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BUFF, KIMBERLY SUHR, SARAH LLOYD,  
NANCY STENCIL, VIKAS VERMA, *and* JAMES  
T. LYERLY,

Case No.2025CV2252

*Plaintiffs,*

*v.*

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

*Defendants.*

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**REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS  
FOR FAILURE TO STATE A CLAIM AND/OR FOR LACK OF  
JURISDICTION OF INTERVENOR-DEFENDANTS CONGRESSMEN  
GLENN GROTHMAN, BRYAN STEIL, TOM TIFFANY, SCOTT  
FITZGERALD, DERRICK VAN ORDEN, AND TONY WIED AND  
INDIVIDUAL VOTERS GREGORY HUTCHESON, PATRICK KELLER,  
PATRICK MCCALVY, AND MIKE MOELLER**

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## INTRODUCTION

Plaintiffs asked this Panel to overturn the Supreme Court’s judgment in *Johnson v. WEC*, 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402 (“*Johnson II*”), after WBLD and Plaintiffs’ counsel (correctly) told the Supreme Court just over a month before that only that Court could issue such relief. Plaintiffs try to change the subject to irrelevant preclusion doctrines but have no answer to the dispositive point that an inferior court cannot overturn a Supreme Court judgment. If that were not enough, Plaintiffs’ answer to the argument that no court, anywhere in the country, has read an anti-competitive gerrymander prohibition into general state-constitutional language is to point to a New York decision enforcing an explicit requirement that “[d]istricts shall not be drawn to discourage competition.” N.Y. Const. art. III, § 4(c)(5). Wisconsin’s Constitution contains no provision like this, so Plaintiffs’ claims fail as a matter of law and are also so contrived as to violate the Elections Clause.

## ARGUMENT

### I. This Panel Cannot Overrule *Johnson II*’s Judgment

A. This Panel cannot afford Plaintiffs relief because the Supreme Court adopted the *Johnson II* map in a *judgment*, and no inferior Wisconsin court—including this Panel—can overrule a Supreme Court judgment. Dkt.193 (“Mem.”) at 6–12. WBLD and Plaintiffs’ counsel made this very point to the Supreme Court, explaining in a motion to intervene in the *Bothfeld v. WEC* original-action petition that “only th[e Supreme] Court has the authority to enjoin th[e] [*Johnson II*] map” that they now challenge here. Mem.11 (quoting Dkt.194, Ex.1 at 16).

B. Plaintiffs mischaracterize this argument as based on “preclusion,” Dkt.198 (“Opp.”) at 25 (emphasis omitted), but this is a constitutional argument because,

under our State’s Constitution, no inferior tribunal can overturn a Supreme Court judgment, Mem.10–11. For much the same reason, Plaintiffs wrongly claim to distinguish “[a]ll” of the “authorities Intervenors cite” on the ground that those cases applied the preclusion doctrine after concluding that “the *same* parties reassert[ed] the *same* claims subsequent to a final determination as to those claims.” Opp.26–27 & n.4. But the *only* case cited in the Motion that Plaintiffs meaningfully attempt to distinguish on this point is *Tietsworth v. Harley-Davidson, Inc.*, 2007 WI 97, 303 Wis. 2d 94, 735 N.W.2d 418, brushing all other cases aside in a conclusory footnote or ignoring them entirely, *compare* Opp.26–33 & n.4, *with* Mem.7–10. In any event, the circuit court in *Tietsworth* “ha[d] no authority to reopen the case” because a circuit court judgment affirmed by the Supreme Court becomes “in legal effect the judgment of [the Supreme Court],” which judgments “the trial court has no power to vacate or set [ ] aside.” 2007 WI 97, ¶ 50 (citation omitted). Plaintiffs seek “to vacate or set [ ] aside” the *Johnson II* judgment here, which this Panel “has no power” to do. *Id.*

Plaintiffs next make a hard-to-follow argument about the Supreme Court’s “superintending authority.” Opp.29–31. Plaintiffs appear to argue that the Supreme Court’s superintending authority does not prevent this Panel from deciding this case because the Court did not exercise that authority in *Johnson II*. *See id.* But that is irrelevant. The Court exercised its original jurisdiction in *Johnson II* and entered a judgment adopting the map here, 2022 WI 14, ¶ 52, which “judgment[ ]” is “final and conclusive,” *Ean v. Chi., M. & St. P. Ry. Co.*, 101 Wis. 166, 76 N.W. 329, 330 (1898). This Panel cannot modify or reverse this judgment. Mem.8–9.

Plaintiffs attempt to avoid the Supreme Court’s decision in *Cook v. Cook*, 208 Wis. 2d 166, 560 N.W.2d 246 (1997), by claiming that they “do not ask this Court to ‘overrule, modify, or withdraw language’” from *Johnson II*. Opp.31–32 (citation omitted). But that is just what Plaintiffs are requesting. *Johnson II* entered a judgment adopting a congressional map for the State for the decade, after holding that it “compl[ies] with all relevant state and federal laws.” 2022 WI 14, ¶¶ 25, 52. Plaintiffs now ask this Panel to “overrule” that judgment, *contra Cook*, 208 Wis. 2d at 189, and hold instead that the *Johnson II* map “violates [the] Wisconsin Constitution,” Dkt.9 at 28.

Plaintiffs cannot avoid *Gabler v. Crime Victim Rights Bd.*, 2017 WI 67, 376 Wis. 2d 147, 897 N.W.2d 384. Opp.32–34. Plaintiffs would limit *Gabler* to the Supreme Court’s “appellate jurisdiction” because it cited Wis. Const. art. VII, § 3(2). Opp.33. But the Court is supreme regardless of what state jurisdiction it acts under. *See* Mem.7–9. Indeed, *Gabler* cited *State v. Williams*, 2012 WI 59, 341 Wis. 2d 191, 814 N.W.2d 460, when making the point that no lower court could review its decisions, *Gabler*, 2017 WI 67, ¶ 45, which, in turn, cited Wis. Const. art. VII, § 2, establishing Wisconsin’s “unified court system” under the Supreme Court, *Williams*, 2012 WI 59, ¶ 36. While Plaintiffs suggest that this portion of *Gabler* is dicta, Opp.33–34, the Panel cannot “dismiss” a Supreme Court “statement” as “dictum,” *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶¶ 50–58, 324 Wis. 2d 325, 782 N.W.2d 682.

Plaintiffs also cannot justify their unconstitutional request by relying on Wis. Stat. §§ 751.035(1) and 801.50(4m). Opp.34–35. Neither statute purports to

authorize circuit courts to review the Supreme Court’s judgments. Mem.10. And reading these provisions as Plaintiffs suggest would render those provisions unconstitutional, which is reason enough to avoid any such reading. *See Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶ 64, 357 Wis. 2d 469, 851 N.W.2d 262.

Finally, *Johnson II*’s directive that the Court’s “order shall remain in effect until new maps are enacted into law or a court otherwise directs,” 2022 WI 14, ¶ 52 (emphasis added), does not save Plaintiffs’ case, Opp.36–37. The Supreme Court cannot constitutionally authorize lower state courts to review its own judgments, Mem.9–10, so the “a court” language cannot refer to a lower state court. Rather, it must refer to the Supreme Court, *see Johnson v. WEC*, 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559, or a federal court, where a plaintiff might show that the *Johnson II* map violated federal law or the U.S. Constitution, U.S. Const. art. VI, cl. 2. Plaintiffs’ response to this “non-delegation” point, Opp.31, misunderstands this argument and *Van Slyke v. Trempealeau Cnty. Farmers’ Mut. Fire Ins. Co.*, 39 Wis. 390 (1876). The Constitution vests the Supreme Court with supreme “authority over all courts,” Wis. Const. art. VII, § 3(1), and *Van Slyke* rightly observes that the Court cannot “subdelegate” its “judicial functions” to others, 39 Wis. at 392.

## **II. Plaintiffs’ Anti-Competitive-Gerrymandering Claims Have No Basis In The Wisconsin Constitution And Fail As A Matter Of Law**

A. Plaintiffs’ anti-competitive gerrymandering claims raise only nonjusticiable political questions, with no grounding in the Constitution. Mem.12–21. Under *Johnson v. WEC*, 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469 (“*Johnson I*”), partisan-gerrymandering claims present nonjusticiable political questions because

the Constitution provides no “right to partisan fairness” or any “judicially manageable standards” to determine “[w]hether a map is ‘fair’ to the two major political parties.” Mem.13 (citations omitted). That logic applies with even more force to anti-competitive gerrymandering claims. Mem.14–21. Such claims have no textual constitutional basis and recognizing them would require courts to divine a manageable standard for determining “the fairness of the makeup of districts” and whether a map is too “anti-competitive,” *id.* at 17–18, while suffering from additional problems, *id.* at 19–21. That is why no court, from any State, has read such an anti-competitive gerrymandering claim into general language in its state constitution. *Id.*

B. Plaintiffs’ contention that the Constitution’s “text” somehow “supports recognizing an anti-competitive gerrymandering claim,” Opp.39–45, is without merit. *Johnson I* identified “Article IV, Sections 3, 4, and 5” as containing “the *only* Wisconsin constitutional limits” placed “on the legislature’s discretion to redistrict.” 2021 WI 87, ¶ 63. Those provisions do not include an anti-competitive gerrymandering prohibition, Mem.15, just as they do not include a partisan-gerrymandering prohibition, *Johnson I*, 2021 WI 87, ¶ 63. There is no “reservoir of additional requirements” outside of those constitutional provisions *Johnson I* identified, 2021 WI 87, ¶ 63, so Plaintiffs’ discussion of Article I, Sections 1 and 22, and Article III, Opp.40–43, is irrelevant. Regardless, none of Plaintiffs’ cited provisions contain a competitive-district mandate. Mem.15–17.

Nothing in the Constitution’s “drafting history,” Opp.45–50, supports Plaintiffs’ theory. Plaintiffs cite a “debate[ ]” regarding congressional redistricting

during the 1848 constitutional convention where John Rountree “inveighed against a proposal to create two safe Democratic districts,” and they note that the Legislature passed that proposal but soon thereafter “apportioned a third congressional seat” and “drew more competitive districts.” Opp.47–48. Rountree’s redistricting amendment failed by a 37-23 vote, *J. of the Convention to Form a Const. for the State of Wis., with a Sketch of the Debates* at 568 (1848), <https://bit.ly/4aHmy3n> (all last accessed Feb. 24, 2026), and the Legislature in no way endorsed it when it redistricted in 1848. Rather, the Legislature had to redistrict after the State received a third seat shortly after statehood. *See* Wis. Act 48 at 15–16 (June 29, 1848), <https://bit.ly/476RHe1>.

The other historical instances upon which Plaintiffs rely only underscore the obvious point that a competitive-district requirement has no constitutional basis. Plaintiffs point to constitutional debates where the Founders expressed their “backing for single-member districts,” their support for “electing judges,” “their preference for short terms in office,” their desire to “limit[] the total number of governmental positions,” and their support for “election” to office over “appointment.” Opp.46–50. But these debates all concerned specific, proposed constitutional provisions, not a competitiveness requirement. *See* Wis. Const. art. IV, §§ 2, 4–5; *id.* art. VII, §§ 4, 5, 7. Any purported concern over “anti-competitive gerrymandering,” Opp.50, was *not* incorporated into the Constitution’s text. And Governor Dreyfus’ 1982 veto of a redistricting plan, Opp.50, came far too late to shed light on the Constitution’s meaning, *see Kaul v. Wis. State Legislature*, 2025 WI 23, ¶ 36, 416 Wis. 2d 322, 21 N.W.3d 513, and does not even purport to interpret the Constitution.

Plaintiffs are wrong to claim that Supreme Court “precedent condemns anti-competitive gerrymandering.” Opp.50. The Court set out all the “requirements” and “constitutional limits” on redistricting in *Johnson I*, 2021 WI 87, ¶ 63, and they do not include a competitiveness requirement, Mem.14–15. None of Plaintiffs’ cases articulates anything close to an anti-competitive gerrymandering claim. *State ex rel. Att’y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724 (1892), struck down a redistricting plan as malapportioned, *id.* at 729–30, while discussing partisan gerrymandering, *id.* at 735 (Pinney, J., concurring). *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551 (1964), confirmed that *Cunningham* found “malapportionment” and discussed districts that had “been manipulated for partisan advantage.” 22 Wis. 2d at 563–64, 566. Finally, *State v. Johnson*, 176 Wis. 107, 186 N.W. 729 (1922) and *Evers v. Marklein*, 2024 WI 31, 412 Wis. 2d 525, 8 N.W.3d 395, are not even about redistricting.

Plaintiffs’ argument that anti-competitive gerrymandering claims are “proliferating elsewhere” outside of Wisconsin, Opp.53–56, backfires badly. The only case that prevailed on the merits—*Harkenrider v. Hochul*, 38 N.Y.3d 494 (2022)—involved a constitutional provision specifically providing that “[d]istricts shall not be drawn to discourage competition,” *id.* at 518 (quoting N.Y. Const. art. III, § 4(c)(5)).

Finally, Plaintiffs argue that their claim is “judicially manageable,” Opp.57, and point to averages and computer-generated maps, Opp.57–62, but they do not explain how those tools would address the unique problems for their claim, such as their interaction with incumbency and core retention. Plaintiffs attempt to brush off

these concerns, Opp.60–61, but the U.S. Supreme Court has held that those are “legitimate” considerations, Mem.20–21. Plaintiffs admit that “intentionally” “amplify[ing]” competition is *not* an unmitigated good and cannot identify any “level of competition” that makes a map too uncompetitive, instead hoping that the ideal level (whatever that means) will “arise[ ] organically.” Opp.59–60.

### **III. Plaintiffs’ Requested Relief Violates The Elections Clause**

A. The U.S. Constitution’s Elections Clause precludes granting Plaintiffs relief. Mem.21–28. The Clause prohibits state courts from “transgress[ing] the ordinary bounds of judicial review” when reviewing legislatively adopted maps under *Moore v. Harper*, 600 U.S. 1, 34, 36–37 (2023). Here, *Johnson II* adhered to the Elections Clause by adopting a least-change map, adjusting the legislatively adopted 2011 map only as necessary to remedy its unconstitutional malapportionment following the 2020 Census. Mem.25–27. Plaintiffs claim now that the *Johnson II* map is an unconstitutional anti-competitive gerrymander, but ruling for Plaintiffs on that theory would transgress the ordinary bounds of judicial review, in violation of the Elections Clause, in three independent respects: (1) it would require jettisoning a least-change map based upon a legislatively adopted map; (2) it would require adopting Plaintiffs’ anti-competitive gerrymandering theory, although it lacks any grounding in the Wisconsin Constitution; and (3) it would require this Panel to overrule a judgment of the Supreme Court, which is unprecedented. Mem.26–28.

B. Plaintiffs argue that *Moore* “preserves the longstanding status quo” of state courts being “entirely free to interpret and enforce state law . . . provided that a state court’s decision does not infringe upon federally protected rights.” Opp.76–80. But

Plaintiffs would have this Panel “infringe upon federally protected rights,” Opp.78: the federally protected “role” of “state legislatures” to conduct congressional redistricting free from state-court review that “exceed[s] the bounds of ordinary judicial review,” *Moore*, 600 U.S. at 37; Mem.25–28. Plaintiffs make the strawman argument that *Moore* permits state courts to recognize “novel” state-constitutional claims against congressional maps. Opp.80–82. No one is arguing that *Moore* prohibits state courts from adjudicating new claims, so long as such claims are grounded in a “fair reading” of state law. Mem.24–25 (quoting *Moore*, 600 U.S. at 38 (Kavanaugh, J., concurring)). For example, *Harkenrider* raises no Elections Clause concerns because the New York Constitution specifically provides that “[d]istricts shall not be drawn to discourage competition.” N.Y. Const. art. III, § 4(c)(5).

Plaintiffs attempt to rebut the first Elections Clause ground in the Motion, Mem.26–27, by arguing that the *Johnson II* map does not trigger that Clause despite being a least-change map, Opp.83. But *Moore*’s holding that “state courts may not [ ] exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon” state legislatures’ Elections Clause authority, 600 U.S. at 37, means that the Clause requires state courts to follow a least-change approach when replacing a legislatively drawn map, Mem.22–23. A hypothetical shows why: if a state court remedied a 10-person malapportionment in a legislatively adopted congressional map by adopting an entirely new map, that would “[dis]respect,” *Moore*, 600 U.S. at 34, the state legislature’s Elections Clause authority by substituting “legislative policies” with the court’s policies, *Abrams v. Johnson*, 521 U.S. 74, 79 (1997); *White v. Weiser*, 412 U.S.

783, 794–95 (1973); *see* Mem.22–23. Plaintiffs criticize reliance on *Abrams* and *White* because they involved *federal*, not *state*, courts, Opp.83, but federal courts too must respect state legislatures’ redistricting authority by following least-change principles, *Abrams*, 521 U.S. at 79; *White*, 412 U.S. at 794–95. Finally, Plaintiffs’ claim that “replacing” *Johnson II*’s “judicially imposed map” with another such map cannot implicate the Elections Clause, Opp.83–84, misses the legal point. The Clause required the Supreme Court to adopt a least-change map in *Johnson II* because the prior map was legislatively adopted, so failing to give the *Johnson II* map Elections Clause respect violates the Clause. Mem.25–27.

Plaintiffs try to address the second Elections Clause ground by reiterating that their anticompetitive-gerrymandering theory is “firmly rooted” in Wisconsin law, Opp.80–82, but that fails for the reasons explained above, *supra* Part II.

Finally, as to the third Elections Clause ground, Plaintiffs fail to dispute that no “fair reading” of Wisconsin law authorizes this inferior Panel to overrule the Supreme Court’s judgment in *Johnson II*. *Compare* Mem.25–28, *with* Opp.80–82. That is a stand-alone reason why the Clause bars Plaintiffs’ claims, and their failure to address it is enough to decide this issue against them. *See State v. Peterson*, 222 Wis. 2d 449, 459, 588 N.W.2d 84 (Ct. App. 1998).

### CONCLUSION

This Court should grant the Motion To Dismiss.\*

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\* The Congressmen and Individual Voters rest on their Opening Memorandum for their laches argument. Mem.28–29.

Dated: February 24, 2026

Respectfully submitted,

*Electronically signed by Misha Tseytlin*

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