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Supreme Court of Wisconsin

No. 2025XX001438

ELIZABETH BOTHFELD, JO ELLEN BURKE, MARY COLLINS, CHARLENE GAEBLER-UHING, KATHLEEN GILMORE, PAUL HAYES, SALLY HUCK, TOM KLOOSTERBOER, ELIZABETH LUDEMAN, GREGORY ST ONGE, and LINDA WEAVER,

Plaintiffs,

vs.

WISCONSIN ELECTIONS COMMISSION; MARGE BOSTELMANN, ANN S. JACOBS, DON MILLIS, ROBERT F. SPINDELL, JR., CARRIE RIEPL, and MARK L. THOMSEN, in their official capacities as commissioners of the Wisconsin Elections Commission; and MEAGAN WOLFE, in her official capacity as administrator of the Wisconsin Elections Commission,

Defendants.

PLAINTIFFS' OPENING BRIEF

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INTRODUCTION

Wisconsin law provides special venue rules for "an action to challenge the apportionment of any congressional or state legislative district." Wis. Stat. § 801.50(4m). Because Plaintiffs challenge Wisconsin's congressional districting plan, their action falls squarely within this provision's scope. Compl. ¶ 34. If this Court agrees, it must then "appoint a panel consisting of 3 circuit court judges to hear the matter." Wis. Stat. § 751.035(1). Otherwise, the case will proceed before a single Circuit Court judge.

While Plaintiffs see little reason to doubt that Section 801.50(4m) applies here, their primary interest is in securing timely relief to protect their constitutional rights, irrespective of which venue rules apply. Accordingly, Plaintiffs respectfully request that the Court resolve this gateway issue promptly so that the lower court—whether a panel or a single judge—may adjudicate Plaintiffs' claims sufficiently in advance of the 2026 elections.

BACKGROUND

I. Plaintiffs challenge Wisconsin's congressional map.

On May 7, 2025, Plaintiffs here petitioned the Wisconsin Supreme Court for leave to commence an original action challenging Wisconsin's congressional map. *See* Pet. for Original Action, *Bothfeld v. Wis. Elections Comm'n*, No. 2025AP996-OA

(Wis. May 7, 2025). The Court denied the petition without comment. *See* Order, *Bothfeld v. Wis. Elections Comm'n*, No. 2025AP996-OA (Wis. June 25, 2025). Less than one month later, Plaintiffs brought the present action in Dane County Circuit Court challenging Wisconsin's congressional map on the same grounds. *See generally* Compl.

Plaintiffs first allege that the criterion used to select the congressional map—that it exhibited the "least change" from prior gerrymandered maps drawn by the political branches—violated the separation of powers and was unlawful in light of this Court's subsequent repudiation of the least-change criterion. *Id.* ¶¶ 77–82 (citing *Clarke v. Wis. Elections Comm'n*, 2023 WI 79, ¶¶ 62–63, 71, 410 Wis. 2d 1, 998 N.W.2d 370). Plaintiffs also allege that the congressional map "impermissibly disadvantages voters based on their political views and partisan affiliation" in violation of the Wisconsin Constitution's guarantees of equal protection, free speech and association, and free government. *Id.* ¶¶ 1, 83–97. Plaintiffs seek declaratory and injunctive relief to ensure "the adoption of a lawful congressional map in time for the 2026 congressional elections." *Id.* at 26.

On the same day they filed their lawsuit, Plaintiffs petitioned the Clerk of Courts for Dane County "to notify the Clerk of the Wisconsin Supreme Court within five days of the filing of this action pursuant to Wis. Stat. § 801.50(4m)" and further

petitioned this Court "to appoint a panel of three circuit court judges pursuant to Wis. Stat. § 751.035 and declare that Dane County Circuit Court is the proper venue for this complaint." *Id.* at 5. The Clerk of Courts for Dane County notified this Court on July 22, 2025, of the present action "challenging the apportionment of Wisconsin['s] congressional districts." Ltr. to Clerk of Ct (July 22, 2025).

II. Proceedings below stall pending action by this Court.

Defendants answered Plaintiffs' complaint on September 5, 2025, taking "no position" on Plaintiffs' claims and instead expressing that their "primary concern is to ensure that any litigation involving congressional district boundaries is conducted in a way that accommodates relevant administrative limitations and statutory deadlines, so that the litigation does not disrupt or impair the proper, efficient, and effective administration of the 2026 election calendar." Defs.' Answer at 1.

The same day, Plaintiffs moved for judgment on the pleadings on their separation of powers claim. *See generally* Pls.' Notice Mot. & Mot. J. on Pleadings; Mem. in Supp. of Pls.' Mot. J. on Pleadings. Plaintiffs argued that because this Court overruled the least-change criterion in *Clarke*, Plaintiffs are entitled to judgment as a matter of law on their claim that the least-change criterion used to select Wisconsin's congressional map was unconstitutional. Mem. in Supp. of Pls.' Mot. J. on Pleadings at 3;

see also Clarke, 2023 WI 79, ¶ 62 ("We cannot allow a judicially-created metric, not derived from the constitutional text, to supersede the constitution.").

Plaintiffs then moved for a briefing schedule, arguing that the issues raised in this action are "of great public importance" and "time is of the essence." Pls.' Request for Entry of Briefing Schedule at 1 (arguing the map should be "enjoined and replaced sufficiently far in advance of the upcoming August 2026 congressional primaries to ensure time for a new map that comports with the Wisconsin Constitution to be selected"). Defendants took no position on the motion for judgment on the pleadings or briefing schedule. *Id.* at 2.

The Dane County Circuit Court denied Plaintiffs' request to set a briefing schedule, reasoning that since the "Wisconsin Supreme Court is statutorily obligated to appoint a panel of 3 circuit court judges," "any actions [Judge Genovese] would take as a sole circuit court judge would contravene the statutory scheme." Order Denying Request for Briefing Schedule at 2.[1] As a result, proceedings below are stalled until this Court acts.

[1] The circuit court mistakenly stated that "Defendants object" to Plaintiffs' request for a briefing schedule, Order Denying Request for Briefing Schedule at 2, when in fact Defendants took no position on Plaintiffs' motion. Only certain *non*-party Members of Congress objected to Plaintiffs' request, but this Court has since

On September 25, this Court ordered the parties to brief whether Plaintiffs' "complaint filed in the circuit court constitutes an 'action to challenge the apportionment of a congressional or state legislative district' under Wis. Stat. § 801.50(4m)." Briefing Order at 2.

DISCUSSION

Wisconsin law instructs that "[v]enue of an action to challenge the apportionment of any congressional or state legislative district shall be as provided in [Wis. Stat. §] 751.035." Wis. Stat. § 801.50(4m). On receiving notice of such an action, the Wisconsin Supreme Court "shall appoint a panel consisting of 3 circuit court judges to hear the matter." *Id.* § 751.035(1). The Court "shall choose one judge from each of 3 circuits and shall assign one of the circuits as the venue for all hearings and filings in the matter." *Id.*

Plaintiffs allege that their action falls under these statutes. Compl. ¶ 34. But even if the Court disagrees, Plaintiffs request that this Court decide the issue promptly so that the lower court—whether a panel or a single judge—may proceed to resolve Plaintiffs' claims on the merits well in advance of the upcoming August 2026 congressional primaries.

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recognized that those Members have yet to move to intervene or seek leave to participate as amici curiae. Briefing Order at 2.

I. Section 801.50(4m) applies here.

Each of Plaintiffs' claims allege that Wisconsin's congressional districting map violates the Wisconsin Constitution and must be redrawn. Compl. ¶¶ 76–82 (alleging that the map violates the separation of powers); *id.* ¶¶ 83–86 (alleging that the map violates equal protection); *id.* ¶¶ 87–93 (alleging that the map violates free speech and association); *id.* ¶¶ 94–97 (alleging that the map violates the free government guarantee). Plaintiffs therefore request as relief an order declaring the congressional map unlawful, enjoining its use, and prescribing procedures for adopting a new map. *Id.* at 26. Under Section 801.50(4m)'s terms, this action is plainly one that "challenge[s] the apportionment of any congressional . . . district."[2]

This Court has not previously had occasion to interpret Section 801.50 because it has regularly decided redistricting challenges on its original action docket. *See, e.g.*, *Clarke v. Wis. Elections Comm'n*, 2023 WI 70, 409 Wis. 2d 372, 374, 995 N.W.2d 779; *Johnson v. Wis. Elections Comm'n*, 2022 WI 91, 991 N.W.2d 704 (table); *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544,

[2] It makes no difference under the statute's terms that Plaintiffs challenge the entire congressional map rather than a single district. "'Any' means 'one, some, or all indiscriminately of whatever quantity.'" *In re A. P.*, 2019 WI App 18, ¶ 12, 386 Wis. 2d 557, 927 N.W.2d 560 (quoting *Any*, *Webster's Third New International Dictionary* (1993)).

548, 126 N.W.2d 551, 554 (1964). That docket, however, is discretionary. *See* Wis. Stat. § 809.70(3); *Hawkins v. Wis. Elections Comm'n*, 2020 WI 75, ¶ 5, 393 Wis. 2d 629, 948 N.W.2d 877. Section 809.70(3) thus contemplates that this Court may deny a petition for original action without shutting the courthouse doors completely. Here, Plaintiffs followed Wisconsin tradition by first presenting their claims to this Court. And, when the Court declined the petition, they followed Wisconsin law by taking their claims to Circuit Court.

The only argument against applying Section 801.50(4m) appears to be Justice Bradley's remark, dissenting from the Briefing Order, suggesting that Plaintiffs' action challenges "redistricting" rather than "reapportionment" and thus falls outside the statute's scope. Briefing Order at 6 (Bradley, J., dissenting). To distinguish between these terms, Justice Bradley pointed to dicta from *Jensen v. Wisconsin Elections Board*, in which the Court commented in a footnote that "[r]eapportionment is the allocation of seats in a legislative body where the district boundaries do not change but the number of members per district does (e.g., allocation of congressional seats among established districts, that is, the states)," while "redistricting is the drawing of new political boundaries." *Jensen v. Wis. Elections Bd.,* 2002 WI 13, ¶ 5 n.2, 249 Wis. 2d 706, 639 N.W.2d 537. *Id.* But *Jensen* did

not decide anything about Section 801.50(4m)—it was decided in 2002, nine years before the statutory enactment.

Respectfully, applying *Jensen*'s technical distinction to Section 801.50(4m) would not make sense. If that provision applies only to actions challenging "the allocation of congressional seats among . . . the states," there would never be an "action challeng[ing] the apportionment of any congressional . . . district" to which Section 801.50(4m) would properly apply. That is because under this narrow understanding of the term, apportionment for congressional seats is done solely at the federal level by Congress, *not* by states. *See* U.S. Const. art. I, § 2, cl. 3. If that reading were correct, then, there would never be a *state*-court action in Wisconsin challenging the "apportionment" of Wisconsin's congressional districts—only actions challenging Wisconsin's *redistricting* of its congressional map. Section 801.50(4m) should not be read so narrowly to effectively snuff it out of existence. *See State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 (statutes should be interpreted "to avoid absurd or unreasonable results").

That is particularly so because under a more natural understanding of "apportionment," the term encompasses *both* the "distribution of legislative seats among districts" (what *Jensen* calls "reapportionment") *and* the "division" of those seats into "proportionate shares" (what *Jensen* calls "redistricting").

Apportionment, *Black's Law Dictionary* (12th ed. 2024). Indeed, the terms are often used interchangeably, including by this Court. *See, e.g.*, *Clarke*, 2023 WI 79, ¶ 59 (describing redistricting issue as an "apportionment challenge"); *id.* ¶¶ 193, 209, 221, 233 (Bradley, J., dissenting) (using "apportionment" or "reapportionment" interchangeably with "redistricting"); *State ex rel. Reynolds,* 22 Wis. 2d at 548 (using "apportionment" to describe challenge to drawing of legislative districts).

To the extent *Jensen* can shed any light on Section 801.50(4m), it only reinforces the conclusion that the statute applies to this action. The *Jensen* Court declined to assume jurisdiction over the dispute because a parallel suit had already been docketed before a federal three-judge panel. *Jensen*, 2002 WI 13, ¶¶ 14, 22. The federal court, in turn, exercised jurisdiction under a federal statute that requires the convening of a three-judge panel to hear any action "challenging the constitutionality of . . . the *apportionment* of any statewide legislative body." 28 U.S.C. § 2284(a) (emphasis added). Though the *Jensen* Court believed the matter before it solely concerned "redistricting," not "reapportionment," 2002 WI 13, ¶¶ 1–3, 5 n.2, that distinction was not an obstacle to a federal panel hearing the matter under a federal statute that parallels Wis. Stat. § 801.50(4m).

In fact, federal three-judge panels regularly hear challenges to the configuration of congressional and state legislative districts

under 28 U.S.C. § 2284(a) without distinguishing between "apportionment" and "redistricting." *See, e.g.*, *Miss. State Conf. of NAACP v. State Bd. of Election Comm'rs*, 739 F. Supp. 3d 383 (S.D. Miss. 2024); *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018), *vacated and remanded*, 588 U.S. 684 (2019); *League of Women Voters of Mich. v. Johnson*, 352 F. Supp. 3d 777 (E.D. Mich. 2018), *rev'd and remanded*, No. 18-2383, 2018 WL 10096237 (6th Cir. Dec. 20, 2018); *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *vacated and remanded*, 585 U.S. 48 (2018); *Shapiro v. McManus*, 203 F. Supp. 3d 579 (D. Md. 2016); *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840 (E.D. Wis. 2012).

There is simply no reason to conclude that in enacting § 801.50(4m), the Wisconsin Legislature intended to exempt from the provision challenges such as this one alleging that Wisconsin's congressional districting map is unlawful.[3]

[3] Though legislative history is scant, public reporting suggests that the Wisconsin Legislature enacted § 801.50(4m) in 2011 in part to make it more difficult for plaintiffs to succeed in challenging its congressional and state legislative districting maps—which the newly-Republican controlled Legislature had just passed after the 2010 census—because plaintiffs would have to convince a panel of three judges, drawn from three circuit courts, instead of just a single judge. *See* Rich Kremer, *In push for new Wisconsin congressional map, liberal firms invoke process created by GOP*, WPR.org (Sept. 25, 2025), https://perma.cc/RSM8-K83X.

II. The Court should act promptly.

Plaintiffs respectfully request that the Court resolve this issue promptly. Even if the Court concludes that § 801.50(4m) does not apply, the normal venue rules under Wisconsin Rules of Civil Procedure would apply, and a single judge in Dane County Circuit Court can hear Plaintiffs' claims. But the lower court has already made clear that it will not advance this action until this Court decides the threshold issue of whether to appoint a three-judge panel. *See* Order Denying Request for Briefing Schedule at 2.

Time is of the essence because the August 2026 congressional primary elections are rapidly approaching. If Wisconsin's congressional map is unconstitutional, as Plaintiffs allege, it must be enjoined and replaced sufficiently far in advance of those elections to ensure time for the selection of a new map that comports with the Wisconsin Constitution. Defendants appear to agree on this point. *See* Defs.' Answer at 1 (explaining their "primary concern is to ensure . . . that the litigation does not disrupt or impair the proper, efficient, and effective administration of the 2026 election calendar").

If Plaintiffs do not secure relief before the 2026 elections, they will suffer irreparable harm—once the elections occur, there "can be no do-over." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (explaining courts "routinely" find irreparable injury when voting rights are at stake);

see Jacksonville Branch of NAACP v. City of Jacksonville, No. 22-13544, 2022 WL 16754389, at *5 (11th Cir. Nov. 7, 2022) (unpublished opinion) (declining to "require the residents of Jacksonville to live for the next four years in districts defined by a map that is substantially likely to be unconstitutional"); *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 587 F. Supp. 3d 1222, 1320 (N.D. Ga. 2022) (finding irreparable harm from "having to vote under" unlawful congressional and state legislative maps because the threatened injury "cannot be undone through any form of monetary or post-election relief"); *Montano v. Suffolk Cnty. Legislature*, 268 F. Supp. 2d 243, 261 (E.D.N.Y. 2003) (similar).

III. The lower court will have the power to grant Plaintiffs relief.

Plaintiffs respectfully disagree with Justice Bradley's contention in dissent that there are obstacles unrelated to Section 801.50(4m) that would prevent a lower court from adjudicating Plaintiffs' claim. Although these arguments appear to be outside the scope of the Court's Briefing Order, Plaintiffs respond briefly to address this misunderstanding.

This Court adopted the current congressional map based on the "least-change" criterion. *Johnson v. Wis. Elections Comm'n*, 2022 WI 14, ¶ 7, 400 Wis. 2d 626, 971 N.W.2d 402. But a year later, this Court expressly "overrule[d] any portions of *Johnson I*, *Johnson II*, and *Johnson III* that mandate a 'least change'

approach." *Clarke*, 2023 WI 79, ¶ 63. In doing so, the Court explained that the "least change" standard did not comport with "other requirements and considerations essential to the mapmaking process." *Id.* ¶¶ 62. The Court further concluded that *Johnson*'s "politically mindless" commitment to the least-change criterion violated the judiciary's duty to serve as a "politically neutral and independent institution." *Id.* ¶ 71. The Court held, "[w]e cannot allow a judicially-created metric, not derived from the constitutional text, to supersede the constitution." *Id.* ¶ 62.

The current congressional map thus rests on quicksand. And since the principle of vertical *stare decisis* requires lower courts to "faithfully apply the decisions" of the Wisconsin Supreme Court, the circuit court hearing this matter will be bound by *Clarke's* repudiation of *Johnson*. *Friends of Frame Park, U.A. v. City of Waukesha*, 2022 WI 57, ¶ 56, 403 Wis. 2d 1, 976 N.W.2d 263 (Bradley, J., concurring) (quoting Daniel R. Suhr & Kevin LeRoy, *The Past and the Present: Stare Decisis in Wisconsin Law*, 102 Marq. L. Rev. 839, 844–45 (2019)). Further, circuit courts have "all the powers . . . necessary to the full and complete jurisdiction of the causes and parties and the full and complete administration of justice." Wis. Stat. § 753.03; *see also* Wis. Const. art. VII, § 8 (circuit court jurisdiction covers "all matters" "[e]xcept as otherwise provided by law"). The full and complete administration

of justice in this action requires enjoining the use of Wisconsin's unlawful congressional map.

Nor does this Court's denial of Plaintiffs' petition to commence an original action deprive the lower court of jurisdiction. Because the decision to grant a petition for an original action is discretionary, the denial of a petition to commence an original action is not a decision on the merits of the action. *See Hawkins*, 2020 WI 75, ¶ 8 (declining petition for original action without "reach[ing] the merits of the issues raised in the petition"). Accordingly, "unless this [C]ourt elects to entertain" an original action "and exclude further proceedings below," "the jurisdiction must be in the circuit court to try such cases." *Petition of Heil,* 230 Wis. 428, 447, 284 N.W. 42, 50 (1938).

In any event, the issue of the scope of the circuit court's authority should be ruled on in the first instance *by the circuit court*. Permitting the issue to first develop below would ensure "adversarial testing" and allow this Court to benefit from any decisions by its "thoughtful colleagues" in circuit court before rendering a reasoned decision of its own. *Maslenjak v. United States*, 582 U.S. 335, 354 (2017) (Gorsuch, J., concurring in part and concurring in the judgment). Accordingly, this Court should follow the normal course and let this matter proceed below.

CONCLUSION

This Court should not allow the rights of Plaintiffs and other Wisconsin voters to drift endlessly in a fog of doubt. Plaintiffs are entitled to an efficient adjudication of the merits of their claims—in whatever forum this Court deems appropriate—in advance of the upcoming congressional elections. Accordingly, Plaintiffs respectfully request that this Court promptly issue an order on whether this action will be heard by a three-judge panel in a venue chosen by the Court or a single judge in Dane County Circuit Court.

Dated: October 9, 2025 Respectfully submitted,

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