

FILED
10-31-2023
CLERK OF WISCONSIN
SUPREME COURT

IN THE SUPREME COURT OF WISCONSIN

No. 2023AP1399-OA

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; ANDRÉ JACQUE, TIM CARPENTER, ROB HUTTON,
CHRIS LARSON, DEVIN LEMAHIEU, STEPHEN L. NASS, JOHN JAGLER, MARK SPREITZER,
HOWARD L. MARKLEIN, RACHAEL CABRAL-GUEVARA, VAN H. WANGGAARD,
JESSE L. JAMES, ROMAINE ROBERT QUINN, DIANNE H. HESSELBEIN, CORY TOMCZYK,
JEFF SMITH, AND 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.

ATKINSON INTERVENORS' OPPOSITION TO MOTION TO DISMISS

Sarah A. Zylstra (Bar No. 1033159)
Tanner G. Jean-Louis (Bar No. 1122401)
Boardman Clark LLP
1 South Pinckney Street, Suite 410
Madison, WI 53701
(608) 257-9521
szylstra@boardmanclark.com
tjeanlouis@boardmanclark.com

Sam Hirsch*
Jessica Ring Amunson*
Jenner & Block LLP
1099 New York Avenue, NW, Suite 900
Washington, DC 20001
(202) 639-6000
shirsch@jenner.com
(additional counsel listed on inside cover)

Elizabeth B. Deutsch*
Arjun R. Ramamurti*
Jenner & Block LLP
1099 New York Avenue NW
Suite 900
Washington, DC 20001
(202) 639-6000
jamunson@jenner.com
edeutsch@jenner.com
aramamurti@jenner.com
* *Pro hac vice*

INTRODUCTION

Professor Atkinson, Dr. Wright, Dr. Krenz, Dr. Hamilton, Dr. Thiffeault, Dr. Jha, Dr. Kane, and Ms. Dudley (collectively, “Atkinson Intervenors”) hereby oppose the motion to dismiss filed by Intervenor-Respondent Wisconsin Legislature and Respondents Senators Cabral-Guevara et al. and joined by the Johnson Intervenors-Respondents (collectively, “Respondents”). The motion should be denied as procedurally improper. In any event, there is no impediment to this Court’s deciding the merits of this original action on which it already has granted review.

PROCEDURAL BACKGROUND

On August 2, 2023, Petitioners filed their Petition to Commence an Original Action, together with a memorandum in support of that Petition. On August 22, Respondents filed briefs opposing the Petition and explaining why, in their view, this Court should not hear the case. Respondents’ filings made the same procedural objections they now raise in the pending motion to dismiss. *See generally* Legislature Amicus Brief (Aug. 22, 2023); Response of Senators Cabral-Guevara et al. in Opposition to Petition (Aug. 22, 2023).

On October 6, this Court granted the Petition in part, granted the Legislature’s motion to intervene, and specified four questions for all parties

to brief in submissions due on October 16 and October 30. *See* Order of Oct. 6, 2023, at 3–4. On October 13, the Court granted all timely motions for intervention, including Atkinson Intervenors'. *See* Order of Oct. 13, 2023. Respondents filed an opening brief on October 16 raising the same procedural objections their August 22 filings raised; they thereafter filed a motion to dismiss the action on October 20 raising these procedural objections for a third time.

ARGUMENT

Respondents' motion is procedurally improper and should not be allowed. Even if it is allowed, it fails on the merits.

Respondents had (and took) their chance to raise objections to this Court's exercise of jurisdiction over the Petition to Commence an Original Action—including that Petitioners' claims were purportedly precluded and barred. But now that the Court has granted the Petition, a motion to dismiss is procedurally improper. Respondents do not get a second bite at the apple, much less a third, to explain why the Court was wrong to grant the Petition in the first instance. Respondents do not provide a single example of a successful motion to dismiss filed in an original action in this Court. Nor are Atkinson Intervenors aware of any case in which this Court has granted such a motion. And the motion is all the more improper because it largely

rehashes arguments from Respondents' October 16 brief, filed just four days earlier. This Court should deny the motion for its procedural impropriety alone.

If, however, the Court entertains the merits of Respondents' procedural arguments for dismissal, their motion should be denied for the same reasons Atkinson Intervenors set forth in their October 30 Response Brief. *See* Atkinson Int. Response Br. 2–18, 20–21 (explaining why Respondents' arguments about lack of standing, claim and issue preclusion, laches, reopening, and *stare decisis* are incorrect and do not bar this Court's review). In opposing the motion to dismiss, Atkinson Intervenors incorporate those arguments by reference.¹

In any event, none of Respondents' procedural objections implicates this Court's jurisdiction. It would be within this Court's jurisdiction to

¹ The only argument raised in Respondents' motion to dismiss that was not raised in their prior briefing is as to this Court's issuance of a writ *quo warranto*. That argument also fails. This Court retains inherent power to order elections in November 2024 for all odd-numbered state senate districts that would not otherwise occur until November 2026. *See State ex rel. Att'y Gen. v. Messmore*, 14 Wis. 115, 119 (1861) (Wisconsin Supreme Court's inherent authority to issue writs of *quo warranto* is guaranteed by the Wisconsin Constitution and “this jurisdiction [can]not be taken away by any legislative changes in the forms of the remedy”); *State v. Pierce*, 191 Wis. 1, 209 N.W. 693, 693 (1926) (Wisconsin Supreme Court has “ample warrant and precedent to assume original jurisdiction” in an “original action by *quo warranto*”).

adjudicate the claims in this original action even if Respondents’ procedural arguments were correct (though none is). Indeed, this Court has often declined to dismiss cases after it has granted review—even where valid procedural impediments have arisen—because of the importance to the litigants and the public of answering the questions presented. *See, e.g., Zealy v. City of Waukesha*, 201 Wis. 2d 365, 372, 548 N.W.2d 528, 530–31 (1996) (recognizing that “lack of ripeness ... should normally result in dismissal” but concluding that “addressing the merits of the case at bar would best serve the interests of justice”); *see also M & I Marshall & Ilsley Bank v. Town of Somers*, 141 Wis. 2d 271, 286, 414 N.W.2d 824, 830 (1987) (similar); *Mueller v. Jensen (In re Recall of Certain Offs. of City of Delafield)*, 63 Wis. 2d 362, 366–67, 217 N.W.2d 277, 279 (1974) (addressing the merits of election-related questions of “sufficient public character, interest and significance,” even though the case had become moot).

This Court should resolve the important constitutional questions it granted this Petition to answer.

CONCLUSION

For the foregoing reasons, as well as those set out in Atkinson Intervenors' October 30, 2023 Response Brief, which is incorporated by reference, this Court should deny Respondents' motion to dismiss.

Dated: October 31, 2023

Electronically signed by

Sarah A. Zylstra

Sarah A. Zylstra

(WI Bar No. 1033159)

Tanner G. Jean-Louis

(WI Bar No. 1122401)

Boardman Clark LLP

1 South Pinckney Street

Suite 410

Madison, WI 53701

(608) 257-9521

szylstra@boardmanclark.com

tjeanlouis@boardmanclark.com

Respectfully submitted,

Sam Hirsch *

Jessica Ring Amunson *

Elizabeth B. Deutsch *

Arjun R. Ramamurti *

Jenner & Block LLP

1099 New York Avenue NW

Suite 900

Washington, DC 20001

(202) 639-6000

shirsch@jenner.com

jamunson@jenner.com

edeutsch@jenner.com

aramamurti@jenner.com

* Appearing *pro hac vice*