

**FILED**  
**08-22-2023**  
**CLERK OF WISCONSIN**  
**SUPREME COURT**

**No. 2023AP001399-OA**

---

IN THE SUPREME COURT OF WISCONSIN

---

REBECCA CLARKE, RUBEN ANTHONY, TERRY DAWSON, DANA GLASSTEIN, ANN GROVES-LLOYD, CARL HUJET, JERRY IVERSON, TIA JOHNSON, ANGIE KIRST, SELIKA LAWTON, FABIAN MALDONADO, ANNEMARIE MCCLELLAN, JAMES MCNETT, BRITTANY MURIELLO, ELA JOOSTEN (PARI) SCHILS, NATHANIEL SLACK, MARY SMITH-JOHNSON, DENISE (DEE) SWEET, AND GABRIELLE YOUNG,  
*Petitioners,*

*v.*

WISCONSIN ELECTIONS COMMISSION; DON MILLIS, ROBERT F. SPINDELL, JR., MARK L. THOMSEN, ANN S. JACOBS, MARGE BOSTELMANN, AND JOSEPH J. CZARNEZKI, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN ELECTIONS COMMISSION; MEAGAN WOLFE, IN HER OFFICIAL CAPACITY AS THE ADMINISTRATOR OF THE WISCONSIN ELECTIONS COMMISSION; SENATOR ANDRÉ JACQUE, SENATOR TIM CARPENTER, SENATOR ROB HUTTON, SENATOR CHRIS LARSON, SENATOR DEVIN LEMAHIEU, SENATOR STEPHEN L. NASS, SENATOR JOHN JAGLER, SENATOR MARK SPREITZER, SENATOR HOWARD L. MARKLEIN, SENATOR RACHAEL CABRAL-GUEVARA, SENATOR VAN H. WANGGAARD, SENATOR JESSE L. JAMES, SENATOR ROMAINE ROBERT QUINN, SENATOR DIANNE H. HESSELBEIN, SENATOR CORY TOMCZYK, SENATOR JEFF SMITH, AND SENATOR CHRIS KAPENGA, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN SENATE,

*Respondents.*

---

**NON-PARTY BRIEF OF WISCONSIN LEGISLATURE AS AMICUS CURIAE IN OPPOSITION TO PETITION FOR AN ORIGINAL ACTION**

---

**BELL GIFTOS ST. JOHN LLC**  
KEVIN M. ST. JOHN, SBN 1054815  
5325 Wall Street, Suite 2200  
Madison, WI 53718  
608.216.7995  
kstjohn@bellgiftos.com

**AUGUSTYN LAW LLC**  
JESSIE AUGUSTYN, SBN 1098680  
1835 E. Edgewood Dr., Suite 105-478  
Appleton, WI 54913  
715.255.0817  
jessie@augustynlaw.com

---

*Additional Counsel Listed on Following Page*

---

**CONSOVOY MCCARTHY PLLC**  
TAYLOR A.R. MEEHAN\*  
1600 Wilson Blvd., Suite 700  
Arlington, VA 22209  
703.243.9423  
taylor@consovoymccarthy.com

**LAWFAIR LLC**  
ADAM K. MORTARA, SBN 1038391  
40 Burton Hills Blvd., Suite 200  
Nashville, TN 37215  
773.750.7154  
mortara@lawfairllc.com

**LEHOTSKY KELLER COHN LLP**  
SCOTT A. KELLER\*  
SHANNON GRAMMEL\*  
GABRIELA GONZALEZ-ARAIZA\*  
200 Massachusetts Avenue, NW  
Suite 700  
Washington, DC 20001  
512.693.8350  
scott@lkcfirm.com

**LEHOTSKY KELLER COHN LLP**  
MATTHEW H. FREDERICK\*  
919 Congress Avenue  
Suite 1100  
Austin, TX 78701

*\* pro hac vice motions forthcoming*

**TABLE OF CONTENTS**

INTRODUCTION ..... 1

ARGUMENT ..... 4

    I. Fidelity to precedent demands denial of the petition. .... 5

    II. Laches bars Petitioners’ claims. .... 13

    III. There is no basis under Wisconsin law for Petitioners’ collateral  
        attack of a prior order of this Court. .... 18

CONCLUSION..... 20

## TABLE OF AUTHORITIES

### Cases

<i>Caperton v. A.T. Massey Coal Co.</i> , 556 U.S. 868 (2009).....	11
<i>Grove v. Emison</i> , 507 U.S. 25 (1993).....	15
<i>Harper v. Hall</i> , 886 S.E.2d 393 (N.C. 2023).....	10
<i>Johnson Controls, Inc. v. Employers Ins. of Wausau</i> , 2003 WI 108, 264 Wis. 2d 60, 665 N.W.2d 257 .....	<i>passim</i>
<i>Johnson v. Wis. Elections Comm’n</i> , 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469 ( <i>Johnson I</i> ) .....	<i>passim</i>
<i>Johnson v. Wis. Elections Comm’n</i> , 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559 ( <i>Johnson III</i> ).....	1, 18
<i>League of Women Voters of Ohio v. Ohio Redistricting Comm’n</i> , 192 N.E.3d 379 (Ohio 2022).....	10
<i>League of Women Voters v. Commonwealth</i> , 178 A.3d 737 (Penn. 2018) .....	10
<i>Rivera v. Schwab</i> , 512 P.3d 168 (Kan. 2022).....	10
<i>Rucho v. Common Cause</i> , 139 S. Ct. 2484 (2019).....	2, 3, 7, 10
<i>Schultz v. Natwick</i> , 2002 WI 125, 257 Wis. 2d 19, 653 N.W.2d 266 .....	9, 10, 20
<i>State ex rel. Wren v. Richardson</i> , 2019 WI 110, 389 Wis. 2d 516, 936 N.W.2d 587 .....	14

<i>State v. Campbell</i> , 2006 WI 99, 294 Wis. 2d 100, 718 N.W.2d 649 .....	19
<i>Szeliga v. Lamone</i> , 2022 WL 2132194 (Md. Cir. Ct. Mar. 25, 2022) .....	10
<i>Trump v. Biden</i> , 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568 .....	14, 15, 17
<i>Williams v. Pennsylvania</i> , 579 U.S. 1 (2016).....	11
<i>Williams-Yulee v. Fla. Bar</i> , 575 U.S. 433 (2015).....	20
<i>Wis. Elections Comm'n</i> , 2023 WI 38, 407 Wis. 2d 87, 990 N.W.2d 122 .....	6
<i>Wis. Small Bus. United, Inc. v. Brennan</i> , 2020 WI 69, 393 Wis. 2d 308, 946 N.W.2d 101 .....	13, 14, 17
<i>Withrow v. Larkin</i> , 421 U.S. 35 (1975).....	12
<i>Zrimsek v. Amer. Auto. Ins. Co.</i> , 8 Wis. 2d 1, 98 N.W.2d 383 (Wis. 1959) .....	19
<b>Statutes</b>	
Wis. Stat. §8.15.....	16
Wis. Stat. §8.16.....	16
Wis. Stat. §806.04.....	18, 19
<b>Other</b>	
Janet for Justice, July 2023 Campaign Finance Report CF-2.....	12
Janet for Justice, Spring 2023 Campaign Finance Report CF-2 .....	12

Jessie Opoien & Jack Kelly, <i>Protasiewicz Would ‘Enjoy Taking a Fresh Look’ at Wisconsin Voting Maps</i> , Cap Times (Mar. 2, 2023), <a href="https://perma.cc/THH2-VH3Q">https://perma.cc/THH2-VH3Q</a> .....	12
Restatement (Second) Judgments §74 (1982) .....	19
Restatement (Second) Judgments §76 (1982) .....	19
Zac Schultz, <i>Candidates Tangle Over Political Issues, Judicial Perspectives at First 2023 Wisconsin Supreme Court Forum</i> , PBS Wis. (Jan. 10, 2023), <a href="https://perma.cc/HC4L-NFUS">https://perma.cc/HC4L-NFUS</a> .....	12

## INTRODUCTION<sup>1</sup>

In 2021, four Wisconsin voters filed an original action in this Court. See *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA. They challenged Wisconsin's existing legislative districts as unconstitutionally malapportioned in light of the 2020 census. *Johnson v. Wis. Elections Comm'n*, 2021 WI 87, ¶2, 399 Wis. 2d 623, 967 N.W.2d 469 (*Johnson I*). With the political branches at an impasse on new redistricting legislation, the Court took original jurisdiction to remedy the *Johnson* petitioners' malapportionment claim with a mandatory injunction. *Id.* ¶5. The injunction ordered elections officials to hold upcoming elections pursuant to Court-prescribed district lines necessary "to comport with the one person, one vote principle while satisfying other constitutional and statutory mandates." *Id.*; *Johnson v. Wis. Elections Comm'n*, 2022 WI 19, ¶73, 401 Wis. 2d 198, 972 N.W.2d 559 (*Johnson III*).

As part of the *Johnson* litigation, this Court held that claims of partisan unfairness are not within the Court's power to adjudicate. Before reaching that decision, this Court ordered all parties—including seven groups of

---

<sup>1</sup> Senator Respondents and the Wisconsin Legislature have contemporaneously filed a recusal motion. The Wisconsin Legislature has contemporaneously filed a motion to intervene, should the petition be granted.

intervenors—to submit briefs addressing whether “the partisan makeup of districts [was] a valid factor for [the Court] to consider in evaluating or creating new maps.” *Johnson I*, 2021 WI 87, ¶7. Based on more than 100 pages of briefing on that particular question, the Court answered it with an unequivocal no: “We *hold* ... the partisan makeup of districts does not implicate any justiciable or cognizable right.” *Id.* ¶8 (emphasis added); *accord id.* ¶82 n.4 (Hagedorn, J., concurring).<sup>2</sup> This Court went on to explain the basis for that holding at length:

The Wisconsin Constitution requires the legislature—a political body—to establish the legislative districts in this state. Just as the laws enacted by the legislature reflect policy choices, so will the maps drawn by that political body. Nothing in the constitution empowers this court to second-guess those policy choices, and nothing in the constitution vests this court with the power of the legislature to enact new maps.

*Id.* ¶3. In this Court’s words, the Court has “no license to reallocate political power between the two major political parties.” *Id.* ¶52 (quoting *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019)). This Court already “searched in earnest” to find “a right to partisan fairness in Article I,

---

<sup>2</sup> Justice Hagedorn “join[ed] the entirety of the majority opinion except ¶¶8, 69-72, and 81” and expressly agreed that the Court “should not consider the partisan makeup of districts.” *Johnson I*, 2021 WI 87, ¶82 n.4.



Sections 1, 3, 4, or 22 of the Wisconsin Constitution,” despite its absence in Article IV. *Id.* ¶¶53-63. The Court found none. *Id.* “Adjudicating claims of ‘too much’ partisanship,” therefore, “would recast this court as a policymaking body rather than a law-declaring one.” *Id.* ¶52. It would be a task with “no legal standards,” only political ones. *Id.* (quoting *Rucho*, 139 S. Ct. at 2507).

Nothing has changed about the Wisconsin Constitution since *Johnson I*. What the Wisconsin Constitution meant then, it means today. *See id.* ¶22 (“Our goal when we interpret the Wisconsin Constitution is to give effect to the intent of the framers and of the people who adopted it[,]...focus[ing] on the language of the adopted text and historical evidence of its meaning.” (quotation marks and alterations omitted)). Then and now, “[t]he Wisconsin Constitution contains ‘no plausible grant of authority’ to the judiciary to determine whether maps are fair to the major parties and the task of redistricting is expressly assigned to the legislature.” *Id.* ¶52 (quoting *Rucho*, 139 S. Ct. at 2507). There is no basis for this Court to grant the petition, only to have to say the same thing again.

It would transgress this Court's judicial power to adjudicate Petitioner's claims of partisan unfairness on the merits. It would ignore this Court's fidelity to its past precedents and the Wisconsin Constitution. It would violate Due Process under the U.S. Constitution, absent recusal. It would reward Petitioners' delay for their unabashed political ends. It would be a blight on this State's highest court. The petition must be denied.

### ARGUMENT

Petitioners ask the Court to decide that the current Court-ordered legislative districts "are extreme partisan gerrymanders" in violation of Article I, Sections 1, 3, 4, and 22 of the Wisconsin Constitution, and whether those claims are "justiciable in Wisconsin courts." Pet. at p.3 (Issues 1-3); *see id.* ¶¶55, 93-121. This Court already parsed those provisions and answered that question: no. *See Johnson I*, 2021 WI 87, ¶¶52-63. Petitioners ask this Court to decide whether the Court-ordered districts violate Article IV of the Wisconsin Constitution because some districts contain legally contiguous but not physically contiguous portions of municipalities. Pet. at pp.3-4 (Issue 4). This Court already answered that question: no. *See Johnson I*, 2021 WI 87, ¶36 ("If annexation by municipalities creates a municipal 'island,' however,

the district containing detached portions of the municipality is legally contiguous even if the area around the island is part of a different district.”). And Petitioners ask this Court to decide that the Court-ordered districts usurped the Governor’s veto power. Pet. at p.4 (Issue 5). This Court already answered that question: no. *See Johnson I*, 2021 WI 87, ¶¶69-72 (describing Court’s role as “judicial in nature” and limited to “provid[ing] a judicial remedy but not to legislate”); *id.* ¶82 n.4 (Hagedorn, J., concurring) (describing Court’s role as providing “judicial remedy”).

There is no basis for relitigating what *Johnson* already decided. This Court’s fidelity to its precedents demands denial of the petition. Petitioners’ delay demands denial of the petition. And any reading of the Wisconsin Declaratory Judgments Act demands denial of the petition.

#### **I. Fidelity to precedent demands denial of the petition.**

Petitioners attempt to reduce *Johnson I* to an “advisory opinion” and “unpersuasive dicta.” Pet. Br. 36 (quoting *Johnson I*, 2021 WI 87, ¶¶102-03 (Dallet, J., dissenting)). What follows are 30 pages of argument relitigating *Johnson I*’s conclusion that this Court has no power to referee claims of

partisan unfairness.<sup>3</sup> There should be no mistaking what Petitioners ask this Court to do: overrule *Johnson I*.

Contrary to Petitioners' re-telling, *Johnson I* is binding precedent. *See Wis. Justice Initiative, Inc. v. Wis. Elections Comm'n*, 2023 WI 38, ¶142, 407 Wis. 2d 87, 990 N.W.2d 122 (Hagedorn, J., concurring) (collecting cases for "the unremarkable rule that when we deliberately take up and decide an issue central to the disposition of a case, it is considered precedential"). In *Johnson*, the Court's task was to craft an injunction that complied with all aspects of the federal and state constitution. *See Johnson I*, 2021 WI 87, ¶15. Accordingly, the Court asked all parties to submit briefs on all relevant legal requirements, from contiguity to partisanship. *Id.* ¶7. From the start, intervening parties identified partisan unfairness as a legal issue. They "complain[ed] that the 2011 maps" challenged as malapportioned in *Johnson* also "reflect[ed] a partisan gerrymander favoring Republican Party candidates," and they "ask[ed the Court] to redraw the maps to allocate districts equally

---

<sup>3</sup> If the Court grants the petition, thereby reopening questions already settled in *Johnson I*, then the parties and intervenors must be provided an adequate opportunity to respond to Petitioners' arguments on the merits. For the reasons stated in the Legislature's contemporaneously filed motion to intervene, state law affords the Legislature the right to intervene and participate as a full party.

between the[] dominant parties.” *Id.* ¶2. Accordingly, the Court ordered the parties to submit briefs about whether the Court could consider “the partisan makeup of districts.” *Id.* ¶7. And with more than 100 pages of briefing on that particular question, the Court said this in *Johnson I*: “We hold ... the partisan makeup of districts does not implicate any justiciable or cognizable right.” *Id.* ¶8 (emphasis added); *accord id.* ¶82 n.4 (Hagedorn, J., concurring).

The decision thus contains far more than “dicta” (Pet. Br. 36) about what the Wisconsin Constitution says (and doesn’t say) about claims of partisan unfairness in redistricting. With respect to whether “a right to partisan fairness” exists in Article I, Sections 1, 3, 4, or 22 of the Wisconsin Constitution, *Johnson I* holds “the right does not exist.” *Id.* ¶53. And with respect to this Court’s power, *Johnson I* holds that “[t]he Wisconsin Constitution contains ‘no plausible grant of authority’ to the judiciary” to resolve such partisan fairness claims. *Id.* ¶52 (quoting *Rucho*, 139 S. Ct. at 2507). They are “political questions” and “must be resolved through the political process and not by the judiciary.” *Id.* ¶4. “To construe Article I, Sections 1, 3, 4, or 22 as a reservoir of additional requirements [in redistricting] would violate axiomatic principles of [constitutional] interpretation, while plunging this

court into the political thicket lurking beyond its constitutional boundaries.”

*Id.* ¶63 (citation omitted).

These are precedential holdings of the Court regarding the legal requirements of redistricting and the limitations of judicial remedies. Deciding whether claims of partisan unfairness were justiciable and cognizable was necessary to deciding whether the Court’s injunctive relief complied with all state and federal redistricting requirements. *See id.* ¶¶5, 72. They are holdings of this Court.

There is an obvious basis for Petitioners to ask this Court to overrule that precedent: politics. One day after the Court’s membership changed, the *Clarke* Petitioners asked this Court to declare their partisan gerrymandering claims justiciable and cognizable under the same provisions of the Wisconsin Constitution that *Johnson I* rejected.

But this Court does not overturn precedent based on politics. This Court has said in no uncertain terms: “The decision to overturn a prior case must not be undertaken merely because the composition of the court has changed.” *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶95, 264 Wis. 2d 60, 665 N.W.2d 257. Rather, this Court “scrupulously” follows

“the doctrine of stare decisis” as part of its “abiding respect for the rule of law.” *Id.* ¶¶94. Any other rule, and “deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results.” *Schultz v. Natwick*, 2002 WI 125, ¶¶37, 257 Wis. 2d 19, 653 N.W.2d 266 (quotation marks omitted).

Both the timing and substance of the petition make a mockery of this Court’s fidelity to its precedent. *Compare, e.g.,* Pet. Br. 43 (“This Court’s precedent squarely supports applying the equal-protection rights enshrined in Article I, Section 1 to prohibit partisan gerrymandering.”), *with Johnson I*, 2021 WI 87, ¶¶55-58 (“Nothing supports the notion that Article I, Section 1 of the Wisconsin Constitution was originally understood—or has ever been interpreted—to regulate partisanship in redistricting.”). The words “*stare decisis*” appear nowhere in the petition or Petitioners’ brief. They present no argument on this Court’s *stare decisis* factors, which serve an important role in ensuring there is a “special justification” for overturning *Johnson I*. *Schultz*, 2002 WI 125, ¶¶37-38; *see Johnson Controls*, 2003 WI 108, ¶¶98-99. Nor could they.

The Wisconsin Constitution remains unchanged. There have been no “changes or developments in the law” that could “have undermined the

rationale behind” *Johnson I*, nor any “newly ascertained facts,” nor any intervening precedents calling into question its “coherence and consistency.” *Johnson Controls*, 2003 WI 108, ¶¶98-99. And *Johnson I*’s clear rule, that Courts should stay out of politics, is by definition workable. *Id.* ¶99.

What remains are Petitioners’ arguments that *Johnson I* was wrong the day it was decided. Pet. Br. 36-65. Recycled arguments that *Johnson I* got it wrong based on the same theories already before the Court in *Johnson I* are not enough. *See, e.g., Schultz*, 2002 WI 125, ¶38 (“no change in the law is justified simply by a ‘case with more egregious facts,’” especially when “facts were already before the court when it decided” an earlier case). Likewise, arguments that *Johnson I* got it wrong based on recent decisions in other state courts interpreting those States’ unique constitutional provisions are not



enough. *See* Pet. Br. 38. Those decisions are distinguishable,<sup>4</sup> incomplete,<sup>5</sup> unreasoned,<sup>6</sup> or on appeal.<sup>7</sup> They are no basis for overturning *this Court's* precedent interpreting *this State's* Constitution: "It is not a sufficient reason for this court to overrule its precedent that a large majority of other jurisdictions, with no binding authority on this court, have reached opposing conclusions." *Johnson Controls*, 2003 WI 108, ¶100. And as for Petitioners' unstated argument that *Johnson I* got it wrong because the Court's membership

---

<sup>4</sup> For example, Petitioners' cited Ohio cases turn on a constitutional provision vesting redistricting responsibility in a redistricting commission and requiring "[t]he statewide proportion of districts whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party shall correspond closely to the statewide preferences of the voters of Ohio." *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 192 N.E.3d 379, 385 (Ohio 2022) (quoting Ohio Const. art. XI, §6); *accord Rucho*, 139 S. Ct. at 2507-08 (citing Florida and other States' redistricting-specific "[p]rovisions in state statutes and constitutions [that] can provide standards and guidance for state courts to apply"). Other cited cases turn on Free Elections Clauses in those States' constitutions, absent in the Wisconsin Constitution. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 813 (Penn. 2018); *Szeliga v. Lamone*, 2022 WL 2132194, at \*12-14 (Md. Cir. Ct. Mar. 25, 2022); *but see Harper v. Hall*, 886 S.E.2d 393, 439-43 (N.C. 2023) (rejecting similar claim based on text and history).

<sup>5</sup> Petitioners omit that, since *Johnson I*, the Kansas and North Carolina supreme courts have likewise rejected claims of partisan unfairness as nonjusticiable. *Rivera v. Schwab*, 512 P.3d 168, 181-87 (Kan. 2022); *Harper*, 886 S.E.2d at 439-43. And the Kentucky Supreme Court is currently evaluating the justiciability and cognizability of partisan unfairness claims. *See Graham v. Adams*, No. 2022-SC-522 (Ky. S. Ct.).

<sup>6</sup> Petitioners' cited New Mexico Supreme Court order (Pet. Br. 48-49) is devoid of reasoning, citing only Justice Kagan's dissenting opinion in *Rucho*.

<sup>7</sup> Petitioners' cited Utah trial court order is now on appeal before the Utah Supreme Court with all ongoing litigation stayed. *See League of Women Voters v. Utah Legislature*, No. 20220991-SC (Utah S. Ct.).

then is different than the Court's membership now—that argument is not only not enough, *id.* ¶95, it also raises serious constitutional concerns.

If this Court were to use its change in membership to grant this petition and then overrule *Johnson*, the Court would transgress the most basic of due process guarantees: “an absence of actual bias’ on the part of a judge” and decisions that have not been pre-decided. *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)); see *Caper-ton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (due process “require[s] recusal when ‘the probability of actual bias on the part of the judge ... is too high to be constitutionally tolerable,’” as measured by “objective standards” (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). As explained in the contemporaneously filed recusal motion, Petitioners’ original action is in response to an invitation given during a campaign for a seat on this Court. While campaigning, Justice Janet Protasiewicz said the *Johnson* maps were “rigged.”<sup>8</sup> She invited another challenge—a “fresh look at the gerrymandering question.”<sup>9</sup> All the while, the Democratic Party contributed millions to

---

<sup>8</sup> Zac Schultz, *Candidates Tangle Over Political Issues, Judicial Perspectives at First 2023 Wisconsin Supreme Court Forum*, PBS Wis. (Jan. 10, 2023), <https://perma.cc/HC4L-NFUS>.

<sup>9</sup> Jessie Opoien & Jack Kelly, *Protasiewicz Would ‘Enjoy Taking a Fresh Look’ at Wisconsin Voting Maps*, Cap Times (Mar. 2, 2023), <https://perma.cc/THH2-VH3Q>.

her campaign as its biggest donor.<sup>10</sup> By election day, it was apparent how Justice Protasiewicz, absent recusal, would be voting.<sup>11</sup> In her words, “The map issue is really kind of easy, actually.”<sup>12</sup> “I agree with” the *Johnson* dissent.<sup>13</sup>

Fidelity to this Court’s precedents must overcome those campaign statements. The Due Process Clause will not tolerate any other result.

## II. Laches bars Petitioners’ claims.

Nearly two years ago, this Court invited “any prospective intervenor” to file a motion to participate in the *Johnson* litigation. See Order of Sept. 22, 2021, *Johnson v. Wis. Elections Comm’n*, No. 2021AP1450-OA. Seven sets of intervenors filed timely motions, and the Court granted every one of them. See Order of Oct. 14, 2021, at 3, *Johnson v. Wis. Elections Comm’n*, No. 2021AP1450-OA. The *Clarke* Petitioners did not intervene. They waited exactly 679 days after this Court’s invitation to intervene in *Johnson*; exactly 474 days after this Court’s final order in *Johnson III*; and exactly 1 day after

---

<sup>10</sup> See Janet for Justice, Spring 2023 Campaign Finance Report CF-2, Schedule 1-B; Janet for Justice, July 2023 Campaign Finance Report CF-2, Schedule 1-B.

<sup>11</sup> Henry Redman, *Supreme Court Candidates Accuse Each Other of Lying, Extremism in Sole Debate*, Wis. Examiner (Mar. 21, 2023), <https://perma.cc/5KLA-S2FV>.

<sup>12</sup> Scott Bauer, *Wisconsin Supreme Court Candidates Clash Over Abortion, Maps in Only 2023 Debate*, PBS Wis. (Mar. 21, 2023), <https://perma.cc/SE77-ED4Z>.

<sup>13</sup> Redman, *supra* note 11.

this Court's membership changed. Only now do they ask the Court's new majority to relitigate the issues finally decided in *Johnson* and obtain an injunction of the injunction issued in *Johnson*. See Pet. ¶¶93-132. Worse, they ask to do so on a blistering-fast schedule with the effect of cutting short sitting Senators' terms. *Id.* at pp.43-45.

The doctrine of laches bars Petitioners' suit. Petitioners "delayed without good reason," and that delay prejudices the parties who will have to defend against Petitioners' claims. *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶¶11-12, 393 Wis. 2d 308, 946 N.W.2d 101. There was no reason to expect that Petitioners would try partisan gerrymandering claims anew when the *Johnson* litigation came to an end. *Id.* ¶18 & n.10. Had anyone predicted Petitioners' suit then, Petitioners could have been joined as parties alongside all the other *Johnson* intervenors.

Petitioners 679-day delay is little different than the two-year delay in *Brennan*. There, Petitioners waited to challenge the Governor's line-item veto until after a subsequent "biennial budget had gone into effect." *Id.* ¶15. So too here—Petitioners waited more than a year after the *Johnson III* maps were final and after elections transpired. See *id.* ¶17.

Petitioners have no good reason for that delay. The only explanation is the Court's change in membership. For the same reason this Court rebukes requests to overturn precedent because of a change in membership, *Johnson Controls*, 2003 WI 108, ¶95, this Court must reject Petitioners' "sleep[ing] on their rights" until that change in membership, *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶14, 389 Wis. 2d 516, 936 N.W.2d 587 (quotation marks omitted). "[E]quity aids the vigilant," *id.*, not the opportunistic. That is particularly true in the elections context. *See Trump v. Biden*, 2020 WI 91, ¶11, 394 Wis. 2d 629, 951 N.W.2d 568. Courts cannot "allow persons to gamble on the outcome of an election contest and then challenge it when dissatisfied"—or satisfied—"with the results, especially when the same challenge could have been made before the public is put through the time and expense of the entire election process." *Id.* (quotation marks omitted).

Petitioners' timing, moreover, stands to create substantial prejudice. More than two dozen individual voters, organizations, public officials, and both political branches already expended substantial resources to litigate, appeal, and obtain a final judgment in the *Johnson* litigation. Well over a year later, Petitioners ask to start again from square one. That is especially

problematic in a redistricting case. There can be only one set of legislative districts. *See Growe v. Emison*, 507 U.S. 25, 35 (1993). Awarding Petitioners relief here will have the effect of dissolving the judgment obtained in *Johnson*—lest the Wisconsin Elections Commissioners be subject, under threat of contempt, to two irreconcilable injunctions.

Worse, Petitioners want relief immediately, before the 2024 elections. Pet. at p.44.<sup>14</sup> Yet nearly two years have passed since this Court invited Petitioners to intervene and press their redistricting arguments in *Johnson*; more than twenty months have passed since this Court decided *Johnson I*, concluding partisan gerrymandering claims are not justiciable or cognizable; and sixteen months have passed since this Court decided *Johnson III*, ordering the district lines that Petitioners now challenge as unconstitutional. After all that time, Petitioners claim their case is urgent, demanding full resolution within months. Candidates will begin qualifying for upcoming

---

<sup>14</sup> Petitioners ask the Court to enjoin the Elections Commission from using the court-ordered districts “in any future election,” which would include the upcoming 2024 primary elections. Pet. at p.43. But Petitioners then ask for “special elections in November 2024 for all odd-numbered state senate districts,” without mentioning the upcoming 2024 primary elections. *Id.* at 44. Petitioners do not explain how the State would conduct a general election for Senate and Assembly candidates pursuant to new district lines without first holding a primary to determine each party’s candidates in that general election. *See Wis. Stat.* §8.16.

elections in eight months, Wis. Stat. §8.15(1). Petitioners sat on their hands for at least twice as long.

All the more extraordinary is Petitioners' demand that this Court deny the validity of the 2022 Senate elections and cut short sitting Senators' constitutionally prescribed four-year terms. *See* Pet. at p.44. Petitioners had every opportunity to file their suit *before* those Senators were elected two years ago. Other voters, represented by Petitioners' same counsel, filed a redistricting suit 11 days after the State received the 2020 census results and well before those 2022 elections. *See* Compl., *Black Leaders Org. for Cmty. v. Spindell*, No. 3:21-cv-534 (W.D. Wis.), ECF 1 (filed Aug. 23, 2021). Weeks later, this Court invited the participation of all prospective intervenors, *supra*. Having spurned that invitation, Petitioners cannot now claim the 2026 elections in those Senate districts are too far away. *See Trump*, 2020 WI 91, ¶¶11-12 & n.7 (stating "[e]xtreme diligence and promptness are required" in the elections context, "particularly where actionable election practices are discovered prior to the election," and collecting cases applying laches to parties failing to come forward before elections). Nor would anyone have expected Petitioners to relitigate claims fully decided well over a year ago,

effectively seeking an injunction of the Court's earlier injunction. *See Brennan*, 2020 WI 69, ¶18 & n.10.<sup>15</sup>

The Court must reject the petition as an unjustifiably delayed collateral attack on the final judgment of this Court in *Johnson*. The time for raising Petitioners' partisan gerrymandering claims was in 2021, when this Court welcomed intervention by all interested voters, political organizations, and the political branches. Granting this petition two years later rewards Petitioners for their delay, for which there is no legitimate justification.

**III. There is no basis under Wisconsin law for Petitioners' collateral attack of a prior order of this Court.**

Petitioners seek a declaration that "[t]he current maps" for the State Assembly and Senate violate various provisions of the Wisconsin Constitution, and Petitioners ask the Court to enjoin them. Pet. ¶¶93-128. But those "current maps" are not codified in Wisconsin's statutes. They exist by virtue of the mandatory injunction granted in *Johnson III*. *See Johnson I*, 2021 WI 87, ¶5 & n.1; *Johnson III*, 2022 WI 19, ¶73. Petitioners thus ask this Court to declare its own mandatory injunction order unconstitutional and to enjoin it.

---

<sup>15</sup> Petitioners' same counsel voluntarily dismissed the above-referenced federal redistricting suit more than 15 months ago. *See* BLOC Pls. Updated Position, *Hunter v. Bostelmann*, No. 21-cv-512 (W.D. Wis.), ECF 143 (filed May 4, 2022).



Wisconsin's Declaratory Judgments Act does not contemplate relief so strange. The Act permits any person to ask for a determination of their rights under deeds, wills, contracts, statutes, or ordinances:

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Wis. Stat. §806.04(2). Earlier injunctions issued by this Court are missing from that list. Petitioners cannot invoke this Court's jurisdiction under the Declaratory Judgments Act to declare its earlier judgment unconstitutional.<sup>16</sup>

Nor have Petitioners explained what legal (versus political) basis there could be for this Court to disavow and dissolve the final judgment in *Johnson*. Cf. *State v. Campbell*, 2006 WI 99, ¶¶52-55, 294 Wis. 2d 100, 718 N.W.2d 649 (cannot "avoid, evade or deny the force and effect of a judgment

---

<sup>16</sup> If this Court disagrees and grants the petition, then all parties from the *Johnson* litigation must be made parties to these proceedings. See Wis. Stat. §806.04(11) ("When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration may prejudice the right of persons not parties to the proceeding.").

in an indirect manner” except with showing of fraud (quotation marks omitted)); *Zrimsek v. Amer. Auto. Ins. Co.*, 8 Wis. 2d 1, 3, 98 N.W.2d 383 (Wis. 1959) (similar); Restatement (Second) Judgments §§74, 76 (1982) (non-parties cannot attack judgment if they fail to exercise reasonable diligence). Petitioners sat out the *Johnson* litigation. *See supra*, p.13. Instead, they filed their own action nearly two years later asking this Court to enjoin its own *Johnson* injunction. Nothing in the Wisconsin Constitution has changed that could justify Petitioners’ extraordinary action. Only this Court’s membership has. A new majority is no basis for granting the petition, lest judges be reduced to politicians and the rule of law reduced to the rule of political will. *See Johnson Controls*, 2003 WI 108, ¶95; *Schultz*, 2002 WI 125, ¶37; *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 437 (2015).

## CONCLUSION

This Court should deny the petition for an original action.

Dated this 22nd day of August, 2023.

Respectfully submitted,

/s/ Kevin M. St. John

**AUGUSTYN LAW LLC**

JESSIE AUGUSTYN, SBN 1098680  
1835 E. Edgewood Dr., Suite 105-478  
Appleton, WI 54913  
715.255.0817  
jessie@augustynlaw.com

**LEHOTSKY KELLER COHN LLP**

SCOTT A. KELLER\*  
SHANNON GRAMMEL\*  
GABRIELA GONZALEZ-ARAIZA\*  
200 Massachusetts Avenue, NW  
Suite 700  
Washington, DC 20001  
512.693.8350  
scott@lkcfirm.com

**LEHOTSKY KELLER COHN LLP**

MATTHEW H. FREDERICK\*  
919 Congress Avenue  
Suite 1100  
Austin, TX 78701

**BELL GIFTOS ST. JOHN LLC**

KEVIN M. ST. JOHN, SBN 1054815  
5325 Wall Street, Suite 2200  
Madison, WI 53718  
608.216.7995  
kstjohn@bellgiftos.com

**CONSOVOY MCCARTHY PLLC**

TAYLOR A.R. MEEHAN\*  
1600 Wilson Blvd., Suite 700  
Arlington, VA 22209  
703.243.9423  
taylor@consovoymccarthy.com

**LAWFAIR LLC**

ADAM K. MORTARA, SBN 1038391  
40 Burton Hills Blvd., Suite 200  
Nashville, TN 37215  
773.750.7154  
mortara@lawfairllc.com

\* *pro hac vice motions forthcoming*

*Attorneys for Non-Party Amicus Curiae and Proposed Intervenor-Respondent,  
The Wisconsin Legislature*

## CERTIFICATION REGARDING LENGTH AND FORM

I certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm), and (c) and §809.81(4), as modified by the Order of this Court. Excluding the portions of this brief that may be excluded, the length of this brief is 4,291 words as calculated by Microsoft Word.

Dated this 22nd day of August, 2023

Respectfully submitted,

Electronically Signed by

/s/ Kevin M. St. John

**BELL GIFTOS ST. JOHN LLC**  
KEVIN M. ST. JOHN, SBN 1054815  
5325 Wall Street, Suite 2200  
Madison, WI 53718  
608.216.7995  
kstjohn@bellgiftos.com