

FILED
10-12-2023
CLERK OF WISCONSIN
SUPREME COURT

No. 2023AP001399-OA

IN THE SUPREME COURT OF WISCONSIN

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

v.

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

Respondents,

WISCONSIN LEGISLATURE,

Intervenor-Respondent.

POSITION ON INTERVENTION MOTIONS BY INTERVENOR-RESPONDENT THE WISCONSIN LEGISLATURE AND RESPONDENT-SENATORS CABRAL-GUEVARA, HUTTON, JACQUE, JAGLER, JAMES, KAPENGA, LEMAHIEU, MARKLEIN, NASS, QUINN, TOMCZYK, AND WANGGAARD

Counsel Listed on Following Page

BELL GIFTOS ST. JOHN LLC

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

CONSOVOY MCCARTHY PLLC

TAYLOR A.R. MEEHAN*
RACHAEL C. TUCKER*
DANIEL M. VITAGLIANO*
C'ZAR BERNSTEIN**
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
703.243.9423
taylor@consovoymccarthy.com

LAWFAIR LLC

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

AUGUSTYN LAW LLC

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

LEHOTSKY KELLER COHN LLP

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

LEHOTSKY KELLER COHN LLP

MATTHEW H. FREDERICK*
408 West 11th St., Fifth Floor
Austin, TX 78701

* *Admitted pro hac vice*

** *Pro hac vice motion forthcoming*

POSITION ON INTERVENTION

Pursuant to this Court's Order of October 6, 2023, the Legislature and Respondent Cabral-Guevara, Hutton, Jacque, Jagler, James, Kapenga, Lemahieu, Marklein, Nass, Quinn, Tomczyk, and Wanggaard submit the following regarding intervention motions filed on October 10, 2023. The Legislature and Senator-Respondents do not oppose the motions to intervene. The Legislature and Senator-Respondents' non-opposition is not a waiver of any arguments regarding laches, preclusion, estoppel, and any other grounds that would bar intervenors' claims or proposed remedies. In particular, some intervenors fully participated in *Johnson* and are now poised to relitigate issues decided in *Johnson*.¹ *But see N. States Power Co. v. Bugher*, 189 Wis. 2d 541, 550-51, 525 N.W.2d 723 (1995) (preclusion doctrines render "final judgment ... 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," and "judgment ... foreclose[s] relitigation in a

¹ See, e.g., Br. of Intervenor-Petitioners Citizen Mathematicians 27-28, *Johnson v. Wisconsin Elections Comm'n*, No. 2021AP001450-OA (Dec. 15, 2021) (proposing remedy with municipal islands and explaining that "a district may contain detached portions of a single municipality and still be deemed contiguous for purposes of the state constitutional requirement"); Br. of Governor 17, *Johnson*, No. 2021AP001450-OA (Dec. 15, 2021) (proposing remedy with municipal islands and explaining that "municipal islands are acceptable").

subsequent action on an issue of law or fact that has been actually litigated and decided in a prior action"); *Mrozek v. Intra Fin. Corp.*, 2005 WI 73, ¶22, 281 Wis. 2d 448, 699 N.W.2d 54 ("Judicial estoppel precludes a party from asserting one position in a legal proceeding and then subsequently asserting an inconsistent position."). Those arguments go to the cognizability and merits of the Petitioners' and proposed intervenors' claims, and the Legislature and Senator-Respondents will accordingly address them in briefing.

Dated this 12th day of October, 2023.

Respectfully submitted.

Electronically Signed by
Jessie Augustyn

Electronically Signed by
Kevin M. St. John

AUGUSTYN LAW LLC

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

Counsel for Respondents Senators Cabral-Guevara, Hutton, Jacque, Jagler, James, Kapenga, LeMahieu, Marklein, Nass, Quinn, Tomczyk, and Wanggaard

LEHOTSKY KELLER COHN LLP

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

LEHOTSKY KELLER COHN LLP

MATTHEW H. FREDERICK*
408 West 11th St., Fifth Floor
Austin, TX 78701

Counsel for the Wisconsin Legislature & Respondents Senators Cabral-Guevara, Hutton, Jacque, Jagler, James, Kapenga, LeMahieu, Marklein, Nass, Quinn, Tomczyk, and Wanggaard

BELL GIFTOS ST. JOHN LLC

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

CONSOVOY MCCARTHY PLLC

TAYLOR A.R. MEEHAN*
RACHAEL C. TUCKER*
DANIEL M. VITAGLIANO*
C'ZAR BERNSTEIN**
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
703.243.9423
taylor@consovoymccarthy.com

LAWFAIR LLC

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

Counsel for the Wisconsin Legislature

* Admitted pro hac vice

** Pro hac vice motion forthcoming

CERTIFICATION REGARDING LENGTH AND FORM

I certify that this brief conforms to Wis. Stat. §809.19. Excluding the portions of this brief that may be excluded, the length of this brief is 308 words as calculated by Microsoft Word.

Dated this 12th day of October, 2023.

Respectfully submitted,

Electronically Signed by
Kevin M. St. John

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