STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

WISCONSIN BUSINESS LEADERS FOR DEMOCRACY, et al.,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION, et al.,

Defendants,

and

BILLIE JOHNSON, et al.,

Intervenors-Defendants.

Case No.: 2025CV2252
Case Code: 30701
Declaratory Judgment

PLAINTIFFS' COMBINED BRIEF IN OPPOSITION TO INTERVENORS-DEFENDANTS' MOTIONS TO DISMISS

Table of Contents

Table of Authorities

Cases

Statutes and Constitutional Provisions

Other Authorities

Introduction

Wisconsin's Constitution, through the promises of Equal Protection and Free Government, prohibits drawing district lines in ways that disadvantage certain groups of voters relative to others. Wis. Const. art. I, §§ 1, 22. Where district lines are deliberately and effectively drawn to suppress competition, voters in artificially uncompetitive districts (other than the incumbent officials themselves) are disadvantaged. Their votes are devalued because they have a diminished likelihood of proving decisive. Voters' representation is also impaired because legislators elected from these districts are less accountable and responsive to their constituents. Voters in Wisconsin have a right to vote grounded in and protected by article III of the Wisconsin Constitution.

The Wisconsin Supreme Court adopted the state's eight current congressional districts in March 2022 by making the "least changes" to congressional districts the Wisconsin State Legislature created in 2011 that they intended to protect incumbents and suppress electoral competition. Through this action, Plaintiffs challenge the current districts, which retain their intentional uncompetitiveness. Three Intervenors—but not the original defendant, the Wisconsin Elections Commission (WEC)—have moved to dismiss this action on four grounds:[1] (1) this Court lacks the

[1] This brief refers to the Intervenors-Defendants Congressmen Glen Grothman, et al.'s Memorandum of Law in Support of Motion to Dismiss (Dkt. 193) as "Cong. Br."; to the Johnson Intervenors' Memorandum in Support of Motion to Dismiss (Dkt. 191) as "Johnson Br."; and to the Intervenor-Defendant Wisconsin State Legislature's Memorandum in Support of Its Motion to Dismiss (Dkt. 188) as "Leg. Br." This brief refers to the three groups of Intervenors-Defendants collectively as "Intervenors." Citations in this brief to pages in the Intervenors' respective briefs are to the page numbers that appear in the file-stamped header at the top of each brief.

authority to invalidate districts adopted by the Wisconsin Supreme Court; (2) Plaintiffs fail to state a claim upon which this Court can grant relief; (3) Plaintiffs unreasonably delayed in bringing this action and it is barred by the doctrine of laches; and (4) the U.S. Supreme Court's decision in *Moore v. Harper* bars Plaintiffs' claims. As demonstrated below, these arguments lack merit, and the Court should deny the motions to dismiss.

Allegations in Plaintiffs' First Amended Complaint[2]

The Plaintiffs

The eight individual Plaintiffs are citizens and qualified Wisconsin voters; the ninth, Plaintiff James Lyerly, will be eligible to vote in at least one Wisconsin election in 2026. (Compl. ¶¶16-33) At least one Plaintiff resides in each of Wisconsin's congressional districts[3] (with two Plaintiffs, Johansen and Verma, residing in Wisconsin's Third Congressional District), including districts rendered unnecessarily uncompetitive by the deliberate design of Wisconsin's congressional map. (*Id.* ¶¶24, 27, 32) Each individual Plaintiff intends to vote, at their current residence, in the 2026 and future congressional elections. All allege that Wisconsin's current anti-

[2] This brief refers to the operative complaint, Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief, Dkt. 184 (filed January 8, 2026), as "Complaint" or "Compl."

[3] The following individual Plaintiffs reside in the following congressional districts: Scott, First (Dkt. 184, Compl. ¶25); Baker, Second (*id.* ¶26); Johansen and Verma, Third (*id.* ¶¶26, 32); Buff, Fourth (*id.* ¶26); Suhr, Fifth (*id.* ¶29); Lloyd, Sixth (*id.* ¶30); Stencil, Seventh (*id.* ¶31); Lyerly, Eighth (*id.* ¶33). Plaintiff Lyerly, a minor until September 2026, is represented in this action by his Court-appointed guardian ad litem, Attorney Rachel E. Snyder. (*See* Dkt. 197, Order Appointing Guardian Ad Litem (Jan. 20, 2026).)

competitive gerrymander effectively disenfranchises them in congressional elections, violating their constitutional rights and causing them harm. (*Id.* ¶¶24-33)

Plaintiff Wisconsin Business Leaders for Democracy (WBLD) is a bipartisan, unincorporated association of business leaders headquartered in Glendale, Wisconsin. (*Id.* ¶16) WBLD is dedicated to helping ensure equitable access to voting; non-partisan, transparent election policy and administration; and unbiased representation. (*Id.*) Increasing competitiveness in the political system is a core principle that WBLD supports and acts to implement through public education, policy advocacy, and democracy-focused litigation. (*Id.* ¶17) WBLD as an association and its members as individuals are harmed by Wisconsin's anti-competitive gerrymander, which makes recruiting talent to Wisconsin businesses (and to membership and activism with WBLD) more difficult. (*Id.* ¶21) WBLD and its members are further harmed by the anti-competitive gerrymander of Wisconsin's congressional districts because it removes incentives for members of Congress to address obstacles to economic growth. In addition, by effectively disenfranchising many Wisconsin voters in congressional elections, the anti-competitive gerrymander undermines WBLD's commitment to free, fair, and regular elections, in which every citizen has equitable access to exercise their right to vote, thus impairing WBLD's interests and rendering its actions less effective. (*Id.* ¶22)

No Plaintiff was a party to *Johnson v. WEC*, the original action in which the Wisconsin Supreme Court adopted the congressional districts that Plaintiffs now

challenge as an anti-competitive gerrymander. 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402 (*Johnson II*).

Wisconsin's Current Congressional Districts

Following each decennial census, Wisconsin must adopt new congressional districts. *See* U.S. Const. art. I, §§ 1-2; *Johnson II*, 2022 WI 14, ¶1. After the 2020 Census, the Wisconsin Legislature passed a bill drawing new congressional districts, which the Governor vetoed. In March 2022, the Wisconsin Supreme Court broke the impasse and adopted the eight congressional districts currently in effect. *See Johnson II*, 2022 WI 14. In adopting that congressional map, the supreme court relied primarily on a "least change" criterion it had adopted in an earlier opinion in the same case. *See id.* ¶¶7, 11-15 & n.7, 19, 25; *Johnson v. WEC,* 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469 (*Johnson I*). Although the supreme court has since repudiated the "least change" approach, *see Clarke v. WEC*, 2023 WI 79, ¶63, 410 Wis. 2d 1, 998 N.W.2d 370, because the current districts are the product of the supreme court's application of that approach, the relevant context for assessing their constitutionality includes the prior redistricting cycle, specifically, 2011 Wisconsin Act 44.

Wisconsin's 2011 congressional map intentionally enacted an anti-competitive gerrymander.

In 2011, incumbent members of Wisconsin's delegation to the U.S. House of Representatives—five Republicans and three Democrats—worked together to update the boundaries of Wisconsin's eight congressional districts after the 2010 decennial census. The Governor's office and both chambers of the Legislature were then under

Republican control. This meant that Republican officeholders had wide latitude in establishing new district maps for Wisconsin's state legislature and its congressional districts. Yet legislative leaders deferred to their congressional counterparts on the details of Wisconsin's 2011 congressional map. (Compl. ¶¶55-59)

Then-Representative Paul Ryan's office took the lead on drawing that new congressional map. His staff solicited information from all members of Wisconsin's delegation to the U.S. House of Representatives, including what changes each member would like implemented. This was, as a federal court later found, "a significantly more bipartisan process" than was used to draw Wisconsin's 2011 state legislative maps. *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 854 (E.D. Wis. 2012). For the congressional map, the line-drawer incorporated "all of the feedback (not just the Republican comments)," including the "preferences" of the three Democrats in the delegation. *Id.* The line-drawer also "avoided putting incumbents together in the same district, and he did not flip districts from majority-Democrat to majority-Republican or vice versa." *Id.* The changes to district boundaries in Wisconsin's 2011 congressional map intentionally made districts less competitive. That is, the changes to the boundaries deliberately insulated each incumbent from electoral competition. (Compl. ¶¶60-64)

On August 9, 2011, Governor Walker signed into law 2011 Wis. Act 44, the congressional map drawn by Representative Ryan's office and adopted by the Wisconsin Legislature. Congressional races over the ensuing decade were, as intended, highly uncompetitive. The median margin of victory in these races never

dropped below twenty percentage points in any election. In 2016, the median margin of victory spiked to well above thirty percentage points. Only a single congressional race over Act 44's entire lifespan (District 3 in 2020) was decided by fewer than ten percentage points. This level of uncompetitiveness would not have arisen from a neutral line-drawing process that did not aim to suppress competition. Maps created through such a process would both have been more competitive overall than Act 44 and included more individually competitive districts. In the decade after Wisconsin's 2011 congressional map was adopted, no incumbent lost a U.S. House of Representatives race in Wisconsin. (Compl. ¶63)

The supreme court's use of the "least change" approach in *Johnson II*, which kept 94.5% of all Wisconsinites in the congressional districts they occupied under 2011 Wisconsin Act 44, necessarily perpetuated the essential features—and the primary flaws—of the 2011 congressional map, including its intentional and effective effort to suppress competition. (*Id.* ¶64) At no time since *Johnson II* has the Legislature revisited Wisconsin's congressional map. The congressional map adopted in *Johnson II* remains in place to this day.

Plaintiffs' Anti-Competitive Gerrymandering Claims

An anti-competitive gerrymander occurs when elected officials work in concert to draw district lines to suppress electoral competition, thereby benefiting incumbent politicians to the detriment of voters. The essence of anti-competitive gerrymandering is that it yields lower levels of competition than would arise under a neutral map not crafted to protect officeholders. Candidates prevail by larger margins, fewer districts

are competitive, and less legislative turnover occurs, undermining core democratic values of accountability and responsiveness. (*Id.* ¶8)

This claim of anti-competitive gerrymandering is distinct from a partisan gerrymandering claim in terms of how liability is determined, who is harmed, and how a violation is remedied. (*Id.* ¶9) Partisan gerrymandering is commonly defined as "draw[ing] district lines to 'pack' and 'crack' voters likely to support the disfavored party," thus unfairly boosting the number of seats won by the line-drawing party. *Rucho v. Common Cause*, 588 U.S. 684, 730 (2019) (Kagan, J., dissenting). An anti-competitive gerrymandering claim is similarly distinct from a racial gerrymandering claim, which asserts that "race was improperly used in the drawing of the boundaries of one or more specific electoral districts." *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 263 (2015) (emphasis removed).

Wisconsin's current congressional plan perpetuated Act 44's intent to sharply and unnecessarily suppress competition in the map overall and in its constituent districts, and the plan achieved that result. Across the sixteen races held under the plan in the 2022 and 2024 elections, the median margin of victory has been close to thirty percentage points, a margin far exceeding any threshold for competitiveness. Only one district (District 3) has seen races decided by fewer than ten percentage points. Moreover, the level of competition would be significantly higher if a neutral line-drawing process that did not aim to suppress competition had been employed. Compared to maps created through such a process, Wisconsin's current congressional

plan is a stark outlier. Seven of the eight specific districts in the plan are outliers as well in their relative lack of competition. (Compl. ¶11)

Plaintiffs allege three separate claims for relief:

- Count I, which alleges that the anti-competitive gerrymander of Wisconsin's congressional districts violates Plaintiffs' rights to equal protection and additional inherent rights guaranteed in article I, section 1 of the Wisconsin Constitution. (*Id.* ¶¶84-91)
- Count II, which alleges that the anti-competitive gerrymander of Wisconsin's congressional districts violates the promise of free government in article I, section 22 of the Wisconsin Constitution. (*Id.* ¶¶92-99)
- Count III, which alleges that the anti-competitive gerrymander of Wisconsin's congressional districts violates the right to vote of WBLD's members and the individual Plaintiffs guaranteed in the Wisconsin Constitution. (*Id.* ¶¶100-06)

Plaintiffs further allege the Wisconsin Constitution must provide, and does provide, a remedy for the harm caused to them and other Wisconsin voters by the anti-competitive gerrymandering of Wisconsin's congressional districts. Wis. Const. art. I, § 9. (Compl. ¶14)

Procedural History

Plaintiffs commenced this action by filing their Complaint for Declaratory and Injunctive Relief and summons on July 7, 2025. (Dkt. 9) On July 10, 2025, the Clerk of Courts for Dane County notified the Clerk of the Wisconsin Supreme Court of Plaintiffs' filing of the summons and complaint in this action, in accordance with Wis. Stat. § 801.50(4m). (Dkt. 12) On September 25, 2025, after receiving notice of the pendency of this action under Wis. Stat. § 801.50(4m), the Wisconsin Supreme Court ordered briefing on the issue of "whether WBLD's 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)." (Dkt. 30 at 2) After receiving briefing on that issue from the current parties to this action, on November 25, 2025, the supreme court issued an order answering the question in the affirmative and appointing to a three-judge panel the three circuit court judges before whom this action is now pending. (Dkt. 40 at 3-4) In the same order, the supreme court designated venue in Dane County for all hearings and filings. (*Id.* at 5)

Three non-parties—the Wisconsin State Legislature, Republican congressmen who currently represent six challenged congressional districts and individual voters residing in their districts, and the group of individual voters who filed the Petition for Original Action in *Johnson v. WEC*—moved to intervene as defendants. (Dkt. 42, 50, 69) Plaintiffs did not oppose those motions (Dkt. 73), and the Court granted them (Dkt. 76, 77, 79). Following a scheduling conference, the Court set a briefing schedule for Intervenors' motions to dismiss. (Dkt. 108)

On January 8, 2026, Plaintiffs filed their First Amended Complaint, which is now the operative complaint in the case. (Dkt. 184) On January 15, each Intervenor separately filed motions to dismiss. (Dkt. 187-88, 190-95) Plaintiffs file this combined brief in response. (*See* Dkt. 108, ¶3)

Legal Standards

A. Relevant Wisconsin Constitution provisions.

Wisconsin Constitution's begins with a Declaration of Rights, the first provision of which provides: "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of

happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed." Wis. Const. art. I, § 1.

A later provision states: "The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles." *Id.* art. I, § 22.

Article III addresses suffrage and, in concert with the Wisconsin Constitution as a whole, guarantees the right to vote. *See, e.g.*, *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 128 N.W. 1041, 1046 (1910) ("[T]he right to vote … is guaranteed both by the Bill of Rights, and the exclusive instrument of voting power contained in section 1, art. 3, of the Constitution, and by the fundamentally declared purpose of government; and the express and implied inhibitions of class legislation, as well.").

B. Motion to dismiss standard.

When reviewing a motion to dismiss, a court "accept[s] as true all facts well-pleaded in the Complaint and the reasonable inferences therefrom." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693. The court "construe[s] th[e] facts and inferences in the light most favorable to the plaintiff." *Pagoudis v. Keidl*, 2023 WI 27, ¶45, 406 Wis. 2d 542, 988 N.W.2d 606 (Ziegler, C.J., concurring) (citing *Preston v. Meriter Hosp., Inc.*, 2005 WI 122, ¶13, 284 Wis. 2d 264, 700 N.W.2d 158) (punctuation omitted). And the court "cannot add facts in the process of construing a Complaint." *Data Key Partners*, 2014 WI 86, ¶19. To survive a motion to dismiss, a plaintiff need only allege facts that "plausibly suggest they are entitled to relief." *State ex rel. Kaul v. Prehn*, 2022 WI 50, ¶10, 402 Wis. 2d 539, 976 N.W.2d 821 (quoting *Data Key Partners*, 2014 WI 86, ¶31).

Argument

I. This Court has authority to adjudicate whether the current congressional districts violate the Wisconsin Constitution.

All three Intervenors assert that this Court, as an inferior tribunal, lacks authority to hold the current congressional districts unconstitutional because our state supreme court adopted them in *Johnson II*. (*See* Cong. Br. 18-25; Johnson Br. 8-9; Leg. Br. 13-15.) In support, Intervenors advance two overarching theories. ***First***, they label Plaintiffs' action an impermissible "collateral attack" on the *Johnson II* judgment and invoke various preclusion doctrines that purportedly bar such an action. ***Second***, they argue that the Wisconsin Supreme Court's superintending role automatically prevents ***any*** inferior court from addressing ***any*** issue over which the court might exercise its discretionary superintending power. As shown below, neither argument withstands scrutiny.

The authorities Intervenors cite for preclusion are wholly inapplicable here: all involve cases where a plaintiff seeks to litigate a claim or an issue resolved in a previous case that the plaintiff ***litigated*** in the previous case. As stated earlier, no Plaintiff here was a party to the *Johnson* litigation. Moreover, the anti-competitive gerrymandering claims at issue here were not brought by any party in *Johnson*; were not before the supreme court in *Johnson*; and were never the subject of any analysis or ruling in *Johnson*. Plaintiffs' claims here cannot be precluded by *Johnson* because no Plaintiff or claim in this action was before the supreme court in *Johnson*.

Intervenors' structural argument fares no better as Intervenors cite no Wisconsin authority—and Plaintiffs' counsel are aware of none—holding that a

remedial holding of the Wisconsin Supreme Court is impervious to subsequent challenge on ***different*** legal theories and for ***different*** legal injuries alleged by ***different*** plaintiffs. The state supreme court's entry of judgment in an action does not ossify Wisconsin law with respect to anything that touches that judgment, forbidding lower courts from adjudicating novel claims by new litigants asserting legal grounds not previously raised or considered.

A. Intervenors' preclusion doctrine arguments fail.

1. Intervenors' preclusion arguments fail because Plaintiffs were not parties in *Johnson* and their claims were neither alleged nor adjudicated in *Johnson*.

All three Intervenors advance the same basic preclusion argument: that Plaintiffs' anti-competitive gerrymandering claims constitute a "collateral attack" on the *Johnson II* judgment beyond the reach of this Court. (Johnson Br. 8) That argument fails: ***parties*** to lawsuits cannot ordinarily challenge final judgments rendered in those actions, but Plaintiffs were ***not parties*** to the *Johnson* litigation.

Wisconsin law could not be clearer: "a judgment is binding on ***the parties*** and may not be attacked in a collateral action unless it was procured by fraud." *In re Brianca M.W.*, 2007 WI 30, ¶28, 299 Wis. 2d 637, 728 N.W.2d 652 (cleaned up) (emphasis added). Indeed, Plaintiffs' claims here are not even a collateral attack because they have been raised in "a direct proceeding prescribed by law." *Id.* ¶27 (quoting *Zrimsek v. Am. Auto. Ins. Co.*, 8 Wis. 2d 1, 3, 98 N.W.2d 383 (1959)). Intervenors' authorities on preclusion —all of which involve a party bound by a judgment attempting indirectly to have it set it aside—are simply inapposite.

Intervenors cite *Tietsworth v. Harley-Davidson, Inc.*, for the proposition that lower courts have "no power to vacate or set [ ] aside" a judgment of [the Wisconsin Supreme] Court," 2007 WI 97, ¶50, 303 Wis. 2d 94, 735 N.W.2d 418 (citations omitted), or to do anything that "conflict[s] with the expressed or implied mandate of the appellate court," *id.* ¶32. (Johnson Br. 9; *see* Cong. Br. 14-17) But *Tietsworth* involved "second bite at the apple" claims brought by a plaintiff whose fraud claims the supreme court had dismissed three years before. 2007 WI 97, ¶¶3-14. The mandate in the earlier appeal stated, "'[t]he decision of the Court of Appeals is reversed.'" *Id.* ¶15. Though that mandate did not include remand to the circuit court, the plaintiff moved the circuit court to reopen the case so that he could amend his complaint to assert three new claims. *Id.* ¶¶15, 17. After the circuit court (correctly) held that it lacked authority to reopen the case in light of the supreme court's entry of final judgment, the court of appeals reversed, holding that the circuit court had discretion "on remand" to resolve matters left open by the supreme court. *Id.* ¶20. When Harley-Davidson appealed, the supreme court held that

> in the absence of a remand order in the mandate line or some other clear directive from the appellate court ultimately deciding the appeal, a circuit court has no authority to reopen the case for an amended complaint after an appellate court has affirmed the dismissal of the complaint in its entirety on the merits.

Id. ¶2. Accordingly, the plaintiff's procedural options after the initial supreme court ruling were limited; if he wanted to return to the circuit court, he "should have filed a motion under Wis. Stat. § (Rule) 809.14 to clarify the effect of our mandate or a motion for reconsideration under Wis. Stat. § (Rule) 809.64." *Id.* ¶48.

The present action differs from *Tietsworth* in ways that render its preclusion holding inapplicable. Plaintiffs here do not seek to reopen a case, clarify a mandate in a case in which they were parties, or get "another 'kick at the cat.'" *Id.* ¶51. They have not yet had an opportunity to adjudicate their claims before any court. *Tietsworth* does not preclude that opportunity now. The various other authorities Intervenors cite as support for preclusion suffer from the same defect: they involve the same parties seeking to reopen issues subject to a prior, final judgement which they themselves litigated and lost.[4] Unlike Intervenors' authorities, Plaintiffs were not "parties or privies" to the *Johnson II* action or judgment.[5] The rule against collateral attacks on judgments does not apply here.

[4] All other authorities Intervenors collectively cite to support their argument that Plaintiffs cannot assert novel claims before an inferior court are inapposite, as they invariably involve the ***same*** parties reasserting the ***same*** claims subsequent to a final determination as to those claims. *See State v. Lira*, 2021 WI 81, ¶23, 399 Wis. 2d 419, 966 N.W.2d 605 (same parties); *In re Brianca M.W.*, 2007 WI 30, ¶¶3-6 (mother attempted to re-litigate the termination of her parental rights over her son—rights she had lost in a prior, final judgment—via a subsequent proceeding seeking to terminate her parental rights over her daughter); *Hoan v. J. Co.*, 241 Wis. 483, 485, 6 N.W.2d 185, 186 (1942) (same parties); *Cline v. Whitaker*, 144 Wis. 439, 129 N.W. 400, 400 (1911) (criminal contempt for "willful disobedience" of an injunction bound appellant until "set aside in some proper proceeding to that end"); *Chicago, M. & St. P. Ry. Co.*, 101 Wis. 166, 76 N.W. 329, 329 (1898) ("the judgment of this court is final upon ***the rights of the parties***" (emphasis added)).

[5] Intervenors assert merely that other "parties represented by Plaintiffs' same counsel and others" were parties to *Johnson* (Leg. Br. 10)—a fact insufficient to establish Plaintiffs here are privies with parties in *Johnson*.

2. The *proposed* complaint that some Plaintiffs here attached to a motion to intervene in an unsuccessful original action neither "admitted" that circuit courts lack authority to hold the congressional map unconstitutional nor waives that argument here.

Perhaps recognizing the weakness of their preclusion argument, both the Legislature and Johnson Petitioners argue that Plaintiffs are bound by a purported concession in a case where some of them attempted to file a complaint in intervention. (*See* Johnson Br. 8; Leg. Br. 13-14; *see also* Johnson Br. 3-4 & n.2.) Last year, a different group of Wisconsinites filed a challenge to the congressional maps. *See Bothfeld v. WEC*, 2025AP996-OA (Wis. 2025). Several Plaintiffs here filed a motion seeking to intervene in the event the *Bothfeld* petition was granted.[6] As required by Wis. Stat. § 803.09(3), they attached as an exhibit to their motion to intervene a ***proposed*** complaint alleging their anti-competitive gerrymandering claims. (Dkt. 194, Exh. 1) In declining to hear the *Bothfeld* Petition for Original Action, the supreme court also denied as moot the motion to intervene. (That ruling, issued June 25, 2025, is reflected on the online docket.) Intervenors' efforts to harp on the never-accepted complaint are built on false premises and fail.

Under Wisconsin law, an admission made in a court filing—a judicial admission—cannot be a statement of law, only one of fact. *Kuzmic v. Kreutzman*, 100 Wis. 2d 48, 51-52, 301 N.W.2d 266 (Ct. App. 1980) ("[I]n order for a statement to constitute a judicial admission, it must be clear, deliberate and unequivocal, and it

[6] The online docket for the *Bothfeld* original action proceeding can be accessed at https://wscca.wicourts.gov/appealHistory.xsl?caseNo=2025AP000996&cacheId=E3BA63DC83CD2AA8E6CF9D198B8189B3&recordCount=1&offset=0&linkOnlyToForm=false&sortDirection=DESC (last accessed January 29, 2026).

must be a statement of fact rather than an opinion."). The rule extends to arguments of counsel made in briefs submitted to the court. *See Fletcher v. Eagle River Mem'l Hosp., Inc.*, 156 Wis. 2d 165, 172, 178-80, 456 N.W.2d 788 (1990) (reversing circuit court judgment based on argument of counsel in pre-trial brief on issue of law that circuit court erroneously deemed a judicial admission). The *Fletcher* court rejected the very "admission" argument Intervenors advance here:

> If the question of whether a party is acting "under color of state law" is a question of law to be decided by the courts, it would be intolerable to foreclose the rights of parties by permitting their counsel to make declarations of law that would bind the courts, or counsel subsequently, to the possible detriment of their clients or to the detriment of the legal process.

Id. at 180. The allegation in the proposed complaint submitted in *Bothfeld*, like the supposed "concession" of the plaintiff's counsel in a pre-trial brief in *Fletcher*, was not a statement of fact, but one of opinion. It cannot form the basis of an admission, and it does not have that effect here.

B. Intervenors' unified court system-based structural arguments misapprehend the nature of the supreme court's superintending authority, which does not preclude the circuit court's consideration of the claims before it nor require dismissal.

The Wisconsin Supreme Court's superintending authority does not preclude this Court from considering Plaintiffs' claims, as that very court has instructed this one to do so. That the supreme court retains supervisory authority over the entire judicial system in no way means that this authority fully eclipses inferior courts' role in adjudicating any claim over which the supreme court ***might*** legitimately exercise its supervisory role but has not. Indeed, were that the case, lower courts would never

decide any controversies at all. No sources Intervenors cite show that superintending authority functions as Intervenors insist.[7]

Rather, as the supreme court has indicated, "[its] superintending authority is invoked 'to implement procedural rules not specifically required by the Constitution or the [statute]' as a remedy for a violation of recognized rights." *State v. Arberry*, 2018 WI 7, ¶22 n.11, 379 Wis. 2d 254, 905 N.W.2d 832 (internal quotation and citation omitted); *see State v. Buchanan*, 2013 WI 31, ¶14, 346 Wis. 2d 735, 828 N.W.2d 847 ("A supervisory writ is an extraordinary remedy to prevent a court from refusing to perform, or from violating, its plain duty."); *State ex rel. Fourth Nat'l Bank of Philadelphia v. Johnson*, 103 Wis. 591, 79 N.W. 1081, 1087 (1899) (elaborating the meaning of "'superintending control over all inferior courts' [as a power] not to be exercised upon light occasion, or when other and ordinary remedies are sufficient, but to be wisely used for the benefit of any citizen when an inferior court either refuses to act within its jurisdiction, or acts beyond its jurisdiction to the serious prejudice of the citizen"). This Court has neither refused to perform its plain duty nor acted beyond its jurisdiction; the ordinary course of this litigation has been adequate, appropriate, and in accord with both the statutory mandate and the supreme court's own order instructing this Court to hear the matter. *WBLD v. WEC*, 2025 WI 52, at 5, 418 Wis. 2d 515, 27 N.W.3d 522 (acting "pursuant to Wis. Stat. § 751.035").

---

[7] *Madison Tchrs., Inc. v. Walker*, 2013 WI 91, ¶16, 351 Wis. 2d 237, 839 N.W.2d 388 (rehearsing the constitutional basis for the supreme court's superintending authority but failing to show that this authority is occlusive of all other courts' role in considering constitutional claims); *Att'y Gen. v. Blossom*, 1 Wis. 317, 326 (1853) (affirming the textual basis for the proposition that the Wisconsin Supreme Court is supreme according to the constitution).

Nor does the Congressmen's novel non-delegation argument have purchase. They contort the holding of a 150-year-old case, *Van Slyke v. Trempeleau Cnty. Farmers' Mut. Fire Ins. Co.*, 39 Wis. 390 (1876), to argue that this Court's consideration of Plaintiffs' claims would transgress the principle that the Wisconsin Supreme Court "may not transfer or delegate its supreme judicial authority over the Wisconsin State Courts to any other court or body even if the Court wanted to." (Cong. Br. 9-10) Yet *Van Slyke* invalidated a Wisconsin statute conferring quasi-judicial authority on ***non-judicial*** officers (court commissioners); it did ***not*** hold that the state constitution bars inferior courts from considering novel constitutional claims. *Van Slyke* at 392. *Accord State ex rel. Universal Processing Servs. of Wis., LLC. v. Cir. Ct. of Milwaukee Cnty.*, 2017 WI 26, ¶76, 374 Wis. 2d 26, 892 N.W.2d 267.

1. Intervenors' authorities do nothing to undermine this Court's authority to adjudicate Plaintiffs' claims.

Intervenors rely on several cases to contend that this Court's position within the structure of Wisconsin's unified court system deprives it of power to adjudicate Plaintiffs' claims. Again, those cases do not support their argument.

All three Intervenors cite *Cook v. Cook*, 208 Wis. 2d 166, 560 N.W.2d 246 (1997), the seminal opinion delineating the role of Wisconsin's unified court of appeals, to support their structural preclusion argument. (Cong. Br. 14; Johnson Br. 8; Leg. Br. 15) But that opinion has no bearing here. There, the supreme court considered "whether the court of appeals may overrule, modify or withdraw language from one of its published decisions," and held that it may not. *Cook*, 208 Wis. 2d, ¶¶41, 55. In rendering that decision, the court noted that it "is the only state court

with the power to overrule, modify or withdraw language from a previous supreme court case." *Id.* ¶51 (cited in Cong. Br. 14; Johnson Br. 8; Leg. Br. 15). But Plaintiffs do not ask this Court to "overrule, modify or withdraw language" from *Johnson II*. Rather, they ask this Court to hold that a remedy the supreme court put in place four years ago (in the form of Wisconsin's eight congressional districts) to remedy other litigants' constitutional rights now operates to violate ***their own*** constitutional rights. *Cook* is inapposite.

The Congressmen also place great emphasis on *Gabler v. Crime Victims Rights Board*, 2017 WI 67, 376 Wis. 2d 147, 897 N.W.2d 384, to support their preclusion argument. (Cong. Br. 15, 17) But *Gabler* is a separation-of-powers case that addresses the constraints against one branch of state government (the Executive) encroaching on the power of another (the Judiciary). *Gabler* framed the issue before it as: "May an executive agency, acting pursuant to authority delegated by the legislature, review a Wisconsin court's exercise of discretion, declare its application of the law to be in error, and then sanction the judge for making a decision the agency disfavors?" 2017 WI 67, ¶36. The supreme court answered that question "unequivocally no." *Id.* That's the holding. It is unrelated to the issue Intervenors present in their briefs of whether a circuit court may entertain Plaintiffs' constitutional challenge to the congressional district maps, a question free of any "collision between branches." *Id.* ¶11. And it has nothing to do with the arguments here that this Court—a circuit court—infringes on the Wisconsin Supreme Court's power by adjudicating claims challenging the congressional districts that the supreme court adopted as a remedy in *Johnson II*.

The Congressmen's entire argument for *Gabler*'s relevance here is premised on a hypothetical discussion about judicial review that arose in "[a]n exchange during oral argument in this case" that the supreme court commented "highlights the untenable scenarios that could arise if we accept the Board's characterization of the scope of its authority." *Id.* ¶45. Indeed, that is the only paragraph of *Gabler* that the Congressmen cite. (*See* Cong. Br. 15, 17.) In reflecting on that hypothetical, the supreme court observed that to allow the Board to potentially discipline sitting Justices for violating victims' rights could potentially necessitate Justices needing to appeal a Board decision under Chapter 227, which could lead to a circuit court and a court of appeals reviewing the supreme court's decision. *Gabler*, 2017 WI 67, ¶45. As the supreme court observed, were such a hypothetical situation to arise, it would put the lower courts in the "position of reviewing the Wisconsin Supreme Court's interpretation of the law," and "[s]ubjecting this court's decisions to ***review*** by a circuit court would obviously interfere with our duties and responsibilities as Wisconsin's court of last resort." *Id.* (emphasis added) (citing Wis. Const. art. VII, § 3(2), which provides that "[t]he supreme court has ***appellate jurisdiction*** over all courts" (emphasis added)).

That hypothetical discussion of the supreme court's powers of appellate review is irrelevant here. This action arose in the circuit court, not in an administrative proceeding, and this Court is not sitting in review of any other court's ruling. Its jurisdiction is not appellate in nature, and any ruling it renders in this case is not in

review of a decision by the supreme court—but is subject to appellate review in that court. *Gabler* is inapposite.[8]

2. Both *Johnson II* and the legislation requiring this Court to adjudicate Plaintiffs' claims demonstrate this Court's constitutional authority to do so.

The Intervenors' structural arguments that this Court lacks authority to adjudicate this case are contrary to the actions and express statements of every branch of Wisconsin government.

First, both the Legislative and Executive branches of government endorse the constitutionality of circuit courts adjudicating challenges to congressional districts adopted by the Wisconsin Supreme Court. The Legislature and Governor Walker's enactment of 2011 Wis. Act. 39, which included the provisions codified at Wis. Stat. §§ 751.035(1) and 801.50(4m) requiring circuit courts to adjudicate redistricting actions, placed this action before this Court. Their respective decisions to pass and sign that legislation demonstrate the Legislature's and Executive's recognition that the Wisconsin Supreme Court is not the sole court in Wisconsin's unified court system that can invalidate existing districts, regardless of how they became law. Taken together, §§ 801.50(4m) and 751.035(1) require that this Court—the circuit court—must adjudicate Plaintiffs' challenge to the existing districts. The Legislature and

[8] As are Intervenors' other cases. (*See* Cong. Br. 13, citing *Coulee Cath. Schs. v. LIRC*, 2009 WI 88, ¶57, 320 Wis. 2d 275, 768 N.W.2d 868, for proposition that Wisconsin's Constitution "positions the Supreme Court atop the State's judicial system, with all other courts in the State falling below it.") *Coulee* is a Free Exercise case addressing the scope of judicial review of administrative decisions. *Id.* ¶31. The paragraph of *Coulee* to which the Congressmen cite says nothing more than that "[t]he authoritative, and usually final, indicator of the meaning of a [constitutional] provision is the text—the actual words used." *Id.* ¶57. The case itself has no bearing on this Court's authority to adjudicate Plaintiffs' claims.

Governor are presumed to have been aware when they enacted Act 39 that federal courts in Wisconsin had adjudicated redistricting claims for many preceding decades. *See, e.g., Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶103, 327 Wis. 2d 572, 786 N.W.2d 177 ("The legislature is presumed to be aware of existing laws and the courts' interpretations of those laws when it enacts a statute."); *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶9, 249 Wis. 2d 706, 639 N.W.2d 537 (noting that "redistricting combatants have either sought or ended up in federal court following both the 1980 census and the 1990 census"). Whether despite that history or because of it, they agreed to enshrine in Wisconsin law that circuit courts would, in the first instance, adjudicate the constitutionality of existing districts, and that any appeal of the circuit court's ruling "may" be reviewed by the Wisconsin Supreme Court. Wis. Stat. § 751.035(3). Obviously, if the Wisconsin Supreme Court "may" review a circuit court's ruling that could, among other things, adopt new state legislative and congressional districts, then as part of that review, the Wisconsin Supreme Court also could adopt new districts. And yet, knowing that possibility, the Legislature and Governor still decided that any redistricting challenge to any such districts ***must*** be adjudicated by a panel of circuit court judges. Presumably, the Legislature, Governor, and their legal advisors considered Act 39, including the provisions codified in §§ 801.50(4m) and 751.035, constitutional when adopted. *See, e.g.*, *State v. Cole*, 2003 WI 112, ¶11, 264 Wis. 2d 520, 665 N.W.2d 328 ("Generally, legislative enactments are entitled to a presumption of constitutionality.").

Second, *Johnson II* refutes the notion that only the Wisconsin Supreme Court may adjudicate the constitutionality of the congressional districts it adopted. As the Legislature notes in its brief, the *Johnson II* court ordered that the current congressional map be adopted, go into effect, and be in place for all elections "until new maps are enacted into law or a court directs otherwise." (Leg. Br. 13) It is notable that the supreme court used the very specific, express phrase "until … ***a*** court otherwise directs," ***not*** "until … ***this*** Court otherwise directs" in that particular directive. *Johnson II*, 2022 WI 14, ¶52 (emphases added). Like the Legislature and the Governor when they adopted Act 39, the supreme court, when it issued *Johnson II*, was aware that in previous decades, from the 1980s through the 2000 redistricting cycle, federal district courts in Wisconsin had adopted new maps, and that federal courts retain the power to enjoin state legislative and congressional district maps—even those adopted by a state's highest court—when they are held to violate federal law. *See Johnson v. WEC*, No. 2021AP1450-OA, Order at 4, 7 & n.7 (Wis. Sept. 22, 2021)[9] (Grassl Bradley, J., concurring) (stating "this court has punted its responsibilities to the federal courts in the past" and identifying federal court decisions in the 1980s, 1990s, and 2000s adjudicating redistricting cases). If the Wisconsin Supreme Court had intended to say that only ***it*** had the power to invalidate the districts adopted in *Johnson II*, it would have said so. *Tietsworth*, 2007 WI 7, ¶¶43-44 (quoting its prior mandate and observing, "[i]f we had wanted to allow the trial court to take further action, we would have specified as much in the mandate or

[9] Attached as Exhibit C to Declaration of Jeffrey A. Mandell (Mandell Declaration).

by clear directive in the text of the opinion"). After all, in *Johnson II*, the Justices used the phrase "this court" ***79 times*** to refer to itself, yet used the phrase "a court" only seven times, and when it once meant to refer to itself using that phrase, it merely appended the word "we" (as in, "how we as a court decided to proceed"). 2022 WI 14, ¶11. As the *Tietsworth* court stated, if the *Johnson II* Court had intended to use the term "this Court" in its penultimate ruling about which courts have the authority to "otherwise direct[]" whether the congressional districts it adopted remain in effect, it knew how to say so and could have. It did not. It meant what it said, and what it said is that "***a***" court—which includes ***this*** Court—may "otherwise direct[]" whether the current congressional districts remain in effect. And if the circuit court should grant such relief, in full accordance with the mandate in *Johnson II*, it would be acting entirely within its constitutional role. Wis. Const. art. VII, § 8 ("Except as otherwise provided by law, the circuit court shall have original jurisdiction in all matters civil and criminal within this state .... The circuit court may issue all writs necessary in aid of its jurisdiction.").

Given this aspect of the *Johnson II* mandate, Intervenors' repeated and puzzling suggestion that this Court must disregard the supreme court's equitable injunction to issue relief in this case is particularly incoherent. (Leg. Br. 14, 15) Simply put, the relief Plaintiffs seek, and this Court's consideration of their claims, in no way resembles the flaunting of court orders in the cases they cite. *See Cline v. Whitaker*, 144 Wis. 439, 129 N.W. 400, 401 (1911) ("the person enjoined disobeys at his peril"; "the willful violation of [a court's] order was a criminal contempt"); *State*

ex rel. Fowler v. Cir. Ct. of Green Lake Cnty., 98 Wis. 143, 73 N.W. 788, 790 (1898) (violation of an "injunctional order" binding upon litigants resulted in criminal contempt).; *see also Tavern League of Wis., Inc. v. Palm,* 2021 WI 33, ¶37, 396 Wis. 2d 434, 957 N.W.2d 261 (Hagedorn, J., concurring) ("[I]f stare decisis is to have any import at all in our legal system, it surely must apply when a court has told a specific party that certain conduct is unlawful, and that party does the very same thing again under the same circumstances.").

There is one final nail to hammer into the coffin of Intervenors' structural argument that this Court lacks authority to adjudicate Plaintiffs' claims. All legislative acts are presumed constitutional unless a party challenging the constitutionality of a statute can carry their "heavy burden" of proving that the statute is unconstitutional "beyond a reasonable doubt." *Cole*, 2003 WI 112, ¶24. ("It is insufficient to merely establish doubt as to an act's constitutionality .... If any doubt remains, this court must uphold the statute as constitutional." (internal quotation marks and citation omitted)). But no party to this action argues that §§ 801.50(4m) and 751.035(1), and specifically their combined mandate that circuit courts adjudicate ***all*** redistricting challenges—without exception or caveat—are unconstitutional. That, obviously, is an argument that the Legislature itself—having adopted the very statute that gives this Court the power to adjudicate Plaintiffs' redistricting claims—cannot make here; it effectively forfeited that argument by adopting the statute in the first place. No other Intervenor argues that §§ 801.50(4m) and 751.035(1) are unconstitutional. Consequently, there has been no argument

presented to the Court in support of the Intervenors' motions to dismiss that the statutes specifically and expressly conferring authority on this Court to adjudicate Plaintiffs' claims are unconstitutional, nor have Intervenors demonstrated beyond a reasonable doubt that those statutes are unconstitutional. Even if their arguments on other grounds could be read to "establish doubt" as to this Court's authority to hear this matter pursuant to §§ 801.50(4m) and 751.035(1) (and to be clear, Plaintiffs are of the view that they cannot), those arguments would fail. This Court's authority to adjudicate this action stands.

II. Anti-competitive gerrymandering is a cognizable and manageable claim under Wisconsin's Constitution.

Turning to Plaintiffs' claim of anti-competitive gerrymandering, no Intervenor addresses the plausibility of the facts pled by Plaintiffs. Instead, Intervenors exclusively make two arguments: that anti-competitive gerrymandering isn't a cognizable claim under Wisconsin's Constitution; and that no manageable standard exists to resolve this kind of allegation. Both objections are unpersuasive. In fact, mainstream approaches to constitutional interpretation support the recognition of anti-competitive gerrymandering; and Plaintiffs' proposed standard is manageable enough that opposing counsel recently used it to invalidate an anti-competitive gerrymander in another state.

A. The constitutional text supports recognizing an anti-competitive gerrymandering claim.

"[C]onstitutional analysis begins with the text." *Wis. Justice Initiative, Inc. v. WEC*, 2023 WI 38, ¶30, 407 Wis. 2d 87, 990 N.W.2d 122. The hallmarks of the textual provisions invoked by Plaintiffs' complaint—article I, section 1; article I, section 22;

and article III—are that they're written at a high level of generality and announce abstract principles rather than granular rules. *See, e.g.*, *id.* ¶106 (Dallet, J., concurring) (discussing the Wisconsin Constitution's "many clauses declaring broad principles in general terms"). The question here thus isn't whether any of these provisions explicitly mentions anti-competitive gerrymandering but whether the values embraced by the provisions bar redistricting with the intent and effect of stifling competition and entrenching incumbents.

Among other things, article I, section 1 states that "[a]ll people are born equally free and independent," that they possess "certain inherent rights," and that, "to secure these rights, governments are instituted, deriving their just powers from the consent of the governed." Wis. Const. art. I, § 1. This provision is plainly "worded in dramatically different ways" from the Fourteenth Amendment to the U.S. Constitution. *Matter of Adoption of M.M.C.*, 2024 WI 18, ¶55, 411 Wis. 2d 389, 5 N.W.3d 238 (Dallet, J., concurring), *cert. denied*, 145 S. Ct. 1051 (2025). In particular, article I, section 1 "provid[es] broader protections for individual liberties," *id.* ¶50, and "declares unequivocally that all Wisconsinites have 'inherent rights,'" *id.* ¶55. *See also, e.g.*, *id.* ¶57 (article I, section 1 is "a statement of revolutionary, republican, egalitarian ideology" (internal quotation marks omitted)); *Black v. State*, 113 Wis. 205, 226, 89 N.W. 522 (1902) (Cassoday, C. J., concurring) (article I, section 1 is "broad enough to cover every principle of natural right, of abstract justice").

The sweeping aspirations of article I, section 1 are incompatible with anti-competitive gerrymandering. "All people are" ***not*** "equally free and independent"

when some of them are placed in districts deliberately designed to render voting meaningless. When this occurs, the "inherent rights" of people to participate fully in elections, to be represented by legislators responsive to their concerns, and to hold legislators accountable for their records, are abridged. *See Nunnemacher v. State,* 129 Wis. 190, 108 N.W. 627, 629 (1906). Anti-competitive gerrymandering seeks not "to secure these rights" but to subvert them. Rather than reflecting "the consent of the governed," the practice aims to make the will of the electorate irrelevant to election outcomes.

Similar reasoning applies to article I, section 22, which states that "[t]he blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles." Wis. Const. art. I, § 22. More than a century ago, the Supreme Court characterized this provision as "our constitutional guaranty as to a firm adherence to the fundamental principles of justice." *State ex rel. Milwaukee Med. Coll. v. Chittenden*, 127 Wis. 468, 506, 107 N.W. 500 (1906). The Court added that article I, section 22 is an "implied prohibition" of any "exercise of the lawmaking power" that is inconsistent with the provision. *Id.* at 521; *see also, e.g.*, *Ekern v. McGovern*, 154 Wis. 157, 262, 142 N.W. 595 (1913) (article I, section 22 is a "check[] upon abuse of power").

Again, the sweeping language of article I, section 22 is irreconcilable with anti-competitive gerrymandering. "The blessings of a free government" are squandered when districts are purposefully drawn to suppress competition and ensure

incumbents' reelection. This activity is the antithesis of—not "a firm adherence to"—"justice, moderation, temperance, frugality and virtue." Instead of "recurr[ing] to fundamental principles" like electoral participation, responsiveness to constituents, and accountability for legislators' records, anti-competitive gerrymandering undermines these core values.

Wisconsin's Constitution is distinguished as well by its vigorous protection of the right to vote. An entire article addresses "suffrage" and states explicitly that each "qualified elector" "may vote" in elections at all levels. Wis. Const. art. III, § 1(2). This right is "one of the most important of the rights guaranteed … by the constitution" because, "[i]f citizens are deprived of that right … we will soon cease to be a Democracy." *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 473 (1949); *see also, e.g.*, *McGrael*, 144 Wis. at 14 (the franchise is "the substructure upon which our whole constitutional system is bottomed"). Notably, the right to vote encompasses not only casting a ballot but also associating with likeminded citizens and participating in competitive elections. "[I]nherent therein[] exists a right of persons to combine according to their political beliefs" to "effect a desired political end." *McGrael*, 144 Wis. at 16. Legislation that "promote[s] the supremacy of the [party] in power," "perpetuat[es] its supremacy," or provides "less opportunity [to other parties] for … competition for the favor of voters at large," is therefore unconstitutional. *Id.* at 23.

McGrael involved a ballot access regulation but could just as easily have been speaking about anti-competitive gerrymandering. The essence of the practice is that

it vitiates voters' ability to "effect a desired political end." *Id.* at 16. Voters may still "combine according to their political beliefs"—but this association becomes pointless when election results are preordained. *Id.* Anti-competitive gerrymandering likewise "promote[s] the supremacy of the [party] in power" in a district crafted to be safe, "perpetuat[es] its supremacy," and provides "less opportunity [to other parties] for … competition" in that district. *Id.* at 23. In fact, district lines can be more entrenching than most ballot access rules. *McGrael* makes clear, then, that redistricting can violate article III of Wisconsin's Constitution.

In response, Intervenors note that the provisions Plaintiffs cite do not refer by name to anti-competitive gerrymandering. (*See* Cong. Br. 19-23; Johnson Br. 10-12; Leg. Br. 22.) This argument makes a mistake the supreme court has long warned against: construing broad constitutional terms narrowly and without attention to their underlying purposes. "Constitutions deal with general principles and policies, and do not usually descend to a specification of particulars," explained the court in 1890. *State ex rel. Weiss v. Dist. Bd. of Sch. Dist. No. 8*, 76 Wis. 177, 199, 44 N.W. 967 (1890). "[T]hese words in the constitution are not to receive an unduly 'limited' construction," the Court reiterated in 1902 with respect to article I, section 1. *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 533, 90 N.W. 1098 (1902). Elaborating on this theme in 1906, the Court faulted certain observers who—like Intervenors here—"fail[ed] to appreciate the far-reaching purpose of the general constitutional declarations, the necessity … of a broad, rather than strict construction of those general terms." *Milwaukee Med. Coll.*, 127 Wis. at 517. This "idea that the general

declared purposes of the Constitution … are only meaningless 'glittering generalities'" has been "condemned … for all time." *Id.*

Intervenors also wrongly assert that Plaintiffs' anti-competitive gerrymandering claim is precluded by *Johnson I*. (*See* Cong. Br. 19-23; Johnson Br. 10; Leg. Br. 21-23.) *Johnson I* purported to hold only that "the Wisconsin Constitution has nothing to say about ***partisan*** gerrymanders." 2021 WI 87, ¶55 (emphasis added). The Court was entirely silent about the distinct legal theory of ***anti-competitive*** gerrymandering and whether it might be forbidden by Wisconsin's Constitution. The passages in *Johnson I* musing about partisan gerrymandering addressed only a hypothetical claim not actually before the Court. Nor did they garner majority support: Justice Grassl Bradley's opinion for the majority ***excluded*** the pertinent paragraphs that contain the principle denying the justiciability of partisan gerrymandering claims. *See* 2021 WI 87, ¶¶8, 69-72, 81; *id.* ¶82 n.4 (Hagedorn, J., concurring) ("[N]ot all paragraphs of the court's opinion reflect the opinion of four justices."). This portion of the court's decision is thus, at most, "an advisory opinion" with no precedential value, "answering a constitutional question that [the Court] never asked, that the parties did not brief, and that is immaterial to this case." *Id.* ¶¶102-03 (Dallet, J., dissenting); *see also In re Grotenrath's Est.*, 215 Wis. 381, 254 N.W. 631, 632–33 (1934) ("[C]ourts will not ordinarily render advisory opinions where the questions propounded have not arisen and may never arise …." (internal citations omitted)). In any event, *Johnson I* examined only sections 1 and 22 of article I. *See*

id. ¶¶53-58, 62-63. The decision made no mention of article III—and so can't possibly negate a claim based on infringement of the right to vote.

With respect to the franchise, Intervenors maintain that voting isn't affected by anti-competitive gerrymandering. (*See* Cong. Br. 19-22; Johnson Br. 12; Leg. Br. 24.) Of course it is. Again, *McGrael* considered at length whether a ballot access regulation ran afoul of article III. Like anti-competitive gerrymandering, a rule about which candidates appear on the general election ballot doesn't directly hinder anyone from casting a ballot. Yet the Court gave its "unqualified approval" to the proposition that a law offends article III if it seeks to "destroy minority parties, retard or prevent formation of new parties, [or] promote the supremacy of the one in power at present." 144 Wis. at 32. Intervenors' stance is even more restrictive than federal constitutional precedent. Like anti-competitive gerrymandering, malapportionment doesn't overtly block anyone from voting. But in a landmark decision, the U.S. Supreme Court held that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

B. Our Constitution's history shows that it was meant to prevent anti-competitive practices of all kinds.

The text of Wisconsin's Constitution, then, supports the recognition of Plaintiffs' anti-competitive gerrymandering claim. So does the drafting history of the text's drafting. This history reveals that both those who wrote Wisconsin's Constitution and those who debated its ratification expected it to thwart gerrymandering. More generally, this history is full of evidence that few practices

troubled Wisconsin's framers more than elected officials wielding the power of the state to entrench themselves in office. Anti-competitive gerrymandering is therefore the realization of one of the framers' worst fears.

As is well known, it took two conventions for Wisconsin to approve its state constitution. Voters rejected the charter drafted by the 1846 convention and subsequently ratified the constitution proposed by the 1848 convention. However, because the two documents are quite similar and cover many of the same areas, courts "consider the debates of both 1846 and 1847-48 in [their] analysis." *Thompson v. Craney*, 199 Wis. 2d 674, 685 n.5, 546 N.W.2d 123 (1996).

One difference between the 1846 and 1848 constitutions is that the former would have required more populous counties to elect their legislators at large (instead of using single-member districts). Observers sharply criticized this choice because it would "make the legislature a place of bargain and intrigue" as factions fought to control bigger delegations. The Movement for Statehood, 1845-1846, at 298 (Milo M. Quaife ed., 1918) (*Racine Advocate*). In contrast, an "advantage of the district system is that it prevents what is called gerrymandering." *Id.* at 300. "[T]he single-district system brings the power closer to the people, and that is what we should all strive to do upon all occasions." *Id.* at 299.

In the leadup to the 1848 convention, commentators repeated their backing for single-member districts. Drawn properly, they "prevent[] all or almost all gerrymandering by legislatures" and "give[] to the minority as near as possible the exact representation it ought to have." The Struggle over Ratification, 1846-1847, at

438 (Milo M. Quaife ed., 1920) (*Racine Advocate*). "Another advantage of the district system is that it prevents [parties] from keeping political power in the same hands for such long periods ... ." *Id.* Such perpetuation of power, of course, is the crux of anti-competitive gerrymandering.

At the 1848 convention, the drafters indeed decided to switch from at-large elections to single-member districts designed pursuant to a series of criteria. Other approaches, said Charles Dunn, "would open a door to gerrymandering, which ought to be kept closed." Journal of the Convention to Form a Constitution for the State of Wisconsin 382 (1848) [Journal of the 1848 Convention]; *see also id.* at 383 (statement by A.L. Castleman that other approaches were vulnerable to "mere party expediency"). Carefully crafted districts, according to George Lakin, were "in accordance with the purest principles of democracy," because they acknowledged that "a minority [had] rights, and rights which ought to be respected." *Id.* at 384. "The system brings home the representative to his constituents, and requires him to be chosen by those who are best acquainted with him," added John Doran. *Id.*

Notably, when the 1848 convention debated congressional districting, John Rountree inveighed against a proposal to create two safe Democratic districts: a compact one in the southeast and a sprawling one in the rest of the state. This configuration was chosen because, in other possible maps, "the western district would not present so heavy and decided a [Democratic] party majority." *Id.* at 566. But "such [electoral] considerations," said Rountree, should "find [no] lodgment in [the drafters'] thoughts," since they were "not placed here to form [D]emocratic districts." *Id.*

Concluding his broadside, Rountree predicted that, at "the very first opportunity that the people may have, they will correct this evil." *Id.* at 567. His forecast proved accurate when, later that same year, Wisconsin was apportioned a third congressional seat and the Legislature drew more competitive districts that enabled two non-Democrats to win close races. *See 1848 United States House of Representatives Elections in Wisconsin*, Wikipedia, https://en.wikipedia.org/wiki/1848_United_States_House_of_Representatives_elections_in_Wisconsin.

Widening the lens beyond redistricting, Wisconsin's constitutional history brims with additional materials criticizing anti-competitive practices and lauding popular sovereignty. To illustrate: The very reason why Wisconsin sought statehood was that territorial status "deprived [the people] of the proper exercise of their legitimate sovereignty." The Movement for Statehood, 1845-1846, *supra*, at 67 (1846 report of the select joint committee on state government). Under statehood, "every department of the government will be held accountable to the people, and dishonesty will be more likely to meet its just rebuke at the ballot box." *Id.* at 68.

Democratic accountability was also why many observers favored electing judges. "Frequent accountability to the people is well calculated to remind [judges] that they are not, as some would feign wish to be, lords of the land," said James Lewis at the 1848 convention. Journal of the 1848 Convention, *supra*, at 406. "A representative democracy secures its efficacy by holding its [judges] accountable to the people through the ballot box," agreed A.D. Smith in his review of an 1847 speech. The Struggle over Ratification, 1846-1847, *supra*, at 583. "If the [judge] is approved,

the people may reelect him. If he prove incompetent, corrupt, or otherwise unfit, his place is supplied by another." *Id.*

Wisconsin's framers similarly justified their preference for short terms in office on anti-entrenchment grounds. "Another objection to long terms," said E.V. Whiton at the 1848 convention, is that they allow an officeholder "to gather around him a clique of politicians, and to fortify himself against competitors." Journal of the 1848 Convention, *supra*, at 55. By comparison, short terms are less conducive to such tactics against rivals. Per Byron Kilbourn, they "impress the officer with a consciousness of his responsibility to the people." *Id.* at 56.

The framers' rationale for limiting the total number of governmental positions, too, was to frustrate politicians intent on staying in power. "[A] government which establishes numerous and unnecessary offices and officers" does so "not for the people, but the office holders." The Struggle over Ratification, 1846-1847, *supra*, at 594 (1847 address by Isaac Walker). These proliferating positions "place[] in [politicians'] hands the machinery and means to perpetuate their official existence." *Id.* They result in an "office-holding regency, junto, clique, or dynasty" that "trample[s] upon the people's rights and interests." *Id.* at 601.

As a final example, the framers generally opposed appointment and supported election to select governmental officials. Appointment "tends to create a central power, around which all the corruption of office seekers is centered . . . and the mere tool of party is exalted to posts of honor and responsibility." The Movement for Statehood, 1845-1846, *supra*, at 185-86 (1846 letter from B. Butterfield). Conversely,

when "the people … retain in their own hands the sacred right of nominating and electing every public officer," "all officers shall be accountable to the people for their stewardship. *Id.* at 186.

Nor was hostility to anti-competitive gerrymandering solely a feature of Wisconsin's founding. In 1982, Governor Lee Dreyfus vetoed a district plan precisely because it sought to suppress competition. "[T]he criteria I believe necessary for a fair reapportionment" include "electoral competitiveness," wrote the governor in his veto message. 1982 Wis. Senate Journal, Regular Session, Vol. 3, at 2157. He could not sign the plan passed by the legislature because its districts were "so weighted toward incumbent re-election as to make serious competition unlikely," thereby "undercut[ting] the basic tenet of democracy that people can periodically influence their government through meaningful elections." *Id.* His veto was not overridden.

In sum, this evidence refutes the argument that Plaintiffs' claim is historically unfounded. (*See* Johnson Br. 18.) In fact, Wisconsin's framers cherished popular sovereignty and democratic accountability and fiercely objected to practices that eroded these values. Anti-competitive gerrymandering starts but doesn't end the list of these practices, which also included (in the framers' eyes) territorial status, unelected judges, long terms in office, excessive governmental positions, and appointment rather than election.

C. Our supreme court's precedent condemns anti-competitive gerrymandering.

Consistent with Wisconsin's constitutional text and history, the Supreme Court has invalidated both anti-competitive gerrymandering and other means

through which officeholders entrench themselves and shirk accountability. In *State ex rel. Atty. Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724 (1892), the Court confronted legislative maps drawn by Democrats "to perpetuate their ascendancy and power." *Id.* at 500 (Pinney, J., concurring). These maps were highly malapportioned, disregarded traditional criteria, and pursued a "private end foreign to constitutional duty"—namely, keeping Democrats in office. *Id.* at 484 (majority opinion). The Court thus struck down the maps, deeming them "a direct and palpable violation of the constitution." *Id.* The constitution, the Court continued, "was adopted upon the express ground that [it] would prevent the legislature from gerrymandering the state." *Id.* By prohibiting gerrymandering, the constitution safeguarded "[t]he right of the people to make their own laws through their own representatives." *Id.*

In *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551 (1964), the Supreme Court confirmed the significance of its ruling in *Cunningham*. The Court indeed "condemned gerrymandering" in *Cunningham*. *Id.* at 566. Moreover, it recognized that "gerrymandering" can be partisan—"to preserve partisan political advantage"—and/or anti-competitive—"to preserve the political status quo." *Id.* And the specific maps at issue in *Cunningham* had both partisan and anti-competitive objectives, being "designed to preserve the power of the majority party." *Id.*

The Supreme Court said little about redistricting between the 1960s and the current cycle, but it displayed its concern about policies that diminished accountability in other contexts. In *State v. Johnson*, 176 Wis. 107, 186 N.W. 729 (1922), the Court explained why the constitution bans sheriffs from running for

successive terms. "[T]he sheriff ha[s] extraordinary powers which could be exercised for the purpose of influencing the electors, and thereby perpetuating himself in office." *Id.* at 116. For example, an incumbent sheriff could "attend the polls with executions in his pocket, and deputies at his heels." *Id.* (internal quotation marks omitted). "[T]o prevent the sheriff from using influences at his command to perpetuate himself in office," the Court insisted on a "two–year period of disqualification" after the sheriff's initial term. *Id.*

More recently, in *Evers v. Marklein*, 2024 WI 31, 412 Wis. 2d 525, 8 N.W.3d 395, the Supreme Court struck down a statute that authorized a legislative committee unilaterally to halt certain expenditures. This law "disrupt[ed] ... governmental accountability" and "undermine[d] democratic governance" by allowing "the legislature [to] avoid[] the political judgments necessary to appropriate funds with greater specificity." *Id.* ¶29. Citing Madison, the court also "warned of the ambition of the legislative branch to grasp at powers beyond its constitutional realm." *Id.* ¶32. Legislators' ambition to stay in office is exactly what impels them to craft districts that insulate them from competition.

True, our supreme court hasn't yet explicitly recognized anti-competitive gerrymandering as a distinct claim. However, the court's decision in *Cunningham* was driven by the court's aversion to legislators using redistricting "to perpetuate their ascendancy and power." 81 Wis. at 500 (Pinney, J., concurring). *Cunningham* also dovetails with the Court's condemnations of anti-competitive practices in other

areas. Curbing anti-competitive gerrymandering is therefore the logical consequence of the court's pro-democracy jurisprudence.

D. Anti-competitive gerrymandering claims are proliferating elsewhere.

Wisconsin's own constitutional text, history, and precedent are the pillars of Plaintiffs' legal theory. Developments in other states, though, demonstrate that, far from being novel, anti-competitive gerrymandering claims are increasingly common. Begin with a New York case litigated by the Congressmen's counsel. In *Harkenrider v. Hochul*, 197 N.E.3d 437 (N.Y. 2022), the plaintiffs argued that a New York congressional plan aimed "to discourage competition." *Id.* at 452. New York's highest court, the Court of Appeals, agreed—based on the same kind of evidence that Plaintiffs will introduce here. *See id.* at 453. This evidence compared the enacted districts to thousands of computer-generated analogues. According to these simulations, "four [R]epublican-leaning districts [were] less competitive" in reality than in expectation, "rendering the next … nine districts less competitive in favor of [D]emocrats." *Harkenrider v. Hochul*, 167 N.Y.S.3d 659, 666 (N.Y. App. Div. 2022).

Florida's Supreme Court likewise nullified a state senate plan that sought to favor incumbent legislators. *See In re Senate Joint Resolution of Legis. Apportionment 1176*, 83 So. 3d 597 (Fla. 2012). Under the plan, "none of the incumbents would run against another incumbent." *Id.* at 654. "[A]t least some incumbents [were] given large percentages of their prior constituencies." *Id.* And the new districts were renumbered "in order to allow incumbents to be eligible to serve longer than they would have otherwise." *Id.* The court subsequently invalidated numerous

congressional districts, one again because it was drawn to entrench an incumbent. "The Legislature's configuration" of this district "had the effect of benefitting the long-time incumbent of the district, Congresswoman Corrine Brown." *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 403 (Fla. 2015).

Anti-competitive gerrymandering claims have been brought in several more states. In *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 208 P.3d 676 (Ariz. 2009), the plaintiffs alleged that the mapmakers "did not sufficiently favor competitive districts" because they "created only four competitive districts" versus the seven that could have been formed. *Id.* at 682. In *Gonzalez v. State Apportionment Comm'n*, 53 A.3d 1230 (N.J. App. Div. 2012), the plaintiffs challenged state legislative plans' "lack of competitive districts"—a "flaw [that] can lead to voter apathy when one's vote is rendered meaningless." *Id.* at 1254. And in *In re Colo. Indep. Legis. Redistricting Comm'n*, 513 P.3d 352 (Colo. 2021), the plaintiffs objected to state legislative plans that "did not maximize the districts' competitiveness." *Id.* at 365. Notably, Colorado's Supreme Court rejected this claim because an ensemble of computer-generated maps (like the one Plaintiffs will present here) indicated that the enacted districts "fell within the expected statistical ranges for competitiveness." *Id.*

Courts that have found unlawful ***partisan*** gerrymandering have identified and decried anti-competitive gerrymandering, too. In *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022), *overruled in later appeal*, 886 S.E.2d 393 (N.C. 2023), North Carolina's Supreme Court compared the enacted congressional plan to computer-generated

maps. Among the simulated maps, not one packed Democratic voters into the three most Democratic districts to the same extent as the enacted plan. *See id.* at 553. Similarly, no simulated map had as many "Republican voters in the next seven districts—i.e., the [potentially] competitive districts." *Id.* (internal quotation marks omitted). Thanks to this systematic suppression of competition, the court found the enacted plan "highly non-responsive to the changing opinion of the electorate." *Id.*

In *Szeliga v. Lamone*, No. C-02-CV-21-001816, 2022 WL 2132194 (Md. Cir. Ct. Mar. 25, 2022),[10] the court also compared the enacted congressional districts to computer-generated analogues. "[A] pattern that appear[ed] again and again" was that what would "otherwise [have been] Republican competitive districts [were] drawn out of that Republican competitive range into an area where Democrats [were] almost guaranteed to" prevail. *Id.* at *31 (internal quotation marks omitted). In other words, competitive Republican-leaning districts were eschewed in favor of safe Democratic seats.

In *Adams v. DeWine*, 195 N.E.3d 74 (Ohio 2022), Ohio's Supreme Court considered the state's defense that its congressional plan should be upheld because the plan was pro-competitive. *See id.* at 80-81. The court was unconvinced because "the enacted plan [was] not nearly as competitive as [defendants] claim[ed]." *Id.* at 86. While defendants asserted that the plan had seven competitive districts, in fact, it had "only two or three competitive districts." *Id.*; *see also id.* at 100 (O'Connor, C.J.,

[10] Attached as Exhibit E to Mandell Declaration.

concurring) ("The "competitiveness" standard that respondents offer ... is another illusion.").

And in *Matter of 2021 Redistricting Cases*, 528 P.3d 40 (Alaska 2023), Alaska's Supreme Court struck down two state senate districts near Anchorage. "[A] highly competitive district" could have been created in the neighborhood of Muldoon. *Id.* at 92 (internal quotation marks omitted). Instead, Muldoon was split in two, and each half was joined with some of the deep-red suburb of Eagle River. *See id.* As a result, this portion of the plan had "two firmly Republican Senate districts rather than one" Republican district and one competitive district. *Id.* at 93.

Ironically, given all this case law, the Intervenors say that courts ***haven't*** previously adjudicated anti-competitive gerrymandering claims. (*See* Cong. Br. 21; Johnson Br. 12.) But courts plainly have done so, and the Intervenors' statements to the contrary simply show their unfamiliarity with this precedent (and their oversight of a case, *Harkenrider*, that the Congressmen's counsel litigated from start to finish).[11]

[11] The Johnson Intervenors also ignore academic work in this area by maintaining that scholars don't recognize anti-competitive gerrymandering. (*See* Johnson Br. 12-14.) In fact, the thesis of the best-known election law theory of the last generation is that courts should evaluate electoral practices based on their consequences for competition. *See, e.g.*, Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 Stan. L. Rev. 643 (1998); Richard H. Pildes, *The Theory of Political Competition*, 85 Va. L. Rev. 1605 (1999). The theory's leading proponents have also written articles explicitly advocating the policing of anti-competitive gerrymandering. *See, e.g.*, Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593 (2002); Richard H. Pildes, *The Constitution and Political Competition*, 30 Nova L. Rev. 253 (2006). Social scientists, too, have assessed the competitiveness of district plans using the very same methodology—comparison with computer-generated maps—on which Plaintiffs will rely here. *See, e.g.*, Christopher T. Kenny et al., *Widespread Partisan Gerrymandering Mostly Cancels Nationally, but Reduces Electoral Competition*, Proc. Nat'l Acad. Sci. (June 13, 2023);

E. Anti-competitive gerrymandering is a judicially manageable claim.

To establish liability for anti-competitive gerrymandering, Plaintiffs are prepared to prove both anti-competitive ***intent*** and anti-competitive ***effect***. *Cf., e.g.*, *Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (plurality) (endorsing a partisan gerrymandering standard with intent and effect prongs). The intent prong limits judicial intervention to situations where line-drawers purposefully inhibit competition. It exculpates mapmakers (like commissions or courts merely abiding by traditional criteria) who accidentally stumble into anti-competitive outcomes. Likewise, the effect prong precludes liability where anti-competitive gerrymanderers fail to achieve their goals. As the U.S. Supreme Court once noted, while not much conduct "has 'the purpose of *x*' but fails to have 'the effect of *x*," this scenario is plausible enough to "justif[y] the separate existence" of each prong. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 332 (2000).

As in other redistricting contexts, anti-competitive intent can be demonstrated through "direct evidence," "circumstantial evidence," or "a mix of both." *Cooper v. Harris*, 581 U.S. 285, 291 (2017) (internal quotation marks omitted). "Direct evidence often comes in the form of a relevant state actor's express acknowledgment" that reducing competition "played a role in the drawing of district lines." *Alexander v. S.C. State Conf. NAACP*, 602 U.S. 1, 8 (2024). Circumstantial evidence can involve "a

Jonathan Mattingly & Greg Herschlag, Responsiveness of the 2024 Congressional Districts (Apr. 9, 2024), https://sites.math.duke.edu/~jonm/Redistricting/NationalResponsiveness/responsivenessanalysis.html.

district's shape and demographics," *Cooper*, 581 U.S. at 291 (internal quotation marks omitted), as well as "alternative map[s]" that don't aim to dampen competition but do satisfy all other criteria, *Alexander*, 602 U.S. at 10.

In recent partisan gerrymandering cases, ***partisan*** effect has typically been shown by comparing the enacted plan to a large number of computer-generated maps. *See, e.g.*, *Rucho v. Common Cause*, 588 U.S. 684, 737-39 (2019) (Kagan, J., dissenting); *Harper*, 868 S.E.2d at 516-22; *Adams*, 195 N.E.3d at 86-87. The same approach can be harnessed to illustrate ***anti-competitive*** effect—with the slight modification that measures of competitiveness, not partisan bias, must be calculated for both the enacted plan and the simulated maps. The "traditional" such metric is the margin of victory: "the simple difference in vote shares between the winner and the runner-up," in a particular district and/or averaged across all districts. Gary W. Cox et al., *Measuring the Competitiveness of Elections*, 28 Pol. Analysis 168, 169 (2020). A related method is to deem a district competitive if it meets a certain condition (like a margin of victory below ten percentage points); these designations can then be aggregated to determine the overall volume of competitive districts. *See, e.g.*, Alan I. Abramowitz et al., *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. Pol. 75, 75 (2006).

As this discussion suggests, measures of competitiveness can be computed for both individual districts and a district plan in its entirety. By the same token, anti-competitive gerrymandering can be a district-specific or a plan-wide claim. Here, Plaintiffs make both allegations: that Wisconsin's congressional plan as a whole is

more uncompetitive than the vast majority of computer-generated maps; and that several districts are more uncompetitive than the bulk of the simulated districts that correspond to them. (*See* Compl. ¶¶11, 69, 78.)

The above test is judicially manageable for several reasons. It borrows the intent-and-effect framework that has been employed for decades to adjudicate partisan gerrymandering claims. *See, e.g.*, *Bandemer*, 478 U.S. at 127 (plurality). It relies on the "extreme outlier approach"—"using advanced computing technology to randomly generate a large collection of districting plans" and then "see[ing] where the State's actual plan falls on the spectrum"—which is the gold standard in contemporary redistricting litigation. *Rucho*, 588 U.S. at 737-38 (Kagan, J., dissenting). And courts have already demonstrated that they can reasonably, non-arbitrarily assess both anti-competitive intent, *see, e.g.*, *League of Women Voters of Fla.*, 172 So. 3d at 403; *In re Senate Joint Resolution of Legis. Apportionment 1176*, 83 So. 3d at 654, and anti-competitive effect through comparison with computer-generated maps, *see, e.g.*, *In re Colo. Indep. Legis. Redistricting Comm'n*, 513 P.3d at 365; *Szeliga*, 2022 WL 2132194, at *31; *Harkenrider*, 197 N.E.3d at 453; *Harper*, 868 S.E.2d at 553.

Intervenors' complaints about this test mostly reflect misunderstandings about its operation or are refuted by their own prior litigation. The Congressmen point out that ***maximal*** competition is undesirable and may conflict with other line-drawing objectives. (*See* Cong. Br. 25-26.) But Plaintiffs aren't asking for maximal competition; instead, they seek the level of competition that arises organically when

all legitimate criteria are satisfied and competition is neither amplified nor muted intentionally. This level of competition can't clash with other mapmaking goals because it already takes them into account. Those other goals are met by the computer-generated maps that establish the benchmark level of competition.

The Johnson Intervenors similarly contend that all uncompetitive districts would be proscribed by Plaintiffs' theory. (*See* Johnson Br. 3, 14.) Hardly. Plaintiffs' theory has no quarrel with uncompetitive districts whose lack of competition stems from adherence to valid criteria against a particular geographic backdrop. For instance, no one would expect evenly split congressional districts in the heavily Democratic vicinities of Madison and Milwaukee. Nor would Plaintiffs' theory necessarily be offended by uncompetitive districts in these areas. Rather, it would raise a flag only if these districts are ***more*** uncompetitive in the enacted plan than in simulated maps that abide by all legitimate requirements but are agnostic as to competition.

The Congressmen further argue that stifling competition is acceptable if it's tied to protecting incumbents. (*See* Cong. Br. 26-27.) But helping incumbents win reelection isn't a redistricting criterion in Wisconsin—or, for that matter, any other state.[12] Courts have also rejected the notion that incumbents deserve a thumb on the line-drawing scale. *See, e.g.*, *LULAC v. Perry*, 548 U.S. 399, 441 (2006) (opinion of Kennedy, J.) ("If … incumbency protection means excluding some voters from the district simply because they are likely to vote against the officeholder, the [aim] is to

[12] *See Redistricting Criteria*, Nat'l Conf. St. Legis. (Sept. 3, 2025), https://www.ncsl.org/elections-and-campaigns/redistricting-criteria.

benefit the officeholder, not the voters."); *Baumgart v. Wendelberger*, Nos. 01–C–0121, 02–C–0366, 2002 WL 34127471, at *3 (E.D. Wis. May 30, 2002)[13] ("expressly reject[ing]" the criterion of "[a]voiding unnecessary pairing of incumbents"). So anti-competitive gerrymandering isn't excused—if anything, it's more suspect—when it doubles as an incumbent-protection racket.

Intervenors additionally raise the objection of all gerrymandering defendants: how can anyone know that Wisconsin's congressional plan is ***too*** uncompetitive? (*See* Cong. Br. 23; Johnson Br. 15.) The appeal of computer-generated maps that comply with all valid criteria, however, is that they solve this baseline problem. Having produced these maps, "we can see where the State's actual plan falls on the spectrum—at or near the median or way out on one of the tails?" *Rucho*, 588 U.S. at 738 (Kagan, J., dissenting). "The further out on the tail," the more certain the plan's illegality. *Id.* The Congressmen's counsel made the same point in their briefing in *Harkenrider*: Enacted districts whose partisan makeups are "below" or "above" the "vast majority of the red/blue bands" representing thousands of simulated districts are the very "DNA" of anti-competitive gerrymandering. (Br. for Pet'rs-Resp'ts at 33, *Harkenrider v. Hochul*, 197 N.E.3d 437 (N.Y. 2022) (No. CAE 22-00506) ("*Harkenrider* Br."))[14]

Finally, opposing counsel's prior briefing shows how to deal with the "imponderables" of certain elections being atypical or certain candidates being stronger or weaker. (Cong. Br. 23-24) The key is to use an "***average*** of certain

[13] Attached as Exhibit A to Mandell Declaration.
[14] Attached as Exhibit B to Mandell Declaration.

statewide races" to estimate the competitiveness of both enacted and computer-generated districts. (*Harkenrider* Br. 32 (emphases added)) By averaging multiple races, the analysis is less sensitive to any election that happens to be "particularly close" or a "wave election." (Cong. Br. 24) Likewise, the focus on statewide races eliminates district-by-district variations in candidate quality since, in these races, the same candidates compete across the entire state.

F. Plaintiffs have pled facts that plausibly establish anti-competitive gerrymandering.

No Intervenor maintains that the facts pled by Plaintiffs are too implausible, or otherwise insufficient, to survive a motion to dismiss. And for good reason. Plaintiffs' complaint alleges detailed facts that plainly give rise to a "reasonable inference[]" that Wisconsin's congressional plan satisfies both the intent and the effect requirements of the test for anti-competitive gerrymandering. *Data Key Partners*, 2014 WI 86, ¶19.

With respect to anti-competitive intent, a federal court found that Wisconsin's 2011 congressional plan aimed to protect incumbents and avoid flipping any districts. (*See* Compl. ¶¶5, 48-55.) *See also Baldus*, 849 F. Supp. 2d at 854. Wisconsin's current congressional plan was selected because it made the "least change" to the 2011 plan. In fact, the current plan kept 94.5% of Wisconsinites in the same districts they occupied under the 2011 plan. (*See* Compl. ¶¶7, 60-65.) The current plan thus perpetuates the anti-competitive intent that motivated the 2011 plan. *See, e.g., Jacksonville Branch of NAACP v. City of Jacksonville*, 635 F. Supp. 3d 1229, 1289 (M.D. Fla. 2022) ("[B]y prioritizing the maintenance of existing lines, the City adopted

a criterion that would inevitably carry forward the effects of the ... lines originally drawn in 2011."); Robert Yablon, *Gerrylaundering*, 97 N.Y.U. L. Rev. 985, 987 (2022) (explaining that "gerrylaundering is an anti-competitive device—a way for those in power to remain in power").

As to anti-competitive effect, Wisconsin's current congressional plan was highly uncompetitive in the 2022 and 2024 elections. In these elections, the victor in each district prevailed by a median margin of almost thirty percentage points, and only one district (District 3) was genuinely competitive. (*See* Compl. ¶¶11, 66-68.) More significantly, the current plan is less competitive than most Wisconsin congressional maps generated without considering election results and complying with all federal and state legal requirements. These maps tend to have a substantially lower median margin of victory than the current plan. Their overall volume of competitive districts tends to be higher. And specific current districts tend to be less competitive than most of their corresponding districts in the simulated maps. (*See id*. ¶¶11, 69.)

III. Laches does not bar Plaintiffs' claims.

All three Intervenors trot out as a basis for dismissal a tired but standard defense routinely asserted and repeatedly rejected in redistricting cases: laches. (Cong. Br. 34-35; Johnson Br. 15-18; Leg. Br. 15-20) Laches is no more grounds for dismissal here than the asserted delay in challenging electoral districts was in any of the other myriad redistricting cases where that argument has been rejected. *See Clarke*, 2023 WI 79, ¶42; *Whitford v. Gill*, 218 F. Supp. 3d 837, 873-75 (W.D. Wis. 2016), *rev'd on other grounds*, 138 S. Ct. 1916 (2018); *Baldus*, 849 F. Supp. 2d at 854-

55; *LULAC*, 548 U.S. at 419 (a map's longevity alone does not create immunity); *cf.*, *Davis*, 478 U.S. at 133 ("[r]elying on a single election cycle to prove unconstitutional discrimination is unsatisfactory" to prove gerrymandering). The teaching of these and other Wisconsin authorities is clear: laches does not apply where plaintiffs allege an ongoing constitutional violation, where factual development is required to assess prejudice, or where the plaintiff could not have brought the claim earlier because it was not ripe. All of those factors are present in this action. This Court should follow the well-trod path of other courts in this state and reject laches here.

Laches is an affirmative, equitable defense barring relief when a claimant's unreasonable delay in bringing a claim prejudices the defendant. *Sawyer v. Midelfort*, 227 Wis. 2d 124, 159, 595 N.W.2d 423 (1999). "[T]he laches doctrine is broadly understood to ask whether a party delayed without good reason in raising a claim, and whether that delay prejudiced the party seeking to defend against that claim." *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶11, 393 Wis. 2d 308, 946 N.W.2d 101. To succeed on a laches defense, a defendant must demonstrate that: (1) the plaintiff unreasonably delayed in bringing a claim; (2) the defendant lacked knowledge that the plaintiff would raise that claim; and (3) the defendant is prejudiced by the delay. *Clarke*, 2023 WI 79, ¶41 (citing *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶15, 389 Wis. 2d 516, 936 N.W.2d 587). "The party seeking application of laches bears the burden of proving each element." *Brennan*, 2020 WI 69, ¶12. "Whether the doctrine of laches applies is fact specific." *Riegleman v. Krieg*, 2004 WI App 85, ¶22, 271 Wis. 2d 798, 679 N.W.2d 857.

However, "[e]ven if all three elements are satisfied, application of laches is left to the sound discretion of the court." *See Brennan*, 2020 WI 69, ¶12. The Wisconsin Supreme Court has warned against resolving redistricting cases though laches, recognizing that "any reapportionment or redistricting case is, by definition, *publici juris*, implicating the sovereign rights of the people of this state." *Jensen*, 2002 WI 13, ¶17. Here, Intervenors have not proved and cannot prove through their motions to dismiss the requisite elements justifying a laches bar. But even if they could, equity favors hearing Plaintiffs' claims that Wisconsin's congressional districts are an unconstitutional anti-competitive gerrymander that deprives Wisconsin voters of the meaningful exercise of their votes for representatives in the U.S. Congress.

A. Plaintiffs did not unreasonably delay in bringing their claims because they were not yet ripe.

Intervenors argue that Plaintiffs unreasonably delayed in commencing this action, asserting that Plaintiffs should have brought their present claims in 2011 when Act 44 was passed; in 2021 in conjunction with the *Johnson* litigation; or after the 2022 or 2024 congressional elections (Cong. Br. 34-35; Johnson Br. 16; Leg. Br. 16-19) Intervenors fail, however, to demonstrate that Plaintiffs unreasonably delayed by bringing this action in July 2025.

Delay is calculated from the time a plaintiff "knew or should have known" of their "potential claim." *Richardson*, 2019 WI 110, ¶21. That timing will vary based on the facts of the case and the totality of the circumstances. *Id.* ¶18. As alleged in Plaintiffs' Complaint, a claim of anti-competitive gerrymandering requires evidence of a durable suppression of competition. (Compl. ¶47) Without such evidence,

Plaintiffs' claims would have been based on speculation, rendering them susceptible to dismissal. *Voters with Facts v. City of Eau Claire*, 2017 WI App 35, ¶39, 376 Wis. 2d 479, 899 N.W.2d 706, *aff'd on other grounds*, 2018 WI 63, 382 Wis. 2d 1, 913 N.W.2d 131 ("Voters' alleged injury is far too speculative to create a plausible claim for relief."). In courts that have considered partisan gerrymandering claims in redistricting cases, it has been often stated that multiple cycles are required to evidence enduring and not episodic gerrymanders. *See, e.g.*, *Davis*, 478 U.S. at 135; *Whitford*, 218 F. Supp. 3d 837 (deciding partisan gerrymandering suit filed four years after plan's enactment). Evidence that competition is artificially suppressed under the map challenged here could most directly be obtained by analyzing the results of at least two congressional elections conducted under that map.

Furthermore, *Whitford v. Gill*, which the Legislature cites in support of its laches argument—even though it was brought at the same mid-point in the decennial redistricting cycle (2015) as this action—does not bolster the application of laches here. (Leg. Br. 18) According to the Legislature, only statewide results can establish partisan bias or competitiveness. Although statewide data might be helpful for a partisan fairness standard, it is not determinative for an anti-competitive gerrymandering claim. In anti-competitive gerrymandering challenges, the standard requires evaluation of the actual districts themselves and assessment against a baseline. This is impossible to do using only statewide data. Without district-specific data, it is impossible to demonstrate the anti-competitive nature of those districts.

Thus, before the November 2024 congressional election, Plaintiffs' claims were not yet ripe.

This is especially true with respect to Plaintiff Lyerly. Laches is inappropriate where a plaintiff could not previously have brought the claim because it was not yet ripe. *See Clarke*, 2023 WI 79, ¶42 (measuring timeliness from the earliest election for which relief could be granted); *Brennan*, 2020 WI 69, ¶17 (recognizing that laches applies differently to substantive constitutional challenges, which may not ripen until enforcement); *Sawyer*, 227 Wis. 2d at 159 (laches requires unreasonable delay after a claim accrues). Lyerly is not yet of majority age, and although he will reach majority and be eligible to vote before the congressional elections in November 2026, he (obviously) was not eligible to vote before *Johnson*, nor was he eligible to vote in the first congressional election after *Johnson II* was decided. (Compl. ¶33) The November 2026 elections will be the first, of any kind, in which he will be eligible to vote, meaning that, for Lyerly, the November 2026 congressional elections are "the soonest elections for which relief could be granted." *Clarke*, 2023 WI 79, ¶42. Lyerly did not "sleep on his rights," in 2022 and 2024, as those rights had not yet blossomed. *Wren*, 2019 WI 110, ¶14.

To be sure, the infirmity of the current congressional plan was carried over from 2011 Act 44—through *Johnson*—but the plan is nevertheless different than that challenged in *Johnson* and is being challenged on its own merit, or lack thereof. (Comp. ¶¶11, 70-73) Even were the Court to accept Intervenors' characterization of the timeline (and it should not), laches is generally unavailable to bar claims alleging

ongoing constitutional violations, particularly where the challenged harm continues to affect voters. *See State ex rel. Lopez-Quintero v. Dittmann*, 2019 WI 58, ¶28, 387 Wis. 2d 50, 928 N.W.2d 480 ("'[T]he overriding responsibility of [the Supreme] Court is to the Constitution of the United States' and of this court, to the Wisconsin Constitution as well, 'no matter how late it may be that a violation of the Constitution is found to exist.'" (quoting *Chessman v. Teets*, 354 U.S. 156, 165 (1957))). That is precisely the basis for Plaintiffs' challenge here. They are not relitigating *Johnson*; rather, Plaintiffs are challenging Wisconsin's current congressional plan as implemented and applied to elections in 2022 and 2024, based on a theory never raised or presented in *Johnson*.

B. Plaintiffs' participation in the *Bothfeld* original action proceeding gave Intervenors notice, and actual knowledge, of Plaintiffs' claims.

Intervenors collectively advance two arguments asserting that they lacked notice of Plaintiffs' claims: (1) they could not have known Plaintiffs would file this action because several elections had been conducted between the enactment of 2011 Wis. Act 44 and the adoption of the current congressional districts in 2022; and (2) by seeking intervention in the *Bothfeld* original action, Plaintiffs demonstrated that they would not initiate this action. (Cong. Br. 35; Johnson Br. 16-17; Leg. Br. 19) Neither Plaintiffs' Complaint nor the authorities that Intervenors cite support those arguments.

The standard courts apply to determine whether the party asserting laches lacked notice is whether that party had actual knowledge of the claim, not how or when they acquired that knowledge. *See, e.g., Watkins v. Milwaukee Cnty. Civ. Serv.*

Comm'n, 88 Wis. 2d 411, 423, 276 N.W.2d 775, 781 (1979) ("The petitioner informed the Commission at the time he rescinded his resignation that litigation would be commenced if a hearing were not granted."); *Schafer v. Wegner*, 78 Wis. 2d 127, 133, 254 N.W.2d 193, 196 (1977) ("Thus it may be said that the respondent had no knowledge that the appellant would assert the right.").

Intervenors all participated in the *Bothfeld* original action proceeding last year. As the docket reflects, the Congressmen moved to intervene, and the Johnson Petitioners and the Legislature filed nonparty (*amicus*) briefs. (*See supra* n.6.) Plaintiffs also sought to intervene in *Bothfeld,* filing a proposed complaint asserting the very same allegations and claims made in this action. (*See* Dkt. 194, Exh. 1.) Without doubt, all three Intervenors had actual knowledge of the claims that Plaintiffs sought leave to assert there and that are now before this Court. They cannot now feign ignorance.

All of the Intervenors asserting laches have participated in serial redistricting litigation in Wisconsin's state and federal courts stretching back four years (or more). *See Bothfeld v. WEC*, No. 2025AP996-OA; *Felton v. WEC*, No. 2025AP999-OA (Wis. 2025); *Johnson*, No. 21AP1450-OA, Order denying Motion for Relief from Judgment (Wis. Mar 1, 2024)[15]; *Wright v. WEC*, No. 2023AP1412-OA (Wis., filed Aug. 4, 2023); *Clarke*, No. 2023AP1399-OA; *Black Leaders Organizing for Communities v. Spindell*, No. 21-cv-00534-jdp-ajs-eec (W.D. Wis., filed Aug. 23, 2021); *Hunter v. Bostelmann*, No. 21-cv-00512-jdp-ajs-eec (W.D. Wis., filed Aug. 13, 2021) Johnson *II*, 2022 WI 14.

[15] Attached as Exhbit D to Mandell Declaration.

The current congressional districts have been contested since their adoption, with all of the Intervenors here willingly inserting themselves into those cases to defend against challenges to the districts. There has been no acquiescence or acceptance of those districts and no cessation of Intervenors' efforts to oppose the legal challenges to them. Because all three Intervenors have been repeat players in litigation over Wisconsin's congressional districts for several years and because they were made aware of the exact claims raised here in May 2025 through the *Bothfeld* original action proceeding, they possessed actual knowledge of Plaintiffs' claims. Given this history of litigiousness, it is preposterous for the Intervenors to now claim that they could not have anticipated that Plaintiffs would seek to pursue their claims in this action.

C. Intervenors are not prejudiced by this action.

The Intervenors all claim similar prejudice arising from Plaintiffs having brought their claims in July 2025: voter confusion; legislators being too frequently disconnected from their constituents; increased expense of elections being conducted in new districts; the loss of evidence, unavailability of witnesses, and fading of witness' memories over time; and the parties to earlier litigation having to re-litigate over the same districts. (Cong. Br. 35; Johnson Br. 17; Leg. Br. 20) None of these claimed prejudices rises to the level required to justify a laches bar. Indeed, Plaintiffs' constitutional claims are a benefit to members of the public, including the Johnson Intervenors. As the supreme court has held, "any disruption to the current ... districts is necessary to serve the public's interest in having districts that comply with each of the requirements of the Wisconsin Constitution." *Clarke*, 2023 WI 79, ¶43.

To demonstrate sufficient prejudice, a party must show that it is "in a less favorable position" than it would otherwise be because of the plaintiff's delay in bringing its claims. *Trump v. Biden*, 2020 WI 91, ¶24, 394 Wis. 2d 629, 951 N.W. 2d 568. For example, the Wisconsin Supreme Court dismissed *Trump* on the basis of laches, finding it "plainly unreasonable" that President Trump could have challenged the outcome of Wisconsin's 2020 presidential election before the election results were final and certified, but he chose to wait "until after an election." *Id.* ¶16. Similarly, the supreme court has applied laches to bar claims brought so late that a court "would be unable to provide meaningful relief without completely upsetting the election." *Hawkins v. WEC*, 2020 WI 75, ¶10, 393 Wis. 2d 629, 948 N.W.2d 877.

The timing and nature of Plaintiffs' filing here are wholly unlike *Trump* and *Hawkins*, where the supreme court found sufficient prejudice to apply laches based on the emergency nature of the relief sought and the delay in bringing the claims. Unlike those cases, Plaintiffs here are not seeking emergency relief on an abbreviated timetable. (Compl. at 28, ¶¶A-F) Indeed, Plaintiffs have been clear that they are seeking an orderly and complete adjudication of their claims on a timetable that will allow for full development of factual evidence and legal arguments. (Dkt. 189, Dec. 15, 2025 H'rg Tr. 10:16-11:20) Despite pressure from some public commentators to adjudicate the case at warp speed, Plaintiffs worked with counsel for all parties, and with the three judges who comprise this Court, to establish a reasonable schedule. All parties have agreed to a trial commencing in April ***2027*** (should the case not be resolved by then), which Plaintiffs' counsel requested so that new districts could be

in place, if appropriate, for the ***2028*** congressional elections. (*Id.* at 21:6-27:8, 34:19-36:1)

Thus, unlike in *Trump*, Plaintiffs seek relief with respect to elections that have not yet occurred and that will not occur ***for more than two years***. And unlike in *Hawkins*, the timing of the relief that Plaintiffs seek, if granted, will allow ample time for Wisconsin's county and municipal clerks (who are responsible for printing ballots and distributing them to the municipalities and towns within their counties, *see* Wis. Stat. §§ 5.66, 5.68, 7.10, 7.15) to print and distribute those ballots. None of the Intervenors can demonstrate that the timing of Plaintiffs' filing wastes any resources being put toward campaigning or preparing for elections in the current districts, although such a showing, even if made, would be insufficient. *See Clarke*, 2023 WI 79, ¶43 (wasted campaign dollars alone do not establish prejudice). In fact, by bringing this lawsuit years before the next election to which any remedial districts would apply, Plaintiffs enable candidates who might wish to run for congressional office in newly composed and constitutionally competitive districts to take any steps necessary to gain eligibility or otherwise prepare campaigns with full knowledge of their constituents.

The Johnson Intervenors also assert, without any factual support, potential prejudice based on a "loss of evidence." (Johnson Br. 17) They do not identify a single lost document, unavailable witness, or memory that has become unreliable due to Plaintiffs' timing. To the contrary, the core events they reference—the creation and enactment of Wisconsin's congressional districts in 2011—are extensively

documented, and the roles of public officials who were involved in that effort are a matter of public record. *Baldus*, 849 F. Supp. 2d at 845-46, 854. The *Baldus* opinion identified numerous witnesses involved in their drafting and approval, including state legislative staff (Adam Foltz, Tad Ottman) and consultants (Joe Handrick), congressional staff (Andrew Speth), and elected officials who approved the maps, including Speaker Jeff Fitzgerald, Senate Majority Leader Scott Fitzgerald, Representative Robin Vos, and Senator Rich Zipperer. *Id.* Intervenors fail to identify any of these (or other witnesses) who are now unavailable. Neither do Intervenors' speculative claims of faded memories, unaccompanied by any details much less supporting evidence, establish prejudice for laches purposes.

The Johnson Intervenors' contention that the relief Plaintiffs seek would confuse voters rests on inapplicable cases. None of the authorities Intervenors cite hold that the possibility of voter confusion, standing alone, constitutes prejudice sufficient to support laches—particularly where relief is sought well in advance of an upcoming election. (*See* Cong. Br. 35; Johnson Br. 17; Leg. Br. 20.) Rather, the cases show that courts consistently distinguish between last-minute changes imposed on the eve of an election and the type of prospective relief Plaintiffs seek here, with ample lead time to permit orderly administration of elections in new districts. In *Fouts v. Harris*, the court was concerned that the data used for new maps would be "unduly prejudicial because they fail to provide a basis for 'fair and accurate representation to the citizens.'" 88 F. Supp. 2d 1351, 1354 (S.D. Fla. 1999), *aff'd sub nom. Chandler v. Harris*, 529 U.S. 1084 (2000). Here, the data is based on elections

from 2022 and 2024 and so is very recent. In *White v. Daniel*, the court was concerned with a small board's need to "reapportion itself this year and it will probably be required to do so again next year, when the results of the [new] census are available." 909 F.2d 99, 104 (4th Cir. 1990). By contrast, the congressional districts at issue here were adopted four years ago and will next be adjusted after the 2030 census, at least five years from now. Similarly, *Knox v. Milwaukee Cnty. Bd. of Elections Comm'rs* addressed a challenge to a county board redistricting where an election was already underway with nomination papers already in the field. 581 F. Supp. 399, 405, 408 (E.D. Wis. 1984). Plaintiffs filed this action in July 2025, and trial is scheduled to occur in April 2027, more than a year before the November 2028 congressional elections.

Intervenors' other cases are similarly inapposite. *Reynolds v. Sims*, 377 U.S. 533 (1964), did not involve laches and instead addressed the constitutionality of malapportionment, recognizing that some disruption may be necessary to vindicate equal protection principles. Indeed, *Reynolds* ruled in favor of a challenge to a map first adopted in 1903, more than sixty years earlier! *See id.* at 539-40. Likewise, *Purcell v. Gonzalez* cautions against last-minute judicial intervention but does not suggest that prospective challenges brought well in advance of an election are untimely. 549 U.S. 1, 5-6 (2006). And *Brennan* only disclaims actions brought with compounding economic prejudice where the intervenors here have none as mentioned above. *See* 2020 WI 69, ¶17. None of these cases support the proposition that voter

familiarity with existing districts creates a reliance interest sufficient to bar timely constitutional claims.

In sum, laches is not available to the Intervenors here as they have failed to demonstrate unreasonable delay, lack of notice, or prejudice sufficient to justify a laches bar to this action. Nor does equity justify the application of laches here even if Intervenors had satisfied any of the requisite elements because it is in the public interest for elections to be conducted under constitutionally compliant maps. In short, laches does not bar this action.

IV. The U.S. Constitution's Elections Clause does not bar Plaintiffs' claims.

All three Intervenors argue that the Court should dismiss this action because recognizing an anti-competitive gerrymandering claim would violate the Elections Clause in article I, section 4 of the U.S. Constitution. (Cong. Br. 27-34; Johnson Br. 18; Leg. Br. 24-26) Arguments in all three briefs rest on a fundamental mischaracterization of the decision in *Moore v. Harper*, 600 U.S. 1 (2023). *Moore* does not, as one Intervenor argues, "impose vital limits on the interpretation and application of state law by state courts in this context." (Cong Br. 30) Nor does it require state courts to adhere to a "least change" approach when remedying constitutional deficiencies in a federal Congressional redistricting plan. (*See, e.g.*, *id.* at 31.) Rather, *Moore* stands for the unremarkable proposition that "[t]he Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review." 600 U.S. at 22.

Following *Moore*, this Court is authorized to do exactly what courts in Wisconsin routinely do and have always done: review legislative enactments, including congressional redistricting statutes, for compliance with the Wisconsin Constitution. While the Supreme Court in *Moore* did identify one extreme circumstance where a state court's enforcement of its own state laws could implicate the Elections Clause—if a state court "transgress[es] the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections," *id.* at 36—Plaintiffs' theory is firmly rooted in the text, structure, and history of the Wisconsin Constitution. It follows that Intervenors' Elections Clause arguments are meritless.

A. Intervenors' interpretation of *Moore v. Harper* is one the Court soundly rejected in that case.

Intervenors' Election Clause arguments rest on a premise the Supreme Court conclusively repudiated in *Moore*: that there is a federally cognizable interest in shielding a state legislature's congressional redistricting enactment from state judicial scrutiny. The *Moore* Court considered the scope of state judicial authority to enforce state-law limitations on a state legislature's drawing of congressional districts. 600 U.S. at 8-9. The dispute arose after the North Carolina Supreme Court, for the first time, construed provisions of its own state constitution to impose limits on partisan gerrymandering and invalidated the North Carolina legislature's congressional redistricting plan. *Id.* On appeal, the North Carolina legislature argued that the federal Elections Clause—which provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in

each State by the Legislature thereof," U.S. Const. art. I, § 4, cl. 1—"vests state legislatures with authority to set rules governing federal elections free from restrictions imposed under state law." *Id.* at 9-10. The Supreme Court concluded otherwise. It confirmed that—consistent with longstanding precedent and centuries of unbroken historical practice—"[s]tate courts retain the authority to apply state constitutional restraints when legislatures act under the power conferred upon them by the Elections Clause." *Id.* at 37.

The *Moore* Court did reiterate that, as in other contexts where state court interpretations of state law might implicate rights protected under the federal constitution, federal courts retain "an obligation to ensure that state court interpretations of that law do not evade federal law." *Id.* at 34. There is always "the concern that state courts might read state law in such a manner as to circumvent federal constitutional provisions." *Id.* at 35. Thus, the Court left the door open for federal intervention were a state court to "transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections." *Id.* at 36. But the Court reaffirmed the authority of state courts to interpret and enforce state constitutional provisions when reviewing a legislature's congressional redistricting enactment: the "power vested in state legislatures" by the Elections Clause always remains "subject to constraints set forth in the State Constitution." *Id.* at 25; *see also id.* at 29-30 (Elections Clause does not exempt state legislatures engaged in Congressional redistricting from "the ordinary constraints on lawmaking in the state constitution").

The Supreme Court's decision in *Moore* thus preserves the longstanding status quo: state courts are entirely free to interpret and enforce state law, including in cases involving federal elections, provided that a state court's decision does not infringe upon federally protected rights. Crucially, the Court ***rejected*** the argument that the Elections Clause confers upon a state legislature some federally cognizable interest in evading a state-court judicial review. *See id*. at 37; Vikram David Amar, *The* Moore *the Merrier: How* Moore v. Harper*'s Complete Repudiation of the Independent State Legislature Theory Is Happy News for the Court, the Country, and Commentators*, 2022-23 Cato Sup. Ct. Rev. 275, 284 (2023) ("[J]udges must heed *Moore*'s holding that the 'federal rights' to be enforced under the Elections Clause have nothing to do with Article I, section 4's use of the word 'legislature.'"). Thus, Intervenors are wrong to suggest that *Moore* requires state courts to abstain from adjudicating state constitutional challenges to congressional redistricting statutes because the Elections Clause "tasks 'the Legislature' specifically with congressional redistricting." (Leg. Br. 24) In advancing this argument, Intervenors make the same mistake as the sole court anywhere to hold that a state law regulating federal elections violated the Elections Clause, in a decision that was swiftly reversed on appeal: they "rel[y] primarily on concurring and dissenting opinions in various United States Supreme Court decisions, but [they] fail[] to apply binding precedent from that Court itself." *Republican Nat'l Comm. v. Eternal Vigilance Action, Inc.*, 321 Ga. 771, 792, 917 S.E.2d 125, 150 (2025).

Unsurprisingly, then, *Moore* has not effectuated a sea change in the relationship between state and federal courts. Before *Moore*, state courts routinely exercised their own powers of judicial review to enforce state constitutional constraints on the legislature's congressional redistricting authority. *See, e.g.*, *Harkenrider v. Hochul*, 167 N.Y.S.3d 659, 664, *aff'd as modified*, 38 N.Y.3d 494 (App. Div. 2022) (holding congressional map to be unlawful partisan gerrymander under state constitution); *League of Women Voters v. Commonwealth*, 645 Pa. 1, 123 (2018) (same); *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1231 (Colo. 2003) (holding that state constitution forbids legislature from engaging in mid-cycle congressional redistricting); *Pearson v. Koster*, 367 S.W.3d 36, 48 (Mo. 2012) (congressional redistricting enactment subject to state constitution's contiguity and compactness requirements); *Brown v. Saunders*, 159 Va. 28, 35 (1932) (same); *see also Brown v. Sec'y of State of Fla.*, 668 F.3d 1271, 1279 (11th Cir. 2012) (concluding that courts could enforce state constitutional amendment establishing standards for congressional redistricting without violating Elections Clause).

Since *Moore*, ***no court anywhere*** has held that a state court's interpretation of its own state law violates the Election Clause: were this Court to so hold, it would be the first in the United States to do so. *See, e.g.*, *Mont. Democratic Party v. Jacobsen*, 416 Mont. 44, 65 n.7, (2024), *cert. denied*, 145 S. Ct. 1125 (2025) ("wholly reject[ing]" the argument that the Elections Clause prohibited the court's interpretation of various Montana election laws); *Genser v. Butler Cnty. Bd. of Elections*, 325 A.3d 458, 461 (Pa. 2024), *cert. denied*, 145 S. Ct. 2778 (2025) (Dougherty, J., concurring) ("[T]he

fact that the majority and my learned colleagues in dissent interpret the relevant statutes differently does not in any way suggest this Court has exceeded the scope of judicial review."); *Eternal Vigilance Action*, 321 Ga. at 792 (legislature's delegation of authority to state elections board did not violate Elections Clause); *League of Women Voters of Utah v. Utah State Legislature*, 554 P.3d 872, 921 (Utah 2024) (citing *Moore* and concluding that state courts possess authority to interpret state constitutional provisions when reviewing congressional redistricting enactments); *Grisham v. Van Soelen*, 539 P.3d 272, 285 (N.M. 2023) (same); *Graham v. Sec'y of State Michael Adams*, 684 S.W.3d 663, 676, 693 (Ky. 2023) (same). That is unsurprising: the Court in *Moore* rejected the invitation to subject state courts to exactly the kind of unprecedented federal constraints that Intervenors request here.

B. Recognizing Plaintiffs' anti-competitive gerrymandering claim does not require transgressing the ordinary bounds of judicial review.

To be sure, the *Moore* Court did state that the Elections Clause could be implicated by a state court decision that "transgress[es] the ordinary bounds of judicial review." 600 U.S. at 36. It did not define with any particularity what those "bounds" might be. But the Court in *Moore* and elsewhere made clear what they are not. Even if the Elections Clause authorizes federal review of a state court's interpretation of state law under some extreme circumstances, those circumstances are not present here.

Intervenors contend that this Court would necessarily violate the Elections Clause by recognizing Plaintiffs' anti-competitive gerrymandering claim because it is novel. (*See, e.g.*, Cong. Br. 28.) Not so. Reaching a novel result does not render a state

court's decision an improper usurpation of the legislature's lawmaking authority: it is simply what courts do when presented with new legal claims that they determine to be meritorious. In *Johnson I*, our supreme court held, for the first time, that districts adopted by the court must make the "least changes" from the previous districts; and that the court could not consider the likely partisanship of the districts proposed by the parties. 2021 WI 87, ¶¶72-74, 76-78. In *Clarke*, the supreme court held just the opposite. 2023 WI 79, ¶¶63, 69-71. Neither case raised federal constitutional issues simply because each reached a novel result; state jurists were engaged in the ordinary process of resolving legal disputes based on arguments presented by the parties. From the vantage point of the Elections Clause as interpreted in *Moore*, what matters instead is whether, in reaching that result, a state court utilizes the interpretive tools and methods that courts in that state ordinarily use to resolve disputes. *See* Anna K. Jessurun et. al., Moore v. Harper, *Evasion, and the Ordinary Bounds of Judicial Review*, 66 B.C. L. Rev. 1295, 1339 (2025) (explaining that *Moore* requires assessing a state court's reasoning within the context of that state's own interpretive tradition). Here, while Plaintiffs ask this Court to explicitly recognize for the first time an anti-competitive gerrymandering claim, Plaintiffs offer a theory that is firmly rooted in standard modes of constitutional interpretation in Wisconsin—arguing from the constitutional text and history, *see supra* at Parts II.A-B, from Wisconsin Supreme Court precedent, *see supra* at Part II.C, and offering a manageable standard that constrains judicial discretion, *see supra*

at Part II.E. Whatever the ultimate merits of Plaintiffs' theory, Plaintiffs' approach to arguing it fully answers Intervenors' invocation of *Moore*.

It is instructive that, in *Moore*, the North Carolina legislature—challenging a state court decision holding, for the first time, that numerous broadly worded provisions of the state constitution prohibited excessive partisan gerrymandering, *see Harper,* 868 S.E.2d at 511—did not contend, as Intervenors do here, that a state court transgresses the Elections Clause if it issues a decision that is new, or misguided, or even flatly wrong. Instead, the legislature "expressly disclaimed the argument that [the Supreme] Court should reassess the North Carolina Supreme Court's reading of state law." *Moore*, 600 U.S. at 37. They argued only that the Elections Clause categorically exempted congressional redistricting from state constitutional constraints. With good reason. Inviting federal courts to grade state courts on their interpretations of their own state constitutions is impracticable and would seriously undermine deeply rooted principles of federalism and comity. *See, e.g.*, Leah M. Litman & Katherine Shaw, *The "Bounds" of* Moore*: Pluralism and State Judicial Review*, 133 Yale L.J. Forum 881, 906 (2024) ("Attempting to constrain state courts in their interpretation of legal texts would also be inconsistent with the notion, reflected throughout *Moore*, that federalism requires granting state courts at least the same powers their federal counterparts enjoy."). *Moore* does not permit Intervenors to transform their disagreement with Plaintiffs' interpretation of the broad provisions of the Wisconsin Constitution into a matter of federal constitutional concern.

For similar reasons, Intervenors are wrong in contending that the Elections Clause requires state courts to adhere to a "least change" approach when remedying an unconstitutional congressional redistricting map—and in arguing, by extension, that the Elections Clause forbids any alterations to the plan adopted in *Johnson II*. (*See, e.g.*, Cong. Br. 28.) *Moore* says nothing of the sort. Instead, *Moore* confirms that state courts are free to apply ordinary ***state law*** doctrines when reviewing state constitutional challenges to congressional redistricting enactments. None of the other cases the Intervenors invoke say anything different. Each case involves a ***federal*** court tasked with redrawing Congressional districts when a state legislature fails, *see Abrams v. Johnson*, 521 U.S. 74, 78-79 (1997); *White v. Weiser*, 412 U.S. 783, 795 (1973); *Branch v. Smith*, 538 U.S. 254, 256 (2003)—not "a state court" as the Intervenors wrongly indicate. (*See* Leg. Br. 25.) Under *Moore*, that distinction makes all the difference: ***state*** courts can authoritatively construe the state law requirements of and constraints on a state's redistricting process, but federal courts cannot. Thus, *Moore* confirms that the various references the Supreme Court makes to "legislative" or "state" redistricting policies in these cases cannot mean the preferences of the ***legislature*** alone, freed from the constraints of the state constitution and state judicial review.

The question, then, is what the ***Wisconsin*** Supreme Court has said about how to remedy an unconstitutional gerrymander. Its answer came in *Clarke*: the "least change" approach is "unworkable in practice," "impractical and unfeasible," and "in tension with established districting requirements." *Clarke*, 2023 WI 79, ¶63.

Regardless, it is nonsensical to suggest that replacing one judicially imposed map with another somehow usurps the legislature's redistricting prerogatives. After all, the current congressional plan was proposed by the Governor and was ***opposed*** by the Legislature. And, besides, it is entirely unclear at this stage what remedial process a court would adopt upon a finding that the plan is an anti-competitive gerrymander. The Elections Clause is not a cudgel Intervenors can use to displace the Wisconsin Supreme Court's binding interpretation of the Wisconsin Constitution in favor of their own. This Court should reject Intervenors' groundless effort to manufacture an illusory federal constitutional issue based on its misrepresentation of *Moore's* holding and reasoning.

Conclusion

For all of the reasons stated above, this Court has the authority to adjudicate Plaintiffs' claims and grant the relief Plaintiffs request, Plaintiffs' Amended Complaint states a claim on which this Court may grant relief, and neither the doctrine of laches nor the U.S. Supreme Court's decision in *Moore v. Harper* bars their claims here. Accordingly, the Court should deny the motions to dismiss and set this case for a scheduling conference to put in place a schedule to enable the trial of Plaintiffs' claims commencing April 5, 2027.

Dated: February 10, 2026.

Electronically signed by Douglas M. Poland
Douglas M. Poland, SBN 1055189
Jeffrey A. Mandell, SBN 100406
T.R. Edwards, SBN 1119447
LAW FORWARD, INC.
222 West Washington Avenue, Suite 680
Madison, Wisconsin 53703
dpoland@lawforward.org
jmandell@lawforward.org
tedwards@lawforward.org
608.283.9822

Ruth M. Greenwood*
Nicholas O. Stephanopoulos*
Samuel Davis*
ELECTION LAW CLINIC AT
HARVARD LAW SCHOOL
4105 Wasserstein Hall
6 Everett Street
Cambridge, Massachusetts 02138
rgreenwood@law.harvard.edu
nstephanopoulos@law.harvard.edu
sadavis@law.harvard.edu
617.998.1010

* Admitted *pro hac vice*

Attorneys for Plaintiffs