No. 2023AP1412-OA

IN THE SUPREME COURT OF WISCONSIN

STEPHEN JOSEPH WRIGHT, GARY KRENZ, SARAH J. HAMILTON, JEAN-LUC THIFFEAULT, SOMESH JHA, JOANNE KANE, AND LEAH DUDLEY,

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; AND MEAGAN WOLFE, IN HER OFFICIAL CAPACITY AS THE ADMINISTRATOR OF THE WISCONSIN ELECTIONS COMMISSION,

Respondents.

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

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INTRODUCTION[1]

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*). Petitioners (or their privies) were parties to that litigation.[2] Claim preclusion

[1] The Wisconsin Legislature has contemporaneously filed a recusal motion and a motion to intervene, should the petition be granted.

[2] Petitioners Wright, Krenz, Hamilton, Thiffeault, and Jha, identifying themselves collectively as the "Citizen Mathematicians and Scientists" or "CMS," intervened in *Johnson*. *See* Order, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Oct. 14, 2021). Petitioners Kane and Dudley, along with Wright, Thiffeault, and Jha, moved to participate as "Citizen Data Scientists" in related federal litigation around the same time. *See* Mot. to Intervene, *Hunter v. Bostelmann*, No. 3:21-cv-512 (W.D. Wis.), ECF 65 (filed Sept. 20, 2021). Petitioners attach the same expert report already submitted in *Johnson* as part of their petition here. *See* Pet. App. 250-83.

stops them from relitigating the same claims two years later based on a change in this Court's membership. *See N. States Power Co. v. Bugher*, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (Wis. 1995).

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 the Citizen Mathematicians and Scientists 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).[3] 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

[3] 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.

> 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, 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' try-it-again tactics with unabashed political ends. It would be a blight on this State's highest court. The petition must be denied.

ARGUMENT

Petitioners ask this 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.1 (Issues a-c); *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 that the Court-ordered districts violate Article IV of the

Wisconsin Constitution. Pet. at p.1 (Issue d). This Court already answered that question: no. *See Johnson III*, 2022 WI 19, ¶73 (choosing remedy that complied with all federal and state requirements, including Article IV); *see also Johnson I*, 2021 WI 87, ¶¶28-38 (addressing state constitutional requirements). And Petitioners ask this Court to decide that the Court-ordered districts usurped the Governor's veto power. Pet. at p.1 (Issue e). 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' that does not bind this Court." Pet. ¶45 (quoting *Johnson I*, 2021 WI 87, ¶¶102 (Dallet, J., dissenting)). What follows are dozens of pages of argument relitigating *Johnson I*'s conclusion that this Court has no power to referee claims

of partisan unfairness. *See id.* ¶¶46-49 (erroneously equating numerical malapportionment cases with partisan gerrymandering cases); ¶¶50-134 (rehashing Petitioners' *Johnson I* arguments that enough expertise "mathematics, statistics, and computer science" can remove subjectivity from adjudicating partisan gerrymandering claims).[4] 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, ¶5. Accordingly, the Court asked all parties to submit briefs on all relevant legal requirements, from contiguity to partisanship. *Id.* ¶7. From the start,

[4] 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.

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 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 is thus far more than an advisory opinion. Pet. ¶45. 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." *Johnson I*, 2021 WI 87, ¶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. Three days after the Court's membership changed, 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—in litigation that they participated in fully as the "Citizen Mathematicians and Scientists" intervenors.

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. 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*. *Id.* ¶¶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. *See* Pet. ¶¶50-134; Pet. App. 250-83 (reproducing Petitioners' *Johnson I* expert report). Recycled arguments that *Johnson I* got it wrong based on the same theories that Petitioners already put 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. ¶43. Those decisions are

distinguishable,[5] incomplete,[6] or unreasoned.[7] 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 then is different than the Court's membership now—that argument is not only not enough, *id.* ¶95, it also raises serious constitutional concerns.

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[5] 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).

[6] 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 Utah and Kentucky Supreme Courts are currently evaluating the justiciability and cognizability of partisan unfairness claims. *See Graham v. Adams*, No. 2022-SC-522 (Ky.); *League of Women Voters v. Utah Legislature*, No. 20220991-SC (Utah).

[7] Petitioners' cited New Mexico Supreme Court order (Pet. ¶43) is devoid of reasoning, citing only Justice Kagan's dissenting opinion in *Rucho*.

If this Court were to use its changed 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 Caperton 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."[8] She invited another challenge—a "fresh look at the gerrymandering question."[9] All the while, the Democratic Party contributed millions to her campaign as its biggest donor.[10] By election day, it was apparent how Justice

[8] 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.

[9] 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.

[10] *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.

Protasiewicz, absent recusal, would be voting.[11] In her words, "The map issue is really kind of easy, actually."[12] "I agree with" the *Johnson* dissent.[13]

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

II. Claim preclusion and laches requires denying the petition.

A. 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. Petitioners (or their privies) took the invitation. *See* n.2, *supra.* The same "Citizen Mathematicians and Scientists" group that seeks to relitigate *Johnson* participated as a party in *Johnson*. *See* Order of Oct. 14, 2021, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (granting intervention). They filed numerous briefs, submitted expert reports, and participated at oral argument. *See Johnson III*, 2022 WI 19, ¶109 n.22 (Bradley, J., concurring) (recalling that CMS's counsel "warned this court at oral argument that in his many years of redistricting experience, he had seldom seen such a heavy focus on race" in

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

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

[13] Redman, *supra* note 13.

plans). The Court rejected their arguments about adjudicating partisan fairness and ultimately did not adopt their proposed redistricting plans in its final judgment. *See* CMS Br. 29-34, *Johnson v. Wis. Elections Comm'n*, No. 2021AP001450-OA (filed Oct. 25, 2021); CMS Response Br. 9-12, *id.* (filed Nov. 1, 2021); *Johnson I*, 2021 WI 87, ¶¶52-63; *Johnson III*, 2022 WI 19, ¶73 (adopting Legislature's proposed redistricting plans). Petitioners cannot come to this Court to relitigate what they already lost in *Johnson*.

Petitioners do not even acknowledge the problem of preclusion in their newly filed petition. The doctrine of claim preclusion bars such "vexatious, repetitious and needless claims." *N. States Power*, 189 Wis. 2d at 550. It makes the Court's judgment in *Johnson* "conclusive in all subsequent actions between the same parties [or their privies] as to all matters which were litigated or which might have been litigated in the former proceedings." *Id.* (alteration in original); *see Dostal v. Strand*, 2023 WI 6, ¶24, 405 Wis. 2d 572, 984 N.W.2d 382 (claim preclusion "extends to all claims that either were or *could have been* asserted in the previous litigation" (emphasis in original)).[14]

[14] There is no plausible argument that Petitioners Kane and Dudley, who previously participated as part of the "Citizen Data Scientists" group alongside Petitioners Wright, Thiffeault, and Jha and were represented by the same counsel in federal court are "not in privity or do[] not have sufficient identity of interest" with the remaining Petitioners who

Petitioners have not abided by those rules here. Rather than let the *Johnson* judgment stay final, they saw an opportunity. The week this Court's membership changed—and 477 days after *Johnson III*—they filed their petition to relitigate the issues already decided against them. The Court should not entertain their unduly delayed and duplicative petition.

B. Even if the Petitioners' suit were not so obviously precluded, the doctrine of laches would bar their suit. Petitioners "delayed without good reason" to relitigate *Johnson*. *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶¶11-12, 393 Wis. 2d 308, 946 N.W.2d 101. That delay prejudices the parties who will have to defend against Petitioners' claims, and none could have expected when *Johnson III* ended that Petitioners would try their claims again in this action. *Id.* ¶¶11-12, 18 & n.10.

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previously participated in this Court in *Johnson*. *See Paige K.B. ex rel. Peterson v. Steven G.B.*, 226 Wis. 2d 210, 224-26, 594 N.W.3d 370 (Wis. 1999) (preclusion applies if "so closely aligned that they represent the same legal interest" (quotation marks omitted)); *see Airframe Sys., Inc. v. Raytheon Co*., 601 F.3d 9, 14 (1st Cir. 2010) ("doctrine of claim preclusion" also protects "litigants against gamesmanship"); *see, e.g.*, *Sumlin v. Krehbiel*, 876 F. Supp. 1080, 1081 (E.D. Mo. 1994) (group of inmates all had the same interest, so it didn't matter if only some were present in a previous action); *Adair v. State*, 470 Mich. 105, 121-23, 680 N.W.2d 386 (2004) (similar for a collection of school districts); *Quiroz v. U.S. Bank Nat. Ass'n*, 2011 WL 2471733, at *7 (E.D.N.Y. May 16, 2011) (claim preclusion applied to a new federal plaintiff who had participated in prior state court proceedings), *report and recommendation adopted*, 2011 WL 3471497 (E.D.N.Y. Aug. 5, 2011).

There is no good reason for Petitioners' delay. The only explanation is the Court's change in membership. That is no basis for delay. *See State ex rel. Wren v. Richardson*, 2019 WI 110, ¶14, 389 Wis. 2d 516, 936 N.W.2d 587 (quotation marks omitted); *accord Johnson Controls*, 2003 WI 108, ¶95 (change in membership does not warrant overruling precedent). "[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.

Petitioners' delay also creates substantial prejudice. Other parties expended substantial resources to litigate, appeal, and obtain a final judgment in the *Johnson* litigation. 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 pp.120-21. That's irreconcilable with their delay. Sixteen months have passed since this Court decided *Johnson III*, ordering the district lines that

Petitioners now challenge as unconstitutional. Petitioners cannot now claim their case is urgent, demanding full resolution of their collateral attack of *Johnson* in the eight months left before candidates qualifying begins, Wis. Stat. §8.15(1). Petitioners sat on their hands for twice as long. All the more extraordinary is Petitioners' demand that this Court cut short the constitutionally prescribed four-year terms of Senators. *See* Pet. at p.121. Petitioners participated in litigation *before* those Senators were elected two years ago. They lost. And that judgment is final and preclusive.

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The Court must reject the petition as an unjustifiably delayed collateral attack on the final judgment of this Court in *Johnson*. Petitioners had every opportunity to litigate their partisan gerrymandering claims beginning two years ago. Granting their petition later gives them a second bite at the apple only months before the elections. The only justification for doing so—based on this Court's change in membership—is illegitimate.

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

Petitioners seek a declaration that "the senate and assembly districting plans" violate various provisions of the Wisconsin Constitution, and

Petitioners ask the Court to enjoin them. Pet. at pp.120-21. But those "districting plans" 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.

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.[15]

[15] If this Court disagrees and grants the petition, then all the remaining 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

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 in an indirect manner" except with showing of fraud); *Zrimsek v. Amer. Auto. Ins. Co.*, 8 Wis. 2d 1, 3, 98 N.W.2d 383 (Wis. 1959) (similar); Restatement (Second) Judgments §74 (1982) (parties cannot attack judgment if they fail to exercise reasonable diligence). Petitioners participated fully in the *Johnson* litigation. Then they filed a do-over 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.

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any interest which would be affected by the declaration, and no declaration may prejudice the right of persons not parties to the proceeding.").

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Respectfully submitted,

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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 4,328 words as calculated by Microsoft Word.

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