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Appeal No. 2026AP001008
SUPREME COURT OF WISCONSIN

Wisconsin Business Leaders for Democracy, John A. Scott,
Nicholas G. Baker, Beverly Johansen, Rachel Ida Buff,
Kimberly Suhr, Sarah Lloyd, Nancy Stencil, Vikas Verma
and James T. Lyerly,

Plaintiffs-Appellants,

v.

Wisconsin Elections Commission, Marge Bostelmann,
Ann S. Jacobs, Don Millis, Robert F. Spindell, Jr.,
Carrie Riepl, Mark L. Thomsen and Meagan Wolfe,

Defendants-Respondents,

Billie Johnson, Chris Goebel, Aaron Guenther,
Charles Hanna, Tim Higgins, Lou Kowieski, Chris Muller,
Eric O'Keefe, Craig Rosand, Ruth Streck, Ronald Zahn,
Glenn Grothman, Bryan Steil, Tom Tiffany, Scott Fitzgerald,
Derrick Van Orden, Tony Wied, Gregory Hutcheson,
Patrick Keller, Patrick McCalvy, Mike Moeller
and Wisconsin State Legislature,

Intervenors-Defendants-Respondents.

On Appeal from the Circuit Court for Dane County,
Three-Judge Panel pursuant to Wis. Stat. § 751.035,
The Honorable David Conway, Michael Moran, and Patricia Baker,
Presiding
Circuit Court Case No. 2025CV2252

BRIEF OF PROF. CONSTANCE VAN KLEY AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

Constance Van Kley is an Assistant Professor of Law at the University of Montana’s Alexander Blewett III School of Law. She specializes in state constitutional law, particularly issues involving state judicial power. Her recent works include *Legislative Privilege and Partisan Gerrymandering in the States*, 74 Kan. L. Rev. 561 (2026), and *The Statewide Injunction: State Judicial Power and Meaningful Remedies*, 60 Harv. C.R.-C.L. L. Rev. 865 (2025). These works, like her ongoing research projects, explore the roles of state courts in giving effect to state constitutional provisions, without overreliance on procedural doctrines developed by federal courts interpreting Article III of the U.S. Constitution.

Professor Van Kley submits this brief to explain why this Court’s judgment in *Johnson II* cannot divest the circuit court of jurisdiction to hear a later challenge brought by plaintiffs who were neither parties nor their privies in *Johnson II*. She takes no position on the precedential weight that should be extended to *Johnson I* and *Johnson II*.

INTRODUCTION

The Wisconsin Constitution guarantees the availability of judicial process and adequate remedies. Wis. Const. art. I, § 9. At minimum, Article I, Section 9 ensures that plaintiffs will be able to have their claims heard by a court with the power to resolve those claims—even if the court is bound to apply existing precedent. At minimum, prior claims brought by nonparties cannot close the courthouse doors.

Thus, this Court should reject the argument that the circuit court has no power to hear Plaintiffs' claims. And, if it holds that Plaintiffs' anticompetitive gerrymandering claim is viable—either because *Johnson I* and *II* do not control or because either or both cases should be overruled—it should remand to the circuit court, which is best situated to resolve the mixed questions of law and fact central to this case.

ARGUMENT

Two briefs—those filed by the Wisconsin State Legislature and intervening Congressmen and individual voters (collectively, “Intervenors-Respondents”)—argue that the circuit court cannot hear Plaintiffs' claims because of this Court's judgment in the *Johnson* litigation. See *Johnson v. Wis. Elections Comm'n*, 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469 (“*Johnson I*”); *Johnson v. Wis. Elections Comm'n*, 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402 (“*Johnson II*”). Disagreements about the degree to which prior cases control are unremarkable, but Intervenors-Respondents' argument is radical. Their position is that no court has mandatory jurisdiction, not even to determine whether *Johnson I* and *Johnson II* direct the outcome in this case.

The Court should confirm the circuit court's jurisdiction to hear Plaintiffs' claims. The circuit court did not adopt—or even engage with—Intervenors-Respondents' extreme position when it ruled that *Johnson I* controlled. Nonetheless, the issue should be addressed and conclusively rejected because it is framed as jurisdictional and because it otherwise may be raised again on remand. Plaintiffs were not parties to the *Johnson* litigation. Plaintiffs' claims are not the same

as those brought in the *Johnson* litigation—but if they were, that would be a reason for the circuit court to apply the precedent therein established, not dismiss for lack of jurisdiction. To divest the circuit court of jurisdiction would be to deprive Plaintiffs of their constitutional rights to a judicial forum and to a remedy, in contravention of Article I, Section 9 of the Wisconsin Constitution.

I. Plaintiffs must be able to bring their claims before the circuit court.

Unlike the U.S. Constitution, most state constitutions include “open courts” or “right to a remedy” provisions. *See Note, Enforcing State Constitutions Through Constitutional Torts*, 139 Harv. L. Rev. 1402, 1407–1408 (2026) (counting 40 states); *see also* Marcus A. Gadson, *Theseus in the Labyrinth: How State Constitutions Can Slay the Procedural Minotaur*, 98 Wash. L. Rev. 1, 11 (2023) (identifying the two most common versions of the provisions). Wisconsin’s provision traces to the Magna Carta, incorporates language written in the seventeenth century by Sir Edward Coke, and is framed similarly to provisions in ten other states, mostly in the Northeast and Midwest. Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. Rev. 1309, 1311 (2003). It provides:

Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.

Wis. Const. art. I, § 9. The provision promises no victories, but it does “guarantee to every suitor his day in a court of competent jurisdiction

to which he may present his claim for judicial relief.” *N.Y. Life Ins. Co. v. State*, 192 Wis. 404, 412, 211 N.W. 288 (1927).

Article I, Section 9 requires that Plaintiffs have access to a court of competent jurisdiction, and therefore some court must exercise mandatory jurisdiction over Plaintiffs’ claims. Intervenor-Respondents’ argument that the *Johnson* litigation divests the circuit court of jurisdiction to hear Plaintiffs’ claims therefore must fail. Further, application of res judicata to Plaintiffs’ claims would violate fundamental due process principles. Finally, as a practical matter, the three-judge circuit court is best situated to hear Plaintiffs’ claims, which present mixed questions of law and fact.

A. Article I, Section 9 requires that a judicial forum exist with mandatory original jurisdiction over Plaintiffs’ claims.

Judges and scholars have not settled on a uniform interpretation of open courts and right to a remedy provisions, despite their prevalence among state constitutions. Compare David Schuman, *The Right to a Remedy*, 65 Temp. L. Rev. 1197 (1992) (arguing that state provisions respond in part to concerns about legislative interference with causes of action and remedies), with Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 Or. L. Rev. 1279 (1995) (contending that provisions provide only procedural rights); see also *Est. of Makos ex rel. Makos v. Wis. Masons Health Care Fund*, 211 Wis. 2d 41, 64–66, 564 N.W.2d 662 (1997) (Crooks, J., concurring) (arguing that Article I, Section 9 may substantively limit legislature), *id.*, 211 Wis. at 83 (A.W. Bradley, J., dissenting) (“I do not believe that Wis. Const. art. I, § 9 stands as an obstacle to the legislative alteration or abolition of

common law rights of action.”); *Aicher ex rel. LaBarge v. Wis. Patients Compen. Fund*, 2000 WI 98, 237 Wis. 2d 99, 613 N.W.2d 849 (reversing *Makos* and largely adopting Justice Bradley’s dissent from that case). These debates engage with difficult interpretive questions, and resolution may vary across time and between states. Compare, e.g., *Kluger v. White*, 281 So. 2d 1, 4–5 (Fla. 1973) (legislature may not abolish cause of action without suitable replacement or compelling need), with *Segers v. Indus. Comm’n*, 732 N.E.2d 488, 496–97 (Ill. 2000) (right to a remedy clause places no substantive limits on legislature).

But there are some interpretive questions that are beyond debate. If Article I, Section 9 is to mean anything, it is that—as this Court itself stated nearly 150 years ago—“the rights of every suitor shall be honestly and promptly adjudicated.” *Flanders v. Town of Merrimack*, 48 Wis. 567, 575, 4 N.W. 741 (1880). A central tenet, tracing to the Magna Carta, is that a common-law based legal system requires that citizens have access to courts to seek remedies available for legally cognizable injuries. See *Horton v. Or. Health & Sci. Univ.*, 376 P.3d 998, 1016–20 (Or. 2016); see also Phillips, 78 N.Y.U. L. Rev. at 1322.

Right to a remedy claims generally arise in challenges to legislation, not—as here—responses to arguments against judicial review. But regardless of the context, the principle stands: at minimum, Article I, Section 9 guarantees an appropriate forum in which a legal claim may be brought on behalf of the injured party. See *W.R.W. v. Bartholomew*, 116 Wis. 2d 150, 162, 41 N.W.2d 682 (1984) (statutes governing procedure to establish paternity unconstitutionally deprived child of power to bring an action on his or her own behalf). Indeed, the provision does not merely negate

unconstitutional legislation but may require flexibility to ensure that a claim may be heard, even absent statutory authority. *See D.H. v. State*, 76 Wis. 2d 286, 294, 251 N.W.2d 196, 201 (1977) (“When an adequate remedy or forum does not exist to resolve disputes or provide due process, the courts, under the Wisconsin Constitution, can fashion an adequate remedy.”) (quoting *Hortonville Ed. Ass’n v. Jt. Sch. Dist. No. 1*, 66 Wis. 2d 469, 497, 225 N.W.2d 658 (1975)); *see also State ex rel. Wickham v. Nygaard*, 159 Wis. 396, 400, 150 N.W. 513 (1915) (“Now it is self-evident that, if an unlawful tax has been assessed against the petitioner, he has suffered a wrong If he cannot go into any court to assert his right, he is absolutely deprived of the remedy which our organic law gives him.”).

Decisions from other states, including those that do not give broad effect to their right to a remedy provision, reach the same conclusion. Even if they do not limit the legislature’s ability to abolish common-law causes of action, the state constitutional right to remedy clauses exist to ensure the availability of a forum where a valid cause of action may be heard. For example, Illinois does not construe its right to a remedy clause to limit the legislature’s ability to abolish a cause of action. *Segers*, 732 N.E.2d at 496–97. However, “the right [to bring a claim], once given, must be regulated by legislation consistent with constitutional safeguards,” limiting regulations that would restrict the ability to present a legally cognizable claim. *People ex rel. Christiansen v. Connell*, 118 N.E.2d 262, 267 (Ill. 1954) (although “the legislature might entirely abolish the right of access to the courts for purposes of divorce and annulment,” it could not impose a 60-day waiting period without violating litigants’ right to a remedy).

A more difficult question is whether, if mandatory original jurisdiction does not lie with this Court, appellate review is also mandatory. *See D.H.*, 76 Wis. at 294 (absent statutory authority creating procedure for expeditious appeal of juvenile court determination that minor defendant waived juvenile court jurisdiction); *see also State v. Johnson*, 569 S.W.2d 808, 815 (Tenn. 1978) (where intermediate appellate review is discretionary, “a critical consideration is the existence of an effective, available and expeditious appellate remedy”); *Dillingham v. Putnam*, 14 S.W. 303, 305 (Tex. 1890) (law requiring appellant to post *supersedeas* bond unconstitutional under open courts provision, coupled with provision defining Texas Supreme Court’s appellate authority). Here, as Plaintiffs requested discretionary review, the Court need not conclusively decide this issue. But the fact that Intervenor-Respondents’ argument, if adopted, would deprive Plaintiffs of not only a trial court but also an appeal, is further reason why it should be rejected.

In sum, this is not an edge case. Article I, Section 9 requires that at least one judicial forum be available to hear Plaintiffs’ claims.¹ And Intervenor-Respondents’ argument—that the circuit court lacks jurisdiction entirely, such that no court has mandatory original

¹ This brief focuses specifically on Intervenor-Respondents’ novel jurisdictional theory and not the issue of justiciability, and so the argument here is straightforward: the courthouse door must remain open to Plaintiffs, as they have not yet had a chance to vindicate their claims. But it should be noted that Article I, Section 9—which has no federal corollary—also weighs in favor of a judicial determination on the merits, particularly because no federal forum is available for Plaintiffs’ claims.

jurisdiction—would deprive them of a fundamental constitutional right.

B. Intervenor-Respondents’ argument also cannot be squared with the doctrine of claim preclusion, nor with fundamental principles of due process.

Intervenor-Respondents’ argument also must be rejected because it contravenes the doctrine of claim preclusion, enforcement of which is necessary to protect Plaintiffs’ due process rights. Intervenor-Respondents essentially ask the Court to treat Plaintiffs as if they had been parties to the *Johnson* litigation, even though they were neither parties nor privies of any party. Thus, if the Court does not reach the constitutional issue of Plaintiffs’ right to a remedy, it should nonetheless reject Intervenor-Respondents’ position.

A ruling to the contrary would have the same effect as applying res judicata to nonparties to prior litigation. Not only does the doctrine of claim preclusion foreclose such a result by requiring privity, *see Menard, Inc. v. Liteway Lighting Prods.*, 2005 WI 98, ¶26, 282 Wis. 2d 582, 698 N.W.2d 738 (doctrine applies only to parties or their privies), claim preclusion is not jurisdictional and cannot close the courthouse doors, *see* Wis. Stat. §§ 802.02(3) (identifying res judicata as an affirmative defense); 802.06(2)(a)2. & 8. (separately listing lack of subject-matter jurisdiction and res judicata as grounds for a motion to dismiss).

What is more, a contrary rule would raise federal due process flags, even under the considerably-less-protective U.S. Constitution, *see, e.g., Taylor v. Sturgell*, 553 U.S. 880, 898 (2008) (“our decisions emphasize the fundamental nature of the general rule that a litigant

is not bound by a judgment to which she was not a party”); *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 805 (1996) (“A state court’s freedom to rely on prior precedent in rejecting a litigant’s claims does not afford it similar freedom to bind a litigant to a prior judgment to which he was not a party.”). A court adjudicates the rights of the parties before it, and exceptions exist only where enhanced protections exist to protect nonparties who may be subject to later claims of preclusion. *See* Wis. Stat. § 803.08 (outlining class action procedures, including notice to and an opportunity to opt out for absent class members).

Indeed, Intervenor-Respondents’ position apparently repackages and disguises preclusion arguments previously rejected by this Court in *Clarke v. Wisconsin Elections Commission*, 2023 WI 79, ¶¶44–48, 410 Wis. 2d 1, 998 N.W.2d 370. In addition to the absence of privity between the parties in this matter and the *Johnson* litigation, the claims raised here do not share a “set of operative facts at issue” with *Johnson I* and *Johnson II* because Plaintiffs “argue that the *Johnson* remedy was unconstitutional on grounds not raised in *Johnson*.” *Id.*, ¶¶47–48. While Intervenor-Respondents may argue that *Johnson* controls as a matter of precedent, that is no reason to refuse Plaintiffs the opportunity to respond with their own position on *Johnson*’s precedential value. And, of course, even if *Johnson* were directly on point, it would be no reason to deny a party any opportunity to challenge precedent. *See, e.g., Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶100, 264 Wis. 2d 60, 665 N.W.2d 257 (“We do more damage to the rule of law by obstinately refusing to admit

errors, thereby perpetuating injustice, than by overturning an erroneous decision.”).

II. Once the jurisdictional issue is resolved, the circuit court is most competent to hear Plaintiffs’ claims.

Practical considerations provide further reason to reject Intervenor-Respondents’ arguments. Circuit courts are “tasked with and institutionally competent to decide questions of fact,” unlike appellate courts, which “are—by design—not equipped to do so.” *State v. J.D.B.*, 2026 WI 5, ¶¶16–17, 419 Wis. 2d 383, 31 N.W.3d 314. “Because this court is not a fact-finding tribunal, it generally will not exercise its original jurisdiction in matters involving contested issues of fact.” *Green for Wis. v. State Elec. Bd.*, 2006 WI 120, 297 Wis. 2d 300, 302, 723 NW.2d 418 (mem.) (citing *In re Exercise of Original Jurisdiction*, 201 Wis. 123, 128, 229 N.W. 643 (1930)).

Allowing the circuit court to resolve this matter makes particular sense here. First, the Wisconsin Legislature created the three-judge circuit court by statute to resolve apportionment and districting disputes, and the separation of powers weighs in favor of giving effect to its choice of forum. *See* Wis. Stat. § 751.035. Second, the three-judge court, like the federal three-judge court after which it is modeled, allows for both multimember decision-making and appellate review, improving legitimacy and efficiency. *See generally* Joshua A. Douglas & Michael E. Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 Geo. L.J. 413 (2019). Finally, the need for a trial court’s fact-finding is particularly acute in the districting context because of the complexity of both the cause of action and the potential remedy. *See Order, Johnson v. Wis. Elections*

Comm'n, No. 2021AP1450-OA, at 14 (Sept. 22, 2021) (Dallet, J., dissenting).

Thus, while this Court potentially *could* exercise original jurisdiction over Plaintiffs' claims, the circuit court is best positioned to do so if this Court concludes that Plaintiffs' claims are viable. As previously explained, under Article I, Section 9, a prior judgment cannot bar a nonparty from filing a subsequent claim in a court competent to hear that claim. And here, the court of competent jurisdiction—jurisdiction over both facts and law—is the circuit court.

Nor can Intervenor-Respondents' reliance on this Court's constitutional supervisory authority over lower courts have any bearing. Under the Wisconsin Constitution, "the judicial power" is vested not only in this Court but also in the circuit courts and "such trial courts of general uniform statewide jurisdiction as the legislature may create by law." Wis. Const. art. VII, § 2. The three-judge circuit court is best situated to hear the merits of Plaintiffs' claims, as the Wisconsin State Legislature made clear when it adopted the venue statute governing reapportionment claims in state court.

CONCLUSION

The Court should confirm that the three-judge circuit court is the appropriate forum to hear Plaintiffs' claims. If it concludes that Plaintiffs' claims are justiciable, it should remand to the circuit court for further proceedings.

Respectfully submitted this 20th day of August, 2026.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19 (7)(d), (8)(b), (bm), and (c) for a brief produced with proportional serif font. The combined length of the Introduction, Argument and Conclusion sections of this brief is 2,771 words.

Dated: August 20, 2026.

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