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CIRCUIT COURT
DANE COUNTY, WI
2025CV002252

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

Wisconsin Business Leaders for
Democracy, et al.,

Plaintiffs,

Case No. 2025-CV-2252

v.

Wisconsin Elections Commission,
et al.,

Defendants.

**JOHNSON INTERVENORS' REPLY
IN SUPPORT OF MOTION TO DISMISS**

INTRODUCTION

Plaintiffs have mounted a collateral attack on the Wisconsin Supreme Court's final judgment in *Johnson II*, which adopted Wisconsin's current Congressional maps. Their novel "anti-competitive gerrymandering" claims have never been recognized by any court and are foreclosed by existing precedent. These claims lack any basis in the text, structure, or history of the Wisconsin Constitution, invite unmanageable judicial second-guessing of electoral outcomes, and are brought far too late—after more than a decade of unchallenged elections under substantially similar lines. Furthermore, Plaintiffs' legal claims run afoul of the U.S. Constitution's elections clause.

Plaintiffs' response misreads controlling precedent, contradicts itself repeatedly, and offers no coherent path for this Court to grant the extraordinary and unprecedented relief they seek without usurping the authority reserved to the

Wisconsin Supreme Court and to the Legislature. This Court should not allow itself to be pulled into Plaintiffs' political thicket.

For the reasons set forth herein, and as further explained in the Johnson Intervenor's opening brief (Dkt. 191), the motion to dismiss should be granted, and Plaintiffs' complaint should be dismissed in full.

ARGUMENT

I. This case is an improper collateral attack on a judgment of the Supreme Court

The Wisconsin Supreme Court's judgments "are final and conclusive." *Sutter v. State, Dept. of Natural Resources*, 69 Wis. 2d 709, 717, 233 N.W.2d 391 (1975) (quoting *Ean v. Chicago, M & St. P. Ry. Co.*, 101 Wis. 166, 76 N.W. 329, 330 (1898)). The judgments of the Supreme Court cannot be cast aside unless it is *that court* doing the casting. Allowing this case to proceed would permit any lower court to nullify a Supreme Court mandate, undermining the hierarchy of the judicial system and destroying the finality of Supreme Court judgments.

A. *Tietsworth* is controlling here

Plaintiffs attempt to evade this bar by asserting that the *Johnson II* opinion did not expressly prohibit lower courts from modifying or invalidating the adopted maps. They argue that "if the 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" and cite to *Tietsworth v. Harley-Davidson*, 2007 WI 97, ¶¶ 43–44, 303 Wis. 2d 94, 735 N.W.2d 418. Dkt. 198: 36–37 (emphasis in original).

This argument stands the law on its head. In *Tietsworth*, the Supreme Court expressly held the opposite: if it intends for a lower court to take further action or exercise jurisdiction over a matter, it “would have specified as much in the mandate or by clear directive in the text of the opinion.” *Id.* 303 Wis. 2d 94, ¶ 44. Absent such an explicit specification or “clear directive,” the default rule controls: lower courts lack authority to reopen, modify, or set aside a Supreme Court judgment. Plaintiffs’ theory here, that silence equals permission for any court to upset a Supreme Court redistricting decision, is untenable and unsupported in Wisconsin law.

Nothing in *Johnson II* contains any such specification or directive authorizing subsequent collateral challenges in other courts. To the contrary, the Court’s adoption of the current maps resolved the apportionment issues presented and closed the matter until after the next census. This Court cannot grant the relief sought in this case without significantly exceeding its authority and directly contravening the finality of a judgment of the Wisconsin Supreme Court.

II. Plaintiffs’ “anti-competitive gerrymandering” claim is not cognizable nor manageable.

Plaintiffs’ novel “anti-competitive gerrymandering” theory has no footing in the constitutional text, is unsupported by the historical record, and is unworkable in practice. The motion to dismiss should be granted, and the complaint should be dismissed in full.

A. Plaintiffs’ claims lack any textual basis.

Plaintiffs’ claims lack any textual basis, and our Supreme Court has explicitly held the constitution *does not say* what Plaintiffs claim it does. Nevertheless,

Plaintiffs argue that those parts of *Johnson I* “musing about partisan gerrymandering addressed only a hypothetical claim not actually before the Court” and claim those comments “did not garner majority support.” Dkt. 198:44. That is incorrect. In *Johnson I*, the majority opinion consisted of all parts except ¶¶ 8, 69–72, and 81. And the provisions of *Johnson I*, which make clear Plaintiffs’ claims are not justiciable, are all clearly within the majority opinion. See Dkt. 191:2 (citing to *Johnson v. WEC*, 2021 WI 87, ¶¶53–63, 399 Wis. 2d 623, 967 N.W.2d 469 and explaining that those sections hold that “Article 1 §§ 1 and 22 do not impose “limits on redistricting”); See also *Id.* at 10–11.

Likewise, the Wisconsin Constitution’s right to vote guarantees do not support Plaintiffs’ claims. Article III, § 1 of the Wisconsin Constitution protects the procedural right to participate in the electoral process; it does not guarantee substantive outcomes or competitive elections. Compare *League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶ 18, 357 Wis. 2d 360, 851 N.W.2d 302 (providing that Article III, Section 1 provides “the qualifications of an elector entitled to vote” and that Article III Section 2 “addresses implementation of voting rights through legislation.”), with *Wagner v. Milwaukee Cnty. Elections Com’n*, 2003 WI 103, ¶ 79, 263 Wis. 2d 709, 666 N.W.2d 816 (explaining that there is “no fundamental right to be a candidate.”) The fact that candidate rights do not receive the same level of constitutional protection as voting rights demonstrates the distinction between the procedural election protections to cast a vote guaranteed in Article III, and substantive electoral guarantees like having your chosen candidate win.

B. The Wisconsin Constitutional history does not support Plaintiffs claims

Plaintiffs' attempt to appeal to the constitutional debates for the Wisconsin Constitution fares no better, and instead, directly undermines their entire argument and supports dismissal of the complaint.

Plaintiffs highlight constitutional delegate John Rountree's objection to proposed congressional districts as gerrymandered "safe" seats for Democrats. Dkt. 198:47. Plaintiffs quote Rountree's statement that delegates were "not placed here to form [D]emocratic districts." Dkt. 198:47. Yet, Plaintiffs omit the decisive fact: the convention *rejected* Rountree's amendment and adopted the districting that created the two, allegedly gerrymandered "safe" Democratic districts. *Journal of the Convention to Form a Constitution for the State of Wisconsin: With a Sketch of the Debates, Begun and Held at Madison, on the Fifteenth Day of December, Eighteen Hundred and Forty-Seven*, 568 (Wis. 1848) (On January 28, 1848, Rountree's proposed amendment to the congressional districts failed by a vote of 23 in favor to 37 opposed). And the final 1848 constitution, approved by the People of Wisconsin, included the two allegedly gerrymandered "safe" Democratic districts that Rountree had argued against. Wis. Const. Art. 14, § 10 (1848) (establishing the first two Wisconsin Congressional districts as the ones Rountree argued against as a gerrymander).

Far from evidencing an intent to ban gerrymandering, the framers and ratifying voters of Wisconsin embedded the precise practice that Plaintiffs now deem unconstitutional in that very founding document. Plaintiffs' claims have no basis in

the constitutional history of Wisconsin. Plaintiffs cited authority, *State ex rel. Atty. Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724 (1892), is inapposite; it addressed county-based legislative districts which are no longer required, and does not discuss anything related to the competitiveness of Congressional districts.

The history of the Wisconsin constitutional debates simply provides no support for Plaintiffs' claims.

C. Even if Plaintiffs could state a claim, there are no judicially manageable standards by which to decide it

Even assuming a cognizable claim here, Plaintiffs offer no workable standards by which a Court could judge it. Their intent-and-effects test, wherein they rely on simulations to measure “competitiveness” collapses under scrutiny. Plaintiffs argue that their “anti-competitive gerrymandering” theory tolerates uncompetitive districts that result from “valid criteria” and geography, but they provide no clear line distinguishing between permissible and impermissible outcomes. Instead, they propose a “trust us, we will know it when we see it approach.”

But electoral results turn on a myriad of factors beyond maps: candidate quality, incumbency advantage, voter turnout, issues, campaign effort, and shifting voter preferences, to name a few. Plaintiffs' attempt to isolate map-driven “anti-competitiveness” from these variables is impossible.

Northern Wisconsin's congressional district illustrates the problem. Long held by Democrat Dave Obey, who won by more than 20 points in 2008¹, *the same district* elected Republican Sean Duffy in 2010 after David Obey's retirement.² Under Plaintiffs' logic, such flips should be impossible. The map had been "anti-competitive" for years.

Simulations cannot resolve this indeterminacy. They assume uniform voter behavior and ignore real-world dynamics and the impacts of campaigns and candidates. What Plaintiffs' framework requires is arbitrary judicial judgments about ideal competitiveness levels—precisely the sort of non-justiciable political questions that have been rejected. Accordingly, Plaintiffs' claims should be dismissed outright.

III. Laches bars these claims

Plaintiffs' claims are also barred by laches, and nothing they provide in response rebuts the fact that they've waited far too long to bring these claims. Plaintiffs respond by arguing their claims could not have been brought until after the 2024 election because their claims required "district-specific data" and two election cycles. Dkt. 198:66–67. But as explained in the Johnson Intervenors' initial brief, all elements of laches are met here.

First, Plaintiffs unreasonably delayed. Plaintiffs' entire claim is based on the 2011 map (and their claim that the *Johnson* map merely "perpetuated" the alleged

¹ See "2008 Election Statistics", United States house of representatives, History, Art & Archives, Election Statistics, 1920 to Present, available at: <https://history.house.gov/Institution/Election-Statistics/Election-Statistics/>.

² See "2010 Election Statistics" from n.1.

problems with that map), and “no fewer than *seven* Congressional elections” have occurred in the years since that map was adopted. Dkt. 191:16. Plaintiffs flip-flop between using the 2011 map to support their claims that the current map is some kind of gerrymander, and arguing the *Johnson* map is, actually, “nevertheless different” than the 2011 map when laches was raised. They cannot have it both ways.

Second, there was no reason to believe—after more than a decade—that this challenge would be brought. Here, Plaintiffs flip-flop again. On one hand, Plaintiffs argue their filings in a separate petition for original action at the Supreme Court qualify as providing notice to all parties of their claims. Dkt. 198:68. But earlier in their response, they went to great lengths to say that filing was meaningless because the Supreme Court dismissed it as moot. Dkt. 198:28–29. Here again, Plaintiffs argue out of both sides of their mouth. They explicitly said these very claims could not be brought here, and then they brought them—this element of laches is clearly met.

Third, this case involves multiple kinds of prejudice. And Plaintiffs’ response is once again contradictory. When arguing the first element of laches, Plaintiffs discounted any import of the 2011 maps, arguing the maps challenged from *Johnson* were “nevertheless different” from the 2011 maps. Dkt. 198:67. But on the third element, they acknowledge that “the creation and enactment of Wisconsin’s congressional districts in 2011” are highly relevant here, and that the Johnson Intervenors’ worry that Plaintiffs’ decade-and-a-half long delay would cause evidentiary prejudice is unfounded. Dkt. 198:72.

“What amounts to prejudice ... depends upon the facts and circumstances of each case, but it is generally held to be anything that places the party in a less favorable position.” *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶32, 389 Wis. 2d 516, 936 N.W.2d 587. Plaintiffs’ delay means that Intervenors will need to rely on the more than fifteen-year-old memories of witnesses for their defense. “It is important to stress that prejudice to a party for purposes of laches does not mean a party is so disadvantaged that it cannot prosecute its case. The prerequisite under our law is prejudice due to the delay, i.e., disadvantage to a party.” *Id.* at ¶38. Intervenors here are clearly disadvantaged by Plaintiffs’ delay of more than fifteen years to bring their never-before-recognized legal claims.

Plaintiffs argue the *Baldus* federal court decision identifies many witnesses, and that many others are in public records. But what those witnesses remember and what documents still exist to refresh memory is not discussed. Nor is the fact that some, if not many, of the witnesses are simply not available 15 years later. That means Intervenors will be forced to hope that all witnesses have vivid memories of all processes from fifteen years ago, and that every relevant document has been maintained. This is the exact “disadvantage to a party” that the prejudice factor is meant to protect against. This element of laches is met. The motion to dismiss should be granted.

IV. The elections clause bars the relief sought here

Finally, as the Johnson Intervenors explained in their opening brief (Dkt. 191:18), the U.S. Constitution vests state legislatures with the authority to prescribe the times, places and manner of federal elections. Despite the Constitution, Plaintiffs

spend the final section of their brief arguing that even though the election clause vests the apportionment authority in state *legislatures*, this Court should instead do that work. Plaintiffs misread *Moore v. Harper* and argue that the elections clause is no bar to their claims.

Plaintiffs misunderstand *Moore* and misapply it to this case. Contrary to Plaintiffs' arguments, *Moore* was a clear limit on the role state courts can play when it comes to congressional redistricting. The Supreme Court was clear that state courts must not "transgress the ordinary bounds of judicial review" lest those state courts "arrogate to themselves the power vested in state legislatures to regulate federal elections." *Moore v. Harper*, 600 U.S. 1, 36, 143 S.Ct. 2065 (2023). These are "complex and context specific" questions. *Id.*

Plaintiffs' never-before-recognized claims are not "firmly rooted in the text, structure, and history of the Wisconsin Constitution" as they claim (Dkt. 198:76), and using their claims to usurp the legislature's power and judicially re-draw Wisconsin's congressional district lines for the second time this decade would be doing *exactly* what the Supreme Court warned state courts against. What's more is that Plaintiffs' alleged textual roots are illusory. No constitutional provision supports their claims. And as explained *supra*, the very founders who drafted our Constitution engaged in the exact type of "anti-competitive" districting that Plaintiffs now say that document has always prohibited.

CONCLUSION

For the reasons explained herein, the panel should grant the motion to dismiss and dismiss this case in its entirety.

Dated February 24, 2026.

Respectfully Submitted,

(Signature block on following page)

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