

**IN THE SUPREME COURT OF WISCONSIN**

No. \_\_\_\_\_

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 CAPACITY AS MEMBERS OF THE WISCONSIN SENATE,

*Respondents.*

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**MOTION FOR SCHEDULING ORDER**

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Pursuant to Wis. Stat. § 809.14(1) and (2)<sup>1</sup>, the Petitioners, by their undersigned counsel, move this Honorable Court for a scheduling order as described below. The grounds of this motion are as follows:

### **INTRODUCTION**

1. As explained in the Petition for Original Action (“Petition”) and accompanying Memorandum of Law, Wisconsin’s current legislative districts are plainly unconstitutional.

2. Specifically, the legislative districts constitute an extreme partisan gerrymander that violates the rights of Wisconsin residents throughout the state, including the Petitioners, by: (1) violating the right of equal protection under the law as guaranteed by Article I, Section 1 of the Wisconsin Constitution; (2) retaliating against voters based upon their expression of political beliefs, and violating their associational rights in violation of Article I, Sections 3 and 4 of the Wisconsin Constitution; and (3) failing to “adhere[] to justice, moderation, temperance, frugality and virtue, ... [and] fundamental principles” in violation of Article I, Section 22 of the Wisconsin Constitution.” Pet. at ¶¶55-77, 93-121.

3. Moreover, the existing legislative districts violate the basic provision of the Wisconsin Constitution that legislative districts consist of “contiguous territory” because 55 of the existing assembly districts, and 21 of the current senate

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<sup>1</sup> See also Wis. Stat. § 809.63 (“When the supreme court takes jurisdiction of an appeal or other proceeding, the rules governing procedures in the court of appeals are applicable to proceedings in the supreme court unless otherwise ordered by the supreme court in a particular case.”).

districts, are noncontiguous and are instead made up of two or more pieces of detached territory. Wis. Const. art. IV, §§ 4 & 5; *see also State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 148, 53 N.W. 35, 57 (1892). Pet. at ¶¶78-92, 122-128.

4. Finally, the existing legislative districts proposed by the Legislature, vetoed by the Governor, and imposed by this Court also violate the separation of powers established and guaranteed by the Wisconsin Constitution, particularly the Governor's exclusive power to veto legislation and the Legislature's exclusive power to override such vetoes, as provided in Article V, Section 10. Pet. at ¶¶122-128.

#### **BASES OF MOTION**

5. Because the existing legislative districts violate the plain text of the Wisconsin Constitution, as well as the Constitution's mandate with respect to the basic provisions and structures of State government, they cannot lawfully be used in any future elections. This motion proposes various procedures that will enable this Court to promptly resolve this issue and guarantee that all future elections are conducted in accordance with constitutional mandates.

6. In light of this Court's dicta regarding the justiciability of partisan gerrymandering claims in *Johnson v. Wisconsin Elections Commission*, 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469 ("*Johnson I*"), a decision at the outset from this Court regarding whether certain language in that opinion, which addressed hypothetical claims that no party in that litigation brought or argued, is controlling and therefore whether Petitioners' partisan gerrymandering claims are justiciable,

would be in the interest of judicial economy and is a question only this Court can resolve. As explained in the Petition and accompanying Memorandum of Law, the *Johnson I* dicta were both advisory and, more importantly, inconsistent with the text, structure, and history of the Wisconsin Constitution. In that regard, even if the Court concluded the *Johnson I* discussion was more than nonbinding dicta, it is inapplicable and does not control Petitioners' claims and requested remedies here.

7. Following a finding that partisan gerrymandering claims are justiciable, the Court should appoint a referee pursuant to Wis. Stat. §§ 751.09 (“In actions where the supreme court has taken original jurisdiction, the court may refer issues of fact or damages to a circuit court or referee for determination”) and 805.06(1) (“A court in which an action is pending may appoint a referee who shall have such qualifications as the court deems appropriate.”). This Court has long recognized the appropriateness of using referees and other mechanisms to conduct proper fact-finding when required. *Johnson v. Wisconsin Elections Comm’n*, 2022 WI 19, ¶185, 401 Wis. 2d 198, 972 N.W.2d 559 (“*Johnson III*”) (Karofsky, J., dissenting) (“This court could have arranged for proper fact finding and examination of expert witnesses, either in front of all of the Justices or through a referee (sometimes referred to as a Special Master) under Wis. Stat. § 751.09.”). The referee should hear, on an expedited basis, the Parties' evidence demonstrating the Petitioners' claims that the current legislative districts are a partisan gerrymander that violate Article I, Sections 1, 3, 4, and 22 of the Wisconsin Constitution, and to report findings of fact to the Court, followed by briefing and argument from the

parties on the legal conclusions to be drawn from those factual findings. This is one way the Court could efficiently receive and consider evidence regarding the nature and extent of the partisan gerrymander that would assist with the Court's ultimate determination of those claims.

8. In addition, the Court should resolve either or both of Petitioners' largely legal claims that the existing legislative maps violate the Wisconsin Constitution's contiguity requirement and its separation of powers limitation. Resolving these questions would require minimal factual development to determine whether the legislative maps are constitutional. *Becker v. Dane Cnty.*, 2022 WI 63, ¶9, 403 Wis. 2d 424, 977 N.W.2d 390 (constitutionality under separation-of-powers principles is a question of law). The Court may therefore choose to answer these questions as soon as briefing has been completed.

### **RELIEF REQUESTED**

9. To ensure a timely and orderly hearing and disposition of this original action, to remedy the various constitutional infirmities raised in the Petition, and to ensure that future Wisconsin legislative elections are conducted within the bounds of the Wisconsin Constitution, the Petitioners respectfully request that this Honorable Court enter an order as follows:

- a. Establishing a schedule for responses to the Petition pursuant to Wis. Stat. § 809.70(2);
- b. Ordering that any response to the Petition fully address the following questions:

1. Are the Petitioners' partisan gerrymandering claims justiciable?
  2. Do the existing legislative maps violate the Wisconsin Constitution because their districts are not contiguous?
  3. Do the existing legislative maps violate the Wisconsin Constitution's separation of powers as asserted by the Petitioners?
  4. Are the Petitioners correct that a "least-change" standard should not apply to any potential remedy in this case and that the Court must assure itself that any remedy it imposes is politically neutral?
10. Enter a decision and order as soon as is practicable:
- a. Granting the Petition pursuant to Wis. Stat. § 809.70(3);
  - b. Accepting Section II through VII of the Petitioners' Memorandum of Law as their opening brief on the questions enumerated in paragraph 9.b., *supra*, or ordering such additional briefing as the Court may find appropriate;
  - c. Answering each of the questions enumerated in paragraph 9.b., *supra*, in the affirmative;
  - d. Appointing a referee pursuant to Wis. Stat. §§ 751.09 and 805.06 with instructions to hear, on an expedited basis, the Parties' evidence demonstrating the Petitioners' claims that the

current legislative districts are a partisan gerrymander that violate Article I, Sections 1, 3, 4, and 22 of the Wisconsin Constitution, and to report findings of fact to the Court, followed by briefing and argument from the parties on the legal conclusions to be drawn from those factual findings;

- e. Declaring the current Assembly and Senate maps unconstitutional in their entirety because they are comprised of largely noncontiguous districts and violate the Wisconsin Constitution's separation of powers limitation and enjoining them from being used in any future election (including the November 2024 election and any earlier special or recall elections that may occur).

11. In the alternative, should the Court agree with the Petitioners regarding the answers to the questions regarding contiguity or separation of powers (Paragraphs 9.b.2 or 3) and if the Court agrees with Petitioners regarding the appropriate remedial standard in this case (Paragraph 9.b.4), then, if the Court believes the calendar will not permit resolution of Petitioners' partisan gerrymandering claims by the deadline to have remedial maps in place<sup>2</sup>, the Court

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<sup>2</sup> The Petitioners respectfully suggest that this deadline is March 19, 2024. This deadline is based upon the statutory deadline by which the Wisconsin Elections Commission must send notice of the primary and general elections to county clerks. Wis. Stat. § 10.06(1)(f). In previous redistricting litigation, however, courts have ordered new legislative districts after this deadline. *See Johnson*, 2022 WI 19, ¶3 (adopting legislative districts on April 15, 2022); *see also Baldus v. Members of Wis. Gov't Accountability Bd.*, 862 F. Supp. 2d 860 (E.D. Wis. 2012) (adopting legislative districts on April 11, 2012). If the Court adopts the process outlined in paragraph 10.d, it would need to set

should accept proposed remedial maps from the parties for either (a) review and selection by the Court or (b) review and recommendation to this Court by a referee or special master appointed pursuant to Wis. Stat. §§ 751.09 and 805.06.

12. Issuing a writ *quo warranto* declaring the election of senators in November 2022 from unconstitutionally configured districts to be unlawful, with senators holding those seats being merely *de facto* officers, and ordering special elections in November 2024 for all odd-numbered state senate districts that would not otherwise occur until November 2026.

Dated this 2nd day of August, 2023.

By *Electronically signed by Daniel S. Lenz*

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a schedule that allows for full adjudication of the Petitioners' claims that the current maps are unconstitutional, followed by a remedial phase that would enable the Court to order new maps on or before March 19, 2024. Should the Court wish, once it has adopted a process, Petitioners can submit a more detailed proposed schedule.

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