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Supreme Court of Wisconsin

No. 2026AP1168

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

Plaintiffs-Appellants,

vs.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN,
ANN S. JACOBS, DON M. MILLIS, ROBERT F. SPINDELL, JR.,
CARRIE RIEPL, MARK L. THOMPSON AND MEAGAN WOLFE,

Defendants-Respondents,

GLENN GROTHMAN, BRYAN STEIL, TOM TIFFANY, SCOTT
FITZGERALD, DERRICK VAN ORDEN, TONY WIED, GREGORY
HUTCHESON, PATRICK KELLER, PATRICK MCCALVY, MIKE
MOELLER, WISCONSIN STATE LEGISLATURE, BILLIE
JOHNSON, CHRIS GOEBEL, AARON GUENTHER, CHARLES
HANNA, TIM HIGGINS, LOU KOWIESKI, CHRIS MULLER, ERIC
O'KEEFE, CRAIG ROSAND, RUTH STRECK AND RONALD ZAHN,

Intervenors-Defendants-Respondents.

On Appeal from Dane County Circuit Court
The Honorable Julie Genovese, Mark Sanders, and Emily Lonergan
Dane County Case No. 2025-CV-2432

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INTRODUCTION

Intervenors have made themselves clear. They prefer this Court's trio of 2021 and 2022 rulings in *Johnson v. Wisconsin Elections Commission*¹—and particularly *Johnson*'s arbitrary commitment to “least-change” judicial redistricting—to this Court's 2023 ruling in *Clarke v. Wisconsin Elections Commission*—and particularly *Clarke*'s explicit “overrul[ing of] any portions of *Johnson I*, *Johnson II*, and *Johnson III* that mandate a least change approach,” 2023 WI 79, ¶ 63, 410 Wis. 2d 1, 998 N.W.2d 370. It is no mystery why Intervenors have such fondness for the congressional map *Johnson* produced: The Legislature appreciates that a court delivered the political victory it was unable to achieve through the legislative process, and Republican Congressmen enjoy the extreme Republican gerrymander that resulted. But that, of course, is the problem. This Court's decision in *Johnson* to relinquish the referee's neutral stripes in a partisan brawl violated the separation of powers. And Wisconsin's Constitution prohibits partisan gerrymandering several times over.

Intervenors have little answer for the congressional map's doctrinal defects. Least-change is bad law; *Clarke* announced a superseding rule that must be followed. Partisan gerrymandering claims are not foreclosed by stray dicta from a malapportionment case. The federal Elections Clause does not prevent state courts from applying the most recent of their own conflicting precedents about state election law.

¹ See 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469 (“*Johnson I*”); 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402 (“*Johnson II*”); and 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559 (“*Johnson III*”).

And Plaintiffs did not wait too long to seek relief from an injury that will be inflicted two years from now (and again two years later).

This Court should instruct the Panel to enter judgment for Plaintiffs on their separation-of-powers claim and enjoin Defendants from administering elections under the current congressional map after 2026. Alternatively, the Court should reverse the dismissal of Plaintiffs' partisan gerrymandering claims and remand for further proceedings.

ARGUMENT

I. This Court may direct the Panel to enter judgment for Plaintiffs on their separation-of-powers claim.

At some point, Intervenor's desperation to avoid merits review must give way to this Court's obligation "to oversee and implement the statewide development of the law." *State v. Mosley*, 102 Wis. 2d 636, 665, 307 N.W.2d 200, 216 (1981). When parties to *Johnson* moved to reopen that judgment, these Intervenor's argued original actions could not be reopened. *E.g.*, Legislature's Br.21, *Johnson v. WEC*, No. 2021AP1450-OA (Wis. Jan. 29, 2024). When Plaintiffs petitioned this Court for their own original action, Intervenor's insisted the matter was too fact-intensive. *E.g.*, Congressmen's Br.12, *Bothfeld v. WEC*, No. 2025AP996-OA (Wis. June 6, 2025). When Plaintiffs invoked the statutory process designed for lower courts to hear redistricting challenges, Intervenor's objected that Wisconsin law did not permit lower courts to grant the requested relief. *E.g.*, R.139, 8-9. Having avoided every other possible form of review, Intervenor's must now live with the consequences of their strategy and litigate the merits in this direct appeal. *Cf. N.Y. Life Ins. Co. v. State*, 192 Wis. 404, 412, 211 N.W. 288, 291 (1927) ("every suitor" has a right to "his day in a court of competent jurisdiction to which he may present his claim for judicial relief").

Still, Intervenor's remain distracted by the propriety of the Panel proceedings. *See* Leg. Br.20-23; Cong. Br.21-26. To be sure, the Panel could have granted Plaintiffs relief by faithfully applying this Court's precedent; as Intervenor's own citations make clear, the Panel below was not free to "overrule, modify or withdraw language" from *Clarke* rejecting *Johnson's* prioritization of least-change. *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246, 256 (1997); *see* Leg. Br.20. But whether the Panel could previously enjoin the congressional map is now academic; there is no question it will have the *obligation* to enter Plaintiffs' requested relief if this Court reverses and remands with those instructions. *See, e.g., Priorities USA v. Wisconsin Elections Comm'n*, 2024 WI 32, ¶ 49, 412 Wis. 2d 594, 8 N.W.3d 429 (reversing despite lower court's application of then-binding precedent). Whether *Clarke* alone condemns continued enforcement of the congressional least-change map, or whether the Court logically "extends" *Clarke's* rule in this appeal, the appropriate outcome is the same: reversal.

"[T]his [C]ourt, unlike the [lower courts], has been designated by the constitution and the legislature as a law-declaring court." *State ex rel. La Crosse Tribune v. Circuit Court*, 115 Wis. 2d 220, 230, 340 N.W.2d 460, 465 (1983). This Court is therefore responsible for interpreting the Wisconsin Constitution, applying its provisions to the congressional map, and adjudicating Plaintiffs' appeal. Plaintiffs seek no more and no less than that.

II. *Johnson's* commitment to least-change violated the separation of powers.

Intervenor's attempt to defend against Plaintiffs' separation-of-powers claim by arguing that *Clarke* was wrong, or irrelevant, or did not mean what it said. They are mistaken at every turn. This Court should

reconfirm that least-change is incompatible with judicial redistricting, and that courts must “take care to avoid selecting remedial maps designed to advantage one political party over another.” *Clarke*, 2023 WI 79, ¶¶ 63, 71. Because the congressional map was selected according to least-change without regard for partisan fairness, it is unlawful. This Court can say so now—no discovery, experts, or trial required.

A. *Clarke* forecloses Intervenor’s defense of least-change.

Intervenors offer the same defenses of least-change judicial districting that this Court rejected in *Clarke*. They argue that least-change is a useful heuristic—but *Clarke* held it is “unworkable in practice.” *Id.* ¶ 63. They argue that it reflects traditional districting criteria—but *Clarke* held it “(1) is based on fundamentals that never garnered consensus, and (2) is in tension with established districting requirements.” *Id.* They argue that courts should ignore partisan impact in adopting remedial maps—but *Clarke* held that “it is not possible to remain neutral and independent by failing to consider partisan impact entirely.” *Id.* ¶ 71.

Intervenors also argue that *Clarke* abandoned least-change only because it confronted a contiguity violation that required a fresh remedy. *See, e.g.*, Leg. Br.24-25. But *Clarke*’s rejection of least-change was a conclusion about least-change itself: that a “judicially-created” metric “not derived from the constitutional text” cannot “supersede the constitution” when selecting a remedial map. 2023 WI 79, ¶ 62. Nothing in *Clarke*’s reasoning suggests that its critique of least-change must be cabined to maps that violate some other redistricting requirement as well. The violation here *is* the separation-of-powers violation.

Stymied by *Clarke*'s text, Intervenor's argue that the decision governs only *future* map-drawing exercises, leaving *Johnson*'s map unaffected. See Leg. Br.II.A; Cong. Br.II.A; Johnson Br.I.B. But Intervenor's "prospective-only" approach contravenes Wisconsin law, federal precedent, and basic principles of equity. To start, Wisconsin courts "presume retroactive application" in civil cases, pursuant to the "Blackstonian Doctrine" that "a decision which overrules or repudiates an earlier decision is retrospective in operation." *Wenke v. Gehl Co.*, 2004 WI 103, ¶ 69, 274 Wis. 2d 220, 682 N.W.2d 405. Intervenor's have failed to establish that this case is one of the "rare situations" where retroactive application would be inequitable. *Id.* To the contrary, the equities here demand that Wisconsin citizens not be forced to reside and vote in unconstitutional congressional districts for years to come.

Indeed, the prospective relief Plaintiffs seek here is nothing out of the ordinary: "There are many cases where a mere change in decisional law has been held to justify modification of an outstanding injunction." *Sys. Fed'n No. 91, Ry. Emp. Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 650 n.6 (1961) (collecting cases); see also *id.* at 647 ("A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need."). As early as 1855, the U.S. Supreme Court recognized that when the law supporting an injunction "has been modified," "it is quite plain the decree of the court cannot be enforced." *State v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 432 (1855). It remains as plain as ever. See *Agostini v. Felton*, 521 U.S. 203, 215 (1997) ("A court errs when it refuses to modify an injunction ... in light of" changes in the law); *Santa Rita Oil Co. v. State Bd. of Equalization*, 112 Mont. 359, 116 P.2d 1012, 1017 (1941) (a court "has not only the power

but the duty to modify or annul its injunction” once “the law has changed” and equity no longer justifies its continuance).

The U.S. Supreme Court has specifically rebuffed a contention similar to Intervenor’s here that a court must wait for a “better vehicle” than the one before it to overturn a now-inequitable injunction, holding instead that the general rule that an injunction based on obsolete law must be changed applies *whenever* “the propriety of continuing prospective relief is at issue.” *Agostini*, 521 U.S. at 239; *see also id.* at 240 (recognizing “it would be particularly inequitable for us to bide our time” and wait when a legally invalid injunction remains in effect).² Intervenor’s suggestion that the Court is somehow timed out of applying its own precedent to ongoing injunctions—and prohibited from enjoining an unconstitutional map for the 2028 and 2030 elections—thus finds no basis in law or reason. *See California by & through Becerra v. U.S. Env’t Prot. Agency*, 978 F.3d 708, 716–17 (9th Cir. 2020) (“[I]t is the prospective effect ... of an injunction that matters, and which renders the injunction amenable to modification based on new law.”). Ultimately, this Court “cannot be required to disregard significant changes in law or facts if it is ‘satisfied that what it [h]as been doing has been turned through changing circumstances into an instrument of wrong.’” *Sys. Fed’n*, 364 U.S. at 647.

B. Applying *Clarke* does not require fact-finding.

The Congressmen suggest fact-finding on remand is needed on “what factors this Court considered when adopting the *Johnson II* map,”

² *Agostini* reached this result even though it reviewed the decision below under the highly deferential abuse of discretion standard. 521 U.S. at 238. Here, the standard of review is de novo. *See Cong. Br.21; Leg. Br.11.*

and to what extent the Court subordinated other criteria to least-change. Cong. Br.33. The Congressmen do not need discovery to answer these questions; they need a Westlaw subscription. *Johnson I* publicly enumerated the criteria it would consider and announced that it would prioritize least-change while ignoring partisan fairness. See 2021 WI 87, ¶¶ 24-79. Following that commitment, *Johnson II* selected the congressional map that “most complies with our least-change directive.” 2022 WI 14, ¶ 7 (describing least-change as the “first question” when analyzing a proposed map and then selecting the map that “score[d] highest” on the “best metric for least change”). That is the precise approach that *Clarke* rebuked, 2023 WI 79, ¶ 62 (faulting *Johnson* for treating least change as an “overarching” principle rather than “adopt[ing] a cabined approach to least change”), and it is the legal violation from which Plaintiffs now seek relief.

III. The Panel erred in dismissing Plaintiffs’ partisan gerrymandering claims.

A. *Johnson I* does not foreclose partisan gerrymandering claims.

Plaintiffs did not waive any challenge to *Johnson I* by not asking this Court to overrule its dicta. *Contra* Leg. Br.III.A.3; Cong. Br.III.A; Johnson Br.II.A. *Johnson I*’s statements about partisan fairness were unnecessary to resolve the malapportionment claim before it. See *Johnson I*, 2021 WI 87, ¶ 103 (Dallet, J., dissenting) (explaining “nobody argue[d] that [the Court] should strike down any existing map on the basis that it is an extreme partisan gerrymander”). *Clarke* later confirmed that partisan gerrymandering remains an “important and unresolved legal question” in Wisconsin. 2023 WI 79, ¶ 7. The Johnson Intervenors themselves told this Court in 2025 that “the *Johnson*

litigation was only about malapportionment.” Johnson Intervenors’ Br.11, *Bothfeld v. WEC*, No. 2025AP996-OA (Wis. June 6, 2025). That concession is fatal to their current position that *Johnson I*’s gerrymandering discussion is a holding entitled to stare decisis.

In any event, this Court “may depart from stare decisis” when “a decision is unsound in principle because it misapplies the Wisconsin Constitution.” *Clarke*, 2023 WI 79, ¶ 24 (citation modified). *Clarke* already found that *Johnson I* did exactly that with respect to least-change. *Id.* ¶¶ 62-63, 71. Because *Johnson I* erred in its approach to crafting remedial maps by failing to consider partisan fairness, its untested assumptions about partisan gerrymandering claims—when no such claim was even before the Court—warrant fresh examination rather than reflexive deference.

B. The Wisconsin Constitution prohibits partisan gerrymandering.

Article I, Sections 1 (Equal Protection), 3 and 4 (Free Speech and Association), and 22 (Free Government) forbid sorting voters into districts to advantage one party over another. *See* Opening Br.30-36. Intervenors respond by observing that these provisions do not use the words “districts” or “gerrymandering.” But nor do they use the words “agriculture land,” “campaign finance,” or “chattel mortgage,” yet this Court has applied these provisions to those very subjects. *See In re Christoph v. City of Chilton*, 205 Wis. 418, 237 N.W. 134 (1931); *State v. Pierce*, 163 Wis. 615, 158 N.W. 696 (1916); *Stierle v. Rohmeyer*, 218 Wis. 149, 260 N.W. 647 (1935). The Wisconsin Constitution speaks in “general principles and policies,” not to every “particular[]” it forbids. *State ex rel. Weiss v. Dist. Bd. of Sch. Dist. No. 8*, 76 Wis. 177, 199, 44 N.W. 967, 975 (1890). Article I, Section 1 illustrates the point. As the Congressmen

acknowledge, this Court has long read Section 1 to regulate districting by imposing population-equality and anti-racial-gerrymandering limits on congressional maps, Cong. Br.40, even though the provision makes no explicit reference to “districts” or “malapportionment” or “race.” Partisan gerrymandering is merely another unlawful way of manipulating district lines to dilute disfavored votes.

This Court has long recognized that Wisconsin’s constitutional framers treated equal representation, flowing from the consent of the governed, as a “sacred right of a free people.” *State ex rel. Att’y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 730 (1892) (striking a map that bore “intrinsic evidence” of having been drawn “intentionally and willfully for some improper purpose ... foreign to constitutional duty”). Because this right is foundational, the various provisions of Article I provide fortress-level protections to prevent infringement of any kind.

C. Partisan gerrymandering claims are justiciable under the Wisconsin Constitution.

Intervenors’ justiciability arguments largely repackage *Rucho v. Common Cause*’s catalog of hypothetical difficulties with adjudicating partisan gerrymandering disputes. See Leg. Br.43-46; Cong. Br.44-45; Johnson Br.25-29. What is missing is any persuasive reason why courts could not evaluate whether a challenged map subordinates traditional redistricting principles to partisan criteria, as Plaintiffs propose. See Opening Br.38. If lawyers could render legal protections nonjusticiable merely by asking questions about the legal test, see Johnson Br.26-29; Leg. Br.44-46, then nothing would ever be justiciable.

Ultimately, the types of line-drawing questions Intervenors identify are the same inquiries that courts “work with every day.” *Rucho*, 588 U.S. 684, 735-36 (2019) (Kagan, J., dissenting). It is no wonder, then,

that sister-state courts have already resolved many of Intervenor’s administrative questions while adjudicating claims under Plaintiffs’ proposed test, as well as under other tests for resolving partisan gerrymandering claims. *See, e.g., League of Women Voters of Pa. v. Pennsylvania*, 645 Pa. 1, 122, 178 A.3d 737, 817 (2018); *see also* Opening Br.37-38 (collecting cases). Intervenor’s do not explain why Wisconsin courts would be uniquely incapable of doing the same.

IV. The Elections Clause is not a bar to Plaintiffs’ claims.

Intervenor’s Elections Clause argument, *see* Cong. Br.20, distorts *Moore v. Harper*, 600 U.S. 1 (2023), beyond recognition and fails for two independent reasons.

First, *Moore* concerns judicial review of “legislative acts.” 600 U.S. at 19. But Plaintiffs challenge a judicial remedy *this Court* adopted in *Johnson II* when the Legislature *failed* to enact a map after the 2020 census. By forfeiting its Elections Clause authority to redistrict, the Legislature necessarily left this Court as the map-drawer of last resort.

Second, *Moore* held the “Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review.” 600 U.S. at 22. If the Elections Clause tolerates ordinary judicial review of a legislature’s districting choices, it necessarily tolerates the far narrower step Plaintiffs request here—review of this Court’s own map for compliance with the Wisconsin Constitution.

V. Plaintiffs’ claims are not barred by laches.

Laches does not bar relief that operates only prospectively. *See* Opening Br.39-40. *Clarke* rejected a laches defense on this ground, holding that a claim seeking to “establish a process going forward so that constitutional maps are adopted in time for the next election” was not stale. 2023 WI 79, ¶ 43 n.20. The *Clarke* petition was filed just over one

year before the election in which relief was sought, while Plaintiffs filed this case nearly *three years* before the 2028 elections for which they now seek relief. Under *Clarke*, Plaintiffs' claims are timely.

Nor can Intervenor establish the remaining elements of laches. Their claimed lack of knowledge of Plaintiffs' claims is not credible: the same Intervenor opposed these same merits theories twice before. Intervenor also show no prejudice from delay. Any voter confusion from a mid-decade map change—which is unlikely given the substantial time to educate voters in advance of 2028—would not be a function of when Plaintiffs sued, as any remedy post-*Clarke* would occur mid-decade. *See Clarke*, 2023 WI 79, ¶ 43 (rejecting claim of prejudice based on disruption to legislative districts). Accordingly, laches “does not apply.” *Id.*

CONCLUSION

This Court should reverse with instructions to enter judgment for Plaintiffs on their separation-of-powers claim and enjoin Defendants from administering elections under the current congressional map after 2026. Alternatively, the Court should remand for further proceedings on Plaintiffs' partisan gerrymandering claims.

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CERTIFICATION OF COMPLIANCE WITH
WIS. STAT. § 809.19(8g)(a)

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 2,944 words excluding those portions permitted to be excluded.

Electronically signed by Barret V. Van Sicklen