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IN THE SUPREME COURT OF WISCONSIN

No. 2023AP1399

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; 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; BILLIE JOHNSON, CHRIS GOEBEL, ED PERKINS, ERIC O'KEEFE, JOE SANFELLIPO, TERRY MOULTON, ROBERT JENSEN, RON ZAHN, RUTH ELMER, AND RUTH STRECK,

Intervenors-Respondents.

PETITIONERS' RESPONSE TO MOTION TO DISMISS BY INTERVENOR-RESPONDENT WISCONSIN LEGISLATURE AND RESPONDENT SENATORS CABRAL-GUEVARA, HUTTON, JACQUE, JAGLER, JAMES, KAPENGA, LEMAHIEU, MARKLEIN, NASS, QUINN TOMCZYK, AND WANGGAARD

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INTRODUCTION

On October 20, 2023, after this Court exercised its original jurisdiction over two of Petitioners' claims, and while the parties were engaged in briefing the specific merits issues as ordered by this Court, Intervenor-Respondent the Wisconsin Legislature ("Legislature") and Respondent Senators Cabral-Guevara, Hutton, Jacque, Jagler, James, Kapenga, LeMahieu, Marklein, Nass, Quinn, Tomczyk, and Wanggaard (collectively, the "Republican Senators")[1] moved to dismiss the two claims this Court already had ruled it would hear on the merits. Intervenor-Respondents Johnson, Goebel, Perkins, O'Keefe, Sanfelippo, Moulton, Jensen, Zahn, Elmer, and Strecsk subsequently "joined" the motion by letter.

The motion to dismiss is procedurally improper where, as here, the Court already has asserted its jurisdiction over, and determined that it will entertain on the merits, the two claims the Legislature and Republican Senators seek to dismiss. Moreover, as the Legislature acknowledges, its arguments in support of the motion are addressed fully, and more properly, in its merits briefs. Finally, the Legislature's arguments regarding Petitioners' request for a writ *quo warranto* are, quite simply, wrong. The motion should be denied.

[1] Petitioner's Response Brief refers to these parties collectively as the "Legislature." Because this response addresses separate actions by these parties, they are referred to separately throughout.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioners filed their petition for an original action and accompanying memorandum of law on August 2, 2023. On August 15, this Court issued an order requiring the Respondents (and any other non-party *amici*) to respond to the petition no later than August 22, 2023.

The parties and the Legislature (which was not yet a party) complied. Most relevant here, the Republican Senators filed a brief in opposition to the petition, arguing that: (1) the issues raised in the petition were controlled by this Court's decisions in the *Johnson v. Wisconsin Elections Commission* litigation; (2) "Petitioners' action is an unduly delayed and impermissible collateral attack of this Court's final judgment in *Johnson*;" and (3) "There is no basis for Petitioners' request for a writ *quo warranto* or special elections." Rep. Sen. Br. in Opp'n to Pet., filed Aug. 22, 2023, 17-32. The Legislature, represented by some of the same attorneys, filed its own non-party brief in opposition to the petition, arguing that: (1) "Fidelity to precedent demands denial of the petition;" (2) "Laches bars Petitioners' claims;" and (3) Petitioners' claims amounted to an improper "collateral attack of a prior order of this Court." Leg. Br. in Opp'n to Pet., filed Aug. 22, 2023, 5-20. In other words, they raised then the same issues they raise again now in their motion to dismiss. The Legislature simultaneously moved to intervene in the case. Leg. Mot. to Intervene, filed Aug. 22, 2023.

On October 6, 2023, the Court issued an order granting the petition as to two issues: whether the existing legislative maps violate the Wisconsin Constitution's

requirement that districts consist of "contiguous territory" (Issue 4); and whether the existing maps violate the separation-of-powers doctrine (Issue 5). Order, 3 (Oct. 6, 2023). In its order, the Court noted the Legislature's and Republican Senators' arguments in opposition to the petition, including the arguments that "petitioners' claims are foreclosed by this court's decision in *Johnson III* and are an unduly delayed collateral attack on that decision." *Id.* at 1. The Court also granted the Legislature's motion to intervene, *id.* at 2, and set deadlines for*, inter alia*, merits briefing on four specific questions, with opening briefs due October 16 and responses due October 30, *id.* at 3.

Pursuant to that order, the parties filed their opening briefs on October 16. The Legislature and Republican Senators filed a joint brief on October 16, repeating the same arguments they made in their *amicus* briefs (many of which they raise in their motion to dismiss) opposing the Petition for an Original Action, that Petitioners' claims are barred by standing, laches, preclusion, and estoppel.[2] Leg. Br. 19-26, 41-42. They also repeated their earlier argument that this case is fully controlled by *Johnson* such that the Court is without ability to determine whether the current districts comply with the Constitution. *Id.* at 48-52, 54-57. Their brief further argues that Petitioners' claims are barred by operation of Wis. Stat. § 806.07 and that regardless, Petitioners fail to state a claim under the Uniform Declaratory Judgments Act. *Id.* at 49-52.

[2] The estoppel argument pertains to Intervenor-Petitioners, including the Atkinson intervenors and Governor Evers, not the Petitioners, and is also part of the merits briefing. Leg. Br. 24-26.

One week after filing their first brief on the merits of the claims over which this Court asserted original jurisdiction, the Legislature and Republican Senators filed a "motion to dismiss." The substantive arguments in that motion repeat the arguments raised in the same parties' October 16 merits brief, as well as in their *amicus* briefs opposing original jurisdiction. The movants variously request that the "case be dismissed," Mot. to Dismiss, 4, and that the "Petition should be dismissed," Mem. ISO Mot. to Dismiss, 35. The Johnson Intervenors joined the motion. Letter of Johnson Ints. Joining Mot. to Dismiss (Oct. 23, 2023).

ARGUMENT

The motion to dismiss should be denied for three reasons. First, it is procedurally improper and seeks relief this Court has already denied. Second, it fails for the reasons properly addressed in the parties' merits briefing. Third, this Court can, and should, properly issue a writ *quo warranto* upon a finding that the existing odd-numbered senate districts are unconstitutional.

I. The motion is procedurally improper.

Original actions are governed by Wis. Stat. § 809.70, which provides that, when a petition for an original action is pending, "[t]he court may deny the petition or may order the respondent to respond and may order oral argument on the question of taking original jurisdiction." Wis. Stat. § 809.70(2). The Court may then grant or deny the petition and, if it grants the petition, "may establish a schedule for pleading, briefing and submission with or without oral argument." *Id.*, § 809.70(3). The rule contemplates that, upon taking jurisdiction, the Court will consider the arguments

of the parties, which is what this Court did in its order of October 6 and what the Legislature and Republican Senators did (at least as an initial step) in presenting those arguments in their October 16 merits brief.

Moreover, the Court granted the petition (in part) with the Legislature's and the Republican Senators' arguments regarding laches, the availability of *quo warranto* relief, and the applicability of the *Johnson* litigation before it. As the October 6 order reflects, the Court considered those arguments before making its decision, yet granted the petition nevertheless, implicitly rejecting the notion that those arguments preclude the Court from considering the merits of the issues over which it has asserted its original jurisdiction. The motion's request that the Court "dismiss the petition" is even less coherent. Mem. ISO Mot. to Dismiss, 15. The petition has already been adjudicated—the Court indicated which parts would be granted and which would be denied. The movants provide no support for the relief their motion requests.

Instead, the movants suggest that they are entitled to an opportunity to raise defenses under Wis. Stat. § 802.06, Wisconsin's civil procedure rule governing defenses, which the movants claim applies to this case by operation of Wis. Stat. § 809.84. *Id.* at 9. As an initial matter, that premise is wrong. The relevant rule provides that "[a]n appeal to the court is governed by the rules of civil procedure as to all matters not covered by these rules unless the circumstances of the appeal or the context of the rule of civil procedure requires a contrary result." Wis. Stat. § 809.84. ***But this is not an appeal***. It is an original action pending before the Court.

And the context here *does* require a contrary result. The Court is providing opportunities for the parties, including intervenors, to present their arguments through briefing and oral argument. The current motion is an end-run around that order, and a way for the Legislature and Republican Senators to restate—for a third time—arguments first raised in their *amicus* briefs and again addressed in their merits briefing.

Even assuming *arguendo* that Wis. Stat. § 802.06 does apply, the motion is still improper. That statute requires such motions to be filed, at most, 45 days after service of the complaint. Wis. Stat. § 802.06(1)(a). Petitioners served the last respondent, Senator Jagler, on August 9, 2023, over 70 days before the motion was filed, Admis. of Serv., 15-16, (filed Aug. 14, 2023), meaning the motion is untimely. Moreover, the rules of civil procedure on which the Legislature relies require the Legislature to have attached such a motion to its original motion to intervene, which it failed to do. *See* Wis. Stat. § 803.09(3).

Most importantly, the Court has afforded, and the Legislature and the Republican Senators have taken advantage of, multiple opportunities to raise these defenses. Collectively, these parties have already filed at least three briefs[3] addressing these issues in various ways. To the extent that those issues have not been fully resolved, the Court will consider them in deciding this case. This motion,

[3] This does not include the briefs in support of the Legislature's motion to intervene, or the brief in support of the motion for recusal.

however, is not properly before the Court and should be summarily denied as procedurally improper.

II. Petitioners incorporate by reference their responses to the other arguments raised in the motion to dismiss.

Except for their argument regarding *quo warranto*, addressed in Section III, *infra*, the Legislature and Republican Senators address each of the other bases of their current motion (standing, laches, preclusion, estoppel, whether this Court may examine its prior injunction, and the role of the Uniform Declaratory Judgments Act) in their opening brief. As the Court ordered, Petitioners will respond to those arguments in their October 30 merits response brief. Rather than burden the Court with redundant briefing on the same issues, Petitioners incorporate those arguments by reference.

III. This Court can, and should, issue writs *quo warranto* and order special elections as a remedy in this case.

The movants raise one argument in support of their motion to dismiss that they did not raise in their October 16 merits brief: that Petitioners cannot obtain a writ *quo warranto* following a finding that the existing legislative districts are unconstitutional. Mem. ISO Mot. to Dismiss, 29-34. They do not explain why they were unable, or chose not, to include that argument in their October 16 brief, or why it should not be considered waived. *See W.H. Shenners Co. v. Delzer*, 169 Wis. 507, 508, 173 N.W. 209, 209 (1919). Regardless, the argument is incorrect as a matter of law. A writ *quo warranto* and subsequent special elections for odd-numbered senate

districts provide the only way for this Court to remedy the widespread constitutional infirmities of the existing maps.

Actions seeking writs *quo warranto* are how the state, and individual litigants, "test [the] ability [of an individual] to hold office." *State ex rel. Shroble v. Prusener*, 185 Wis. 2d 102, 108-09, 517 N.W.2d 169 (1994). The statute provides for judgment when an individual is "unlawfully holding or exercising any office." Wis. Stat. § 784.13. This Court also retains inherent authority under the Constitution to hear and determine this type of controversy. *State ex rel. Attorney General v. Messmore*, 14 Wis. 115, 119-20 (1861). The Legislature and Republican Senators cherry-pick language from the statutes in an attempt to limit its application, but *quo warranto* is not limited to circumstances in which the officeholder was fraudulently elected or forfeited their office. Mem. ISO Mot. to Dismiss, 31. For example, the Court has held that a writ is properly issued when a judge ceases to be qualified for their office because they are no longer an attorney of record in the state. *State v. Pierce*, 191 Wis. 1, 4-7, 209 N.W. 693 (1926). The Court has also held that contesting whether a village trustee and board member was properly appointed is a valid subject of a *quo warranto* action. *Henning v. Vill. of Waterford*, 78 Wis. 2d 181, 188, 253 N.W.2d 893 (1977).

Most directly, this Court has previously considered an action for a writ *quo warranto* in the redistricting context. In *State ex rel. Neacy v. City of Milwaukee*, a relator brought such an action, challenging the right of ward assessors to continue to hold office based on an allegation that a redistricting ordinance was void. 150

Wis. 616, 616-18, 138 N.W. 76 (1912) (syllabus). This Court ultimately ruled against the relator, but the opinion did not question whether such a writ could properly apply in the redistricting context. *Id.* at 618-20. This is consistent with other states, which consider and apply *quo warranto* in redistricting cases. *See State ex rel Landis v. Crandon*, 141 So. 177, 178 (Fla. 1932) (per curiam) (ordering ouster upon a finding that county redistricting was unconstitutional); *State v. Wilder*, 78 N.W. 83, 84 (Minn. 1899) (ordering ouster under writ of quo warranto following board of county commissioners redistricting).

Similarly, Petitioners' request for special elections to occur in 2024 for odd-numbered senate seats is well-grounded. The Legislature and Republican Senators cite only federal caselaw regarding the appropriateness of special elections as a remedy. Federal courts, of course, have specific requirements to follow in considering such a remedy. *Gjertsen v. Bd. of Election Comm'rs for City of Chi.*, 791 F.2d 472, 479 (7th Cir. 1986). While a federal court's decision to truncate the terms of state legislators raises federalism concerns, no such concerns arise with respect to state courts. Even federal courts, however, properly contemplate, and order, special elections as a potential remedy, and consider the impact of the alleged unconstitutional practice in making that determination. *Id.* One three-judge federal panel described the need for special elections as follows:

> Further, if it should be allowed to survive until 1968, the General Assembly—from January 1966 to January 1968—would be composed of a House of Delegates elected on one (a valid) scheme of apportionment with a Senate elected upon another (invalidated) plan. This, too, would be constitutionally unjustifiable.

Mann v. Davis, 238 F. Supp. 458, 460 (E.D. Va. 1964), *aff'd sub nom*. *Hughes v. WMCA. Inc*., 379 U.S. 694 (1965); *see also Petuskey v. Rampton*, 243 F. Supp. 365, 374 (D. Utah 1965) (requiring all Utah state senators to be elected at the upcoming election).

Other state supreme courts have ordered these types of elections in similar contexts. In 1966, in adopting a state reapportionment plan, the Supreme Court of Pennsylvania required all fifty state senate seats to be up at the next election and truncated the terms of the odd-numbered senators. *Butcher v. Bloom*, 216 A.2d 457, 459 (Pa. 1966) (per curiam). The Supreme Court of Alaska described the authority to require mid-term elections in redistricting cases to be "well established." *Egan v. Hammond*, 502 P.2d 856, 874 (Alaska 1972). Other states have followed suit. *In re Apportionment L. Appearing as S. J. Res. 1 E*, 414 So. 2d 1040, 1048 (Fla. 1982); *see generally Kelsh v. Jaeger*, 641 N.W.2d 100, 110 (N.D. 2002) ("When reapportionment results in a substantial constituency change, the constitutional requirement that a senator be elected from a district may justify truncating an incumbent senator's term to give the electorate in the newly drawn district an opportunity to select a senator from that district.")

The facts of this case justify this well-established remedy. Nearly two-thirds of the current state senate districts are noncontiguous, and all of them are the result of a violation of the Wisconsin Constitution's separation-of-powers doctrine. Ensuring that future districts comply with the Constitution while adhering to

traditional redistricting criteria and this Court's role as a neutral arbiter will require substantial changes to the senate districts. Permitting odd-numbered senators to nonetheless serve until January 2027 would mean that many voters will have been unable to vote for senators from constitutionally compliant districts for the better part of a decade. Moreover, it would pose a practical problem for devising a remedial map, as it would require attention to the residency of odd-numbered senators in configuring districts and assigning district numbers. Conversely, issuing the requested writs and ordering special elections is the only way that the Court can guarantee that all voters in Wisconsin will have the opportunity to elect senators from constitutionally drawn districts, avoid any concerns about "senate disenfranchisement," and promote representative democracy in the state.

The Legislature's and Republican Senators' additional objections are misplaced. Special elections and related relief are not necessarily warranted when (otherwise constitutional) reapportionment follows the decennial census because the senators serving at the time of such reapportionment were elected from constitutionally compliant districts. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 421 (2006) ("States operate under the legal fiction that their plans are constitutionally apportioned throughout a decade."). By contrast, the senate districts challenged in this case were unconstitutionally noncontiguous and unconstitutionally configured in violation of the Constitution's separation-of-powers limitations from the moment they were imposed and at the time of the senators' elections. And issuance of a writ *quo warranto* does not result in an

immediate special election. Rather, special elections are subject to specific rules that explicitly contemplate that such elections may be held concurrently with a general election. *See* Wis. Stat. §§ 8.50(1)(d), (2)(a). Petitioners' request that special elections coincide with the 2024 General Election significantly reduces the burden on the state and local governments.

CONCLUSION

For the reasons outlined above, the Court should deny the Motion to Dismiss.

Respectfully submitted this 30th day of October, 2023.

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(8g)(a)

I certify that, excluding those portions of the brief that are not to be included in the word count, the length of this brief is 2916 words.

Dated this 30th day of October, 2023.

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