiffs attempt to argue that in overturing those parts of the *Johnson* cases which "mandate a least change approach," *Clarke*, 2023 WI 79, ¶ 63, the Court actually overturned much more. Dkt. 151:41–42. But again, the Court could easily have done so and plainly did not.

B. The separation of powers claims also fail.

Finally, Plaintiffs' remaining claim alleges a "separation of powers" violation, but never actually alleges any true violation of the separation of powers.

1. *Clarke* did not render the Congressional map unconstitutional.

Plaintiffs misread *Clarke* as retroactively invalidating the Congressional map, something that the Supreme Court has repeatedly denied requests to do. Instead, *Clarke* overruled only those "portions" of *Johnson* mandating least-change for future state legislative redistricting. 2023 WI 79, ¶ 63. It did not invalidate the congressional map, which was adopted under then-valid law and not before the *Clarke* Court. *Id.* ¶ 7 (declining to address partisan gerrymandering). *Clarke* overruled state maps due to a contiguity defect absent here. *Id.* ¶ 42. Further, and as explained below and in Intervenor-Defendants' opening brief (Dkt. 139:15–16), the Congressional maps implicate the federal Elections Clause, distinguishing them from state maps. U.S. Const. art. I, § 4.

2. There is no actual separation of powers even alleged here.

Plaintiffs argue that, in adopting Governor Evers' Congressional map, the Supreme Court violated the separation of powers doctrine by "abdication." *See* Dkt. 151:27; citing *Tetra Tech v. Wis. D.O.R.*, 2018 WI 75, ¶ 48. But as Intervenor-Defendants have explained to the Court, what the Supreme Court did in *Johnson II* was not an "abdication" but rather a wholly appropriate action taken "to fix the identified constitutional violation and nothing more." Dkt. 140:13. This limited role is especially important because redistricting is a political exercise entrusted to the legislative branch of government and is a *legislative* power. U.S. Const. art. I, § 4. And in *Clarke*, as explained *supra*, the Court's basis for reopening *Johnson* with respect to the state legislative maps was a contiguity defect, *not* because the maps

were adopted using a least-change approach. *Clarke*, 2023 WI 79, ¶¶ 34, 77. The Supreme Court has *not said* that the *Johnson* Court's "least change" approach to adopting the Congressional maps is—by itself—grounds for tossing a validly enacted map. And, absent any legal *defect* in the Congressional maps (and there is none), the Congressional maps are valid. Plaintiffs desire a new Congressional map that contains deliberately-engineered partisan outcomes—that is what this lawsuit is really about—but that is not a legal claim, much less grounds for invalidating the approved Congressional maps.

Taken to their logical end, Plaintiffs' arguments attempt to create an entirely new standard for the judiciary in resolving redistricting disputes: if the legislature and governor cannot agree, then it is the Court's responsibility to not only fix whatever legal violation exists, but to draw an entirely new map from scratch containing *the Court's* assessment of what constitutes "fairness" from a partisan perspective[1], notwithstanding the total and utter lack of judicially manageable standards for determining how such "fairness" should be evaluated. That is the true separation of powers violation, because it would constitute a usurpation of the redistricting authority assigned exclusively to the Legislature. U.S. Const. art. I, § 4.

[1] As a final reminder, **all** of Plaintiffs' claims rest on the alleged illegitimacy of the Congressional maps approved by the Supreme Court in *Johnson II*, and the alleged illegitimacy of those maps **all** depend on Plaintiffs factual allegations regarding the supposed partisan unfairness of those maps. The Intervenor Defendants vigorously dispute those allegations which means that, even if Plaintiffs' claims survive the Intervenor Defendants' motion to dismiss (and they should not), a trial will be necessary to resolve Plaintiffs' claims and judgment on the pleadings is inappropriate.

Plaintiffs' claim that the *Johnson* Court somehow "abdicated" its responsibilities goes nowhere.

IV. Granting the relief sought here would violate the U.S. Constitution

The Elections Clause vests congressional redistricting in the various state legislatures. U.S. Const. art. I, § 4. Plaintiffs spend a large portion of their brief trying to explain how this simple statement actually empowers state courts, not legislatures.

Of course, courts may have a role to play when that legislative process is not complete, be it through veto or an inability for the legislative bodies to adopt new maps through their legislative processes. But the Supreme Court was clear in *Moore v. Harper*, 600 U.S. 1 (2023), that state courts are limited to "ordinary" review without usurping legislative role. What Plaintiffs seek here, for this Court to redraw Congressional maps in the middle of a decade based upon a legal theory that has been explicitly rejected would surely exceed the "ordinary" bounds of judicial review, violating the U.S. Constitution.

CONCLUSION

This Court should grant the motion and dismiss the complaint.

Dated: February 4, 2026.

Respectfully Submitted,

WISCONSIN INSTITUTE
FOR LAW & LIBERTY

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