STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 13

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

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION; MARGE BOSTELMANN, ANN S. JACOBS, DON M. MILLIS, ROBERT F. SPINDELL, JR., CARRIE RIEPL, 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.

Case No. 2025CV002432

Three-Judge Panel
Wis. Stat. §751.035

INTERVENOR-DEFENDANT WISCONSIN STATE LEGISLATURE'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

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INTRODUCTION

Plaintiffs' complaint challenges the constitutionality of an injunction issued by the Wisconsin Supreme Court. *See Johnson v. Wis. Elections Comm'n* (*Johnson II*), 2022 WI 14, ¶52, 400 Wis. 2d 626, 971 N.W.2d 402. Because their complaint implicates Wisconsin's congressional districts, Wisconsin law "required" convening this three-judge Court, *Bothfeld v. Wis. Elections Comm'n*, 2025 WI 53, 418 Wis. 2d 545, 27 N.W.3d 508, 510, for this Court to decide in the first instance Plaintiffs' "rather extraordinary plea" to have this Court declare the *Johnson II* injunction unconstitutional, *id.* at 511 (Hagedorn, J., concurring in part and dissenting in part). What happens next is plain: dismissal. Only the Wisconsin Supreme Court can vacate the *Johnson II* injunction. Plaintiffs, represented by the same counsel, said so themselves only months ago. In their words: "Because Petitioners bring purely state law claims against a map that was adopted by th[e] [Wisconsin Supreme] Court, no other court can provide Petitioners' requested relief." Pet. for an Original Action ¶98, *Bothfeld v. Wis. Elections Comm'n*, No. 2025AP996-OA (Wis. May 7, 2025). For that reason alone, the complaint should be dismissed.

Plaintiffs' complaint should also be dismissed because it is untimely. Myriad parties litigated the constitutionality of Wisconsin's congressional districts in the *Johnson* litigation four years ago. Plaintiffs could have intervened, as other voters and organizations did. But they sat out that action. The doctrine of laches bars Plaintiffs from unwinding the *Johnson* final judgment after their years of delay.

Plaintiffs' complaint should also be dismissed because it states no claim cognizable in Wisconsin courts. The Wisconsin Supreme Court already defined the limits of the judicial power in redistricting suits like this one: "The Wisconsin Constitution contains 'no plausible grant of authority' to the judiciary to determine whether maps are fair to the major parties and the task of redistricting is expressly assigned to the legislature." *Johnson v. Wis. Elections Comm'n* (*Johnson I*), 2021 WI 87, ¶52, 399 Wis. 2d 623, 967 N.W.2d 469; *accord id.* ¶86 (Hagedorn, J., concurring). Add to that the U.S. Constitution's requirement that "the Legislature" determines "[t]he Times, Places and Manner of holding Elections" for Congress. U.S. Const. art. I, §4, cl. 1. That includes prescribing congressional districts. Given that grant of authority to the Legislature, "state courts do not have free rein" and "may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections." *Moore v. Harper*, 600 U.S. 1, 34, 36 (2023). Perhaps for these reasons, the Wisconsin Supreme Court has denied requests to revisit *Johnson II*'s judgment regarding Wisconsin's congressional districts—*three times*. *See* Order, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Wis. Mar. 1, 2024) (denying motion for relief from *Johnson II* judgment); Order, *Felton v. Wis. Elections Comm'n*, No. 2025AP999-OA (Wis. June 25, 2025) (denying petition for original action); Order, *Bothfeld v. Wis. Elections Comm'n*, No. 2025AP996-OA (Wis. June 25, 2025) (same). That marks the end of the road for Plaintiffs.

There is no alternative avenue for relief here—not even Plaintiffs thought so until now. The complaint must be dismissed.

BACKGROUND

A. In November 2011, Wisconsin enacted 2011 Wisconsin Act 44, prescribing new congressional districts. A decade later following the 2020 census, the Legislature introduced new congressional redistricting legislation, which made few changes to the 2011 districts. *See* 2021 Senate Bill 622; *see also Johnson II*, 2022 WI 14, ¶14 (2021 legislation kept 93.5% of people in existing districts). The Governor vetoed that legislation. *See* Wis. Governor's Veto Message, 2021 Senate Bill 622 (Nov. 18, 2021).

Meanwhile, voters initiated an original action alleging that the 2011 districts were malapportioned, as revealed by the 2020 census. *Johnson I*, 2021 WI 87, ¶5. The Wisconsin Supreme Court granted the petition for an original action and, facing an impasse between the Legislature and the Governor over new redistricting legislation, commenced proceedings to remedy the *Johnson* Petitioners' malapportionment claims. *Id.* ¶¶5-6.

Two guardrails limited the *Johnson* proceedings. First, the Wisconsin Supreme Court said it would take a "least change" approach to the existing congressional districts: Acknowledging the Court had only "the power to provide a judicial remedy but not to legislate," the Court held its "judicial remedy should reflect the least change necessary for the maps to comport with relevant legal requirements" and "[u]s[e] the existing maps as a template." *Id.* ¶¶71-72 (plurality op.) (cleaned up); *accord id.* ¶85 (Hagedorn, J.,

concurring) ("It is appropriate for us to start with the laws currently on the books because they were passed in accordance with the constitutional process and reflect the policy choices the people made through their elected representatives. Our task is therefore rightly focused on making only necessary modifications … ." (footnote omitted)). That "least-change approach is nothing more than a convenient way to describe the judiciary's properly limited role in redistricting." *Id.* ¶72 (plurality op.); *accord id.* ¶85 (Hagedorn, J., concurring).[1] Second, the Court held it had no power to address claims that the districts were politically unfair: Courts "have no license to reallocate political power between the two major political parties, because no legal standards exist to limit and direct [the Court's] decisions." *Id.* ¶52 (cleaned up). "The Wisconsin Constitution contains 'no plausible grant of authority' to the judiciary to determine whether maps are fair to the major parties … ." *Id.*

The Wisconsin Supreme Court ultimately selected the Governor's proposed remedy. That injunction modified the existing congressional districts, enacted by 2011

[1] The Wisconsin Supreme Court later rejected a "least-change approach" in subsequent litigation challenging anew Wisconsin's Assembly and Senate districts but not the congressional districts. *Clarke v. Wis. Elections Comm'n*, 2023 WI 79, ¶¶61-63, 410 Wis. 2d 1, 998 N.W.2d 370. *Clarke* thus did not resolve whether the least-change approach remains appropriate for congressional districts, including to comply with the U.S. Constitution's Elections Clause. After all, when the least-change approach is simply "a convenient way" of describing the Wisconsin Constitution's limitations on the judicial power in redistricting cases, *Johnson I*, 2021 WI 87, ¶72 (plurality op.); *accord id.* ¶85 (Hagedorn, J., concurring), then abandoning that approach to redraw districts anew would "transgress the ordinary bounds of judicial review" and have the Court "arrogate to [itself] the power vested in state legislatures to regulate federal elections," *Moore*, 600 U.S. at 36.

Wisconsin Act 44, to the least extent necessary. *Johnson II*, 2022 WI 14, ¶¶13-19. Nearly 95% of Wisconsinites remained in their existing Act 44 congressional districts. *Id.* ¶14. Still today, that *Johnson II* injunction remains in place.

B. The Wisconsin Supreme Court has since declined to revisit that injunction three separate times. First in early 2024, the court denied a motion by *Johnson* intervenors—represented by the same counsel as Plaintiffs here—to reopen the *Johnson* litigation. *See* Order, *Johnson*, No. 2021AP1450-OA (Wis. Mar. 1, 2024). Then in 2025, the court denied a petition for a new original action that collaterally attacked the *Johnson II* injunction on grounds that districts were malapportioned. *See* Order, *Felton*, No. 2025AP999-OA (Wis. June 25, 2025). Then again in 2025, the court denied a petition for a new original action brought by Plaintiffs here, represented by the same counsel, that collaterally attacked the *Johnson II* injunction on grounds that districts were politically unfair. *See* Order, *Bothfeld*, No. 2025AP996-OA (Wis. June 25, 2025). In that proposed original action, Plaintiffs claimed that "[b]ecause Petitioners bring purely state law claims against a map that was adopted by th[e] [Wisconsin Supreme] Court, no other court can provide Petitioners' requested relief." Pet. for an Original Act ¶98, *Bothfeld*, No. 2025AP996-OA (Wis. May 7, 2025). Proposed intervenors similarly argued that because the Wisconsin Supreme Court "imposed the current congressional map in *Johnson II*, only th[at] Court has the authority to enjoin that map or otherwise alter the order that requires Respondents to hold elections

under the map." Mot. to Intervene by Wis. Bus. Leaders for Democracy et al. Ex.1 ¶16, *Bothfeld*, No. 2025AP996-OA (Wis. June 5, 2025).

C. Despite Plaintiffs' representations to the Wisconsin Supreme Court, Plaintiffs initiated this action in July 2025—more than 3 years after the *Johnson II* injunction, nearly 14 years after the enactment of 2011 Wisconsin Act 44, and after 3 failed attempts to convince the Wisconsin Supreme Court to revisit *Johnson II*. Their complaint challenges the political fairness of Wisconsin's congressional districts, alleges that they are an unconstitutional "partisan gerrymander" and violate "separation-of-powers principles." *E.g.*, Compl. ¶¶1-7. Plaintiffs named the Wisconsin Elections Commission, including its commissioners and administrator, as Defendants. But throughout Plaintiffs' complaint, they challenge the alleged fairness of the Legislature's 2011 redistricting legislation and the *Johnson II* injunction for perpetuating that alleged unfairness. *E.g.*, *id.* ¶¶8-12, 35-58, 66-75. The Legislature intervened and now moves to dismiss Plaintiffs' complaint as an impermissible collateral attack on a final judgment long ago issued by the Wisconsin Supreme Court.

LEGAL STANDARD

For this motion to dismiss, the Court accepts the complaint's factual allegations as true and takes "all reasonable inferences that may be drawn from those facts in favor of stating a claim." *Notz v. Everett Smith Grp., Ltd.*, 2009 WI 30, ¶15, 316 Wis. 2d 640, 764 N.W.2d 904; *see* Wis. Stat. §802.06(2)(a). But the court need not accept "legal conclusions"

or "unreasonable inferences" as true. *Morgan v. Pa. Gen. Ins. Co.*, 87 Wis. 2d 723, 731, 275 N.W.2d 660 (1979); *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693. Dismissal is appropriate when "it appears quite certain that no relief can be granted under any set of facts the plaintiffs might prove in support of their allegations." *Notz*, 2009 WI 30, ¶15. When Plaintiffs' complaint fails to state any claim for relief as a matter of law, the court must grant the motion to dismiss. *See League of Women Voters of Wis. v. Evers*, 2019 WI 75, ¶¶13, 42, 387 Wis. 2d 511, 929 N.W.2d 209 (ordering dismissal at the motion-to-dismiss stage when the Court held that plaintiffs' "interpretation of constitutional and statutory provisions" did not support claim for relief).

ARGUMENT

I. Plaintiffs Cannot Ask This Court to Set Aside or Declare Unconstitutional an Injunction Issued by the Wisconsin Supreme Court.

Plaintiffs' complaint must be dismissed because it asks this Court to sit as a court of review over the Wisconsin Supreme Court. Plaintiffs ask this Court to declare unconstitutional the Wisconsin Supreme Court's *Johnson II*'s final judgment and vacate its mandatory injunction prescribing Wisconsin's current congressional districts. But the Wisconsin Supreme Court issued that injunction with instructions that it was to remain in place "for all upcoming elections" and "until new maps are enacted into law or a court

otherwise directs." *Johnson II*, 2022 WI 14, ¶52. Three times, the Wisconsin Supreme Court has been asked to revisit that injunction. All three times, it has declined. *Supra* p.5.

Against that procedural history, Plaintiffs cannot now seek a declaration that the Wisconsin Supreme Court acted unconstitutionally and demand a new injunction demarcating new congressional districts to supersede *Johnson II*. *But see* Compl. p.26 ¶¶2-3. Plaintiffs said so themselves only months ago when they were before the Wisconsin Supreme Court. The same Plaintiffs, represented by the same counsel, filed a petition for an original action to challenge Wisconsin's congressional districts as gerrymandered. Pet. for an Original Action, *Bothfeld*, No. 2025AP996-OA (Wis. May 7, 2025). In their petition, Plaintiffs agreed that only the Wisconsin Supreme Court "can provide Petitioners' requested relief," *i.e.*, declare Wisconsin's current congressional districting map unconstitutional and enjoin its use. *See id.* ¶98 ("Because Petitioners bring purely state law claims against a map that was adopted by th[e] [Wisconsin Supreme] Court, no other court can provide Petitioners' requested relief."); *see also* Mot. to Intervene by Wis. Bus. Leaders for Democracy et al. Ex.1 ¶16, *Bothfeld*, No. 2025AP996-OA (Wis. June 5, 2025) (observing the Wisconsin Supreme Court "imposed the current congressional map in *Johnson II*," such that "only th[at] Court has the authority to enjoin that map or otherwise alter the order that requires Respondents to hold elections under the map"). The Wisconsin Supreme Court has since denied that petition for an original action. Order,

Bothfeld, No. 2025AP996-OA (Wis. June 25, 2025). By Plaintiffs' own logic, that marks the end of the road for their attempt to undo Wisconsin's existing congressional districts.

As Plaintiffs themselves said, neither this Court nor Defendants can simply ignore that binding and precedential injunction issued in *Johnson II*. *See Cline v. Whitaker*, 144 Wis. 439, 129 N.W. 400, 400-01 (1911) ("An injunctional order, within the power of the court, must be implicitly obeyed so long as it stands ... unless there is a want of jurisdiction."); *State ex rel. Fowler v. Cir. Ct. of Green Lake Cnty.*, 98 Wis. 143, 73 N.W. 788, 790 (1898) (same). The "sole remedy" to challenge the injunction is "by motion to vacate the injunction." *Fowler*, 73 N.W. at 790.

For injunctions entered by the Wisconsin Supreme Court specifically, Wisconsin law prescribes seeking reconsideration in that court—be it in a motion for reconsideration or some follow-on original action—not the circuit courts. *See* Wis. Stat. §809.64; *see also, e.g.*, *Clarke*, 2023 WI 79. With respect to these very congressional districts, Plaintiffs' same counsel tried those routes and failed. Order, *Bothfeld*, No. 2025AP996-OA (Wis. June 25, 2025); Order, *Johnson*, No. 2021AP1450-OA (Wis. Mar. 1, 2024). The *Johnson II* injunction therefore "must be obeyed while in existence." *Fowler*, 73 N.W. at 790. Whatever one might think about the wisdom of *Johnson II*, only the Wisconsin Supreme Court can entertain an action asking to vacate its own injunction. *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case."); *see also*

Madison Tchrs., Inc. v. Walker, 2013 WI 91, ¶16, 351 Wis. 2d 237, 839 N.W.2d 388 ("Article VII, Section 3 of the Wisconsin Constitution vests th[e] [Wisconsin Supreme Court] with superintending authority over all Wisconsin courts.").

II. Laches Bars Plaintiffs' Unduly Delayed Complaint.

The doctrine of laches bars Plaintiffs' complaint. Laches is a "question of law" and is an independent basis for dismissal. *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶12, 393 Wis. 2d 308, 946 N.W.2d 101. When "(1) a party unreasonably delays in bringing a claim; (2) a second party lacks knowledge that the first party would raise that claim; and (3) the second party is prejudiced by the delay," the doctrine of laches precludes the suit. *Id.* ¶12. In *Brennan*, for example, petitioners waited to challenge the Governor's line-item vetoes for the biennial budget until it had been in effect for over two years. *Id.* ¶¶9, 15. The Wisconsin Supreme Court held that petitioner's two-year delay was "unreasonable," *id.* ¶17, that respondents "had no advance knowledge or warning of this particular claim," *id.* ¶18, and that the delay prejudiced respondents in the "planning and management of state receipts and expenditures," *id.* ¶20; *see also Diehl v. Dunn*, 13 Wis. 2d 280, 287, 108 N.W.2d 519 (1961) (applying laches after three-year delay). Each element is likewise met here.

A. Unreasonable Delay

Nothing stopped Plaintiffs from participating in *Johnson* four years ago. The Court invited all conceivable intervenors to intervene at that time, presumably in view that

redistricting litigation would be a one-time event this decade, not *Jarndyce v. Jarndyce* litigation that never ends. *See* Order 3, *Johnson*, No. 2021AP1450-OA (Wis. Sept. 22, 2021) (inviting motions to intervene); Order 1-2, *Johnson*, No. 2021AP1450-OA (Wis. Oct. 14, 2021) (granting all motions to intervene). Plaintiffs' counsel represented a group of intervening voters. *See* Mot. to Intervene of Lisa Hunter et al., *Johnson*, No. 2021AP1450-OA (Wis. Oct. 6, 2021). Those voters, joined by various other parties in *Johnson*, claimed the Wisconsin Constitution required districts to pass a political fairness test. *See Johnson I*, 2021 WI 87, ¶2. Plaintiffs could have joined those arguments made by their same counsel and other Wisconsin voters. But they waited. They could have joined with the other voters, represented by their same counsel, who moved to reopen *Johnson* after the 2022 elections. But they waited. Or after the 2024 elections. But they waited. Only now, after years of delay and after repeated orders from the Wisconsin Supreme Court declining to revisit the congressional districts, Plaintiffs filed their complaint.

Plaintiffs' delay is calculated from the time they "knew or should have known" of their "potential claim." *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶21, 389 Wis. 2d 516, 936 N.W.2d 587. By Plaintiffs' own allegations, they knew or should have known of their potential partisan gerrymandering claims well over a decade ago with the passage of Act 44. (Compl. ¶¶37, 71; *see id.* ¶42.) ("Those [political] considerations were readily apparent in the congressional map."). They detail elections and events from 2011 following the enactment of Act 44. (*Id*. ¶¶43-45, 71.) They allege *Johnson II* simply perpetuated that

alleged unfairness. (*Id.* ¶¶11-12, 51, 75.) But Plaintiffs waited, even though their claims arise from alleged constitutional violations they say began 14 years ago with 2011 Wisconsin Act 44. (*See id*. ¶¶11-12, 51, 75.) As for their separation-of-powers claim, Plaintiffs knew or should have known of that claim four years ago with *Johnson I*'s adoption of the least-change approach, or no later than three-and-a-half years ago with *Johnson II*'s injunction ordering the present congressional districts. (*See id.* ¶¶50-51.) So why wait until now?

Plaintiffs do not even attempt to justify their delay. They claim *Clarke*'s overruling "least change" renders the current congressional map "wholly without a legal foundation." *Id.* ¶66. *But see supra* n.1. But that was more than two years ago. Voters—represented by Plaintiffs' same counsel—sought (unsuccessfully) a redraw of the congressional map only weeks after that decision. Order, *Johnson,* No. 2021AP1450-OA (Wis. Mar. 1, 2024). Where were Plaintiffs then?

Plaintiffs' timing cannot be reconciled with the normal course of election litigation. Election claims "must be brought expeditiously." *Trump v. Biden*, 2020 WI 91, ¶32, 394 Wis. 2d 629, 951 N.W.2d 568 (dismissing elections challenge on laches grounds). Courts do not "allow persons to gamble on the outcome of an election contest and then challenge it when dissatisfied with the results, especially when the same challenge could have been made before the public is put through the time and expense of the entire election process." *Id.* ¶11. And in redistricting litigation specifically, plaintiffs do not wait on years

of elections data to challenge years-old maps as unlawful. "[R]edistricting challenges are subject to the doctrine of laches because of the ten-year expiration date of electoral districts." *Chestnut v. Merrill*, 377 F. Supp. 3d 1308, 1314 (N.D. Ala. 2019).

Plaintiffs' lengthy delay is far more egregious than the two-year delay triggering laches in *Brennan*. *See* 2020 WI 69, ¶15. Here, the alleged partisan gerrymander occurred in 2011 with the passage of Act 44. And the alleged separation-of-powers violation occurred years ago with *Johnson*. As in *Brennan*, Plaintiffs' years-long delay in bringing this action is plainly "unreasonable." *See id.*, ¶17.

B. Lack of Knowledge

No party could have anticipated Plaintiffs' years-delayed claim in this Court—not even Plaintiffs themselves. Less than a year ago, Plaintiffs themselves, along with proposed intervenors, said that only the Wisconsin Supreme Court has the power to revisit its *Johnson* injunction. *Supra* Part I. The Wisconsin Supreme Court then declined that invitation—as well as another—to revisit the *Johnson* injunction. *See* Order, *Felton*, No. 2025AP999-OA (Wis. June 25, 2025); Order, *Bothfeld*, No. 2025AP996-OA (Wis. June 25, 2025). Who, then, could have anticipated that Plaintiffs would come to this Court and ask it to second-guess the Wisconsin Supreme Court? No party. There was no reason to believe another lawsuit was incoming. *See Brennan*, 2020 WI 69, ¶18 (finding "sufficient to satisfy this element of a laches defense" that "the respondents … had no advance knowledge or warning of this particular claim"); *accord Trump*, 2020 WI 91, ¶23.

C. Prejudice

Plaintiffs' delay also creates substantial prejudice. Everyone—voters, constituents, candidates, congressmembers, and election officials—are prejudiced by Plaintiffs' untimeliness. *See Trump*, 2020 WI 91, ¶24. If this case ends in a redistricting do-over as Plaintiffs hope, then the State will be required to redistrict again in only a few years' time following the 2030 census. *See Chestnut*, 377 F. Supp. 3d at 1317; *White v. Daniel*, 909 F.2d 99, 104 (4th Cir. 1990). That extra round of redistricting will come with substantial "costs and instability." *LULAC v. Perry*, 548 U.S. 399, 421 (2006) (plurality op.); *see also Reynolds v. Sims*, 377 U.S. 533, 583 (1964) ("Limitations on the frequency of reapportionment are justified by the need for stability and continuity … ."). Compounding that harm, "voters have come to know their districts and candidates, and will be confused by change." *Fouts v. Harris*, 88 F. Supp. 2d 1351, 1354 (S.D. Fla. 1999). A statewide redraw this far into the decade risks "voter confusion." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). And all the parties who already litigated *Johnson* and who already litigated subsequent attempts to re-open *Johnson* would "surely [be] placed 'in a less favorable position'" by Plaintiffs' delay—forced to re-litigate redistricting anew. *See Brennan*, 2020 WI 69, ¶¶24-25. Entertaining Plaintiffs' requested do-over, years after they sat out *Johnson*, would "transgress the ordinary bounds of judicial review." *Moore*, 600 U.S. at 36.

Because "equity aids the vigilant," this Court must reject Plaintiffs' "sleep[ing] on their rights" for years to bring this lawsuit. *Wren*, 2019 WI 110, ¶14.

III. Plaintiffs' Complaint Fails to State a Claim Upon Which Relief Can Be Granted.

A. The Wisconsin Constitution Contains "No Plausible Grant of Authority" to Adjudicate Plaintiffs' Gerrymandering Claims.

Plaintiffs contend that *Johnson II* perpetuated a partisan gerrymander originating with 2011 Wisconsin Act 44. Compl. ¶¶11, 51, 75. They contend that the gerrymander violates Article I, Sections 1, 3, 4, and 22 of the Wisconsin Constitution. *Id*. ¶¶83-97. Already in the *Johnson* original action, the Wisconsin Supreme Court passed upon and rejected such arguments. *Johnson I*, 2021 WI 87, ¶¶52-63, 65. Plaintiffs cannot now relitigate what the Wisconsin Supreme Court already decided.

From the start, *Johnson* intervening parties argued that the existing districts were politically unfair and "ask[ed] [the Court] to redraw the maps to allocate districts equally between th[e] dominant parties." *Id.* ¶2. The Court invited briefing addressing specifically whether "the partisan makeup of districts [is] a valid factor" to consider as part of a redistricting remedy. *Id.* ¶7.

The Court's conclusions are binding here. The Court concluded: "We hold … the partisan makeup of districts does not implicate any justiciable or cognizable right." *Id.* ¶8 (plurality op.); *accord id.* ¶82 n.4 (Hagedorn, J., concurring). The Court found no "right to partisan fairness in Article I, Sections 1, 3, 4, or 22 of the Wisconsin Constitution." *Id.* ¶53 (majority op.). The Court concluded the Wisconsin Constitution affords the Court "no license to reallocate political power between the two major political parties." *Id.* ¶52.

"Adjudicating claims of 'too much' partisanship" would unconstitutionally "recast this court as a policymaking body rather than a law-declaring one." *Id.* The Court held that "[t]he Wisconsin Constitution contains 'no plausible grant of authority' to the judiciary to determine whether maps are fair to the major parties." *Id.* The Court found "no legal standards discernable in the Constitution for" deciding "what constitutes a 'fair' map." *Id.* ¶44.

1. As for Plaintiffs' specific claims here, the Court held Article I, Section 1 "has nothing to say about partisan gerrymanders," *id.* ¶55; Article I, Sections 3 and 4 "do not inform redistricting challenges," *id.* ¶59; and Article I, Section 22 does not provide "an open invitation to the judiciary" to "fabricate a legal standard of partisan 'fairness,'" *id.* ¶62. "To construe Article I, Sections 1, 3, 4, or 22 as a reservoir of additional [redistricting] requirements," the Court held, "would violate axiomatic principles of [constitutional] interpretation, while plunging this court into the political thicket lurking beyond its constitutional boundaries." *Id.* ¶63 (citation omitted). Those parts of the Wisconsin Constitution remain unchanged.

2. Plaintiffs' separation-of-powers claim fares no better. *See* Compl. ¶¶76-82. Plaintiffs claim the congressional map is unlawful because the Wisconsin Supreme Court "abdicated" its obligation to "exercise its independent judgment" when it "committed to selecting a map that made the 'least change' to the 2011 map." *Id.* ¶¶10-11. The Wisconsin Supreme Court, Plaintiffs contend, "improperly substituted the partisan judgment that

prevailed in the 2011 political process for its own." *Id.* ¶80. In other words, courts cannot defer to prior plans. By this logic, any judicial remedy in the redistricting context requires redrawing districts from scratch. *But see, e.g.*, *Perry v. Perez*, 565 U.S. 388, 393 (2012) (per curiam) (courts "should take guidance from the State's recently enacted plan"); *White v. Weiser*, 412 U.S. 783, 795 (1973) (courts "should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary'"). Plaintiffs have it exactly backwards.

The approach in *Johnson*, "implementing only those remedies necessary to resolve constitutional … deficiencies," reflects "the judiciary's properly limited role in redistricting." *Johnson I*, 2021 WI 87, ¶72 (plurality op.); *accord id.* ¶85 (Hagedorn, J., concurring) ("A least-change approach is the most consistent, neutral, and appropriate use of our limited judicial power to remedy the constitutional violations … ."). While the Wisconsin Supreme Court relaxed those remedial rules in subsequent litigation regarding only the State's Assembly and Senate districts, *supra* n.1, the court simultaneously *refused* to do so for the congressional districts, Order, *Johnson*, No. 2021AP1450-OA (Wis. Mar. 1, 2024). Still, were state courts to "[t]read[] further than necessary to remedy … legal deficiencies" for congressional districts, they would "intrude upon the constitutional prerogatives of the political branches." *Johnson I*, 2021 WI 87, ¶64 (majority op.). Meddling with congressional district lines more than necessary would transform courts into "no more than a super-legislature," *Flynn v. Dep't of Admin.*,

216 Wis. 2d 521, 528-29, 576 N.W.2d 245 (1998), usurping the Legislature's constitutionally assigned duty to redistrict and implicating the federal Elections Clause. *Infra* Part III.B. When, as the Wisconsin Supreme Court explained, the least-change approach is simply "a convenient way" of describing the Wisconsin Constitution's limitations on the judicial power in redistricting cases, *Johnson I*, 2021 WI 87, ¶72 (plurality op.); *accord id.* ¶85 (Hagedorn, J., concurring), then abandoning that approach to redraw congressional districts anew would "transgress the ordinary bounds of judicial review" and have the Court "arrogate to [itself] the power vested in state legislatures to regulate federal elections," *Moore*, 600 U.S. at 36.

* * *

Plaintiffs' complaint can be dismissed for failure to state a claim. The Wisconsin Supreme Court already decided as much.

B. Adjudicating Plaintiffs' Claims Would Transgress the Elections Clause.

Finally, Plaintiffs' complaint can be dismissed as violative of the Elections Clause. Courts do not have "free rein" to redistrict congressional districts anew. *Moore*, 600 U.S. at 34. The U.S. Constitution instead tasks "the Legislature" specifically with congressional redistricting. U.S. Const. art. I, §4, cl. 1. Applied here, the Legislature redistricted in 2011. *See* 2011 Wis. Act 44 (codified at Wis. Stat. §§3.11-3.18). Act 44 was challenged and upheld in federal court, *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 853-54 (E.D. Wis. 2012) (three-judge court), and used in the ensuing five congressional

elections. Then in 2021, the census showed those districts were malapportioned. With the Legislature and the Governor at an impasse over new districts, this Court remedied voters' malapportionment claims by making only slight adjustments to existing lines. *Johnson II*, 2022 WI 14, ¶52. With that injunction, the Court did not itself redistrict anew as though it were "the Legislature" tasked with redistricting in the U.S. Constitution. U.S. Const. art. I, §4, cl.1. Rather, the Court issued an injunction with the effect of moving "the fewest number of people into new districts." *Johnson II*, 2022 WI 14, ¶19. For when a state court is put in the unsavory position of adjusting districts, it "follow[s] the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature." *Branch v. Smith*, 538 U.S. 254, 274 (2003) (cleaned up); *see White*, 412 U.S. at 795 (courts "honor state policies in the context of congressional reapportionment"). To do more would assume legislative power, not "judicial power." Wis. Const. art. VII, §2; *see Johnson I*, 2021 WI 87, ¶¶71-72 (plurality op.); *id.* ¶85 (Hagedorn, J., concurring). Redistricting is "an inherently … legislative—not judicial—task." *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶10, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam); *see Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 7 (2024).

Against that procedural history, there is nothing left for this Court to do. Plaintiffs' request that this Court redistrict anew to strike a new political balance across Wisconsin's congressional districts is an invitation to transgress the normal bounds of judicial review

three times over. It invites this Court to declare invalid an injunction that only the Wisconsin Supreme Court can vacate. *Supra* Part I. It invites this Court to entertain a challenge that is unduly delayed by any measure, contrary to even the most liberal application of the doctrine of laches. *Supra* Part II. And it invites this Court to exercise a power that the Wisconsin Supreme Court has held the Wisconsin Constitution does not confer on its courts: the power to decide what is politically fair in districting. *Supra* Part III.A.1. For any one of these reasons, entertaining Plaintiffs' request for new congressional districts would "transgress the ordinary bounds of judicial review," "arrogate … power vested in state legislatures to regulate federal elections," and run afoul of the federal Elections Clause. *Moore*, 600 U.S at 36; *accord id.* at 38 (Kavanaugh, J., concurring) (same).

CONCLUSION

This Court should grant the Legislature's Motion to Dismiss the complaint.

Dated: January 12, 2026

Respectfully submitted,

Electronically signed by Matthew M. Fernholz

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