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,

GOVERNOR TONY EVERS, IN HIS OFFICIAL CAPACITY; NATHAN ATKINSON, STEPHEN JOSEPH WRIGHT, GARY KRENZ, SARAH J. HAMILTON, JEAN-LUC THIFFEAULT, SOMESH JHA, JOANNE KANE, AND LEAH DUDLEY,

Intervenors-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,

WISCONSIN LEGISLATURE; BILLIE JOHNSON, CHRIS GOEBEL, ED PERKINS, ERIC O'KEEFE, JOE SANFELIPPO, TERRY MOULTON, ROBERT JENSEN, RON ZAHN, RUTH ELMER, AND RUTH STRECK,

Intervenors-Respondents.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS BY INTERVENOR-RESPONDENT WISCONSIN LEGISLATURE AND RESPONDENTS SENATORS CABRAL-GUEVARA, HUTTON, JACQUE, JAGLER, JAMES, KAPENGA, LEMAHIEU, MARKLEIN, NASS, QUINN, TOMCZYK, AND WANGGAARD

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INTRODUCTION

This collateral attack on the Court's final judgment in *Johnson* should be dismissed for at least three independent reasons. Wis. Stat. §802.06.[1] *First*, Petitioners have not adequately established standing. *Second*, Petitioners and Intervenor-Petitioners' claims are barred by laches, preclusion, and estoppel. *Third*, there is no legal basis for Petitioners' requested declaratory or injunctive relief, nor any legal basis for their request for a writ quo warranto. And for the reasons already briefed in the Legislature and Senator-Respondents' opening brief, stare decisis precludes relitigation of their contiguity claim, and their

[1] When this Court takes jurisdiction of an appeal or any other proceeding, it follows the rules governing proceedings in appellate courts, *see* Wis. Stat. §809.63, which include dismissal motions, *see id.* §809.14. Wisconsin's rules of civil procedure apply to all matters not covered by the appellate rules unless context requires otherwise. *See id.* §809.84. In this original action, Respondents must have an opportunity to raise and preserve their affirmative defenses and seek dismissal of Petitioners' action, no different than if Petitioners had filed this action in the circuit court. The Legislature and Respondent Senators have raised some of those defenses in their opening brief to the extent possible within the Court's 10-day briefing schedule—half of those days falling on weekends and a federal holiday—and word limits. In accordance with Wis. Stat. §802.06, the Legislature and Respondent Senators also raise and preserve those defenses in this brief in support of their motion to dismiss. While ordinarily discovery and other proceedings would be stayed pending a motion to dismiss, *id.* §802.06(1)(b), movants do not understand this motion to affect the Court's order of October 6, 2023, setting an expedited schedule for merits briefing.

separation-of-powers claim is illogical, self-defeating, and based on a mistaken understanding of this Court's judgment in *Johnson*. For any of these reasons, the case should be dismissed.

STATEMENT OF THE CASE

In 2011, Wisconsin enacted new legislation demarcating the State's Assembly and Senate districts. 2011 Wis. Act 43.[2] Then in 2021, after the 2020 census, Wisconsin's efforts to enact new redistricting legislation stalled when the Governor vetoed the Legislature's proposed changes to Act 43. *See Johnson v. Wis. Elections Comm'n* (*Johnson I*), 2021 WI 87, ¶¶17-18, 399 Wis. 2d 623, 967 N.W.2d 469. Given the impasse, a group of voters brought an original action in this Court that challenged the 2011 districts as malapportioned. They asked the Court to issue an injunction requiring the Wisconsin Elections Commission to enforce modified district lines that "comport[ed] with the one person, one vote principle while satisfying other constitutional and statutory mandates." *Id.* ¶5. After multiple rounds of briefing,

[2] In 2012, a federal court issued an injunction ordering the Wisconsin Elections Commission to modify two Milwaukee districts in part for Voting Rights Act compliance. *See Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840 (E.D. Wis. 2012).

expert reports, and an appeal to the U.S. Supreme Court, this Court entered a mandatory injunction still binding the Elections Commission and the judgment in *Johnson* became final in April 2022. *Johnson v. Wis. Elections Comm'n* (*Johnson III*), 2022 WI 19, ¶73, 401 Wis. 2d 198, 972 N.W.2d 559. The 2022 elections were administered pursuant to the *Johnson* injunction.

Fifteen months later, Petitioners filed this original action collaterally attacking *Johnson*. On October 6, 2023, this Court granted the petition in part. Some of the parties from *Johnson* intervened, including the Governor. The Court did not order the parties to submit responsive pleadings, and so the Legislature and Respondent Senators submit this motion to dismiss to present their defenses. *See* Wis. Stat. §802.06(2).

ARGUMENT

Dismissal is warranted where the court lacks jurisdiction, where the plaintiff fails to state a claim on which relief may be granted, and where the claims are precluded. *See* Wis. Stat. §802.06(2)(a). Dismissal is warranted here for any of these reasons. And as explained in the Legislature and Senator-Respondents'

opening merits brief of October 16, 2023, stare decisis forecloses Petitioners' contiguity claim, and both their claims fail on the merits.

I. Petitioners lack standing to bring their claims.

Petitioners' claims should be dismissed because Petitioners do not have standing. Wis. Stat. §802.06(2)(a)(6); *see* Legislature Op. Br. 19-20, 41-42. Standing requires that Petitioners "must have suffered an actual injury to a legally protected interest" to advance their constitutional claims. *McConkey v. Van Hollen*, 2010 WI 57, ¶15, 326 Wis. 2d 1, 783 N.W.2d 855. They must have "a personal stake in the outcome of the controversy," *State ex rel. First Nat'l Bank v. M & I People's Bank*, 95 Wis. 2d 303, 308-09, 290 N.W.2d 321 (Wis. 1980), not merely "generalized grievances," *Cornwell Pers. Assocs. v. DILHR*, 92 Wis. 2d 53, 62, 284 N.W.2d 706 (Ct. App. 1979); *see Moedern v. McGinnis*, 70 Wis. 2d 1056, 1064, 236 N.W.2d 240 (Wis. 1975).

A. Harms from redistricting are "district specific"; they "result from the boundaries of the particular district in which [the voter] resides." *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018). Thus, "a voter who lives in the *district* attacked" has standing to assert a voting-rights claim, but the harm from the alleged violation does "not so keenly

threaten a voter who lives elsewhere in the State." *See Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 263 (2015). For that reason, "[a] plaintiff who complains of [redistricting practices], but who does not live in [an affected] district, asserts only a generalized grievance." *Gill*, 138 S. Ct. at 1930 (cleaned up). Even a plaintiff who lives in a challenged district "cannot sue to invalidate the whole State's legislative districting map; such complaints must proceed 'district-by-district.'" *Id.*

Petitioners have failed to establish standing to raise a contiguity claim. Petitioners' alleged harm is "having the strength of their votes diluted on a district-by-district basis." Pet. ¶5. But for most of the allegedly noncontiguous districts, no petitioner claims to live in them,[3] so they are not subject to challenge. *See Ala. Legis. Black Caucus*, 575 U.S. at 263. Several Petitioners do not even claim to live in

[3] No voter challenging districts claims to live in AD2-AD3, AD5-AD6, AD15, AD25, AD27-AD28, AD30, AD32-AD33, AD37-AD41, AD43-AD46, AD48, AD52-AD54, AD58-AD61, AD63, AD67-AD68, AD70, AD72, AD76, AD81, AD83, AD86, AD88-AD89, AD94-AD95, AD97-AD99 (and corresponding SD1-SD2, SD13, SD15, SD20-SD21, SD23-SD24, SD28-SD29, and SD33) on Petitioners' list of allegedly noncontiguous districts. *See* Mem. ISO Pet. 72 nn.21-22.

noncontiguous districts,[4] and thus lack standing entirely. *See, e.g.*, *Shaw v. Hunt*, 517 U.S. 899, 904 (1996). Insofar as Citizen Mathematicians suggest that their residing in districts that "share[] borders" with allegedly noncontiguous districts, *e.g.*, Citizen Mathematicians Pet. ¶¶1-2, can confer standing, it cannot. *See Sinkfield v. Kelley*, 531 U.S. 28, 30-31 (2000) (per curiam) (holding voters lack standing to challenge "adjacent," or "neighboring," districts on the ground that they unavoidably affect the shape of their own); *see also Backus v. South Carolina*, 857 F. Supp. 2d 553, 560 (D.S.C.) (rejecting standing where plaintiffs "reside[d] in a district adjacent to a racially gerrymandered district"), *aff'd*, 568 U.S. 801 (2012).

Even for the few *Clarke* Petitioners and Citizen Mathematicians who claim to live in districts with municipal islands,[5] they do not

[4] The following voters do not allege that they live in districts with municipal islands: Petitioners Dawson (AD57, SD19), Hujet (AD90, SD30), Iverson (AD56, SD19), McNett (AD51, SD17), Slack (AD96, SD32), Smith-Johnson (AD73, SD25), and Sweet (AD74, SD25) and Citizen Mathematicians Atkinson (AD77, SD26), Wright (AD77, SD26), Hamilton (AD20, SD7), Thiffeault (AD77, SD26), Kane (AD77, SD26), and Dudley (AD77, SD26). Pet. ¶¶8, 11-12, 18, 21-23; Citizen Mathematicians Pet. ¶¶1-2, 4-5, 7-8.

[5] The following voters allege that they live in districts with municipal islands: Petitioners Clarke (AD26, SD9), Anthony (AD80, SD27), Glasstein (AD24, SD8), Groves-Lloyd (AD42, SD14), Johnson (AD31, SD11), Kirst

assert a cognizable injury sufficient for standing. The petition's alleged harm is in Petitioners' "inability to achieve a Democratic majority in the state legislature." Pet. ¶5. But this has no causal connection to their constitutional contiguity or separation-of-powers claims. *See, e.g.*, *Mast v. Olsen*, 89 Wis. 2d 12, 16, 278 N.W.2d 205 (Wis. 1979) (noting a party has standing to challenge government action that "causes that party injury in fact"). For instance, Madison-area districts with allegedly noncontiguous municipal islands have long been represented by Democrats, and those alleged noncontiguities are surrounded by other Madison-area districts that have long been represented by Democrats. Resolving the alleged discontinuities are not the cause of, and could not redress, Petitioners' alleged harm—their inability to elect more Democrats, Pet. ¶5. That disconnect between their alleged injury and their constitutional claim is reason enough to dismiss the petition.

(AD80, SD27), Lawton (AD91, SD31), Maldonado (AD66, SD22), McClellan (AD29, SD10), Muriello (SD5), Schils (AD93, SD31), and Young (AD47, SD16), Pet. ¶¶6-7, 9-10, 13-17, 19-20, 24, and Citizen Mathematicians Krenz (SD8) and Jha (AD79, SD27), Citizen Mathematicians Pet. ¶¶3, 6.

In their opening brief, Petitioners suggested a new harm, absent from their petition. Without citation, Petitioners contended that allegedly noncontiguous districts result in "real representational consequences"—that "[l]egislators are less likely . . . to interact with constituents residing in disconnected pieces of their district." Pet'rs Op. Br. 29. That is absurd and unfounded. Roughly one-third of the allegedly noncontiguous municipal islands contain zero people, and more than 80 percent contain 20 or fewer people. *See* Legislature Op. Br. 20, 60 & App.4-11; *cf. Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶25, 403 Wis. 2d 607, 976 N.W.2d 519 (standing exists under vote dilution/pollution theory only where "the level of pollution is high enough"). Nowhere do Petitioners allege that keeping these sparsely populated and nearby municipal islands in districts with the municipalities will prevent Petitioners from voting, campaigning, donating, interacting with their representatives, or otherwise participating in the political process. Nowhere do Petitioners explain how a representative will be unable to serve a Madison-area district's municipal islands, where the distance between the farthest parts of the district pales in comparison

to Wisconsin's sprawling northern and more rural districts. Nor could they. Nothing physically prevents a legislator from representing the entire Town of Lawrence and City of De Pere (AD2) despite their islands. Just as water does not prevent legislators from interacting with constituents on the "disconnected" Washington Island in AD1,[6] so too do municipal islands not prevent legislators from connecting with voters who reside there.

Most fundamentally, all municipal islands in Petitioners' districts have the effect of keeping wards or municipalities together, offering well-established representational *benefits*. *See, e.g.*, *Prosser v. Elections Bd.*, 793 F. Supp. 859, 863 (W.D. Wis. 1992) (per curiam). Petitioners' contiguity claim presents no injury at all, much less a cognizable one sufficient to provide standing. *See* Legislature Op. Br. 18-20. And in no way is their claim sufficient to warrant a statewide remedy of the sort they seek. *See, e.g.*, *Gill*, 138 S. Ct. at 1930.

[6] Press Release, Joel Kitchens, AD1, Death's Door BBQ (Sept. 1, 2017), https://legis.wisconsin.gov/assembly/01/kitchens/media/1207/9117.htm ("Last weekend I attended the Death's Door BBQ on Washington Island.").

B. For similar reasons, Petitioners have also failed to establish standing to raise a separation-of-powers claim. *See* Legislature Op. Br. 41-42. A branch of government, such as the Legislature, may have a stake in preventing encroachment on its powers, but "no one outside the legislature would have an equivalent stake in the issue." *Panzer v. Doyle*, 2004 WI 52, ¶42, 271 Wis. 2d 295, 680 N.W.2d 666, *abrogated on other grounds*, *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408. Petitioners, therefore, have not alleged a "personal interest" that is "injured" or "adversely affected" by this Court selecting the Legislature's proposed judicial remedy in *Johnson III*. *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶40 & n17, 333 Wis. 2d 402, 797 N.W.2d 789 (collecting cases). Petitioners' "generalized grievances" do not suffice. *Cornwell*, 92 Wis. 2d at 62.

II. Petitioners fail to state a claim on which relief may be granted because their claims are barred by laches, preclusion, and estoppel.

A. Petitioners' claims are barred by laches.

Laches bars Petitioners' claims because they "unreasonably delayed" in presenting them to the Court. *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶14, 393 Wis. 2d 308, 946 N.W.2d 101 (dismissing

original action for undue delay); *see* Legislature Op. Br. 21-22, 41. The Legislature enacted Act 43 more than a decade ago, establishing new legislative districts after the 2010 census. *See* 2011 Wis. Act 43. As Petitioners acknowledge, those districts contained municipal islands, consistent with the treatment of municipal islands for 50 years. *See* Wis. Stat. §4.001(3) (1983); *id.* §4.001(2) (1971). Petitioners never challenged the existing districts as unconstitutionally noncontiguous. Nor did they take the opportunity in the *Johnson* litigation to raise that constitutional argument. Two years ago, this Court invited "any prospective intervenor" to move to participate in *Johnson* and granted every timely intervention motion. *See* Orders of Sept. 22 & Oct. 14, 2021, *Johnson*, No. 2021AP1450-OA. Petitioners did not intervene. They waited more than a year after *Johnson* ended to file this case. This Court found a similar delay unreasonable in *Brennan*, where petitioners waited two years to challenge the governor's partial veto of an appropriation bill. *Brennan*, 2020 WI 69, ¶15.

The only discernible reason for Petitioners' delay is the change in this Court's membership, but that is not a valid basis to ask this

Court to overturn precedent. *See Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶95, 264 Wis. 2d 60, 665 N.W.2d 257. This Court should hold that Petitioners' decision to "sleep on their rights" is unreasonable. *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶14, 389 Wis. 2d 516, 936 N.W.2d 587 (citation omitted). "[E]quity aids the vigilant," *id.* (citation omitted), 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.* (citation omitted).

Because Petitioners chose not to participate in *Johnson* despite this Court's invitation, Respondents had no notice that the remedial maps ordered by the Court in that case were subject to challenge for lack of contiguity or violation of the separation of powers. Perhaps unsurprisingly given decades of unbroken practice, those challenges were not raised by any of the parties in *Johnson*—even though the

parties had multiple rounds of briefing on a broad range of state and federal issues that included the contiguity requirement and the Court's proper judicial role. Respondents and Intervenor-Respondents had no reason to expect that any party would bring those challenges in a new action long after the judgment in *Johnson* became final. *See Brennan*, 2020 WI 69, ¶18; *see also Trump*, 2020 WI 91, ¶23 & n.10.

Respondents and Intervenor-Respondents have been severely prejudiced by this delay. Not only did they devote significant time and resources to reach a final judgment in *Johnson*, *see Wren*, 2019 WI 110, ¶33 & n.26 (discussing economic prejudice), they did so in an effort to establish lawful redistricting maps so the State could conduct future elections, *see Johnson I*, 2021 WI 87, ¶5. And they succeeded—this Court entered an injunction adopting the current legislative maps after holding that they complied "with the Equal Protection Clause, along with all other applicable federal and state legal requirements." *Johnson III*, 2022 WI 19, ¶73. But Petitioners demand that this Court disrupt the status quo by relitigating those maps and adopting new maps in mere months, even though Petitioners waited almost a year

and a half since *Johnson*—and more than a decade since the 2011 districts were enacted—to bring their claims. Had the issue been raised in *Johnson*, and had the Court agreed with Petitioners, then the parties in *Johnson* could have submitted maps that aligned with that understanding in the first instance. But it was not, and they did not. Faithful adherence to, and evenhanded application of, laches bars Petitioners' contiguity claims. *Trump*, 2020 WI 91, ¶32; *see also Clarke v. Wis. Elections Comm'n*, 2023 WI 66, ¶1 (Protasiewicz, J.) ("I promised—above all else—to decide cases based only on the rule of law," not "personal opinions.").

B. Petitioners' claims are barred by preclusion.

All parties are precluded from relitigating Petitioners' contiguity and separation-of-powers claims because those issues were "actually litigated and determined" in *Johnson*, and "the determination was essential to the judgment" prescribing a malapportionment remedy. *Dostal v. Strand*, 2023 WI 6, ¶24, 405 Wis. 2d 572, 984 N.W.2d 382. All parties identified contiguity as a remedial requirement, and all parties defined contiguity to allow politically contiguous municipal

"islands."[7] This Court agreed. *Johnson I*, 2021 WI 87, ¶36; *Johnson v. Wis. Elections Comm'n (Johnson II)*, 2022 WI 14, ¶36, 400 Wis. 2d 626, 971 N.W.2d 402; *Johnson III*, 2022 WI 19, ¶70. Likewise, all parties in *Johnson* recognized the fundamentally judicial role courts play in issuing redistricting remedies—including injunctive remedies.[8] Once again, this Court agreed. *Johnson I*, 2021 WI 87, ¶69; *Johnson II*, 2022 WI 14, ¶2.

The Court's holdings in *Johnson* preclude relitigation of those issues here because Petitioners and Intervenor-Petitioners have "sufficient identity of interests to comport with due process." *Paige K.B. ex*

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[7] *E.g.*, Bewley Br. 12-13, *Johnson*, No. 2021AP1450-OA (Oct. 25, 2021); BLOC Br. 13 (Oct. 25, 2021); Citizen Mathematicians Br. 12-13 (Oct. 25, 2021); Evers Br. 6 (Oct. 25, 2021); Hunter Br. 23 (Oct. 25, 2021); Bewley Br. 10 (Dec. 15, 2021); Evers Br. 17 (Dec. 15, 2021); Citizen Mathematicians Br. 27-28 (Dec. 15, 2021); BLOC Br. 50 (Dec. 15, 2021); *see also* Joint Stip. of Facts & Law 15 (Nov. 4, 2021) (agreeing that "[m]unicipal 'islands' are legally contiguous with the municipality to which the 'island' belongs").

The Citizen Mathematicians did not, as they now claim, "argue[] that districts containing detached territory were unconstitutionally noncontiguous" in *Johnson*. *See* Citizen Mathematicians Op. Br. 15 n.6. They stipulated, weeks before *Johnson I* was even decided, that municipal islands were constitutionally contiguous. *See* Joint Stip. of Facts & Law 15, *Johnson*, No. 2021AP1450-OA (Nov. 4, 2021). And after *Johnson I*, they never objected to any remedial proposal as unconstitutionally noncontiguous.

[8] *E.g.*, Bewley Br. 7-9, *Johnson*, No. 2021AP1450-OA (Oct. 25, 2021); BLOC Br. 65-66 (Oct. 25, 2021); Citizen Mathematicians Br. 4-5 (Oct. 25, 2021); Evers Br. 15-16 (Oct. 25, 2021); Hunter Br. 13 (Oct. 25, 2021).

rel. Peterson v. Steven G.B., 226 Wis. 2d 210, 224, 594 N.W.2d 370 (Wis. 1999) (citation omitted). The parties in *Johnson* included the legislative and executive branches as well as any other voter or interest group who timely intervened. Petitioners here are Democratic supporters like the intervenor-petitioners in *Johnson*. *See* Pet. ¶1. Indeed, all Petitioners and Intervenor-Petitioners are represented by the same attorneys who represented intervenor-petitioners in *Johnson*. *See* Legislature Op. Br. 23.

At the very least, it is beyond dispute that any claim by the Governor and Citizen Mathematicians—as Intervenor-Petitioners here and parties in *Johnson*—is barred by res judicata. *See Lindas v. Cady*, 183 Wis. 2d 547, 558, 515 N.W.2d 458 (Wis. 1994); *see* Legislature Op. Br. 24-25. Those parties fully litigated *Johnson* and are subject to *Johnson*'s judgment that existing districts are contiguous. *See N. States Power Co. v. Bugher*, 189 Wis. 2d 541, 551, 525 N.W.2d 723 (Wis. 1995). New members of the Citizen Mathematicians (Atkinson, Kane, and Dudley), "have sufficient identity of interest" with the members who already litigated *Johnson* and are likewise bound by the judgment.

Paige K.B., 226 Wis. 2d at 224. They share the same self-selected group name, the same lawyers, and the same arguments. *Id.* at 224-26.

C. Intervenor-Petitioners are estopped from bringing their claims.

Judicial estoppel independently bars the Governor and Citizen Mathematicians from making arguments inconsistent with their arguments in *Johnson*. *See* Legislature Op. Br. 25-26, 41. This doctrine "protect[s] the judiciary as an institution from the perversion of judicial machinery." *State v. Petty*, 201 Wis. 2d 337, 346, 548 N.W.2d 817 (Wis. 1996) (citation omitted); *see also New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001). Specifically, it prevents a party from "playing fast and loose with the courts by asserting inconsistent positions" in subsequent proceedings. *Mrozek v. Intra Fin. Corp.*, 2005 WI 73, ¶22, 281 Wis. 2d 448, 699 N.W.2d 54 (citation and quotation marks omitted).

The Governor and Citizen Mathematicians are playing fast and loose here. In their initial briefing in *Johnson*, Citizen Mathematicians acknowledged that municipal islands were constitutionally permissible. *See* Citizen Mathematicians Br. 13, *Johnson*, No. 2021AP1450-OA (Oct. 25, 2021) ("'literal contiguity'" is "not require[d]" where

municipal "'islands'" exist) (citation omitted); Citizen Mathematicians Br. 13-14 (Nov. 1, 2021) (same). Then, weeks before this Court issued *Johnson I*, all parties—including the Governor and Citizen Mathematicians—stipulated that political contiguity of municipal islands is constitutionally sound:

> Each assembly district shall "consist of contiguous territory" and each senate district shall be of "convenient contiguous territory." Wis. Const. art. IV, §§4, 5. Contiguity for state assembly districts is satisfied when a district boundary follows the municipal boundaries. Municipal "islands" are legally contiguous with the municipality to which the "island" belongs. Wis. Stat. §5.15(1)(b); Wis. Stat. §4.001(2) (1972); *see Prosser v. Election Bd.*, 793 F. Supp. 859, 866 (W.D. Wis. 1992) (three-judge court).

Joint Stip. of Facts & Law 15, *Johnson*, No. 2021AP1450-OA (Nov. 4, 2021). And in December 2021, both the Governor and Citizen Mathematicians proposed remedial plans with municipal islands and argued their plans were constitutionally contiguous. *See* Evers Br. 17, *Johnson*, No. 2021AP1450-OA (Dec. 15, 2021); Citizen Mathematicians Br. 27-28 (Dec. 15, 2021); Governor's Least Changes Assembly, http://bit.ly/45tcpRL; Evers Districts Map, LTSB, https://bit.ly/3Fmc4UB (Dec. 22, 2021); Math Districts Map, LTSB, https://bit.ly/3FtI22U (Dec. 22, 2021). They cannot now claim that

Article IV's contiguity clause "means that all parts of a district must be physically connected." Evers Op. Br 6; *see also* Citizen Mathematicians Op. Br. 7 ("All territory within a district must be physically connected, not detached."). Judicial estoppel bars such "manipulative perversion of the judicial process." *Petty*, 201 Wis. 2d at 354.

III. Petitioners fail to state a claim on which relief may be granted.

A complaint does not state a claim unless it "allege[s] facts that, if true, plausibly suggest a violation of applicable law." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶21, 356 Wis. 2d 665, 849 N.W.2d 693. In testing the sufficiency of a claim, "legal conclusions stated in the complaint are not accepted as true, and they are insufficient to enable a complaint to withstand a motion to dismiss." *Id.* at ¶19 (citations omitted). Petitioners have failed to state a claim here, providing another basis for dismissal. *See* Wis. Stat. §802.06(2)(a)(6).

A. Petitioners cannot seek an injunction collaterally attacking another injunction.

Petitioners' action is a collateral attack on *Johnson*. That much is clear from the relief they seek. They ask the Court to enjoin the Wisconsin Elections Commission from carrying out the Court's judgment

in *Johnson*. The action can be dismissed on that basis alone. Parties cannot collaterally attack this Court's final orders unless the Court acted without jurisdiction or the judgment was obtained by fraud. *See State v. Campbell*, 2006 WI 99, ¶¶51-55, 294 Wis. 2d 100, 718 N.W.2d 649. Petitioners have not challenged the *Johnson* Court's jurisdiction—indeed they raise the same arguments for invoking its jurisdiction here—nor have they alleged that the *Johnson* Court's judgment was induced by fraud. That judgment is final, and it cannot be modified or set aside in this separate action. *See Kriesel v. Kriesel*, 35 Wis. 2d 134, 139, 150 N.W.2d 416 (Wis. 1967).

B. Intervenor-Petitioners failed to comply with §806.07.

The only potential mechanism to modify or dissolve the *Johnson* injunction would be to reopen the judgment in *Johnson*; however, that is not available to any of the parties to this case. A case can be reopened only on the motion of "a party or legal representative." Wis. Stat. §806.07. But it is too late for the Intervenor-Petitioners who were parties in *Johnson* to move to reopen the judgment—any such motion must be filed "not more than one year after the judgment was entered," *id.* §806.07(1)-(2); *Walker v. Tobin*, 209 Wis. 2d 72, 78, 568

N.W.2d 303 (Ct. App. 1997). That deadline has long since passed. Neither can the parties in *Johnson* bring "an independent action to relieve a party from judgment," Wis. Stat. §806.07(2), because they cannot make the extraordinary showing of fraud or unconscionability necessary to support such an action in equity. *See Walker*, 209 Wis. 2d at 79 (identifying elements of the common-law rule); *Doheny v. Kohler*, 78 Wis. 2d 560, 564, 254 N.W.2d 482 (Wis. 1977) (explaining that judgment may be set aside "only in cases where serious inequity, approaching at least the unconscionable, would result from carrying out the original judgment"). Petitioners do not allege fraud or unconscionability here. Because Petitioners cannot reopen *Johnson* in this original action, they cannot secure any relief. Their Petition should be dismissed for failure to state a claim on which relief can be granted.

C. Petitioners have no plausible basis for seeking a writ quo warranto.

Petitioners ask this Court to "issue a writ *quo warranto* declaring the election of senators in November 2022 from unconstitutionally configured districts to be unlawful," declare Senators in those districts to be "merely *de facto* officers," and "order special elections in

November 2024." Pet. at 44. The Attorney General correctly refused to bring this quo warranto action. *Id.* at 44 n.3.

Petitioners' quo warranto request is nonsensical. In a true quo warranto action, the unlawful officeholder vacates the office immediately, and the Governor calls a special election. Wis. Stat. §§8.50, 784.13. The writ has no application in the redistricting context. If it did, then the Legislature would be disabled every ten years upon the delivery of new census numbers revealing that legislators' existing districts are malapportioned. That constitutional defect does not trigger a quo warranto action, let alone vacancies and special elections; it triggers an obligation to redistrict and, failing that, a judicial remedy for malapportionment claims. *Reynolds v. Sims*, 377 U.S. 533, 568-69, 585 (1964).

For the same reason the *Johnson* Petitioners could make no plausible claim of entitlement to a writ quo warranto in their malapportionment action, Petitioners can make no plausible claim to a writ quo warranto here. An action of quo warranto may be brought "[w]hen any person shall usurp, intrude into or unlawfully hold or exercise

any public office." Wis. Stat. §784.04(1)(a). In other words, quo warranto is appropriate only when an official has no legal right to his office. Yet Petitioners do not allege that the Respondent Senators usurped, intruded into, or unlawfully hold their seats. Nor could they. The Respondent Senators rightfully occupy their offices because they won their respective elections as provided by Wisconsin law. *See* Wis. Const. art. IV, §5; Wis. Stat. §4.001. Petitioners do not allege that those elections were invalid, and they do not deny the results. They do not allege that any Respondent Senator has "done or suffered an act which, by the provisions of law, shall work a forfeiture of office." Wis. Stat. §784.04(1)(b). They do not allege "that illegal votes were cast," "that lawful votes were tendered and not received," that "lawful votes were rejected," or "that the entire vote . . . was illegal." *Id.* §784.06. And they do not allege that other individuals are entitled by law to occupy the Respondents' seats. The petition contains no allegation which, if true, would prove that the Respondent Senators "unlawfully hold" the offices to which they were legally elected.

Petitioners argue instead that the Respondent Senators are not legally entitled to their offices because the *Senate districts* adopted by this Court's injunction in *Johnson* are unlawfully drawn. Even if that were so, it would not follow that the Senators "unconstitutionally obtained" their elections, Mem. ISO Pet. 82, or that they "unlawfully hold" their seats. Petitioners' quo warranto action is not a means of obtaining the extraordinary relief they seek—special elections for half of the Wisconsin Senate.

Nor is there any claim presented here that could justify a judicial order ejecting duly elected officials from office and compelling special elections. Special elections are "an extraordinary remedy which the courts should grant only under the most extraordinary of circumstances." *Bowes v. Ind. Sec'y of State*, 837 F.3d 813, 817 (7th Cir. 2016) (citation and quotation marks omitted). Courts therefore will not set elections aside "absent serious voting violations or aggravating factors, such as racial discrimination or fraudulent conduct." *Cook v. Luckett*, 735 F.2d 912, 922 (5th Cir. 1984) (citation and quotation marks omitted).

Petitioners do not allege facts that approach the level of serious voting violations, fraud, or racial discrimination necessary to justify a special election. The cases they cite suggest that special elections might not be appropriate even if they did. In *Cousins v. City Council of Chicago*, 361 F. Supp. 530, 536-37 (N.D. Ill. 1973), *aff'd in part, rev'd in part*, 503 F.2d 912 (7th Cir. 1974), the district court ordered special elections limited to two aldermanic districts affected by intentional racial discrimination. The Seventh Circuit reversed the finding of discrimination on appeal, yet it declined to order any relief that would "affect the status" of the aldermen elected in those wards "before the end of the current term of office." 503 F.2d at 924-26. In *Smith v. Beasley*, 946 F. Supp. 1174, 1212 (D.S.C. 1996), the court refused to disrupt the upcoming elections even after finding that 6 state assembly districts and 3 state senate districts were unconstitutional racial gerrymanders. And the Supreme Court has not even determined "whether or when a special election may be a proper remedy for a racial gerrymander." *North Carolina v. Covington*, 581 U.S. 486, 488 (2017), let alone for Petitioners' unduly delayed and precluded claims in this case. The

petitioners have no plausible claim of entitlement to such relief here. Their request for a writ quo warranto should be dismissed.

D. Petitioners have not stated a claim for relief under the Declaratory Judgments Act.

Petitioners have failed to state a claim for relief under the Declaratory Judgments Act because the statute does not authorize the relief they seek. The Declaratory Judgments Act provides:

> 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). Petitioners ask this Court to enter a declaratory judgment that this Court's judgment in *Johnson* was unconstitutional. They are not entitled to that judgment under the Act for at least two reasons. *First*, the Act does not grant the Court authority to enter a declaratory judgment that its own prior judgment is unconstitutional. *Second*, Petitioners have not satisfied the Act's requirement that "all persons shall be made parties who have or claim any interest which would be affected by the declaration," *id.* §806.04(11), because they

did not attempt to join the parties in *Johnson*, all of whom have interests that would be affected by a declaration about the validity of the *Johnson* injunction. The only option available to the Court is to dismiss Petitioner's request for declaratory relief. *See, e.g.*, *PRN Assocs. v. State Dep't of Admin.*, 2009 WI 53, ¶¶56, 69, 317 Wis. 2d 656, 766 N.W.2d 559.

CONCLUSION

For the reasons stated above and in the Legislature and Senator-Respondents' opening brief, the petition should be dismissed.

Dated this 20th day of October, 2023.

Respectfully submitted.

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CERTIFICATION REGARDING LENGTH AND FORM

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.81, which governs the form of documents filed in this court where Chapter 809 does not expressly provide for alternate formatting. The length of this brief is 5305 words as calculated by Microsoft Word.

Dated this 20th day of October, 2023

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