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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.

BRIEF OF SENATOR RACHAEL CABRAL-GUEVARA, SENATOR ROB HUTTON, SENATOR ANDRE JACQUE, SENATOR JOHN JAGLER, SENATOR JESSE L. JAMES, SENATOR CHRIS KAPENGA, SENATOR DEVIN LEMAHIEU, SENATOR HOWARD L. MARKLEIN, SENATOR STEPHEN L. NASS, SENATOR ROMAINE ROBERT QUINN, SENATOR CORY TOMCZYK, AND SENATOR VAN H. WANGGAARD, IN OPPOSITION TO PETITION FOR AN ORIGINAL ACTION

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INTRODUCTION[1]

In 2021, this Court agreed to take original jurisdiction over redistricting claims brought by four Wisconsin voters. *See Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA. The political branches could not agree on a redistricting plan after the 2020 census, and so it fell to the Court to modify existing state redistricting laws to ensure that districts were reapportioned "while satisfying other constitutional and statutory mandates." *Johnson v. Wis. Elections Comm'n*, 2021 WI 87, ¶¶2, 5, 14-19, 399 Wis. 2d 623, 967 N.W.2d 469 (*Johnson I*). The Court ordered all interested intervenors to file motions to participate, and the Court granted all timely filed motions. All parties—including the Wisconsin Governor, the Wisconsin Legislature, and five other sets of intervenors—then submitted multiple rounds of briefs and more than a dozen expert reports and response reports. The Court issued lengthy opinions regarding state and federal redistricting requirements. *See*

[1] The Senator Respondents have jointly filed a recusal motion with the Wisconsin Legislature. The motion requests the recusal of Justice Janet Protasiewicz from all aspects of this case, including the decision to grant or deny the Petition. As detailed in the recusal motion, given Petitioners' alleged harm and requested relief, the U.S. Constitution and state law require recusal based on millions of dollars donated by the Democratic Party of Wisconsin and campaign statements declaring the challenged maps as "unfair" and "rigged" in favor of Republicans. Justice Protasiewicz invited a "fresh look" at the questions presented. And Petitioners accepted the invitation, filing this Petition one day after Justice Protasiewicz was sworn in.

Johnson I, 2021 WI 87; *Johnson v. Wis. Elections Comm'n*, 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402 (*Johnson II*), *rev'd sub nom., Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245 (2022) (per curiam); *Johnson v. Wis. Elections Comm'n*, 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559 (*Johnson III*). The Supreme Court issued an opinion regarding federal statutory and constitutional requirements. *See Wis. Legislature*, 142 S. Ct. 1245. And ultimately, the litigation ended with an injunction requiring the Wisconsin Elections Commission to hold all future elections pursuant to Court-ordered district lines. *See Johnson III*, 2022 WI 19, ¶73.

From the beginning, this Court explained that its task was a judicial one, not a political one. *See Johnson I*, 2021 WI 87, ¶¶64, 69, 71; *accord id.* at ¶82 & n.4 (Hagedorn, J., concurring). The Court emphasized that redistricting "remains the legislature's duty." *Id.* at ¶19. Accordingly, the Court's task was "to provide a judicial remedy but not to legislate." *Id.* at ¶71; *accord id.* at ¶85 (Hagedorn, J., concurring). The Court explained that a judicial remedy would "not encompass rewriting duly enacted law" and instead must "reflect the least change necessary" to the existing maps "for the maps to

comport with relevant legal requirements." *Id.* at ¶72 (quotation marks omitted); *accord id.* at ¶¶83-85 (Hagedorn, J., concurring).

The Court confronted head-on the claim that its least-changes approach would cement an unconstitutional partisan gerrymander. *See id.* at ¶¶2-3. The Court held it had no power to address those claims of partisan unfairness. *Id.* at ¶8 ("We hold … the partisan makeup of districts does not implicate any justiciable or cognizable right."); *accord id.* at ¶82 & n.4 (Hagedorn, J., concurring). The Court acknowledged the political effects of the existing maps—when the state and federal constitutions "clearly contemplate[] districting by political entities," "unsurprisingly districting turns out to be root-and-branch a matter of politics." *Id.* at ¶52 (quotation marks and alterations omitted). But the Court held that it was not within its judicial power to strike a new political balance: "The Wisconsin Constitution contains 'no plausible grant of authority' to the judiciary to determine whether maps are fair to the major parties," after all "the task of redistricting is expressly assigned to the legislature." *Id.* at ¶52 (quoting *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019)). As Justice Hagedorn put it in his concurring opinion, the *Johnson* intervenors' call to use the Court's "equitable

authority to reallocate political power in Wisconsin" would "stretch[] far beyond a proper, focused, and impartial exercise of [this Court's] limited judicial power." *Id.* at ¶86 (Hagedorn, J., concurring).

The only thing that has changed since *Johnson* is this Court's membership. Petitioners waited exactly one day after that change in membership to ask this Court to take a "fresh look" at the political questions rejected as beyond its power in *Johnson*.[2] But Petitioners did not participate in *Johnson* when this Court welcomed any prospective intervenors. Petitioners did not seek relief before or after the 2022 elections. Petitioners waited. And with only months left before the next elections, they now want *Johnson*'s judicial remedy declared unconstitutional and "enjoin[ed]." Pet. at 43-44. They want new maps to redress their alleged harm: "the inability to achieve a Democratic majority in the state legislature." *Id.* at ¶5. And they want the extraordinary remedy of cutting short sitting Senators' constitutionally prescribed terms because, as they tell it, the election of senators to those districts pursuant to the injunction in *Johnson* was "unlawful." Pet. at 44.

[2] Jessie Opoien & Jack Kelly, *Protasiewicz Would 'Enjoy Taking a Fresh Look' at Wisconsin Voting Maps*, The Cap Times (Mar. 2, 2023), https://perma.cc/THH2-VH3Q.

The Court cannot reward Petitioners' delay, nor can it indulge the fiction that the Constitution today means something different than it meant weeks ago. *See State v. Halverson*, 2021 WI 7, ¶22, 395 Wis. 2d 385, 953 N.W.2d 847. This Court does not overrule precedent based on changes to its membership. *See Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶95, 264 Wis. 2d 60, 665 N.W.2d 257. That is especially so here, where there can be only one set of legislative districts. Those districts are the districts ordered in *Johnson III*, until the political branches pass new redistricting legislation. *Johnson I*, 2021 WI 87, ¶19. The Court cannot disavow and dissolve *Johnson III*'s final judgment because it now believes Democrats deserve a "majority in the state legislature." Pet. ¶5. The Petition must be denied.

STATEMENT OF THE CASE

A. Following the release of the results of the 2020 census, voters filed multiple lawsuits challenging Wisconsin's existing electoral districts as malapportioned. *See Johnson I*, 2021 WI 87, ¶5; *Hunter v. Bostelmann*, No. 3:21-cv-00521 (W.D. Wis.) (three-judge court); *Black Leaders Organizing for Communities v. Spindell*, No. 3:21-cc-00534 (W.D. Wis.) (three-judge court). It became apparent that the political branches would not agree on new redistricting legislation. *See Johnson I*, 2021 WI 87, ¶¶14-19. Accordingly, four Wisconsin

voters ("the *Johnson* Petitioners") filed an original action asking this Court to enjoin the Wisconsin Elections Commission from using the malapportioned districts in the forthcoming 2022 elections. *See Johnson I*, 2021 WI 87, ¶5.

This Court granted the Petition. *Id.* at ¶6. The same day, this Court ordered "any prospective intervenor" to file a motion to intervene. Order, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Sept. 22, 2021). The Court granted all timely motions to intervene. Order, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Oct. 14, 2021). The Governor, the Legislature, five other sets of intervenors, including voters and political organizations, participated as full parties, alongside the *Johnson* Petitioners and Respondents. And the related federal litigation was stayed and ultimately dismissed.

B. The *Johnson* litigation proceeded in two stages. First, the Court ordered all parties, including all intervenors, to submit briefing on the ground rules guiding the Court's remedy for the *Johnson* Petitioners' malapportionment claims. *See Johnson I*, 2021 WI 87, ¶7. The Court asked the parties to brief the relevant state and federal legal requirements for a redistricting

remedy. *Id.* The Court asked whether "the partisan makeup of districts" was one such requirement, in response to intervenors' arguments that the existing "2011 maps reflect a partisan gerrymander favoring Republican Party candidates at the expense of Democrat Party candidates" and their request that the Court "redraw the maps to allocate districts equally between these dominant parties." *Id.* at ¶¶2, 7. And the Court asked what form its remedy should take—in particular, whether the Court was required "to modify existing maps" with a mandatory injunction "using a 'least-change' approach." *Id.* at ¶7.

With respect to the justiciability and cognizability of intervenors' partisan gerrymandering arguments, the parties submitted more than 100 pages of briefing. In response, the Court held intervenors' arguments presented political questions, which were neither justiciable nor cognizable in the courts: "We hold … the partisan makeup of districts does not implicate any justiciable or cognizable right." *Id.* at ¶8; *see id.* at ¶81 (arguments about "partisan makeup of districts … do[] not implicate any justiciable or cognizable right"); *accord id.* at ¶82 n.4 (Hagedorn, J., concurring).

Regarding justiciability, the Court explained that "[t]he lack of standards by which to judge partisan fairness is obvious from even a cursory view of partisan gerrymandering jurisprudence." *Id.* at ¶41. The Court observed that Wisconsin had no party registration and that "more than one-third of Wisconsinites self-identify as independents, affiliating themselves with no party at all." *Id.* at ¶43 (citing *Marquette Law School Poll* (Aug. 3–8, 2021), https://perma.cc/U6YU-EV6U). The Court continued that even if voters' politics could be measured, "what constitutes a 'fair' map poses an entirely subjective question with no governing standards grounded in law" and that "[t]he people have never consented to the Wisconsin judiciary deciding what constitutes a 'fair' partisan divide." *Id.* at ¶¶44-45. The Court concluded that "[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.* at ¶52 (quoting *Rucho*, 139 S. Ct. at 2507).

Regarding cognizability, the Court concluded that the Wisconsin Constitution says nothing about partisan gerrymandering. *Id.* at ¶¶53-63. The Court parsed all provisions presented anew in the *Clarke* Petition now

before the Court. "Having searched" those provisions "in earnest," the Court "conclude[d] the right" to "partisan fairness" in redistricting "does not exist" in Wisconsin's Constitution. *Id.* at ¶53. Interpreting Article I, Section 1, the Court explained it "enshrines a first principle of our nation's founding" that the people, not an English King, get to organize their government. *Id.* at ¶54. The Court held that nothing in that provision, as "originally understood" or "ever . . . interpreted," "regulate[s] partisanship in redistricting." *Id.* at ¶58. Interpreting Article I, Sections 3 and 4, the Court explained that redistricting did not implicate those provisions: "Nothing about the shape of a district infringes anyone's ability to speak, publish, assemble, or petition. Even after the most severe partisan gerrymanders, citizens remain free to run for office, express their political views, endorse and campaign for their favorite candidates, vote, and otherwise influence the political process through their expression." *Id.* at ¶60 (quotation marks omitted). The Court held that these provisions did not further guarantee that "political speech will find a receptive audience." *Id.* at ¶61. Addressing Article I, Section 22, the Court refused "[t]o fabricate a legal standard of partisan 'fairness'" from its plain terms. *Id.* at ¶62. The Court held that "whatever

operative effect Section 22 may have, it cannot constitute an open invitation to the judiciary to rewrite duly enacted law by imposing our subjective policy preferences in the name of 'justice[.]'" *Id.* (alteration in original). Finally, addressing Article IV, the Court held that Sections 3, 4, and 5 "express a series of discrete requirements governing redistricting," none of which set a standard for partisan fairness. *Id.* at ¶63. In short, "[e]ndeavoring to rebalance the allocation of districts between the two major parties would be a decidedly nonjudicial exercise of partisanship by this court." *Id.* at ¶76.

As for the legal requirements for its forthcoming remedy, the Court specifically addressed the Wisconsin Constitution's requirement that districts be "contiguous" in Article IV, Section 4. The Court clarified that "[i]f 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." *Id.* at ¶36. Wisconsin redistricting has taken that same approach to contiguity for at least fifty years. *See Prosser v. Elections Bd.*, 793 F. Supp. 859, 866 (W.D. Wis. 1992); Wis. Stat. §4.001(2) (1971).

Finally, the Court explained the limits of its remedial power, saying "[t]he constitutional confines of our judicial authority must guide our exercise of power in affording the Petitioners a remedy for their claims." *Id.* at ¶64. The Court refused to "intrude upon the constitutional prerogatives of the political branches and unsettle the constitutional allocation of power" by "[t]reading further than necessary to remedy" the 2011 districts' "current *legal* deficiencies," versus perceived political ones. *Id.* (emphasis added). The Court explained that "the Wisconsin Constitution embodies a structural separation of powers," "restraining this court from exercising anything but judicial power." *Id.* at ¶65. The Court said its involvement in redistricting must remain "judicial in nature" and that it has no power "to legislate." *Id.* at ¶¶69, 71; *accord id.* at ¶¶83-84 (Hagedorn, J., concurring). Accordingly, the Court concluded that it would "us[e] the existing maps as a template and implement[] only those remedies necessary to resolve constitutional or statutory deficiencies"—a "least-change" approach. *Id.* at ¶72 (quotation marks omitted); *accord id.* at ¶¶83-86 (Hagedorn, J., concurring). The Court refused to wade further "into the deepest of political thickets" of redistricting and "draw maps from scratch," which "would be profoundly

incompatible with Wisconsin's commitment to a nonpartisan judiciary." *Id.* at ¶75; *accord id.* at ¶86 (Hagedorn, J., concurring) (using courts "to reallocate political power in Wisconsin [] is not a neutral undertaking" and "stretches far beyond a proper, focused, and impartial exercise of our limited judicial power").

After this Court set those ground rules in *Johnson I*, the parties submitted two rounds of remedial briefs supported by extensive expert reports. *See Johnson I*, 2021 WI 87, ¶87 (Hagedorn, J., concurring); *Johnson II*, 2022 WI 14, ¶¶4-6. Various parties, including the Governor and the Wisconsin Legislature, proposed different least-changes remedies for the State's electoral districts. *See Johnson II*, 2022 WI 14, ¶¶7-8. The Legislature's proposed least-changes plans for the Assembly and Senate districts were the plans earlier passed by the Legislature and vetoed by the Governor. *See Johnson I*, 2021 WI 87, ¶17.

In *Johnson II*, the Court adopted the Governor's proposed Assembly, Senate, and congressional districts. *Johnson II*, 2022 WI 14, ¶52. The Court concluded that the VRA required a seventh majority-Black Assembly district in the Milwaukee area, *id.* at ¶10, and the Legislature and *Johnson*

Petitioners appealed that issue to the U.S. Supreme Court, *Wis. Legislature*, 142 S. Ct. 1245. The U.S. Supreme Court summarily reversed, concluding that any such plan would have to satisfy strict scrutiny to comport with the U.S. Constitution's Equal Protection Clause. *Id.* at 1249, 1251.

On remand, the Court in *Johnson III* accepted the Legislature's proposed Assembly and Senate districts. 2022 WI 19, ¶73. The Court concluded that "[t]he Legislature's maps address[ed]" the *Johnson* Petitioners' "malapportionment" claims "in a least changes way" and "[n]o other" proposed plans "compl[ied] with all legal requirements." *Id.* at ¶72.

C. Months later, the Wisconsin Elections Commission held elections pursuant to the Court's injunction in *Johnson III*. Voters elected Assembly members to two-year terms, and voters in odd-numbered Senate districts elected Senators to constitutionally prescribed four-year terms. *See* Wis. Const. art. IV, §5.

D. In 2023, voters returned to the polls and elected Justice Janet Protasiewicz to this Court. The *Johnson* redistricting litigation was a dominant theme of the campaign. Then-candidate Protasiewicz said the current

legislative maps were "rigged."[3] She invited another challenge to take a "fresh look."[4] As stated on the campaign trail, "The map issue is really kind of easy, actually."[5] "It is no secret that Wisconsin's maps are gerrymandered."[6] "I agree with" the *Johnson* dissent.[7] Meanwhile, the Democratic Party became her largest donor, contributing millions.[8]

E. The day after Justice Protasiewicz won the Supreme Court election, the executive director of Law Forward—representing Petitioners here—announced they would file a lawsuit challenging the State's electoral districts "in the weeks or months after Justice-elect Janet Protasiewicz is sworn in on Aug. 1."[9] As promised, just one day after Justice Protasiewicz took the bench, Law Forward filed its Petition on behalf of Democrats asking this Court to exercise original jurisdiction over partisan gerrymandering claims

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[3] 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.

[4] 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.

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

[6] @janetforjustice, Twitter (Mar. 3, 2023, 5:31 PM), https://twitter.com/janetforjustice/status/1631799609751117825.

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

[8] *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.

[9] Jack Kelly, *Liberal Law Firm to Argue Gerrymandering Violates Wisconsin Constitution*, The Cap Times (April 6, 2023), https://perma.cc/5TCG-4EQF.

and draw its own maps to redress Petitioners' alleged harm—their "inability to achieve a Democratic majority in the state legislature," Pet. ¶5.

Petitioners are former Democratic candidates and Democratic voters, including those who campaign for and donate to Democratic candidates. Pet. ¶¶6-24. They include members active in the Democratic Party of Wisconsin, the Brown County Democrats, Columbia County Democrats, the Douglas County Democratic Party, the Democratic Party of Outagamie County, Ozaukee County Democrats, Rock County Democrats, Sheboygan County Democrats, and Waukesha County Democrats. *Id.* ¶¶6, 8-14, 19, 22. They contend that, as a result of the *Johnson* litigation, "Democrats do not have the same opportunity Republicans have," that "Democratic voters have been unconstitutionally deprived of their ability to express their views and associate with like-minded voters in an impactful way," and that they can't "see laws and policies they favor enacted." *Id.* ¶¶4-5.

The Petition asks this Court to exercise its original jurisdiction to declare the *Johnson* injunction unconstitutional and to "enjoin" it. Pet. at 43-45. Petitioners ask this Court to revisit and overrule all of *Johnson*'s holdings on the justiciability and cognizability of partisan gerrymandering claims, the

meaning of "contiguous" in the Wisconsin Constitution, and the separation-of-powers questions addressed in *Johnson I*. *See id.*; *see also id.* ¶¶93-132. Petitioners ask for new Court-drawn maps that "will not adhere to any 'least-changes' approach." *Id.* at 44. And Petitioners seek the extraordinary remedy of "order[ing] special elections in November 2024 for all odd-numbered senate districts that would not otherwise occur until November 2026," based on Petitioners' contention that "the election of senators in November 2022 from unconstitutionally configured districts" was "unlawful." *Id.*

ARGUMENT

One day after this Court's membership changed, Petitioners asked the Court to exercise its original jurisdiction to declare that the Court's own injunction entered in *Johnson III* is unconstitutional. They say the Court-ordered legislative districts "are extreme partisan gerrymanders" in violation of Article I, Sections 1, 3, 4, and 22 of the Wisconsin Constitution. Pet. ¶¶1, 3; *see id.* ¶¶55, 93-121. They say the Court-ordered districts violate Article IV because they are not contiguous. Pet. ¶4; *see id.* ¶¶122-28. And they say the Court violated the Constitution's separation-of-powers requirements. Pet. ¶5; *see id.* ¶¶129-32. The Petition is an unapologetic attempt to retread old ground with the hope of a different result. *See Johnson I*, 2021 WI 87, ¶¶36,

53-63, 69-72; *Johnson III*, 2022 WI 19, ¶¶72-73. Fidelity to this Court's precedents and the rule of law require that the Petition be denied.

I. This Court does not overrule precedent based on changed membership.

A. Petitioners repaint the *Johnson* litigation as deciding very little. For instance, they call *Johnson I*'s holding that partisan gerrymandering claims are not justiciable and not cognizable under the Wisconsin Constitution as an "'advisory opinion'" and "unpersuasive dicta." Memo. of Law ISO Pet. at 36 (quoting *Johnson I*, 2021 WI 87, ¶¶102-03 (Dallet, J., dissenting)). But Petitioners' aim is clear. Their Petition contemplates nothing short of overruling the following precedential holdings in *Johnson I* and *Johnson III*: (1) this Court's holding that partisan gerrymandering claims are not justiciable and not cognizable, *Johnson I*, 2021 WI 87, ¶¶53-63; *id.* at ¶82 n.4 (Hagedorn, J., concurring); (2) this Court's holding that "contiguous" in the Wisconsin Constitution means political contiguity, where annexation has created municipal "islands" that are not physically contiguous, *id.* at ¶36; (3) this Court's holding that it had power only to confer a judicial remedy, which necessitated the Court's least-changes approach, *id.* at ¶¶72-79; *id.* at ¶¶82, 86 (Hagedorn, J., concurring); (4) this Court's holding that going beyond

that least-changes approach would violate the Wisconsin Constitution's separation of powers, *id.* at ¶¶64-66; and ultimately (5) this Court's holding that the Legislature's proposed Assembly and Senate districts made "minimal changes to the existing maps while still complying with federal and state law," *Johnson III*, 2022 WI 19, ¶72.

Contrary to Petitioners' arguments, there is no basis for this Court to overrule those precedential holdings. Senator Respondents adopt and incorporate by reference the Legislature's arguments regarding this Court's fidelity to its prior precedents. *See* Non-Party Br. of Wisconsin Legislature as *Amicus Curiae* in Opposition to Pet. for Original Action ("Legislature Amicus Br.") at 5-12 (filed Aug. 22, 2023). The above conclusions from *Johnson I* and *Johnson III* are all holdings of this Court. *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"). The very purpose of the *Johnson* litigation was to craft an injunction that complied with all aspects of the federal and state constitution. *See Johnson I*, 2021 WI 87, ¶5. Petitioners cannot

now return to this Court to relitigate the Court's conclusions in *Johnson* about what the federal and state constitutions required and what remedy was consistent with those requirements.

This Court does not overrule precedent based on changed politics: "The decision to overturn a prior case must not be undertaken merely because the composition of the court has changed." *Johnson Controls*, 2003 WI 108, ¶95. And yet, that is exactly what the *Clarke* Petitioners are hoping this Court will do. One day after the Court's membership changed, they asked this Court to declare their partisan gerrymandering claims justiciable and cognizable and the Court-ordered districts non-contiguous, based on the same constitutional provisions that *Johnson I* already parsed. Pet. ¶¶93-128.

The Court should reject the Petition and honor its commitment to "scrupulously" follow "the doctrine of stare decisis" as part of its "abiding respect for the rule of law." *Johnson Controls*, 2003 WI 108, ¶94. Deciding cases is not "a mere exercise of judicial"—or political—"will." *Schultz v. Natwick*, 2002 WI 125, ¶37, 257 Wis. 2d 19, 653 N.W.2d 266 (quotation marks omitted).

B. Petitioners have offered no legal basis for revisiting its holdings in *Johnson*—only political ones. *See* Legislature Amicus Br. at 5-12. In *Johnson*, this Court interpreted the Wisconsin Constitution by "giv[ing] effect to the intent of the framers and the people who adopted it." *Johnson I*, 2021 WI 87, ¶22 (quotation marks omitted). The Court's constitutional analysis was based on "the language of the adopted text and historical evidence of its meaning." *Id.* (quotation marks and alterations omitted). The relevant constitutional text remains unchanged today. There have been no intervening constitutional amendments prescribing partisan neutrality or proportionality in redistricting. *See Johnson Controls*, 2023 WI 108, ¶¶98-99; *compare, e.g.*, *Rucho*, 139 S. Ct. at 2507-08 (citing Florida and other States' recently enacted redistricting-specific "[p]rovisions in state statutes and constitutions [that] can provide standards and guidance for state courts to apply").

All that remains are Petitioners' recycled arguments that the conclusions reached in the *Johnson* litigation were wrong. Memo. of Law ISO Pet. at 36-76. The Court heard Petitioners' same arguments raised by other intervenors in *Johnson*, and this Court rejected them. *See Johnson I*, 2021 WI 87, ¶¶2, 76; *id.* at ¶86 (Hagedorn, J., concurring). And while Petitioners contend

that additional state courts have weighed in on questions of partisan gerrymandering since *Johnson*, those decisions regarding other state constitutions cannot change the meaning of the Wisconsin Constitution. *See Johnson Controls*, 2003 WI 108, ¶100. Petitioners fail to mention critical distinctions between those other States' constitutions and Wisconsin's,[10] and they omit decisions following *Johnson*'s conclusion that partisan gerrymandering claims are not justiciable.[11] Beyond politics, there is no basis for this Court to exercise its original jurisdiction to relitigate what it already decided in *Johnson*. *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 the "facts were already before the court when it decided" an earlier case (quotation marks omitted)).

[10] *See, e.g.*, *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 192 N.E.3d 379, 385 (Ohio 2022) (turning on constitutional requirement specific to redistricting that requires proportionality); *League of Women Voters v. Commonwealth*, 178 A.3d 737, 813 (Penn. 2018) (turning on Free and Equal Elections Clause); *Szeliga v. Lamone*, 2022 WL 2132194, at *12-14 (Md. Cir. Ct. Mar. 25, 2022) (turning on Free Elections Clause); *see also Harper v. Hall*, 886 S.E.2d 393, 439-43 (N.C. 2023) (rejecting similar claim based on text and history).

[11] *See, e.g.*, *Rivera v. Schwab*, 512 P.3d 168, 181-87 (Kan. 2022) (rejecting partisan gerrymandering claims); *Harper v. Hall*, 886 S.E.2d 393, 416, 439-43 (N.C. 2023) (rejecting partisan gerrymandering claims). The Kentucky and Utah supreme courts are currently evaluating the justiciability and cognizability of partisan unfairness claims. *See Graham v. Adams*, No. 2022-SC-522 (Ky. S. Ct.); *League of Women Voters v. Utah Legislature*, No. 20220991-SC (Utah S. Ct.).

C. Petitioners' request that this Court disavow and dissolve its judgment in *Johnson* raises unique problems given the events preceding the filing of the Petition. If this Court were to grant the Petition, without recusal by Justice Protasiewicz, and then overrule *Johnson*, the Court would transgress basic due process requirements. *See Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016). Due process does not permit these proceedings to be pre-decided (as they appear to be based on campaign statements) or infected with "'the probability of actual bias on the part of the judge'" (as they appear to be as measured by "objective standards"). *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)); *see Williams*, 579 U.S. at 8. As explained in the contemporaneously filed recusal motion, Petitioners filed this action in response to an invitation given during a campaign for a seat on this Court. While campaigning, Justice Protasiewicz said the *Johnson* maps were "rigged" and invited another challenge, while the Democratic Party became her biggest donor. *See supra*, pp. 13-14. Due process requires recusal. And fidelity to this Court's precedents requires denial of the Petition.

II. Petitioners' action is an unduly delayed and impermissible collateral attack of this Court's final judgment in *Johnson*.

In *Johnson*, this Court ordered "any prospective intervenor" to file a motion to participate in that litigation. *Supra*, p. 6. Petitioners did not intervene. Petitioners 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 this Court's membership changed. After all that time, they ask this Court to declare itself in violation of the Constitution.

A. The doctrine of laches bars Petitioners' suit. *See* Legislature Amicus Br. at 13-17. The only explanation for Petitioners' 679-day delay is politics. Any court observer could conclude that Petitioners' original action is unreasonably delayed. *See Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶¶11-12, 393 Wis. 2d 308, 946 N.W.2d 101; *see, e.g.*, *Trump v. Biden*, 2020 WI 91, ¶11, 394 Wis. 2d 629, 951 N.W.2d 568. Nor was there any reason to expect that Petitioners would try partisan gerrymandering claims anew when the *Johnson* litigation came to an end. *Brennan*, 2020 WI 69, ¶18 & n.10. Had anyone predicted Petitioners' suit then, Petitioners could have been joined as parties. And Respondents could have entirely avoided Petitioners' late-filed

claim now that the 2022 elections of Senators to odd-numbered districts were "unlawful." Pet. at 44; *see Trump*, 2020 WI 91, ¶¶11-12.

Petitioners' have no good reason for their delay, and their timing creates substantial prejudice. *See* Legislature Amicus Br. at 13-17. There can be only one set of legislative districts. *See Growe v. Emison*, 507 U.S. 25, 35 (1993). For that reason, it was incumbent upon "any prospective intervenor" to participate in *Johnson*, as ordered by this Court nearly two years ago. *Supra*, p. 6. Allowing Petitioners a do-over here will have the effect of dissolving the judgment obtained in *Johnson*.

Worse, Petitioners want relief immediately, with only months left before qualifying deadlines begin for the 2024 elections. *See* Wis. Stat. §8.15(1). Yet Petitioners sat on their hands for years and let the 2022 elections come and go. After all that time, Petitioners claim their case is urgent, demanding full resolution within months. All the more extraordinary is their 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 44. Having failed to intervene in *Johnson*, Petitioners cannot now claim that the 2022 elections were invalid and that 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 (citation omitted)).

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.

B. Petitioners' unduly delayed suit seeks a declaration that "[t]he current maps" for the State Assembly and Senate are unconstitutional. Pet. ¶¶93-128. But those "current maps" 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. For the reasons explained in the Legislature's contemporaneously filed amicus brief (at 18-19), there is no basis for this Court to exercise its original jurisdiction and declare its own mandatory injunction order

unconstitutional and to enjoin it. Wisconsin's Declaratory Judgments Act contemplates declarations related to deeds, wills, contracts, statutes, or ordinances—not injunctions of this Court. *See* Wis. Stat. §806.04.(2). Nor have Petitioners explained what legal (versus political) basis there could be for this Court to enjoin the injunction issued in *Johnson III*. *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 (quotation marks and citation 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). 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.

III. There is no basis for Petitioners' request for a writ *quo warranto* or special elections.

Among other extraordinary remedial requests, Petitioners ask the 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 declined to bring this *quo warranto* action, *see id.* at 44 n.3. This Court should likewise decline to entertain it and deny the Petition.

Petitioners fail to provide any justification for entertaining their petition for a writ *quo warranto*. Such actions are not appropriate unless the petitioner claims that an official has no legal entitlement to his office. *See* Wis. Stat. §784.04(1)(a) (providing that an action of *quo warranto* may be brought "[w]hen any person shall usurp, intrude into or unlawfully hold or exercise any public office"). Individuals holding the office of Senator are determined by elections. Wis. Const. art. IV, §5; Wis. Stat. §4.001. Those elections took place pursuant to this Court's injunction in *Johnson*, and the Respondent Senators won. *See, e.g.*, Pet. ¶¶30-46. Petitioners do not deny the results of those elections.

Instead, Petitioners appear to argue that the Respondent Senators "unlawfully hold" their seats because they were elected from districts that were improperly ordered by this Court. But whatever Petitioners think of the merits of this Court's earlier injunction, those arguments do not change

the fact that the Senators are the duly elected officeholders in their respective Senate districts. A writ *quo warranto* challenges "the ability of an individual to hold office." *State ex rel. Kaul v. Prehn*, 2022 WI 50, ¶13, 402 Wis. 2d 539, 976 N.W.2d 821 (alterations, quotation marks, and citation omitted). Respondent Senators did not "usurp, intrude into or unlawfully hold or exercise" their offices. Wis. Stat. §784.04(1)(a). They are not alleged to "have done or suffered an act which, by the provisions of law, shall work a forfeiture of office." *Id.* §784.04(1)(b). Petitioners 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. Petitioners do not suggest that other individuals are legally entitled to Respondents' Senate offices, nor could they. Respondents are legally qualified by election to hold their Senate seats. If Petitioners were correct that alleged defects in electoral districts stripped the duly elected representatives of their legal entitlement to office, then every Senator elected to a four-year term in the last year of a decennial redistricting cycle would automatically become an unlawful holder of his or her seat, either when new census data indicated that existing districts were malapportioned or when new electoral districts

were enacted. That is not and never has been the case. Petitioners' theory is incorrect, and their *quo warranto* action is baseless.

Petitioners also fail to acknowledge just how extraordinary special elections are. The U.S. Supreme Court "has never addressed whether or when a special election may be a proper remedy for a racial gerrymander," let alone for the type of partisan gerrymander Petitioners allege here. *North Carolina v. Covington*, 581 U.S. 486, 488 (2017). In redistricting cases, only after liability is found, courts must undertake an "equitable weighing process" evaluating "what is necessary, what is fair, and what is workable." *Id.* (internal quotation marks and citation omitted). And "obvious considerations" for granting this type of relief "include the severity and nature of the particular constitutional violation, the extent of the likely disruption to the ordinary processes of governance if early elections are imposed, and the need to act with proper judicial restraint when intruding on state sovereignty." *Id.* If the U.S. Supreme Court remains unsure about whether special elections could be awarded to remedy even racial gerrymandering, there is no conceivable basis for assuming special elections would ever be appropriate for the "partisan gerrymander" Petitioners allege here. Petitioners are

equally wrong to presume a right to relief before the next election. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (explaining that "equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid").

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) (quotation marks and citation omitted); *see also Cook v. Luckett*, 735 F.2d 912, 921-22 (5th Cir. 1984) ("[O]ur decisions reveal a strong reluctance to undertake the 'drastic, if not staggering' remedy of voiding a location election" (citation omitted)). Elections that have already occurred "will not be set aside absent serious voting violations or aggravating factors, such as racial discrimination or fraudulent conduct." *Cook*, 735 F.2d at 922 (quotation marks and citation omitted).

Petitioners cannot point to any such aggravating factors here. The 2022 elections occurred pursuant to *this Court's* order. Contrast that to Petitioners' cited cases involving intentional racial discrimination. *See* Mem. of Law ISO Pet. at 82-84. In *Cousins v. City Council of Chicago*, 361 F. Supp. 530

(N.D. Ill. 1973), *aff'd in part, rev'd in part*, 503 F.2d 912 (7th Cir. 1974), the district court found that one aldermanic ward was drawn intentionally to replace a black majority with a white majority. *Id.* at 536. But rather than "throw out the entire . . . map and start anew," as plaintiffs requested, the court limited its remedy to a revision of the offending ward and the adjoining ward. *Id.* at 536-37. The district court ultimately ordered a special election in those wards, but its finding of discrimination was reversed on appeal. *See* 503 F.2d at 924-26. Despite reversing, the Seventh Circuit ordered that its "reversal shall not affect the status of the aldermen of those wards, now serving, before the end of the current term of office." *Id.* at 926. In *Smith v. Beasley*, 946 F. Supp. 1174, 1210 (D.S.C. 1996), the court found that 6 state assembly districts and 3 state senate districts were unconstitutional racial gerrymanders, but it refused to disrupt the *upcoming* elections, *id.* at 1212. Instead, the court ordered the State to conduct special elections the following year "to elect Representatives to serve the balance of the terms in the amended districts." *Id.* Petitioners have no support for their demand to cut short Respondent Senators' terms and hold special elections in 2024, much

less an order declaring the Respondent Senators to be "unlawful" occupants of their offices.

Petitioners also fail to consider the burdens of a special election. They assume that the burdens will be minimal because the November 2024 general elections are slated to occur anyway. Mem. of Law ISO Pet. at 83. But this discounts the fact that any special election will likely force the government and candidates to prepare on a compressed timeline. *See Bowes*, 837 F.3d at 817-18; *United States v. City of Houston*, 800 F. Supp. 504, 506 (S.D. Tex. 1992). State and local election officials would have to divert resources to conduct unanticipated elections, *see City of Houston*, 800 F. Supp. at 506, and candidates would be forced to campaign and fundraise on an abbreviated schedule, *see Bowes*, 837 F.3d at 820. The disruption of the ordinary political process that special elections entail is a major reason why they are ordered only in the most extreme circumstances. There is no reason to consider such an extraordinary remedy when Petitioners have not even attempted to explain why it is feasible.

CONCLUSION

This Court should deny the petition for an original action.

Dated this 22nd day of August, 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 6,577 words as calculated by Microsoft Word.

Dated this 22nd day of August, 2023

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